Contracting Around Insolvency Jurisdiction: Private Ordering in European Insolvency Jurisdiction Rules and Practices

Kokorin, I.; Lazić, V.; Stuij, S.

Chapter 2
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Ilya Kokorin

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Abstract Insolvency law is driven by various policy considerations. This is why, as opposed to the domain of contract law, the room for private regulation in insolvency has always been limited. The 'choice' of an insolvency jurisdiction is not an exception. Since the adoption of the first European Insolvency Regulation (EIR) in 2000, determination of the international insolvency forum has been determined by the presence of the debtor's centre of main interests (COMI). In the EIR of 2015, COMI is defined as 'the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.' Conceptually, COMI cannot be controlled or chosen by the parties (debtors

I. Kokorin (✉)
Department of Financial Law, Leiden Law School, Steenschuur 25, 2311 ES Leiden, The Netherlands
e-mail: i.kokorin@law.leidenuniv.nl

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and creditors). This chapter argues that there are situations in which COMI fails to make international insolvency jurisdiction ascertainable or efficient. These include investment in capital markets, groups of companies, decentralised management and platform-based business models. The changing commercial environment in which companies operate, the rising power of (certain groups of) creditors and the thrust towards rescuing ailing companies have led to the emergence of different mechanisms of private nature that allow (partial) regulation of the insolvency process. This chapter attempts to make sense of this development and explore whether a conceivable shift to a contractual paradigm in insolvency has manifested itself in insolvency jurisdiction rules and practices in Europe. Such exploration will involve the analysis of a contractual COMI-choice, synthetic/reverse synthetic insolvency proceedings and the selection of a group coordination forum.

Keywords Insolvency · Centre of main interests (COMI) · Forum selection · Synthetic insolvency proceedings · Corporate groups · Decentralised management · European Insolvency Regulation

2.1 Introduction

The value of ascertainability of the insolvency forum (insolvency jurisdiction) is hard to overestimate. This forum determines whether insolvency proceedings can be commenced, and in case the court of the forum assumes jurisdiction, the law of such a forum will usually govern the effects of the opening of insolvency proceedings and such issues, as ranking of claims, distribution of proceeds, transaction avoidance and directors' liability. In addition to legal implications, the 'selection' of an insolvency jurisdiction influences the amount of costs related to administration of insolvency proceedings and participation of creditors in them. This is why legal certainty is crucial for creditors, as they need to calculate investment-related risks and risk premiums built into investment beforehand.

Since the adoption of the European Insolvency Regulation in 2000 (EIR),[1] the concept of 'centre of main interests' (COMI) has played a leading role in allocating international jurisdiction in cross-border insolvency cases within the European Union (EU). The importance of COMI comes from the fact that it determines which court has jurisdiction to handle debtor's insolvency and which law will govern insolvency proceedings. The new Insolvency Regulation,[2] in force since 26 June 2017 (EIR Recast), stipulates that COMI 'shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties' (Article 3(1) EIR Recast).

[1] Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings.

[2] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast).

Despite the decisive role of the COMI concept, since its introduction in the EIR, the determination of a centre of main interests has been tainted by uncertainty and has become a matter for protracted litigation. This chapter offers a critique of the existing (European) doctrine of international insolvency jurisdiction. There are three major reasons for this. The first comes from the inherent vagueness and fluidity of the concept. The second one relates to the scenario of corporate group insolvency, addressed in the newly established Chap. 5 EIR Recast. Despite the apparent progress made in this area, group centralisation for the purposes of efficient and effective debt resolution remains hindered by the prevailing entity-by-entity approach. The third reason comes from the changing nature of businesses and their underlying organisational structures over the last two decades. For instance, platform-based enterprises and decentralised autonomous organisations make it difficult (if not impossible) to pinpoint a particular jurisdiction of the debtor's 'nerve centre'.[3] Indeed, the very criterion of a place where the debtor 'conducts the administration of its interests' loses its salience when such a place cannot be identified with reasonable certainty.

This chapter is an attempt to restart the discussion on the rules determining insolvency forum and the role salient stakeholders, such as creditors and debtors, have in selecting it. It begins with a brief outline of the concept of COMI and its current mode of operation (Sect. 2.2). Then it reviews a selection of bond prospectuses, issued by companies wishing to raise capital across the EU securities markets, to probe the expectations the bondholders have (or should be considered as having) in a case of the issuer's insolvency, particularly in terms of the insolvency forum, applicable law and the restructuring regime (Sect. 2.3.1). The difficulties of applying the COMI-standard are studied in the context of multinational enterprise groups (Sect. 2.3.2) and emerging platform-based and decentralised business models (Sect. 2.3.3). While Sect. 2.3 uncovers shortcomings of the current European insolvency model and its weaknesses in the face of modern developments, Sect. 2.4 addresses potential ways of improving predictability and effectiveness of rules on international insolvency jurisdiction.

The changing business environment in which companies operate, the rising power of (certain groups of) creditors and the thrust towards rescuing ailing companies have led to the emergence of various mechanisms of private nature that allow (partial) regulation of the insolvency process. This chapter attempts to make sense of this development and explore whether a conceivable shift to a contractual paradigm in insolvency has manifested itself in insolvency jurisdiction rules and practices in Europe. This exploration involves the review of instances of contractual insolvency forum selection (Sect. 2.4.1), the analysis of synthetic/reverse synthetic insolvency proceedings (Sect. 2.4.2) and a brief introduction to the choice of a group coordination forum (Sect. 2.4.3).

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[3] 'Nerve center' has been described as the 'principal place of business […] from which a corporation radiates out to its constituent parts and from which its officers direct, control and coordinate all activities.' *Phoenix Four v. Strategic Resources Corp.*, 446 F.Supp.2d 205, 214–215 (S.D.N.Y. 2006). See also Wessels 2015, para 10236a.

Based on recent case law and legal developments, it is argued that there may be a room for the use of private arrangements to constructing (contracting around) insolvency jurisdiction. Such arrangements seem to be more welcome as an *ex post* strategy, a strategy pursued upon the initiation of insolvency proceedings. *Ex ante* contracting in insolvency remains marginal but can still increase insolvency-related predictability and efficient risk allocation, thus empowering private parties (insolvency stakeholders) to engineer their own fate.

2.2 International Insolvency Jurisdiction and Centre of Main Interests

The idea of devising a connecting factor for insolvency proceedings is not new. If properly implemented, this factor should indicate to the debtor's creditors and other stakeholders the jurisdiction where the insolvency proceedings can be started, as well as the law applicable to the debtor's insolvency. The concept of COMI was designed to serve as such connecting factor. In insolvency and restructuring matters, its origin can be traced to the 1980 Draft Convention on Bankruptcy, Winding-Up, Arrangements, Compositions and Similar Proceedings[4] (1980 Draft Convention).

The 1980 Draft Convention was one of the early attempts to harmonise insolvency-related jurisdictional rules in the European Economic Community (EEC). It took a strong pro-unity (one debtor, one insolvency proceeding) stance and proposed a term 'centre of administration', decisive in determining international jurisdiction. It reads in Article 3(1): 'Where 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.' According to Article 3(2), the centre of administration meant the place where the debtor usually administers its main interests. Due to proposed exclusivity, countries not having the debtor's 'centre of administration' were precluded from opening parallel insolvency proceedings.[5] However, local interests remained protected by the application of national insolvency rules with respect to assets located in each EEC jurisdiction.[6]

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[4] 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), http://aei.pitt.edu/5480/1/5480.pdf. Accessed 1 June 2019.

[5] States were allowed to open insolvency proceedings in the absence of 'centre of administration' only when (1) such centre was not in a Contracting State and (2) the debtor had an establishment in a Contracting State, requested to open insolvency proceedings (Article 4(1) 1980 Convention).

[6] As a consequence, multiplicity of insolvency estates (sub-estates) was created. This approach was inherited from the EEC Preliminary Draft Convention on Bankruptcy, Winding-up, Arrangements, Compositions, and Similar Proceedings (1970). The approach, if adopted, would have led to a perplexing and cumbersome arrangement. According to Fletcher, '[t]he sheer complexity of the exercise was truly horrifying, and would have resulted in much wasteful expenditure of administrative resources.' Fletcher 2016, para 1.17.

Despite the fact that the 1980 Convention was not adopted, the idea of having a connecting jurisdictional link in international insolvency cases migrated to the 1990 Istanbul Convention,[7] drafted under the auspices of the Council of Europe. It then reappeared in the 1995 European Convention on Insolvency Proceedings (1995 Convention), a document which strongly influenced both the UNCITRAL Model Law on Cross-Border Insolvency of 1997 (Model Law) and the EIR (now recast).[8] The 1995 Convention and the authoritative report accompanying it, the Virgós-Schmit Report,[9] proposed a model in which main insolvency proceedings having a universal scope were linked to (could be opened at) the jurisdiction of the debtor's COMI. The same approach is now followed by the EIR Recast.

The EIR Recast is the major instrument regulating cross-border insolvencies in the EU and is directly applicable in all EU Member States (except Denmark), replacing domestic private international law rules.[10] According to Article 3(1) EIR Recast, '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.' In case of a legal entity, the place of the registered office is presumed to be the centre of its main interests in the absence of proof to the contrary. COMI performs two main functions within the system of the EIR Recast. First of all, it allocates international insolvency jurisdiction for the opening of main insolvency proceeding. Secondly, 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, *lex concursus* governs powers of the debtor and insolvency practitioners, rules governing the distribution of proceeds from the realisation of assets and ranking of claims (see Article 7 EIR Recast). In addition to legal implications, the 'selection' of the insolvency jurisdiction affects the amount of transaction costs, arising from the opening of insolvency proceedings and participation in them (legal, transportation, translation and other costs).

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7 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.

8 The influence of the 1995 Convention on the Model Law is evident from its Guide to Enactment and Interpretation (1997), stating in para 18 that '[t]he Model Law takes into account the results of other international efforts, including the negotiations leading to the European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings.'

9 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.

10 The personal scope of the EIR Recast excludes certain types of companies. According to Article 1(2) EIR Recast, the Regulation shall not apply to proceedings concerning insurance undertakings and credit institutions. These categories of legal entities fall under special regulation, making the problem of COMI less relevant for them. For example, under Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding-up of credit institutions (CIWUD), the competent insolvency forum shall be the home Member State (Article 9 CIWUD), defined as Member State in which an institution (i.e. bank) has been granted authorisation. For more on EU banking insolvency see Moss et al. 2017.

