Part IV Regulation versus. Model Law: a Comparative Review on Key Aspects

Introduction

4.01 In this part, the Regulation on insolvency proceedings [Council Regulation (EC) 1346/2000, hereinafter EC Regulation], the Regulation of the European Parliament and of the Council on insolvency proceedings (recast) [Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), hereinafter the EU Regulation (recast)][483] and the UNCITRAL Model Law on Cross-border Insolvency (1997) with Guide to Enactment and Interpretation (2013) (hereinafter the Model Law and the Guide and Interpretation) will be compared to each other in order to figure out the similarities and differences of the two regimes on key aspects through literature review and case analysis. Rules of applicable law will not be discussed in detail but briefly mentioned because they do not constitute a part of proposed China's regional cross-border arrangements. The reason for the exclusion will be discussed later in Part V. Please also refer to Annex IV, in which the main lines of the three regimes have been briefly outlined and summarized comparatively in the form of table. Besides, to illustrate the way of implementation of the Model Law, the US case law will be referred under most circumstances, which is usually regarded as "helpful guide to the way in which key expressions may be interpreted and applied by national courts".[484]

4.02 In the following sections, the comparative discussion about the Regulation and the Model Law will cover the key topics concerning cross-border insolvency law, in particular, jurisdiction, recognition and enforcement, corporate groups, cooperation and communication. Before starting to make such comparison, there are two questions that need to be answered. The first one is why the Regulation and the Model Law are selected. The reason is that they are outstanding examples in the area of cross-border insolvency. Before the Regulation and the

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[483] In EU, the EU Insolvency Regulation, twelve years after it came into effect, received the political agreement on its amended text by the Council (Justice and Home Affairs) on 4 December 2014. On 12 March 2015, the Council officially adopted its position at first reading with a view on the Regulation (EU) of the European Parliament and of the Council on insolvency proceedings (recast) [2012/0340 (COD)]. Later on 28 April 2015 the position of the Council at the first reading together with its statement of reasons was published on the Official Journal [Position (EU) No.7/2015 of the Council at first reading with a view to the adoption of a Regulation of the European Parliament and of the Council on insolvency proceedings (recast) adopted on 12 March 2015, 2015/C 141/01; Statement of the Council's reasons: Position (EU) No 7/2015 of the Council at first reading with a view to the adoption of a Regulation of the European Parliament and of the Council on insolvency proceedings (recast), 2015/C 141/02]
On 20 May 2015, the European Parliament approved the final text of the recast of the European Insolvency Regulation, which was published in the Official Journal of the European Union on 5 June 2015 and shall apply from 26 June 2017.
The text of Regulation (EU) 2015/848 of the European Parliament and of the Council on insolvency proceedings (recast) is referred to as the EU Regulation (recast) in the entire dissertation. For the text of EU Regulation (recast), please visit: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2015:141:FULL&from=EN (Last visited on 14 June 2016)

[484] Wessels, Bob, International Insolvency Law (3rd ed.), Vol.X, Deventer: Kluwer, 2012, para.10254

Model Law began to play the leading role in dealing with issues arising from cross-border insolvency, there have been a few multilateral initiatives, either on the international level or on the regional level, most of which failed to gain wide and active acceptance. For instance, in Latin America, some relevant efforts have been made, for example, through Treaty of Montevideo 1940. However, with limited provisions it was not that successful.[485] In Europe, some related conventions were replaced or partly replaced by the EC Regulation, such as the Nordic Bankruptcy Convention of 1933 partly replaced except that it is still applicable in the Denmark case because Denmark falls beyond the scope of the Regulation. It is required under the EC Regulation that

"no later than 1 June 2012, and every five years thereafter, the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Regulation. The report shall be accompanied if need be by a proposal for adaptation of this Regulation."[486]

4.03 In December 2012, the European Commission presented its proposals of amendments to the EC Regulation.[487] In February 2014, the Parliament made amendments to the proposal of the Commission.[488] On 4 December 2014, the revision of the EC Regulation passed its first reading and evolved into the EU Regulation (recast),[489] which was approved by the EU Parliament on 20 May 2015.[490] Although the EU Regulation (recast) will be implemented 2 years after it comes into effect and the EC Regulation will still apply in the interim, the EU Regulation (recast) represents the updated development of the current EC Regulation and the legislation of the cross-border insolvency on EU level in the near future. Hence, it will be introduced as well.

4.04 The Model Law was developed in the mid 90s of the last century, at a time when trade and investment increasingly expanded across all over the world. The administration of cross-border insolvencies at that time, however, were conducted in a fragmented way subject to national insolvency laws prevailingly based on territoriality.[491] By then, the text of the EC Regulation 1346/2000 was

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[485] See Wood, Philip, Principles of International Insolvency, London: Sweet & Maxwell 2nd. ed., 2007, 29-081; Wessels, Bob, International Insolvency Law (3rd ed.), Vol.X, Deventer: Kluwer, 2012, para. 10066

[486] The EC Regulation, Article 46

[487] EU Commission Explanatory Memorandum, Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings, Strasbourg, 12.12.2012, COM(2012) 744 final

[488] European Parliament, Legislative Resolution of 5 February 2014 on the Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings (COM (2012) 0744 – C7-0413/2012 – 2012/0360(COD)), Strasbourg, 5 February 2014

[489] Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings [First reading] - Political agreement, 15414/14 ADD 1 COR 1, Brussels, 25 November 2014

[490] Please refer to the procedure file of the EU Parliament: http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2012/0360(COD) (Last visited on 14 June 2016)

[491] UNCITRAL, A/CN.9/398 - Cross-border Insolvency: Report on UNCITRAL – INSOL Colloquium on Cross-Border Insolvency, 1994, paras.5-6

merely available in the preliminary form of a draft convention[492] and "best practice" guidelines served as earlier initiatives to address the global cross-border insolvency problems.[493] During 1995 and 1997, a project was launched by UNCITRAL with participation of "seventy-two states, seven inter-governmental organizations and 10 non-governmental organizations" in order to work out a draft model law on cross-border insolvency.[494] Therefore, the drafting procedure of the Model Law found its wide acceptance on a global level and accordingly the Model Law was established based on international consensus.[495] Nowadays there are over 40 jurisdictions in the world that have incorporated the Model Law into their insolvency systems,[496] five of which are the Member States of EU, including Greece (2010), Poland (2003), Romania (2002), Slovenia (2007) and the United Kingdom (2006).[497]

4.05 Unlike the Regulation, the worldwide agreement on adoption of the Model Law is not guaranteed by any regional legal instrument but achieved by its own flexible nature, which tolerates a wide range of legal diversity. Even though it is expected to find a solution to China's interregional cross-border insolvency issues, it cannot be established in exactly the same way as the Regulation due to lack of the same degree of integration or equivalent legal foundation. Instead, more discretionary alternatives offered by the Model Law can be taken into consideration. In addition, the merits of the Model Law are that it does not address all of the traditional topics of private international law, such as jurisdiction or choice of law, but focuses on "model legal provisions for streamlined recognition of cross-border insolvency proceedings"[498] and in

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[492] Moss, Gabriel, Fletcher, Ian F, Isaacs, Stuart (ed.), The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide (2nd ed.), Oxford University Press, 2009, paras.1.01- 1.25

[493] For example, Committee J of the Section on Business Law of International Bar Association (IBA), The Model International Insolvency Cooperation Act (MIICA), 1989; IBA, International Bar Association Cross Border Insolvency Concordat, 1995

[494] Mohan, S Chandra, Cross-border Insolvency Problems: Is the UNICITRAL Model Law the Answer?, in: International Insolvency Review, Vol. 21, 2012, p.202

[495] See the report of UNCITRAL on the work of its thirtieth session (Official Records of the General Assembly, Fifty-second Session, Supplement No. 17 (A/52/17), paras. 12-225).

[496] Please note that the number of the Enacting States of the Model Law is subject to changes. For instance, in September 2015, the 17 Member States (including Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Republic of the Congo, Côte d'Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Senegal, Togo and Democratic Republic of the Congo) of OHADA (the Organisation pour l'Harmonisation en Afrique du Droit des Affaires) adopted the UNCITRAL Model Law. The so-called Uniform Act Organizing Collective Proceedings for Wiping Off Debts establishes regimes to address cross-border insolvency cases both from outside OHADA States and internal to OHADA. It also introduces a number of reforms to the OHADA insolvency framework consistent with the UNCITRAL Legislative Guide on Insolvency Law and the World Bank Principles on Effective Insolvency and Creditor/Debtor Rights. Enactment of legislation based on UNCITRAL texts is a positive example of the role UNCITRAL can play in assisting law reform in regional economic integration organizations like OHADA.
Available at: http://www.unis.unvienna.org/unis/en/pressrels/2015/unisl222.html
Please also visit the official website of UNCITRAL for the relevant updated information.
http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html (Last visited on 14 June 2016)

[497] Ibid.

[498] Block-Lieb, Susan and Halliday, Terence C., Less is More in International Private Law, (2015) 3 NIBLeJ 4, p.56

particular, obligation of cooperation and communication between the courts and insolvency representatives involved, which is also considered as the emphasis of China's interregional cross-border insolvency arrangement. Considering the successful contribution of the two regimes to international development of the cross-border insolvency, it is of significance to conduct comparative research on the two regimes to discover their respective advantages as well as their differences, which will help to find a better solution to China's cross-border insolvency issues.

4.06 The second question is how to make comparison between the Regulation, a binding regional framework, and the Model Law, a soft law mechanism. Generally speaking, they are different in forms, objectives, scopes, structures and ways of interpretation. However, they are also interrelated to each other. The Model Law has taken into consideration the content of the EC Regulation by adopting some key concepts stipulated under the EC Regulation, such as COMI and establishment.[499] With respect to cooperation and communication, it is also explicitly stated under the EU Regulation (recast) that European insolvency practitioners and courts shall refer to "relevant guidelines prepared by UNCITRAL".[500] Besides, they also share something in common in treating corporate groups. For example, both suggest the actors involved to cooperate and communicate with each other properly through use of cross-border insolvency agreements[501] or appointment of a single insolvency practitioner to conduct coordination,[502] although in the EU context such an appointment may also be affiliated with opening of group coordination proceedings.[503] In pursuit of a suitable solution for China's cross-border insolvency cooperation, it is of significance to discover the difference and similarity from those leading international regimes, which are both potentially relevant models.

Ch.1 General Provisions

4.07 In this chapter, comparison of the characteristics between the Regulation and the Model Law will be presented from general perspectives, including forms, objectives, scopes, structures and ways of interpretation. In each section concerning the EU context, development of the Regulation from the EC Regulation to the EU Regulation (recast) will be addressed as well. If the contents remain unchanged, they will be referred to as the Regulation altogether and the relevant provisions under the EU Regulation (recast) will be provided in the footnotes subsequent to the EC Regulation.

1.6 Forms

[499] Guide and Interpretation, para.10, 82
[500] The EU Regulation (recast), recital (48)
[501] The EU Regulation (recast), recital (49), article 56; Part III to the Legislative Guide (treatment of enterprise groups), III, para.48-54
[502] The EU Regulation (recast), article 71; Part III to the Legislative Guide (treatment of enterprise groups), III, para.43-47
[503] The EU Regulation (recast), recital (55), article 61(1)(a)

4.08 In EU, a cross-border insolvency cooperation regime was originally supposed to be in the form of a convention, which was unfortunately not favored by all contracting States and did not succeed in the end.[504] The current EU cross-border insolvency regime is adopted in the form of regulation because systematic cross-border insolvency cooperation throughout EU was regarded as a matter of "inescapable".[505] The Regulation is binding in its entirety, has general application and is directly applicable in all EU member states, except for Denmark,[506] which used to be a Community legal instrument based on ex Article 65 TEC[507] and now a Union legal instrument in accordance with Article 81 TFEU.[508] By means of regulation, it enables EU to provide directly binding measures on cross-border judicial cooperation between the Member States.[509]

4.09 In contrast to the binding characteristics of the Regulation, the Model Law adopted a soft law mechanism, which is of voluntary nature and subject to different national enactment. As pointed out by Berends that from the beginning it was clear that the UNCITRAL instrument "should be cast in a different mold". [510] Without equivalent institutional arrangements like EU and also considering the diversity of national legislations, it might be too ambitious to achieve a binding text on a global level at that time. Hence, the Model Law is a recommendation in essence. On the other hand, the flexibility of the Model Law also guarantees that its "membership" is widely open, which enables its far more extensive potential range of application than the Regulation.

1.7 Objectives

1.2.1 General Objectives

4.10 With its entry into force on 31 May 2002, the EC Regulation filled in the gap left behind by the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [now Brussels Regulation I (recast)].[511] The birth of the EC Regulation is triggered by the need of a uniform

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[504] There was a Preliminary Draft Convention that evolved over the years from 1960 to 1980 (Phase I), which failed in the end. In 1995 the Convention on Insolvency Proceedings was signed by 12 states (Phase II). By April 1996, fourteen Member States had signed the EU Convention and only the United Kingdom had not yet done so due to the mad-cow disease. See also Moss, Gabriel, Fletcher, Ian F, Isaacs, Stuart (ed.), The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide (2nd ed.), Oxford University Press, 2009, para. 1.01- 1.25.

[505] See Fletcher, Ian, Insolvency in Private International Law. National and International Approaches, Oxford Private International Law Series, Oxford University Press 2nd ed. 2005, para. 7.02.

[506] The EC Regulation, recital (8), (33); the EU Regulation (recast), recital (8), (88); See also Moss, Fletcher, Isaacs (ed.), The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide (2nd ed.), Oxford University Press, 2009, para. 1.02

[507] The EC Regulation, recital (2)

[508] The EU Regulation (recast), recital (3)

[509] The EC Regulation, Recital (8); the EU Regulation (recast), recital (8)

[510] Berends, André, The UNCITRAL Model Law on Cross-border Insolvency: A Comprehensive Overview, in: 6 Tul. J. Int'l & Comp. L., pp. 319.

[511] Brussels I refers to Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which replaced the 1968 Brussels Convention with effect from 1 March 2002 [2001] OJ L12. Brussels I

efficient and effective cross-border insolvency system within EU, as stressed by the Council, which can better safeguard "the proper functioning of the internal market."[512] It has been concluded by Virgós and Garcimartín that the EC Regulation has three basic objectives:

"(1) to provide for legal certainty in cross-border insolvency;
(2) to promote the efficiency of insolvency proceedings, by favoring those solutions which facilitate their administration and improve the *ex ante* planning of transactions;
(3) to remove inequalities among Community-based creditors with regard to access and participation in such proceedings"[513]

4.11 The Model Law, which was adopted in 1997, is designed to assist States to equip their insolvency laws with a modern, harmonized and fair framework to address more effectively instances of cross-border insolvency.[514] The Model Law indicates its objectives explicitly under the Preamble:

"(a) Cooperation between the courts and other competent authorities of State and foreign States involved in cases of cross-border insolvency;
(b) Greater legal certainty for trade and investment;
(c) Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
(d) Protection and maximization of the value of the debtor's assets; and
(e) Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment."

4.12 It is unsurprisingly that the EC Regulation and the Model Law, both of which are leading international insolvency regimes, generally aims at assisting states in operating transnational insolvency systems in an efficient, fair and cost-effective manner, providing legal certainty and protecting equal treatment of creditors. The EU Regulation (recast) brings the common objectives closer, by introducing the aims of promoting rescue into the existing European cross-border insolvency regime[515] and encouraging cooperation and communication between all the actors involved, including insolvency practitioners and the courts. [516] Nevertheless, in pursuit of efficient administration of the debtor's insolvency estate and effective realization of the total assets, the EU Regulation (recast) lays different emphasis on coordination. In case of a single debtor, the dominant role of the main proceedings shall be preserved in the way that insolvency practitioners in the main proceedings are granted with powers to intervene if the secondary proceedings are considered unsupportive for the efficient and

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was replaced by Brussels I (recast), Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matter (recast), which became applicable on 10 January 2015. Article 2(b) of the Brussels I (recast) explicitly excludes bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogues proceedings.

[512] The EC Regulation, recital (2)

[513] Virgós and Garcimartín, The European Insolvency Regulation: Law and Practice, Kluwer Law International, 2004, p.7

[514] Guide and Interpretation, para.1

[515] The EU Regulation (recast), recital (10), article 1(1), 47

[516] The EU Regulation (recast), recital (48), (49), article 41, 42, 43, 56,57,58

effective realization of the total assets.[517] With respect to coordination of insolvency proceedings relating to group of companies, the EU Regulation (recast) provides the integrated possibilities, which are the group coordination proceedings on a voluntary basis,[518] in addition to the combined efforts of all the actors involved in the multiple proceedings through compulsory cooperation and communication.[519]

1.2.2 Aim of Prevention of Forum Shopping

4.13 Despite those general objectives in common, the EC Regulation alone literally sets up the aim of prevention of forum shopping[520] and the EU Regulation (recast) further attempts to rule out forum shopping in a fraudulent or abusive manner.[521] Such an arrangement is tied to the characteristics of cross-border insolvency law and the requirement of the effective functioning of the internal market.

4.14 As summarized by Bell, forum shopping is possible because first, there are potential parallel forums that are available to be selected;[522] second, the legal systems in those potentially available forums must be heterogeneous.[523] In international insolvency law, debtor's center of main interests (COMI) is the criterion to determine the jurisdiction of the main proceedings. It is not defined and shall be assessed based on facts. COMI's fact-dependent feature provides opportunities for shift and manipulation of forum.[524] Change of forum would not be necessary if the insolvency system was the same everywhere. On the contrary, the fact is that each Member State in EU has its own insolvency law, which can be perceived through the Annex A to the Regulation. In accordance with Heidelberg-Luxembourg-Vienna Report as well as Impact Assessment issued by EU Commission, for example, UK is deemed as an attractive venue because it provides flexible restructuring tools for corporates in default[525] as well as shorter time period of discharge for indebted individuals[526].

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[517] The EU Regulation (recast), recital (41)
[518] The EU Regulation (recast), recital (55), (56)
[519] The EU Regulation (recast), recital (52)
[520] The EC Regulation, recital (4)
[521] The EU Regulation (recast), recital (5), (29), (31)
[522] Bell, Andrew, Forum Shopping and Venue in Transnational Litigation, Oxford, 2003, p.5
[523] Bell, Andrew, Forum Shopping and Venue in Transnational Litigation, Oxford, 2003, p.25
[524] Eidenmüller, Horst, Abuse of Law in the Context of European Insolvency Law, in: 6 ECFLR 1, 2009, p.4
[525] Hess, Oberhammer, Pfeiffer, European Insolvency Law-The Heidelberg-Luxembourg-Vienna Report on the Application of Regulation No.1346/2000/EC on Insolvency Proceedings (External Evaluation JUST/2011/JCIV/PR/0049/A4), C.H.Beck.Hart.Nomos, 2014, para.175; EU Commission Staff Working Document Impact Assessment Accompanying the document - Revision of Regulation (EC) No 1346/2000 on insolvency proceedings, Strasbourg, 12.12.2012, SWD(2012) 416 final, at 3.4.1.2, p. 21
[526] Hess, Oberhammer, Pfeiffer, European Insolvency Law-The Heidelberg-Luxembourg-Vienna Report on the Application of Regulation No.1346/2000/EC on Insolvency Proceedings (External Evaluation JUST/2011/JCIV/PR/0049/A4), C.H.Beck.Hart.Nomos, 2014, para.121; EU Commission Staff Working Document Impact Assessment Accompanying the document - Revision of Regulation (EC) No 1346/2000 on insolvency proceedings, Strasbourg, 12.12.2012, SWD(2012) 416 final, at 3.4.1.2, p. 20

4.15 In EU, the freedom of establishment of companies is regarded as one of the fundamental principles guaranteed currently by the TFEU,[527] which is of central significance to the effective functioning of internal market.[528] Following its interpretation in *Centros*,[529] the CJEU continues in the case law to support the freedom of establishment in case of allegedly abusive conduct[530] and embrace a very liberal and "pro-free market" point of view,[531] which might facilitate COMI shift.[532] The EU Regulation (recast) thus introduced a look-back period of three months to ease the tension between the freedom of establishment and avoidance of COMI shift.[533] It is also required that a study on the issue of abusive forum shopping shall be submitted by the Commission to the European Parliament, the

[527] TFEU, article 49 (ex article 43 TEC), Article 54 (ex article 48 TEC); Case C-55/94, *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, Case C-2/74, *Jean Reyners v Belgian State* [1974] ECR 631

[528] European Commission, the EU Single Market: freedom to provide services/ freedom of establishment, at: http://ec.europa.eu/internal_market/top_layer/living_working/services-establishment/index_en.htm (Last visited on 14 June 2016)

[529] Case C-212/97, *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-01459, at 27: "That being so, the fact that a national of a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States cannot, in itself, constitute an abuse of the right of establishment. The right to form a company in accordance with the law of a Member State and to set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty."

[530] Case C-208/00, *Überseering BV v Nordic Construction Company Baumanagement GmbH* [2002] ECR I-09919, at 95: "where a company formed in accordance with the law of a Member State (`A') in which it has its registered office exercises its freedom of establishment in another Member State (`B'), Articles 43 EC and 48 EC require Member State B to recognise the legal capacity and, consequently, the capacity to be a party to legal proceedings which the company enjoys under the law of its State of incorporation (`A')."

Case C-411/03, *Sevic Systems AG* [2005] ECR I-10805, at 19: "Cross-border merger operations, like other company transformation operations, respond to the needs for cooperation and consolidation between companies established in different Member States. They constitute particular methods of exercise of the freedom of establishment, important for the proper functioning of the internal market, and are therefore amongst those economic activities in respect of which Member States are required to comply with the freedom of establishment laid down by Article 43 EC."

Case C-210/06, *Cartesio Oktató és Szolgáltató bt,* [2008] ECR I-09641, at 124: "as Community law now stands, Articles 43 EC and 48 EC are to be interpreted as not precluding legislation of a Member State under which a company incorporated under the law of that Member State may not transfer its seat to another Member State whilst retaining its status as a company governed by the law of the Member State of incorporation."

Case C-378/10, *VALE Építési Kft.* [2012], at 41: "Articles 49 TFEU and 54 TFEU must be interpreted as precluding national legislation which enables companies established under national law to convert, but does not allow, in a general manner, companies governed by the law of another Member State to convert to companies governed by national law by incorporating such a company."

[531] Tridimas, P. Taski, Abuse of Right in EU Law: some reflections with particular reference to financial law, 2009, p.15, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1438577 (Last visited on 14 June 2016)

[532] Eidenmüller, Horst, Abuse of Law in the Context of European Insolvency Law, in: 6 ECFLR 1, 2009, p.12

[533] The EU Regulation (recast), recital (31)

Council and the European Economic and Social Committee in no later than 3 years after the EU Regulation (recast) 's entry into enactment.[534]

4.16 The Model Law does not set up prevention of forum shopping as its objective and actually it is a concept that has not been mentioned in its main text. Instead, there is an equivalent concept of forum shopping stated under the Guide and Interpretation Law, which is abuse of process.[535] Under the circumstance that an applicant falsely claims the center of main interests to be in a particular State, whether or not that constitutes a deliberate abuse of the process and accordingly provides a ground to decline recognition is not governed by the Model Law but by domestic law or procedural rules.[536] Therefore, prevention of abuse of the process will bring two consequences to the Model Law regime. One is refusal of recognition and the other, non-uniformity in its application. Recognition is one of the core objectives of the Model Law. Refusal of recognition will undermine its function, i.e. "to foster international cooperation as a means of maximizing outcomes for all stakeholders".[537] Therefore, it is suggested that domestic law or procedural rules applied to abuse of process should be narrowly construed. [538] In addition, unlike the Regulation, which is a Union legal instrument binding in its entirety, uniformity in its application is the goal the Model Law shall strive for.[539] Without a uniform criteria of abuse of process, the enacting State should apply its domestic law with due consideration and regard has to be given to international origins of the Model Law.[540] In sum, although the courts are not prevented from applying domestic law or procedural rules in response to an abuse of process,[541] the two overriding purposes of the Model Law, including reducing the possibility of non-recognition to the minimum and promoting uniformity in application on international level, outweigh the necessity to set up prevention of abuse of process as an objective.

