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Global Competition in Cross-Border Restructuring and Recognition of Centralized Group Solutions

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INTRODUCTION

Cooperation and coordination in the context of group insolvency can promote efficiency in the administration of insolvency proceedings, resulting in the preservation of group synergies and going concern value of enterprise group members, maximization of estate value and reduction of costs. The UNCITRAL Legislative Guide (Part three), addressing the treatment of enterprise groups in insolvency, recognizes that there are decentralized groups characterized by a low degree of integration which do not require coordinated responses in a situation of financial distress. Nevertheless, it emphasizes that for many groups, cooperation and coordination may be the only way to ensure fair and efficient administration of proceedings and to avoid disintegration and piecemeal liquidation, causing the destruction of going concern value of constituent group entities.[1]

Coordinated group-wide distress resolution, especially where an enterprise group is international or has international aspects, is promoted by legal centralization, where multiple proceedings are drawn to the same jurisdiction or the same court, or where a single proceeding seeks to restructure group debt (e.g. release of cross-guarantees). Centralization in the context of group restructuring has been supported by scholars.[2] Yet, in the absence of a developed legal framework, territorialist inclinations may prevail,[3] leading to fragmented country-by-country responses to group distress. To achieve centralization, a legal framework should offer rules on international jurisdiction, recognition of foreign proceedings and relief that can be granted to support or defer to the centralized process. These rules may exist at three levels – global, regional, and domestic.

On the global level, insolvency law has been strongly influenced by the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI),[4] which deals with access to foreign courts, recognition of and relief to foreign insolvency proceedings and cooperation in cross-border insolvency cases. The MLCBI is a soft law instrument in the sense that it needs to be transposed into national law to obtain binding force. When it is implemented, it becomes a part of the domestic law.[5] While its provisions focus on single debtors, the MLCBI has been instrumental in resolving complex insolvencies of groups of companies.[6] In 2019, UNCITRAL adopted a new model law – the Model Law on Enterprise Group Insolvency

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[1] UNCITRAL Legislative Guide on Insolvency Law, Part three: Treatment of enterprise groups in insolvency, 2010, Chapter III, para. 7. For the analysis of different 'prototypes' of group structures, see I. Mevorach, Insolvency within Multinational Enterprise Groups, OUP, 2009, Chapter 5.

[2] See e.g. S. Bufford, Coordination of Insolvency Cases for International Enterprise Groups: A Proposal, Penn State Law Research Paper No. 1-2014, available at https://ssrn.com/abstract=2382123. I. Mevorach, The 'Home Country' of a Multinational Enterprise Group Facing Insolvency, The International and Comparative Law Quarterly, Vol. 57, No. 2, 2008, pp. 427-448; N. Wouters, A. Raykin, Corporate Group Cross-Border Insolvencies Between the United States & European Union: Legal & Economic Developments, Emory Bankruptcy Developments Journal, Vol. 29, Issue 2, 2013, pp. 387-423.

[3] I. Mevorach, The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps, OUP, 2018, Chapter 2, discussing how territorialist inclinations and tendencies may be driven by different cognitive biases, including loss aversion, status quo bias, endowment effect and short termism. The debate between universalism and territorialism is well known in academic literature. This article does not take a side in this abstract debate but instead notes that for certain types of groups, coordinated responses and centralization promoted by universalism or modified universalism, may be most beneficial. For various positions concerning this debate, see J. Westbrook, A Global Solution to Multinational Default, Michigan Law Review, Vol. 98, Issue 7, 2000, pp. 2276-2328; L. LoPucki, The Case for Cooperative Territoriality in International Bankruptcy, Michigan Law Review, Vol. 98, No. 7, 2000, pp. 2216-2251; E. Janger, Universal Proceduralism, Brooklyn Journal of International Law, Vol. 32, Issue 3, 2007, pp. 819-849; A. Walters, Modified Universalism & the Role of Local Legal Culture in the Making of Cross-Border Insolvency Law, American Bankruptcy Law Journal, Vol. 93, Issue 1, 2019, pp. 47-110; I. Mevorach, Modified Universalism as Customary International Law, Texas Law Review, Vol. 96, 2018, pp. 1403-1436.

[4] UNCITRAL Model Law on Cross-Border Insolvency (1997). The majority of UNCITRAL instruments can be found at https://uncitral.un.org/en/texts/insolvency.

[5] Noting this transformational aspect of soft law, Pottow used the terms "semi-soft law" or "contingently soft law." He also pointed out the dialogue-provoking role of soft law and its influence on evolving international norms. See J. Pottow, The Dialogic Aspect of Soft Law in International Insolvency: Discord, Digression, and Development, Michigan Journal of International Law, Vol. 40, 2019, p. 481.

[6] I. Mevorach, On the road to Universalism: a Comparative and Empirical Study of UNCITRAL Model Law on Cross-Border Insolvency, EBOR, Vol. 12, Issue 4, 2011, pp. 537 et seq.

(MLEGI),[7] targeting group insolvencies to encourage and enable coordination in such cases and the development of group solutions. Another related instrument adopted by UNCITRAL in 2018 is the Model Law on the Recognition and Enforcement of Insolvency-Related Judgments (MLIJ). The MLIJ complements the MLCBI. It requires recognition and enforcement of insolvency-related judgments and clarifies that the MLCBI relief provisions include recognition and enforcement of such judgments.[8]

Second, at the regional level, a leading example of an integrated market with a unique international framework for insolvency is the European Union (EU). The European Insolvency Regulation of 2015 (EIR Recast),[9] which replaced the original EIR of 2000, applies to insolvency proceedings opened after 26 June 2017. It harmonizes private international law rules on international insolvency jurisdiction, applicable law, recognition of foreign insolvency proceedings and insolvency-related judgments, communication and cooperation between insolvency practitioners and courts. The EIR Recast contains a new Chapter V, which offers tailored provisions on coordination of insolvency proceedings with regard to groups of companies. Such coordination may be carried out through the opening of an assisting proceeding – a group coordination proceeding.[10] For recognition of group solutions falling outside of the EIR Recast's scope, such as English schemes of arrangement (pre-Brexit), other regional instruments have been applied, including the Brussels I-bis Regulation (Brussels I-bis).[11]

Third, several countries have implemented insolvency law reforms and have introduced tools aiming at the adoption of group-mindful solutions or making the adoption of such solutions more likely. We distinguish in this regard between two types of laws.

The first type is laws specifically designed for group insolvencies. A key mechanism here is procedural consolidation, which manifests in the centralization of proceedings in a single forum or court. Group insolvency laws may also provide for substantive consolidation where assets and/or debts of the group entities may be pooled together in the course of insolvency proceedings. Various countries have adopted such laws in recent years, including Germany,[12] Italy,[13] Spain[14] and France.[15] Insolvency of corporate groups has also attracted attention of policymakers outside Europe. Notably, in 2019, the Insolvency and Bankruptcy Board of India created a Working Group on Group Insolvency to discuss and draft a possible group insolvency framework.[16] Procedural consolidation is common in the USA, where the Bankruptcy Code permits a debtor to file for insolvency in any bankruptcy court in which a bankruptcy case concerning the debtor's affiliate is pending.[17] Argentine insolvency law focuses on group

[7] UNCITRAL Model Law on Enterprise Group Insolvency (2019).
[8] UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments with Guide to Enactment (2018)
[9] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings.
[10] EIR Recast, Article 61. For an overview, see C. Thole and M. Dueñas, Some Observations on the New Group Coordination Procedure of the Reformed European Insolvency Regulation, International Insolvency Review, Vol. 24, Issue 3, 2015, pp. 214-227.
[11] Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).
[12] Insolvenzordnung (InsO), § 3a (Gruppen-Gerichtsstand) and § 56b (Gruppen-Verwalter), aiming at establishing a common forum and a common administrator for the group. See also § 269d-269i (Koordinationsverfahren), introducing coordination proceedings.
[13] Codice della crisi d'impresa e dell'insolvenza in attuazione della legge 19 ottobre 2017, n. 155, Art. 284. A. Zorzi, The Italian Law Reform, 2019, available at https://ssrn.com/abstract=3492422. D. Corapi, D. Benincasa, The Law on Groups of Companies in Italy, European Company Law Journal, 16(4), 2019, pp. 121-129.
[14] Ley Concursal, Artículo 25, allowing a debtor or a creditor to submit a petition for declaration of joint insolvency proceedings of several debtors if they are part of the same group of companies.
[15] LOI n° 2015-990 du 6 août 2015 pour la croissance, l'activité et l'égalité des chances économiques (sometimes referred to as Loi Macron), adding Article L. 721-8 to the Code of Commerce. This article specifies jurisdiction of specialized commercial courts over certain insolvency proceedings and provides that companies facing an insolvency proceeding with subsidiaries in a similar position will be subject to the same court.
[16] Report of the Working Group on Group Insolvency, 2019.
[17] 28 U.S. Code § 1408. Federal Rules of Bankruptcy Procedure, Rule 1015(b). The wide range of permissible bankruptcy venue options, resulting in a concentration of bankruptcy cases in a few districts, attracted criticism. In 2018, Senators J. Cornyn

reorganizations and provides for the possibility of a single or joint application to embrace all group members.[18] This happens in cases where insolvency of one group entity may affect other group entities or where entities in a group are closely integrated. Interestingly, Argentine law permits an insolvency application to include solvent group members, so long as it is in the interest of the group as a whole and facilitates group reorganization.[19] In Brazil, substantive consolidation has been applied quite frequently in recent years in group insolvency cases.[20]

The second type is laws and procedures, inspired by English schemes of arrangement, that are primarily used for restructuring of a debtor's capital structure (e.g. changing the composition, conditions or structure of assets and/or liabilities) without disrupting business operations or causing a liquidation. We refer to these procedures as "schemes" or "restructurings" interchangeably, though we recognize and show the range of differences between them across jurisdictions. Schemes have become increasingly trendy as an area for global innovation and competition. In particular, this competition is pronounced in large cases of international groups that can afford to move between systems and that countries wish to attract the most. Scheme laws have recently been adopted, for example, in Singapore,[21] the Netherlands[22] and Germany.[23] Unlike the first type of laws, characterized by the rules expressly targeting group insolvencies, restructuring law reforms in the second type have not solely or specifically focused on groups. However, they encompass innovations which can be and are becoming instrumental in reaching centralized group solutions. Among such innovations are releases of intra-group obligations via a single proceeding (third-party releases) and flexible jurisdictional rules enabling centralized responses to group distress.

This second type of procedures is the focus of this article, which examines the problem of cross-border recognition of schemes used for group restructuring purposes. It thus connects the national legal regimes with the instruments developed internationally, concentrating mainly on the global UNCITRAL Model Laws system. The article situates group schemes within a unique taxonomy, which combines different levels and forms of centralization, and asks whether the existing international insolvency law framework provides a solid basis for recognition of centralized restructurings, taking into account possible negative externalities of global competition.

The article is structured as follows. Part I delineates the key approaches to the administration of group insolvencies and offers a taxonomy of levels and types of centralization, pointing to those levels that are most relevant to group schemes. Part II contrasts the rise of centralized solutions with the traditional jurisdictional standard, which focuses on individual debtor's center of main interest (COMI). Part III reviews comparatively the development of scheme laws and their application to group insolvencies, focusing on three jurisdictions – the UK, Germany, and the Netherlands – as examples that highlight the shift to more dynamic jurisdictional criteria. Thus, the jurisdictional benchmarks prevalent in insolvency may be less relevant in view of the rise of these new restructuring procedures. Part IV further examines

and E. Warren introduced the Bankruptcy Venue Reform Act of 2018, which, among other things, seeks to limit the "affiliate-filing rule".

[18] Argentine Insolvency Law No. 24522 (LCQ), Chapter VI, Articles 65-68. See M.E. Uzal, National Report on Argentina, in R.M. Manóvil, Groups of Companies: A Comparative Law Overview, Springer, 2020, pp. 614-616.

[19] Ibid.

[20] For a critical view of the Brazilian group insolvency approach, see Sheila Neder Cerezetti, Reorganization of Corporate Groups in Brazil: Substantive Consolidation and the Limited Liability Tale, International Insolvency Review, Vol. 30(2), 2021, noting that the current Brazilian cases of substantive consolidation treat "an exceptional measure as a day-to-day event, dramatically altering the rights of creditors and the obligations of debtors without regard to the limitation of liability."

[21] Singapore Companies (Amendment) Act 2017; Insolvency, Restructuring and Dissolution Act 2018 (No. 40 of 2018).

[22] Act on Court Confirmation of Extrajudicial Restructuring Plans (Wet homologatie onderhands akkoord or WHOA), available at https://www.eerstekamer.nl/behandeling/20200526/gewijzigd_voorstel_van_wet_3.

[23] Gesetz zur Fortentwicklung des Sanierungs- und Insolvenzrechts, Bundesgesetzblatt Jahrgang 2020, Teil I, Nr. 66 zu Bonn am 29. Dezember 2020.

the implications of the growth of schemes. It notes that they can result in jurisdictional plurality, trigger jurisdictional conflicts and undermine creditors' legitimate expectations. Against these backdrops, Part V explores whether the MLCBI accommodates centralized group solutions performed via schemes. Part VI then studies whether the newer instruments – the MLIJ and in particular the MLEGI – offer greater possibilities and a desirable framework for the realization and recognition of centralized group solutions. Part VII identifies the weak spots in the current international regime and shares the ideas for its further development in order to accommodate centralized group restructurings and promote constructive global competition in insolvency.

I. Levels of Centralization for Group Restructuring

In practice, there are different ways to structure group insolvency proceedings to address their financial distress.[24] As noted above, oftentimes the most effective way is through some form of centralization. We distinguish here between procedural and operational centralization.

Procedural centralization involves concentration of separate insolvency (in a broad sense and including restructuring) proceedings in a single forum or in one court.[25] It also manifests itself in situations where obligations of several group entities are restructured in a single proceeding opened with respect to one group member. Thus, procedural centralization is determined by reference to either the number of proceedings (one proceeding that also has wider effects on non-debtor members of a group) or their localization (several proceedings but consolidated in one forum or court). *Operational centralization* deals with how group entities are controlled, managed, or directed in insolvency. For example, operational centralization may be achieved by way of appointing the same insolvency practitioner (IP) in multiple proceedings,[26] or by the opening an assisting proceeding that assumes additional coordinating or managerial-like functions.[27] As opposed to procedural centralization, operational centralization is not premised on the number or the location of proceedings but looks at the concentration of the decision-making roles and functions.

Procedural and operational centralization are often correlated and go hand in hand. For example, concentration of proceedings in the same jurisdiction makes it more likely that the same IP will be appointed, resulting in the centralized management of the proceedings. Conceptualizing different forms of centralization, Graph 1 distinguishes eight levels of tackling financial distress in enterprise groups.

Level 8 indicates the minimum level or the absence of any centralization. From that level, the graph moves up to indicate other approaches, which enable higher procedural and operational centralization. Thus, Level 7 envisages a degree of communication and cooperation in the process, even though in a

[24] See R. van Galen, Insolvent Groups of Companies in Cross Border Cases and Rescue Plans, Report to the Netherlands Association for Comparative and International Insolvency Law (conference of 8 November 2012), p. 29, at http://www.nvrii.nl/uploads/files/NVRII_Preadviezen_2012.pdf. Van Galen distinguishes six solutions for the treatment of insolvencies of international groups in relation to the EU, from coordination on a non-hierarchical basis to substantive consolidation and a flexible (case-by-case) approach.

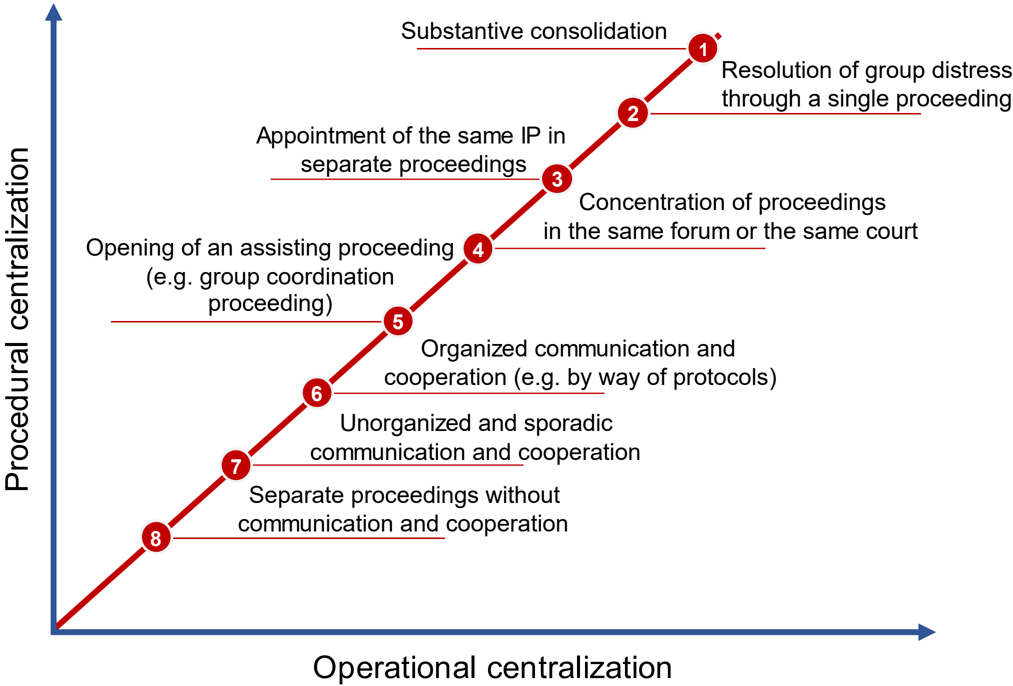
[25] This is a form of procedural consolidation. D. Zhang, Reconsidering Procedural Consolidation for Multinational Corporate Groups in the Context of the Recast European Insolvency Regulation, International Insolvency Review, Vol. 26, Issue 3, p. 335, listing among the benefits of procedural consolidation "preservation of group value, reduction of costs arising from multiple insolvency proceedings and avoiding the interruption of legal personality of subsidiaries in the same group." See also J. Sarra, Oversight and Financing of Cross-Border Business Enterprise Group Insolvency Proceeding, Texas International Law Journal, Vol. 44, Issue 4, pp. 547-576.

[26] EIR Recast, Recitals 50 and 53; InsO, § 56b; The World Bank Principles for Effective Insolvency and Creditor/ debtor Regimes, 2015, C17.4; MLEGI, Article 17.