This is why ascertainability of COMI is crucial for creditors, as they need to calculate the risks of investment, including risk premiums charged. The Virgós-Schmit Report convincingly states that insolvency is 'a foreseeable risk'. With few exceptions, no business is immune from insolvency.[11] It is therefore important that the insolvency jurisdiction is based on a place known to the debtor's actual and potential creditors. In case of contractual relations and (less so) in property law, parties may adjust their relations *ex ante* or *ex post*, e.g. by choosing an available remedy and a dispute resolution mechanism. This is generally not the case with insolvency law, which curbs party autonomy to ensure collective debt enforcement and *pari passu* distribution of value among the creditors. However, predictability (and suitability) of the international insolvency jurisdiction is not always guaranteed by the existing regulatory environment.

2.3 COMI: Problems Unravelled

Since the adoption of the EIR, substantial progress has been made in clarifying the concept of COMI and its application. A leading role in this has been played by the Court of Justice of the European Union (CJEU). Four years after the EIR had entered into force, in one of the first cases interpreting COMI, *Eurofood IFSC Ltd.*,[12] the CJEU stressed its autonomous 'supranational' meaning. The CJEU noted that COMI must be identified by 'reference to criteria that are both objective and ascertainable by third parties', hence allowing such parties to calculate the risks of dealing with the debtor. The simple presumption in favour of the jurisdiction of the registered office[13] can be rebutted only if objective and ascertainable factors indicate that COMI is somewhere else. This is the case of a 'letterbox' company not carrying out any business activity in the territory of its registered office. In the 2011 case of *Interedil Srl*,[14] the CJEU further reinforced the registered-office

[11] A situation of 'insolvency-proofness' existed in France as applied to establishments of an industrial and commercial character (EICC, or EPIC in their French acronym), such as La Poste. In French administrative law, EPICs are legal entities governed by public law which have distinct legal personality from the state. The status of EPIC entailed a number of legal consequences, including the inapplicability of insolvency and bankruptcy procedures under ordinary law. As a result, creditors of La Poste always had an implied and unlimited state guarantee that their unpaid claims would not be cancelled. This immunity from insolvency was, however, considered to be a source of (unlawful) state aid within the meaning of Article 87(1) EC. See *French Republic v. European Commission*, Case C-559/12 P, ECLI:EU:C:2014:217, Apr. 3, 2014.

[12] *Eurofood IFSC Ltd.*, Case C-341/04, ECLI:EU:C:2006:281, May 2, 2006.

[13] This presumption can be found in Article 3(1) EIR Recast, which states that '[i]n the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.' The same presumption appeared in Article 3(1) EIR.

[14] *Interedil Srl v. Fallimento Interedil Srl*, Case C-396/09, ECLI:EU:C:2011:671, Oct. 20, 2011.

presumption by making it impossible to rebut if the debtor's central administration and registered office are situated in the same country.

Despite efforts to achieve predictability, it has proven to be a challenging task. In the words of McCormack, 'the concept of 'centre of main interests' is inherently problematic and certainly capable of varying judicialinterpretations.'[15] One of the recent examples supporting this statement is the jurisdictional 'ping-pong' in the insolvency of NIKI, a subsidiary of Air Berlin registered in Austria. At first instance, the District Court of Charlottenburg in Germany accepted that since NIKI's business was operationally controlled and integrated with Air Berlin (Germany), which had practically been NIKI's only customer and sales generator, its COMI was in Germany.[16] The appellate court in Berlin disagreed, finding NIKI's COMI to be in Austria.[17] It noted that in deciding to rebut the registered-office presumption, high demands must be made in order to ensure legal certainty. Shortly after, the Austrian regional court of Korneuburg opened main insolvency proceedings in Austria.

Indeterminacy of COMI can equally play against the interests of a debtor and its management. EU Member States apply divergent rules and approaches when it comes to directors' duties in the period preceding insolvency, sometimes referred to as the 'twilight zone.'[18] Some jurisdictions (e.g. Germany[19]) mandate a strict obligation to file for the opening of insolvency proceedings within a prescribed period of time, imposing severe penalties for failure to do so. Others (e.g. the UK[20]) do not stipulate filing obligations, but regulate directors' behaviour through more flexible wrongful trading rules. In other words, the rules of the game differ from one jurisdiction to another. This is why it is of utmost importance for directors to know which rules apply at any given moment in time. Considering the vagueness of COMI, directors' duties in the period approaching insolvency may become uncertain.[21] This uncertainty together with personal liability of directors is capable of discouraging professional and responsible managers from directing and rescuing failing businesses.

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15 McCormack 2009, p. 185. See also Eidenmüller 2005, p. 430, noting that COMI as a standard is 'fuzzy and manipulative, allowing forum shopping in the immediate vicinity of bankruptcy.'

16 AG Berlin-Charlottenburg, 36n IN 6433/17, Dec. 13, 2017.

17 LG Berlin, 84 T 2/18, Jan. 8, 2018.

18 Keay 2015, pp. 140–164. See also INSOL International 2017.

19 Section 15a German Insolvency Code.

20 Section 214 Insolvency Act 1986.

21 For example, in *Simona Kornhaas v. Thomas Dithmar* the CJEU held that liability for the failure to perform the obligation to file for the opening of insolvency proceedings was to be determined according to the German law (*lex concursus*), despite the fact that the debtor company was registered in the UK. This case shows that the applicable company and insolvency rules may fall under different legal (and jurisdictional) regimes, further complicating the position of the debtor's management. See *Simona Kornhaas v. Thomas Dithmar*, C-594/14, ECLI:EU:C:2015:806, Dec. 10, 2015.

In 2016 the Proposal for a Restructuring Directive (Proposal)[22] was published. Its main goal is to ensure access to national preventive restructuring frameworks which enable enterprises and entrepreneurs in financial difficulties to continue operating and effectively (financially and operationally) restructure. Among other things, the Proposal acknowledges that to 'further promote preventive restructurings, it is important to ensure that directors are not dissuaded from exercising reasonable business judgment or taking reasonable commercial risks.'[23] In a situation of jurisdictional uncertainty, this becomes an uphill battle. The next sections discuss three situations or developments, which might highlight the need to revisit the applicable European rules on determining international insolvency jurisdiction.

2.3.1 Uncertainty and European Capital Markets

The lack of clarity with regards to the insolvency jurisdiction and the applicable law deprives creditors of the opportunity to calculate insolvency-related risks, should their counterparty go insolvent. A good case exemplifying this comes from the European capital markets.

As more traditional sources of finance became scarce in the post-financial crisis era, debt capital market products have gained momentum.[24] As a result, many authors highlight the shift in debt structures of companies and corporate groups and the increasingly important role of bondholders in the insolvency (restructuring) process.[25] To ensure investor protection and market efficiency, various regulatory instruments have been adopted in Europe to spur capital flows and cross-border investment. One of the early examples of such regulation is the EC Prospectus Directive.[26] This Directive sought to improve the quality of information provided to investors by companies wanting to attract external investors in order to raise capital

[22] Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30, COM (2016) 723 FINAL-2016/0359 (COD). Unlike the EIR Recast, which creates a binding uniform cross-border private international law framework, the Directive aims at harmonising domestic insolvency (restructuring) laws and needs to be transposed into national laws of Member States.

[23] Recital 36 of the Proposal. The importance of fostering reasonable risk taking and encouraging business reorganisation is also stressed in Principle B2 of the World Bank's Principles for Effective Insolvency and Creditor/debtor Regimes, 2016.

[24] Finch and Milman 2017, p. 246.

[25] Dakin et al. 2012, p. 120.

[26] Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC. The Directive 2003/71/EC is repealed with effect from 21 July 2019 by the Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC, COM (2016) 723 Final.

in the European market. The EC Prospectus Directive, with limited exceptions, requires the publication of a prospectus prior to the offering of securities within the European Economic Area (EEA) (Article 3). According to Article 5 of the Prospectus Directive, 'the prospectus shall contain all information which […] is necessary to enable investors to make an informed assessment of the assets and liabilities, financial position, profit and losses, and prospects of the issuer and of any guarantor, and of the rights attaching to such securities.' Adequate and timely disclosure of information shall protect investors' expectations and help them calculate risks and profits attached to the investment.[27]

Since disclosure represents forward-looking information, on the basis of which investors assess their future earnings, and because insolvency is a calculable risk, it can be expected that prospectuses will cover the insolvency scenarios. Against this background, a selection of prospectuses filed with authorities of the EU Member States has been analysed to find out if this is indeed the case. The chosen prospectuses date from 2009 until 2017 and are therefore covered by the temporal scope of the Prospectus Directive. While this selection does not claim to be comprehensive or in any way representative, it can serve as a starting point in discussing the legitimate expectations of bondholders (investors) in case of the issuers' insolvency. The issuers, whose prospectuses have been studied, include PETRONAS Capital Limited,[28] 4finance S.A.,[29] TUI AG,[30] Photon Energy N.V.[31]

Apart from the usual complexity and extensive length of prospectuses, the first observation to be made is that most of the bond prospectuses mention the issuer's (and guarantor's) insolvency as a potential risk for investors. However, the depth of clarification of such a risk, the explanation of rights of creditors (including their ranking), the applicable law and potential insolvency forum differ significantly. For example, the prospectus of PETRONAS Capital Limited mentions the word 'insolvency/bankruptcy' only once. In contrast, 4finance S.A. allocates a large section describing the insolvency-related risk factors, including enforceability of the notes and guarantees in each of the jurisdictions in which the issuer and the guarantors are organised or incorporated. The difficulty of enforcing guarantees across multiple jurisdictions, caused by ambiguity and unpredictability of applicable insolvency rules has been also stressed in the prospectus of TUI AG. This may be attributed to the problems of determining COMI of the issuer and other parties involved. As explained in the 4finance S.A.'s prospectus, '[t]he determination of

[27] See Georgakopoulos, arguing that disclosure rules lead to reductions in transaction costs, higher security prices and lower cost of capital. In turn, '[a]ccurate prices make trading less risky and, hence, more appealing.' Georgakopoulos 2017, p. 75.

[28] PETRONAS Capital Limited prospectus dated 12 August 2009, International Securities Identification Number (ISIN) USY68856AH99, Common Code 044509822.

[29] 4finance S.A. prospectus dated 5 August 2016, ISIN XS1417876163, German Securities Identification Number (Wertpapierkennnummer WKN) A181ZP, Common Code 141787616.

[30] TUI AG prospectus dated 21 October 2016, ISIN XS1504103984, Common Code 150410398, WKN A2BPFK.