1.8 Scopes

1.3.1 Definitions

4.17 The definition of insolvency proceedings under the EC Regulation has four characteristics.[542] Some has been reserved and some has been changed pursuant to the EU Regulation (recast). First of all, the general scopes of application of both of them are the same, which applies to collective insolvency proceedings.[543] Secondly, it is required that the proceedings under the EC Regulation must be based on the debtor's insolvency and not on any other grounds.[544] The EC Regulation inherited the traditional concept of insolvency, which attached

[534] The EU Regulation (recast), article 90(4)
[535] Guide and Interpretation, para.161-162
[536] Guide and Interpretation, para.162
[537] Guide and Interpretation, para.161
[538] Guide and Interpretation, para.161
[539] Guide and Interpretation, para.22
[540] Guide and Interpretation, para.161
[541] Guide and Interpretation, para.162
[542] Virgós/Schmit Report (1996), para.49
[543] The EC Regulation, recital (9); the EU Regulation (recast), recital (12)
[544] Virgós/Schmit Report (1996), para.49(b)

importance to liquidation and distribution of the remaining assets of the debtor's.[545] According to Wessels, the liquidation approach prevailed in Europe during the last two decades of the last century.[546] The EC Regulation restricts the secondary proceedings to liquidation.[547] In accordance with the EC Regulation, even the person or body, who is entrusted with the administration of the assets of the debtor in the insolvency proceedings, are called "liquidators".[548] As pointed by the European Commission in its Impact Assessment, that traditional preference now becomes an obstacle to promote the rescue of business in financial difficulties and fails to sufficiently reflect "current EU priorities and national practices in insolvency law".[549] For the purpose of promoting the rescue culture, the EU Regulation (recast) broadens the definition of insolvency proceedings, which also covers pre-insolvency proceedings on an interim or provisional basis and hybrid proceedings, in which the debtor can continue to manage its assets and affairs (debtor in possession).[550] Accordingly, the liquidation limitation set on the secondary proceedings has been removed, which will be discussed in the following section. Thirdly, the EU Regulation (recast) also substitutes the term "liquidators" with a more extensive one, "insolvency practitioners", including on an interim basis,[551] which echoes its rescue-oriented reform. Thirdly, it is required under the EC Regulation alone that the proceedings should entail at least partial divestment of that debtor, which is influenced by the liquidation approach, and the appointment of a liquidator.[552] That means the power of administration and disposal of the debtor's assets are vested in total or in part in the liquidator or through the intervention and control of the liquidator's actions.[553] The appointment of liquidators is no longer considered a component of the definition concerning insolvency proceedings under the EU Regulation (recast) because in the process of debt restructuring such appointment is not always deemed necessary.[554] Fourthly, the definition of the insolvency proceedings under the EC Regulation was exclusively enclosed with relevant Annexes.[555] The close-list approach serves as direct indication of applicability of the EC Regulation and generated high degree of legal certainty, which has also been followed by the EU Regulation (recast).

4.18 The EC Regulation and the Model Law used to have considerable disparities in definitions of insolvency proceedings, which have now been notably reduced

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[545] Hess, Oberhammer, Pfeiffer, European Insolvency Law-The Heidelberg-Luxembourg-Vienna Report on the Application of Regulation No.1346/2000/EC on Insolvency Proceedings (External Evaluation JUST/2011/JCIV/PR/0049/A4), C.H.Beck.Hart.Nomos, 2014, para.36

[546] Wessels, Bob, Themes of the future: rescue businesses and cross-border cooperation, in: Insolv.Int. 2014, 27(1), p.4

[547] The EC Regulation, article 3(3), Annex C

[548] The EC Regulation, article 1(1), Annex B

[549] EU Commission Staff Working Document Impact Assessment Accompanying the document - Revision of Regulation (EC) No 1346/2000 on insolvency proceedings, Strasbourg, 12.12.2012, SWD(2012) 416 final, at 3.1, p. 10

[550] The EU Regulation (recast), article 1(1), 2(4), Annex A

[551] The EU Regulation (recast), article 2(5), Annex B

[552] Virgós/Schmit Report (1996), para.49(c), (d)

[553] Virgós/Schmit Report (1996), para.49(c)

[554] The EC Regulation, article 1(1)

[555] The EC Regulation, article 1(1), 2(a), (b)

due to the revision of the former. First of all, both the EU Regulation (recast) and the Model Law require that the insolvency proceedings should be collective proceedings, [556] albeit in accordance with the EU Regulation (recast), the insolvency proceedings are exhaustively listed in Annex A.[557] Secondly, both the Regulation and the Model Law can cover any collective proceedings, regardless of for the purpose of reorganization or liquidation or interim proceedings.[558]

4.19 Thirdly, both the EU Regulation (recast) and the Model Law provide that the collective proceedings should be based on a law relating to insolvency[559] but they have different focuses. The EU Regulation (recast) requires that proceedings are not qualified as pursuant to laws relating to insolvency unless they are designed exclusively for insolvency situations.[560] On the contrary, the Model Law aims at seeking a compatible description in order to encompass a range of insolvency rules as extensive as possible regardless of whether the specific statue or law is exclusively related to insolvency or not labeled as insolvency law but addressing insolvency *de facto* (e.g. company law). [561] Moreover, the Model Law also acknowledges that insolvency proceedings may be initiated under specific circumstances defined by law of some enacting states that the debtor is not in fact insolvent.[562] It therefore establishes a rebuttable presumption of insolvency of the debtor for the purposes of commencing a local insolvency proceeding, which is, recognition of a foreign main proceeding can be deemed as proof that the debtor is insolvent.[563]

4.20 Fourthly, both the EU Regulation (recast) and the Model Law requires that the collective proceedings should be subject to "control or supervision" by a court.[564] Nevertheless, the EU Regulation (recast) neither clarifies the level of control or supervision required to satisfy this aspect of the definition nor the time at which that control or supervision should arise. It merely indicates in its recital that the intervention by the court on appeal by a creditor or other interested parties can meet the condition of "control or supervision" by a court.[565] Meanwhile, UNCITRAL makes some clarification concerning "control or supervision". In accordance with Guide and Interpretation, a proceeding in which the debtor retains some measure of control over its assets, albeit under court supervision, such as a debtor-in-possession would fulfill the condition.[566] In addition, indirect control or supervision exercised by an actor, such as an insolvency representative, who is subject to control or supervision by the court,

[556] The EC Regulation, recital (10), article 1(1); the EU Regulation (recast), article 2(1); the Model Law, article 2(a), Guide and Interpretation, para.69-70
[557] The EU Regulation (recast), recital (9), article 2(4)
[558] The EU Regulation (recast), article 1(1), 2(4), Annex A; the Model Law, article 2(a)
[559] The EU Regulation (recast), recital (16), article 1(1); the Model Law article 2(a), Guide and Interpretation, para.73
[560] The EU Regulation (recast), recital (16)
[561] Guide and Interpretation, para.73
[562] Guide and Interpretation, para. 72
[563] The Model Law, article 31
[564] The EU Regulation (recast), recital (10), article 1(1); the Model Law, article 2(a)
[565] The EU Regulation (recast), recital (10)
[566] Guide and Interpretation, para.74

can qualify as well.[567] As for the proper time of control or supervision, it recognizes that expedited reorganization proceedings, which need control or supervision by a court at a late stage of the insolvency process, should also be counted in.[568] Last but not least, fully aware of the importance of disclosure of information to the creditors and to preserve the collective nature of the proceedings,[569] the EU Regulation (recast) also literally introduces the word "public" into the definition of insolvency proceedings,[570] which is different from its predecessor and the Model Law.

1.3.2 Exclusion

4.21 First of all, the Regulation and the Model Law has slightly different attitudes towards whether or not to include natural persons and non-traders. In accordance with the Regulation, the courts of the other Member States shall unconditionally grant recognition without being able to review the assessment on the basis of domestic legal rule, which is made by the court that opened the main insolvency proceedings enclosed in the Annexes.[571] The supportive basis, as indicated by the CJEU, is the principle of mutual trust, which should be deemed as "the waiver by the Member States of the right to apply their internal rules on recognition and enforcement in favor of a simplified mechanism for the recognition and enforcement of judgments handed down in the context of insolvency proceedings."[572] The Model Law is not established on the ground of the principle of mutual trust. Considering that in some jurisdictions there is no special insolvency regime governing natural persons and non-traders, they can be excluded from the scope of application of the Model Law if it is so required in accordance with the insolvency law of the enacting State.[573]

4.22 Secondly, both the Regulation and the Model Law exclude the financial institutions from the scope of application. The insolvency proceedings related to insurance undertakings,[574] credit institutions and investment undertakings[575]

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[567] Guide and Interpretation, para.74

[568] Guide and Interpretation, paras.75-76; See also Legislative Guide, Part two, Ch. IV, paras. 76-94 and Recommendations 160-168

[569] EU Commission Staff Working Document the Impact Assessment Accompanying the document Revision of Regulation (EC) No 1346/2000 on insolvency proceedings, Strasbourg, 12.12.2012, SWD(2012) 416 final, at 3.4.3, p.24-25

[570] EU Regulation (recast), Article 1(1)

[571] Case C-444/07, *MG Probud Gdynia sp. z o.o*. [2010] ECR I-00417, para. 29, 39, 40; *Eurofood,* para.42, 46, 47

[572] The EC Regulation, recital (22); the EU Regulation (recast), recital (69); Case C-444/07, *MG Probud Gdynia sp. z o.o*. [2010] ECR I-00417, para.28; Case C-341/04 *Eurofoods IFSC Ltd* [2006] ECR I-03813 (*Eurofood*), para.40

[573] Guide and Interpretation, para. 61

[574] Council Directive (EC) 2001/17 on the reorganization and winding-up of insurance undertakings, O.J. L 110 of 20 April 2001.

[575] Council Directive (EC) 2001/24 on the reorganization and winding-up of credit institutions, O.J. L 125 of 5 May 2001; Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field as amended by Directive 95/26/EC; Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities, amended by Directive 95/26/EC

have been left outside the scope of application under the EC Regulation.[576] As explained in the Virgós/Schmit Report, those aforementioned institutions are subject to prudential supervision under national laws as well as regulated pursuant to the standards set up by the Directives.[577] Due to the amendments to those related Directives, the EU Regulation (recast) further specifies that investment firms and other firms, institutions and undertakings[578] as well as collective investment undertakings shall be excluded.[579] The Model Law also provides the possibility of excluding the financial institutions, such as banks or insurance companies because they are usually subject to a special insolvency regime under the national law.[580]

4.23 Thirdly, with respect to whether proceedings are based on a law relating to insolvency, the EU Regulation (recast) provides that those proceedings that are based on general company law shall be excluded.[581] Hence, UK schemes of arrangement based on the Companies Act 2006, s 885 are beyond the scope of the recast Regulation. It is further clarified that certain adjustment of debt proceedings concerning a natural person of very low income and very low asset value, which never makes provisions for payment to creditors, should be excluded.[582] Accordingly, UK Debt Relief Orders based on Part 7A of the Insolvency Act 1986 (c. 45) do not fall within the ambit of the recast Regulation. As aforementioned in section 1.3.1, the Model Law has wider extent in this regard by acknowledging proceedings opened on the basis of specific law, which is not exclusively related to insolvency but addresses insolvency *de facto*, such as company law.[583] Nevertheless, it is noteworthy that the Model Law explicitly excludes a simple proceeding for a solvent legal entity, which merely seeks to dissolve its legal status, instead of pursuing reorganization.[584]

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[576] The EC Regulation, recital (9), article 1(2)

[577] Virgós/Schmit Report (1996), para.54

[578] The EU Regulation (recast), recital (19), article 1(2)(c); The investment firms and other firms, institutions and undertakings are referred to those to the extent these are covered by Directive 2001/24/EC as amended. On 15 May 2014, Directive 2014/59/EU of the European Parliament and of the Council 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 (hereinafter, Directive 2014/59/EU) was issued. The Directive 2014/59/EU will apply to both credit institutions investment firms. Thus the Directive 2001/24/EC, which provides for the mutual recognition and enforcement in all Member States of decisions concerning the reorganization or winding up of institutions having branches in Member States other than those in which they have their head offices, shall be amended accordingly. Directive 2014/59/EU, recital (1), (119)

[579] The EU Regulation (recast), recital (19), article 1(2)(d), 2(2): collective investment undertakings means undertakings for collective investment in transferable securities (UCITS) as defined by Directive 2009/65/EC and alternative investment funds (AIFs) as defined by Directive 2011/61/EU. On 23 July 2014 the European Union adopted Directive 2014/91/EU amends the current Directive 2009/65/EC. On 17 December 2013 the European Commission adopted a Delegated Regulation (EU) No 694/2014 supplementing Directive 2011/61/EU.

[580] The Model Law, Article 1(2); Guide and Interpretation, para.56

[581] The EU Regulation (recast), recital (17)

[582] The EU Regulation (recast), recital (17)

[583] Guide and Interpretation, para.73

[584] Guide and Interpretation, para.73

4.24 Last but not least, by introducing the word 'public' into the definition of insolvency proceedings,[585] the EU Regulation (recast) alone confirms that no confidential proceedings should be included.[586] For example, French *mandataire ad hoc* and conciliation proceedings, which are both out-of-court settlement proceedings (règlement amiable) based on Article L611-13 and L611-4 of French Commercial Code and are preventative and confidential in nature, should thus be excluded.

1.4 Structures

4.25 The Regulation consists of recitals, articles and annexes. There are 33 recitals and 47 articles under the EC Regulation and 89 recitals and 92 articles under the EU Regulation (recast). The main text of the EC Regulation is composed of international private law rules in matters of jurisdiction, applicable law, recognition and enforcement of judgments, cooperation and communication involving cross-border insolvency proceedings, which has been excluded from the scope of the Brussels I[587] that is now repealed by the Brussels I (recast).[588] Deriving from the EC Regulation, the EU Regulation (recast) makes an overall improvement of the aforementioned basic contents and further enhances the function of cooperation and communication, sets out provisions related to group companies and the interconnection of insolvency registers. The recitals are placed prior to the main text, which present the background, context and aims of the Regulation. Besides, the recitals of the Regulation possess explanatory function. Although the definitions contained in them are not binding,[589] they can equip the national courts and the CJEU with guidance for proper understanding and interpretation of the Regulation.[590] That probably explains why the amount of the recitals grows proportionally to those of the articles under the EU Regulation (recast).

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585 The EU Regulation (recast), recital (12), article 1(1)

586 The EU Regulation (recast), recital (13)

587 The EC Regulation, recital (7); Brussels I refers to Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which replaced the 1968 Brussels Convention with effect from 1 March 2002 [2001] OJ L12

588 The EU Regulation (recast), recital (7); Brussels I (recast) refers to Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matter (recast), which replaced the Brussels I and came into effect on 10 January 2015. OJ 20 December 2012, L 351/1

589 Virgós and Garcimartín, The European Insolvency Regulation: Law and Practice, Kluwer Law International, 2004, p. 7

590 *Re BRAC Rent-A-Car-International Inc* [2003] BCC 248, 251C (Lloyd J): the recitals "help to cast light on some of the substantive provisions", (qtd. in Moss, Fletcher & Isaacs (ed.), The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide (2nd ed.), Oxford University Press, 2009, p.32 footnote 90); The recitals were decisive in e.g. Case C-294/02, *Commission of the European Communities v AMI Semiconductor Belgium BVBA and Others* [2005] ECR I-02175; *Commission v. AMI Semiconductor Belgium BVBA* [2005] C-294/02 and, Case C-1/04 *Susanne Staubitz-Schreiber* [2006] ECR I-00701 (*Staubitz-Schreiber*) (qtd. in Wessels, Bob, International Insolvency Law (3rd ed.), 2012, 10489 (5)

4.26 There are three annexes attached to the EC Regulation, which determine whether or not the relevant national insolvency proceedings and liquidators fall within the ambit of the EC Regulation. The three annexes are equally important for the application of the EC Regulation. Annex A contains a list of insolvency proceedings pursuant to article 2(a). Annex B includes a list of winding-up proceedings in accordance with article 2(c). Annex C refers to persons and organs, qualifying as liquidators based on article 2(b). These annexes work together with the main text of the EC Regulation by indicating which national legal institutions fall within the ambit of the definitions. The "close-list method" serves to provide liquidators and courts with a simple method of consulting the annexes to verify whether the EC Regulation is applicable to a specific proceeding.[591] Four annexes are enclosed to the EU Regulation (recast). Compared to their predecessors, the renewed annexes have undergone content and structural adjustments. In accordance with the EU Regulation (recast), winding-up proceedings are no longer the sole attribute assigned to the secondary proceedings. Therefore, it is no longer necessary to provide a separate list as under the Annex B to the EC Regulation. The recast Annex A is an integrated list of insolvency proceedings, including interim proceedings as well as proceedings related to rescue, adjustment of debt, reorganization or liquidation.[592] The revised Annex B accommodates any person or body, including on an interim basis, who are qualified as insolvency practitioners under the relevant national law of each member state.[593] The renewed Annex C records the list of successive amendments to related EU legislations due to repeal of the EC Regulation.[594] In addition, a correlation table is placed in the Annex D adhered to the EU Regulation (recast) in order to provide relevant references to the repealed EC Regulation.

4.27 The Model Law consists of Preamble and 32 articles. According to Berends, the general idea behind the Model Law is that "there are only three things that are important in cross-border insolvency: speed, speed, and more speed. To put it bluntly: act first, think later."[595] The Model Law focuses on four elements identified as key to the conduct of cross-border insolvency cases: access, recognition, relief (assistance) and cooperation.[596] As an international instrument, the Model Law does not contain any close-list annexes, in which applicable insolvency proceedings are mandatorily included. Instead, the Model Law leaves room for national legislations by inserting brackets filled with *italics*, which can be replaced by introducing relevant national legislations into the model provisions.

4.28 Besides, the Model Law is complemented by guides, which gradually evolved to cope with the demands in practice. Among all those guides, the Guide

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[591] Wessels, Bob, International Insolvency Law (3rd, ed.), at 10443; see also Virgós/Schmit Report (1996), para. 9.
[592] The EU Regulation, recital (7), (9), article 1(1), 2(4)
[593] The EU Regulation, recital (21), article 2(5)
[594] The EU Regulation, Annex C
[595] Berends, André, The UNCITRAL Model Law on Cross-border Insolvency: A Comprehensive Overview, in: 6 Tul. J. Int'l & Comp. L., pp. 320.
[596] The Judicial Perspective, at 13

to Enactment is of particular importance, which provides background and explanatory information as well as article-by-article remarks (as revised in 2013, titled "Guide to Enactment and Interpretation", hereinafter Guide and Interpretation). UNCITRAL has also adopted the Legislative Guide on Insolvency Law in 2004 (the Legislative Guide), the Practice Guide on Cross-border Insolvency Cooperation in 2009 (the Practice Guide on Cooperation), Part III to the Legislative Guide (treatment of enterprise groups) in 2010 (the Legislative Guide Part III), the Judicial Perspective in 2011 as well as Part IV to the Legislative Guide (Directors' obligations in the period approaching insolvency) in 2013.[597] In addition, once enacted, the Model Law will be included in the CLOUT information system, which is used for collecting and circulating information on case law relating to the conventions and model laws that have emanated from the work of UNCITRAL. The purpose of the system is to "promote international awareness" of the legislative texts formulated by UNCITRAL and to "facilitate their uniform interpretation and application".[598]

1.5 Ways of Interpretation

4.29 The Regulation is supposed to be uniformly applied throughout the Member States. However, there is risk of mistranslation since the Regulation is translated into about 23 official languages and each version is equally authoritative. A report, written by Virgós and Schmit (the Virgós/Schmit Report), was published together with the 1995 Insolvency Convention that was adopted nearly verbatim by the EC Regulation.[599] Judicial opinions and legal academics unanimously hold that this report is a source of authoritative explanatory guidance for the interpretation of the EC Regulation.[600] Nevertheless, with the development of the Regulation and the contents replaced, updated sources of explanatory statement are needed. As aforementioned, the recitals, the number of which is notably increasing under the EU Regulation (recast), can be regarded as guidance to proper understanding of the revised Regulation. Moreover, as a Union legal instrument, the Regulation is subordinate to the Union legal order and rules. Therefore, the Regulation shall be interpreted in such a way that is consistent with the Treaty articles as well as general principles of Union law that govern it, which have been recognized as such by the Court of Justice of the European Union (CJEU).[601] In accordance with the Treaty on the Functioning of the European Union (TFEU), the CJEU is granted the jurisdiction to give preliminary

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[597] The texts are available at http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency.html (Last visited on 14 June 2016)

[598] Guide and Interpretation, para.243

[599] Virgós and Garcimartín, The European Insolvency Regulation: Law and Practice, Kluwer Law International, p. 7

[600] Academic perspective: Virgós and Garcimartín, The European Insolvency Regulation, p. 7; Vallender, Aufgaben und Befugnisse des deutschen Insolvenzrichters in Verfahren nach der EuInsVO, KTS . 2005, p 283, 288; in: Pannen, Klaus. cit., Introduction, mn 41, p. 17; Smid, Stefan, Deutsches und Europäisches Internationales Insolvenzrecht Kommentar, Kohlhammer, 2012, mn 14; Judicial perspective: Case C-341/04 *Eurofood IFSC Ltd* [2006] ECR I-03813 (*Eurofood*), Opinion of AG Jacobs, at 2; Case C-396/09 *Interedil Srl (in liquidation) v Fallimento Interedil Srl, Intesa Gestione Crediti SpA* [2011] ECR I-09915 (*Interedil*), Opinion of AG Kokott, at 63

[601] Moss, Fletcher & Isaacs, The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide (2nd ed.), Oxford University Press, 2009, para. 2.19

rulings concerning the interpretation of the Regulation,[602] who safeguards the coherent interpretation of autonomous meanings inherent in the Regulation. Fully aware of its the contribution in that regard, the EU Regulation (recast) even directly refers to the case law of the CJEU in its recitals.[603]

4.30 Considering the diversity of national legislations, the drafters of the Model Law placed text in italics between square brackets to "instruct" the national legislators to complete the text in their own way.[604] Although the spirit of a Model Law and the intention of its drafters, is that a State should stay as close as possible to the text of the Model Law to ensure a degree of certainty and predictability, the degree of harmony is likely to be lower than that resulting from a convention.[605] In order to tailor the Model Law to the national insolvency system, the modification to the uniform text is thus foreseeable. In light of interpreting the provisions of the Model Law, it is required under the Article 8 of the Model Law to take consideration its international origin so as to promote the uniformity in its application and the observance of good faith. Besides, CLOUT, the UNCITRAL Case Law database, also helps to harmonize interpretation of the Model Law in the way of providing information of relevant judicial decisions.[606] However, it can be an obstacle for CLOUT to collect the relevant cases if the enacted state does not have a specialized case database at the national level. In addition, the UNICTRAL secretariat also assists States with technical consultations for the preparation of legislation based on the Model Law.[607] Nonetheless, the UNICTRAL secretariat does not function as the CJEU to issue authoritative judgments, which can directly interfere with the interpretation of the Regulation in a uniform manner.

Ch.2 Jurisdiction

4.31 COMI and establishments are terms relating to determination of jurisdiction employed by both the Regulation and the Model Law. This chapter will introduce the two terms separately. For each of them, the introduction will start with their origins. Then I will move on to explain the reasons of ambiguity of the concept, in particular, COMI, and the problems incurred by application of the overlapping concepts, including the timing issues, under the EC Regulation and the Model Law in practice. I will further explore the development of interpretation under the EU Regulation (recast) as well as under the Model Law based on the legal texts and the case law.

2.1 COMI

2.1.1 Origin

[602] TFEU, article 267 (ex article 234 EC Treaty)
[603] The EU Regulation, recital (18), (24)
[604] Berends, André, The UNCITRAL Model Law on Cross-border Insolvency: A Comprehensive Overview, in: 6 Tul. J. Int'l & Comp. L., pp. 320, 323.
[605] Wessels, Bob, International Insolvency Law (3rd ed.), Vol.X, Deventer: Kluwer, 2012, para. 10195; See also the Guide and Interpretation, para. 20.
[606] Guide and Interpretation, para. 107
[607] Guide and Interpretation, para. 242

4.32 By incorporating COMI into the respective texts,[608] the Regulation and the Model Law literally utilize the same terminologies to indicate the jurisdiction in cross-border insolvency. In fact, it is the EC Regulation that inspired both the contents and the formulations of COMI under the Model Law.[609] Therefore, to find the origins of the two concepts, it is necessary to trace the relevant sources in the EU context.