[27] The opening of special proceedings to coordinate separate insolvency or restructuring proceedings is envisaged in the EIR Recast (Article 61). Besides, the EIR Recast leaves open the possibility for IPs to agree to grant additional powers to an IP appointed in one of the group proceedings (Article 56(2)).

rather sporadic manner. Level 6 is distinguished by an increasingly organized way of cross-border communication and cooperation, which may be facilitated by the adoption of insolvency protocols or cooperation agreements.[28] Level 5 streamlines coordination of parallel proceedings through the opening of a special assisting proceeding, such as a group coordination proceeding under the EIR Recast. Level 4 represents concentration of proceedings in the same forum or the same court. Level 3 relates to a situation where the same IP is appointed in proceedings concerning enterprise group members. Level 2 permits the resolution of group's financial problems in a single proceeding concerning a single group member but extending its effects to other group members. Level 1 is substantive consolidation.[29]

Graph 1. Procedural and operational centralization in group restructurings



The above Graph also encompasses differences between group centralizations in term of the extent to which they implicate or encroach on the entity separateness. Some approaches to group insolvencies entail a strict entity-by-entity treatment that stresses legal separateness of group entities and does not allow any of the proceedings to assume a coordinating role. This entity-based approach seeks to preserve the boundaries of a corporate veil and may also be intertwined with territorialism. Thus, local control over local entities can be maintained.[30] Other approaches promote coordinated administration of proceedings, departing from a strict entity-by-entity view and recognizing that developing a common

[28] UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation, 2009, Introduction, para. 13, defines a cross-border insolvency agreement as "an oral or written agreement intended to facilitate the coordination of cross-border insolvency proceedings and cooperation between courts, between courts and insolvency representatives and between insolvency representatives." Insolvency protocols have proven critical in facilitating efficient resolution of complex insolvencies, including insolvencies of large multinational enterprises, such as Lehman Brothers, Nortel Networks and Bernard Madoff Investment Securities. Recently protocols have been embraced in airline insolvency cases of LATAM and Jet Airways. On insolvency protocols, see I. Kokorin, B. Wessels, Cross-Border Protocols in Insolvencies of Multinational Enterprise Groups, Edward Elgar Publishing, 2021.

[29] UNCITRAL Legislative Guide on Insolvency Law, Part three, Chapter II, para. 107, noting that while substantive consolidation is typically discussed in the liquidation context, it may in principle be used in group reorganizations, including by way of a reorganization plan. The EIR Recast in Article 72(3) prescribes that a group coordination plan shall not include recommendations as to any consolidation of proceedings or insolvency estates.

[30] I. Mevorach, Towards a Consensus on the Treatment of Multinational Enterprise Groups in Insolvency, Cardozo Journal of International and Comparative Law, Vol. 2, No. 2, 2010, p. 385.

solution may safeguard group synergies and the going concern value of group entities and the group as a whole, potentially resulting in greater payouts to creditors. Still, such approaches do not encroach on the entity separateness, because group entities retain their independence and asset/liabilities separateness is preserved. On the other side of the spectrum, as an outlier, is substantive consolidation, i.e. Level 1. Here the high level of operational and procedural centralization interacts with disregard of the corporate veil. At least in its full form, substantive consolidation leads to a pooling of assets and liabilities of several companies together as if they are a single legal entity.[31] It sacrifices the separate legal personality to avoid disproportionate expense or delay due to disentangling "asset integrated" entities.[32]

The purpose of the proposed taxonomy is not to suggest that some approaches are superior to others. We wish to avoid oversimplification, overlooking the diversity of group forms and structures.[33] Whereas a closely integrated group may benefit from coordinated efforts and centralized crisis responses, for non-integrated groups with truly separate businesses such efforts might be unnecessary. They may lead to an increase in transaction costs arising from negotiations of a cross-border insolvency protocol or from the opening of a group coordination or a planning proceeding. Substantive consolidation is particularly controversial as it affects the distribution between creditors where creditors of a single debtor are forced to share the estate value with creditors of all consolidated entities. Thus, it leads to imposed wealth redistribution, profoundly affecting creditors' property rights and recoveries.[34] However, in relevant circumstances, substantive consolidation can immensely reduce transaction costs and simplify the insolvency process, including by resolving cross-liability arrangements (intercompany loans, cross-guarantees, co-debtorship, intercompany avoidance actions) as the separateness of legal entities and insolvency estates disappears.

In practice, legal tools and mechanisms emerge to achieve greater centralization in restructuring of multinational enterprise groups. Schemes permit centralization corresponding to Levels 2 and 4 of the Graph. Level 4 involves concentration of group members' restructurings in the same forum or the same court.[35] It simplifies the adoption of a coherent group-wide solution and reduces costs. Level 2 permits resolution of group distress via a single proceeding opened with respect to a single group entity by extending restructuring effects to affiliated entities acting as co-debtors, guarantors, and collateral providers. In addition to a significant cost reduction,[36] this mechanism makes it possible to preserve operational continuity of group entities and going concern value of the group.[37] This outcome is achieved insofar as debt of several companies is restructured without each of them entering a formal proceeding.

[31] UNCITRAL Legislative Guide on Insolvency Law, Part three, Chapter II, para. 135, noting that substantive consolidation can be partial or limited, excluding certain assets or claims.

[32] Substantive consolidation is typically restricted to cases of intermingling of assets and liabilities within an enterprise group, or to cases of fraud and abuse of corporate form. For example, according to French law, the "commenced proceedings may be extended to one or more other persons where their assets are intermingled with those of the debtor or where the legal entity is a sham." Article L. 621-2 Commercial Code. In a similar vein, Spanish law exceptionally allows substantive consolidation "when there is confusion of assets and it is not possible to separate the ownership of assets and liabilities without incurring an unjustified expense or delay." Article 25 ter. 2 LC.

[33] I. Mevorach, Insolvency within Multinational Enterprise Groups, OUP, 2009, p. 132, distinguishing groups based on three dimensions, such as 'business integration', 'asset integration' and 'weak or no integration'.

[34] C. Frost, Organizational Form, Misappropriation Risk, and the Substantive Consolidation of Corporate Groups, Hastings Law Journal, Vol. 44, Issue 3, 1993, p. 451. W. Widen, Corporate Form and Substantive Consolidation, The George Washington Law Review, Vol. 75 (2), 2007, p. 306, accepting that "a substantive consolidation might defeat expectations of creditors who had advanced funds to the separate legal entities."

[35] It may also be (and frequently is) accompanied by the appointment of a single IP, reaching Level 3.

[36] See S. Lubben, The costs of corporate bankruptcy: how little we know, in B. Adler (ed.), Research Handbook on Corporate Bankruptcy Law, Edward Elgar Publishing, 2020, p. 276, discussing direct costs of insolvency (e.g. professional fees associated with reorganization, court filing fees) and indirect costs, which are more abstract (e.g. managerial time, lost revenues, lost opportunities and lost goodwill).

[37] This strategy can be compared to a Single Point of Entry (SPOE) strategy, used in bank resolution, whereas resolution powers (e.g. bail-in, transfer tools) are applied at the top parent or holding company level, while operating subsidiaries continue as a going concern without entering resolution. See FSB, Recovery and Resolution Planning for Systemically Important Financial

Centralization of group solutions,[38] however, could prima facie clash with the traditional jurisdictional standard in insolvency that focuses on each entity's COMI. We discuss next the development of the COMI rule and its application in the group context.

II. COMI and the Rise of Group Centralization in Insolvency

A. *COMI: Rise, Rationale, and Interpretation*

The concept of COMI is well-known to insolvency scholars and practitioners. Its origins can be traced to the 1980 Draft Convention on Bankruptcy, Winding-Up, Arrangements, Compositions and Similar Proceedings (Draft Convention).[39] This Draft Convention was one of the early attempts to harmonize private international law issues in the area of insolvency in the European Economic Community. Even though it was not adopted, the idea of using a jurisdictional link based on debtor's place of administration of main interests, proposed therein,[40] survived. It was repeated in multiple documents drafted in the 1990s, including the Istanbul Convention[41] and the European Convention on Insolvency Proceedings (1995 Convention)[42] – a document that has strongly influenced both the MLCBI and the EIR (now recast).[43]

The 1995 Convention and the authoritative report accompanying it, Virgós-Schmit Report,[44] proposed a model in which main insolvency proceedings having a universal scope were linked to and could be opened at the jurisdiction of the debtor's COMI. The same approach is now followed by the EIR Recast, under which "centre of main interests" is defined as a place where the debtor "conducts the administration of its interests on a regular basis and which is ascertainable by third parties."[45] In case of a legal entity, the place of the registered office is presumed to be the debtor's COMI in the absence of

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Institutions: Guidance on Developing Effective Resolution Strategies, 2013. See also J. Jennings-Mares, A. Pinedo, O. Ireland, The Single Point of Entry Approach to Bank Resolution, in J.-H. Binder, D. Singh (eds.), Bank Resolution: The European Regime, OUP, 2016.

[38] The term "group insolvency solution" has been introduced in the MLEGI (Article 2(f)). A group insolvency solution may result in "reorganization, sale or liquidation of some or all of the assets and operations of one or more enterprise group members" in order to protect, preserve or enhance the overall combined value of the participating enterprise group members. It is therefore the intention of the MLEGI to offer a flexible concept that may be adjusted to the specific circumstances and needs of a corporate group, its business model and degree of integration between its members. Group insolvency solutions can be achieved by different means, entailing varying degrees of procedural and operational centralization. This article adopts the definition of a group insolvency solution used in the MLEGI but recognizes that new restructuring laws most commonly target financial restructuring rather than liquidation.

[39] Draft Convention on bankruptcy, winding-up, arrangements, compositions, and similar proceedings. Report on the draft Convention. Bulletin of the European Communities, Supplement 2/82 (1982), Article 3(1), laying down the rule that "[w]here the centre of administration of the debtor is situated in one of the Contracting States, the courts of that State shall have exclusive jurisdiction to declare the debtor bankrupt." At http://aei.pitt.edu/5480/1/5480.pdf. For the discussion of the origins of COMI in Europe, see I. Tirado, An Evolution of COMI in the European Insolvency Regulation: From 'Insolvenzimperialismus' to the Recast, in J. Sarra and B. Romaine (eds.), Annual Review of Insolvency Law (2015), pp. 691-722.

[40] Draft Convention, Article 3(2).

[41] European Convention on Certain International Aspects of Bankruptcy, Istanbul, 5.VI.1990. The Istanbul Convention was drafted by a committee of experts subordinate to the European Committee on Legal Co-operation. It was signed by 8 countries (Luxemburg, Turkey, Italy, Greece, Germany, France, Cyprus and Belgium), but ratified only by Cyprus. The Istanbul Convention never entered into force, as this would have required ratification by at least 3 countries.

[42] Convention on Insolvency Proceedings, 23 November 1995, available at http://aei.pitt.edu/2840/.

[43] The influence of the 1995 Convention on the Model Law 1997 is evident from its Guide to Enactment (1997), confirming in para. 18 that the "Model Law takes into account the results of other international efforts, including the Convention on Insolvency Proceedings of the European Union."

[44] Virgós and Schmit 1996. The report has been frequently referred to by advocates general in their opinions on particular cases involving interpretation of the EIR.

[45] EIR Recast, Article 3(1).

proof to the contrary.[46] The key role of ascertainability and importance of the registered office presumption in determining COMI have been acknowledged in cases decided by the Court of Justice of the European Union (CJEU).[47] As Virgós and Garcimartín explain, the "objective ascertainability of the centre of main interests is an important factor, as it enables creditors to calculate the commercial or financial risk they face in the event of the debtor's insolvency."[48]

COMI performs three main functions within the system of the EIR Recast. First, it allocates international insolvency jurisdiction for the opening of main insolvency proceedings, having a universal scope. Second, COMI jurisdiction usually determines the law applicable to insolvency proceedings (*lex concursus*), their effects on rights and duties of a debtor and its creditors. For example, this law governs powers of an IP, ranking of claims, composition of insolvency estate, etc.[49] Third, the location of COMI influences the powers of IPs in a cross-border setting.[50]

The concept of COMI is an integral part of the UNCITRAL instruments (further explored in Parts V-VII), even though its role differs significantly from that played under the EIR Recast.[51] According to the MLCBI, COMI is key to determining the type of a foreign proceeding (i.e. main v. non-main) and the respective relief available to it prior to or upon recognition.[52] COMI can also affect recognition decisions under the MLIJ, as it permits recognition of an insolvency-related judgment to be refused if it originates from a state in which the debtor has neither COMI nor establishment.[53] Within the framework of the MLEGI, COMI is relevant to the opening of a planning proceeding – a major innovation foreseen as a tool to improve the administration of group insolvencies and to develop a group insolvency solution.[54] A planning proceeding is defined as a main proceeding commenced in respect of a group member, provided that this group member is likely to be a necessary and integral participant in a group insolvency solution, and in which other group members are participating for the purpose of developing a group solution.[55] The MLEGI adds that a court can recognize as a planning proceeding a proceeding that is separate from the main proceeding, if that separate proceeding has been approved by the court which

[46] Ibid.

[47] *Eurofood IFSC Ltd*., Case C-341/04, 2 May 2006, ECLI:EU:C:2006:281, para. 33, noting that COMI "must be identified by reference to criteria that are both objective and ascertainable by third parties" and that "objectivity and […] possibility of ascertainment by third parties are necessary in order to ensure legal certainty and foreseeability." See also *Interedil*, Case C-396/09, 20 October 2011, ECLI:EU:C:2011:671, para. 49. I. Mevorach, Jurisdiction in Insolvency: A Study of European Courts' Decisions, Journal of Private International Law, Vol. 6, No. 2, 2010, pp. 327-357.

[48] M. Virgós and F. Garcimartín, The European Insolvency Regulation: Law and Practice, Kluwer Law International, 2004, p. 42. Similarly, the Virgós-Schmit Report in para. 75 stipulates that, since insolvency is a foreseeable risk, it is "important that international jurisdiction […] be based on a place known to the debtor's potential creditors. This enables the legal risks which would have to be assumed in the case of insolvency to be calculated."

[49] EIR Recast, Article 7.

[50] EIR Recast, Article 21.

[51] R. Bork, The European Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency, International Insolvency Review, Vol. 26, Issue 3, 2017, pp. 255-258, discussing COMI under the EIR Recast, the MLCBI and other regulations.

[52] MLCBI, Articles 20-21.

[53] MLIJ, Article 14(h), which is an optional provision that states may decide to implement. The concept of establishment has been developed in parallel to COMI. It is used in the EIR Recast (Article 2(10)) and the MLCBI (Article 2(f)). Under the former, it indicates a jurisdiction where secondary proceedings, having a territorial scope, may be opened. Pursuant to the latter, establishment characterizes non-main proceedings. It refers to the place of operations where the debtor carries out a non-transitory economic activity with human means and goods.
or services.

[54] Read further I. Mevorach, A Fresh View on the Hard/Soft Law Divide: Implications for International Insolvency of Enterprise Groups, Michigan Journal of International Law, Vol. 40, 2019, pp. 505-530.

[55] MLEGI, Article 2(g). As to the requirement that a group entity should be "necessary and integral" to a group insolvency solution, the Guide to the MLEGI states in para. 46 that the relevant factors may include "the structure of the enterprise group, the degree of integration between members, the group insolvency solution that is to be proposed." It recognizes in para. 45 that there can be more than one planning proceeding in an insolvency concerning the same enterprise group, for example, where such a group is horizontally organized or where different plans are required for different parts of the group.

has jurisdiction over the main proceedings.[56] In both cases, the jurisdiction of the main proceeding (COMI-jurisdiction) is determinative to the opening of a planning proceeding (although other participating members may not have their COMI in the same place).

Thus, while the UNCITRAL instruments do not regulate international jurisdiction for main or non-main insolvency proceedings, these instruments, in particular the MLCBI, consider COMI as a crucial factor determining the powers and effects of such proceedings. COMI should be interpreted in a uniform way.[57] It must be the place known to the debtor's actual and potential creditors. For contractual relations and (less so) in property law, parties may adjust their relations, ex ante or ex post, for example by choosing an available remedy and a dispute resolution mechanism. This is generally not the case with insolvency law, which in many instances curbs party autonomy to ensure collective debt enforcement and *pari passu* value distribution among creditors.[58] The past decades have witnessed the expansion of secured credit and powers of secured creditors in insolvency,[59] conclusion of intercreditor agreements and restructuring support agreements, increasing control of debtor in possession (DIP) financiers over the insolvency process.[60] These developments could signal the rise of a new contract paradigm in insolvency law.[61] However, this insolvency-related contracting rarely extends to the determination or a choice of insolvency forum or applicable insolvency law.[62] In this area, party autonomy continues to be largely restricted. As will be shown below, the proliferation of schemes creates more options and choices for parties, opening the doors for centralized group restructuring solutions.

B. *Group Insolvency and Limits of COMI*

As we have seen, COMI originated in the 1980s. At that time, the insolvency of groups of companies was not widely debated or dealt with. In the academic literature of the 1980s, insolvency of corporate groups was only sparsely discussed.[63] It is recognized that when the text of the MLCBI was debated,

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[56] This addition allows recognition as a planning proceeding of a group coordination proceeding, opened under the EIR Recast, as long as the latter has been opened by the court of the main insolvency proceeding.

[57] Guide to Enactment and Interpretation of the MLCBI (2013), para. 82, stating that "the formulation "centre of main interests" in the EC Regulation corresponds to that of the Model Law" so that the "jurisprudence interpreting the EC Regulation may also be relevant to interpretation of the Model Law."

[58] T. Jackson, Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain, The Yale Law Journal, Vol. 91, No. 5, 1982, pp. 857-907, justifying insolvency's collective proceedings by the inability of dispersed creditors to effectively contract with one another over the best response to debtor's financial distress. See also D. Baird, T. Jackson, Corporate Reorganizations and the Treatment of Diverse Ownership Interests, University of Chicago Law Review, 51, 1984, pp. 97-130.

[59] A. Nocilla, Asset Sales and Secured Creditor Control in Restructuring: A Comparison of the UK, US and Canadian Models, International Insolvency Review, Vol. 26, Issue 1, 2017, pp. 60-81; ABI Commission to Study the Reform of Chapter 11, Full Report, 2014, p. 12.

[60] The ever-increasing control by secured creditors over the insolvency process has been particularly emphasized in the US literature. See D. Baird and R. Rasmussen, The End of Bankruptcy, Stanford Law Review, Vol. 55, 2002, pp. 751-789; D. Skeel, Creditors' Ball: The New Corporate Governance in Chapter 11, University of Pennsylvania Law Review, Vol. 152, No. 2, 2003, p. 918, noting that "[w]hereas the debtor and its managers seemed to dominate bankruptcy only a few decades ago, Chapter 11 now has a distinctly creditor-oriented cast." K. Ayotte and E. Morrison, Creditor Control and Conflict in Chapter 11, Journal of Legal Analysis, Vol. 1, Issue 2, 2009, pp. 511–551. See also R. Rasmussen, The end of bankruptcy revisited, in B. Adler (ed.), Research Handbook on Corporate Bankruptcy Law, Edward Elgar Publishing, 2020, p. 42, mentioning among the factors strengthening the position of secured creditors in insolvency: 1998 amendments to Article 9 UCC, making it easier to obtain a blanket security interest in all debtor's assets; debtor-in-possession financing and the use of far-reaching lending covenants, giving a senior lender control over debtor's access to cash in its accounts.

[61] D. Skeel, G. Triantis, Bankruptcy's Uneasy Shift to a Contract Paradigm, University of Pennsylvania Law Review, Vol. 166, Issue 7, 2018, pp. 1777-1817. See also J. Karas, M. Harland, S. Foreman, When 'Where' Matters: Anchoring Jurisdiction in Insolvency, INSOL Special Report, 2015.

[62] I. Kokorin, Contracting around insolvency jurisdiction: private ordering in European insolvency jurisdiction rules and practices, in V. Lazić V. and S. Stuij (eds.), Recasting the Insolvency Regulation: Improvements and Missed Opportunities. Short Studies in Private International Law, Asser Press, 2020, pp. 21-58.