[31] Photon Energy N.V. prospectus dated 21 September 2017, ISIN DE000A19MFH4.

where any such company has its "center of main interests" is a question of fact on which the courts of the different EU Member States may have differing and even conflicting views'.[32] The prospectus of Photon Energy N.V. in similar vein states that '[i]n case the Issuer faces financial difficulties, it is not possible to state with certainty, which legal regulations would govern potential opening of insolvency or similar proceedings, or even anticipate the result thereof'.[33]

Even with this limited selection of prospectuses, it becomes clear that insolvency is treated as an inherently unpredictable situation, a kind of a black box, both in terms of the appropriate (or probable) insolvency forum, the validity and enforceability of guarantees, ranking of bondholders' claims and applicable *lex concursus*. This situation is unsatisfactory and goes against the very purpose and principles of securities (i.e. prospectus) and insolvency regulation.

Another layer of complexity arises from the fact that issuers do not usually act on a standalone basis, but instead attract finance as a corporate group, consisting of several legal entities, acting as guarantors or co-issuers. Considering this, the Commission Regulation (EC) No. 809/2004,[34] mentions that prospectuses should disclose the terms, conditions and scope of the guarantee (Annex VI). Thus, if a parent company guarantees performance of debt obligations assumed by its subsidiary, both the description of the guarantee and the guarantor must be given. Minimum disclosure requirements also include organisational structure. If the issuer is part of a corporate group, a brief description of the group and of the issuer's position within it shall be provided. More so, if the issuer is dependent upon other entities within the group, this must be clearly stated together with an explanation of this dependence (Annex IX).

The prospectuses referred to in this chapter describe in detail the position of issuers in corporate group structures. For instance, PETRONAS Capital Limited (Malaysia) is described as a 'wholly-owned special purpose finance subsidiary of PETRONAS, which has been established for the purpose of issuing debt securities and other obligations from time to time to finance the operations of PETRONAS'.[35] This is a typical example of a special purpose company that serves as a financing vehicle for its global parent. 4finance S.A. (Luxembourg) is a part of a consolidated group of companies under the holding company 4finance Holding S.A. 4finance S.A. provides financing to the group companies and is financed through its share capital, external debt and cash from the activities of the group's operating companies.[36] The notes issued by 4finance S.A. are unconditionally and irrevocably

32 Supra note 29, at 244.

33 Supra note 31, at 50.

34 Commission Regulation (EC) No. 809/2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements. This Regulation contains over two hundred pages of detailed description of information to be disclosed to investors.

35 Supra note 28, at title page.

36 Supra note 29, at 135.

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guaranteed on a joint and several basis by its parent company and some other group members. Quite the opposite, Photon Energy N.V. is not a special purpose entity, but a holding company with stakes in more than 50 entities, whose activities lie in selection (investment analysis, project acquisition), financing and implementation (investing in the construction) of various projects.[37]

The relative clarity of a group structure and a role performed by an issuer within that structure are crucial in assessing investment risks and, what is more relevant for this article, insolvency risks. More alarming are provisions referring to the occurrence of insolvency itself, since they highlight uncertainty and unpredictability of the insolvency forum and the applicable insolvency law. This brings up the question, to what extent insolvency law and the concept of COMI, in particular, serve the interests of corporate groups and their stakeholders in a situation of financial crisis? The next section of the chapter purports to deal with this question.

2.3.2 Singular Vision and Multinational Enterprise Groups

The principles of (modified) universalism and procedural efficiency, equal treatment of creditors and maximisation of the estate value have played a leading role in the modernisation of insolvency rules in the 20th century, both at the domestic and regional levels. For the most part, such rules possessed two characteristics. First, they were liquidation-oriented, entailing cessation of the debtor's business in the efficient manner and distribution of proceeds from asset realisation.[38] Second, they had a single-entity (i.e. single debtor) insolvency process in mind, thus lacking provisions related to groups of companies. For instance, neither the Directive on the reorganisation and winding up of credit institutions (CIWUD),[39] nor the original EIR (EIR)[40] provided for coordination of insolvency proceedings opened against members of the same corporate group.[41] Neither did the Model Law. It took more than 30 years to agree on a unified set of basic rules and principles underpinning insolvency regulation within the EU, exemplifying complexity and political sensitivity of the matters concerned. Unsurprisingly, the issue of group insolvencies was left out. The difficulty

[37] Supra note 31, at 10.

[38] The scope of the EIR covered only 'collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator.' (Article 1(1) EIR). In addition, according to Article 3(3) EIR, secondary proceedings had to be winding-up proceedings.

[39] Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions.

[40] See supra note 9, in para 76 highlighting that the Convention (predecessor of the EIR) 'offers no rule for groups of affiliated companies (parent-subsidiary schemes).'

[41] According to the Bank for International Settlements, the global financial crisis has illustrated the shortcomings of the current bank resolution regime and in particular the 'absence of a process for the coordinated resolution of the legal entities in a financial group or financial conglomerate,' thereby limiting the chances of 'coordinated resolution of such cross-border groups or conglomerates.' Bank for International Settlements 2010, p. 24.

of designing a harmonised private international law regime for insolvency of corporate groups in Europe can also be attributed to the fact that the notion of a 'group of companies' did not have any equivalent in some of the domestic laws of the Member States, let alone a single approach at the European level.

The adoption of the EIR Recast in 2015, the Bank Recovery and Resolution Directive (BRRD)[42] in 2014 and the continued work of the UNICTRAL Working Group V on draft legislative provisions facilitating the cross-border insolvency of enterprise groups signify a second stage in the development of modern insolvency law. The question remains, whether the concept of COMI, developed in, and belonging to, the first stage of insolvency regulation (second half of the 20th century) serves well in the new stage.

There is no universal definition of a corporate group. For instance, the EIR Recast defines 'group of companies' as a parent undertaking and all its subsidiary undertakings (Article 2(13)). The Draft model law on enterprise group insolvency (Model Law on Group Insolvency), prepared by the UNCITRAL's Working Group V, characterises an 'enterprise group' as 'two or more enterprises that are interconnected by control or significant ownership.'[43] Mevorach has developed a comprehensive typology of multinational enterprise groups, depending on their level of organisational integration and interdependence.[44] While some groups may consist of relatively self-sufficient business units (e.g. conglomerate group of companies, responsible for separate product/industry lines), others are notable for running a cohesive enterprise. It is the latter type of integrated corporate groups that deserves special attention in insolvency, since the failure of one group member can be contagious and lead to a domino effect for all other group members. The absence of a group-wide solution to financial distress may result in a piecemeal liquidation of assets and suboptimal returns to group creditors.

In a group scenario, problems associated with parallel insolvency proceedings multiply. Protection of enterprise integrity in a single entity, conducting cross-border operations is significantly stronger compared to protection available to cross-border enterprise groups. For example, according Article 20 of the Model Law, recognition of a foreign main proceeding leads to a stay of execution against the debtor's assets. The same effect is created by Article 20 EIR Recast, which extends the effects of the opening of insolvency proceedings under *lex concursus*

[42] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council.

[43] See Annex to the Report of Working Group V (Insolvency Law) on the work of its fifty-fourth session (Vienna, 10–14 December 2018), Article 2(b).

[44] The classification of prototypes of corporate groups is built around three dimensions, namely insolvency scenario (group collapse v. insolvency of a single member), level of integration and interdependence of corporate group members (from weak (or no) integration to asset integration), degree of management centralisation (from centralised 'head' office to hierarchical networks). For description of prototypes see Mevorach 2009, pp. 136–147.

(typically including enforcement moratorium) to all other EU Member States (except Denmark). Similar tools are unavailable for corporate groups—a stay on individual enforcement actions adopted with regard to one legal entity will usually not apply to another group member, even more so when the latter is located in a different Member State. This situation is further exacerbated by the practice of cross-guarantees, a pervasive arrangement between two or more related companies to provide reciprocal guarantees for each other's liabilities.[45] Cross-guarantees transmit credit risks across parent-subsidiary boundaries, allowing simultaneous filing of claims against several related companies. As a result, the infamous run to court transforms into multiple runs to multiple courts. While cross-guarantees arguably lower the interest rates for the group when it is solvent, they may simultaneously dilute the returns to non-guaranteed creditors upon insolvency.[46] Thus, the collective action and the common pool problems, characteristic of a crisis environment, remain unresolved, generating a ripple effect of failures and potentially upsetting the equality of creditors.

Financial interdependence of corporate groups is neglected by legal separation in insolvency, which can be exploited by some of the creditors. The holdout problem created by the tragedy of 'anticommons'[47] is exacerbated at a group level. When negotiating a restructuring solution for a group as a whole, creditors of some of its members may adopt rent-seeking behaviour, refusing to vote in favour of a plan, even when such a plan is Pareto efficient for all group creditors.[48] Creditors, whose claims are secured by cross-guarantees or numerous pledges, might have even fewer incentives to cooperate and adhere to a restructuring plan if the plan entails deferral of payments or partial debt cancellation.[49] If some of the entities within a

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45 Levitin 2019, p. 168.

46 Squire 2011, p. 608.

47 In short, anticommons 'present themselves in a situation in which there are several owners or entitled parties, and each of the parties has it within its power to block the use by others.' De Weijs 2012, p. 67. As a result, a single party may sabotage a collectively beneficial solution. Unlike the common pool problem, characterised by overuse of common pool resources (insolvency estate), the problem of anticommons leads to underuse, since each party may veto the use by others. For the discussion of tragedy of anticommons in the context of restructuring law see Madaus 2018, pp. 615–647.

48 An outcome may be considered Pareto efficient (Pareto optimal) where it is not possible to change the situation to make somebody better off without making someone else worse off. In insolvency, the concept of Pareto efficiency may be manifest 'where an insolvency decision or choice produces a greater return to some creditors without reducing the return to any other creditor.' Morrison and Anderson 2013, p. 196.

49 The hold out position of secured creditors is exacerbated by the existing substantive rules, such as the absolute priority rule (see Section 1129(b)(2) of the U.S. Bankruptcy Code, also suggested in the EC Proposed Restructuring Directive, COM (2016) 723 final). This rule ensures that a dissenting class of creditors is paid in full before a more junior class can receive any distribution or keep any interest under the restructuring plan. In a group context, the rigidity of the absolute priority rule increases due to the differences in priority of creditors across jurisdictions. For criticism of the rule, see Baird 2016, pp. 785–829; Stanghellini et al. 2018, p. 46, suggesting introduction of a relative priority rule.

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group of companies approve the restructuring plan, while others reject it, the utility of the plan and its success become doubtful. Creditors of the rejecting group member will not be bound by the restructuring plan and could pursue enforcement (e.g. foreclosure of the pledged property). Unlike with single entity insolvencies, rules on cram down do not apply in a cross-group framework—there is no cross-entity cram down. As a consequence, the group asset pool is diluted, enterprise value is diminished and restructuring fails.