4.33 The EC Regulation does not contain a definition of COMI. Instead, it offers a presumption, which is rebuttable. What is the reason behind that kind of arrangement? It can be deemed as a balance between the real seat theory of the civil law and state of incorporation theory of the common law.[610] In Europe, there are two competing doctrines with respect to the domicile of companies,[611] incorporation vis-à-vis real seat. The place of incorporation prevailed in the common law system. Its reflection on cross-border insolvency law is that according to this theory, if there were to be proceedings in more than one country, the main proceedings would take place in the jurisdiction of the place of registration of the company, and proceedings in other jurisdictions would be ancillary to the main proceeding.[612] On the other hand, the real seat theory of jurisdiction espoused by the civil law prevails in Europe.[613] In the case of *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)*,[614] the CJEU mentioned the points of view of Germany's Bundesgerichtshof with respect to the weakness of the place of incorporation

"where the connecting factor is taken to be the place of incorporation, the company's founding members are placed at an advantage, since they are able, when choosing the place of incorporation, to choose the legal system which suits them best. Therein lies the fundamental weakness of the incorporation principle, which fails to take account of the fact that a company's incorporation and activities also affect the interests of third parties and of the State in which the company has its actual centre of administration, where that is located in a State other than the one in which the company was incorporated."[615]

"by contrast, where the connecting factor is taken to be the actual center of administration, that prevents the provisions of company law in the State in which the

[608] The EC Regulation, recital (13), article 3(1); the EU Regulation (recast), recital (28), (30), article 3(1); the Model Law, article 2
[609] Guide and Interpretation, para.81, 88
[610] Fletcher, Insolvency in Private International Law (Oxford University Press, 2005, supplement 2007), p. 367.
[611] Brussels I Regulation, article 60(1)
[612] In *re English Scottish and Australian Chartered Bank*, [1893] 3 Ch. 385, 394 (U.K.); qtd Moss, Group Insolvency – Choice of Forum and Law: the European Experience under the Influence of English Pragmatism, 32 Brook. J. Int'l L. 1005 2006-2007, pp.1008, ft. 17.
[613] Moss, Fletcher, Isaacs(ed.), The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide (2nd ed.), Oxford University Press, 2009, para. 3.12
[614] *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)*, C-280/00, 5 November 2002.
[615] *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)*, C-280/00, 5 November 2002, para.15

actual center of administration is situated, which are intended to protect certain vital interests, from being circumvented by incorporating the company abroad."[616]

4.34 It is considered that it will be of more advantages to lay emphasis on substance instead of formality so that the insolvency cases can be dealt with in a more appropriate court where the debtor has a genuine connection. Accordingly, it seems that the theory of real seat is most likely the idea behind the "center of main interests" concept. However, it is not directly applicable but a possibility of replacement to the place of incorporation under the EC Regulation. It is designed in such a way, which implied that a consensus was hard to be reached between the common law and the civil law at the beginning and thus a compromise was indispensible.

2.1.2 Rebuttal of Presumption

2.1.2.1 EU

4.35 The aforementioned compromise gives rise to a controversial problem concerning the meaning of COMI, which is how to rebut the presumption of registered office. In EU, elusive nature of COMI used to result in different points of view between theory and practice. As Wessels observed, the legal literature has suggested that presumption is strong and difficult to be rebutted "under very specific circumstances". [617] Nevertheless, in accordance with the empirical research conducted based on 104 cases collected all over EU from 2002 to 2009, more than 80 per cent of the Member State courts whose decisions form the basis of this study rebutted the presumption of the cases[618] since the factors that could determine COMI were diverse.[619] The tension was firstly eased by the CJEU in the *Eurofood* case.[620] *Eurofood* is an Irish subsidiary wholly owned by an Italian company, Parmalat. The Italian court also opened an insolvency proceeding against *Eurofood* in Italy, determining that the COMI of it was in Italy. Later the Irish court also opened the insolvency proceeding against *Eurofood*, ruling that the COMI of it was in Ireland where it was registered. The CJEU affirmed the jurisdiction of the Irish court by indicating that

"the presumption … whereby the center of main interests of that subsidiary is situated in the Member State where its registered office is located, can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established

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[616] *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)*, C-280/00, 5 November 2002, para.16

[617] Wessels, International Insolvency Law, 3rd ed.,Vol.X, Deventer: Kluwer, 2012, para.10568

[618] Mevorach, Irit, Jurisdiction in Insolvency, A Study of European Courts' Decisions, in: Journal of Private International Law, vol. 6, no. 2, 2010, p. 343.

[619] Marshall, Jennifer (ed.), European Cross-border Insolvency Looseleaf, Allen & Overy, Sweet & Maxwell, Latest Release: December 19, 2013, at 1.8.225; For instance, the "head office function", where activities such as making strategic, executive and administrative decisions regarding accounting, IT, corporate marketing, branding etc. are performed, see Gabriel Moss and Tom Smith, Commentary on Council Regulation 1346/2000 on Insolvency Proceedings, in: Moss Fletcher, Isaacs (ed.), para. 8.81; in *King v. Crown Energy Trading AG,* the judge utilized the "central administration" and the "principal place of business" to determine the COMI, *King v. Crown Energy Trading AG* [2003] E.W.H.C. 163 (Comm), at 12-14

[620] Case C-341/04 *Eurofoods IFSC Ltd* [2006] ECR I-03813 (*Eurofood*)

that an actual situation exists which is different from that which location at that registered office is deemed to reflect. That could be so in particular in the case of a company not carrying out any business in the territory of the Member State in which its registered office is situated. By contrast, where a company carries on its business in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by that Regulation."[621]

4.36 In its decision of *Eurofood*, the CJEU set very high threshold to rebut the presumption, which could therefore be understood to equate COMI with the registered office.[622] However, later in the cases law, the CJEU gradually deviated from the strict approach adopted by the *Eurofood* with respect to Article 3(1). The *Interedil* case is the one of the most significance. In 2001, *Interedil* transferred its registered office from Italy to UK. In 2002, the company ceased all activity and was removed from the UK register. One year later, *Intesa Gestione Crediti SpA* filed insolvency proceedings against *Interedil* in Italy. *Interedil* challenged the jurisdiction of the Italian court on the ground that only the UK courts would have jurisdiction following the company's transfer to the UK. The CJEU was asked to provide guidance on how the COMI under Articles 2 and 3 was to be interpreted. The court indicated that a debtor company's main center of interests must be determined by attaching greater importance to the place of the company's administration. This place must be identified by reference to criteria that are both objective and ascertainable by third parties, in particular by the company's creditors. Importantly, the court held that if the bodies responsible for the company's management and supervision are in the same place as its registered office, the presumption in article 3(1) cannot be rebutted. Under the circumstance that a company's central administration is not to be found in the same place as its registered office, the CJEU concluded that the presence of objective factors, such as "immovable property owned by the debtor company, lease agreements, and the existence in that Member State of a contract concluded with a financial institution … may be regarded as objective factors and, in the light of the fact that they are likely to be matters in the public domain, as factors that are ascertainable by third parties",[623] can be taken into consideration. However, these elements cannot be regarded as sufficient factors to rebut the presumption, unless

"a comprehensive assessment of all the relevant factors makes it possible to establish, in a manner that is ascertainable by third parties, that the company's actual center of management and supervision and of the management of its interests is located in that other Member State."[624]

4.37 Following *Interedil*'s decision, the CJEU rendered another judgment involving similar issues in the *Rastelli* case. The Commercial Court of Marseille (Tribunal de commerce de Marseille) opened a main proceeding of Médiasucre,

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[621] *Eurofood*, para. 34 - 36
[622] McCormack, Gerard, Jurisdictional Competition and Forum Shopping in Insolvency Proceedings, in: 68 Cambridge Law Journal 169, 2009, p.189.
[623] Case C-396/09 *Interedil Srl (in liquidation) v Fallimento Interedil Srl, Intesa Gestione Crediti SpA* [2011] ECR I-09915 (*Interedil*)
[624] *Interedil,* para. 53

the registered office of which is located in France. The liquidator of Médiasucre filed the application in order to put Rastelli, an Italian registered company, together into the liquidation proceeding because the property of the two companies were intermixed. The request was approved by the French Court of Appeal (Cour d'appel d'Aix-en-Provence), holding that the liquidator's application was not intended to open insolvency proceedings against Rastelli but to join it to the judicial liquidation already opened against Médiasucre.[625] The Cour de cassation decided to stay the proceedings and to refer to the Court of Justice for the preliminary ruling on the questions of the effectiveness of national substantive consolidation rules in the case of cross-border insolvency and the possibility of joining one company into another company's main proceeding because of intermix of companies property. With respect to the matter of COMI, the CJEU held that

"That presumption may be rebutted where, from the viewpoint of third parties, the place in which a company's central administration is located is not the same as that of its registered office. In that event, the simple presumption laid down by the European Union legislature in favor of the registered office of that company can be rebutted if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect."[626]

4.38 From *Eurofood* to *Interedil* and *Rastelli,* it seems that the CJEU, when assessing rebuttal of the registered office presumption, has attached more importance to the place where the company has its central administration[627] on the basis of a comprehensive assessment of all the relevant factors. Ascertainability by third parties, in particular the creditors, is also a crucial factor that needs to be taken into account.

2.1.2.2 The Model Law

4.39 Corresponding to the term in the Regulation, COMI is also contained in article 16 of the Model Law, which provides that "in the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the center of the debtor's main interests."[628] Although it serves a different purpose,[629] it is stated in the Guide and Interpretation of the Model Law that the jurisprudence with respect to interpretation of COMI in the EC Regulation may be relevant to its interpretation in the Model Law.[630]

4.40 Nevertheless, the practice told a different story of "may be not". The overlapping concepts are actually subject to divergent interpretation in different

[625] Case C-191/10 *Rastelli Davide e C. Snc v. Jean-Charles Hidoux* [2011] ECR I-13209 (*Rastelli*), para. 11
[626] *Rastelli* , para. 35; *Eurofood*, para. 34, and *Interedil*, para. 51
[627] Jennifer Marshall (ed.), European Cross-border Insolvency Looseleaf, Allen & Overy, Sweet & Maxwell, Latest Release: December 19, 2013, at 2.4.250
[628] The Model Law, Article 16 (3)
[629] Guide and Interpretation, para. 141
[630] Guide and Interpretation, para. 141

jurisdictions. The Model Law was introduced into UK via the Schedule 1 to the Cross-Border Insolvency Regulation 2006 (CBIR), which enacted almost verbatim the Model Law. In *Re Standford* case,[631] there are parallel insolvency proceedings concerning the group in the U.S.A and in Antigua and Barbuda, where the key entity (Stanford International Bank Ltd) is registered. Due to disagreement between the American Receiver and the Antiguan Liquidators, they both applied for recognition under the CBIR in UK, which enacted almost verbatim the Model Law, in order to control assets in the UK. With respect to the concept of COMI, the British Court of Appeal determined the meaning of COMI in accordance with the CJEU's decision in *Eurofood*[632] based on the Regulation and held that

… if there is any difference in the test promulgated by the ECJ in *Eurofood* and that applied by the courts in the US then it is right that the court in England should apply the *Eurofood* test.[633] … There is nothing in it to suggest that the COMI of SIB alone was not in Antigua.[634]

4.41 However, the flexibility inherent in the Model Law allows the enacting State to make adjustments to its uniform text. In the US, on the contrary, as indicated in *Re Tri-Continental Exchange Ltd.,*

"Congress chose to substitute "evidence" for "proof' and otherwise to adopt the Model Law provision word-for-word. The explanation was that the substitution conformed to United States terminology and made clear that the burden of proof of "center of main interests" is on the foreign representative who is applying for recognition of a foreign proceeding as a main proceeding. This comports with the concept of a rebuttable presumption for purposes of Federal Rule of Evidence 301. FED.R.EVID. 301"[635]

4.42 By replacing the word "proof" with "evidence" in the equivalent provision for the COMI presumption, the U.S courts began to part with the *Eurofood* approach. Especially in *Re Bear Stearns*, Judge Lifland distributed the burden of proof on the person who was asserting that particular proceedings were main proceedings[636] and considered that the registered office presumption would be rebutted if there was any evidence to the contrary, regardless of an objection raised by any interested parties.[637] According to the empirical study conducted by Westbrook, "the COMI requirement had reduced forum shopping after Bear Stearns primarily because of the rejection of haven filings". [638]

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631 *Re Stanford International Bank* [2010] EWCA Civ 137; [2011] Ch 33

632 The simple presumption laid down by the Community legislature in favour of the registered office of that company can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect. *Eurofood,* para. 34.

633 *Re Stanford International Bank* [2010] EWCA Civ 137; [2011] Ch 33, at 54

634 *Re Stanford International Bank* [2010] EWCA Civ 137; [2011] Ch 33, at 63; Critism to confusion with respect to the COMI in *Re Stanford* case, please see Wessels, Bob, International Insolvency Law (3rd ed.), Vol.X, Deventer: Kluwer, 2012, para. 10283e

635 In *Re Tri-Continental Exchange Ltd* [2006] 349 BR 629, at 635

636 In *Re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd* 374 BR 122, at 127

637 In *Re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd* 374 BR 122, at 130

638 See Westbrook, An Empirical Study of the Implementation in the United States of the Model Law on Cross-Border Insolvency, 87 Am. Bankr. L. J. 247, (2013), p.252

4.43 In the *Re Stanford* case, [639] by referring to Judge Lifland's opinion in *Re Bear Stearns,*[640] Lewison J, the judge of the High Court of Justice of UK, also pointed out that

"except where there is no contrary evidence the registered office does not have any special evidentiary value. This change in language of the enactment, as it seems to me, may well explain why the jurisprudence of the American courts has diverged from that of the ECJ"[641]

4.44 As States that both enacted the Model Law, [642] the literal distinction of COMI under the legislations of the USA and UK is visible. Although there are obvious similarities between the Model Law and the Regulation both in the definitions and the rebuttable presumptions, there are differences, too. For instance, there is nothing in the Model Law comparable to clarification of COMI under the EC Regulation, which indicates that "the 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties".[643] The definition of foreign main proceeding in the Model Law is wider than that of "insolvency proceedings" in the EC Regulation. The former comprehends at least some types of receivership but the latter does not. Bearing the difference in mind, the US Receiver submitted that Lewison J should have applied the head office functions test he had recognized in *Re Lennox Holdings Ltd* and not the objective and ascertainable test adopted by *Eurofood* he applied in this case.

4.45 The US proceedings were not the end of the story. In 2009, the Superior Court of Quebec reached conclusions opposite to the UK decision on Stanford.[644] The Quebec court recognized the US Receiver as the "foreign representative", holding that the center of interest is in Houston, which is indisputable.[645] Later the Quebec Court of Appeal dismissed the appeal of the Antiguan Liquidators because "the Court is of the view that petitioners' efforts to have this conclusion set aside shows no reasonable chance of success."[646]

2.1.3 Time to determine COMI

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[639] *Re Stanford International Bank* [2010] EWCA Civ 137; [2011] Ch 33 In *Re Standford* case, there are parallel insolvency proceedings concerning the group in the U.S.A and in Antigua and Barbuda, where the key entity (Stanford International Bank Ltd) is registered. Due to disagreement between the American Receiver and the Antiguan Liquidators, they both applied for recognition under the CBIR in UK in order to control the local assets.

[640] In *Re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd* 374 BR 122

[641] *Re Stanford International Bank* [2009] EWHC 1441 (Ch), at 65

[642] The Model Law was introduced into UK via the Schedule 1 to the Cross-Border Insolvency Regulation 2006 (CBIR). The US enacted the Model Law as Chapter 15 of the Federal Bankruptcy Code.

[643] The EC Regulation, recital (13).

[644] *Stanford International Bank Ltd.* (Syndic de), 2009 QCCS 4109

[645] Id. at 36, "L'importance du centre névralgique de Houston est incontestable. Et le plus équitable est que le Tribunal reconnaisse comme *foreign proceeding* le *receivership* et comme représentant étranger le US Receiver Janvey." (in French)

[646] *Stanford International Bank Ltd.* (Dans l'affaire de la liquidation de), 2009 QCCA 2475, at 31

4.46 Although fraudulent or abusive forum shopping is not allowed in general, it is not forbidden to relocate COMI to some place else. In practice, to evaluate whether or not the relocation is effective largely depends on the COMI's time of establishment.

2.1.3.1 EU

4.47 In the EU, the EC Regulation did not explicitly set up rules on the timing issue. It is the CJEU that gradually made the relevant interpretation. The first case is the *Staubitz-Schreiber*, which involved individual insolvency.[647] Ms Staubitz-Schreiber used to be resident in Germany and filed for opening of insolvency proceedings regarding her assets before a German court. After her request for the opening of insolvency proceedings was lodged, she moved to Spain before the court decided to open the proceedings.[648] Hence, the main issue of this case is whether COMI of Ms Staubitz-Schreiber should be assessed on the time of filing of the request. If not, the German court should no longer have jurisdiction to open the main proceedings since COMI of the applicant was shifted to Spain. The CJEU decided in favor of the time of the request for the opening of proceedings.[649] The reasons are mainly twofold. The first reason is to achieve the objective of preventing forum shopping and the second concerns legal certainty and the power to adopt preservation measures.[650] As pointed out by AG Colomer,

"to hold that it is legitimate for a debtor to transfer his center of main interests in the period between the request for the opening of proceedings and the opening of insolvency proceedings would undermine the foundations of the whole scheme of the Regulation. In graphic terms, that would ultimately lead to creditors and courts continually having to pursue insolvent debtors in a vicious circle of requests for the opening of insolvency proceedings and transfers of centers of main interests which would never reach a satisfactory conclusion. Such a fate would have more in common with the legend of the Flying Dutchman than with the proper application of the Regulation on insolvency proceedings."[651]

4.48 The second case is regarding corporate insolvency, which is the aforementioned *Interedil* case. With respect to the relevant date for the purpose of locating the COMI of the company, the court followed the *Staubitz-Schreiber* approach, holding

"in principle, it is the location of the debtor's main center of interests at the date on which the request to open insolvency proceedings was lodged that is relevant for the purpose of determining the court having jurisdiction."[652]

2.1.3.2 The Model Law

[647] Case C-1/04, *Susanne Staubitz-Schreiber* [2006] ECR I-00701 (*Staubitz-Schreiber*)
[648] *Staubitz-Schreiber,* para.15-16
[649] *Staubitz-Schreiber,* para.29
[650] *Staubitz-Schreiber,* para.25,27,28;
[651] *Staubitz-Schreiber* Opinion of AG Colomer, para.82
[652] *Interedil,* para.55

4.49 The Model Law itself does not provide any rules concerning the date to determine COMI. It is stipulated under the Guide and Interpretation that the date relevant to COMI determination is the date of commencement of the foreign proceeding,[653] which is an approach different from European one. In accordance with the Model Law, COMI is utilized to facilitate the recognition of foreign insolvency proceedings. Although there can be pending period between the time of the application for commencement and the actual commencement of those proceedings, a request for recognition of foreign proceedings can only be made for existing proceedings, which are effectively opened. Hence, in the case of the Model Law, it is more appropriate to refer to the date of commencement of the foreign proceeding to determine COMI.[654]

4.50 In practice, the instruction is not always obeyed by the enacting States. For example, there is a split concerning the timing issue among the bankruptcy courts in the U.S. Some courts followed the Guide and Interpretation of the Model Law[655] but some did not, which considered that COMI should be determined as of the date of petition for recognition.[656] The first case set rules on the date is *Re Ran*, which involved an individual insolvency case. Ran was an Israeli businessman, who was put into an involuntary bankruptcy proceeding in 1997. Before the involuntary bankruptcy proceeding was commenced, Ran left Israel and moved to the U.S.A. and worked there. He has never returned to Israel. Nearly a decade after Ran's emigration, the receiver of Israeli insolvency proceeding filed a petition seeking recognition of the Israeli bankruptcy proceeding as a foreign main or non-main proceeding under Chapter 15 of the Bankruptcy Code in the U.S. Bankruptcy Court for the Southern District of Texas. The petition was dismissed and then it was appealed to the Court of Appeals for the Fifth Circuit.[657] In addition to the extreme fact in *re Ran* that almost a decade lapsed between the commencement of the foreign bankruptcy proceeding and petition for recognition,[658] the Court of the Fifth Circuit emphasized the grammar of the statute, holding

"Congress's choice to use the present tense requires courts to view the COMI determination in the present, i.e. at the time the petition for recognition was filed."[659]

4.51 Moreover, the Court of Appeals for the Fifth Circuit considered that it would be contrary to Congress's purpose for implementing Chapter 15, if COMI had to be assessed by focusing upon debtor's operational history, indicating

"a meandering and never-ending inquiry into the debtor's past interests could lead to a denial of recognition in a country where a debtor's interests are truly centered, merely

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[653] Guide and Interpretation, para.141, 149, 159
[654] Guide and Interpretation, para.159, ft.34
[655] In *re Kemsley*, 489 B.R. 346 (Bankr. S.D.N.Y. 2013); In *re Millennium Global Emerging Credit*, 458 B.R. 63 (Bankr. S.D.N.Y. 2011); In *re Gerova Fin. Grp., Ltd*., 482 B.R. 86 (Bankr. S.D.N.Y.2012)
[656] In *re Ran*, 607 F.3d 1017 (5th Cir. 2010); In *re Betcorp Ltd*., 400 B.R. 266 (Bankr. D. Nev. 2009); In *re British American Isle of Venice (BVI), Ltd*., 441 B.R. 713 (Bankr. S. D. Fla. 2010); In *re Fairfield Sentry Ltd*., 440 B.R. 60, 64 (Bankr. S.D. N.Y. 2010), aff'd, 714 F.3d 127(2d Cir. 2013)
[657] In *re Ran*, 607 F.3d 1017 (5th Cir. 2010), at 1020
[658] In *re Ran*, 607 F.3d 1017 (5th Cir. 2010), at 1026
[659] In *re Ran*, 607 F.3d 1017 (5th Cir. 2010), at 1025

because he conducted past activities in a country at some point well before the petition for recognition was sought."[660]

4.52 Later in *re Kemsley*, Mr. Kemsley, who is British, has also been living and working in the United States for an extended period of time. He was ordered personal bankruptcy in London in January 2012 and his bankruptcy trustee filed a petition in the U.S.A under chapter 15, seeking an order recognizing the UK Proceeding as a foreign main or non-main proceeding. Judge Peck held that the date of commencement of a foreign insolvency proceeding is the proper date for determining COMI for a foreign debtor and refused to grant recognition accordingly.[661] In his analysis with respect to the timing issue, Judge Peck considered that the date of opening the bankruptcy proceeding is

"a fixed and readily verifiable date. In contrast, the date for filing a petition for recognition can vary greatly depending on circumstances and the diligence of the foreign representative."[662]

4.53 With respect to corporate insolvency, the two options concerning the date to determine COMI also co-exist. In *re Betcorp Ltd.,* the court, by referring to *re Ran*, used the time of the petition for recognition as the date for determining COMI of an Australian company.[663] Nevertheless, in *re Millennium*, Judge Groppe rejected the reasoning in *re Ran*. The case involved two funding companies, which were incorporated in Bermuda and was put into liquidation there three years prior to their Chapter 15 petitions. First of all, Judge Gropper considered that the "plain words" of the statute did not control the date to make COMI determination.[664] He further pointed out that the petition for recognition under Chapter 15 was ancillary or secondary in nature and thus the date of the petition for recognition was "a matter of happenstance",[665] whereas the substantive date for the determination of the COMI issue should be "at the date of the opening of the foreign proceeding for which recognition is sought".[666]

4.54 Secondly, Judge Gropper referred to the decision in *re Tri-Continental Exchange Ltd.* and determined that the term COMI "generally equates with the concept of principal place of business' in United States law." [667] Considering that a debtor does not continue to have a place of business after liquidation is ordered since the business stops operating, it is obvious that an entity's principal place of business should be determined before it was placed into liquidation.[668]

4.55 Thirdly, Judge Gropper took into account the international origin of Chapter 15, which adopted the Model Law almost verbatim. The term of COMI under the

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[660] In *re Ran*, 607 F.3d 1017 (5th Cir. 2010), at 1025; See also Westbrook, Locating the Eye of the Financial Storm*,* 32 BROOK. J. INT'L L. 1019, 2007, at 1020.
[661]In *re Kemsley*, 489 B.R. 346 (Bankr. S.D.N.Y. 2013), at 354
[662]In *re Kemsley*, 489 B.R. 346 (Bankr. S.D.N.Y. 2013), at 354
[663] In *re Betcorp Ltd*., 400 B.R. 266 (Bankr. D. Nev. 2009), at 292
[664] In *re Millennium Global Emerging Credit*, 458 B.R. 63 (Bankr. S.D.N.Y. 2011), at 72
[665] In *re Millennium Global Emerging Credit*, 458 B.R. 63 (Bankr. S.D.N.Y. 2011), at 72
[666] In *re Millennium Global Emerging Credit*, 458 B.R. 63 (Bankr. S.D.N.Y. 2011), at 72
[667] In *re Tri-Continental Exchange Ltd.,* 349 B.R. 627 (Bankr. E.D.Cal.2006), at 634
[668] In *re Millennium Global Emerging Credit*, 458 B.R. 63 (Bankr. S.D.N.Y. 2011), at 72