[63] See P. Blumberg, The Law of Corporate Groups: Procedural Problems in the Law of Parent and Subsidiary Corporations, Little Brown, 1983. P. Blumberg, The Law of Corporate Groups: Problems in the Bankruptcy or Reorganization of Parent & Subsidiary Corporations Including Law of Corporate Guarantees, Little Brown, 1985. P. Blumberg, Limited Liability and Corporate Group, The Journal of Corporation Law, 11, 1986, pp. 573-631.

"groups were regarded as "a stage too far."[64] Indeed, the MLCBI and the EIR did not address the issue of group insolvency, and neither envisioned a notion of "group COMI". Instead, both had a single-entity debtor in mind. This "singular" or "group-neutral" vision was supported by the CJEU's decision in *Eurofood IFSC Ltd*.[65] The same idea of entity-by-entity COMI determination underpins the findings in *Rastelli Davide e C. Snc v. Jean-Charles Hidoux*,[66] in which the court stressed that even if property of two companies had been intermixed, COMI determination had to be carried out separately for each company as each debtor constituted a distinct legal entity, subject to its own court jurisdiction.

The adoption in 2015 of the EIR Recast has not changed this singular vision despite the fact that a new chapter was added to promote coordinated administration of group insolvencies.[67] The EIR Recast acknowledges that a court should be able to open insolvency proceedings for several companies belonging to the same group in one jurisdiction, "if the court finds that the centre of main interests of those companies is located in a single Member State."[68] In other words, COMI of each separate entity should be established in the same jurisdiction in order to achieve full centralization. Following the authoritative interpretation of the CJEU, European courts have been cautious in accepting the rebuttal of the registered office presumption and have required convincing evidence that COMI is located in a jurisdiction other than the jurisdiction of debtor's registered office. For example, in the case concerning COMI of a special purpose financial vehicle (SPV) Oi Coop, registered in the Netherlands but fully dependent on the management and operational centre of the group located in Brazil (where a group-wide restructuring was under way), the Dutch Supreme Court concluded that the registered office presumption was not rebutted.[69]

We should note, however, that the interpretation of COMI with respect to enterprise groups and their members has not been fully consistent across jurisdictions. Not all courts have followed the strict line (entity-based approach) drawn by the CJEU. In many insolvencies of groups, courts have adopted a group-mindful interpretation of COMI, considering group interdependencies and the economic realities where group entities may have been centrally controlled in a particular jurisdiction.[70] In determining a debtor's COMI, US courts have used the concept of a "nerve center", referring to a location from where debtor's activities are directed and controlled.[71] As opposed to the findings of the Dutch court, referred to above, the US court found that COMI of Oi Coop, acting as an SPV, was in Brazil – the location of the corporate "nerve center".[72] The concept of a nerve center has also been embraced in Canadian case

[64] UNCITRAL Working Group V, Thirty-eighth session, UNCITRAL Legislative Guide on Insolvency Law, Part three: Treatment of enterprise groups in insolvency, 11 February 2010, A/CN.9/WG.V/WP.92/Add.1, p. 3.
[65] *Supra* note 47. For critical analysis of the CJEU's decision in Eurofood, see S. Bufford, Center of Main Interests, International Insolvency Case Venue, and Equality of Arms: The Eurofood Decision of the European Court of Justice, Northwestern Journal of International Law & Business, Vol. 27, Issue 2, 2007, pp. 351-419.
[66] *Rastelli Davide e C. Snc v. Jean-Charles Hidoux*, C-191/10, 15 December 2011, ECLI:EU:C:2011:838.
[67] EIR Recast, Chapter V.
[68] EIR Recast, Recital 53.
[69] Decision of the Dutch Supreme Court, ECLI:NL:HR:2017:1280, July 7, 2017. See further the case concerning insolvency of NIKI, an Austrian subsidiary of Air Berlin (LG Berlin, 84 T 2/18, Jan. 8, 2018), where the Austrian registered office prevailed, despite significant ties and dependence on a parent company, located in Germany. See also *In the Matter of Videology Limited* [2018] EWHC 2186 (Ch), where the court noted that the debtor, registered in England and Wales, was part of a larger corporate group with its parent incorporated in Delaware, the USA. This is also where strategic management decisions were made. However, the court was not persuaded that the registered office presumption had been rebutted, since the debtor's trade premises, customers and creditor relations were located in the UK.
[70] See I. Mevorach, Jurisdiction in insolvency – a study of European courts' decisions, Journal of Private International Law, Vol. 6, No. 2, 2010, pp. 327-357.
[71] *In re OAS S.A.*, 533 B.R. 83 (Bankr. S.D.N.Y. 2015); *In re Fairfield Sentry Ltd*., 714 F.3d 127 (2nd Cir. 2013).
[72] Order Granting Recognition of Foreign Main Proceeding and Certain Related Relief, July 22, 2016, *In re OI S.A*., No. 16-11791 [ECF No. 38] (Bankr. S.D.N.Y. 2016). See also *In re Serviços de Petróleo de Constellation S.A*., 600 B.R. 237 (Bankr. S.D.N.Y. 2019), noting that a court may consider a debtor's "nerve center", including from where its activities are directed and controlled ('principal *executive office* of the group of companies') in determining COMI. In this case, the central coordination of the rigs happened in Brazil. The court paid attention to the fact that the foreign entities were members of an integrated

law in determining COMI of a group entity.[73] Group-sensitive COMI determination was shown by the Australian courts in the case concerning insolvency of Buccaneer, an Australian listed company with main activities in the USA, where its subsidiaries engaged in the exploitation of various oil and gas assets. Finding COMI of the Australian-registered parent company to be in the USA, the Australian court took into account the overall group structure and the role played in it by the debtor in question as it appeared to third parties.[74] Citing the Buccaneer judgment, and in contrast to the CJEU logic (relying on entity separateness and entity-centered COMI view), the High Court of Singapore in *Re Zetta Jet* held that "in ascertaining a specific company's COMI, there is no need to maintain strictly the distinction between different entities within a group. It is possible for the analysis to be made of the activities of an entire group of companies, rather than of the specific debtor company in question."[75]

The divergence of approaches to the determination and interpretation of COMI,[76] its inherent ambiguity and, at times, inflexibility, make it a difficult standard to apply when contemplating a centralized group restructuring. For groups of companies with several operating subsidiaries in different jurisdictions and having decentralized management, it may be difficult to locate COMIs of all or the majority of the group entities in the same country.[77] As a result, a centralized group restructuring is unlikely.[78] The problem can also be framed differently. It may be questioned whether COMI as an autonomous concept is at all the right method to achieve a group centralization in insolvency. Against this backdrop, the next Part III discusses the emergence of restructuring procedures that can be used to restructure group debt in a centralized manner, including by employing alternative, more flexible jurisdictional criteria.

III. The Rise of Schemes and a Sufficient Connection Test

We first describe English schemes of arrangement (including the newer restructuring plan regime) with emphasis on their cross-border aspects. We then look at the expansion of schemes around the world and in particular the influence of English schemes on the equivalent regimes developed in the Netherlands and Germany. This review and the focused examples aim to show the growth of the market for schemes that also embraces more lenient norms concerning jurisdiction.

A. *"Sufficient Connection" Test as a Jurisdictional Threshold*

English schemes of arrangement are well known around the world. They constitute a flexible statutory mechanism to facilitate and implement "a compromise or arrangement between a company and its creditors, or any class of them, or its members, or any class of them."[79] When sanctioned by a court, a

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enterprise group and analyzed group roles and relations in some detail. It found that for a holding/financing company, the location of its subsidiaries, from which it generated the actual positive cash flows, was relevant to the COMI analysis.

[73] *Massachusetts Elephant & Castle Group Inc. (Re)*, 2011 ONSC 4201, 2011 CarswellOnt 6610, holding that the location of the "debtor's headquarters or head office functions or nerve centre" is usually significant in interpreting COMI. The integration of a specific debtor within the larger enterprise was also recognized as a "significant factor" to determining its COMI. See *CHC Group Ltd. (Re)*, 2016 BCSC 2623, 2016 CarswellBC 3949. See also *Angiotech Pharmaceuticals Inc., Re* (2011), 2011 BCSC 115, 2011 CarswellBC 124, 76 C.B.R. (5th) 317, setting among the factors relevant to COMI determination, the extent of integration of an enterprise's international operations, existence of shared management within entities and in an organization, consolidated management of an enterprise.

[74] *Young, Jr, in the matter of Buccaneer Energy Limited v Buccaneer Energy Limited* [2014] FCA 711.

[75] *Re: Zetta Jet Pte Ltd and others (Asia Aviation Holdings Pte Ltd, intervener)* [2019] SGHC 53, para. 83.

[76] For the review of such differences, see I. Kokorin and B. Wessels, COMIs under Chapter 15 and EIR Recast: Brothers, but not Twins, ABI Journal, August 2018.

[77] See Mevorach, *supra* note 2.

[78] Mevorach, *supra* note 54, at 521, emphasizing that the "absence of explicit provisions concerning the centralization of group proceedings can result in uncertainty regarding the possibility of opening such proceedings in the same place or granting them recognition and relief."

[79] Companies Act 2006, Part 26, Section 895(1).

scheme becomes binding on the company and its shareholders and relevant creditors.[80] It is essentially an instrument to solve a holdout problem, as it permits the majority of shareholders or creditors to bind the minority within a class (intra class cram-down). In a purely out-of-court workout, such a cram-down would not be possible. While originating in the 19th century, schemes of arrangement have not gained their popularity until the 2000s,[81] when they have proven to be a useful procedure to reorganize debt and/or equity of a company, to re-arrange its contractual or similar liabilities and to alter creditors' rights (e.g. extend maturity dates, release security, write-off debt), to effect a debt-to-equity swap, to compel creditors to accept an assignment of their claims, etc.[82] We will explore some of the key substantive requirements for schemes and their differences in Part V in the context of cross-border recognition and assistance. Here we concentrate on the private international law aspects, and specifically on the unique approach to establishing international jurisdiction.

Unlike the majority of insolvency and restructuring proceedings across the EU, English schemes of arrangement had been deliberately excluded from the scope of the EIR Recast (when the UK was still part of the EU).[83] Therefore, the high jurisdictional threshold of COMI did not apply. Instead, English courts use a different, far less stringent and straightforward "sufficient connection" test – connection between the proposed scheme of arrangement and the UK.[84] This test was elaborated over time through case law. Among the criteria which were found to be enough to establish a sufficient connection to sanction a scheme are: English law governed debt of key finance contracts and principal activity of the debtor in England;[85] English law governed contracts;[86] English domicile of creditors holding >50% by value of claims; choice of English law and jurisdiction of English courts in the facilities agreement;[87] purposeful alteration of the governing law and the jurisdiction clause in contracts to English law and English courts;[88] and movement of operations to England and domicile of 18% of the scheme creditors in England.[89]

English courts have also referred to the potential applicability of the Brussels I-bis and its jurisdictional rules. They adhered to the position that the question whether schemes of arrangement fell within the scope of the Brussels I-bis was not completely resolved. However, they have taken a pragmatic approach and assumed that it applied, and scrutinized whether the court would have jurisdiction over scheme creditors on that assumption. Under the Brussels I-bis, as a general rule, persons domiciled in a Member State shall be sued in the courts of that Member State.[90] However, to avoid irreconcilable judgments in connected actions and to facilitate expedient dispute resolution, a joint jurisdiction may be established.[91]

[80] Ibid, Section 899(3).
[81] On the historical developments of schemes of arrangement, see J. Payne, Schemes of Arrangement: Theory, Structure and Operations, CUP, 2014.
[82] G. Moss et al. Giving Effect to Debt Compromise Arrangements – Binding the Minority or Out of the Money Classes of Creditors, in C. Mallon and S. Waisman (eds.), The Law and Practice of Restructuring in the UK and US, OUP, 2011, para. 7.100.
[83] Schemes of arrangement were not included in Annex A to the EIR Recast, as formally they were not classified as proceedings under a law relating to insolvency, instead constituting an instrument of company law. See P. Mankowski, The European World of Insolvency Tourism: Renewed, But Still Brave? Netherlands International Law Review, Vol. 64, 2017, p. 106.
[84] *Re Drax Holdings Ltd* [2004] 1 WLR 1049. In *Re Drax Holdings*, the court established that a foreign company can be wound up in England if three requirements are met: 1) there must be a sufficient connection with England; 2) there must be a reasonable possibility, if a winding up order is made, of benefit to those applying for the winding up order; 3) one or more persons interested in the distribution of assets of the company must be persons over whom the court can exercise jurisdiction.
[85] Ibid.
[86] *Re Primacom Holding GmbH* [2011] EWHC 3746 Ch; *Vietnam Shipbuilding Industry Groups* [2013] EWHC 2476 (Ch), 2013 WL 3994997.
[87] *In the Matter of Rodenstock GmbH* [2011] EWHC 1104 (Ch), 2011 WL 1151484.
[88] *In the Matter of Apcoa Parking Holdings GmbH and Others* [2014] EWHC 1867 (Ch), 2014 WL 2530822. See also *Algeco Scotsman PIK S.A.* [2017] EWHC 2236 (Ch), 2017 WL 02672218.
[89] *In the Matter of Noble Group Limited* [2018] EWHC 3092 (Ch), 2018 WL 05982647.
[90] Brussels I-bis, Article 4(1).
[91] Ibid., Article 8(1).

As a result, multiple defendants can be sued in the same jurisdiction. In 2016, in *DTEK Finance Plc*,[92] it was decided that if at least one scheme creditor (considered by English courts as a defendant for the purposes of the Brussels I-bis) was domiciled in England, the Brussels I-bis conferred jurisdiction on English courts to sanction a scheme affecting rights of creditors domiciled outside England. Notably, in some other cases it was suggested that a single creditor domiciled in England ("anchor defendant") may be insufficient and that courts need to take into account the number and size of creditors.[93] Nevertheless, in more recent cases, courts confirmed that in principle the domicile of a single creditor in the court's jurisdiction sufficed to approve a scheme affecting foreign creditors.[94] This interpretation created a wide jurisdictional basis for approving schemes and for centralizing the case in a single forum on expediency grounds.[95]

From this concise overview, we can see that international jurisdiction for schemes of arrangement can be premised on different factors. These factors are distinct from those applicable to the determination of COMI or establishment. They are more flexible. Oftentimes, steps are taken to create the jurisdiction of English courts, including by changing the applicable law in a contract to English law, transferring operations to England or establishing a company in the UK solely for the purpose of creating a jurisdictional basis for a scheme.[96]

The UK has reformed its restructuring law in 2020. The Corporate Insolvency and Governance Act 2020 (CIGA) entered into force on 26 June 2020 and introduced modern procedures and tools to assist struggling businesses. Among them is the Restructuring Plan, a procedure that is similar to a scheme of arrangement because it allows the debtor to propose a compromise or arrangement to its creditors and/or members and have it approved by a court.[97] However, unlike a scheme of arrangement, it may be imposed on a dissenting class of creditors (applying a cross-class cram down; it is therefore referred to as a "super-scheme").[98] It also requires current or anticipated financial distress of a debtor. As to international jurisdiction, a super-scheme seems to follow the same rules as schemes of arrangement.[99]

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[92] *Re DTEK Finance Plc* [2017] BCC 165 and [2016] EWHC 3563 (Ch). See also *Re Metinvest BV* [2016] EWHC 79 (Ch) at [32].

[93] *In the Matter of Noble Group Limited* [2018] EWHC 3092 (Ch) at [114] and [116]; *Re Van Gansewinkel Groep* [2015] EWHC 2151 (Ch) at [51]; *Re Global Garden Products Italy SpA* [2017] BCC 637 at [25] to [28].

[94] *In the Matter of Castle Trust Direct Plc & Ors.* [2020] EWHC 969 (Ch); *Re Lecta Paper UK* [2020] EWHC 382 (Ch); *Swissport Fuelling Ltd, Re* [2020] EWHC 1499 (Ch). *In Virgin Atlantic Airways Ltd, Re* [2020] EWHC 2191 (Ch), the court, dealing with the restructuring plan of Virgin Atlantic, noted that at least one scheme creditor from each class was domiciled in England. In *Selecta Finance UK Ltd, Re* [2020] EWHC 2689 (Ch) the court took a slightly different view, noting tentatively that the test laid down in Article 8 of the Brussels I-bis "is rather less about the geographical distribution in terms of number and size of the prospective defendants, and is rather more about the expediency in case management terms of connected claims being resolved in one place, even if only one anchor defendant is domiciled there."

[95] Commenting on the lack of exact interpretation of the Brussels I-bis and ambiguity of English courts' position, Kortmann and Veder conclude that "there is a substantial amount of uncertainty as to where the boundaries lie with respect to the English courts accepting jurisdiction to sanction a scheme." L. Kortmann and M. Veder, The Uneasy Case of Arrangements under English Law in Relation to non-UK Companies in Financial Distress: Pushing the Envelope? NIBLeJ, 3(13), 2015, p. 250.

[96] See *Selecta Finance UK Ltd, supra* note 94, where for the purposes of establishing the jurisdiction, (i) the governing law of senior secured notes was changed from New York to English law; (ii) jurisdictional provisions were changed to provide for exclusive jurisdiction of English courts in relation to any proceedings commenced by an obligor; (iii) the newly created English company entered into a supplemental trust deed, making it a co-issuer. These steps were interpreted by the court as "good forum shopping". Similar steps (incorporation of a UK company, change of governing law in debt instruments to English law, and assumption of debt) have been taken in restructuring of the Dutch retailer HEMA. See *In the Matter of Hema UK I Limited* [2020] EWHC 2219 (Ch), 2020 WL 04354882.

[97] Companies Act 2006, Part 26A, Section 901A.

[98] J. Marshall, J. Cho and G. Orbán, The Big Three: the UK Restructuring Plan, the Dutch Scheme and US Chapter 11 Proceedings, INSOL World – Second Quarter 2020, p. 27. The first case in which a cross-class cram down was applied concerned the Dutch subsea services provider DeepOcean. See *In the Matter of Deepocean 1 UK Limited* [2020] EWHC 3549 (Ch), 2020 WL 07409918.

[99] *In the Matter of Pizzaexpress Financing 2 Plc* [2020] EWHC 2873 (Ch), noting with respect to Part 26A that "this is a new jurisdiction albeit closely related to the well-established scheme jurisdiction" and that the "principles that are well established in the context of schemes of arrangement" should apply to restructuring plans.

A foreign registered company with COMI outside the UK is therefore not prevented from proposing a plan so long as there is a "sufficient connection" with the English jurisdiction.[100]

B. *Jurisdictional Aspect of Third-Party Releases*

To ensure efficiency of a group restructuring, a scheme may operate to release or modify the obligations of guarantors and co-debtors to prevent their ricochet (subrogation) claims against the borrower (third-party or ancillary releases). Where guarantors and co-debtors are group entities registered in countries other than the UK, a jurisdictional issue arises. In this scenario, only one group entity (e.g. primary debtor, guarantor or co-debtor) is subject to a scheme, but such a scheme is intended to bind scheme creditors against other group entities.