As noted above, the EIR did not tackle the problem of group insolvencies. Clearly, this instrument was drafted with a single-entity debtor in mind. This singular vision has been supported by the CJEU's decision in *Eurofood IFSC Ltd.*, in which it was stressed that in a situation of a group of companies, COMIs of its members shall be determined separately (entity-by-entity approach). The court relied on the principle of effectiveness, but considered such effectiveness in a narrow sense (single-entity-effectiveness), not paying enough attention to context of a complex multinational enterprise, experiencing financial difficulties in multiple jurisdictions at the same time and trying to pursue restructuring in a single point of entry.[50] The approach taken by the CJEU could be partially explained by the liquidation-oriented nature of the EIR. However, even if the company is destined to be liquidated, the highest possible realisation of its value may depend on whether coordinated group-wide solution (e.g. going concern sale) is available.

As opposed to the EIR, the EIR Recast contains a whole chapter (Chap. 5) dedicated to group insolvencies, with over twenty articles. Nevertheless, the entity-by-entity approach developed by the CJEU, deeply ingrained in the European insolvency law, has not changed with the adoption of the EIR Recast. The latter does not introduce the concept of 'group/enterprise COMI.'[51] Neither does it sanction substantive (pooling of assets and liabilities) or procedural (single insolvency proceeding) consolidation of insolvency proceedings opened against members of a group of companies.[52] It does, however, provide (albeit in the recital) that the court should have the power to open insolvency proceedings for several companies belonging to the same group in a single jurisdiction if the court finds that the

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[50] The CJEU's failure to address the treatment of related entities in a corporate group with systemic insolvency problems was highlighted by Bufford in Bufford 2007, p. 403.

[51] On the idea of 'enterprise center of main interests (ECOMI)', see Bufford 2012, pp. 685–747.

[52] It should be noted that some European jurisdictions allow for the pooling of assets and liabilities of some or all members of a corporate group, so that a creditor of one member becomes, in essence, a creditor of all members. For instance, art L. 621-2 of the French Commercial Code provides for a consolidation of insolvency proceedings against companies whose property is intermixed or where the corporate body is a sham. However, due to entity shielding and legal separability, substantive consolidation remains extremely rare in Europe. In Case C-191/10, *Rastelli Davide e C. Snc v. Jean-Charles Hidoux*, Case C-191/10, ECLI:EU:C:2011:838 (Dec. 15, 2011), the CJEU had to decide whether the court, having opened the main insolvency proceedings in one Member State (France), could join to those proceedings a second company whose registered office was in another Member State (Italy) solely on the basis that the property of the two companies had been intermixed. The court noted that the legal personality of the two debtors should be respected and that each debtor constituting a distinct legal entity was subject to its own court jurisdiction.

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centre of main interests of those companies is located in a single Member State (see Recital 53). Bringing members of a corporate group into a single insolvency forum can significantly reduce transaction costs arising from multiple insolvency proceedings and enhance the chances for a successful restructuring (rescue) of a group as a whole. However, in practice this can be problematic, bearing in mind the singular nature of COMI determination under the EIR Recast. In groups with several operating subsidiaries located in different Member States, locating COMI of all or the majority of group members in the same jurisdiction is highly unlikely. The result is the multiplication of insolvency proceedings, protracted litigation, increased costs, coordination difficulties and reduced chances of a successful group-level resolution.[53]

The rise of corporate groups is not the only development that sits uneasily with current insolvency rules related to insolvency jurisdiction. The next section explores how the modern trends towards decentralisation of business ownership and control challenge our understanding of the centre of main interests.

2.3.3 COMI, New Business Models and Changing Corporate Landscape

Large vertically integrated firms prevailed over the course of the 20th century, the time when the foundation of the modern insolvency law was laid. Throughout that century ‘centralisation was the dominant philosophy, a shift brought about largely by the invention of Alexander Graham Bell.’[54] COMI is also a product of that period in history and was therefore affected by the economic and business conditions existing at that time. It should be relatively easy to find the centre of main interests of a railroad company or a vertically integrated manufacturing company. However, the concept becomes less straightforward or practicable in light of the changing corporate landscape. Among relevant developments, proliferation of cooperative (contract-based) enterprises, platform (sharing) economy, and the diminishing role of integrated corporate structures.[55] One can only imagine how the ensuing complexity will affect the ‘traditional’ approach to corporate structures as well as to finding COMI in a situation of distributed management, where it is either highly problematic or outright impossible to locate the place where the debtor ‘conducts the

53 A recent example of a complex group restructuring is the case of the Oi Group, Brazil’s largest fixed-line telecoms operator. The restructuring process took around two years, led to extensive litigation in Brazil, the Netherlands and New York and extended to seven legal entities, including two special purpose entities registered in the Netherlands. A large portion of litigation related to the determination of COMIs of Oi’s Dutch subsidiaries. For more on the Oi case see Kokorin and Wessels 2018.

54 Decentralisation—Idea, The Economist, 2009, https://www.economist.com/news/2009/10/05/decentralisation. Accessed 1 June 2019.

55 Gilson et al. 2009, pp. 431–502.

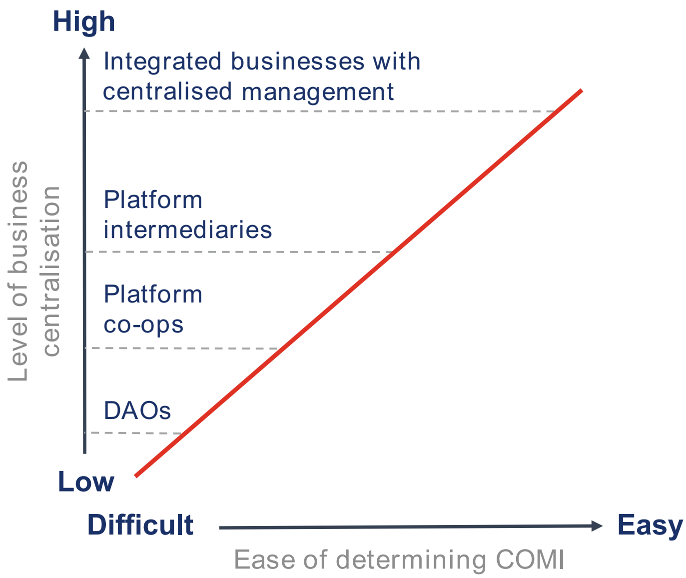

Fig. 2.1 COMI determination and business (management) centralisation

administration of its interests on a regular basis and which is ascertainable by third parties.' The following figure shows a correlation between, on the one hand, the level of business centralisation (from low centralisation to high centralisation of management functions) and the relative ease of determining COMI (from 'difficult' to 'easy'), on the other hand. Thus, highly decentralised business models (like DAOs and unincorporated platform cooperatives (co-ops), addressed below) present the biggest challenge to the concept of COMI and its application in practice (Fig. 2.1). AQ2

2.3.3.1 Platform Enterprises and Decentralised Ownership

Ironically, whereas the technological progress of the 19th century (e.g. invention of telegraph and telephone) promoted integration and centralisation of corporate structures,[56] modern technologies seem to pull to the opposite direction by advancing decentralisation. The ease with which information can be accessed and disseminated nowadays simplifies access to corporate decision-making and corporate ownership, e.g. through equity crowdfunding facilitated by platforms like SeedInvest and Wefunder.

[56] Before that, large businesses were typically decentralised. Such was, for instance, the case with the East India Company, whose multi-divisional nature (separation of powers between the board of directors and relatively independent overseas managers (factors) was highlighted in a number of studies. See Erikson 2014; Anderson et al. 1983, p. 226.

Another decentralising factor arises from the way platform-based businesses operate in general. A good example is Uber, a ride-hailing service, which connects drivers (or driver-partners, as Uber prefers to call them) and riders through a smartphone application. Despite local presence, the largest portion of legal relations with the service-provider is shaped electronically, by downloading and using the application for drivers or riders. Uber portrays itself as a market intermediary and not as a provider of transportation and logistics services.[57] This has an effect on its assets side, as Uber does not own cars.[58] The changing capital structure does not necessarily fit the procedures and even principles of insolvency laws, drafted against the background of assets-heavy industries.[59] Baird persuasively claims that '[f]ew businesses today center around specialised long-lived assets. In a service-oriented economy, the assets walk out the door at 5:00 pm.'[60] Here I make a point that such assets-light platform-based businesses also cast doubt on the rules determining insolvency jurisdiction, particularly when it comes to ascertainability and predictability. Platforms insulate service providers from their users-creditors/debtors by virtue of online space.

According to Uber's Terms of Use, when ordering a Uber-taxi in Spain, Austria or Poland, riders actually enter into a contract with Uber B.V., a private limited liability company established in the Netherlands. While Uber claims that the arranged transportation is then performed by independent third parties, the platform operator remotely controls contracts concluded via the platform with the use of algorithmic rules. Such rules determine, inter alia, a suggested route for each trip and service fees charged.[61] This enables 'platform operators to install data-driven governance structures and exercise control over production and distribution of goods and services without the need for the organisational structure and corporate form of a firm.'[62] Taking into account this algorithmic governance (regulation by technology), it becomes doubtful whether the jurisdiction of the registered office (i.e. the Netherlands) or any other jurisdiction is sufficiently ascertainable either from the drivers' or riders' perspective. Customer and contractor relations are established via the platform's interface, with little knowledge of (or the possibility to know) where Uber actually administers its interests on a regular basis.

Whereas the example of Uber is linked to the issue of notifying creditors about the identity and location of their counterparty (and of its COMI), other examples

[57] See Uber's U.S. Terms of Use, effective 13 December 2017.

[58] It does, however, impose requirements on the model, year and capacity of cars used by Uber drivers.

[59] See Roe 2017, p. 215, suggesting that while collective bankruptcy proceedings are needed for industries comprised of big, vertically integrated firms, they may lose appeal in case of decentralised organisational structures.

[60] Baird 2004, p. 82.

[61] These rules are supplemented by the layer of self-regulation, evidenced in the Community Guidelines. https://www.uber.com/en-GH/drive/resources/community-guidelines/. Accessed 1 June 2019. For more on regulatory aspects of platform economy, see Finck 2017.

[62] Busch 2018, forthcoming in: Cantero Gamito and Micklitz 2019.

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revolve around dispersed ownership, which is associated with the proliferation of various crowdfunding platforms.[63] As a new form of technology-enabled financial service, 'crowdfunding carries the potential to help better match investors with business projects in need of funding.'[64] Importantly, unlike debt investors (e.g. bond purchasers), equity investors become owners of stock. This is why their position in the insolvency context is very different from that of unsecured creditors. As a matter of practice, in insolvency (restructuring) proceedings equity is either substantially diluted or wiped out completely. Nevertheless, many problems concerning ascertainability, investor protection and risk calculation connected to investment in corporate bonds are just as relevant for equity investment. Dispersed shareholding and control rights, as well as involvement of a crowdfunding platform may conceal the actual decision-making process[65] and make ascertainment of COMI by creditors more problematic.