Model Law corresponds to the formulation in article 3 of the EC Regulation. Judge Gropper indicated that the date of the opening of initial insolvency proceeding is the only date that the original drafters of the term for the EC Regulation could have contemplated.[669]

4.56 Fourthly, contrary to the opinions in *re Ran*,[670] Judge Gropper found inquiry "in the past" consistent with the "plain words of the statute" and stood in line with the stated purpose of Chapter 15, "to promote cooperation with foreign proceedings".[671] In particular, Judge Gropper mentioned that the fact the liquidator appeared before the U.S. court ten years after the commencement of the foreign proceeding could prevent him from being granted substantive relief, instead of using the date of Chapter 15 petition to deny recognition.[672] Fifthly, Judge Gropper considered that COMI determination as of the time of the petition for recognition could result in forum shopping because it "gives *prima facie* recognition to a change of residence between the date of opening proceedings in the foreign nation and the chapter 15 petition date".[673]

4.57 In *re Fairfield Sentry Ltd*., the Court of Appeals for the Second Circuit, reaffirmed that "a debtor's COMI is determined as of the time of the filing of the Chapter 15 petition."[674] The Second Circuit first pointed out that the statute text of the Chapter 15 did not invite the courts to take into consideration the debtor's entire operational history but signified the proper time, i.e. the filing date of the Chapter 15 petition, to trigger the COMI analysis.[675] Then the Second Circuit looked into the relevant case law of the federal courts, noting

"Most courts in this Circuit and throughout the country appear to have examined a debtor's COMI as of the time of the Chapter 15 petition."[676]

4.58 The Second Circuit further referred to *re Millennium,* in which the court attempted to equate COMI with principal place of business and consequently raised the expectation of debtor's operational history check at the time of commencement of the foreign proceedings.[677] The Second Circuit considered that the "principal place of business" approach, however, was intentionally abandoned by the Congress in enacting Chapter 15.[678] Besides, the Second Circuit also noticed that the Congress suggested to take into account its international origin of Chapter 15 in the event of interpretation. The Second Circuit turned to the Guide and Interpretation and the EC Regulation but indicated that international interpretation was of limited use in resolving the

[669] In *re Millennium Global Emerging Credit*, 458 B.R. 63 (Bankr. S.D.N.Y. 2011), at 74
[670] In *re Ran*, 607 F.3d 1017 (5th Cir. 2010), at 1025; *see also In re Betcorp Ltd*., 400 B.R. 266 (Bankr. D. Nev. 2009), at 291-292
[671] In *re Millennium Global Emerging Credit*, 458 B.R. 63 (Bankr. S.D.N.Y. 2011), at 75
[672] In *re Millennium Global Emerging Credit*, 458 B.R. 63 (Bankr. S.D.N.Y. 2011), at 76
[673] In *re Millennium Global Emerging Credit*, 458 B.R. 63 (Bankr. S.D.N.Y. 2011), at 75
[674] In *re Fairfield Sentry Ltd*., 714 F.3d 127(2d Cir. 2013), at 134
[675] In *re Fairfield Sentry Ltd*., 714 F.3d 127(2d Cir. 2013), at 135
[676] In *re Fairfield Sentry Ltd*., 714 F.3d 127(2d Cir. 2013), at 136
[677] In *re Millennium Global Emerging Credit*, 458 B.R. 63 (Bankr. S.D.N.Y. 2011), at 72
[678] In *re Fairfield Sentry Ltd*., 714 F.3d 127(2d Cir. 2013), at 137

timing problem the U.S. courts met, especially pointing out "the EU Regulation does not operate as an analog to Chapter 15".[679]

4.59 In the end, the Second Circuit tried to reconcile the split on the timing issues among the federal courts.[680] By taking into consideration the EC Regulation and other international interpretations, it is suggested "a court may consider the period between the commencement of the foreign insolvency proceeding and the filing of the Chapter 15 petition to ensure that a debtor has not manipulated its COMI in bad faith."[681]

2.1.4 Development of COMI

2.1.4.1 EU

4.60 It has been a well-acknowledged problem that the crucial concept of COMI is not defined under the EC Regulation.[682] In accordance with the EU Regulation (recast), the former Recital (13) under the EC Regulation,[683] which provided explanatory statement to COMI, is relocated to Article 3(1) of the EU Regulation (recast) with slight modification.[684] Such a "relocation" can at least be deemed as formal introduction of clarification concerning COMI into the main text. Moreover, the registered office presumption regarding a company or legal person has gone through tremendous content alteration. First of all, a look-back period has been set on the presumption in order to restrict the improper reincorporation of a company.[685] Reincorporation of less than three months prior to the application for insolvency proceedings is viewed as fraudulent or abusive forum shopping.[686] Accordingly, the registered office presumption can possibly be rebutted.[687] Besides, it seems that the EU Regulation (recast) changed the tone set on the presumption, which no longer shall be applied but is

[679] In *re Fairfield Sentry Ltd*., 714 F.3d 127(2d Cir. 2013), at 137
[680] Hon. Adler, Louise De Carl, Managing the Chapter 15 Cross-Border Insolvency Case (A Pocket Guide for Judges), 2nd ed., Federal Judicial Center, 2014, p.22
[681] In *re Fairfield Sentry Ltd*., 714 F.3d 127(2d Cir. 2013), at 138
[682] EU Commission Staff Working Document the Impact Assessment Accompanying the document Revision of Regulation (EC) No 1346/2000 on insolvency proceedings, Strasbourg, 12.12.2012, SWD (2012) 416 final, p.19
[683] The EC Regulation, recital (13): The 'center of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.
[684] The EU Regulation (recast), article 3(1): The center of main interests shall be the place where the debtor conducts the administration of his interests on a regular basis and which is ascertainable by third parties.
In the case of a company or legal person, the place of the registered office shall be presumed to be the center of its main interests in the absence of proof to the contrary. This presumption shall only apply if the registered office has not been moved to another Member State within a period of 3 months prior to the request for the opening of insolvency proceedings.
[685] The EU Regulation (recast), article 3(1), para.2
[686] Rudbordeh, Amir Adl, An analysis and hypothesis on forum shopping in insolvency law: From the European Insolvency Regulation to its Recast, p.51, available at: https://www.iiiglobal.org/node/1932
[687] Moss, Gabriel, Fletcher, Ian F, Isaacs, Stuart (ed.), The EU Regulation on Insolvency Proceedings (3rd ed.), Oxford University Press, 2016, at 8.560 - 8.561

possible to be rebutted if certain conditions are met.[688] The EU Regulation (recast) offers in its renewed recitals additional explanations on those key conditions, which were left unresolved under the EC Regulation. It is noteworthy that the EU Regulation (recast) sets up all those conditions by literally codifying the case law handed down by the CJEU .[689]

4.61 The first decisive condition is what constitutes administration. In accordance with the EU Regulation (recast), it refers to central administration of a company where it conducts "actual center of management and supervision and of the management of its interests".[690] The second condition is COMI should be assessed comprehensively based on all the relevant factors.[691] Given the third condition that COMI shall be ascertainable by third parties, the EU Regulation (recast) also specifies that the creditors and their perception deserve special consideration. For instance, timely notification to the creditors in the case of relocation of COMI through appropriate means.[692]

2.1.4.2 The Model Law

4.62 In order to provide guidance concerning the interpretation of COMI, the Guide has been revised in accordance with the request of UNCITRAL at its forty-third session (2010)[693] and was adopted by the Commission as the "Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency" on 18 July 2013.[694] It is stipulated that the key indicators, considered as a whole, to determine the location of COMI are (1) central administration of the debtor; (2) ascertainability by creditors; (3) the date at which these factors should be analyzed,[695] which is the date of commencement of the foreign proceeding.[696] In case that the three indicators are not sufficient to locate COMI, the Model Law also allows additional factors, including "an unexhaustive list of relevant factors",[697] to be taken into consideration in individual cases. Further, the Model Law emphasizes that

"In all cases, however, the endeavor is an holistic one, designed to determine that the location of the foreign proceeding in fact corresponds to the actual location of the debtor's center of main interests, as readily ascertainable by creditors."[698]

4.63 Regardless of COMI under the two instruments serving different purposes,[699] the Model Law lays out quite identical criteria to EU Regulation

[688] The EU Regulation (recast), recital (30)
[689] *Interedil,* para. 53
[690] The EU Regulation (recast), recital (30)
[691] The EU Regulation (recast), recital (30)
[692] The EU Regulation (recast), recital (28)
[693] Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17), para.259
[694] Guide and Interpretation, para.18
[695] Guide and Interpretation, para.145
[696] Guide and Interpretation, para.141, 149, 159
[697] Guide and Interpretation, para.147
[698] Guide and Interpretation, para.146
[699] Guide and Interpretation, para.141

(recast) with respect to determination of COMI. In reality, however, the enacting States do not strictly abide by those common rules. I hereby recall the *re Suntech Power* case,[700] which I have mentioned in section 1.3 of Part III. It involved parallel cross-border insolvency proceedings pending in China, the Cayman Islands and the United States. On 5 November 2013, provisional liquidation of Suntech Power was initiated in Cayman Islands (the Cayman proceeding). On 21 February 2014, a petition was filed for recognition of Suntech Power's provisional liquidation proceeding pending in Cayman Islands as a foreign main proceeding or non-main proceeding.[701] One of Suntech Power's American creditors, Solyndra, who brought antitrust litigation against the debtor, objected to the request.[702] On 17 November 2014, the United States Bankruptcy Court for the Southern District of New York (S.D.N.Y.) recognized the Cayman proceeding as the foreign main proceeding.[703]

4.64 The case was filed in New York merely based on a New York bank account established one day prior to the petition for recognition,[704] Solyndra contended that neither was Suntech Power's venue proper in New York, nor could Suntech Power's be qualified as debtor under section 109(a) of the Bankruptcy Code.[705] By referring to *Re Octaviar Admin. Pty Ltd*., 511 B.R. 361, 372-73 (Bankr. S.D.N.Y. 2014)[706] and *Re Yukos Oil Co.*, 321 B.R. 396, 407 (Bankr. S.D. Tex. 2005), the court

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[700] In *re Suntech Power Holdings Co., Ltd.*, Case No.: 14-10383(SMB), Written Opinion Signed On 17 November, 2014

[701] In *re Suntech Power Holdings Co., Ltd.*, Case No.: 14-10383(SMB), Written Opinion Signed On 17 November, 2014, p.14

[702] Objection of the Solyndra Residual Trust to Chapter 15 Petition of *Suntech Power Holdings Co., Ltd.* (in provisional liquidation) for Recognition of Foreign Main Proceeding Pursuant to Section 1517 of the Bankruptcy Code, In *re Suntech Power Holdings Co., Ltd.* (in Provisional Liquidation), Case No. 14-10383 (SMB), Related Docket Nos. 1, 2, 3, 4

[703] In *re Suntech Power Holdings Co., Ltd.*, Case No.: 14-10383(SMB), Written Opinion Signed On 17 November, 2014, p.3

[704] Objection of the Solyndra Residual Trust to Chapter 15 Petition of Suntech Power Holdings Co., Ltd. (in provisional liquidation) for Recognition of Foreign Main Proceeding Pursuant to Section 1517 of the Bankruptcy Code, In *re Suntech Power Holdings Co., Ltd*. (in Provisional Liquidation), Case No. 14-10383 (SMB), Related Docket Nos. 1, 2, 3, 4, at D Suntech Has Not Qualified as a Debtor Under 11 U.S.C. § 109(a), ii Suntech Cannot Rely on $500,000 Recently Placed in the KCC Trust Account as "Property"; See also Findings of Fact and Conclusions of Law Granting Petition for Recognition as Foreign Main Proceeding and Denying Cross-motion to Change Venue, In *re Suntech Power Holdings Co., Ltd.*, Case No.: 14-10383(SMB), Written Opinion Signed On 17 November, 2014, at D New York Proceeding, 2. The Chapter 15 Case

[705] Objection of the Solyndra Residual Trust to Chapter 15 Petition of Suntech Power Holdings Co., Ltd. (in provisional liquidation) for Recognition of Foreign Main Proceeding Pursuant to Section 1517 of the Bankruptcy Code, In *re Suntech Power Holdings Co., Ltd*. (in Provisional Liquidation), Case No. 14-10383 (SMB), Related Docket Nos. 1, 2, 3, 4, at Factual Background, p.7

[706] It has been suggested by the United States Court of Appeals Second Circuit in *re Barnet* that Section 109(a) of the Bankruptcy Code should be applied to cases filed under the Chapter 15. (See In *re Barnet*, 737 F.3d 238 (2d Cir. 2013) and Hon. Adler, Louise De Carl, Managing the Chapter 15 Cross-Border Insolvency Case A Pocket Guide for Judges (2nd ed.), Federal Judicial Center, 2014, p.9). *Re Octaviar* is the remand case of *Re Barnet* and thus followed the holding in *re Barnet.* Chapter 15 adopted the UNCITRAL Model Law almost in verbatim. Nonetheless, there is no threshold under the Model Law, requiring a foreign debtor must have a business or property in the state, where the petition of recognition is filed. The Second Circuit's conclusion that section 109(a) applies in Chapter 15 cases has received criticism by commentators. (See Seife, Howard and Vazquez, Francisco, The Octaviar Saga: The Chapter 15 Door Opens, Closes, and then Reopens on the Foreign Representatives, in: Norton Journal of Bankruptcy Law and

considered the New York bank account, as the only asset of the debtor in the United States,[707] sufficed to render the eligibility of the debtor under 11 U.S.C. § 109(a) through the establishment of the bank account in New York.[708]

4.65 Solyndra further argued that the debtor's center of main interests was not located in the Cayman Islands. As of the commencement of the Cayman proceeding,

"- Suntech was headquartered in China;
- All of Suntech's managers and employees resided outside of the Cayman Islands
-Suntech's (technically, those of its wholly-owned subsidiaries) manufacturing facilities were located in China;
-All of Suntech's creditors, suppliers, and customers were located outside the Cayman Islands;
- As the debtor's primary assets, all of Suntech's bank accounts were maintained in Hong Kong and the Mainland China"[709]

4.66 By referring to its former decisions on the similar issues, the United States Bankruptcy Court for the Southern District of New York considered that the following non-exhaustive list of factors, singly or combined, could be relevant to determining a debtor's COMI:

Practice, Vol.23, No.5, October 2014, p.576) It has been argued that the decision in *re Barnet* "limits international cooperation under chapter 15" and "is ill-suited for deciding the jurisdictional requirements for a chapter 15 case". (See Swick, R. Adam, Harle, Paul, Section 109(a)'s Jurisdictional Requirements Applied to Chapter 15, in: 33-MAR Am. Bankr. Inst. J. 30, 2014, p. 32). The decision is contrary to the former case law. For example, in *re Toft*, 453 B.R. 186 (Bankr, S.D.N.Y. 2011), at 193 and in re Fairfield, 458 B.R. 665 (Bankr. S.D.N.Y. 2011), at 679, no.5. Later in *re Bemarmara,* it is held that "This Court does not agree with the decision of the Second Circuit. And it is the Court's belief that there is a strong likelihood that the Third Circuit, likewise, would not agree with that decision." In *re Bemarmara Consulting A.S.*, No. 13-13037 (KG) (Bankr. D. Del. Dec. 17, 2013) *Re Barnet* will still have the binding effect on any court within the Second Circuit until the Bankruptcy Code is revised or the Supreme Court reconsiders the issue, although the Second Circuit has forwarded copies of its opinion of *Re Barnet* to Congress in order to report the technical deficiencies in the Bankruptcy Code. (In *re Barnet*, 737 F.3d 238 (2d Cir. 2013), at Conclusion. In accordance with the Long Range Plan for the Federal Courts adopted by the Judicial Conference, 91e: All courts of appeals should be encouraged to participate in the pilot project to identify technical deficiencies in statutory law and to inform Congress of same. In: Report of the Proceedings of the Judicial Conference Of the United States, Sept.19, 1995, p.62)

[707] In *re Suntech Power Holdings Co., Ltd.,* Case No.: 14-10383(SMB), Written Opinion Signed On 17 November, 2014, at Discussion A Eligibility to be a Debtor, p.18

[708] In *re Suntech Power Holdings Co., Ltd.,* Case No.: 14-10383(SMB), Written Opinion Signed On 17 November, 2014, at Discussion A Eligibility to be a Debtor, p.18-19. The court held that "Interpreting the Bankruptcy Code to prevent an ineligible foreign debtor from establishing eligibility to support needed chapter 15 relief will contravene the purposes of the statute to provide legal certainty, maximize value, protect creditors and other parties in interests and rescue financially troubled businesses. … Despite the lack of a United States presence, it owes a substantial amount of United States debt and requires recognition as a condition to the enforcement of the scheme of arrangement in the United States…"

[709] Objection of the Solyndra Residual Trust to Chapter 15 Petition of *Suntech Power Holdings Co., Ltd.* (in provisional liquidation) for Recognition of Foreign Main Proceeding Pursuant to Section 1517 of the Bankruptcy Code, In *re Suntech Power Holdings Co., Ltd.* (in Provisional Liquidation), Case No. 14-10383 (SMB), Related Docket Nos. 1, 2, 3, 4, p.2

"the location of the debtor's headquarters; the location of those who actually manage the debtor (which, conceivably could be the headquarters of a holding company); the location of the debtor's primary assets; the location of the majority of the debtor's creditors or of a majority of the creditors who would be affected by the case; and/or the jurisdiction whose law would apply to most disputes."[710]

4.67 First of all, the court admitted that up to 5 November 2013, when the Cayman proceeding was commenced, Suntech Power did "not conduct any activities in the Cayman Islands and maintained its principal executive offices in Wuxi, China from where it managed the Suntech Group".[711] Nevertheless, the court followed the decision of the Court of Appeal for the second circuit in *re Fairfield Sentry Ltd.*,[712] holding that a debtor's COMI should be determined based on its activities at the time the Chapter 15 petition is filed, i.e. on 21 February 2014. Secondly, the court laid emphasis on the liquidation activities of the Joint Provisional Liquidators by quoting *re Fairfield Sentry Ltd.,* holding that "any relevant activities, including liquidation activities and administrative functions may be considered in the COMI analysis".[713] The court indicated that the Appointment Order entered by the Cayman Court, which commenced the Cayman proceeding, appointed and authorized the Joint Provisional Liquidators to do all acts on behalf of the debtor, enabled the shift of COMI from China to Cayman Islands. Within less than four months between the initiation of the foreign liquidation proceeding and the filing of the Chapter 15 petition, necessary steps have been taken by the Joint Provisional Liquidators to centralize the administration of the proceeding in the Cayman Islands.[714]

4.68 Coleman and Johnson have done comprehensive analysis on the timing issue concerning COMI in the American jurisprudence, which highlighted that "at its core, COMI is a pre-insolvency concept."[715] I agree and would like to add a few points from a comparative perspective. Despite of the complex cross-border insolvency scenarios, COMI is an international standard, upon which a certain degree of consensus has been reached between the two international instruments specializing at cross-border insolvency law, i.e. the Regulation and the Model Law. Although those two instruments diverse from each other in many ways, with respect to the time to determine COMI, the EU Regulation (recast) provides that it should be assessed at the date of the request for opening of

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[710] In *re SPhinX, Ltd*., 351 B.R. 103 (Bankr. S.D.N.Y. 2006), at 117; In *re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.,* 389 B.R. 325 (S.D.N.Y. 2008), at 336; In *re Basis Yield Alpha Fund (Master)*, 381 B.R. 37 (Bankr. S.D.N.Y. 2008), at 47

[711] In *re Suntech Power Holdings Co., Ltd.,* Case No.: 14-10383(SMB), Written Opinion Signed On 17 November, 2014, at Discussion C. COMI, p.25

[712] "[A] debtor's COMI is determined as of the time of the filing of the Chapter 15 petition," but, "[t]o offset a debtor's ability to manipulate its COMI, a court may also look at the time period between the initiation of the foreign liquidation proceeding and the filing of the Chapter 15 petition." In *re Fairfield Sentry Ltd*., 714 F.3d 127, (2d Cir. 2013), at 133, 137.

[713] In *re Fairfield Sentry Ltd.*, 714 F.3d (2d Cir. 2013), at 137

[714] In *re Suntech Power Holdings Co., Ltd*., Case No.: 14-10383(SMB), Written Opinion Signed On 17 November, 2014, at Discussion C. COMI, p.27

[715] Coleman, Sarah, Johnson, Jen, Journey to the Center of the Economic Universe: How the Current U.S. COMI Timing Determination Misses the Mark, 23 No. 6 J. Bankr. L. & Prac. NL Art. 4, December 2014, p.6

insolvency proceedings[716] and it is required pursuant to the Guide and Interpretation of the Model Law (2013) that it shall be at the date of commencement of the foreign proceeding.[717] It is evident that both of them opt for a pre-insolvency approach.

4.69 Moreover, based on objective observation, to allow assessment of COMI to start later after the commencement of insolvency proceedings, it will breed expansion of the scope of factors that can be taken into account to determine COMI so that liquidation activities and administrative functions can be validated as effective factors for the COMI determination. Consequently, more factors can be actually utilized for COMI relocation. The United States has adopted the Model Law almost verbatim by incorporating Chapter 15 into its bankruptcy code, including the concept of COMI, which can be deemed as a commitment to an international standard. If there is inconsistency between the rule of domestic statutory and a particular section of Chapter 15, the problem of proper interpretation arises. Deviation from its original international approach on proper interpretation of a common concept would compromise the goal of achieving uniformity and facilitating cross-border cooperation in insolvency matters and would reduce certainty and predictability in the application of the international standard.