It is well established in English jurisprudence that a scheme can affect the rights of creditors against third parties. The question remains, though, what the jurisdictional basis is for the extension of scheme effects. In *T&N Ltd*, the court sanctioned the scheme concerning rights of employees and former employees against the debtor's insurers, noting that "the rights which the claimants had against the insurers were *sufficiently connected* with the claimants' rights against T&N to bring the proposed arrangement within the scope of s425 [Companies Act 2006]"[101] (emphasis added). In *Re Lehman Brothers International (Europe)*, it was accepted that the release of contractual rights against related parties should be available where it is necessary "to give effect to the arrangement proposed for the disposition of the debts and liabilities of the company to its own creditors."[102] In *Noble Group*, it was clarified that this would cover any claims "*arising out of, relating to or in respect* of the Scheme Claims and any of the facts and matters giving rise to the Scheme Claims"[103] (emphasis added). Thus, it is not the territorial connection to England or the use of English law that define jurisdiction to sanction a third-party release, but the connection of the released claims to obligations of the scheme debtor and the effectiveness of the arrangement which come to the forefront.[104] This jurisdictional connection is even more expansive, as it is not dependent on geographical presence, and relies on the nexus to obligations under a scheme in relation to a scheme company that may itself have limited territorial connection to the centralizing court.

In sum, English law subscribes to a "pro-release" approach and the jurisdictional threshold for third-party releases in schemes of arrangement appears to be rather low. It is even lower than that for bringing a debtor company into a scheme (making it a scheme company). Claims arising from various types of inter-company liability arrangements (cross-guarantees, co-debtorship, and collateral arrangements) facilitating group interconnectedness and interdependence, will commonly be eligible for a release. This release can be granted in the case where a scheme company is the principal debtor,[105] where it is one of the principal debtors,[106] as well as where it is a guarantor.[107]

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[100] Just like Part 26 (schemes of arrangement), Part 26A (restructuring plans) extends to "any company liable to be wound up under the Insolvency Act 1986." This provision has been interpreted by English courts to include foreign-registered companies. *Re Drax Holdings Ltd*, *supra* note 84.

[101] *Re T&N Ltd (No. 4)* [2007] Bus LR 1411.

[102] *Re Lehman Brothers International (Europe) (No 2)* [2010] Bus LR 489 at [65].

[103] *Re Noble Group Ltd* [2019] BCC 349 at [24].

[104] However, third-party releases are not limited to guarantees and other claims closely connected to scheme claims. For example, in *In re Lecta Paper UK Ltd* [2020] EWHC 382 (Ch), the release extended to claims of scheme creditors against a large number of third parties, including directors, legal advisors, financial advisors and other persons.

[105] *Re APCOA Parking Holdings GmbH* [2014] EWHC 3849 (Ch), 2014 WL 5833966.

[106] *Re NN2 Newco Ltd* [2019] EWHC 1917 (Ch). In this case NN2 was specifically incorporated in England for the purposes of facilitating a scheme of arrangement. Upon incorporation, NN2 voluntarily became co-issuer and co-obligor under financial obligations, assuming joint and several liability under the debt instruments. The court noted that such technique to create jurisdiction for a scheme was not abusive.

[107] *Swissport Fuelling Ltd, Re* [2020] EWHC 1499 (Ch). In this case, the scheme company was a guarantor rather than a borrower. It was incorporated in England and Wales, while the borrowers were incorporated in Luxembourg and Switzerland

C. *The Geographical Expansion of Schemes*

English schemes of arrangement have been exported to many Commonwealth and ex-Commonwealth jurisdictions, including Australia, New Zealand, Canada, Hong Kong, Ireland, Singapore, South Africa, and the Cayman Islands.[108] Many of them are close to the English model, both in terms of the substance and the jurisdictional rules.[109] English schemes have also served as a source of inspiration for recent reforms in European non-common law jurisdictions, such as the Netherlands and Germany. The result is a myriad of scheme options with notable similarities but also some important differences, potentially allowing for greater flexibility and choice as will be further discussed in Part IV. This section describes the key features of the Dutch and German restructuring laws, focusing again on the cross-border aspects – jurisdictional rules adopted in these two countries.

1. The Dutch WHOA and the Jurisdictional Puzzle

Insolvency and restructuring law of the Netherlands has gone through a process of significant revision. The discussions about reforming the national insolvency law framework to promote the adoption of extrajudicial restructuring plans accelerated since 2012 and led to the Act on Court Confirmation of Extrajudicial Restructuring Plans (*Wet homologatie onderhands akkoord* or WHOA), in force since 1 January 2021).[110] Before it, restructuring options in the Netherlands were limited and the existing insolvency procedures have proven inefficient in rescuing financially distressed companies.[111] As a result, many Dutch enterprise groups availed themselves of English schemes of arrangement or US Chapter 11 procedures.[112]

Under the WHOA, a restructuring plan can be prepared and approved through a public (i.e. publicly disclosed) pre-insolvency procedure or by way of a non-public procedure.[113] The jurisdiction of Dutch courts in the case of a public procedure is determined based on the EIR Recast (subject to its inclusion in Annex A). In other words, to take benefit from the public procedure, all companies in the group should have COMI or establishment in the Netherlands. In case of a non-public procedure, falling outside the scope of the EIR Recast (it excludes non-public proceedings),[114] the jurisdiction is established on the basis of other EU instruments, or based on the Dutch Code of Civil Procedure (DCCP).[115]

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and might have been unable to establish a sufficient connection with England. Initially, the borrowers did not have a right of contribution or indemnity against the guarantors. However, in order to create interconnectedness (i.e. ricochet claims), the scheme company entered into a deed in favor of the borrowers, under which it assumed the position of a primary obligor together with the borrowers.

[108] For a review of scheme provisions in some of these jurisdictions, see Payne, *supra* note 81, Chapter 8.

[109] See *Nordic Aviation Capital Designated Activity Company v. The Companies Act 2014 to 2018* (Approved) [2020] IEHC 445, in which the High Court of Ireland thoroughly analyzed the issue of jurisdiction as applied to third-party releases and drew extensively on the cases from Singapore, Australia and England. The court adopted a pro-release approach and embraced the "sufficient nexus or connection" test. See also *Re PT MNC Investama TBK* [2020] SGHC 149, noting that "substantial connection clearly encompasses the presence of business activities, control, and assets in Singapore" and holding that even though the debtor, an Indonesian company, did not carry on business, register as a foreign company, or have a place of business or substantial assets in Singapore, it had a substantial connection with Singapore, since it was the issuer of notes which were listed on the Singapore Stock Exchange.

[110] WHOA, available at https://www.eerstekamer.nl/wetsvoorstel/35249_wet_homologatie_onderhands.

[111] Explanatory Memorandum to the Draft Act on Court Confirmation of Extrajudicial Restructuring Plans. For unofficial English translation of the WHOA and related documents, see https://www.debrauw.com/insightsandopinions/draft-bill-continuity-companies-act-ii-wcoii/.

[112] For example, Van Gansewinkel Groep B.V., Indah Kiat International Finance Company B.V., Estro Groep B.V., Magyar Telecom B.V., Metinvest B.V., HEMA B.V., DeepOcean group.

[113] WHOA, introducing Article 369 to the Bankruptcy Act. Apart from the different jurisdictional rules, the only major distinction between public and non-public proceedings is that, unlike the latter, public proceedings are publicly disclosed in the insolvency and trade registers. In addition, requests to the court are heard in open session.

[114] EIR Recast, Recital 13.

[115] Dutch Code of Civil Procedure, Article 3.

This means that a Dutch court has jurisdiction in cases where either the applicant or, where there are multiple applicants, one of them has its domicile or habitual residence in the Netherlands or where the case is otherwise sufficiently connected to the Dutch legal system.[116] According to the Explanatory Memorandum to the draft WHOA, a sufficient connection may arise from a single group member having its COMI or an office in the Netherlands, from the presence of (substantial) assets of the debtor in the Netherlands, or if the debtor is liable for debts of another debtor in respect of which the Dutch courts have jurisdiction.[117]

Thus, if a debtor or a restructuring plan are sufficiently connected to the Netherlands, Dutch courts should have jurisdiction to approve the restructuring plan. In a group restructuring context, for such a jurisdiction to be established, it is sufficient that at least one group entity has a sufficient nexus to the Netherlands. As long as this is the case, Dutch courts will be able to restructure debts of non-scheme companies, liable under intra-group liability arrangements (e.g. cross-guarantees, co-debtorship, intra-group collateral). The tool of third-party releases has been introduced by the WHOA in Article 372 of the Dutch Bankruptcy Code. One of the criteria for such releases is that the court would have jurisdiction if these third parties themselves offered a restructuring plan. For non-public restructuring plans, the test of a sufficient connection discussed above should be used. As a result, if a group's financing structure includes a Dutch debtor or the group issued corporate bonds through a Dutch SPV, the entire group debt may be restructured by Dutch courts, even in a situation where all other debtors are located somewhere else.[118] As a consequence, all related obligations may be restructured via a single restructuring plan.

Notably, third-party releases are available only to an enterprise group that meets the definition of a group under Dutch law. A group is "an economic unit in which legal persons and commercial partnerships are organizationally interconnected."[119] The existence of an economic unity and organizational interconnectedness are the main characteristics of a group,[120] highlighting interdependence of group members, importance of group synergies and (typically) centralized management. Thus, third parties which are not members of a closely integrated and interconnected group, such as debtor's directors and officers, insurance companies, legal and financial advisors, cannot benefit from a third-party release pursuant to the WHOA. Also, entities that are not linked by economic unity are excluded. For example, a pure investment company that holds shares in another company may not be associated with that company in a group.[121] In other words, business and economic reality within the organizational context plays a key role.

2. The German StaRUG and the Question of International Jurisdiction

Germany reformed its insolvency law in 2020 by passing the Act on Further Development of Restructuring and Insolvency Law, incorporating the Enterprise Stabilization and Restructuring Act (*Gesetz über den Stabilisierungs- und Restrukturierungsrahmen für Unternehmen* or StaRUG), in force since 1 January 2021.[122] The StaRUG aims at creating an efficient framework for restructuring that is available to businesses in financial distress outside insolvency proceedings. In this respect, it implements

[116] Ibid., Article 6(i) on jurisdiction over insolvency, suspension of payments and debt reorganization procedure for natural persons. The WHOA scheme is, however, not listed.
[117] Explanatory Memorandum, *supra* note 111.
[118] Court confirmation of extrajudicial restructuring plans. What you need to know about the new Dutch act, De Brauw Blackstone Westbroek, October 2020.
[119] Dutch Civil Code, Book 2, Article 2:24b.
[120] Groene Serie Rechtspersonen, A Kernoverzicht bij: Burgerlijk Wetboek Boek 2, Artikel 24b [Groep], A.F.M. Dorresteijn bewerkt door M. Olaerts, 2019.
[121] Asser/Maeijer, Van Solinge & Nieuwe Weme 2-II* 2009/816.
[122] StaRUG, available at http://www.gesetze-im-internet.de/starug/BJNR325610020.html.

the provisions of the EU Restructuring Directive,[123] but also draws on English schemes of arrangement and Dutch WHOA schemes.

Following the Dutch approach, the StaRUG too provides for a dual track which includes public and non-public procedures. Thus, the debtor should decide whether to operate the restructuring publicly or privately. The main and possibly only reason to choose public court assistance over the non-public option would be the desire to secure cross-border effects under the regime of the EIR Recast.[124] In the former case, the court must indicate in its first decision opening the proceeding whether its jurisdiction is based on Article 3(1) or 3(2) of the EIR Recast.[125] In other words, international jurisdiction for public proceedings shall be determined based on the debtor's COMI or establishment.

Non-public proceedings are not subject to the EIR Recast and its jurisdictional requirements. Instead, their jurisdiction is likely to be governed by the Brussels I-bis,[126] as well as national rules of private international law. Unlike the WHOA, the StaRUG does not specifically clarify which criteria or circumstances may be considered in deciding on the jurisdiction for non-public restructuring plans when they involve non-German debtors and creditors. Common German doctrine[127] suggests that the provision regulating territorial jurisdiction also determines international jurisdiction for German courts unless EU law is directly applicable. Under this approach, §35 StaRUG would restrict access to German schemes to businesses with German COMI unless the Brussels I-bis prevails and German courts decide to follow the logic adopted by English courts in interpreting its Article 8(1), described in Part III.[128]

Following the English and Dutch examples, the StaRUG seeks to introduce the rules on third-party releases. Such releases can be granted to amend or discharge obligations of companies of the debtor's group acting as guarantors, co-debtors, and collateral providers (upstream, cross-stream and downstream guarantees and security).[129] The possibility to restructure inter-company obligations in a single restructuring plan should facilitate centralized group solutions and improve efficiency. Just like the WHOA,[130] the StaRUG embraces the best interest of creditors test to protect the interests of affected creditors (e.g. creditors affected by the release).[131] While the StaRUG does not lay down any specific jurisdictional requirements for third-party releases, departing from the WHOA in this respect, it mentions that such releases should be available to subsidiaries which have provided security to secure performance by the debtor. Thus, in line with the English approach, the requisite jurisdictional

[123] Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt.

[124] EIR Recast, Articles 19 and 32.

[125] StaRUG, § 84(2). As the application of the EIR Recast requires that the new German (public) StaRUG proceedings are listed in its Annex A, this option will only be available once the Annex is amended by the EU legislator. The German legislator expects this to be achieved within 18 months and hence suspended the availability of respective rules (§§ 84-88 StaRUG) until 17 July 2022.

[126] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. See S. Madaus, Auf in die Moderne! Das SanInsFOG macht den Restrukturierungsstandort Deutschland 2021 wettbewerbsfähig, 2 Oktober 2020, available at https://stephanmadaus.de/category/news/. Applicability of Brussels I-bis to non-public preventive restructuring proceedings has been supported in D. Skauradszun, W. Nijnens Brussels Ia or EIR Recast? The Allocation of Preventive Restructuring Frameworks, International Corporate Rescue, Vol. 16, Issue 4, 2019, pp. 193-201. Applicability of the Brussels I-bis to German non-public schemes would result in their automatic recognition within the EU (Article 36), unless a substantive matter of the decision would fall under the exclusive jurisdiction provisions, especially for matters relating to rights in rem in immovable property in Article 24(1), and reserve jurisdiction for another country.

[127] See the German Federal Court of Justice in BGH NZI 2009, 859 at para. 21.

[128] Unless the CJEU would rule that these proceedings meet the insolvency exception in Article 1(2)(b) Brussels I-bis and are therefore excluded from its scope. In which case, the jurisdictional basis of Article 8(1) Brussels I-bis would no longer be available.

[129] StaRUG, § 2(4).

[130] WHOA, Article 384(3).

[131] StaRUG, § 26(1).

connection seems to relate to the inter-company obligations in question, rather than the domicile or some other connection of subsidiaries – security providers.

IV. Group Restructuring and Regulatory Competition

A. *Regulatory Competition: Positive and Negative Externalities*

The rise of schemes may be attributed to various reasons. At least in the EU, the Restructuring Directive mandates Member States to establish preventive restructuring procedures, which should allow debtors to restructure before they become insolvent. The adoption of the new legislation in the Netherlands and Germany has been influenced and expedited by the harmonization drive of the Restructuring Directive. Another important reason is regulatory competition. This competition creates a market for corporate restructurings and is based on: (i) the diversity of legal rules applied in different countries; (ii) the incentives for countries to compete to attract restructuring cases; and (iii) the feasibility of choice by market participants.[132] In this article, regulatory competition is understood broadly to also include reforms of national laws, driven by the desire to allow local businesses to efficiently restructure locally, rather than to attract foreign businesses. The reforms of Dutch and German law have at least partly been facilitated by the goal of creating an efficient restructuring framework or a domestic alternative to stop movements of Dutch and German companies abroad (i.e. case retention rather than case attraction).[133]

The Restructuring Directive and various international soft law instruments[134] promote harmonization in insolvency and restructuring law. In many core aspects new restructuring proceedings converge (e.g. class formation, availability of interclass and cross-class cram down). Nevertheless, full harmonization has not been achieved and will likely not be achieved in the near future, or ever.[135] For example, differences may be found in the rules on voting thresholds,[136] applicable standards for approving restructuring plans, duration of a moratorium in support of restructuring, formulation of "best interests of creditors" test,[137] degree of court oversight and involvement, differences in class categorization, availability and scope of third-party releases, and the possibility to terminate or amend executory contracts.[138] These differences may create incentives for market participants to choose a particular forum

[132] H. Eidenmüller, The Rise and Fall of Regulatory Competition in Corporate Insolvency Law in the European Union, European Business Organization Law Review, Vol. 20, 2019, p. 549.
[133] Explanatory Memorandum, *supra* note 111; Entwurf eines Gesetzes zur Fortentwicklung des Sanierungs- und Insolvenzrechts, 14 Oktober 2020.
[134] Among such soft law instruments are the UNCITRAL Legislative Guide on Insolvency Law (four parts), The World Bank Principles for Effective Insolvency and Creditor/debtor Regimes (2015) and the EBRD Core Principles of an Effective Insolvency System (2020).
[135] Eidenmüller, *supra* note 132, at 560, noting that the Restructuring Directive contains more than 70 regulatory options, leaving plenty of room for experimentation.
[136] For example, under Article 381(7) of the WHOA, a class of creditors is considered to have accepted the plan if a group of creditors that together represent two-thirds of the total amount of the claims of the creditors who cast a vote in that class has voted in favor. Pursuant to Article 383(1), for a cross-class cram down it is sufficient that at least one in-the-money class of creditors has accepted the plan. In contrast, the StaRUG in §25 requires that at least three-fourths of the total amount of creditor claims in a class support the restructuring plan. For a cross-class cram down to be imposed, it is necessary that the majority of classes approve the plan – as opposed to the WHOA, where one supporting in-the-money class of creditors is sufficient.
[137] The Restructuring Directive allows EU Member States to select the thresholds determining the best-interest-of-creditors test in national law. Such thresholds may include alternative liquidation scenarios (piecemeal liquidation or sale of the business as a going concern) or the next-best-alternative scenario. See Article 2(1) and Recital 52. For discussion of the EU best-interest-of-creditors test, see A. Krohn, Rethinking priority: The dawn of the relative priority rule and the new "best interests of creditors" test in the European Union, International Insolvency Review, 17 December 2020 (online version).
[138] The WHOA provides for the termination or amendment of executory contracts in Article 373. The draft StaRUG initially contained a section on contract termination (§§ 51 ff. RegE). However, during the final deliberations, it was decided to remove this section.

to implement a restructuring. Flexible jurisdictional rules applicable to schemes enable the choice.[139] However, the extent to which parties will take advantage of this choice, remains to be seen. It will also likely depend on many other factors, beyond law on the books, including the institutional environment, efficiency of a court system, expertise of judges and insolvency practitioners and wider legal culture.

Regulatory competition can serve as a driver for reform resulting in positive externalities, including in the form of more efficient legal frameworks benefiting various stakeholders.[140] Countries can learn from each other and borrow best practices to solve similar problems in a similar way,[141] as well as innovate further and propose alternative approaches. However, regulatory competition might also create negative externalities, arising from lower protective standards afforded to certain groups of market participants, representing a "race to the bottom".[142] Negative externalities particularly affect those persons who cannot exercise legal mobility and select a legal regime. In the insolvency or restructuring context, this group of persons may be represented by non-adjusting creditors (e.g. tort victims), since they have no real opportunity to affect the choice of an insolvency forum or applicable law.