2.3.3.2 Blockchain and Decentralised Management

But an even larger challenge lies in technological developments, characterised by a distributed nature, trustless consensus mechanics and undisputed reliability.[66] The first and by far the most famous example of the latest inventions is Bitcoin, a cryptocurrency that operates on a P2P basis, i.e. without an intermediary or central authority such as governments or banks. All transactions between Bitcoin users are verified and validated by other users and recorded in a public distributed ledger ('blockchain'). Despite the fact that the cryptocurrency did not become prominent in retail transactions, Bitcoin has turned into an investment asset, and (maybe more importantly) introduced the blockchain technology into the world. Blockchain makes it possible to record multiple transactions in a decentralised and distributed manner so that such transactions cannot be altered retroactively.

Apart from its use for cryptocurrencies, blockchain allowed the creation of the so-called DAOs or decentralised autonomous organisations, which in essence are computer codes that allow people from all over the world with access to the Internet to anonymously (pseudonymously, to be more accurate) enter into series of transactions, which are enforced and recorded on blockchain. They are therefore globally decentralised (not linked to any particular jurisdiction) and distributed among their users.[67] Without going too far in explaining the technical side of DAOs, it is sufficient to say that they allow a partnership-like 'entity' to exist,

[63] Schwartz 2015, p. 634.

[64] EC Proposal for a Regulation of the European Parliament and of the Council on European Crowdfunding Service Providers (ECSP) for Business, COM (2018) 113 final, 2018.

[65] See Walthoff-Borm et al. 2018, noting on p. 317 that 'the more ownership becomes dispersed, the more challenging it will be to align the interests of all crowd investors.'

[66] This part draws on Kokorin 2017.

[67] De Filippi and Wright 2018, p. 148.

attract new investor-users and make decisions by majority voting of its users. As a result, the separation of ownership and control becomes less prominent. In turn, access to (corporate) governance becomes more open. This makes DAOs more similar to the Athenian polis (ancient Greek city-state) with its (direct) democracy than a corporation with separate ownership and control as famously described by Berle and Means.[68]

A DAO is based on a decentralised model—its members may be unaware of who other members are and which countries they come from. Besides, there is no central authority or management, as decisions are made by DAO's members (so called 'token holders') themselves by way of voting on proposals. Each transaction is kept on the blockchain. Given these characteristics, it becomes especially problematic (if not impossible) to connect a DAO to any particular jurisdiction. One of the first DAOs was The DAO. The DAO acted as a venture capital vehicle, whose members acquired 'ownership' stakes by spending cryptocurrency called Ether (digital value token of the Ethereum blockchain) on The DAO's 'shares' or tokens. The DAO had no physical address, employees or formal management. Even though the exact legal status of The DAO (or any DAO for that matter), is unclear, whereas risks (both regulatory and operational) remain high, it managed to raise more than USD 150 million during a feverish, 27-day token sale. Yet a then unforeseen flaw in The DAO's code was exploited, resulting in a USD 60 million loss and the collapse of the project.[69]

Despite the fact that The DAO's fate was doomed, its failure did not undermine the prospects for decentralised organisations.[70] Modern technological advancements, allowing 'trustless' decision-making between anonymous persons will play an ever-bigger role in the future. And with this rise of decentralisation in mind, it will be increasingly difficult to find a linking factor to any single jurisdiction. The conservative criteria formulated for locating COMI, especially the idea that it

[68] Berle and Means 1932.

[69] For more on the DAO and its collapse see D. Siegel, Understanding the DAO Attack, Coindesk, 25 June 2016. https://www.coindesk.com/understanding-dao-hack-journalists. Accessed 1 June 2019.

[70] The creation of self-organising companies that run via software and allow people to collaborate with each other without command-and-control type of internal regulation or formal incorporation is foreseen by a number of innovative startups. For instance, The Colony Protocol proposes the creation of a 'new "Nature of the Firm" by significantly reducing both the transaction costs of the market exchange mechanism for labour, and trust required for people to work together.' This should result from integration of decentralised and self-regulating division of labour, decision making, and financial management into the applications. See Colony. Technical White Paper, 27 July 2018. https://colony.io/whitepaper.pdf. Accessed 1 June 2019. On the discussion of Colony's proposed capital and governance structure see also Mannan 2019. Another example is Aragon Network, which aims at providing a 'mechanism for pseudo-anonymous blockchain entities, including decentralised autonomous organizations (DAOs) and individuals, to create flexible human-readable agreements that are enforceable on-chain.' See Aragon Network White Paper. https://github.com/aragon/whitepaper. Accessed 1 June 2019.

should be ascertainable by third parties, simply does not fit the new decentralised world paradigm. In decentralised entities, where there is no formal management, decision-making is inherently democratic. There are no physical assets—only digital tokens and claims arising from them. Besides, such entities do not have offices or officers, while the stakeholders might be scattered around the globe.

Algorithmic governance, embraced by new platform-based business models, and decentralised decision-making, facilitated by blockchain technology provide reasons to doubt whether linking insolvency jurisdiction to the place of ‘administration of interests on a regular basis’ or the registered office remains operational and feasible. The next section considers several ways that can make insolvency jurisdiction rules more up-to-date with modern technological, corporate and financial developments.

2.4 The ‘New Age’ and New Approaches to Insolvency Jurisdiction

In the previous sections, we introduced the concept of COMI as currently applied under the EIR Recast. It was shown that there are difficulties of using COMI as a jurisdictional link to determine the insolvency forum. The lack of clarity and ascertainability of COMI-jurisdiction appears unsettling and leads to a situation in which insolvency is treated as an unpredictable event, both in terms of the insolvency forum and related applicable law. As a result, up to the point of a default (or even after the default), investors struggle in calculating insolvency-related risks of their investment and, similarly, other creditors face the same struggle. The EIR Recast attempts to tackle the endemic concern over COMI’s vagueness with the introduction of a presumption that a company’s registered office coincides with its COMI (Article 3(1) EIR Recast). This is a half-hearted solution. Firstly, the value assigned to the registered office presumption and the comparable ease of its rebuttal vary depending on the interpretation given by a particular court or a judge, as exemplified by NIKI’s insolvency, discussed above. Secondly, the presumption falls short of addressing situations of groups of companies as the legal separation (insulation), facilitated by the presumption, may ignore economic reality and frustrate group-wide restructuring. Thirdly, company registration plays a lesser role, or is less ascertainable, in the context of decentralised ownership and decision-making. For example, decentralised autonomous organisations or platform cooperatives may exist without formal corporate registration and operate through algorithms (smart contacts).

This section of the chapter looks at three ‘enhanced’ approaches to the treatment of insolvency jurisdiction. These approaches are not meant to substitute or undermine the prevailing doctrine of COMI, embraced both by the Model Law and the EIR Recast (although, not necessarily in a consistent way), thus cumulatively

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covering around 60 jurisdictions.[71] Instead, they serve the purpose of supplementing the application of the COMI concept.

The chapter began by stressing that the power of creditors and other stakeholders to make a choice of the insolvency forum is significantly curtailed. The starting point is that parties cannot freely select the forum where the resolution of the debtor's insolvency should take place. This limitation to party autonomy can be attributed to the never really discussed pre-occupation that 'insolvency law' is 'public law' and should therefore be handled by courts, which are public institutions. Another attribution is formed by the fears of abusive forum shopping, where COMI is shifted for the purposes of benefiting certain actors (e.g. debtor's management and owners) to the detriment of the general body of creditors.[72] While the dangers of abusive forum shopping must not be underestimated, the real negative economic effects of such practice is difficult to calculate. Besides, value-destructive forum shopping may be addressed by less intrusive and more narrowly tailored means than outright prohibition of insolvency-forum contracting (as it should preferably be referred to).[73] In light of this, it may be suggested that serious consideration needs to be given to the possibilities of parties (debtors and creditors) to shape *ex ante* and *ex post* the insolvency process, including the international insolvency jurisdiction.

The previous section highlighted that insolvency stakeholders cannot freely choose the insolvency forum and the applicable insolvency law. This limitation has two major consequences. First, creditors cannot adequately calculate investment risks *ex ante*, since insolvency remains outside the scope of their control. Second, upon insolvency, *ex post* control over the choice of the insolvency jurisdiction and *lex concursus* is further restricted. This leads to suboptimal results, as credit costs are increased, while the option of selecting the optimal insolvency regime (and its tools) to effectively address financial distress becomes unavailable. The outcome ultimately hurts both creditors and debtors.

In the 1980s, the Creditors' Bargain theory was proposed to offer a comprehensive normative theory of insolvency (bankruptcy) law.[74] According to this

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[71] The term 'centre of main interests' is also used in the Cape Town Convention on International Interests in Mobile Equipment (2001), covering more than 70 states, as well as the European Union. For status of the Convention see https://www.unidroit.org/status-2001capetown. Accessed 1 June 2019.

[72] According to Recital 29 EIR Recast, '[t]his Regulation should contain a number of safeguards aimed at preventing fraudulent or abusive forum shopping.' For more on insolvency forum shopping see Ringe 2017, pp. 38–59; Eidenmüller 2009.

[73] Such measures are already ingrained in the structure of the EIR Recast. For example, Article 3 (1) EIR Recast contains the so called 'suspension periods' for COMI shifts carried out shortly before the debtor files for insolvency. The EIR Recast provides that the change of the debtor's registered office within 3 months prior to the insolvency filing disables the registered office presumption. This is a mandatory and inflexible rule, which cannot be overridden by the parties' consent. Thus, the fact that the COMI-shift has been approved by the debtor and all (or substantial majority) of its creditors, and is beneficial for all the parties concerned, has no legal effect.

[74] Jackson 1982, pp. 857–907; Jackson 1986.

theory, insolvency rules can be seen through the prism of an implicit bargain reached by creditors of a debtor. In other words, insolvency is viewed as a system 'designed to mirror the agreement one would expect the creditors to form among themselves were they able to negotiate such an agreement from an *ex ante* position.'[75] This chapter does not aim at supplying a comprehensive overview of this theory. Neither does it claim that this theory can fully explain or support the observable shift of insolvency law to a contract paradigm. Instead, it suggests that the Creditors' Bargain theory provides a useful explanatory toolbox and can be seen as a starting point to the analysis of current insolvency rules and ways to improve them, extending far beyond the justification of the collective nature of insolvency proceedings.[76] From the creditors' point of view, inefficiencies created by the blanket prohibition of the *ex ante* or *ex post* choice of insolvency forum and insolvency law are obvious. These inefficiencies may lead to the increase in strategic costs (e.g. calculating insolvency-related risks or negotiating over additional security), decrease in the aggregate pool of assets (e.g. due to inadequate insolvency regime or costly COMI-shifts) and the rise of administrative inefficiencies (e.g. costs of COMI-related litigation or communication between insolvency practitioners and courts).