2.2 Establishment

2.2.1 Origin

4.70 The term "establishment" under the Model Law was also inspired by the relevant provision under the EC Regulation.[718] The concept of establishment under the Regulations is connected to opening of territorial proceedings, including territorial insolvency proceedings (prior to the opening of the main proceedings) and secondary proceedings. According to the Virgós/Schmit Report, whether or not to encompass such a concept incurred heated debate throughout the negotiations of the Convention on Insolvency Proceedings (EC Convention),[719] which was adopted nearly verbatim by the EC Regulation.[720] The main issue was in addition to establishment, some Member States suggested enclosing the mere presence of assets of the debtor, which could also serve as the basis of opening territorial proceedings.[721] That approach has been adopted in Article 17 of the European Convention on Certain Aspects of Bankruptcy (the Istanbul Convention)[722] and was finally abandoned by the EC Convention.[723] The

[716] The EU Regulation (recast), recital (31) (with the objective of preventing fraudulent or abusive forum shopping), Article 3(1), para.2
[717] Guide and Interpretation, para.141, 149, 159
[718] Guide and Interpretation, para.88
[719] Virgós/Schmit Report (1996), para.70
[720] Virgós, Miguel and Garcimartín, Francisco, The European Insolvency Regulation: Law and Practice, Kluwer Law International, 2004, nr. 4
[721] Virgós/Schmit Report (1996), para.70
[722] Fletcher, Ian F., Insolvency in Private International Law. National and International Approaches, Oxford Private International Law Series, Oxford University Press 2nd ed. 2005, at 6.20
[723] Virgós/Schmit Report (1996), para.70

reason is that opening of territorial proceedings was considered a deviation from the principle of universality[724] and accordingly the main tone set on the conditions to commence the territorial proceedings was restriction.[725] It is necessary to seek a balance between preservation of the legal certainty and economic transaction stability for the local potential creditors[726] and reduction on possibilities for the local creditors to place themselves in a more advantageous position.[727]

4.71 The concept of establishment pursuant to the Model Law is not related to opening of local proceedings (jurisdiction) but a decisive factor in determining recognition of a non-main proceeding.[728] It is held under the Guide and Interpretation that proceedings commenced on the presence of assets without establishment would not qualify for recognition under the Model Law scheme.[729]

2.2.2 Definition of Establishment

2.2.2.1 Components of the Definition

4.72 In EU, the term establishment has already been used under the Article 5(5) of the 1968 Brussels Convention,[730] i.e. Article 7(5) of the current Brussels I (recast), which refers to the place of domicile of the defendant. Nevertheless, the establishment under the EC Regulation should be given its own meaning.[731] It is a concept, which corresponds to "any place of operations" on a "non-transitory" basis,[732] requires manifest externality instead of the subjective intention of the debtor.[733] According to Viimsalu, from the external perspective, it should reflect a distinct presence of the debtor in the market; from the internal perspective, it should involve a certain degree of operational organization.[734] In the case of *Interedil*, the CJEU held that

The term 'establishment' within the meaning of Article 3(2) of Regulation No 1346/2000 must be interpreted as requiring the presence of a structure consisting of a minimum level of organization and a degree of stability necessary for the purpose of

[724] Balz, M, The European Union Convention on Insolvency Proceedings, in: American Bankruptcy Law Journal, Vol.70, 1996, p. 494
[725] *Eurofood*, para. 28; Case C-444/07, *MG Probud Gdynia sp. z o.o*. [2010] ECR I-00417, para.22
[726] Virgós/Schmit Report (1996), para.71
[727] Fletcher, Ian F., Insolvency in Private International Law. National and International Approaches, Oxford Private International Law Series, Oxford University Press 2nd ed. 2005, at 7.54
[728] Guide and Interpretation, para.85
[729] Guide and Interpretation, para.32
[730] Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 27 September 1968
[731] Virgós/Schmit Report (1996), para.70 See also Viimsalu, Signe, The Meaning and Functioning of Secondary Insolvency Proceedings (doctoral dissertation), Tartu University Press, 2011, p.42
[732] EC Regulation, Article 2(h): 'establishment' shall mean any place of operations where the debtor carries out a non-transitory economic activity with human means and goods.
The Model Law Article 2(f): "Establishment" means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.
[733] Virgós/Schmit Report (1996), para.71
[734] Viimsalu, Signe, The Meaning and Functioning of Secondary Insolvency Proceedings (doctoral dissertation), Tartu University Press, 2011, p.43

pursuing an economic activity. The presence alone of goods in isolation or bank accounts does not, in principle, meet that definition.[735]

4.73 It seems that the CJEU narrowed the definition of establishment by setting up certain degree of ascertainability as one of its determinative requirements, which was equivalent to determination of COMI [736]. Further, the CJEU emphasized in *Interedil* that in order to ensure legal certainty and foreseeability concerning the determination of the courts with jurisdiction, the existence of an establishment must be determined, in the same way as the location of the COMI, on the basis of objective factors which are ascertainable by third parties.[737]However, that interpretation concerning COMI has not been adopted into the EU Regulation (recast), which does not introduce ascertainability into the definition of establishment.[738]

4.74 In addition, the economic activity should be carried out with "human means and goods".[739] In *Re Stojevic*, the Higher Regional Court of Vienna held that

"The human means referred to in Article 2(h) must, it is submitted, be understood as referring to activities conducted by persons for whom the debtor is legally responsible, either as employer or as principal."[740]

4.75 It is also pointed out in *Re Stojevic* that the term goods in Art 2(h) of the English version is a mistranslation of the French "*biens*" and the German "*Vermögenswerten*".[741] By quoting the discussion in *Newham v. Khatun*,[742] Moss and Smith submitted that "goods" would have been better translated into "assets".[743] In accordance with the EU Regulation (recast), the word "goods" is now replaced with "assets".[744]

4.76 The term of establishment under the Model Law was also enlightened by the EC Regulation.[745] As stated by Wessels, "the only difference being the latter part"(or service).[746] The Guide and Interpretation did not provide substantive analysis of the term "establishment" but directly cited Virgós/Schmit Report to

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[735] *Interedil*, para.64

[736] The EC Regulation, recital (13): The 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.

[737] *Interedil*, para.63

[738] The EU Regulation (recast), article 2(10): 'establishment' means any place of operations where a debtor carries out or has carries 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.

[739] The EC Regulation, article 2(h)

[740] *Re Stojevic*, Higher Regional Court of Vienna, 9 Nov. 2004, 28 R 225/04w

[741] *Re Stojevic*, Higher Regional Court of Vienna, 9 Nov. 2004, 28 R 225/04w

[742] *Newham v. Khatun* [2005] 1 QB 37, paras.68 – 70, 78

[743] Moss, Fletcher & Isaacs, The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide (2nd ed.), Oxford University Press, 2009, para.8.45

[744] The EU Regulation (recast), article 2(10)

[745] The Model Law, article 2(f): "Establishment" means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services. See also Guide and Interpretation, para.88

[746] Wessels, Bob, International Insolvency Law (3rd ed.), Vol.X, Deventer: Kluwer, 2012, para. 10534

make clarification.[747] It is specified in the Guide and Interpretation that the mere presence of property cannot be equal to establishment.[748] It also considers the inquiry into establishment is "purely factual in nature".[749]

2.2.2.2 Time to Determine Establishment

4.77 The EC Regulation did not provide a temporal framework for determining establishment. In *Shierson v. Vlieland-Boddy*,[750] the debtor was a qualified accountant, who moved from U.K to Spain for 9 months prior to the opening of insolvency proceedings.[751] Based on the evidences, the Court concluded that the debtor's center of main interests had moved to Spain.[752] As for whether the court could assume jurisdiction to open territorial proceedings against him in UK, it would depend on the reference date to determine establishment.[753] The Court of Appeal referred to para.70 of Virgós/Schmit Report, holding that establishment should be determined "at the time the registrar opened territorial insolvency proceedings".[754]

4.78 It is stipulated under the Guide and Interpretation that the date of commencement of the non-main foreign proceeding is the relevant date to be considered to determine the existence of an establishment.[755] In *re Millennium*, Judge Groppe addressed the issue of the appropriate date to determine whether the foreign debtor has an establishment in the foreign nation should be on or about the date of the commencement of the foreign proceeding.[756]

4.79 The EU Regulation (recast) provides that the reference date to determine whether an establishment exists should be three months prior to the request to open main insolvency proceedings.[757] Between the date of the request to open main proceedings and the date of the request to open secondary proceedings, there used to be a gap period under the original wording of the definition in Article 2(h) of the EC Regulation. It might be the case that an establishment by the time of the request to open secondary proceedings had been shut down or had ceased to operate or deal with third parties at the time of the opening of main proceedings. The added temporal requirement concerning the establishment under the EU Regulation (recast) helps to resolve the problem caused by the gap period. Before the EU Regulation (recast) was adopted, some national court assumed that "jurisdiction under Article 3(2) could only be exercised if the alleged establishment was continuing to operate as a place of

[747] Guide and Interpretation, para.89
[748] Guide and Interpretation, para.90
[749] Guide and Interpretation, para.90
[750] *Shierson v. Vlieland-Boddy*, [2005] EWCA Civ. 974, [2005] W.L.R. 3966 (2005)
[751] *Shierson v. Vlieland-Boddy*, [2005] EWCA Civ. 974, [2005] W.L.R. 3966 (2005), at 20
[752] *Shierson v. Vlieland-Boddy*, [2005] EWCA Civ. 974, [2005] W.L.R. 3966 (2005), at 56
[753] *Shierson v. Vlieland-Boddy*, [2005] EWCA Civ. 974, [2005] W.L.R. 3966 (2005), at 64
[754] *Shierson v. Vlieland-Boddy*, [2005] EWCA Civ. 974, [2005] W.L.R. 3966 (2005), at 68; See also Fletcher, Ian F, Insolvency in Private International Law. National and International Approaches, Oxford Private International Law Series, Oxford University Press 2nd ed. 2005, at 7.56
[755] Guide and Interpretation, para.160
[756] In *re Millennium Global Emerging Credit*, 458 B.R. 63 (Bankr. S.D.N.Y. 2011), at 76
[757] The EU Regulation (recast), article 2(10)

business at the time of the request to open territorial proceedings"[758]. Olympic Airlines SA[759] is such an example. On 2 October 2009, the main proceeding of Olympic Airlines SA started in Greece.[760] In order to seek compensation under the Pensions Act 2004 from the UK's Pension Protection Fund, the trustees of the company's pension scheme presented a winding-up petition against the company in England on 20 July 2010 because such compensation is payable from the date when a "qualifying insolvency event" occurred.[761] Nevertheless, due to a change in legislation under the Pensions Act 2004, the new insolvency event applied and it was deemed to occur on the fifth anniversary of the commencement of the Greek proceedings, i.e. on 2 October 2014, after the Court of Appeal handed down its decision in this case refusing to make a winding-up order on the basis of lack of jurisdiction.[762] To open a secondary proceeding, the key issue is whether there is an establishment in accordance with the EC Regulation within the territory of UK. The UK Supreme Court of made its decision on the basis of the definition of establishment under the EC Regulation, holding

"Olympic was not carrying on any business activity at 11 Conduit Street on the relevant date (namely 20 July 2010, the date of filing in UK, added by the author) The last of the company's business activities had ceased some time before. All that Mr Savva and Mr Platanias were doing was handling matters of internal administration associated with the final stages of the company's disposal of the means of carrying on business. The company cannot therefore be said to have had an "establishment" in the United Kingdom."[763]

4.80 However, if the same case was decided in accordance with the EU Regulation (recast), the result could not be the same. Then the relevant date to determine whether the company has had a UK establishment would be three months prior to the request to open the main insolvency proceeding in Greece (i.e. on 2 October 2009). At that time, the business of Olympic Airlines SA was still operating in the UK[764] and therefore the UK court could probably exercise its territorial jurisdiction provided that the establishment was in active operation in the period prior to the request to open Greek main proceeding. According to Fletcher, the incorporation of temporal condition into the definition of establishment under the recast EU Regulation "remove any doubt about the

[758] Moss, Gabriel, Fletcher, Ian F, Isaacs, Stuart (ed.), The EU Regulation on Insolvency Proceedings (3rd ed.), Oxford University Press, 2016, at 3.31

[759] *Trustees of the Olympic Airlines SA Pension and Life Assurance Scheme v Olympic Airlines SA* [2015] UKSC 27

[760] *Trustees of the Olympic Airlines SA Pension and Life Assurance Scheme v Olympic Airlines SA* [2015] UKSC 27, at 4

[761] *Trustees of the Olympic Airlines SA Pension and Life Assurance Scheme v Olympic Airlines SA* [2015] UKSC 27, at 5

[762] *Trustees of the Olympic Airlines SA Pension and Life Assurance Scheme v Olympic Airlines SA* [2015] UKSC 27, at 8

[763] *Trustees of the Olympic Airlines SA Pension and Life Assurance Scheme v Olympic Airlines SA* [2015] UKSC 27, at 15

[764] On 28 September 2009, shortly before the commencement of the liquidation proceedings in Greece, the area manager for Olympic in London was instructed that the company would cease all commercial operations as from 00.01 on the following day. *Trustees of the Olympic Airlines SA Pension and Life Assurance Scheme v Olympic Airlines SA* [2015] UKSC 27, at 8

possibility of opening territorial proceedings".[765] Besides, it seems that the relevant date of the request to open main proceedings now has a direct impact on determination of establishment because it becomes a decisive factor to the opening of secondary proceedings. In my view, that kind of arrangement more or less reflects the subordinate nature of territorial proceedings under the Regulation.

2.2.3 Development of Establishment-based Proceedings in EU

4.81 The territorial proceedings, which can be opened on the basis of establishment under the Regulation, mainly bear two functions. One is the function of protection, which can shield domestic creditors from the effects of foreign insolvency proceedings.[766] The other is the function of assistance, which facilitates the administration of the proceedings and realization of the debtor's local assets in close cooperation with the main proceedings.[767] There are two types of territorial proceedings can be opened on the basis of establishment under the Regulation: territorial insolvency proceedings and secondary proceedings. The effects of the territorial proceedings are restricted to the assets located within the Member State where the establishment of the debtor is located.[768]

2.2.3.1 Territorial Insolvency Proceedings

4.82 Territorial insolvency proceedings can only be commenced prior to the opening of main proceedings.[769] Moreover, territorial insolvency proceeding shall be transferred into secondary proceedings as soon as the main insolvency proceedings are opened.[770] Considering that territorial insolvency proceedings serve the sole purpose of protection of local interests, it is required to open territorial insolvency proceedings under limited circumstances and such restrictions are considered absolutely necessary.[771] In the first situation, territorial insolvency proceedings may only be initiated under the circumstance that the main proceedings cannot be opened in accordance with the law of the Member State where the debtor has the center of his main interest.[772] In the second situation, territorial insolvency proceedings can only be commenced by certain specific applicants. Under the EC Regulation, only the local creditors

[765] Moss, Gabriel, Fletcher, Ian F, Isaacs, Stuart (ed.), The EU Regulation on Insolvency Proceedings (3rd ed.), Oxford University Press, 2016, at 3.31
[766] Viimsalu, Signe, The Meaning and Functioning of Secondary Insolvency Proceedings (doctoral dissertation), Tartu University Press, 2011, p.23-25
[767] Viimsalu, Signe, The Meaning and Functioning of Secondary Insolvency Proceedings (doctoral dissertation), Tartu University Press, 2011, p.25-27
[768] The EC Regulation, recital (12), article 3(2); the EU Regulation (recast), recital (23), article 3(2)
[769] The EC Regulation, article 3(4); the EU Regulation (recast), article 3(4)
[770] The EC Regulation, Recital (17), article 3(4); the EU Regulation (recast), recital (38), article 3(4)
[771] The EC Regulation, recital (17); the EU Regulation (recast), recital (37)
[772] The EC Regulation, article 3(4)(a); the EU Regulation (recast), article 3(4)(a)

within the territory of which the establishment is situated, or whose claim arises from the operation of that establishment, can file petitions.[773]

4.83 In the case of *Zaza Retail*,[774] the CJEU made very important interpretations with respect to the conditions governing the opening of the territorial insolvency proceedings. *Zaza Retail* was a company, which had an establishment in Belgium and the COMI of which was situated in the Netherlands. The Belgian Public Prosecutor requested commencement of territorial insolvency proceedings in Belgium nearly two years prior to the opening of the main proceedings in the Netherlands. The Supreme Court of Belgium (Hof van Cassatie van België) referred several questions to the CJEU. One of the main issues was whether the term 'creditor' in Article 3(4)(b) of the EC Regulation included the public authority, such as Public Prosecutor, who under the national law of that State is to act in the public interest and with a view to safeguard the interests of all the creditors.[775] Without a definition of the term creditor, the CJEU held that the condition for opening territorial insolvency proceedings should be interpreted in a narrow and restrictive manner. Therefore, the public authority does not fall in the ambit of the creditor under the Article 3(4)(b) of the EC Regulation. However, it is also indicated by the CJEU that

"the intervention of that public authority helps to address an undertaking's difficulties in a timely manner, by making up for the debtor's and its creditors' failure to act where that is appropriate."[776]

4.84 The recast EU Regulation has extended the scope of persons empowered to request the opening of territorial insolvency proceedings to public authority, who has the right to make a request under the law of the Member State within the territory of which the establishment is situated.[777]

2.2.3.2 Secondary Insolvency Proceedings

4.85 The secondary insolvency proceedings are territorial proceedings opened subsequent to the commencement of the main proceedings and can be requested by insolvency practitioner in the main proceedings or any other person or authority empowered under the national law of that Member State.[778] The secondary insolvency proceedings can be opened upon the request of

"(a) insolvency practitioner in the main proceedings
(b) any other person or authority empowered under the national law of that Member State"[779]

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[773] The EC Regulation, article 3(4)(b); the EU Regulation (recast), article 3(4)(b)(i)
[774] Case C–112/10, *Zaza Retail* [2011] ECR I-11525 (*Zaza Retail*), para.30
[775] *Zaza Retail*, para.27
[776] *Zaza Retail*, para.32
[777] The EU Regulation (recast), article 3(4)(b)(ii)
[778] The EC Regulation, recital (18), (37), article 29; the EU Regulation (recast), recital (38), article 37(1)
[779] The EC Regulation, article 29; the EU Regulation (recast), recital (38), article 37(1). As aforementioned, the liquidators under the EC Regulation have been changed into insolvency

4.86 In *Burgo* case,[780] the CJEU made further explanation on the condition, under which the secondary proceedings can be opened. The decision is also linked to the relevant amendment under the EU Regulation (recast).[781] In *Burgo* case, the corporate group, Illochroma, commenced its main proceedings in France. Its Italian creditor, Burgo Group, requested to open secondary proceedings against Illochroma in Belgium. One of the main questions referred to the CJEU is whether it is appropriate to open secondary proceedings in the Member State of the registered office, if the main proceedings concerning a legal person or company have been opened in a Member State other than that of its registered office. By referring to its decision in *Interedil*,[782] the CJEU examined the criteria set out under Article 2(h) of EC Regulation, noticing that the registered office is not precluded from the definition of establishment.[783]

4.87 Fully aware of the protection function seized by establishment, the CJEU went on to emphasize that the local interests, in connection with the legitimate expectation of a creditor,[784] may also exist where the registered office of the debtor company concerned is situated,[785] which deserve equal protection by comparison with local interests established in other Member States in which the debtor may have other establishments.[786] Hence, the CJEU held that the definition of establishment should include the registered office.[787] The decision of the CJEU in *Burgo* case is relevant for the new amendment to the Recital under the EU Regulation (recast), which allows secondary proceedings concerning a legal person or company in the Member State of the registered office to be opened, if the debtor is carrying out an economic activity with human means and assets in that State and main proceedings have been opened in a Member State other than that of its registered office.[788]

2.2.3.3 Intervention in Secondary Insolvency Proceedings

4.88 The ideal of the Regulation is to achieve "a single exclusive universal form of insolvency proceedings for the whole of the Community",[789] which are established on the basis of the principle of unity (i.e. "concentrating cross border

practitioners pursuant to the EU Regulation (recast), which reflected the shift of attitudes from liquidation to rescue.

[780] Case C-327/13, *Burgo Group SpA v Illochroma SA and Jérôme Theetten* [2014] (*Burgo*)

[781] The EU Regulation (recast), recital (24): Where main proceedings concerning a legal person or company have been opened in a Member State other than that of its registered office, it should be possible to open secondary proceedings in the Member State of the registered office, provided that the debtor is carrying out an economic activity with human means and assets in that State, in the light of the case law of the Court of Justice of the European Union.

[782] *Interedil*, para.62

[783] *Burgo*, para.31, 32

[784] *Burgo*, para.37

[785] *Burgo*, para.36

[786] *Burgo*, para.38

[787] *Burgo*, para.39

[788] The EU Regulation (recast), recital (24)

[789] Virgós/Schmit Report (1996), para.12

insolvencies within a single proceeding"[790]) and the principle of universality ("extending those proceedings to all the debtor's assets, wherever they may be situated"[791]).[792] Therefore, opening of secondary proceedings inevitably disrupts these underlying principles of the Regulation. Nevertheless, owing to pre-existing rights created under diverse local laws as well as different priority rules governed by various domestic insolvency systems, secondary proceedings are considered as "a necessary evil"[793] and subordinate to the main proceedings under the Regulation. Accordingly, the secondary insolvency proceedings possessing both the function of protection of local interests and the auxiliary function can be opened as well as intervened for the purpose of the efficient administration of the insolvency estate and the effective realization of the total assets.

2.2.3.3.1 Intervention under the EC Regulation

4.89 The EC Regulation provides a few measures for the main liquidators to intervene with the secondary proceedings. First of all, the main liquidator shall be given an early opportunity of submitting proposals on the liquidation or use of the assets in the secondary proceedings.[794] Secondly, the liquidator in the main proceedings can apply for realization of assets in the secondary proceedings to be suspended[795] or request an order for stay of the process of liquidation for a certain period.[796] Thirdly, although the secondary proceedings must be winding-up proceedings under the EC Regulation,[797] the main liquidator is empowered to propose a rescue plan, a composition or a comparable measure in order to close the secondary proceedings if such a measure is allowed under the law applicable to secondary proceedings.[798] If someone else other than the main liquidator proposes such a measure, the consent of the main liquidator is required in order to become final; failing his agreement, it may become final if the financial interests of the creditors in the main proceedings are not affected by the measure proposed.[799] Last but not least, the main liquidators and the liquidators in the secondary proceedings are duty bound to cooperate and communicate with each other.[800]

4.90 After over ten years of implementation, the European Commission summarized that the opening secondary proceedings could result in

[790] Arts, Robert, Main and Secondary Proceedings in the recast of the European Insolvency Regulation – the only good secondary proceeding is a synthetic secondary proceeding, 2015, p.2, available at: http://iiiglobal.org/iii-prize-in-insolvency.html (Last visited on 14 June 2016)
[791] Case C-328/12, *Ralph Schmid v. Lilly Hertel* [2013] Opinion of Advocate General Sharpston, ft.6
[792] Case C-328/12, *Ralph Schmid v. Lilly Hertel* [2013] Opinion of Advocate General Sharpston, para.22
[793] Pottow, John A.E., A New Rule for Secondary Proceedings in International Bankruptcies, in: 46 Tex. Int'l L.J. 579, 2011, p. 582
[794] The EC Regulation, article 31(3)
[795] The EC Regulation, recital (20)
[796] The EC Regulation, article 33(1)
[797] The EC Regulation, article 31(1)
[798] The EC Regulation, article 34(1)
[799] The EC Regulation, article 34(1)
[800] The EC Regulation, article 31(1), (2)

segmentation of the assets from the main proceedings and disruption to the efficient administration of the entire estate,[801] which could consequently jeopardize the principle of universality. Besides, the Commission pointed out that the disadvantage of opening of secondary proceedings also related to additional costs of proceedings incurred substantially.[802] The 2015 World Bank report may serve as supportive reference. The cost of insolvency proceedings,[803] irrespective of domestic or cross-border, was about 9% of the value of the debtor's estate in France, 8% in Germany, 4% in the Netherlands, 22% in Italy and 6% in United Kingdom.[804]

4.91 Nevertheless, sometimes opening of secondary proceedings is used as counter-measures against main insolvency proceedings, which stems from disagreement on the location of COMI. In the case of Illochroma, it involved a French group Illochroma, which had a subsidiary in Italy (Illochroma Italy). After the French court decided that the COMI of Illochroma Italy was located in France and accordingly opened a main proceeding, the Italian court commenced a secondary proceeding on the same company to prevent the assets of Illochroma Italy from being at disposal of the French main proceeding.[805] That kind of motivation to commence a secondary proceeding simply adds nothing but complexity and costs to the entire proceedings.

4.92 In addition, according to the Commission, coordination between main and secondary proceedings is not sufficient in practice.[806] This is partly due to limited content of cooperation and communication as prescribed under the Article 31 and the need for specific guidelines and best practice in that regard.[807]

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[801] EU Commission Staff Working Document the Impact Assessment Accompanying the document Revision of Regulation (EC) No 1346/2000 on insolvency proceedings, Strasbourg, 12.12.2012, SWD(2012) 416 final, p.23

[802] EU Commission Staff Working Document the Impact Assessment Accompanying the document Revision of Regulation (EC) No 1346/2000 on insolvency proceedings, Strasbourg, 12.12.2012, SWD(2012) 416 final, p.23

[803] The costs include court fees and government levies; fees of insolvency administrators, auctioneers, assessors and lawyers; and all other fees and costs. See Word Bank, Doing Business 2015 - Going Beyond Efficiency, Washington, DC: World Bank, 2014, p.140

[804] Word Bank, Doing Business 2015 - Going Beyond Efficiency, Washington, DC: World Bank, 2014, p.167-230

[805] C-327/13, *Burgo Group SpA v Illochroma SA and Jérôme Theetten* [2014]; See also Corte d'Appello Torino, 10/3/2009, IL Fallimento, 11/2009,1296, cases reported by Caponi, Remo, Mucciarelli, Federico Maria (Italy); See also MG Rover case reported by Veder, Michael (Netherlands) in: Hess, Burkhard, Oberhammer, Paul, Pfeiffer, Thomas, European Insolvency Law-The Heidelberg-Luxembourg-Vienna Report on the Application of Regulation No.1346/2000/EC on Insolvency Proceedings (External Evaluation JUST/2011/JCIV/PR/0049/A4), C.H.Beck.Hart.Nomos, 2014, Annex Systematic Summary of National Reports, Q.29: Could you give examples of cases where the opening of secondary proceedings was considered as a useful tool to protect the interests of local creditors or to facilitate the administration of the main proceedings and instances in which it has not? Are you aware of cases in which secondary proceedings have been opened abusively?