In the EU, the EIR Recast recognizes the potentially negative effects of insolvency forum selection. It states that for the proper functioning of the internal market, it is necessary "to avoid incentives for parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favorable legal position to the detriment of the general body of creditors."[143] To prevent abusive forum shopping, the EIR Recast embraces several safeguards, including the COMI test with its elements of "regularity" and "objective ascertainability", and the suspect periods neutralizing the registered office presumption.[144] The same concepts generally apply globally, where COMI determines recognition and relief, as discussed in detail in Part V. To the extent that schemes use flexible connecting factors and in the event that they fall outside the scope of international insolvency instruments, they may not be subject to similar safeguards. For example, the Dutch and German non-public plans described in Part III will likely not fall under the EIR Recast but rather under the general instrument for recognition and enforcement of judgments in civil and commercial cases, the Brussels I-bis, which does not seek to counter abusive forum shopping. It also does not provide adequate safeguards to allow for a collective or semi-collective process to consider the interests of affected stakeholders.[145]

B. *Jurisdictional Conflicts and Protection of Legitimate Expectations*

The use of flexible criteria of sufficient connection may also lead to a situation of jurisdictional plurality, where courts of two or more countries may (potentially) exercise jurisdiction to open proceedings and sanction a scheme. This problem becomes even more acute in view of the growth of the market for

[139] Arguably, the choice of an insolvency forum and insolvency law is also feasible in practice, but it requires an effective COMI-shift, which might be complex and expensive.

[140] H. Eidenmüller, The Transnational Law Market, Regulatory Competition, and Transnational Corporations, Indiana Journal of Global Legal Studies: Vol. 18, Issue 2, 2011, p. 748, concluding that "[r]egulatory competition between the legal products of different states and the law market are, in principle, to be assessed positively and used as a process to discover which law is best." See also G. McCormack, Jurisdictional Competition and Forum Shopping in Insolvency Proceedings, The Cambridge Law Journal, Vol. 68, No. 1, 2009, p. 179, underlining that the "scope for competition and innovation at a national level may lead to a great release of energy and creativity."

[141] Nevertheless, legal transplantation does not work in every case. See e.g. S. Ferreri and L. DiMatteo, Terminology Matters: Dangers of Superficial Transplantation, Boston University International Law Journal, Vol. 37, 2019, p. 35, noting that "[s]uperficial transplantations are doomed to failure and likely to cause negative consequences such as jurisprudential chaos."

[142] See J. Stark, Law for Sale: A Philosophical Critique of Regulatory Competition, OUP, 2019, Chapter 2.

[143] EIR Recast, Recital 5.

[144] Pursuant to Article 3(1) EIR Recast, the place of the registered office shall be presumed to be the COMI, unless the registered office has been moved "within the 3-month period prior to the request for the opening of insolvency proceedings."

[145] D. Skauradszun, W. Nijnens, The Toolbox for Cross-Border Restructurings Post-Brexit – Why, What & Where? NIBLeJ, 7(1), 2019, noting that "[o]ne can debate at length whether these safeguards provided for in the EIR are really effective to prevent abusive forum shopping, but if anything is clear then it is that these safeguards are much more effective than the application of Brussels I."

restructuring procedures. While in the past, foreign companies often resorted to English schemes of arrangement or to the US Chapter 11 to restructure their liabilities, in the future, there will be a whole range of restructuring procedures available in multiple European and non-European jurisdictions.

Jurisdictional plurality is problematic for two reasons. First, it may contribute to jurisdictional conflicts, leading to the breakup of a case and hindering a centralized group restructuring.[146] Second, it can run contrary to the principles of protection of trust, certainty of transactions and creditors' legitimate expectations. When extending credit, a reasonable creditor undertakes an assessment of risks related to financial distress and insolvency of its counterparty. It includes the ascertainment of a jurisdiction of prospective restructuring or insolvency proceedings and applicable law. Put simply, "[p]eople need to be sure about their legal rights and positions."[147] In the environment of jurisdictional plurality, it becomes increasingly difficult to determine such positions and price the risk of failure. This uncertainty and instability may increase the cost of finance.[148]

One may object by noting that oftentimes schemes of arrangement are used to restructure debts owed to sophisticated counterparties. These counterparties (e.g. banks, noteholders) are likely to be advised by professional advisers and, unlike some trade creditors, could choose between different investment opportunities and diversify their risks accordingly.[149] They should also anticipate that a debtor in a state of financial distress will try to select a restructuring forum favoring its restructuring plans.[150] While financial creditors may be better positioned to calculate risks related to restructuring or insolvency, this does not address the problem of jurisdictional plurality affecting centralized restructuring and the costs involved in investigating the plethora of potentially applicable laws. Certainly, sophisticated creditors can negotiate governing law and choice of court with built-in safeguards against change of terms in the financing documents. This, however, does not completely solve the problem, as the court approving a scheme may not be bound by an exclusive choice of forum clause.[151] Besides, the efficiency of schemes-inspired restructuring procedures as tools to re-balance the capital structure of a company will be

[146] The Brussels I-bis mitigates the risk of jurisdictional conflicts and conflicting judgments by laying down the *lis pendens* rules in favor of the court first seised to decide on jurisdiction (Article 29). However, these rules do not eliminate the possibility of cherry-picking a favorable jurisdiction before the first motion is filed. Moreover, conflicting proceedings can still be opened if the case falls outside of the scope of the Brussels I-bis. This applies to English schemes of arrangement instituted after the end of the transition period (i.e. 31 December 2020), unless a special arrangement is made between the EU and the UK. The UK has applied to accede to the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Lugano Convention). In the absence of the Brussels I-bis and the Lugano Convention, jurisdiction could be determined in accordance with the Hague Convention on Choice of Court Agreements (where there is an exclusive jurisdiction agreement), bilateral agreements and in other cases in accordance with common law. Notably, neither the Lugano Convention nor the Hague Convention extend to insolvency and analogous proceedings, and therefore would likely be inapplicable to English super schemes. See *In the matter of Gategroup Guarantee Limited* [2021] EWHC 304 (Ch), concluding that English restructuring plans are within the insolvency exclusion of the Lugano Convention.

[147] R. Bork, Principles of Cross-Border Insolvency Law, Intersentia, 2017, para. 4.56.

[148] V. Finch, Corporate Insolvency Law: Perspectives and Principles, CUP, 2002, p. 115, arguing that "[u]ncertainty […] increases credit costs."

[149] S. Paterson, Debt Restructuring and Notions of Fairness, The Modern Law Review, Volume 80, Issue 4, 2017, pp. 600-623, discussing the issue of fairness in debt restructuring and arguing that the notion of fairness should be addressed in application to particular circumstances (SME debt restructuring, large corporate debt restructurings implicating only financial creditors, etc.).

[150] I. Mevorach and A. Walters, The Characterization of Pre-insolvency Proceedings in Private International Law, European Business Organization Law Review, 21, 2020, p. 877, noting that in skinny restructurings, "the creditors are invariably sophisticated multinational parties whose expectations will be shaped as much by prevailing trends in the restructuring market as by contract."

[151] See *Re Tiger Resources Ltd* [2019] FCA 2186, where the Federal Court of Australia held that the exclusive jurisdiction clause did not confer exclusive jurisdiction on the English courts in relation to the proposed scheme of arrangement. The case related to a guarantor scheme (guarantor being an Australian company) affecting obligations of the primary obligor, incorporated in the Democratic Republic of the Congo (DRC), concerning debt governed by English law. Interestingly, in this case restructuring could have been sought in three jurisdictions, i.e. the DRC – the primary debtor jurisdiction, the UK – a jurisdiction whose law governed the debt, and in Australia – where the parent company (i.e. guarantor) was incorporated. Read further P. Apáthy and A. Dick, Australian Restructuring: Legislation, Transactions and Cases, GRR, 16 November 2020.

hindered should they be limited to financial creditors and exclude lessors and trade creditors. Indeed, neither the WHOA nor the StaRUG appear to restrict their scope to any particular type of creditors, and therefore can in principle be utilized for both financial and operational restructuring.[152]

V. Cross-Border Recognition of Centralized Group Solutions

Against the backdrop of desired levels of centralization for group restructurings, proliferation of scheme options and potential opportunities but also risks of loosened jurisdictional thresholds, we ask in the rest of this article whether the system of UNCITRAL Model Laws for international insolvency effectively and fairly supports group restructurings. The efficiency of group restructurings will be significantly undermined should they be deprived of recognition and support on a global scale. Domestic private international law rules are of limited assistance in this respect, if they are not sufficiently harmonized or if domestic rules do not match the norms on the international level.[153] Within a region such as the EU there may be means to support schemes to the extent that the EIR Recast or the Brussels I-bis apply, but these frameworks are limited in their geographical reach.[154]

We start with examining the MLCBI – the major instrument for cross-border recognition of insolvency proceedings. In Part II, we noted that the MLCBI, creating an international framework for recognition of foreign insolvency proceedings,[155] was not drafted with group insolvency in mind. We also pointed out that the MLCBI endorses the concepts of COMI and establishment for the purposes of determining whether a foreign proceeding can be recognized and what relief is available to such a foreign proceeding. The question remains – does the MLCBI provide a solid foundation to facilitate the recognition of group restructurings, reached via schemes or similar proceedings?

A. *Presence of COMI or Establishment as a Precondition for Recognition*

The Guide to Enactment and Interpretation of the MLCBI (Guide to the MLCBI) explains that a "foreign proceeding should be recognized as either a main proceeding or a non-main proceeding."[156] This conclusion is based on Article 17(2) of the MLCBI, according to which a foreign proceeding shall be recognized (a) as a foreign main proceeding, if it takes place in a state of debtor's COMI, or (b) as a foreign non-main proceeding if the debtor has an establishment in the originating foreign state.[157] The Guide to the MLCBI makes it clear that "[p]roceedings commenced on a different basis, such as presence

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[152] For example, the WHOA has a special rule related to a separate class of small trade creditors and tort claimants. The members of this class may not receive a distribution lower than 20% of their claim, unless there is an imperative reason for offering a lower distribution (Article 374(2)). It also has rules on the protection of security for new funding, ability to continue essential contracts despite default by providing security for the performance of new obligations, invalidation of ipso facto and change of control clauses, ability to reject onerous contracts, etc. Thus, it has a large arsenal of tools, beyond those available in English schemes, to implement a full scale financial and operational restructuring. Because of its multi-purpose and multi-faceted nature, the Dutch WHOA may be compared to US Chapter 11.

[153] The application of domestic insolvency and private international law rules, not based on the MLCBI, could complicate recognition of schemes and scheme-like procedures. Thus, it is far from obvious that schemes falling outside the scope of the regional instruments would be recognized in a country like Germany under its domestic private international law system. In the *Equitable Life Insurance* case (BGH, 15 February 2012, IV ZR 194/09), the German court concluded that English schemes were not capable of being recognized under the German Insolvency Act. It reasoned that the schemes were not functionally comparable (in terms of the main features) to insolvency proceedings under German law because they required neither insolvency nor collectivity. It was therefore not possible to rely on national insolvency law to recognize them. At the moment it is likely that solvent and semi-collective schemes cannot be recognized in Germany.

[154] For example, Article 8(1) of Brussels I-bis, usually relied on by courts to extend jurisdiction to creditors, domiciled outside the scheme jurisdiction, applies only in respect of scheme creditors domiciled elsewhere in the EU and not outside the EU.

[155] As of January 2021, legislation based on the MLCBI has been adopted in 49 states in a total of 52 jurisdictions.

[156] Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency, 2013, para. 31.

[157] The MLCBI does not define COMI but states that "[i]n the absence of proof to the contrary, the debtor's registered office […] is presumed to be the centre of the debtor's main interests" (Article 16(3)).

of assets without a centre of main interests or establishment, would not qualify for recognition under the Model Law scheme."[158]

A number of the MLCBI-based jurisdictions have followed this interpretation. For example, the US Bankruptcy Courts have refused to recognize foreign proceedings on the basis that a debtor did not have COMI or establishment in the originating state.[159] This approach was noted to reflect "a U.S. legislative policy to provide the assistance of its bankruptcy courts only to those foreign bankruptcy proceedings that are premised on a tangible presence of the debtor in the foreign jurisdiction."[160] A similar position was taken in cases from Australia and New Zealand.[161]

Thus, pursuant to the MLCBI, recognition of a foreign insolvency proceeding may be denied if such a proceeding originates from a no-COMI and no-establishment jurisdiction. As noted above, schemes may not depend on either COMI or establishment. The presence of assets, creditors, a single group entity, or applicable law may be enough to constitute a sufficient connection for a scheme to be sanctioned, including a scheme restructuring debts of non-scheme companies. These factors will likely be insufficient to confirm COMI or establishment as interpreted under the MLCBI. As a result, there is a risk that some of the schemes may fall outside the scope of the MLCBI, potentially jeopardizing their cross-border efficiency.

A good example is the scheme concerning Mood Media Corporation and its subsidiaries.[162] Mood Media Corp was a Canadian company that together with fourteen direct and indirect US subsidiaries was subject to the arrangement under the Business Corporations Act in Canada (CBCA).[163] The debtors sought recognition of the Canadian proceedings in the USA as foreign non-main proceedings. The arrangement approved by the Canadian court required the creditors of Mood Media Corp to exchange their notes and to release any guarantee claims against the US companies. In refusing recognition of the arrangement as applied to such companies, the US court held that: (i) the US companies were beneficiaries rather than debtors in the foreign proceeding, and (ii) the US companies had no office or physical presence in Canada. As a result, the court concluded that the US subsidiaries did not maintain "a place of operations in Canada" and therefore did not have COMI or establishment in Canada. This finding, however, did not stop the US court from recognizing third-party releases, as following from the recognition of the arrangement concerning the parent company, which had its COMI in Canada.

It should be noted that countries have enacted the MLCBI with some notable differences, which may also affect the recognition of foreign insolvency proceedings not based on either COMI or establishment. For example, the Canadian Companies' Creditors Arrangement Act (CCAA) defines a foreign non-main proceeding as "a foreign proceeding, other than a foreign main proceeding."[164] Thus, it drops the

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[158] Guide to the MLCBI (2013), para. 32.

[159] *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd. (Bear Stearns II)*, 374 B.R. 122, 129 (Bankr. S.D.N.Y. 2007); *In re Serviços de Petróleo Constellation S.A.*, 600 B.R. 237 (Bankr. S.D.N.Y. 2019), noting that "[i]f a proceeding does not qualify as a main or nonmain proceeding, it cannot be recognized under chapter 15."; *In re British Am. Ins. Co., 488 B.R. 205, 213* (Bankr. S.D. Fla. 2013), pointing out that Chapter 15 "reflects a policy determination by UNCITRAL and Congress that this Court should not assist a representative of a foreign action unless the debtor has a sufficient presence in the country in which the foreign action is taking place."

[160] D. Glosband, Bankruptcy Court Rejects Cayman Proceedings of Bear Stearns Hedge Funds, ABI Journal, Vol. XXV, No. 10, December/January 2007.

[161] See *Indian Farmers Fertiliser Cooperative Ltd v. Legend International Holdings Inc* [2016] VSC 308, where the Australian court refused to recognize the Chapter 11 proceeding on the basis that the Australia-incorporated debtor had neither COMI nor establishment in the USA. Actions necessary to comply with auditing requirements in the USA were held to be insufficient to create an establishment. *Gainsford v. Tannenbaum* [2012] FCA 904. See also *Williams v. Simpson* [2011] 2 NZLR 380, where the High Court of New Zealand refused to recognize the English bankruptcy proceeding because the debtor had neither COMI nor establishment in England.

[162] *In re Mood Media Corporation*, 569 B.R. 556 (Bankr. S.D.N.Y. 2017).

[163] Canada Business Corporations Act (R.S.C., 1985, c. C-44), sec. 192.

[164] Companies' Creditors Arrangement Act (R.S.C., 1985, c. C-36), sec. 45(1).

requirement of "establishment" for the qualification as a non-main proceeding. It was pointed out that because Canadian law does not require that an establishment exists as a condition for recognition of non-main proceedings, Canadian courts may be less likely to refuse recognition of foreign insolvency proceedings.[165] In *Syncreon Group B.V.*,[166] the Canadian court granted recognition of the English scheme of arrangement adopted with respect to Dutch-incorporated Syncreon B.V. It reasoned that since the debtor did not have a COMI in the UK, the foreign proceeding should therefore be recognized as a non-main proceeding. Due to the differences in transposition of the MLCBI and its interpretation, there may well be a situation where the same scheme is eligible for recognition in some countries but not in others. This could create complexity and legal uncertainty, but also new planning opportunities.

More generally, the MLCBI is less readily applicable to decentralized groups, namely to group structures where entities have had separate COMIs in different countries rather than a common one typically at the group headquarters. For centralized groups, a group restructuring may take place in a country where all group entities' COMIs are located or where there is a combination of COMI and establishments,[167] enabling recognition of all proceedings as foreign main or non-main proceedings, achieving a Level 4 centralization (or Level 3 if a single IP is appointed). COMI can also facilitate a Level 2 centralization, through a third-party release granted in a main proceeding and its subsequent recognition abroad.

However, the case appears less straightforward where the group is decentralized. The MLCBI does not contemplate any specific mechanism for groups that would take account of different group structures. Thus, even if COMI indicates the connection between one of the entities and the jurisdiction executing a scheme, participation by other group members that ought to be involved in the restructuring may not be recognized and given effect to.

B. *Involvement of Solvent Companies in Group Restructurings*

The characteristic feature of a group restructuring is that it typically involves one or more group entities that are not insolvent or financially distressed. Nevertheless, their engagement might be necessary to reach a feasible restructuring outcome. This is the case where a negotiated restructuring plan entails contributions from a solvent group entity, including the extension of a loan, guarantee or collateral. Such an entity may possess certain assets and data which are indispensable to the insolvency solution being developed for the enterprise group. It can also protect its own interests. Inclusion of a solvent group member is particularly justified in groups with a significant degree of interdependence or control, where distress cannot be resolved at a single-entity level and requires a group-wide solution. This view is held by UNCITRAL, which emphasized in the Legislative Guide, Part three that "[t]he inclusion of a solvent group member may facilitate the development of an insolvency solution for the whole group."[168] For example, such a solution could result in the adoption of a reorganization plan covering the assets of insolvent and solvent group entities.[169]

[165] S. Bomhof & A. Slavens, Shifting Gears in Cross-border Insolvencies from Comity to COMI, Banking & Finance Law Review, Vol. 24, No. 1, 2008, p. 58, available at http://www.martindale.com/matter/asr-517160.pdf. See also A. MacFarlane and T. Gertner, Foreign Non-Main Proceedings and the Public Policy Exception – A Comparison of Canadian and American Insolvency Regimes, in J. Sarra (ed.), Annual Review of Insolvency Law, 2015.
[166] *Syncreon Group B.V., Re*, 2019 ONSC 5774, 2019 CarswellOnt 16582.
[167] See *In the Matter of Videology Limited* [2018] EWHC 2186 (Ch), where the jurisdictional concentration was achieved through the recognition of foreign non-main proceedings (based on the finding of establishment in the USA) and granting of relief as if such proceedings were in fact foreign main proceedings, as well as declining to open parallel proceedings in the UK (COMI-forum). Thus, a group restructuring could proceed uninterrupted in the USA (a non-COMI forum, but an establishment-forum).
[168] UNCITRAL Legislative Guide on Insolvency Law, Part three, Chapter II, para. 13. See Recommendation 238.
[169] Ibid.

In order to benefit from the WHOA, the debtor must be in a situation in which it may reasonably be assumed that it will be unable to continue paying its debts (i.e. likelihood of insolvency).[170] Court-based restructuring support tools offered by the StaRUG are available only to a debtor that is prospectively cash flow insolvent (illiquid) within the next 24 months.[171] Restructuring plans (super-schemes) under Part 26A of the Companies Act 2006 are accessible to a company that "has encountered, or is likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern."[172] These tests set the criterion of financial distress as an entry requirement to access the restructuring tools. However, they do not prevent solvent entities from voluntarily taking part in a restructuring plan and contributing to it, inter alia, by providing financing. A scheme of arrangement approved under English law may in principle include both financially distressed or insolvent and solvent group entities. The pivotal question remains whether a scheme or a restructuring plan involving solvent group companies could be recognized pursuant to the MLCBI. To answer this question, we will look at its material scope.