In this context, it may serve the collective interests of creditors as a group to agree on the insolvency-related conditions in advance or *ex post*. Such an agreement could result in the reduction of uncertainty, which itself must be viewed as a virtue, leading to improved efficiency of insolvency proceedings. In the absence of certainty, incentives are created for both the debtor and its creditors to manipulate (search for self-serving) insolvency jurisdiction and/or the applicable law. As noted above, uncertainty equally plays against the management of ailing businesses, since the prospects of personal liability act as a deterrent to active management. Consequently, directors may embrace conservative, risk-minimising strategies, shifting from 'an active management mode to one of passive asset-preservation.'[77] These considerations make it likely that a general unsecured creditor and a debtor will agree to the possibility of *ex ante* or *ex post* contracting for the insolvency forum. Such an agreement will arguably lead to the decrease in strategic costs, an increase in the aggregate pool of assets and reduction of administrative inefficiencies.

The Creditors' Bargain theory deals with hypothetical or implicit contracting, which is attributed to practical difficulties of reaching an agreement between widely dispersed and constantly changing creditors. However, decades have passed since the model of creditors' bargain was developed and the various forms of actual contracts shaping the course of insolvency process have appeared in practice. One notable development is the rise and expansion of secured credit in capital structures

[75] Ibid., p. 860.

[76] The Creditors' Bargain theory was initially suggested by Thomas Jackson to explain insolvency law's role in resolving a common pool problem. By imposing collective enforcement, insolvency law prevents individual race to court and preserves the integrity of the insolvency estate.

[77] Stilson 1995, p. 91.

of insolvent companies.[78] Secured creditors derive their priority and power from contractual arrangements, which guarantee them a preferential position in insolvency and the ability to exercise significant control over the insolvency process. In some jurisdictions (e.g. the Netherlands[79]), secured creditors are essentially immune from insolvency proceedings. In others (e.g. the US), they typically lead insolvency proceedings and dictate the conditions for the business sale.[80] Thus, contractually agreed rights presuppose a certain position in insolvency. Another example of contracts affecting insolvency proceedings are intercreditor agreements or agreements between creditor(s) and a debtor. Such agreements may entail claim subordination, where one creditor or a group of creditors agree to subordinate their rights in insolvency, therefore contracting out of the *pari passu* principle.[81] In the famous case *Re Maxwell Communications Corp. plc (No. 2)*,[82] the English court upheld the effectiveness of contractual subordination, rejecting the argument that it contravened the mandatory (public) rules of insolvency law. More novel forms of insolvency-related contracting include restructuring support agreements, used primarily in the US to lock up the contractual arrangements and support of a particular plan later implemented by way of a pre-packaged deal. Such arrangements provide certainty and ensure 'a clearer, quicker, and more reliable path toward exit from Chapter 11.'[83]

These and other instances of contractual 'regulation' of insolvency allowed Skeel and Triantis to conclude that the US insolvency (bankruptcy) law is considerably less mandatory than it appears to be and that the new contract paradigm seems to emerge (even if in a somewhat inconsistent way).[84] In this shift towards private ordering, contracting during or prior to insolvency as an alternative or next to judicial decision-making refers primarily to substantive effects of insolvency,[85] such as the position of a creditor in the ranking of claims or the power to control the

[78] See American Bankruptcy Institute Commission to Study the Reform of Chapter 11, 2012–2014 Final Report and Recommendations; Nocilla 2017, pp. 60–81.

[79] According to Article 57 Dutch Bankruptcy Act, pledgees and mortgagees may exercise their (preferential recovery) rights as if there was no bankruptcy.

[80] It has been noted that without consent from a secured creditor, it may not be possible to sell property in a 363 Sale free and clear of liens. See Simpson and Goffman in Mallon and Waisman 2011, p. 15.

[81] Goode 2011, p. 241; Finch and Milman 2017, p. 530.

[82] *Re Maxwell Communications Corp Plc (No. 2)*, [1994] 1 All E.R. 737.

[83] Baird 2017, p. 604. Chapter 11 of the US Bankruptcy Code (Chapter 11, Title 11, United States Code) generally provides for the reorganisation of debts of financially distressed companies. It may be used to preserve the legal entity or sell its business as a going concern.

[84] Skeel and Triantis 2018.

[85] An increase in the ability of debt holders (sometimes referred to as 'creditors in possession') to influence the conduct of business prior and during the course of the Chapter 11 proceedings has also been noted by Rasmussen, who mentions among the instruments of control, covenants in credit agreements, loan-to-own strategies, appointment of a chief restructuring officer, debtor in possession (DIP) financing, plan support and restructuring support agreements, etc. See Rasmussen 2018.

course of insolvency proceedings, e.g. through the provision of post-petition financing. The question arises whether this encroachment of private law mechanisms to regulate the insolvency process also extends to issues of insolvency jurisdiction. As explained above, the conventional wisdom is that parties cannot contract on this matter.[86] However, in practice and in law various forms of insolvency forum choice have emerged. AQ3

2.4.1 Choice of Insolvency Forum in a Contract

Even though the choice of the insolvency jurisdiction in a contract concluded between a creditor and a debtor is not legally enforceable at the current time, making such a choice can still be a good idea. The reason being that the parties' agreement as to the debtor's COMI enters the realm of their expectations and is therefore ascertainable from the moment of contracting. Unless the agreed COMI is clearly contrary to the economic or business (administration of interests) reality, the selection of the insolvency forum should not be easily ignored.

There is no statistics on how widespread the practice of COMI choice is. Hamilton and Hair report that it is rather common in the UK market for lenders to ask for a representation from a borrower that its COMI is located in a certain jurisdiction, and for an undertaking not to move the COMI without the lenders' consent or notification.[87] However, there are very few instances of judicial interpretation of provisions allocating insolvency jurisdiction. In a recent case *In the matter of Videology Limited*,[88] the court had to interpret the following warranty and representation as to the COMI of the debtor: 'For the purposes of the Council of the European Union Regulation No. 1346/2000 on Insolvency Proceedings ("the Regulation") [the debtor's] centre of main interest (as that term is used in Article 3(1) of the Regulation) is situated in England and it has no "establishment" (as that term is used in Article 2(h) of the Regulation) in any other jurisdiction.' Interestingly, the sole director of the debtor argued that this COMI-related clause contained 'boilerplate' representations which were not given 'any particular thought to at the time.' However, the court did not accept the characterisation of this clause as mere 'boilerplate'. In finding otherwise, it noted that a clause expressly referred to the EIR and identified the COMI of the debtor as being in England in the agreement predominantly between US parties and governed by US law. Besides,

[86] For early discussion on the possibility of choice of the insolvency forum see Rasmussen 1992; Rasmussen 1997; Schwartz 1993.

[87] Hamilton and Hair, County Report—Great Britain, in Pannen 2007, p. 651. The possibility of including COMI-related representations and warranties is also supported by the Act borrower's guide to the LMA facilities agreement for leveraged transactions, Association of Corporate Treasurers, October 2008, pp. 106–108.

[88] *In the matter of Videology Limited and In the matter of the Cross-Border Insolvency Regulations* [2018] EWHC 2186 (Ch).

the director acknowledged that the purpose of the inclusion of such a clause was to 'provide certainty to the lenders as to the jurisdiction in which any insolvency proceedings in relation to the [debtor] would take place.'[89] According to the court, the express representations in the financing documents gave strong support of finding the debtor's COMI in the agreed jurisdiction.

The importance of safeguarding parties' expectations in financial contracts is undeniable. However, this does not mean that parties are free in their insolvency-related contracting. For instance, in order to preserve integrity of insolvency proceedings or ensure centralisation of restructuring efforts, it should not be possible for a debtor to choose a different insolvency forum in various contracts with creditors. The unacceptability of allowing the debtor to contract with creditors on an opt-out basis has also been emphasised by the authors of the Creditors' Bargain theory.[90] This is why it is rather surprising that such an opt-out exists in practice and is frequently called the 'Gibbs rule'.[91]

Despite the fact that the law governing a contract is usually not determinative for international insolvency jurisdiction, the chosen law can have a decisive effect on the course and results of debt restructuring. The century-old Gibbs rule, as applied by English courts, effectively means that English law-governed debt cannot be discharged or compromised by a foreign insolvency proceeding, unless the creditor had submitted to such proceeding. Discharge of a debt or its alteration under the insolvency law of a foreign country is only treated as discharge in England if it is done under the law applicable to the contract. Thus, in a recent case of *Bakhshiyeva v. Sberbank of Russia*,[92] the English court refused to grant a moratorium to prevent creditors from commencing enforcement actions against assets of a foreign bank, which was subject to restructuring abroad. As long as a debt instrument is governed by English law, it is immune from the effect of non-English restructurings. The Gibbs rule has been heavily criticised in academic literature as undermining the principles of international insolvency law, such as universality (modified universalism), efficiency of insolvency (restructuring) proceedings and *pari passu*.[93] It also facilitates non-cooperative behaviour and enhances the position of hold-out creditors, potentially undermining value-creating restructuring attempts.

[89] Ibid., para 69.

[90] Supra note 74, at 866.

[91] The name of the rule comes from the case of *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux* (1890) LR 25 QBD 399, in which the English Court of Appeal held that 'a debt governed by English law cannot be discharged or compromised by a foreign insolvency proceeding. Indeed, the proposition goes further: discharge of a debt under the insolvency law of a foreign country is only treated as a discharge therefrom in England if it is a discharge under the law applicable to the contract.'

[92] *Bakhshiyeva v. Sberbank of Russia* [2018] EWHC 59 (Ch), upheld on appeal.

[93] See Ramesh, who noted that '[t]he Gibbs principle is a relic of a different legal and economic era that ought to be consigned to the annals of history.' In Ramesh 2017, p. 42. See also Fletcher, who claimed that the 'Gibbs doctrine belongs to an age of Anglocentric reasoning which should be consigned to history.' Fletcher 2005, para 2.129.