[806] EU Commission Staff Working Document the Impact Assessment Accompanying the document Revision of Regulation (EC) No 1346/2000 on insolvency proceedings, Strasbourg, 12.12.2012, SWD(2012) 416 final, p.23

[807] EU Commission Staff Working Document the Impact Assessment Accompanying the document Revision of Regulation (EC) No 1346/2000 on insolvency proceedings, Strasbourg, 12.12.2012, SWD(2012) 416 final, p.24

Moreover, the tension flowing from main and secondary proceedings, i.e. the interests of the local creditors pursuant to *lex fori secundarii* and the universal effect of the main proceedings based on *lex fori concursus*, is sometimes difficult to be reconciled. Secondary proceedings are more frequently initiated for the interest of local creditors, in particular, employees, who usually receive privileged protection under the domestic insolvency system due to socio-political consideration.[808]

4.93 In fact, there is also specialized regime at EU level, which is Directive 2008/94/EC on the protection of employees in the event of the insolvency of their employer, to ensure payment of employees' outstanding claims in the event of employer insolvency by requiring Member States to set up an institution to guarantee the payments. According to Arts, protecting the interests by means of opening of secondary proceedings, which are already adequately guaranteed by other instruments, could "result in an unjustified diminution of the insolvency estate".[809] It seems that the mere fact of the existence of secondary proceedings, which results in depart from the principles of unity and universality and difficulty in coordination, turns itself into a big problem.

2.2.3.3.2 Intervention under the EU Regulation (recast)

4.94 Under the recast EU Regulation, in addition to the interfering powers granted to the main insolvency practitioners as the main liquidators under the EC Regulation, such as an early opportunity to submit proposals on the realization or use of the assets in the secondary insolvency proceedings[810] or closing a secondary proceeding with a restructuring plan, a composition or a comparable measure if so permitted under the law of that Member State,[811] intervention with the secondary proceedings has been further strengthened. First of all, duties of cooperation and communication have been broadened for the insolvency practitioners and extended to the courts involved.[812] (I will discuss about that point later in the Cooperation and Communication Section) Secondly, the courts are empowered, upon the request of the main insolvency practitioners, to postpone or refuse the opening of secondary proceedings. Thirdly, the main insolvency practitioner shall be given an immediate notice and an opportunity to be heard if a request to open secondary insolvency

[808] In EU See national reports to Q.29 from Austria, Germany, Netherlands, Portugal, Spain, Sweden and UK, in: Hess, Burkhard, Oberhammer, Paul, Pfeiffer, Thomas, European Insolvency Law-The Heidelberg-Luxembourg-Vienna Report on the Application of Regulation No.1346/2000/EC on Insolvency Proceedings (External Evaluation JUST/2011/JCIV/PR/0049/A4), C.H.Beck.Hart.Nomos, 2014, Annex Systematic Summary of National Reports

[809] Arts, Robert, Main and Secondary Proceedings in the recast of the European Insolvency Regulation – the only good secondary proceeding is a synthetic secondary proceeding, 2015, p.15, available at: http://iiiglobal.org/iii-prize-in-insolvency.html (Last visited on 14 June 2016)

[810] The EU Regulation (recast), article 41(2)(c)

[811] The EU Regulation (recast), article 47(1)

[812] Wessels, Bob, Contracting out of Secondary Insolvency Proceedings: The Main Liquidator's Undertaking in the Meaning of Article 18 in the Proposal to Amend the EU Insolvency Regulation, in: Brooklyn Journal of Corporate, Finance & Commercial Law, vol.9, issue 1, 2014, p.87

proceedings is presented to a court,[813] which functions as a procedural guarantee for the intervention.

2.2.3.3.2.1 Undertaking

4.95 The first innovation is to introduce the so-called synthetic secondary proceedings.[814] It aims at preventing the potential opening of the secondary proceedings, which is framed in a way that insolvency practitioners can promise to the local creditors in the form of an undertaking that they will be treated as if secondary proceedings had been opened.[815] The origin of synthetic secondary proceedings are rooted in practice, in particular practice of common law.

4.96 The motivation of such an invention was twofold by then. One related to the liquidation nature of the secondary proceedings opened under the EC Regulation.[816] The other was linked with the fact that due to lack of specific rules concerning a group of companies, in practice, a subsidiary of a group of company is treated as establishment,[817] on the basis of which the secondary proceedings can be opened. The two factors combinedly stimulated the pursuit of a more preferable solution to prevent incoherence between the main proceedings and the secondary proceedings and accordingly the piecemeal of the debtor's assets, which was detrimental to rescue of the same company in difficulty or the entire group.

4.97 A typical example is *Collins & Aikman*.[818] It involved a group company, whose ultimate parent of the enterprises group was in U.S.A. It has very complicate structure with 24 companies in 10 European countries. Again the English court decided that the COMI of the 24 European companies were in UK on the ground that "the cash management functions for the plant were managed from London and other administrative functions were based in England and strategic management in respect of the company took place by way of the Strategy Committee based in England."[819] Aiming at rescue the companies as going concerns and seek to achieve a better result for the companies' creditors and to avoid the opening of secondary proceedings, the administrators gave oral assurances to creditors at creditors' meetings and creditors' committees' meetings that if there were no secondary proceedings in the relevant jurisdiction

[813] The EU Regulation (recast), article 38(1)
[814] EU Commission Staff Working Document the Impact Assessment Accompanying the document Revision of Regulation (EC) No 1346/2000 on insolvency proceedings, Strasbourg, 12.12.2012, SWD(2012) 416 final, p.36
[815] Pottow, John A.E., A New Role for Secondary Proceedings in International Bankruptcies, 46 Tex. Int'l L.J., 2011, p.585. Those "as if" proceedings are referred to as virtual territoriality by Janger. See Janger, Edward, Virtual Territoriality, 48 Colum. J. Transnat'l L. 2010, p.401; referred to as virtual contractual proceedings by Dammann and Menjucq, see also Menjucq, Michael & Dammann, Reinhard, Regulation No. 1346/2000 on Insolvency Proceedings: Facing the Companies Group Phenomenon, 9 Bus. L. Int'l. 145, 2008, p.154
[816] The EC Regulation, article 3(3)
[817] Fasquelle, Daniel, Les faillites des groupes de sociétés dans l'Union européenne : la difficile conciliation entre approches économique et juridique, Bulletin Joly Sociétés 2006, n°2, p.151-167
[818] *Re Collins & Aikman Corp Group*, [2006] B.C.C. 606
[819] *Re Collins & Aikman Corp Group*, [2006] B.C.C. 606, at 1

then their respective financial positions as creditors under the relevant local law would as far as possible be respected in the English administration, was of critical importance to the successful execution of the administration strategy.[820] How did the administrators keep their promise? They relied on the Article 4 (1) of the Regulation,[821] which required the application of English Law, and successfully convinced the English court with three grounds for justifying the giving of assurances and their fulfillment.[822] The three grounds are

(1) the rule in Exp. James (1873–74) L.R. 9 Ch. App. 609, which was described in McPherson's Law of Company Liquidation (4th ed., 1999, Lawbook Co) as "this elusive and difficult principle is based on morality. At the center of the principle is that if an officer of the Court is under an obligation of conscience, then the Court will direct the officer to fulfill that obligation."[823]

(2) express powers of the English legislation,[824] and

(3) the inherent jurisdiction of the court[825]

4.98 Without equivalent legal basis as those provided under the common law system, the approach adopted by the administrators in *Collins & Aikman* could not have worked. In particular, the courts of civil law countries in the continental Europe might not be given the discretion to allow the administrators to keep the assurance they made in advance and fulfill the obligation. Now the EU Regulation (recast) set out the specific legal basis for an undertaking as well as formulates detailed conditions.[826]

4.99 An undertaking is proposed by insolvency practitioners in the main insolvency proceedings.[827] The main content of an undertaking is concentrated on distribution or the proceeds received as a result of their realization from the local assets to the creditors in a way as if secondary insolvency proceedings had been opened.[828] It should also be stated in the undertaking the factual assumptions on which it is based, in particular the value of the assets located in the Member State concerned and the options available to realize such assets.[829] The assets shall be determined at the moment the undertaking is given.[830] The undertaking shall be made in the form of writing[831]and in the official language or

[820] *Re Collins & Aikman Europe SA*, [2006] B.C.C. 861, at 8
[821] The EC Regulation, article 4(1): Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened, hereafter referred to as the 'State of the opening of proceedings'.
[822] Moss, Group Insolvency - Choice of Forum and Law: The European Experience under the Influence of English Pragmatism, 32 Brook. J. Int'l L., 2006-2007, p.1018
[823] *Re Collins & Aikman Europe SA*, [2006] B.C.C. 861, at 15
[824] *Re Collins & Aikman Europe SA*, [2006] B.C.C. 861, at 21-26
[825] *Re Collins & Aikman Europe SA*, [2006] B.C.C. 861, at 18 - 20
[826] The EU Regulation (recast), article 36, 38(2)
[827] The EU Regulation (recast), recital (42), article 36(1)
[828] The EU Regulation (recast), article 36(1)
[829] The EU Regulation (recast), article 36(1)
[830] The EU Regulation (recast), article 36(2)
[831] The EU Regulation (recast), article 36(4)

one of the official languages of the Member State where secondary insolvency proceedings could have been opened.[832] Other formality requirements concerning an undertaking are governed by the law of the State of the opening of the main insolvency proceedings.[833]

4.100 One of the most significant problems arising from synthetic proceedings is concerning the applicable law rules. A synthetic proceeding is not a real secondary proceeding but in essence an agreement between the main and the virtual secondary proceedings, in which the estate is fictionally split[834] to prevent the formal opening of secondary insolvency proceedings. In accordance with the EU Regulation (recast), the main effects of the undertakings, including realization of assets, the ranking of creditors' claims and the rights of creditors in relation to the assets, are governed by the law of the Member State, in which secondary insolvency proceedings could have been opened (*lex fori concursus secondarii*).[835] Meanwhile, the main insolvency practitioner may exercise all the powers conferred on it, by the law of the State of the opening of proceedings (*lex fori concursus*), in another Member State, as long as no other insolvency proceedings have been opened there and no preservation measure to the contrary has been taken there further to a request for the opening of insolvency proceedings in that State.[836] Accordingly, it seems that *lex fori concursus* and *lex fori concursus secondarii* will go hand-in-hand in the context of the synthetic proceedings. However, since the wording under the Article 36(1) of the EU Regulation (recast), especially such as the rights of creditors in relation to the assets (to which extent those rights should be?), is quite general and vague. Without detailed rules, it is expected that there will be conflicts between the powers granted to the main insolvency practitioner and protection exclusively guaranteed to the local creditors in the synthetic proceedings.

4.101 Moreover, Wessels pointed out the possible influences of the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) and Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), which provide rules of applicable law governing contractual obligations and non-contractual obligations. Their influences on the undertaking are not direct but are decisive on the law governing the rights of creditors in relation to the assets. Both Rome I and Rome II are based on the principle of freedom of choice.[837] In particular under Rome I, the applicable law to a contract, upon consensus between the parties concerned, may be changed at any time.[838] Technically speaking, it is possible that the majority of the known local creditors can choose a more

[832] The EU Regulation (recast), article 36(3)
[833] The EU Regulation (recast), article 36(4)
[834] Arts, Robert, Main and Secondary Proceedings in the recast of the European Insolvency Regulation – the only good secondary proceeding is a synthetic secondary proceeding, 2015, p.19, available at: http://iiiglobal.org/iii-prize-in-insolvency.html (Last visited on 14 June 2016)
[835] The EU Regulation (recast), article 36(2)
[836] The EU Regulation (recast), article 21(1)
[837] Rome I, Article 3; Rome II, Article 14
[838] Rome I, Article 3(2)

favorable law to their contracts according to Rome I upon the agreement of the main insolvency practitioners because the right of approval of the undertaking is conferred on the known local creditors.[839] Hence, Wessels suggested to create specialized applicable law rules for an undertaking and advocated amendments to both Rome I and Rome II, which shall explicitly exclude undertakings from their scope of application.[840] In short, the synthetic secondary proceedings make the landscape of rules of applicable law more complicated because they enable *lex fori concursus*, *lex fori concursus secondarii* and relevant EU law to run parallel to each other. A clearer line is expected to sort out those problems.

4.102 Protection of local creditors is the key concern arising out of an undertaking. First of all, the right of approval of the undertaking is conferred on the known local creditors.[841] Secondly, the local creditors have the rights to be informed about the undertaking, of the rules and procedures for its approval, and of the approval or rejection of the undertaking[842] as well as the intended distributions prior to distributing the assets and proceeds provided in accordance with the undertaking.[843] Thirdly, the local creditors are given the right to apply to the courts of the Member State in which main insolvency proceedings have been opened or secondary insolvency proceedings could have been opened in order to seek suitable measures necessary to ensure compliance with the terms of the undertaking and the applicable law.[844] Besides, any damage caused to local creditors should be ascribed to non-compliance of the insolvency practitioner with the obligations and requirements.[845] Fourthly, in order to facilitate the creditors to exercise the voting rights, they can vote by distance means of communication where national law so allows.[846] Nevertheless, given all those crucial rights conferred on them in the context of synthetic proceedings the EU Regulation (recast) did not define who can be referred to as "local creditors",[847] (for example can a creditors, who already lodged claims in the main proceedings, also count as a local creditor?), which will probably cause troubles in practice.

2.2.3.3.2.2 Temporary Stay of the Opening of Secondary Insolvency Proceedings

4.103 In addition to an undertaking, the court can temporarily stay the opening of secondary insolvency proceedings for the purpose of preservation of the efficiency of moratorium granted in the main proceedings,[848] which allows for

[839] The EU Regulation (recast), article 36(5)
[840] Wessels, Bob, Contracting out of Secondary Insolvency Proceedings: The Main Liquidator's Undertaking in the Meaning of article 18 in the Proposal to Amend the EU Insolvency Regulation, in: Brooklyn Journal of Corporate, Finance & Commercial Law, vol.9, issue 1, 2014, p.104 -110
[841] The EU Regulation (recast), article 36(5)
[842] The EU Regulation (recast), article 36(5)
[843] The EU Regulation (recast), article 36(7)
[844] The EU Regulation (recast), article 36(7), (8), (9)
[845] The EU Regulation (recast), article 36(10)
[846] The EU Regulation (recast), article 36(5)
[847] Wessels, Bob, Contracting out of Secondary Insolvency Proceedings: The Main Liquidator's Undertaking in the Meaning of Article 18 in the Proposal to Amend the EU Insolvency Regulation, in: Brooklyn Journal of Corporate, Finance & Commercial Law, vol.9, issue 1, 2014, p.98-99
[848] The EU Regulation (recast), recital (45)

negotiations between the debtor and its creditors in order to promote the prospects of a restructuring of the debtor's business.[849] The insolvency practitioner or the debtor in possession can make such a request.[850] The most important condition that needs to be satisfied before a temporary stay on the commencement of secondary proceedings is granted is that suitable measures are in place to protect the interests of local creditors,[851] including "protective measures ordered by the court by requiring the insolvency practitioner or the debtor in possession not to remove or dispose of any assets which are located in the Member State where its establishment is located unless this is done in the ordinary course of business, or other measures ordered by the court during a stay, which are compatible with the national rules on civil procedure".[852]

4.104 The temporary stay on the commencement of secondary proceedings is also subject to limitations. (1) The stay can only last for a period not longer than three months.[853] (2) If a consensus has been built in the negotiations during the stay, the court on its own motion or upon the request of any creditor shall revoke the stay.[854] (3) The court shall on its own motion or at the request of any creditor lift the stay if

"(a) the continuation of the stay is detrimental to the creditor's rights, in particular if the negotiations have been disrupted or it has become evident that they are unlikely to be concluded; or
(b) the insolvency practitioner or the debtor in possession has infringed the prohibition on disposal of its assets or on removal of them from the territory of the Member State where the establishment is located."[855]

2.2.3.3.2.3 Right to Challenge the Opening of Secondary Insolvency Proceedings

4.105 It is required under the EU Regulation (recast) that the court shall immediately give notice to the insolvency practitioner or the debtor in possession in the main proceedings and give him an opportunity to be heard on the pending request to open secondary proceedings.[856] In *Nortel Network*, due to the highly integrated trading relationships between group companies, the joint administrators also planned to avoid any secondary proceedings so as to achieve a coordinated reorganization of the entire group in Europe.[857] The joint administrators applied to the court for a letter of request to be sent to the courts of a number of EU Member States, requesting

(1) to be given notice of any application for the opening of secondary insolvency proceedings in respect of any of the companies in administration;

[849] The EU Regulation (recast), article 38(3), para.1
[850] The EU Regulation (recast), article 38(3), para.1
[851] The EU Regulation (recast), recital (45)
[852] The EU Regulation (recast), article 38(3), para.2
[853] The EU Regulation (recast), article 38(3), para.1
[854] The EU Regulation (recast), article 38(3), para.3
[855] The EU Regulation (recast), article 38(3), para.4
[856] The EU Regulation (recast), article 38(1)
[857] *Re Nortel Networks SA*, [2009] B.C.C. 343

(2) to be given an opportunity for the administrators to be heard on any such application and to enable them to explain to the foreign court why such proceedings would not be in the interests of the creditors prior to the opening of any secondary insolvency proceedings[858]

4.106 Now the EU Regulation (recast) provides the procedural legal basis that the insolvency practitioner in the main proceedings may challenge the decision to open secondary proceedings before the courts of the Member State where secondary proceedings have been opened, if his rights to be heard are not be satisfied. [859] Besides, the insolvency practitioner in the main insolvency proceedings can also request the court to open a different type of secondary insolvency proceedings as listed in Annex A other than the type initially requested if the conditions for opening a different type of secondary insolvency proceedings are satisfied under the national law and that type of proceedings is considered the most appropriate for the interests of the local creditors and coherence between the main and secondary insolvency proceedings.[860]

2.2.4 Influences of the Concurrent Proceedings under the Model Law

4.107 Contrary to its functions under the Regulation, establishment merely serves as a criterion for recognition of non-main proceedings in accordance with the Model Law. Upon recognition of a foreign main proceeding, the Model Law actually imposes no limitations on the jurisdiction of the courts in the enacting State to commence or continue concurrent insolvency proceedings on the basis of establishment or mere presence of assets.[861] However, the Model Law also explicitly welcomes a more restrictive approach, which allows the initiation of the local proceeding only if the debtor has an establishment in the State.[862] In principle, the effects of the concurrent proceedings are restricted to the assets of the debtor that are located in the State.[863] There is also possibility that the effects of a local proceeding can be extended to assets located abroad if both of the following conditions are met.

(i) to the extent necessary to implement cooperation and coordination to other assets of the debtor;
(ii) those foreign assets must be subject to administration in the enacting State under the law of the enacting State[864]

4.108 In addition, a concurrent proceeding can also be opened in accordance with the law of the enacting State relating to insolvency and the court involved should seek cooperation and coordination pursuant to Chapter IV of the Model Law.[865] The underlying principle is the commencement of a local proceeding

[858] *Re Nortel Networks SA*, [2009] B.C.C. 343
[859] The EU Regulation (recast), article 39
[860] The EU Regulation (recast), article 38(4)
[861] The Model Law, article 28; Guide and Interpretation, para.224-226
[862] Guide and Interpretation, para.226
[863] Guide and Interpretation, para.227
[864] The Model Law, article 28, Guide and Interpretation, para.227
[865] The Model Law, article 29

does not prevent or terminate the recognition of a foreign proceeding.[866] It is suggested that intervention with the local proceedings under the Model Law can be conducted in a different scenario "by tailoring the relief to be granted to the foreign main proceeding and cooperating with the foreign court and foreign representative".[867] (I will discuss about reliefs in detail in the next Chapter "Recognition and Reliefs").

4.109 If the concurrent proceeding is commenced prior to application for recognition of the foreign proceeding concerning the same debtor, any discretionary reliefs granted to the foreign proceedings should be in consistent with the concurrent proceeding in the enacting State.[868] Moreover, automatic recognition and reliefs granted to a foreign main proceeding based on Article 20 of the Model Law does not apply if the foreign proceeding is recognized as a foreign main proceeding in this enacting State where a concurrent proceeding has already been opened.[869] If the concurrent proceeding is opened after recognition or after the petition for recognition of the foreign proceeding, any discretionary reliefs should be reviewed by the court and should be modified or terminated if inconsistent with the concurrent proceeding in this enacting State.[870] In case that the foreign proceeding is a foreign main proceeding, the stay and suspension in accordance with Article 20(1) should be modified or terminated pursuant to Article 20(2) if inconsistent with the proceeding in this enacting State.[871]

4.110 It is observed that the local proceeding, regardless opened before or after recognition of a foreign proceeding, can result in modification or termination of reliefs to be granted to the foreign proceedings, including the foreign main proceedings.[872] It entail that the foreign main proceeding pursuant to the Model Law does not have the same superior status as the main insolvency proceedings under the Regulation. Besides, it is emphasized that the Model Law is not intent to establish "a rigid hierarchy" between the proceedings in order to facilitate cooperation of the court.[873]

Ch.3 Recognition and Reliefs

4.111 Upon request for recognition of a foreign judgment, a receiving court has to determine (1) Whether or not to recognize a foreign judgment? (2) Once recognized, to which extent the effect of the foreign judgment should be accorded? (3) If the judgment is recognized, how to enforce it? This section will answer the three questions in the context of cross-border insolvency and identify the difference concerning recognition, effects and enforcement between the Regulation and the Model Law.

[866] Guide and Interpretation, para.230
[867] Guide and Interpretation, para.226
[868] The Model Law, article 29(a)(i)
[869] The Model Law, article 29(a)(ii)
[870] The Model Law, article 29(b)(i)
[871] The Model Law, article 29(b)(ii)
[872] Guide and Interpretation, para.231
[873] Guide and Interpretation, para.231

3.1 Automatic Recognition and Universal Effects under the Regulation

4.112 The recognition system under the Regulation is based on a singular criterion, which is directly linked to jurisdiction. A judgment commencing a main insolvency proceeding rendered by a court of a Member State shall be automatically recognized in all other Member States as long as the court that opened the proceeding has jurisdiction pursuant to Article 3.[874] To understand that kind of arrangement, it should be explained from three aspects. First of all, that arrangement accords with the general rule concerning recognition under private international law, which is "no state recognizes the judgment of another state rendered without jurisdiction over the judgment debtor".[875] Secondly, from the perspective of cross-border insolvency, the aim of the Regulation is universalism though alongside with some compromise.[876] The rationale behind that principle is to administrate all of the assets and debts of the debtor through one central jurisdiction. Accordingly, the Regulation provides a system of automatic recognition concerning the main proceeding throughout the EU. Thirdly, that arrangement is peculiar to EU because automatic recognition is guaranteed by the principle of mutual trust.[877] (For discussion concerning the principle of mutual trust, please refer to section 2.2.1) It requires that grounds for non-recognition should be reduced to the minimum necessary (See section 3.3 Public Policy Exception.) In the case that the courts of two Member States both claim competence to open the main insolvency proceedings, the principle of mutual trust should also serve as the proper foundation for jurisdiction dispute settlement in the course of recognition.[878] In *Eurofood* case, the CJEU makes clear that

"the principle of mutual trust requires that the courts of the other Member States recognize the decision opening main insolvency proceedings, without being able to review the assessment made by the first court as to its jurisdiction."[879]

4.113 On the ground the principle of mutual trust, the effects flowing from automatic recognition are universal to the extent the exception applies, which means without further formalities, the effects of the main proceeding are extended to all other Member States.[880] Besides, the scope of the effects of cross-border insolvency proceedings is also connected with choice of law rules. In order to approach the universal effect, the Regulation adopted *lex fori concursus* as the fundamental rule of its uniform choice of law system, which requires that

[874] The EC Regulation, article 16(1); the EU Regulation (recast), article 19(1): Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognized in all other Member States from the moment that it becomes effective in the State of the opening of proceedings.
[875] American Law Institute, Restatement of the Law Third: The Foreign Relations Law of the United States, Vol.1, St. Paul: American Law Institute Publishers, 1987, p.591
[876] Virgós/Schmit Report (1996), para.12; the EC Regulation, recital (11), (12); the EU Regulation (recast), recital (22), (23)
[877] The EC Regulation, recital (22); the EU Regulation (recast), recital (65)
[878] The EC Regulation, recital (22); the EU Regulation (recast), recital (65)
[879] *Eurofood*, para.42; the EU Regulation (recast), recital (65)
[880] The EC Regulation, article 17(1); the EU Regulation (recast), article 20(1)

the law of the State of the opening of proceedings shall determine the conditions for the opening, conduct and closure of insolvency proceedings.[881] Meanwhile, aware of the fact that it is difficult to implement a single exclusive regime of universality without modifying,[882] the effects of the main proceedings will be limited by the opening of secondary proceedings in another Member State.[883] Although the rule of applicable law on the secondary proceedings is also *lex fori concursus*,[884] the effects, instead of being universal, are restricted to the assets located in the State of the opening of secondary proceedings (hence, in fact, *lex fori concursus secondarii*).[885]

4.114 Upon recognition, the effects are mainly realized by the insolvency practitioners, who exercise the powers vested in them under the Regulation.[886] If an insolvency practitioner is appointed by the opening of the main proceedings, the nature, content and extent of his power is determined subject to the *lex fori concursus* automatically exercisable in other Member States.[887] There are also built-in exceptions. First of all, if the main insolvency practitioners exercise the powers in foreign Member States, they shall be subject to both substantive and procedural restrictions. For instance, there are explicit bars on coercive measures and rights to rule on legal proceedings and disputes. In addition, they should take action in the manner according to the local law.[888]

4.115 Secondly, the power of the main insolvency practitioners to remove the debtor's assets from the territory of the Member State in which they are situated is deemed as "the most common reason for attempting to exercise powers and perhaps the most sensitive in terms of local interests".[889] Therefore, it is stipulated under the Regulation that third parties' rights in rem and rights involving reservation of title are not affected by the effects of the main proceedings[890] and accordingly fall out of the reach of the powers of the main insolvency practitioners.