The MLCBI applies to recognition of a foreign proceeding that is "a collective judicial or administrative proceeding [...], pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation."[173] The Guide to the MLCBI clarifies that the term "insolvency" refers to collective proceedings "commenced with respect to debtors that are in *severe financial distress or insolvent*"[174] (emphasis added). It adds that a proceeding to wind up a solvent entity should not be considered an insolvency proceeding for the purposes of the MLCBI. If the proceeding has several purposes, including winding up of a solvent entity, it only falls within the scope of the MLCBI if the debtor is insolvent or in severe financial distress.[175] It appears that insolvency or serious financial distress are needed for a foreign proceeding to be eligible for recognition under the MLCBI, as originally contemplated.

However, if strictly followed, this interpretation impedes recognition of schemes or restructuring plans, involving solvent or not severely distressed group entities. The case of a group restructuring is quite different from a solvent winding up procedure, referred to in the Guide to the MLCBI, where only shareholders' rights are at stake.[176] The requirement of insolvency or financial distress for the recognition of a centralized group restructuring was discussed in the case of the Croatian extraordinary administration proceedings, opened against Agrokor and its group entities.[177]

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[170] WHOA, Article 370(1).

[171] InsO, § 18(2). S. Madaus, A Giant Leap for German Restructuring Law? The New Draft Law for Preventive Restructuring Procedures in Germany, OBLB, 26 October 2020, available at https://www.law.ox.ac.uk/business-law-blog/blog/2020/10/giant-leap-german-restructuring-law-new-draft-law-preventive.

[172] Companies Act 2006, Part 26A, sec. 901A(2).

[173] Model Law 1997, Article 2(a).

[174] Guide to the MLCBI (2013), para. 48. See also para. 67, reiterating that the focus of the MLCBI is upon "severely financially distressed and insolvent debtors". The Guide to the MLCBI (1997) is similar, as it points out in para. 51 that the MLCBI applies in cases of collective proceedings opened with respect to insolvent debtors. It clarifies in para. 71 that the term 'insolvency proceeding' is intended to "refer broadly to proceedings involving companies in severe financial distress".

[175] Guide to the MLCBI (2013), para. 48.

[176] There are conflicting views on whether solvent winding up is covered by the MLCBI's recognition and assistance regime. For example, in *Carter v. Bailey & Anor (Sturgeon Central Asia Balanced Fund Ltd)* [2020] EWHC 123 (Ch), the English court terminated the earlier recognition order given to a liquidation of a solvent investment fund incorporated in Bermuda and concluded that "it would be contrary to the […] purpose and object of the Model Law to interpret "foreign proceeding" to include solvent debtors." In *In re Betcorp Ltd,* 400 B.R. 266 (Bankr. D. Nev. 2009), the US court took a different view, holding that that a solvent members' voluntary winding-up was entitled to recognition under the MLCBI, as long as a liquidation was authorized or conducted under a law related to insolvency or the adjustment of debts. In *Re Chow Cho Poon (Private) Ltd* [2011] 80 NSWLR 507, the Australian court accepted that a winding-up order of a Singapore company based on "just and equitable grounds" (and not on insolvency) can be regarded as a foreign proceeding within the meaning given in the MLCBI.

[177] On insolvency of Agrokor read D. Djuric and V. Jovanovic, "Too big to fail"? The Agrokor case and its impact on West Balkan economies, International Insolvency Review, Vol. 28, Issue 1, 2019, pp. 22-43. See also V. Savković, Universalism

The court in Croatia imposed a stay on proceedings and enforcement actions against Agrokor and its controlled and affiliated companies. Agrokor sought recognition of the court order in several jurisdictions. Courts in Serbia and Montenegro, both of which have transposed the MLCBI, refused to recognize the Croatian proceeding on the basis that the extraordinary administration applied to subsidiary companies not meeting any of the insolvency conditions.[178] The key question was whether the MLCBI required all companies involved in a foreign proceeding to be insolvent or financially distressed. Contrary to the findings of the above courts, the English court reasoned that the mere fact that a subsidiary or an affiliate company, which is not insolvent or threatened to be insolvent, can join in the same proceeding as another group entity (e.g. parent company) subject to such a threat, does not exclude this proceeding from the scope of the MLCBI.[179] It concluded that insolvency (actual or threatened) of one company which triggers the proceeding that can be joined by other group entities may be qualified as a proceeding filed under the law relating to insolvency covered by the MLCBI.

This divergence of views on the application of the MLCBI and the proceedings that it applies to may be exacerbated by the discrepancy of its implementation at the national level, including with respect to the definition of a "foreign proceeding". Australia, the UK and New Zealand, for example, have not changed the definition of foreign proceedings as provided in the MLCBI. The US law adds to the definition that a foreign proceeding may relate to "adjustment of debt".[180] Japanese law defines a foreign proceeding as a proceeding which corresponds to a (Japanese) bankruptcy liquidation, civil rehabilitation, corporate reorganization, corporate readjustment, or special liquidation proceeding.[181] Korean law specifically refers to rehabilitation, bankruptcy, and other similar proceedings.[182]

C. *Centralized Group Restructuring, Public Policy and Adequate Protection*

The MLCBI provides that the court should be able to refuse to recognize foreign proceedings or take any other action under the regime if that action would be "manifestly contrary" to the public policy of the recognizing state.[183] It is acknowledged that the intention of the respective norm is that the public policy exception should be interpreted restrictively and should be used only in exceptional and limited circumstances.[184] Importantly, the Guide to the MLCBI clarifies that "[d]ifferences in insolvency schemes do not themselves justify a finding that enforcing one State's laws would violate the public policy of another State."[185]

In addition to the public policy exception, the MLCBI stipulates that in granting provisional or discretionary relief, the court must be satisfied that the interests of creditors and other interested persons are adequately protected.[186] The adequate protection safeguard is linked to a balance between a relief

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and the recognition of group proceedings under the UNCITRAL Model Law in Montenegro, International Insolvency Review, Vol. 28, Issue 1, 2019, pp. 103-125.

[178] Ibid, Djuric & Jovanovic.

[179] *Agrokor DD, Re (Cross-Border Insolvency Regulations 2006)* [2017] EWHC 2791 (Ch).

[180] 11 U.S.C. § 101(23). N. Hannan, Cross-Border Insolvency: The Enactment and Interpretation of the UNCITRAL Model Law, Springer, 2017, p. 65, noting that this addition anticipates recognition of proceedings that aim to restructure the debt of a company which may otherwise be solvent.

[181] K. Yamamoto, New Japanese Legislation on Cross-border Insolvency as Compared with the UNCITRAL Model Law, International Insolvency Review, Vol. 11, Issue 2, 2002, p. 71, noting that a Japanese court would recognize as a foreign insolvency proceeding a proceeding that does not make debtor's insolvency a precondition for its commencement.

[182] Wai Yee Wan, G. McCormack, Implementing Strategies for the Model Law on Cross-Border Insolvency: The Divergence in Asia-Pacific and Lessons for UNCITRAL, Emory Bankruptcy Developments Journal, Vol. 36, Issue 3, 2020, p. 79, arguing that schemes of arrangement are likely to be considered similar to rehabilitation proceedings in South Korea.

[183] MLCBI, Article 6.

[184] Guide to the MLCBI (1997), para. 89 and (2013), paras. 30 and 104. Countries have not transposed the MLCBI in a uniform way. For example, Singapore omitted the word "manifestly" in relation to public policy. In *Re Zetta Jet* cited above, the court concluded that due to this omission, "the standard of exclusion on public policy grounds in Singapore is lower than that in jurisdictions where the Model Law has been enacted unmodified." The exact contours of this standard are not entirely clear.

[185] Guide to the MLCBI (2013), para. 30.

[186] MLCBI, Article 22(1).

that may be granted to a foreign proceeding and the interests of the affected persons, including local creditors.[187] In practice, the adequate protection argument may be used to refer to procedural participation and fairness, order and priority of asset distribution in a foreign proceeding as compared to the local one, and identity of entitlements. In *In re Artimm*, it was clarified that "sufficient protection" (the term used in the US legislation instead of "adequate protection") embodies three principles: (i) just treatment of all holders of claims against the bankruptcy estate, (ii) protection of US claimants against prejudice and inconvenience in the processing of claims in the foreign proceeding, (iii) distribution of proceeds of the foreign estate substantially in accordance with the order prescribed by US law.[188]

It has been argued that the potentially broad application and interpretation of the adequate protection rule can lead to a result contrary to the principles of modified universalism.[189] The question is whether differences between scheme laws can lead to a denial of recognition and/or relief on the basis that it would be in breach of public policy or due to a lack of adequate protection afforded to creditors or other parties in a foreign state. This question may be particularly acute regarding third-party releases and cross-class cram down where these are allowed and utilized in a foreign group scheme.

1. Recognition of Third-Party Releases

Third-party releases is a tool for centralized group restructuring as it permits addressing liability of group entities in one jurisdiction and in one proceeding. It thus falls under Level 2 in the taxonomy offered in Part II. While some jurisdictions adopt a "pro-release" approach (e.g. Ireland, Singapore, Australia, Canada, England and Wales), many other jurisdictions prohibit them, or allow them only in exceptional instances. For example, third-party releases are not permissible in a rescue plan under Japanese law unless all creditors consent.[190] In the United States, courts either disallow third-party releases or permit them in unusual circumstances. This hesitation can be explained with reference to the US Bankruptcy Code,[191] as well as to the potential risk of their abuse.[192]

The approach of the US courts to the recognition of foreign restructuring plans or schemes, entailing non-consensual third-party releases has not been straightforward. For example, in the case of *In re Vitro*,[193] the foreign IP filed a motion for the recognition of a reorganization plan approved in Mexico.

[187] Guide to the MLCBI (2013), para. 196.
[188] *In re Artimm, S.r.l.*, 335 B.R. 149 (Bankr. C.D. Cal. 2005), cited in *In re Atlas Shipping A/S*, 404 B.R. 726, 731 (Bankr. S.D.N.Y. 2009) and *In re ENNIA Caribe Holding N.V.*, 596 B.R. 316 (Bankr. S.D.N.Y. 2019).
[189] Mevorach, The Future of Cross-Border Insolvency, *supra* note 3, at 219. See *Akers v. Deputy Commissioner of Taxation* (2014) 311 ALR 167; 100 ACSR 287; [2014] FCAFC 57, concerned with protection of local creditors (revenue claims) in case of remitting the funds from Australia to a foreign proceeding, and noting that "the sacrifice of the rights (or the value in the rights) of local creditors upon an altar of universalism may be to take the general informing notion of universalism too far." See also *In re Sivec SRL*, 476 B.R. 310 (Bankr. E.D.Okla. 2012), holding that the differences between US and Italian law, especially as to whether creditors with set off rights were treated as having secured claims, prevented the US court from finding that creditor's interests would be adequately protected if it were instead required to turn over retainage for administration by Italian court. For other examples, see Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency (2020), available at https://uncitral.un.org/en/texts/insolvency.
[190] Corporate Restructuring and Insolvency in Asia 2020, ABLI Legal Convergence Series, 2020, p. 406.
[191] 11 U.S. Code § 524(e), which provides that a "discharge of a debt of the debtor does not affect the liability of any other entity on, or property of any other entity for, such debt." The minority of circuit courts (Ninth, Tenth and Fifth circuits) have adopted a restrictive view on third-party releases, ruling that § 524(e) altogether prohibits them. Other circuit courts may under certain conditions be willing to consider and approve third-party releases. Courts in these circuits focus on § 105(a) of the Bankruptcy Code, which grants them equitable powers to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." See *Class Five Nev. Claimants v. Dow Corning Corp. (In re Dow Corning Corp.)*, 280 F.3d 648, 658 (6th Cir. 2002) at 657–658, stressing that a third-party release is "a dramatic measure to be used cautiously." *In re Millennium Lab Holdings II LLC*, 945 F.3d 126 (3rd Cir. 2019), holding that the existence of the nonconsensual third-party releases and injunctions contained in the proposed reorganization plan was "integral to the restructuring of the debtor-creditor relationship," and so the bankruptcy court had constitutional authority to confirm the plan.
[192] See *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136 (2nd Cir. 2005), warning that "a nondebtor release is a device that lends itself to abuse. […] In form, it is a release; in effect, it may operate as a bankruptcy discharge arranged without a filing and without the safeguards of the Code."
[193] *In re Vitro, S.A.B. de C.V.*, 473 B.R. 117 (Bankr. N.D.Tex. 2012).

This plan discharged the obligations of the third-party guarantors – US-registered subsidiaries, which themselves were not part of the Mexican proceedings. The recognizing court declined recognition and enforcement. It noted that the Mexican insolvency proceeding by permanently enjoining creditors' claims against debtor's subsidiaries drastically altered treatment which such creditors would otherwise receive (since their rights against the guarantors are cut off) and that their interests have not been sufficiently protected. It concluded that "the protection of third party claims in a bankruptcy case is a fundamental policy of the United States" and that the plan, containing a third-party release, was manifestly contrary to such public policy.[194]

Nevertheless, in other instances courts did not find that third-party releases violated public policy or constituted an obstacle to recognition of a foreign scheme or reorganization plan. For example, in *In Re Metcalfe*,[195] the court stressed the narrow interpretation of the public policy exception and underlined that the relief granted in a foreign proceeding, including a third-party release, did not need to be identical to the one available in the USA.[196] Schemes and restructuring plans that release affiliate guarantees have been recognized in more recent cases,[197] including cases involving group restructurings.[198] Alongside recognition decisions, courts have also granted relief suspending actions against third parties, including group guarantors, to assist in and maintain the integrity of the administration of foreign insolvency proceedings.[199]

2. Recognition, Absolute Priority Rule, and Cross-Class Cram Down

One of the heavily debated issues in restructuring law in recent years concerns differences between the priority rules in domestic regimes, including the absolute priority rule (APR), the relative priority rule (RPR) and their various iterations.[200] Priority rules play an important role in the application of the cross-class cram down mechanism. This mechanism is one of the key tools offered by many schemes and restructuring regimes. It aims at overcoming the hold-out problem and allows a plan confirmation despite its rejection by the dissenting classes of creditors. This section describes the APR and the RPR

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[194] *In re Vitro S.A.B. de C.V.*, 701 F.3d 1031, 1042 (5th Cir. 2012) affirmed this decision, relying on the fact that the plan had only one class of unsecured creditors and that the necessary creditor votes to approve the plan were only achieved by counting the votes of insiders. Under US bankruptcy law, the votes of insiders are not counted (11 U.S.C. § 1129(a)(10)). The Court of Appeal did not state its position on the argument of a public policy violation.

[195] *In re Metcalfe & Mansfield Alternative Investments*, 421 B.R. 685 (Bankr. S.D.N.Y. 2010).

[196] This idea has been embraced in other cases. See *In re Rede Energia S.A.*, 515 B.R. 69 (Bankr. S.D.N.Y. 2014), referring to *Loucks v. Standard Oil Co. of New York*, 224 N.Y. 99 (Court of Appeals of New York 1918), stating that "We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home." *In re Agrokor d.d.*, 591 B.R. 163 (Bankr. S.D.N.Y. 2018).

[197] *In re Ocean Rig UDW Inc.*, 570 B.R. 687 (Bankr. S.D.N.Y. 2017); *In re Avanti Communications Group PLC*, 582 B.R. 603 (Bankr. S.D.N.Y. 2018), distinguishing this case from *In re Vitro* and highlighting near unanimous support of the scheme by creditors, excluding support by insiders. The court also noted that the failure to enforce guarantor releases could result in prejudicial treatment of creditors "to the detriment of the Debtor's reorganization efforts and prevent the fair and efficient administration of the Restructuring"; *In re Olinda Star Ltd.*, 614 B.R. 28 (Bankr. S.D.N.Y. 2020), noting that creditors had a full and fair opportunity to vote and be heard in connection with the BVI scheme and that courts have previously granted permanent injunctions to support proper implementation of foreign schemes of arrangement.

[198] For example, *In re Avanti Communications Group PLC*, 582 B.R. 603 (Bankr. S.D.N.Y. 2018) concerned recognition of the UK scheme of arrangement, which involved debt restructuring of a large corporate group, with guarantees of the debt issued by the affiliates (direct and indirect subsidiaries of the scheme company). *In re Agrokor d.d.*, 591 B.R. 163 (Bankr. S.D.N.Y. 2018), recognizing and enforcing the restructuring plan reached in the Croatian proceeding with respect to foreign debtors, which released and discharged written guarantees by non-debtor affiliates of both the English law and New York law debt.

[199] *CT Inv. Management Co., LLC v. Carbonell*, 2012 WL 92359 (S.D.N.Y. 2012), holding that the laws of Mexico and the United States need not be identical for extension of comity to be appropriate. For the opposite view, see *In re Qimonda AG*, 482 B.R. 879 (Bankr. E.D. Va. 2012), where the court agreed with the decision in *In re Vitro*, which held that extending the automatic stay to debtor's subsidiaries would be contrary to basic US bankruptcy law. A. Walters, Giving Effect to Foreign Restructuring Plans in Anglo-US Private International Law, Nottingham Insolvency and Business Law e-Journal, Vol. 3, 2015, pp. 375-392, pointing out that the US reception of schemes from sister common law jurisdictions has been consistently generous.

[200] See R. Mokal, The Court Discretion in Relation to the Part 26A Cram Down, Journal of International Banking and Financial Law, 36(1), 2021.

and discusses whether the differences between them may have an effect on the cross-border recognition of centralized group solutions under the MLCBI.