Thus, under the Gibbs rule, the choice of law governing the contract indirectly allows parties to select the insolvency forum. In other words, the choice of law becomes the choice of the insolvency jurisdiction. Previously, it was stated that an *ex ante* agreement as to the COMI can be beneficial and lead to a decrease in strategic costs and a reduction of administrative costs. The Gibbs scenario is the example of the opposite, to the extent that it allows selective choice of the insolvency jurisdiction, which disrupts the otherwise centralised resolution of financial distress. The possibility of individual enforcement actions in the absence of a parallel English proceeding (e.g. scheme of arrangement) may subvert the collective nature of insolvency proceedings. In the hypothetical bargain situation, no creditor would agree to be bound to the collective system unless it were a compulsory system binding on all other creditors, including those who might agree on English law as law governing their contractual relations with the debtor.

2.4.2 Synthetic and 'Reverse' Synthetic Insolvency Proceedings

The previous sub-section of this chapter provides an example of contractual regulation of international insolvency jurisdiction. It involves an agreement reached by a debtor and its creditor(s). However, the possibility of contracting or, broadly speaking, constructing the insolvency jurisdiction in cross-border insolvency cases is not limited to agreements in a traditional sense. Thus, in the case of *Collins & Aikman Europe SA*,[94] the High Court of Justice authorised the English-appointed joint administrators of a group of companies to implement the assurances given earlier to creditors in the relevant European jurisdictions and hence to *pro tanto* depart from the application of the ordinary provisions of English law, the law of the main proceedings. The case concerned Collins & Aikman group, which was a leading supplier of automotive components, typically plastic and soft-trim products used in the interiors of motor vehicles. In Europe, the group operated through 24 legal entities spread over ten jurisdictions. In 2005, these entities applied for the UK court to open insolvency proceedings. Subsequently, insolvency proceedings were opened in the UK against all 24 companies, including those registered on the Continent (for example, in Spain, Sweden, Germany, Belgium, Italy and The Netherlands).

The appointed joint administrators immediately recognised that although the European companies were incorporated in several different European countries, they formed a closely-linked group, many of the functions of which were organised on a Europe-wide rather than on a national basis. The strategy developed by the administrators was based on this understanding and included the adoption of a coordinated approach to the continuation of the businesses. Administrators were, however, very

[94] *Re Collins & Aikman Europe SA and other companies* [2006] EWHC 1343 (Ch).

aware that, whilst the main proceedings were in England, creditors remained entitled to seek the opening of secondary proceedings in any of the other countries where a relevant company had an 'establishment'. To avoid such secondary proceedings, oral assurances were given by or on behalf of the joint administrators to local creditors that their claims would be dealt with in accordance with the relevant (foreign) insolvency law and the respective ranking of claims. As a result, creditors were to receive the benefits of the secondary proceedings (such as preferential payments), while such proceedings did not formally exist. Thus, the terms 'synthetic' or 'virtual' secondary proceedings were proposed. Ultimately, the English court supported this very practical and commercially-driven solution and empowered the administrators to implement any assurances that they had earlier given.

The concepts of party autonomy and judicial effectiveness underpin the operation of this legal innovation. The following interpretation given by Ramesh should be endorsed:

> [w]hen the English court sanctioned the arrangement, it was in effect endorsing the parties' autonomy to determine the jurisdiction that the insolvency proceedings ought to be carried out in.[95]

As a result of the administrators' actions and the willingness of the courts to support them, the group resolution became more predictable, centralised and cost-efficient.[96]

The acceptance of practical utility of synthetic proceedings has led to the inclusion of Article 36 in the EIR Recast. According to this article, in order to avoid the opening of secondary insolvency proceedings, the insolvency practitioner in the main insolvency proceedings may give a unilateral undertaking ('undertaking') in respect of the assets located in the Member State in which secondary insolvency proceedings could be opened. This undertaking guarantees that when distributing those assets or the proceeds received as a result of their realisation, the main insolvency practitioner will comply with the distribution and priority rights under domestic law that creditors would have if secondary insolvency proceedings were opened in that Member State.[97] If an undertaking complies with Article 36 and adequately protects the general interests of local creditors, the court asked to open secondary proceedings shall refuse to do so (Article 38(2) EIR Recast). Thus, the judicial innovation of *Collins & Aikman Europe SA* has now been institutionalised at the EU level.[98] It pursues two major objectives. Firstly, it allows for the centralisation of control over the major decisions affecting the debtor and the insolvency estate, such as the development of a cohesive restructuring plan, in one

[95] Ramesh 2018, p. 6.

[96] Pottow 2011, p. 585.

[97] On the nature of 'undertaking' as an instrument of private and public nature see Wessels 2014, pp. 63–110.

[98] On the implementation of Article 36 EIR Recast at the domestic level, see Realisation of the EU Insolvency Regulation (EIR 2015) in national (procedural) law of the Member States, CERIL Report 2018-1 on Insolvency Regulation (Recast) and National Procedural Rules, 2018.

jurisdiction. Secondly, it safeguards the rights and legitimate expectations of local and preferential creditors by ensuring compliance with the priority rights guaranteed under the relevant domestic insolvency laws.

It must be noted that an undertaking, as prescribed by Article 36 EIR Recast, is always one-sided and only works in vertical relations, that is, between main insolvency practitioner (main proceedings) and local creditors (secondary proceedings). It cannot be applied to avoid the opening of main insolvency proceedings, e.g. by a request from the insolvency practitioner appointed in territorial proceedings. This is a serious restriction, particularly for insolvencies of groups of companies, which may require concentration of insolvency proceedings at the location of both the COMIs and establishments of group members. Interestingly, the evasion of main insolvency proceedings happened in *Re Videology Ltd.* referred to above. In that case, Videology Ltd. (debtor), the UK registered entity, was part of the joint efforts to sell the business of the whole corporate group as a going concern. For that reason, both the debtor and its parent company filed voluntary bankruptcy petitions under Chapter 11 of the US Bankruptcy Code.[99] The debtor asked the court in the UK to recognise the US proceedings as foreign main proceedings to secure a moratorium on individual enforcement actions and preclude initiation of parallel insolvency proceedings. Having closely studied the facts of the case, the UK court was not persuaded that the debtor's COMI was in the US. It concluded that COMI of Videology Ltd. was in the UK, the jurisdiction of its incorporation.[100] What is more important is the type and effects of relief granted by the court.

The court first noted that there should be very good reasons to restrict or prohibit creditors of a company with its COMI in the UK from seeking to commence main insolvency proceedings there. Nevertheless, this was found to be the case. Allowing the business and assets of the debtor to be sold as part of a coordinated sale pursuant to the Chapter 11 proceeding in the US was beneficial to all creditors of Videology Ltd.[101] In this respect, the opening of parallel (main) insolvency proceedings in the UK would have disturbed this smoothly running process. This cost-benefit analysis (i.e. Pareto efficiency, referred to above) has led to the pragmatic decision, essentially driven by the parties' choices. The court held that it was appropriate to grant the relief, in effect entrusting the realisation and distribution of the entirety of the

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[99] Chapter 11, Title 11, United States Code.

[100] The EIR/EIR Recast apply only if COMI is within the EU (with the exception of Denmark). Therefore, if the UK court had found that the debtor's COMI was in the US or in another non-EU country, the EIR/EIR Recast would not have been applicable. In such a case, the English court would need to rely on its national conflict of law rules, including the Cross Border Insolvency Regulations 2006 (CBIR), implementing the Model Law. In *Re Videology Ltd.* the English court relied on the CBIR to determine the relief granted to a foreign (non-EU) non-main proceeding. This is because the EIR/EIR Recast do not regulate relations with non-EU countries (i.e. the US). For more on the territorial scope of the EIR Recast and its drawbacks see Nisi 2017.

[101] According to the court, the anticipated outcome of a coordinated sale of the business of the group in the US would result in the payment of £0.07 per £1. By contrast, 'a stand-alone liquidation or administration of the debtor and collection of its receivables would be expected to achieve a return of only about £0.01 per £1.' See supra note 88, para 88.

assets of the debtor to the US proceeding, the jurisdiction of an establishment, and imposing a court-controlled moratorium on creditors' claims in the UK. Thus, the opening of main insolvency proceedings was avoided (therefore, 'reverse' synthetic proceedings).[102] This is a good example of a more advanced construction of the insolvency jurisdiction in a cross-border insolvency scenario, involving several members of the corporate group.

The described case relied on the Model Law, providing for the possibility of granting flexible discretionary relief under its Article 21. Would reverse synthetic proceedings be available under the EIR Recast? The analysis of the EIR Recast framework leads to the negative answer. First and foremost, Article 36 EIR Recast applies only to an undertaking given by a main insolvency practitioner in respect of assets located in a Member State where secondary proceedings could be opened. The corresponding Article 38(2) mandating the court to refuse the opening of proceedings in case of an undertaking, refers only to secondary proceedings. The refusal of the opening of main proceedings is not mentioned. Another practical limitation stems from the difficulty of opening territorial proceedings in the absence of main insolvency proceedings. For example, Article 3(4) EIR Recast lists a number of rigid conditions under which territorial proceedings are allowed.[103] Besides, on a more fundamental structural level, the nature of territorial and secondary proceedings under the EIR Recast is strictly territorial. This nature does not easily accommodate the geographical extension beyond the territory of such proceedings.[104]

There might be compelling reasons to allow the use of 'reverse' synthetic insolvency proceedings in Europe, particularly in the context of resolution within corporate groups. The centralisation of insolvency proceedings opened against members of a corporate group in a single 'point of entry' is significantly restricted by the notion of COMI, as found in Article 3(1) EIR Recast. The concept of establishment,[105] permitting the initiation of secondary proceedings, could

[102] The term 'reverse synthetic proceedings' was coined by Kannan Ramesh in Ramesh 2018. The use of the word 'reverse' should indicate that as opposed to normal synthetic proceedings (prevention of *secondary* proceedings), 'reverse' synthetic proceedings prevent the opening of *main* insolvency proceedings.

[103] The territorial insolvency proceedings may only be opened prior to the opening of main insolvency proceedings where (a) main insolvency proceedings cannot be opened because of the conditions prescribed by *lex concursus*; or (b) the opening of territorial insolvency proceedings is requested by: (i) a creditor whose claim arises from or is in connection with the operation of an establishment situated within the territory of the Member State where the opening of territorial proceedings is requested; or (ii) a public authority which, under the law of the Member State within the territory of which the establishment is situated, has the right to request the opening of insolvency proceedings.

[104] This extension is only permitted in exceptional circumstances, such as where the application for the return of assets or a transaction avoidance claim is filed in a foreign court pursuant to Article 21(2) EIR Recast.

[105] According to Article 2(10) EIR Recast, 'establishment' means any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets.

represent a tool to open territorial (non-main) proceedings with the effect 'as if' such proceedings are actually main insolvency proceedings. This approach has distinct advantages of adaptivity and increased flexibility.