4.116 Thirdly, if preservation measure has been taken in order to open secondary proceedings, the main insolvency practitioners cannot exercise their powers conflicting with those measures.[891] Last but not least, once the secondary proceedings are opened, the powers of the main insolvency practitioners will no longer be effective as against those local assets. The secondary insolvency practitioners have the power to claim in any other Member State that moveable

[881] The EC Regulation, recital (23), article 4; the EU Regulation (recast), recital (66), article 7
[882] Virgós/Schmit Report (1996), para.12
[883] The EC Regulation, article 3(2)(3); the EU Regulation (recast), article 3(2)(3)
[884] The EC Regulation, recital (23); the EU Regulation (recast), recital (66)
[885] The EC Regulation, recital (12); the EU Regulation (recast), recital (23)
[886] The EC Regulation, article 18; the EU Regulation (recast), article 21
[887] The EC Regulation, article 18(1); the EU Regulation (recast), article 21(1)
[888] The EC Regulation, article 18(3); the EU Regulation (recast), article 21(3)
[889] Moss, Fletcher, Isaacs (ed.), The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide (2nd ed.), Oxford University Press, 2009, para.8.276
[890] The EC Regulation, article 5,7; the EU Regulation (recast), article 8,10
[891] The EC Regulation, article 18(1); the EU Regulation (recast), article 21(1)

property was removed from the State where the territorial proceedings were commenced to after the opening of those insolvency proceedings [892]

3.2 Recognition and Reliefs under the Model Law

3.2.1 Recognition

4.117 Instead of establishing a comprehensive framework as under the Regulation, the Model Law narrowed its scopes and goals to some of the most crucial issues concerning cross-border insolvency, including facilitation of recognition of foreign insolvency proceedings. [893] Under the Model Law, recognition will be "granted as a matter of course" [894] if recognition is not contrary to the public policy of the enacting States and if the application meets the basic criteria set out in Article 17(1), including

(1) the proceeding must be a foreign proceeding (within the meaning of article 2 (a));
(2) applied by a foreign representative (within the meaning of article 2 (d));
(3) the application meets the requirements (provided under article 15 (2));
(4) has been submitted to the competent court (article 4).

4.118 Those simple recognition criteria reflects the core philosophy of the Model Law, which is "there is no time to waste, as the recognition must take place as expeditiously as possible".[895] In particular, it is advised that based on any of those criteria a proceeding could be deemed a main proceeding. If more than one criterion is included, it "would raise the risk of competing claims from foreign proceedings for recognition as the main proceeding".[896] The receiving court is not given the opportunity to judge the merits of the foreign proceedings.[897] Further, it has been stressed that to obtain early recognition is often the guarantee for effective protection of the assets of the debtor from dissipation and concealment. For that reason, the court is obliged to decide on the application "at the earliest possible time".[898] In addition, the Model Law also uses the jurisdictional basis, i.e. COMI and establishment, for the court to distinguish recognition of the foreign proceedings as the main or non-main proceedings.[899]
To be recognized as main or non-main proceeding differ quite substantially in the legal consequences because the effects and reliefs flowing from recognition may depend upon the category into which a foreign proceeding falls.

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[892] The EC Regulation, article 18(2); the EU Regulation (recast), article 21(2)
[893] UNCITRAL Secretariat, Report on UNCITRAL-INSOL Colloquium on Cross-Border Insolvency, U.N. Doc. A/CN.9/398 (May 19, 1994), paras.17-18
[894] Guide and Interpretation, para.150
[895] Berends, André, The UNCITRAL Model Law on Cross-border Insolvency: A Comprehensive Overview, in: 6 Tul. J. Int'l & Comp. L., pp. 320
[896] Guide and Interpretation, para. 155
[897] Guide and Interpretation, Para. 151
[898] The Model Law, Article 17(3); See also the Guide and Interpretation, para. 163: the phrase "at the earliest possible time" has a degree of elasticity. Some cases may be so straightforward that the recognition process can be completed within a matter of days. In other cases, particularly if recognition is contested, "the earliest possible time" might be measured in months. Interim relief will be available in the event that some order is necessary while the recognition application is pending.
[899] The Model Law, Article 17(2)(a)(b)

3.2.2 Reliefs

4.119 Due to various insolvency systems from State to State influenced by respective social, political, financial and other considerations, UNCITRAL found it difficult to provide uniform choice of law rules on global level in the process of drafting the Model Law and thus choice of law rules fall outside of the ambit of the Model Law.[900] Without harmonized choice of law rules, the applicable law that governs the effect of recognition is unpredictable and uncertain. To fill in the gap and give necessary support to the recognized proceedings, the Model Law introduced a "minimum" list of automatic or discretionary effects and measures that would be triggered by recognition, while at the same time leaving room for the recognizing court to provide additional effects or measures.[901] Those effects or measures are addressed as reliefs in the context of the Model Law.

3.2.2.1 Automatic Reliefs

4.120 Automatic reliefs are mandatory and solely granted upon recognition of main proceedings alone. The types of those automatic reliefs are certain and specific under Article 20(1) of the Model Law, including

(a) Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;
(b) Execution against the debtor's assets is stayed; and
(c) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.[902]

4.121 As emphasized in the Guide and Interpretation, recognition of the main proceedings set up under the Article 20 has its own effects rather than importing the consequences of the foreign law into the insolvency system of the enacting State. That entails the imposition on the insolvent debtor of the consequences of article 20 in the enacting State is justified, even if the automatic effects of the insolvency proceeding in the country of origin are different from the effects of article 20 in the enacting State.[903] Meanwhile, notwithstanding the "automatic" or "mandatory" nature, the automatic reliefs upon recognition of the main proceedings might be subject to certain exceptions, limitations, modifications or termination in accordance with the law of the enacting State.[904]

3.2.2.2 Discretionary Reliefs

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[900] Clift, Jenny, Choice of Law and the UNCITRAL Harmonization Process, Brooklyn Journal of Corporate, Finance & Commercial Law, Vol.9, Issue1, 2014, p.22
[901] UNCITRAL, Working Group on Insolvency Law, Report on its 18th Session, Oct.30–Nov.10, 1995, U.N Doc A/CN.9/419 (Dec. 1, 1995), paras. 55-56
[902] The Model Law, article 20 (1)
[903] Guide and Interpretation, para.178
[904] The Model Law, article 20 (2)

4.122 In addition to the automatic reliefs under the article 20, the Model Law also provides discretionary reliefs. The scope of discretionary reliefs are much wider, including provisional reliefs under Article 19 of the Model Law and any appropriate relief available upon recognition under the laws of the Enacting State.[905] Provisional relief deals with "'urgently needed' relief that may be ordered at the discretion of the court and is available as of the moment of the application for recognition".[906] Provisional reliefs include stay of execution against the debtor's assets; transfer of the administration or realization of the debtor's assets to the foreign representative or another person designated by the court, suspension of the right to transfer, encumber, or dispose of any assets of the debtor, providing for the examination of witness, the taking of evidence or the delivery of information concerning the debtor's assets etc., and granting additional relief.[907] Unless granted extension in accordance with Article 21 (f), provisional reliefs terminate when the application for recognition is decided upon.[908]

4.123 Following the recognition of main or non-main proceedings, the court may, at the request of the foreign representative, grant any appropriate relief,[909] which means the court may "subject the relief granted to any conditions it considers appropriate".[910] Unlike a representative of a foreign main proceeding, who normally seeks to gain control over all assets of the insolvent debtor, a representative of a foreign non-main proceeding normally have narrower interests and limited authority.[911] Relief granted to a foreign non-main proceeding should be limited to assets that are to be administered in that non-main proceeding, and if the foreign representative seeks information concerning the debtor's assets or affairs, the relief must concern information required in that non-main proceeding.[912] In order not to interfere with the administration of another insolvency proceeding, in particular the main proceeding, the court is advised when granting relief in favor of a foreign non-main proceeding, the court "should not give unnecessarily broad powers to the foreign representative".[913] Moreover, it is stipulated under the Model Law "granting any additional relief that may be available under the laws of this State".[914] In accordance with the Guide and Interpretation of the Model Law,

"The proviso 'under the law of this State' reflects the principle underlying the Model Law that recognition of a foreign proceeding does not mean extending the effects of the foreign proceeding as they may be prescribed by the law of the foreign State. Instead, recognition of a foreign proceeding entails attaching to the foreign proceeding consequences envisaged by the law of the enacting State."[915]

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[905] The Model Law, article 21,
[906] Guide and Interpretation, para.170
[907] The Model Law, article 19(1), 21 (c), (d), (g)
[908] Guide and Interpretation, para. 174
[909] The Model Law, article 21(1)
[910] Guide and Interpretation, para.191
[911] Guide and Interpretation, para. 193
[912] The Model Law, article 21(3),
[913] Guide and Interpretation, para. 193
[914] The Model Law, article 21(1)(g)
[915] Guide and Interpretation, para.194

4.124 The Model Law did not specify whether "the law" includes private international law of the enacting state. Nevertheless, a few relevant recommendations concerning discretionary reliefs find their ways in the Legislative Guide.[916] If private international law is included into "the law", a question arises whether the recognizing court can grant the reliefs on the basis of *lex fori* or *lex fori concursus*. The general rule adopted by the Legislative Guide to apply to the insolvency proceedings is the *lex fori concursus*, which entails insolvency proceedings shall be governed by the law of the State in which those proceedings are commenced.[917]

4.125 In the meantime, it also provides a couple of exceptions to the *lex fori concursus* in order to respect the rights and claims established under the domestic law,[918] to maintain the certainty of ordinary transactions relying on a determined legal environment[919] or to safeguard certain rights subject to special protection.[920] It is pointed out under the Legislative Guide that the general application of the *lex fori concursus* can better achieve the goal of maximizing the value of the debtor's assets and an exception to the *lex fori concursus* may distort the universal insolvency effects on similarly situated creditors owing to varied applicable law.[921] The Model Law aims at fairly and efficiently administrating cross-border insolvency proceedings for the benefit of all creditors on an equal basis rather than specific individual creditors.[922] Hence, any exception to the general rule of the *lex fori concursus* is suggested to be limited and clearly elaborated.[923]

4.126 In UK, it is stated under the Schedule I of the UK Cross-border Insolvency Regulations 2006,

"references to the law of Great Britain include a reference to the law of either part of Great Britain (including its rules of private international law)"[924]

4.127 As indicated by Ho, there is possibility that choice of law rules may direct an English court to use (foreign law) *lex fori concursus* when granting relief.[925] *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings (Cambridge Gas)*[926] is such a typical example. The UK Privy Council granted relief in accordance with Chapter 11 of the US Bankruptcy Code instead of a scheme of arrangement under section 152 of the

[916] The Legislative Guide, Part Two, I, Recommendations 30-34
[917] The Legislative Guide, Part Two, I, paras.83-84; Recommendation 31
[918] The Legislative Guide, Part Two, I, paras.81-82; Recommendation 30
[919] The Legislative Guide, Part Two, I, paras.85-86, 88-90; Recommendations 32
[920] The Legislative Guide, Part Two, I, paras.87; Recommendations 33
[921] The Legislative Guide, Part Two, I, paras.91
[922] The Legislative Guide, Part Two, I, paras.91
[923] The Legislative Guide, Part Two, I, Recommendations 34
[924] Schedule I UNCITRAL Model Law on Cross-border Insolvency, article 2(q)
[925] Ho, Look Chan, Applying Foreign Law-Realising the Model Law's Potential, [2010] J.I.B.L.R. 552, p.557
[926] *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings* [2006] UKPC 26; [2007] 1 AC 508

Companies Act 1931. There are two main conditions that enabled the UK Privy Council to grant a relief in accordance with the US Bankruptcy Code: (1) the underlying principle of the common law in matters of judicial assistance in international insolvency is the principle of universality, which entails universal application.[927] (2) In the present case, exactly the same result could have been achieved by a scheme of arrangement under section 152 of the Companies Act 1931 as under the Chapter 11 plan.[928]

4.128 Nevertheless, the decision in the *Cambridge Gas* was overturned by the Supreme Court in the case of *Rubin v Eurofinance*[929]. The principal issue is whether the rules at common law or under the foreign law regulating those foreign courts, which are to be regarded as being competent for the purposes of enforcement of judgments, apply to judgments in avoidance proceedings in insolvency.[930] The main finding in *Rubin* was that orders in insolvency matters are either *in personam* or *in rem*[931] "but not *sui generis* in terms of the private international law rules of insolvency"[932]. When enforcing foreign insolvency orders at common law in England, the principles in the *Dicey* rules are applicable unless the judgment is considered subject to a separate rule.[933] It was pointed out that prior to *Cambridge Gas* and the present cases, there had been no suggestion that there might be a different rule for judgments in personam[934] in insolvency proceedings and other proceedings.[935] Further, the Supreme Court held that there was no reason to class avoidance judgments relating to insolvency proceedings any differently to any other type of foreign judgment in the interests of the universality of bankruptcy.[936] Accordingly, the decision in the *Cambridge Gas* was deemed as "a radical departure from substantially settled law"[937] and wrongly decided.[938]

4.129 On 10 November 2014, the Privy Council handed down its decision in *Singularis Holdings Limited (Singularis) v PricewaterhouseCoopers (PwC)*[939]. *Singularis*, incorporated in the Cayman Island, was ordered by the Grand Court of

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[927] *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings* [2006] UKPC 26; [2007] 1 AC 508, para.16

[928] *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings* [2006] UKPC 26; [2007] 1 AC 508, at 24

[929] *Rubin v Eurofinance* [2012] UKSC 46

[930] *Rubin v Eurofinance* [2012] UKSC 46, at 87

[931] *Rubin v Eurofinance* [2012] UKSC 46, at 103-104

[932] Dessain, Anthony, Wilkins, Michael, How Strong and How Long Is "the Golden Thread"? Jurisdictional Issues in a Globalized World, in: The Jersey & Guernsey Law Review, Issue 1, 2014, p.74

[933] *Rubin v Eurofinance* [2012] UKSC 46, at 106

[934] The avoidance orders in the present case was held in personam. The judge in the Court of Appeal accepted that the judgment was in personam and the *Rubin* respondents have not sought to argue that it was not an in personam judgment. See *Rubin v Eurofinance* [2012] UKSC 46, at 104, 105

[935] *Rubin v Eurofinance* [2012] UKSC 46, at 107

[936] *Rubin v Eurofinance* [2012] UKSC 46, at 115

[937] *Rubin v Eurofinance* [2012] UKSC 46, at 129

[938] *Rubin v Eurofinance* [2012] UKSC 46, at 132

[939] *Singularis Holdings Limited v PricewaterhouseCoopers* [2014] UKPC 36. This case is closely connected with its decision in *PricewaterhouseCoopers v Saad Investments Company Limited* [2014] UKPC 35.

the Cayman Islands to be wound up. The Bermudan court issued an order recognizing in Bermuda the status of the Cayman liquidators. The Bermudan court then exercised what it termed a common law power "by analogy with the statutory powers contained in section 195 of the Companies Act" to order PwC to provide information under section 195.[940] The Court of Appeal set aside this order on the basis that this was not an appropriate exercise of discretion because this would be an order made in support of a Cayman liquidation, which could not have been made by the Cayman court.[941] In deciding this case, the Privy Council addressed the apparent conflict between the *Cambridge Gas* case and the *Rubin* case and gave guidance as to whether the principle of modified universalism as articulated by Lord Hoffman in Cambridge Gas was correct. The Privy Council considered

"The primary way in which the case was put by the liquidators was that the common law develops to meet changing circumstances and that in international insolvencies the common law should be developed by the adoption of a principle that where local legislation does not provide for relevant assistance to a foreign officeholder, the legislation should be applied by analogy "as if" the foreign insolvency were a local insolvency. This argument was accepted by the Chief Justice. But it involves a fundamental misunderstanding of the limits of the judicial law-making power, and should not go unanswered. "

4.130 Although the aforementioned cases involved different kinds of reliefs, such as recovery of assets, transaction avoidance and access to information, there is no material difference on the principal issue invoked among them. In each case, the main issue was whether the local legislation should be applied and if so, to which extent. The Privy Council in *Singularis* held that the principle of modified universalism is a recognized principle of the common law.[942] However, the principle is much more limited in scope than articulated in *Cambridge Gas*. This is because the principle of modified universalism is subject to local law and local public policy and the domestic court can only ever act within the limits of its own statutory and common law powers.[943] To that extent, *Cambridge Gas* is overruled.[944] As indicated by Lord Collins,

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[940] *Singularis Holdings Limited v PricewaterhouseCoopers* [2014] UKPC 36, at 6

[941] The Grand Court of the Cayman Islands has power under section 103 of the Cayman Islands Companies Law to order any person, whether or not resident in the Islands, who has a relevant connection to a company in liquidation (including its former auditor) to "transfer or deliver up to the liquidator any property or documents belonging to the company". The equivalent power of the Bermuda court stipulated under section 195 of the Companies Act 1981 is in wider terms, which are not limited to information belonging to the company. However, it is exercisable only in respect of a company, which that court has ordered to be wound up. See *Singularis Holdings Limited v PricewaterhouseCoopers* [2014] UKPC 36, at 3-7

[942] *Singularis Holdings Limited v PricewaterhouseCoopers* [2014] UKPC 36, at 23

[943] As for the limits of the power to compel the production of necessary information, this power was subject to the following limitations:
(i) It is only available to assist the officers of a foreign court of insolvency jurisdiction or equivalent public officers;
(ii) it is a power of assistance. It exists for the purpose of enabling those courts to surmount the problems posed for a world-wide winding up of the company's affairs by the territorial limits of each court's powers. It is not therefore available to enable them to do something, which they could not do even under the law by which they were appointed.

"It is a principle of the common law that the court has the power to recognize and grant assistance to foreign insolvency proceedings… Those powers can be extended or developed from existing powers through the traditional judicial law-making techniques of the common law… The very limited application of legislation by analogy does not allow the judiciary to extend the scope of insolvency legislation to cases where it does not apply."[945]

4.131 As a result, the appeal was dismissed because the liquidators would not have had the power to require PwC to produce the requested documentation under Cayman Islands law. [946]

4.132 In U.S., *lex fori concursus* used to be applied when granting relief. In *re Schimmelpenninck*,[947] a Dutch Curator, a position akin to a trustee in a United States bankruptcy proceeding, filed an ancillary proceeding in the United States Bankruptcy Court in the Northern District of Texas, requesting declaratory and injunctive relief in order to preserve for the estate the value of the debtor's.[948] The United States Court of Appeals for the Fifth Circuit overturned the decision made by the bankruptcy court and the district court on appeal, granting declaratory and injunctive relief to the Dutch curator. After having examining the related Dutch law, the court adopted the comity-based approach for application of the foreign law, considering

"the foreign laws need not be identical to their counterparts under the laws of the United States; they merely must not be repugnant to our laws and policies ... As we have already found sufficient congruity between Dutch and American bankruptcy laws to eschew such repugnance, we conclude that principles of comity weigh in favor of granting the injunction sought by the Curators."[949]

4.133 The case was heard in 1999 on the basis of Section 304 of the U.S. Bankruptcy Code, which has been replaced by Chapter 15. Case law applying that section remains relevant. Some of the American courts continuously followed that point of view after 2005 when Chapter 15 came into effect[950] but some

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(iii) It is available only when it is necessary for the performance of the foreign office holder's functions.
(iv) The order must be consistent with the substantive law and public policy of the assisting court.
(v) As with other powers of compulsion exercisable against an innocent third party, its exercise is conditional on the applicant being prepared to pay the third party's reasonable costs of compliance
Singularis Holdings Limited v PricewaterhouseCoopers [2014] UKPC 36, at 15, 25
[944] *Singularis Holdings Limited v PricewaterhouseCoopers* [2014] UKPC 36, at 18
[945] *Singularis Holdings Limited v PricewaterhouseCoopers* [2014] UKPC 36, at 38
[946] *Singularis Holdings Limited v PricewaterhouseCoopers* [2014] UKPC 36, at 30, 31
[947] *Re Schimmelpenninck*, 183 F.3d 347 (5th Cir. 1999)
[948] *Re Schimmelpenninck*, 183 F.3d 347 (5th Cir. 1999), at 350
[949] *Re Schimmelpenninck*, 183 F.3d 347 (5th Cir. 1999), at 365; See also *Overseas Inns S.A. P.A. v. United States*, 911 F.2d 1146 (5th Cir. 1990), at 1149; In *re Petition of Garcia Avila*, 296 B.R. 95 (Bankr. S.D.N.Y. 2003), at 112
[950] In *re Metcalfe & Mansfield Alternative Investments*, 421 B.R. 685 (Bankr. S.D.N.Y. 2010), at 697; In *re Qimonda AG*, 462 B.R. 165 (Bankr. E.D.Va. 2011), at 184 n.17; In *re Sivec SRL*, 476 B.R. 310 (Bankr. E.D. Okla. 2012), at 324

courts don't. *Re Vitro*[951] is such a notable example. In *re Vitro*, it involved recognition and enforcement of a Mexican reorganization plan (the Concurso Approval Order).[952]

4.134 The United States Court of Appeals for the Fifth Circuit pointed out "whether any relief under Chapter 15 will be granted is a separate question from whether a foreign proceeding will be recognized by a United States bankruptcy court"[953] and recognized the Mexican reorganization proceeding as a foreign main proceeding.[954] However, it denied the enforcement of the reorganization plan, which would discharge obligations held by non-debtor guarantors and did not provide the protections afforded to creditors under the Bankruptcy Code.[955] The Fifth Circuit admitted that comity is central to Chapter 15[956] and "an important factor in determining whether relief will be granted"[957]. Nevertheless, the Fifth Circuit also found that

"Chapter 15 does impose certain requirements and considerations that act as a brake or limitation on comity, and preclude granting the relief requested by a foreign representative."[958]

4.135 It therefore developed a hierarchical three-step framework of statutory analysis, which governs whether a relief should be granted or precluded.[959] They are

"Step (1): a court should check whether the relief requested falls within the ambit of one of the explicit provisions enumerated under § 1521(a)(1)-(7).
Step (2): if § 1521(a)(1)-(7) and (b) does not list the requested relief, a court should decide whether it can be considered "appropriate relief" under § 1521(a).
Step (3): if the requested relief goes beyond the relief afforded under § 1521, a bankruptcy court then should consider whether "additional assistance" is appropriate under § 1507."[960]

4.136 As addressed by Honorable Justice Louise De Carl Adler, with §304 of the Bankruptcy Code replaced by Chapter 15 in 2005, comity has been elevated from one of six factors under §304(c) to the introductory text of §1507.[961] Nevertheless, the three-step framework adopted by the Fifth Circuit in *re Vitro* gives more weight to the law of the U.S.A. (*lex fori*), who seems to depart from its former *lex fori concursus* approach on the basis of comity. Besides, Chapter 15 instructs the US courts to take into account its international origin and the need to promote an application of this chapter that is consistent with the application

[951] *Ad Hoc Grp of Vitro Noteholder v. Vitro SAB de CV*, 12-10542 (5th Cir. 2012)
[952] In *re Vitro, SAB De CV*, 455 B.R. 571 (Bankr. N.D. Tex. 2011), at 575
[953] *Ad Hoc Grp of Vitro Noteholder v. Vitro SAB de CV*, 12-10542 (5th Cir. 2012), at 16
[954] *Ad Hoc Grp of Vitro Noteholder v. Vitro SAB de CV*, 12-10542 (5th Cir. 2012), at 16
[955] *Ad Hoc Grp of Vitro Noteholder v. Vitro SAB de CV*, 12-10542 (5th Cir. 2012), at 2
[956] *Ad Hoc Grp of Vitro Noteholder v. Vitro SAB de CV*, 12-10542 (5th Cir. 2012), at 14, 31
[957] *Ad Hoc Grp of Vitro Noteholder v. Vitro SAB de CV*, 12-10542 (5th Cir. 2012), at 32
[958] *Ad Hoc Grp of Vitro Noteholder v. Vitro SAB de CV*, 12-10542 (5th Cir. 2012), at 32
[959] *Ad Hoc Grp of Vitro Noteholder v. Vitro SAB de CV*, 12-10542 (5th Cir. 2012), at 36,39
[960] *Ad Hoc Grp of Vitro Noteholder v. Vitro SAB de CV*, 12-10542 (5th Cir. 2012), at 36-38
[961] Adler, Louise De Carl, Managing the Chapter 15 Cross-Border Insolvency Case (A Pocket Guide for Judges), 2nd ed., Federal Judicial Center, 2014, ft.48

of similar statutes adopted by foreign jurisdictions,[962] whereas the restrict interpretation of Chapter 15 in *re Vitro* are more subordinate to the peculiarities of jurisprudence in U.S.A. Moreover, to seek relief, extra requirements are set for foreign representatives to satisfy, which previously have not been required by Chapter 15.