The absolute priority rule has been characterized as the "organizing principle of the modern law of corporate reorganizations",[201] the "cornerstone of reorganization practice and theory"[202] and "bankruptcy's most important and famous rule."[203] The APR gives protection in a situation of a cross-class cram down by requiring that a dissenting class of creditors receives the full value before creditors of a lower class receive or retain anything under the plan.[204] The APR was developed in the USA in the early 1900s to address the equity receivership system, which favored insiders at the expense of unsecured creditors.[205] The rule is now codified in the US Bankruptcy Code.[206] The rationale of this rule is that it implements the payment priorities existing outside bankruptcy,[207] therefore contributing to legal certainty and protecting parties' expectations. This should ultimately contribute to reduced costs of debt. It has also been pointed out that the APR encourages parties to reach an agreement, as cross-class cram down depends on full payment according to the pre-established distribution waterfall.[208]

Despite its long existence, the APR has not escaped criticism. Some scholars have called it "defective" to the extent that it may incentivize dissenting (holdout) behavior and prevent efficient restructuring.[209] The rigidity and inflexibility of the APR was also recognized by the American Bankruptcy Institute (ABI), which acknowledged that while ensuring important creditor protection, the rule "has proven to be inflexible and often a barrier to a debtor's successful reorganization."[210] Various alternatives have been proposed, most of which considered the possibility of offering junior (including out-of-the-money) creditors value under a reorganization plan to incentivize their engagement.[211]

The Restructuring Directive has also departed from the strict adherence to the APR model and embraced a more flexible model, oftentimes referred to as the relative priority rule. It allows a partial distribution of the reorganization surplus to junior creditors, including shareholders, as long as senior creditors are

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[201] D. Baird, Priority Matters: Absolute Priority, Relative Priority, and the Costs of Bankruptcy, University of Pennsylvania Law Review, Vol. 165, No. 4, 2017, p. 786.
[202] B. Markell, Owners, Auctions, and Absolute Priority in Bankruptcy Reorganizations, Stanford Law Review, Vol. 44, 1991, p. 123.
[203] M. Roe and F. Tung, Breaking Bankruptcy Priority: How Rent-Seeking Upends the Creditors' Bargain, Virginia Law Review, Vol. 99, 2013, p. 1236.
[204] If the affected class supports the plan, the departure from absolute priority is permitted.
[205] See e.g. *Louisville, N.A. & C. Ry. Co. v. Louisville Trust Co.*, 174 U.S. 552 (1899), holding that "no such proceedings can be rightfully carried to consummation which recognize and preserve any interest in the stockholders without also recognizing and preserving the interests, not merely of the mortgagee, but of every creditor of the corporation."
[206] 11 U.S. Code § 1129(b). A form of the APR is the general rule in Italian, Indian and Singapore law. See A. Zorzi, The Italian Insolvency Law Reform (November 23, 2019), available at https://ssrn.com/abstract=3492422; D. Kumar, The absolute priority rule in Indian insolvency law, Insolvency Intelligence, 33(3), 2020, pp. 87-95; Wai Yee Wan, C. Watters and G. McCormack, Schemes of Arrangement in Singapore: Empirical and Comparative Analyses, American Bankruptcy Law Journal (forthcoming, 2020), available at https://ssrn.com/abstract=3723104.
[207] E. Warren, A Theory of Absolute Priority, Annual Survey of American Law, Annual Survey of American Law, No. 1, 1991, p. 37, noting that the APR offers a form of creditor protection that attempts "to restrict the ability of corporate owners and insiders from depleting a failing business for their own benefit, leaving the creditors with only the empty shell of a business."
[208] J. Lipson, The Secret Life of Priority: Corporate Reorganization After Jevic, Washington Law Review, Vol. 93, 2018, p. 672.
[209] L. Stanghellini et al. (eds.), Best Practices in European Restructurings. Contractualised Distress Resolution in the Shadow of the Law, Wolters Kluwer, 2018, p. 46. B. Wessels, S. Madaus, Rescue of Business in Insolvency Law, 2017, p. 333, noting that the "argument that shareholders with no real economic interest cannot claim any value (including the extra value from cooperation) as long as creditors have not yet been paid in full has no legal basis." See also S. Lubben, The Overstated Absolute Priority Rule, Fordham Journal of Corporate & Financial Law, Vol. XXI, 2016, p. 602, arguing that "the desire to apply "strict" priority in a reorganization case is seriously misguided. Reorganization is not liquidation. It requires different rules."
[210] ABI Commission to Study the Reform of Chapter 11, Final Report and Recommendations, 2014, p. 213, pointing out unfairness arising from valuation and distribution issues in Chapter 11.
[211] D. Baird and D. Bernstein, Absolute Priority, Valuation Uncertainty, and the Reorganization Bargain, The Yale Law Journal, 115, 2006, pp. 1930-1970; A. Casey, The Creditors' Bargain and Option-Preservation Priority in Chapter 11, The University of Chicago Law Review, Vol. 78, No. 3, 2011, pp. 759-807.

treated relatively better.[212] The introduction of the RPR model in the EU has sparked further debates among academics.[213] Following the Restructuring Directive, some jurisdictions decided to depart from a strict APR approach. The WHOA incorporates a form of a relative priority (or a flexible or "mitigated" absolute priority), under which a deviation from the insolvency ranking of claims may be allowed where there are reasonable grounds for it and where it is not detrimental to the interests of the relevant creditors or shareholders.[214] The StaRUG adopts a "relaxed" absolute priority approach that permits deviations from the absolute priority where new value is created by the junior creditor to reorganization ("new value exception") or where the preservation of debtor's going concern value requires involvement of a shareholder class.[215] In such cases, insistence on the APR would not be in the interest of creditors whose protection this rule is intended to serve. Cross-class cram down in restructuring plans under Part 26A of the UK Companies Act 2006 is not dependent on either the APR or the RPR, instead relying on the best interest of creditors test.[216] This approach is inherited from schemes of arrangement.

The question which approach is preferable, the APR or the RPR or some other one, is beyond the scope of this article. Instead, we ask whether the divergence between the different cram-down models may bar recognition of schemes or restructuring plans. Writing on the US law perspective, Junqueira points out that "[w]hether a U.S. bankruptcy court should enforce a foreign nonconsensual reorganization plan that violates the absolute priority rule is a different and significantly harder question",[217] compared to the mere differences in voting thresholds. This is due to the foundational importance of the APR.

However, a closer look at these approaches perhaps reveals that the similarities are more significant than the differences. Notably, US law as a leading regime adhering to the APR has exceptions to absolute priority. Chapter 11 has been recently amended to address the needs of small and mid-sized companies. Among other things, the new subchapter V on small business debtor reorganization stipulates that the rule of the APR does not apply in cases falling under it.[218] There are other exceptions to the APR developed in practice (e.g. "new value" exception, "gift plan" exception).[219] These exceptions indicate that the APR, despite its fundamental character and long history, may in fact be departed from where other interests take precedence. Thus, while differences in priority rules in the context of schemes may provide room for invoking safeguards, the MLCBI and its underlying modified universalist norm may ultimately reject such expanded interpretations of either public policy or adequate protection.

D. *Summary: Groups Schemes and the MLCBI*

From the above we can conclude that whilst the MLCBI has not been designed for groups, nor was it written specifically with the scheme procedures in mind, it is capable of ensuring recognition of and

[212] Restructuring Directive, Article 11(1)(c). As a derogation from the RPR, countries may decide to implement the APR, see Article 11(2).
[213] R. de Weijs, A. Jonkers, M. Malakotipour, The Imminent Distortion of European Insolvency Law: How the European Union Erodes the Basic Fabric of Private Law by Allowing 'Relative Priority' (RPR), Amsterdam Law School Research Paper No. 2019-10, 2019, available at https://ssrn.com/abstract=3350375; J. Seymour, S. Schwarcz, Corporate Restructuring under Relative and Absolute Priority Default Rules: A Comparative Assessment, University of Illinois Law Review, Forthcoming, Vol. 2021, No. 1, 2019, available at https://ssrn.com/abstract=3498611; A. Krohn, Rethinking Priority: The Dawn of the Relative Priority Rule and a New 'Best Interest of Creditors' Test in the European Union, 2020, available at https://ssrn.com/abstract=3554349; S. Madaus, A Simple Guide to the Relative Priority Rule, 20 January 2020, available at https://stephanmadaus.de/2020/01/20/a-simple-guide-to-the-relative-priority-rule/.
[214] WHOA, Article 384(4)(b).
[215] StaRUG, § 26.
[216] Companies Act 2006, Part 26a, Section 901G. Dissenting class should not be any worse off than it would be in the event of the relevant alternative, which is defined as "whatever the court considers would be most likely to occur in relation to the company if the compromise or arrangement were not sanctioned under section 901F."
[217] T. Junqueira, The Enforcement of Consensual Foreign Plans of Reorganization in Chapter 15, Emory Bankruptcy Developments Journal, Vol. 35, 2019, p. 109.
[218] 11 U.S. Code § 1181(a).
[219] A. Levitin, Business Bankruptcy. Financial Restructuring and Modern Commercial Markets, Wolters Kluwer, 2nd ed., 2019, p. 799.

support to centralized group schemes (Levels 2-4). This requires, however, a finding that the entities subject to the scheme have their COMIs or at least establishments in the scheme jurisdiction. Centralization may also hinge on the possibility of engaging group entities that are not in severe financial distress to take part in a group solution and the prerequisite that courts reject the temptation to invoke the MLCBI-based safeguards merely because of the differences in restructuring laws, even where they otherwise meet the minimum standards of fairness.[220]

Indeed, a refusal to recognize and give effect to a foreign proceeding departing from the rules of the recognizing state could potentially impact a large number of group restructurings, and undermine their efficiency. For example, many countries do not follow the APR approach or provide exceptions to it. Among them are the Netherlands, Germany, the UK, South Korea[221] and China.[222] The risk of non-recognition of restructuring plans adopted in these countries may not promote the objectives underlying the MLCBI, which seeks to create a legal framework that makes cross-border insolvency resolution expedient, predictable and efficient. It may also discourage centralized group solutions, facilitated by schemes, to the extent that they permit resolution of group financial distress under the same set of rules and principles. Instead, group entities would be forced to undergo restructuring in different jurisdictions – each under its own rules and standards or even in several jurisdictions simultaneously, to ensure that such restructuring will be widely recognized.[223]

VI. The New Generation of Insolvency Model Laws

In the introduction, we have posed the question whether the existing international insolvency law framework is suitable and capable of promoting centralized group restructurings reached through schemes of arrangement or similar restructuring proceedings. We also noted that we focus on high levels of centralization (short of substantive consolidation), in particular jurisdictional concentration of the restructuring processes (Level 4) and restructuring of group liabilities via a single proceeding (Level 2).

The MLCBI and legislation based on it have been used as a legal basis to recognize group solutions, including those reached via schemes. But there are important "weak spots", where the application of the MLCBI may face roadblocks, leading to inefficiencies and producing legal uncertainty. These concern the recognition of foreign restructuring plans: (i) adopted in jurisdictions where a debtor or some of the debtors do not have COMI or establishment, (ii) involving both insolvent (financially distressed) and solvent group entities, or (iii) confirmed with the application of substantive rules different from those applicable in the recognizing forum, in particular those related to the availability of third-party releases and the priority rules in cross-class cram down. These weak spots may be attributed to the vagueness of

[220] Mevorach & Walters, *supra* note 150, at 890.

[221] Corporate Restructuring and Insolvency in Asia 2020, ABLI Legal Convergence Series, 2020, p. 719, noting that Korean law "merely requires that the ratio of impairment of shareholders is greater than that applicable to unsecured creditors."

[222] Z. Huimiao, Lame-Duck Bankruptcy Institutions under Government Intervention in Reorganisation of Listed Companies in China (Part 1), Hong Kong Law Journal, 46, 2016, p. 370, noting that "[a]mong 45 reorganisation cases, the absolute priority rule was breached in 43 cases."

[223] A similar result is achieved by the application of the Gibbs rule, according to which English courts refuse to enforce a foreign restructuring discharging or modifying the terms of English-law-governed debt. For the recent application of the Gibbs rule by English courts, see *Re OJSC International Bank of Azerbaijan* [2018] EWCA Civ 2802. Hence, in order to restructure English-law-governed obligations and to achieve its recognition in the UK, such restructuring needs to be conducted in the UK. The Gibbs rule therefore demonstrates an affinity with territorialism. Mevorach notes that in this way it "precludes deference to the central court's insolvency laws and judgments." See I. Mevorach, Overlapping International Instruments for Enforcement of Insolvency Judgments: Undermining or Strengthening Universalism? EBOR, 2021, online access. Courts in Singapore and the USA have chosen not to follow the Gibbs rule. See *Pacific Andes Resources Development Ltd* [2016] SGHC 210; *In re Agrokor d.d.*, 591 B.R. 163 (Bankr. S.D.N.Y. 2018).

some of the rules used in the MLCBI, its focus on single-debtor insolvency (and not on groups), and divergence in the transposition of the MLCBI into national law and in its interpretation.

To complement the MLCBI and to close certain apparent gaps, UNCITRAL has developed two new model laws briefly noted earlier – the MLIJ (2018) and the MLEGI (2019). The next section explores whether the abovementioned weak spots are addressed by this new generation of the UNCITRAL Model Laws.

A. *Centralized Group Restructuring and the MLIJ*

One of the reasons for the development of the MLIJ was the desire to address uncertainty around recognition and enforcement of judgments rendered in the course of foreign insolvency proceedings.[224] The MLIJ seeks to provide clear rules for recognition of insolvency-related judgments, including those: (i) confirming or varying a plan of reorganization or liquidation, (ii) granting a discharge of the debtor or of a debt, and (iii) approving a voluntary or out-of-court restructuring agreement.[225] Thus, the MLIJ may apply to a scheme approved by a court. While the MLIJ does not explicitly address enterprise group insolvency, does it nonetheless have the potential to make the recognition of group restructurings more secure and predictable?

According to Article 14(h) of the MLIJ,[226] recognition and enforcement of an insolvency-related judgment may be refused if the judgment originates from a state whose insolvency proceeding is not or would not be susceptible of recognition under the MLCBI. The Guide to the MLIJ clarifies that this may be the case where the originating state is neither the location of the debtor's COMI nor of its establishment.[227] It explains that this provision is designed to ensure that the regulatory framework of the MLCBI is not undermined by the recognition and enforcement of insolvency-related judgments, which should have been resolved in either a main or non-main proceeding.[228] In other words, the MLIJ accommodates the idea that main or non-main insolvency proceedings and related actions should be concentrated in the same jurisdiction or proceeding. This doctrine is also known as *vis attractiva concursus*.[229] Regarding the problem of recognition of group insolvency solutions, originating from a no-COMI/no-establishment jurisdiction, this means that the MLIJ does not in principle interfere with or depart from the approach taken in the MLCBI. But it provides additional jurisdictional grounds to refuse recognition and enforcement of a foreign judgment. Among them is the exercise by the originating court of jurisdiction on the basis that is unfamiliar to the recognizing court or where the exercise of such jurisdiction is incompatible with laws of the recognizing state.[230]

[224] The MLIJ was drafted in response to uncertainty created by the UK Supreme Court in *Rubin v. Eurofinance* SA [2012] UKSC 46, [2013] 1 AC 236.
[225] Guide to Enactment of the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (Guide to the MLIJ), para. 60.
[226] This is an optional provision that may be considered by states which have enacted (or are considering enacting) the MLCBI.
[227] Ibid., para. 117. Article 14(h)(i) and (ii) of the MLIJ provides one exception to the principle of non-recognition of no-COMI/no-establishment proceedings. This exception applies in a situation where an IP of a main or non-main proceeding (i.e. proceedings capable of being recognized) participated in the proceeding giving rise to the judgment in question and this judgment relates solely to assets located in the originating state. This exception may facilitate the recovery of additional assets for insolvency estate and resolution of disputes related to such assets.
[228] Ibid., para. 118.
[229] This doctrine can be seen in Article 6 of the EIR Recast, under which courts presiding over main, secondary or territorial proceedings should have jurisdiction "for any action which derives directly from the insolvency proceedings and is closely linked with them." Read further on the European approach, Z. Fabok, Jurisdiction concerning annex actions in the context of the insolvency and Brussels Ibis regulations, International Insolvency Review, Vol. 29, Issue 2, 2020, pp. 204-233.
[230] MLIJ, Article 14(g)(iii)-(iv). The Guide to the MLIJ, para. 114 clarifies that Subparagraph (g)(iii) should not permit the receiving court to refuse recognition and enforcement on the basis that the originating court did not properly exercise jurisdiction, if the law of the receiving state would have permitted a court to exercise jurisdiction in parallel circumstances. In para. 115 it is explained that Subparagraph (g)(iv) is broader and should "discourage courts from refusing recognition and

Thus, it is possible to recognize and enforce a single scheme that affects group entities, or a restructuring plan adopted in proceedings opened against several entities in the same jurisdiction (supporting Level 2 or Level 4 centralizations). But again, there may be a mismatch between the jurisdictional basis applied domestically and in a foreign proceeding. Even if the recognizing state decides not to implement Article 14(h), the court applying the MLIJ may still refuse to recognize and enforce a scheme if, for example, it is not familiar with the criterion of "sufficient connection" as a basis for a group scheme, or considers that this standard is incompatible with domestic law (Article 14(g)). The MLIJ does not attempt to harmonize the jurisdictional bases for recognition and enforcement, resulting in imprecise and subject-to-interpretation criteria of analogousness and non-incompatibility.[231]

As to the involvement of solvent group entities in a group solution, the MLIJ adopts the same approach as the MLCBI. The definition of "insolvency proceeding" used in the MLIJ is identical to the definition of a "foreign proceeding" used in the MLCBI.[232] This coherent terminology may result in interpretation, according to which only proceedings opened with respect to a severely distressed or insolvent debtors are covered by the MLIJ and its regime for insolvency-related judgments.[233] The MLIJ is also quite in line with the MLCBI when it comes to a public policy exception and adequate protection of creditors with regard to the recognition and enforcement of restructuring plans.[234]

In conclusion, while the MLIJ is targeted at recognition of insolvency-related judgments, including those approving a restructuring plan, it does not necessarily support centralized group solutions or make their recognition more predictable. The MLIJ is not per se concerned with group insolvency. In many aspects it follows the MLCBI, and in others it offers additional refusal grounds related to jurisdiction of a foreign court.

B. *Centralized Group Restructuring and the MLEGI*

In 2019, UNCITRAL adopted the Model Law on Enterprise Group Insolvency (MLEGI). This model law aims at providing effective mechanisms to address group insolvencies.[235] Unlike the MLCBI and the MLIJ, the MLEGI is specifically designed to make the administration of cross-border insolvencies of enterprise groups more efficient and to facilitate the development of group insolvency solutions. The MLEGI offers various tools to support centralized group solutions. Among them are (i) the opening and recognition of a planning proceeding and a wide range of relief available to it, and (ii) "synthetic proceedings", which can be used to avoid the commencement of multiple proceedings, specifically in a group context, and to facilitate centralized treatment of claims in enterprise group insolvency.[236]

The MLEGI does not seek to adjust the concepts of COMI or establishment to permit jurisdictional concentration of group proceedings in the same forum. It does not propose a "group COMI" or require that COMIs of all participating entities are in the same jurisdiction.[237] Instead, the centralizing impetus

enforcement of a judgment in cases in which the originating court's exercise of jurisdiction was not unreasonable, even if the precise basis of jurisdiction would not be available in the receiving State."

[231] Pottow positively assesses Article 14(g)(iv), arguing that it "could be the start of a new significant strand of private international law that provides a doctrinal anchor for meaningful expansion (and a coherent foundation) for indirect jurisdiction." See Pottow, *supra* note 5, at 501. More skeptically, Mevorach underlines that the MLIJ "is somewhat obscure on jurisdictional bases and is not fully consistent with the general cross-border regime." See Mevorach, *supra* note 223.

[232] MLIJ, Article 2(a).

[233] Guide to the MLIJ, para. 22.

[234] MLIJ, Articles 7, 14(f).

[235] MLEGI, preamble.

[236] Guide to the MLEGI, para. 200.