Whereas the prospects of reverse synthetic proceedings in Europe remain unclear, the door for them may be opened with the adoption of a new UNCITRAL Model Law on Group Insolvency, briefly referred to above. The idea to create a new model law, specifically addressing the issue of insolvency of enterprise groups emerged in 2013. Since then the UNCITRAL Working Group V (Insolvency Law) has been working on the draft provisions of the new model law. As of February 2019, its adoption is foreseeable in the near future. Interestingly, the current draft of the Model Law on Group Insolvency in Articles 30 and 31 of Part B (Supplemental provisions) creates a framework for reverse synthetic proceedings. It empowers an insolvency representative, appointed in non-main proceedings, to give an undertaking to treat creditors as if main proceedings have been opened. In this case, a court in the jurisdiction of the debtor's COMI may stay or decline to commence main proceedings. Arguably, resolution of insolvency in a non-main forum may run afoul of prior expectations of creditors and other third parties. This is why, according to the Guide to enactment of the draft Model Law on Group Insolvency, 'departing from that basic principle of commencing proceedings on the basis of COMI should be limited to exceptional circumstances, namely to cases where the benefits, in terms of efficiency, largely outweigh any negative effect on creditors' expectations in particular and legal certainty in general.'[106]

The idea of choosing and altering the insolvency forum for the sake of efficient group resolution and well-functioning administration of the insolvency estate is quite remarkable. The instrument of an undertaking, whether given to avoid the opening of main or non-main (secondary) proceedings, creates a binding and enforceable obligation upon the insolvency estate.[107] This can be characterised as an extension of the private law relations arising from a contract (or unilateral promise) to traditionally public-interest driven and protected area of insolvency law,[108] and the issue of international insolvency jurisdiction in that area, in particular.

2.4.3 Selection of a Group Coordination Forum

Alongside the mechanism of synthetic proceedings, the EIR Recast offers another tool, which gives creditors and debtors additional leeway to decide and construct their own fate in insolvency. This tool is called 'group coordination proceedings'.

[106] Enterprise group insolvency: guide to enactment of the draft model law (as contained in A/CN.9/WG.V/WP.161), 20 September 2018, para 206.

[107] Ibid., para 188.

[108] As famously stated by Sir Peter Millett, '[n]o branch of the law is moulded more by considerations of national economic policy and commercial philosophy,' than insolvency law. Millett 1997, p. 109.

Group coordination proceedings is an innovation of the EIR Recast. It has been introduced '[w]ith a view to further improving the coordination of the insolvency proceedings of members of a group of companies, and to allow for a coordinated restructuring of the group' (Recital 54 EIR Recast). In essence, group coordination proceedings are separate from any other insolvency proceedings and can be seen as a legal superstructure, imposed on (all or some) insolvency proceedings of corporate group members.

Coordinated treatment of insolvency proceedings in a group context should be achieved with the help of a 'group coordinator' (Article 71 EIR Recast), an independent person, whose main tasks consist of identifying and outlining recommendations for the coordinated conduct of the insolvency proceedings and drafting a group coordination plan (Article 72(1) EIR Recast). The group coordination plan may contain measures to re-establish the economic performance and the financial soundness of the group or any part of it, such as the increase of equity capital, simplification of the financial structure of the group, and the elimination of deficiencies in the intra-group cash pooling system. Measures might also aim to improve business performance, including through the reorganisation of the group structure, the realignment and refocusing of business activities, replacement of management, and personnel reduction.[109] Notably, the group coordination plan cannot include recommendations as to any consolidation of proceedings or insolvency estates (Article 72(3) EIR Recast).

The opening of a group coordination proceeding can be requested by an insolvency practitioner appointed in insolvency proceedings opened in relation to *any* group member, and before *any* court presiding over insolvency proceedings of a group member (Recital 55, Article 61 EIR Recast). Arguably, this can lead to a situation where a group coordination proceeding is opened in a jurisdiction unsuitable for a coordination task, whether due to language, economic or any other practical barriers. As a solution, Article 66 EIR Recast ('Choice of court for group coordination proceedings') allows insolvency practitioners appointed in insolvency proceedings of the members of the corporate group *by agreement* to choose the jurisdiction for the opening of group coordination proceedings, the courts of which shall have *exclusive* jurisdiction. This agreement requires participation (i.e. approval) of at least two-thirds of all insolvency practitioners appointed in insolvency proceedings of the members of the group. In this scenario, the court first seized of jurisdiction must decline its jurisdiction in favour of the chosen court (Article 66(3) EIR Recast). This is a fine example of a contractual insolvency forum selection.

One may rightfully object that coordination proceedings introduced in Chap. 5 EIR Recast are very different from 'normal' insolvency proceedings. Group coordination proceedings are voluntary in nature; they do not reflect 'insolvency', but 'coordination' and could therefore easily relate to any other economic activity. Members of the group are free to participate or not to participate in group

[109] Wessels and Kokorin 2018, pp. 136–137.

coordinating proceedings. In addition, they lead to non-binding actions (recommendations) of a group coordinator and the proposal of a group coordination plan setting out an integrated approach to the resolution of the group members' insolvencies.[110] As opposed to 'normal' insolvency proceedings, group coordination proceedings do not entail collective enforcement of creditors' claims and are closer to mediation in terms of the mode of operation. Despite these unique characteristics and important distinctions, group coordination proceedings strive to facilitate the effective administration of the insolvency proceedings of enterprise group members (Recital 57 EIR Recast). In this respect, they pursue a shared goal of maximising estate value in insolvency, either by way of a group-level restructuring (group wide solution) or through coordinated sale of the enterprise as a going concern.

To the extent that actions by insolvency practitioners may be classified as private, the possibility of them choosing the coordination jurisdiction by agreement is remarkable and highlights the private element in group insolvency. It also underscores the expansion of the use of private law mechanisms (consensual resolution of insolvency) in a traditionally court-centred insolvency and restructuring environment.

2.5 Conclusion

Corporate world is rapidly changing. New forms of business organisations are being developed, new ways to attract financing are being explored, and new types of business relations are being created. These changes can be viewed as intriguing challenges to conventional wisdom of (entrepreneurial) life, or as opportunities to make such life better and more efficient. Whichever opinion one may adhere to, law plays no small part in it. This chapter discusses one issue, namely allocation of the insolvency jurisdiction under the current European rules. Gradually formed throughout the 20th century, these rules culminated in the adoption of the EIR in 2000 and the EIR Recast in 2015. According to these instruments, international insolvency jurisdiction shall be determined by the presence of the debtor's centre of main interests (COMI), which is defined as the 'place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.'

The first part of the chapter (Sect. 2.3) introduces three situations or developments, which show that the concept of COMI, originating from the 1980s (if not earlier), does not seem to create legal certainty and cater to other needs of creditors and debtors.

110 For these reasons, the new set of rules on group insolvency have had a mixed reception in legal literature, with the majority of authors expressing doubts as to their effectiveness and practical value, as well as to the high costs the group coordinating proceedings may bring with them and their complex character. See Thole and Dueñas 2015, pp. 214–227; Weiss 2015, pp. 192–213; Hess et al. 2018, p. 220; Wessels 2017, para 10929j.

The first situation concerns capital markets and the position of investors in them. The possibility to calculate investment risks underlies the European rules (e.g. EC Prospectus Directive), facilitating informed assessment of the assets and liabilities of the borrower, its financial position, profit and losses. However, the analysis of a selection of prospectuses indicates that insolvency forum and applicable insolvency rules in case of the borrower's insolvency, are frequently treated as an unpredictable event beyond parties' control. This result is unsatisfactory and can be partly attributed to the inherent indeterminacy of COMI and the impossibility of selecting it by consent. The second problem relates to insolvency of corporate groups. The approach adopted by the EIR Recast in this respect promotes the so-called entity-by-entity treatment. Accordingly, COMI of each group member is determined separately, with no or limited analysis of the group structure. This makes efficient group resolution (restructuring or sale of business as a going concern) less likely. The third challenge comes from technological advancement. The rise of the platform economy and platform-based businesses with little connection to any jurisdiction further complicates COMI determination. But even bigger disruption comes from decentralised business models, empowered by the application of the blockchain technology. While decentralised autonomous organisations, managed by dispersed holders of tokens, and algorithmic governance remain at the initial stage of development, the trend towards decentralisation should not be ignored. In the world of decentralised decision making, finding the place where the debtor conducts the administration of its interests becomes an impossible task.

These challenges set the scene for entering into a 'new age', which may require new solutions. The second part of the chapter (Sect. 2.4) analyses various tools being applied to customise the application of COMI. It should be noted that the present-day economic environment is quite different from that of the last quarter of the 20th century, the time in which modern insolvency law takes its roots. The creditors have become more professional and are now increasingly represented by sophisticated distressed asset managers. Another change comes from the proliferation of secured credit and an accompanying increase in the power of secured creditors in the insolvency process. This power goes beyond traditional voting rights and practically equates to contractually-created control over debtors' insolvency (thus, the term 'creditors in possession'). Other forms emanating from private law include restructuring support agreements and agreements accompanying rescue (debtor in possession) finance. These are examples of private (contractual) insolvency regulation of substantive character. The trend towards consensus-based resolution of financial distress is also supported by the EC Proposal for a Restructuring Directive, acknowledging the utility of limiting court involvement and adopting restructuring plans.

The question is whether the nascent shift to a contractual paradigm manifests itself in the treatment of international insolvency jurisdiction. The answer to this question draws on the analysis of three different practices, namely the contractual selection of the COMI-jurisdiction, synthetic and reverse synthetic insolvency proceedings, and selection of a group coordination forum. These solutions to the inherent ambiguity and fluidity of COMI may be used to construct (contract around) the insolvency jurisdiction, ensure efficient group resolution and well-functioning administration of the insolvency estate.

While the new tools offer an opportunity for creditors and other actors to alter the default COMI-option, they cannot and do not aim at replacing COMI or solving all the problems brought by the 'new age'. They may, however, indicate the emergence of an insolvency regime (partially) based on private ordering. The empowerment of private parties to engineer their own fate in insolvency scenarios fits well in the new world. The flexibility of contractual approaches can help addressing new enterprise forms and decentralised business models. They can also promote legal certainty and better calculation of market risk premiums. Synthetic/reverse synthetic proceedings and group coordination proceedings, currently underused, open the door for centralised and coordinated insolvency resolution in the context of corporate groups. Diverse forms of synthetic proceedings and the freedom to choose a group coordination forum under Article 66 EIR Recast are examples of institutionalised tools of *ex post* contracting. They can be used once insolvency proceeding(s) have been initiated. *Ex ante* contracting, that is contracting prior to insolvency, is less institutionalised and remains relatively marginal in Europe.

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