[237] UNCITRAL Working Group V discussed the notion of group COMI, noting that "[i]dentifying the jurisdiction most central for a corporate group might be assisted by developing a concept of a "corporate group COMI"; or developing a rule deeming the COMI of the group to be, for example, the place of registration of the parent of the group or the place where it conducts its business activities." The Working Group acknowledged the difficulties in achieving an agreed definition of a corporate group

of the MLEGI comes from enhanced coordination, that can also be achieved by way of a planning proceeding. A planning proceeding has been mentioned in Part II, where we noted that it can be opened where one of the group members, integral and necessary to the group solution, has its COMI. To support the coordination efforts, the MLEGI affords relief to a planning proceeding, which may include staying the execution against assets of an enterprise group member, suspending the right to transfer, encumber, or otherwise dispose of any assets of the enterprise group member, staying insolvency proceedings concerning a participating group member, and authorizing intra-group funding arrangements.[238] The use of different forms of relief and participation in a planning proceeding can open the doors to procedural consolidation, restricting the opening of proceedings in multiple jurisdictions and fostering their concentration in a single or a few forums.[239]

The MLEGI allows to tighten the centralization even further. It provides for the possibility to defer to a concentrated process through the concept of "synthetic" proceedings.[240] It stipulates that in order to minimize the commencement of non-main proceedings or to facilitate the treatment of claims in a group insolvency, "a claim that could be brought by a creditor of an enterprise group member in a non-main proceeding in another State may be treated in a main proceeding […] in accordance with the treatment it would be accorded in the non-main proceeding."[241] To realize this norm, an undertaking to extend such "as if" treatment needs to be made by a main IP or jointly with a group representative (if appointed), and a court in the main proceeding should approve the treatment to be accorded in such a proceeding.[242] If an undertaking is made, a court of the potential ("synthetic" or "virtual") non-main proceeding may stay or decline to commence a non-main proceeding.[243]

Importantly, the MLEGI also foresees centralization of proceedings by way of a planning or a non-main proceeding and by avoiding additional proceedings in multiple jurisdictions. In supplemental provisions (Part B), the MLEGI allows for an undertaking to be given by an IP of a group member or by a group representative to creditors who might otherwise file their claims in the potential ("synthetic" or "virtual") *main* proceeding.[244] In this case, a court in the jurisdiction of the debtor's COMI may stay or decline to commence a main proceeding.[245] The need to commence main proceedings is therefore minimized and centralization is achieved through a contract-like arrangement (undertaking) and flexible jurisdictional connection (COMI of a single group entity or establishment of relevant group entities). The supplement also allows granting additional relief in the form of a stay or declining to open local proceedings

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and problems related to foreseeability of a group COMI to creditors. Working Group V, Treatment of Corporate Groups in Insolvency, U.N. Doc. A/CN.9/WG.V/WP.76/Add.2, 6 March 2007.

[238] MLEGI separately addresses the relief available to a planning proceeding in a state where such a proceeding has been opened (Article 20) and relief that may be granted to a foreign planning proceeding. The latter is divided in provisional (pre-recognition) relief (Article 22) and relief that may be granted upon recognition of a foreign planning proceeding (Article 24).

[239] Mevorach, *supra* note 54, at 527. The use of relief to achieve a centralized group solution characterize *In the Matter of Videology Limited*, cited above.

[240] Different terms have been used to describe the same concept, including "virtual" secondary proceedings and "as if" proceedings. See B. Wessels, Contracting Out of Secondary Insolvency Proceedings: The Main Liquidator's Undertaking in the Meaning of Article 18 in the Proposal to Amend the EU Insolvency Regulation, Brooklyn Journal of Corporate, Financial & Commercial Law, Vol. 9, 2014, pp. 63-110.

[241] MLEGI, Article 28(1).

[242] MLEGI in Article 28(2) specifies that an undertaking "shall be enforceable and binding on the insolvency estate of the main proceeding."

[243] MLEGI, Article 29. The idea of "synthetic" proceedings originates from case law. In *Re Collins & Aikman Europe SA and other companies* [2006] EWHC 1343 (Ch), the English court authorized the joint administrators of an enterprise group to implement the assurances given earlier to creditors in the relevant European jurisdictions and hence to depart from the application of the ordinary provisions of English law, the law of the main proceedings. As a result, the group restructuring was more predictable, centralized and cost-efficient. See K. Ramesh, Synthesising Synthetics: Lessons learnt from Collins & Aikman, 2nd Annual GRR Live New York, 26 September 2018, discussing this case and noting the inherent adaptability and versatility of synthetic secondary proceeding and their utility in a group insolvency context, as a "powerful tool in the restructuring toolkit for facilitating the centralisation of key issues in a single forum."

[244] MLEGI, Article 30.

[245] MLEGI, Article 31.

following recognition of planning proceedings, particularly if an undertaking has been given.[246] The use of relief and synthetic proceedings should help to avoid duplication of proceedings, minimize costs, and achieve procedural consolidation.

Referring back to the centralization levels, noted in Part I, the MLEGI enables at least Level 4, where a group solution, including a restructuring plan, is contemplated in a single jurisdiction, where one of the group members has its COMI and other entities (which do not need to demonstrate any connection to the planning forum) participate. It can also be used to contemplate a Level 2 concentration where only a single process is opened and participation by other members is limited to being affected by the scheme without the need to open any additional processes.

We noted in Part V that participation of solvent group entities in a scheme or restructuring plan might cause problems at the recognition stage, since the MLCBI seems to require either insolvency or severe financial distress of a debtor. The MLEGI, on the other hand, is open to participation of all group entities in a planning proceeding and a group solution, irrespective of their financial status.[247] The focus of the MLEGI is on usefulness and desirability of an enterprise group member participating in insolvency or restructuring proceedings of another group member.[248] At the same time, the MLEGI makes it clear that, as a general rule, the relief in support of a local[249] or foreign[250] planning proceeding may not be granted with respect to assets and operations of an enterprise group member for which no insolvency proceeding has commenced. This does not preclude a solvent group member (or, to be more precise, a group member that is not subject to insolvency proceedings) from voluntarily participating in or contributing to a planning proceeding. Indeed, such a group member could aid a group solution being developed for other group members.[251]

Finally, when it comes to the matters of public policy and adequate protection of creditors, the MLEGI generally follows the MLCBI and the MLIJ. It includes an overarching rule that a court should be able to refuse to take any action if it would be manifestly contrary to the public policy.[252] Alongside the public policy exception, the MLEGI also contains a provision, drawn upon Article 22 of the MLCBI, under which when granting, denying, modifying or terminating relief, a court "must be satisfied that the interests of the creditors of each enterprise group member subject to or participating in a planning proceeding and other interested persons [...] are adequately protected."[253] But it may be anticipated that these safeguards will be even less debilitating in the MLEGI context, where group schemes will be contemplated within a comprehensive framework designed for groups.

VII. Centralized Group Restructuring: Weak Spots and Way Forward

In the previous Parts, we noted the emergence of restructuring procedures which facilitate centralized group restructurings, including through jurisdictional concentration of proceedings (Level 4, and Level

[246] MLEGI, Article 32.
[247] Guide to the MLEGI, paras. 47 and 111.
[248] Guide to the MLEGI, para. 111.
[249] MLEGI, Article 20(2).
[250] MLEGI, Articles 22(4) and 24(3).
[251] Guide to the MLEGI, para. 134. See also the UNCIRTAL Legislative Guide, Part three, Recommendation 238, stipulating that "insolvency law should specify that an enterprise group member that is not subject to insolvency proceedings may voluntarily participate in a reorganization plan proposed for one or more enterprise group members subject to insolvency proceedings."
[252] MLEGI, Article 6. The Guide to the MLEGI emphasizes the restrictive interpretation of public policy and adds in para. 65 that "[c]ooperation among courts, including through the recognition of a planning proceeding, should not be hampered by an expansive interpretation of public policy."
[253] MLEGI, Article 27(1). Guide to the MLEGI, para. 189.

3, if a single IP is appointed) or reorganization of group debts via a single proceeding (Level 2). We also highlighted that the existing international insolvency law framework, based on the MLCBI, can support centralization of restructuring attempts. However, there are bottlenecks or, as we have called them – weak spots, which may undermine centralized group restructurings going forward. These relate to the material scope of the MLCBI, which may not enable recognition of no-COMI/no-establishment group restructuring schemes. The personal scope of the MLCBI can also preclude the involvement of solvent group entities in a group solution. The application of safeguards to divergent substantive rules and varying standards across jurisdictions could be a barrier as well. The new generation of the UNCITRAL Model Laws provide additional mechanisms, but they too have weak spots. In this Part we consider the alternative mechanisms and propose certain optional ways to further advance groups restructurings within the global cross-border insolvency framework.

If we consider schemes of arrangement and similar restructuring proceedings to fall under the MLCBI – even though they might not be fully collective and insolvency-tested, we subject them to the MLCBI requirements. As discussed, a key requirement for recognition and support under the MLCBI is the presence of COMI or establishment in the originating state. Since schemes often depart from these jurisdictional bases and apply more flexible tests, such as a sufficient connection, there is an inherent discrepancy between schemes and the MLCBI-based recognition regime. This mismatch can result in legal uncertainty and complicate the recognition of centralized group restructurings.

One possible solution is, therefore, to change the existing approach under the MLCBI and altogether abandon the requirement of COMI or establishment as a precondition to recognition of a foreign proceeding. But this may be a step too far, considering that the MLCBI provides a general framework for a wide variety of proceedings for the purposes of liquidation or reorganization. While jurisdictional flexibility can benefit certain light-touch restructurings, it may not be feasible for fully collective and more traditional insolvency proceedings, involving operational restructuring and large numbers of non-adjusting and trade creditors. The reason is that it is usually more efficient to initiate these proceedings at the place of the concentration of debtor's business activity, that COMI and establishment serve to indicate. Equally important is the fact that the MLCBI has proven successful in facilitating cross-border recognition and relief, while maintaining a degree of legal certainty and predictability. Although flexible jurisdictional rules can promote concentration of proceedings in a single forum, as noted in Part IV, they pose a risk of jurisdictional plurality (cherry-picking) and conflicting jurisdictions. They may also run contrary to parties' legitimate expectations because it becomes more difficult to calculate a restructuring forum and its applicable law.

Another solution is to "relax" the determination of COMI and establishment, or to make forum shopping more accessible, or to introduce a presumption of "good" forum shopping for the schemes which solely aim at restructuring of financial obligations (so called "skinny" restructurings).[254] Since bondholders, credit institutions and other financial creditors are usually sophisticated counterparties, they are better positioned to assess and diversify their risks compared to the majority of trade and non-adjusting creditors. Hence, the application of less stringent jurisdictional criteria may be justified. Indeed, many schemes are targeted at balance sheet ("skinny") restructurings, as the scheme model lends itself well to a targeted approach.[255] Therefore, relaxed rules on COMI and establishment can potentially cover many centralized group restructurings discussed in this article. However, the relaxed jurisdictional rules may

[254] Indeed, forum selection in the form of movement of COMI prior to commencement of insolvency proceedings to benefit creditors as a whole is acceptable under the MLCBI. See Guide to the MLCBI, para. 71 et seq.
[255] Mevorach & Walters, *supra* note 150, at 864, noting that "skinny restructuring is the main territory of pre-insolvency proceedings in practice."

not be optimal for schemes involving operational restructuring and affecting rights of non-adjusting and trade creditors.

The third solution includes promoting centralized group solutions by innovatively applying the various tools developed in the newer generation of model laws. These tools (discussed in Part VI) include broad relief, a planning proceeding, synthetic main and secondary proceedings, and enforcement of judgments including orders related to schemes. We saw that these tools, especially those developed in the MLEGI, are quite flexible and as such can potentially facilitate efficient group restructurings. By participating in a planning proceeding, granting an undertaking to minimize the number of proceedings, or recognizing and enforcing scheme orders, procedural centralization or a single process encompassing multiple entities can be achieved without concentrating COMI of all group entities in the same forum. This requires, though, the adoption and application of the full range of options in the model laws, including the provisions allowing to defer to the group process and avoid opening multiple proceedings, contemplated in the supplement to the MLEGI. The fact that some of these provisions are in the supplement, a separate part, may result in countries and implementing institutions being reluctant to adopt and apply them.[256] Furthermore, the presence of COMI of at least one group member that is a necessary and integral participant in a contemplated group solution, is still a precondition under the MLEGI for the opening of a planning proceeding, and both the MLIJ and MLEGI include safeguards which can be relied on to decline granting recognition or relief to a foreign scheme that diverges from local laws. These model laws are also currently only an option for countries to consider. While the MLIJ and especially the MLEGI can be instrumental in facilitating centralized restructurings, they are not yet binding law as they first need to be enacted in national legislation.

The fourth solution would be to develop a tailor-made international instrument for restructurings, instead of trying to fit such procedures into the existing framework.[257] This instrument can take the shape of a new model law for recognition and enforcement of restructuring plans and proceedings, regardless of their full collectivity, debtor's financial status, or debtor's COMI or establishment – thus better reflecting the developing market and legal practice. This model law may apply flexible jurisdictional criteria and jurisdictional review at the recognition stage. In exchange for this flexibility, such a framework may place greater ex post control in the form of the adequate protection test. This test could ensure that creditors and other interested parties are not disadvantaged by the application of laws in a scheme jurisdiction that are different from those that would otherwise apply to restructure their rights or obligations (i.e. *lex concursus* and *lex causae*). This test is demanding and goes beyond requiring that a foreign proceeding complies with broadly recognized principles of insolvency law. Instead, it seeks to ensure the entitlement baseline of objecting creditors under the law originally applicable to their claims. The idea behind this test underpins the rules on synthetic proceedings found in the MLEGI, since they aim to facilitate the centralized treatment of claims in an enterprise group insolvency and in the meantime accord the prescribed treatment which creditors would otherwise be entitled to.

This approach has some notable advantages. First, it gives parties leeway in choosing the restructuring forum, permitting centralization of restructuring efforts. Second, it respects the freedom of contract and choice of law applicable to a contract. Third, it upholds parties' legitimate expectations and protections afforded by the normally applicable law (*lex concursus* and *lex causae*). It also makes it easier for creditors to calculate the risks related to investment and prospective restructuring. Nevertheless, while

[256] Mevorach, *supra* note 54, at 528.
[257] S. Madaus, Leaving the Shadows of US Bankruptcy Law: A Proposal to Divide the Realms of Insolvency and Restructuring Law, EBOR, 19, 2018, arguing that "simply expanding insolvency rules to (all) restructurings does not seem convincing" and suggesting a differentiating solution, based on private international law rules on judgments and contracts.

the new state of the art instrument could offer important benefits, it will likely require considerable effort to develop in the first place and the political will to adopt it in national law thereafter.

Earlier in Part IV we noted that the proliferation of schemes and scheme-like procedures has not resulted in the full harmonization of applicable rules and standards. This divergence is evident, inter alia, in the approaches concerning third-party releases and priorities in the context of cross-class cram down. We argue that the application of conflicting rules may cause problems and undermine centralized group solutions by depriving them of cross-border recognition and assistance. The public policy exception and adequate protection of creditors are an integral part of the existing international insolvency framework and fulfil an important defensive function. However, especially the notion of "adequate protection" has a strong destabilizing potential and can be difficult to apply in practice. This is because the "adequacy" or "fairness" are not defined in the MLCBI (and other model laws) and can be interpreted rather broadly to protect local creditors, justify territorialistic biases and hinder centralized restructuring attempts. In addition to this ambiguity, in group restructurings, the difficulty may arise from the need to consider the interests of creditors of multiple entities, as well as such group entities themselves.

Ultimately, therefore, it is crucial that countries and parties affected by the relevant centralized group restructurings have a certain degree of trust in a foreign legal system and the good faith of stakeholders selecting it. This trust should be based on the acceptance that substantive insolvency or restructuring laws differ. The mere fact that the law of the recognizing state does not offer the same rule or relief, or that its application would have led to a different outcome compared to that reached abroad, should not by itself be considered a violation of creditors' rights (lack of adequate protection) or trigger the public policy hammer. In this respect, the way forward may be in further harmonization of substantive restructuring law, as well as the additional specification in the way the adequate protection is and should be understood and applied in the context of a group restructuring. As we foresee the increasing role of the concept of adequate protection in the future, formulation of general principles or guidelines for it can be taken up by UNCITRAL and other standard-setting organizations.

CONCLUSION

Efficient administration of insolvency and restructuring proceedings in the context of enterprise groups is challenging. Due to legal separateness, distinct proceedings are commonly opened with respect to individual entities in a group of companies. Coordination of such proceedings is complicated in an international setting. Furthermore, the lack of harmonization of national insolvency and restructuring laws, as well as the persistence of territorialistic inclinations and biases could hamper the adoption of a coherent group-wide restructuring strategy.

To reduce the risk of piecemeal liquidation or the cost of unnecessary multiple restructurings concerning the same group, a strategy of legal centralization may be utilized. Such centralization can be achieved by way of concentrating proceedings of group entities in the same forum or court or through the resolution of group distress via a single proceeding opened with respect to a single group entity. In practice, both mechanisms are embraced in group restructurings. In this article, we have studied them against the background of the increased adoption and use of schemes of arrangement or scheme-like procedures permitting centralized group restructuring. This trend seems to, at least partially, be driven by regulatory competition creating both positive and negative externalities.

We have shown that these new restructuring procedures are supported by a solid system of instruments developed at the international level. Generally, the UNCITRAL Model Laws concerning cross-border insolvency accommodate centralized group solutions and promote their cross-border recognition and

enforcement. But we highlighted certain problems or weak spots, which need to be addressed. One weak spot relates to the uncertainty and unpredictability arising from incoherent incorporation, interpretation and application of national law provisions based on the MLCBI. In part this can be linked to the lack of definitions and vagueness of some of the terms used in this instrument. The MLIJ and the MLEGI have not yet been enacted in legal systems, but their future implementation may also result in inconsistencies. For example, the terms "adequate protection", "public policy", "foreign proceeding", "jurisdictional non-incompatibility" found in these model laws, require coherent interpretation and clear international standards applied in a group restructuring context. This is particularly topical considering the fact that the proliferation of restructuring schemes has not led to full harmonization of national laws. Differences between such laws might play a key role in the choice of a restructuring forum but lead to problems at the recognition stage. We have noted some of these differences, including the availability of third-party releases and the variations in the substantive protections afforded to creditors.

The rise of schemes and their use for group restructurings also bring up peculiar jurisdictional dilemmas, since the sought centralization often departs from the long-established connecting factors of COMI and establishment. Jurisdictional flexibility makes centralized debt resolution possible, contributing to cost saving and shorter time frames for the completion of restructuring cases. However, it might disconnect the restructuring forum from real economic ties, make risk calculation for creditors less straightforward and influence creditor participation. It may also result in jurisdictional plurality and conflicts, where several courts claim jurisdiction at the same time, undermining centralization efforts.

Maintaining the jurisdictional flexibility of schemes, permitting centralized group restructurings, while discouraging abuse and protecting the interests of creditors and other parties, calls for new and creative approaches. This article has considered the various ways of accommodating group restructuring and supporting them internationally, including through further development of the international model laws system. Radically, we could depart from the requirement of COMI or establishment as a prerequisite to recognition under the MLCBI. But this solution would raise concerns about compatibility with the rules on relief and protection of parties' expectations and may not be feasible for many comprehensive and collective insolvency proceedings. An alternative and sensible solution could entail a certain relaxation of the rules related to the determination of COMI and establishment when applied to restructuring of financial obligations via schemes, thus not extending to operational restructuring and leaving trade and non-adjusting creditors unaffected. International group restructurings can also rely on the various tools available in the model laws system for insolvency using these innovatively, including the more advanced solutions proposed in the MLEGI and its supplement. Among these tools are a range of relief that may be granted to defer to a centralized group process, the use of main and non-main synthetic proceedings, and concentration through the opening and participation in a planning proceeding. Finally, a completely new model law may be designed to address the recognition of restructuring plans and proceedings, which would better reflect their unique nature, embrace jurisdictional flexibility of schemes, and also introduce adequate safeguards to protect the rights and legitimate expectations of the affected parties.