3.3 Public Policy

3.3.1 Public Policy in the Context of Cross-border Insolvency

4.137 Public policy is applied in both the Regulation and the Model Law to refuse the recognition of the foreign insolvency proceedings. Public policy is the only ground for refusing recognition under the EC Regulation [963] and the EU Regulation (recast) follows this approach,[964] which reflects the fact that the Regulation is based on a presumption that a judgment opening insolvency proceedings is valid.[965] Hence, public policy is interpreted by the CJEU in a very restrict manner and is expected to be applied in exceptional cases. The CJEU set the tone with respect to public policy in the *Eurofood* case, in which it directly referred to its case law on the Brussels Convention (*Bamberski v Krombach* (Case C-7/98 [2000] E.C.R.I – 1935; [2001] Q.B. 709). As stated in *Bamberski v Krombach*, the CJEU based on the Brussels Convention (Brussels I and II) ruled that

> "recourse to that clause can be envisaged only where recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. The infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognized as being fundamental within that legal order.[966]
>
> …
>
> …on a proper interpretation of Art. 26 of the Regulation, a Member State may refuse to recognize insolvency proceedings opened in another Member State where the decision to open the proceedings was taken in flagrant breach of the fundamental right to be heard, which a person concerned by such proceedings enjoys."[967]

4.138 In practice, courts of the Member States often refer to the case law of the CJEU in matters of the public policy exception in a consistent way.[968] In addition, based on the national reports collected in the Study of Interpretation of the

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[962] 11 U.S. Code § 1508
[963] The EC Regulation, article 26
[964] The EU Regulation (recast), article 33
[965] Moss, Fletcher, Isaacs, (ed.), The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide (2nd ed.), Oxford University Press, 2009, pp. 106.
[966] Case C-7/98, *Dieter Krombach v André Bamberski* [2000] ECR I-01935, paras.23, 37
[967] *Eurofood,* para.67
[968] Hess/Pfeiffer, Interpretation of the Public Policy Exception (IP/C/JURI/IC/2010-076), pp. 30 et seqq. & pp.167-168.

Public Policy Exception, the policy exception is applied narrowly at the national level.[969]

4.139 Public policy has not been defined in Article 6 of the Model Law on purpose since the notion of public policy is "grounded in national law and may differ from State to State". [970] It is emphasized under the Guide and Interpretation that the genuine intent of Article 6 was expected to "be invoked under exceptional circumstances".[971] Nonetheless, Wessels indicated that the scope under Article 6 of the Model Law is wider than that under the Regulation because the latter only involve negative condition of recognition whereas Article 6 of the Model Law "provides the possibility of invoking public policy against any decision of a foreign court".[972]

4.140 A notable example is that public policy is not only an exception for recognition but also has been frequently applied to entitlement to relief in the American jurisprudence. In *re Cozumel Caribe*,[973] the dispute involved the effect of insolvency proceedings opened against *Cozumel Caribe,* a Mexican corporation, in Mexico (the *concurso*). The debtor, *Cozumel Caribe*, together with its non-debtor Mexican affiliates, was jointly under the debt repayment obligations in connection with a $103 million secured loan. The loan was guaranteed through the Cash Management Account governed by New York law. The Account was controlled by CTIM, as special servicer for the loan. When the debtor and the non-debtor affiliates had defaulted on the loans, CTIM sought to recover some or all of the funds in the Cash Management Account before the United States District Court for the Southern District of New York. Meanwhile, the foreign representative filed a petition for recognition of the *concurso* and a stay of the adversary proceeding brought by the foreign representative. Although the US Bankruptcy Court for the Southern District of New York recognized the *concurso* as foreign main proceedings and granted a stay of the adversary proceeding, Judge Glenn considered that a bankruptcy court can grant the relief if it "sufficiently protects parties in interest in accordance with §1522"[974], and must deny the relief if it is "manifestly contrary to United States public policy under §1506".[975] Judge Glenn is not the first American bankruptcy judge and not the last one, who has extended the public policy exception to granting relief. I will turn to this issue later in the Section 3.3.2.2.

3.3.2 Basic Content of Public Policy

3.3.2.1 Procedural contents

[969] This result was confirmed by the national reports from Austria, France, Germany, Italy, Netherlands, Poland, Portugal and the UK. According to the Austrian Report, the narrow approach is supported by the Annexes A and B to the Regulation as the proceedings listed there are generally recognized. See Hess/Pfeiffer, Interpretation of the Public Policy Exception (IP/C/JURI/IC/2010-076), ft.713.
[970] Guide and Interpretation, para.101
[971] Guide and Interpretation, para.104
[972] Wessels, International Insolvency Law (3rd ed.), Vol.X, Deventer: Kluwer, 2012, para. 10247
[973] In *re Cozumel Caribe, S.A de C.V.*, 482 B.R. 96 (2012)
[974] In *re Cozumel Caribe, S.A de C.V.*, 482 B.R. 96 (2012), at 113
[975] In *re Cozumel Caribe, S.A de C.V.*, 482 B.R. 96 (2012), at 113

4.141 The content of public policy is left to each Member State to decide and has not been unified by the Regulation. As explained in the Virgós-Schmit Report, public policy under the Regulation is governed by fundamental principles of both substance and procedure.[976] Thus public policy can embody procedural and substantive contents. With respect to procedural contents, the importance of due process has been highlighted. Failure to observe due process, including the adequate opportunity to be heard and the rights of participation in the proceedings, will consequently incur the violation of the equality of arms principle, which probably hamper the substantial rights of the parties concerned.

4.142 What constitutes public policy is also an unanswered question under the Model Law but governed by various national laws.[977] It has been acknowledged that the majority limits the public policy exception to fundamental principles of law, in particular constitutional guarantees.[978] Whether or not due process will be considered manifestly contrary to public policy is not resolved by the Model Law but also depends on the laws of the enacting states.[979] Although the Model Law does not mandate due process, it is also emphasized "in a number of jurisdictions, fundamental principles of due process, in some cases enshrined in the constitution".[980] For instance, in *re Silvec*, an Italian debtor did not give a U.S. creditor notice of Italian insolvency proceedings. The US court noted that there were no procedures in Italy that would allow for the protection of the creditor's rights of notice and opportunity to be heard. Consequently, the court modified the automatic stay of the Italian insolvency proceedings, holding that fundamental public policy under U.S. law is that parties in a legal proceeding are entitled to due process and notice and denying those rights, therefore, is manifestly contrary to that policy.[981]

3.3.2.2 Substantive Contents

4.143 Procedural contents are more foreseeable, whereas substantive contents are more variable. As incorporated into the systematic context of the Regulation, the public policy exception shall also be guided by the principle of universality[982] and of equal treatment of creditors,[983] which are "opposed to any unnecessary fragmentation of insolvency proceedings based on a non-recognition of foreign insolvency proceedings".[984] Accordingly, the threshold set out by the Regulation for the Member States to refuse to recognize insolvency proceedings is very

[976] Virgós/Schmit Report (1996), para. 206
[977] Guide and Interpretation, para.30, 101
[978] Guide and Interpretation, para.102
[979] Guide and Interpretation, para.136
[980] Guide and Interpretation, para.135
[981] In *re Sivec SRL*, WL 3651250 (E.D. Okla. Aug. 18, 2011), para.7.
[982] The EC Regulation, recital (11); the EU Regulation (recast), recital (21)
[983] The EC Regulation, recital (21); the EU Regulation (recast), recital (59)
[984] Hess, Burkhard, Oberhammer, Paul, Pfeiffer, Thomas, European Insolvency Law-The Heidelberg-Luxembourg-Vienna Report on the Application of Regulation No.1346/2000/EC on Insolvency Proceedings (External Evaluation JUST/2011/JCIV/PR/0049/A4), C.H.Beck.Hart.Nomos, 2014, para.976

high.[985] According to Hess and Pfeiffer's statistical information, there are only a few cases where the public policy exception was raised successfully out of substantive contents.[986] For instance, in the case of *Re Rover France SAS*,[987] it involved a British holding company, MG Rover, which had subsidiaries registered in different European countries. The holding company, together with some of its subsidiaries, applied for the opening of the main insolvency proceedings in UK in order to put the entire group into joint administration.[988] The effects of the English main proceedings met resistance in France, where the French Public Prosecutor attempted to initiate parallel main insolvency proceedings.[989] The French Public Prosecutor considered the English main proceedings should not be recognized because recognition, which could amount to the negative influences on the rights of French employees, would constitute a manifest breach of French public policy.[990] As pointed out by Norris QC,

"In general, in striking the balance between the interests of employees on the one hand and the interests of finance and trade creditors on the other, English insolvency law treats the claims of employees less favourably than the law of other Member States."[991]

4.144 Nevertheless, the Commercial Court of Nanterre (the Tribunal de commerce, Nanterre) and the Court of Appeal of Versailles (Cour d'Appel, Versailles) held against the French Public Prosecutor and did not think the public policy objection could be properly raised in this case. First of all, in accordance with the Regulation, the employment contract was governed by the law of contract, i.e. French law, which required that the works committee and the staff representatives should be consulted where insolvency proceedings affected contracts of employment and labor relations.[992] The fact that the British court had the jurisdiction to open main proceedings would not change the applicable law or consequently undermine the adequate protection of employees. Secondly, the English administrators gave certain undertakings to ensure that the French employees would receive the same treatment as they could receive under French law.[993]

4.145 There is no related statistics or survey into all the enacting states of the Model Law on how they interpret public policy with respect to substantive contents on international level. The case law in American jurisprudence can be viewed as an exemplar, which illustrates the scope of substantive contents concerning the public policy exception. Substantive rights, which are guaranteed under the constitution, are included. In *re Toft*,[994] it involved a request applied by

[985] Moss, Fletcher, Isaacs(ed.), The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide (2nd ed.), Oxford University Press, 2009, para.5.86
[986] Hess/Pfeiffer, Interpretation of the Public Policy Exception (IP/C/JURI/IC/2010-076), p.119-120
[987] *Re Rover France SAS* [2005] EWHC 874
[988] *Re Rover France SAS* [2006] B.C.C. 599
[989] *Public Prosecutor v Segard (As Administrator for Rover France SAS)* [2006] I.L.Pr. 32, at H3
[990] *Public Prosecutor v Segard (As Administrator for Rover France SAS)* [2006] I.L.Pr. 32, at H5
[991] *Re Rover France SAS* [2006] EWCH 3426 (Ch), at 8
[992] *Public Prosecutor v Segard (As Administrator for Rover France SAS)* [2006] I.L.Pr. 32, at H5
[993] Samad, Mahmud, Court Application under the Company Acts, Dublin: Bloomsbury, 2013, p.1251
[994] In *re Toft*, 453 B.R. 186 (S.D.N.Y. 2011).

the foreign representative in a Germany Insolvency proceeding to get access to the debtor's e-mail accounts under Chapter 15, which were stored on servers in the United States.[995] While German law permitted such mail interception,[996] the ex parte interception of electronic communications is illegal under two U.S. statutes.[997] The Court held that the relief sought would be manifestly contrary to public policy because "the relief sought would directly compromise privacy rights subject to a comprehensive scheme of statutory protection, available to aliens, built on constitutional safeguards incorporated in the Fourth Amendment as well as the constitutions of many [s]tates."[998]

4.146 In addition, the public policy exception is also extended to fundamental policy of the United States. In the aforementioned *re Vitro* case, the Fifth Circuit refused to grant reliefs to the Mexican reorganization plan (the *Concurso* Approval Order), holding

"The expression by Congress in §524, paired with the case law in this Circuit, lead this Court to conclude that the protection of third party claims in a bankruptcy case is a fundamental policy of the United States. The *Concurso* Approval Order does not simply modify such claims against non-debtors, they are extinguished. As the *Concurso* plan does not recognize and protect such rights, the *Concurso* plan is manifestly contrary to such policy of the United States and cannot be enforced here."[999]

4.147 The other typical instance related to fundamental policy is *re Qimonda AG*, which was appealed to the Supreme Court of the U.S.A. In *re Qimonda AG*, a German manufacturer of semiconductor memory devices (Qimonda) obtained recognition of the German proceeding as a foreign main proceeding in the United States under Chapter 15.[1000] The specific question presented was whether Chapter 15 permits a foreign administrator to avoid the application of Section 365(n) of the Bankruptcy Code, which was enacted by Congress with the explicit goal of furthering the public policy of supporting the high-tech industry by providing protection for intellectual property license agreements.[1001] The court concluded that Congress enacted section 365(n) to protect American technology, and that this is direct evidence of a "strong" U.S. policy favoring technological innovation.[1002] In reaching this conclusion, the Court conducted a balancing test between the relief that may be granted to the foreign representative and the interests of the persons that may be affected by such relief. The Court noted that failure to apply section 365(n) would "slow the pace of innovation, to the detriment of the U.S. economy" and "would severely impinge an important statutory protection ... and thereby undermine a fundamental U.S. public

[995] In *re Toft*, 453 B.R. 186 (S.D.N.Y. 2011), para. 188-189.
[996] In *re Toft*, 453 B.R. 186 (S.D.N.Y. 2011), para. 197-198.
[997] The two Statutes referred to the Wiretap Act, 18 U.S.C. § 2511 (2012) and the Privacy Act, 18 U.S.C. § 2701 (2012) . See In *re Toft*, 453 B.R at 196-197.
[998] In *re Toft*, 453 B.R. 186 (S.D.N.Y. 2011), para. 198.
[999] In *re Vitro, S.A.B. de C.V.,* 473 B.R. 117 (Bankr. N.D. Tex. 2012), at 1070
[1000] In *re Qimonda AG*, 433 B.R. 547 (Bankr. E.D. Va. 2010), at 552.
[1001] See Chung, John J., In Re Qimonda AG: The Conflict between Comity and the Public Policy Exception in Chapter 15 of the Bankruptcy Code, in: 32 B.U. Int'l L.J. 2013, pp.91 In *re Qimonda AG*, 462 B.R. 165, 183 (Bankr. E.D. Va. 2011).
[1002] In *re Qimonda AG*, 462 B.R. 165 (Bankr. E.D. Va. 2011), para.185

policy."[1003] Accordingly, the bankruptcy court denied the motion of the foreign administrator, who then appealed to the United States Court of Appeals for the Fourth Circuit.

4.148 The Fourth Circuit affirmed the Bankruptcy Court's decision and concluded that the Bankruptcy Court reasonably exercised its discretion in balancing the interests of the licensees against the interests of the foreign debtor and finding that the application of section 365(n) of the Bankruptcy Code was necessary to protect the licensees' rights under Qimonda's US patents.[1004] The Fourth Circuit recognized both the importance of the chapter 15 of the Bankruptcy Code to the global economy and the United States' commitment to cooperate with foreign insolvency proceedings. Nevertheless, such commitment, according to the Fourth Circuit, was not untempered.[1005] The Fourth Circuit held that a bankruptcy court is required to ensure sufficient protection of creditors under section 1522(a) of the Bankruptcy Code, and at a more general level, a bankruptcy court may refuse to grant comity or take an action that would be manifestly contrary to the United States' public policy under section 1506 of the Bankruptcy Code.[1006] The foreign administrator then appealed to the Supreme Court of the United States for review of the decision of the Fourth Circuit. On 6 October, 2014, the Supreme Court denied the petition for a writ of certiorari.[1007]

4.149 It seems that public policy under the Model Law could be interpreted in a much broader way if it might relate to any mandatory rule of the local law or protection of the interests of local creditors, although it is expected that the public policy exception will be rarely used and shall be understood more restrictively than domestic public policy. [1008]

Ch. 4 Enterprise Groups

4.1 A Blank in the Text

4.150 Neither the EC Regulation[1009] nor the Model Law[1010] provides the specific rules governing the enterprise groups. In Europe, the Commission has summed

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[1003] Id

[1004] *Jaffé v. Samsung Electronics Co.,* 737 F.3d 14 (4th Cir. 2013), at 6

[1005] *Jaffé v. Samsung Electronics Co.,* 737 F.3d 14 (4th Cir. 2013), at 41

[1006] *Jaffé v. Samsung Electronics Co.,* 737 F.3d 14 (4th Cir. 2013), at 27, 33

[1007] *Jaffé v. Samsung Electronics Co.,* 135 S.Ct. 66 (2014)

[1008] Guide and Interpretation, para.21(e), 30, 103-104

[1009] Virgós/Schmit Report (1996), para. 76:
The Convention (now the Regulation) offers no rules for groups of affiliated companies (parent-subsidiary schemes).
The general rule to open or to consolidate insolvency proceedings against any of the related companies as a principal or jointly liable debtor is that jurisdiction must exist according to the Convention (now the Regulation) for each of the concerned debtors with a separate legal entity.

[1010] UNCITRAL Model Law Legislative Guide on Insolvency Law, Part three Treatment of enterprise groups in insolvency, 2010, para.1: "The Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law (UNCITRAL Model Law), which is relevant to cross-border insolvency proceedings with respect to an individual group member, but does not address issues pertinent to the insolvency of different group members in different States."

up the three reasons for the omission. First of all, the current EC Regulation contains a very similar text to the Convention on Insolvency Proceedings, which was open for signature in 1995 but failed in the end. At that time, the phenomenon of groups of companies was not as widespread as it is today. Moreover, the reorganization or rescue of companies was not a prevailing option in the domestic insolvency laws of Member States and liquidation was the norm. Finally, the creation of rules for groups of companies raised complex problems and it may have been considered more appropriate to postpone it to a later date.[1011] As for the Model Law, when the text of what became the UNCITRAL Model Law on Cross-Border Insolvency was debated, groups were also regarded as "a stage too far".[1012] Paulus regarded this blank as a "veritable sin of omission".[1013]

4.151 In fact, instead of a lack of appreciation, the issues of enterprise groups in cross-border insolvency have not been addressed mainly because it is considered to be too complex. The complicated organizational structure of enterprise groups made itself a definition difficult to tell precisely. This is reflected, as pointed out by Mevorach, in an absence of consistent definitions of groups in legal systems. Normally, no general definition is offered, not even for domestic groups. [1014] As a topic "extremely relevant to cross-border insolvencies",[1015] there are various opinions and recommendations that attempt to provide the solutions. Some suggestions focus on the definition of COMI. Paulus suggested that

"'The centre of a debtor's main interests' for the purposes of Article 3(1) shall mean, in the case of companies and legal persons, the place of the registered office, or, if shown to be in a different Member State, the place where the debtor conducts the administration of his interests on a regular basis and which is therefore ascertainable by third parties, except for cases where the debtor is part of a group of companies or legal persons which operate as an economic unit ("an economic unit case"). In an economic unit case, the centre of a debtor's main interests for the purposes of Article 3(1) shall mean the place where the head office functions of the debtor are carried out, provided that place is ascertainable by prospective creditors as the place where such head office functions are carried out." [1016]

4.152 Bufford went even further and proposed what he described as "a bold solution."[1017] He recommended the adoption of a new ECOMI[1018] system for the

[1011] EU Commission Staff Working Document the Impact Assessment Accompanying the document Revision of Regulation (EC) No 1346/2000 on insolvency proceedings, Strasbourg, 12.12.2012, SWD(2012) 416 final, p.16

[1012] United Nations, A/CN.9/WG.V/WP.90 - Treatment of enterprise groups in insolvency, 2009, para.3

[1013] Paulus, Christoph, Die europaische Insolvenzverordnung, und der deutsche Insolvenzverwalter, NZI 2001, p.505, cite: Pannen, Klaus (ed.), European Insolvency Regulation, Berlin: De Gruyter Recht, 2007, ft.144

[1014] Mevorach, Insolvency within Multinational Enterprise Groups, Oxford University Press, 2009, at 26

[1015] Pannen, Klaus (ed.), European Insolvency Regulation, Berlin: De Gruyter Recht, 2007, p.49

[1016] Moss & Paulus, Insolv. Int. 2006, 19(1), p. 3

[1017] Bufford, Samuel L., Coordination of Insolvency Cases for International Enterprise Groups: A Proposal, 86 AMBKRLJ 2012, p. 691

recognition of insolvency cases for multinational enterprise groups, which draws upon the U.S. courts' substantial experience with the coordination of domestic and international bankruptcy cases for related entities[1019] and encourages the integrated way for all bankruptcy cases in the form of one single court before one single judge. For example, according to the ECOMI system,

"The country where an enterprise groups' ECOMI is located is the presumptively proper country for the commencement of main insolvency proceedings or cases for each member of the group. Any such case shall be assigned to the same judge for supervision and administration. Once such a main proceeding is commenced in the ECOMI State, no main insolvency proceeding for such an entity may be commenced or proceed in any other State, unless the appropriate court in the ECOMI country gives authorization."[1020]

4.153 In *Re Daisytek*,[1021] the court opted for the centralization of proceedings in the context of enterprise group, which was built upon the head office function approach to determine COMI. It has been followed by several countries, such as Germany,[1022] France,[1023] Hungary,[1024] UK,[1025] although it has been argued that the head office function is based on an inaccurate presumption and deviated from the EC Regulation (recital 13).[1026]

4.154 Vallender and Deyda are not convinced by the possibility of defining an international jurisdiction norm for insolvency of international groups of companies. Such a definition will not bring enough clarity and certainty, with as a result interpretation problems leading to certain exceptions to the given rule.[1027] Another jurisdictional approach in that regard is to treat a subsidiary

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[1018] The term "ECOMI" has been used by other writers to discuss this concept. See e.g. Mabey, Ralph R. & Johnston, Susan Power, Coordination Among Insolvency Courts in the Rescue of Multinational Enterprises, 2009 Norton Rev. of Int'l Insolvency 33, 48 n.53

[1019] Bufford, Samuel L., Coordination of Insolvency Cases for International Enterprise Groups: A Proposal, 86 AMBKRLJ 2012, p. 700

[1020] Bufford, Samuel L., Coordination of Insolvency Cases for International Enterprise Groups: A Proposal, 86 AMBKRLJ 2012, p. 692

[1021] *Re Daisytek-ISA Ltd*., [2003] B.C.C. 562 Daisytek was the holding company of the European group of companies whose parent company was an American company declared bankrupt in the U.S.A. The European group companies, including three German companies and a French company, petitioned for administration orders in UK to achieve a more advantageous realization of the assets than would be achieved in a winding-up.

[1022] *Amtsgericht Mtinchen* [AG] May 4, 2004, ZIP 20/2004, 962 (F.R.G.), qtd: Moss, Group Insolvency - Choice of Forum and Law: The European Experience under the Influence of English Pragmatism, 32 Brook. J. Int'l L., 2006-2007, ft.48

[1023] *Tribunal de grande instance* [T.G.I.] [ordinary court of original jurisdiction] Nanterre, Feb. 15, 2006 [2006] B.C.C. 681 (Fr.), qtd: Moss, Group Insolvency - Choice of Forum and Law: The European Experience under the Influence of English Pragmatism, 32 Brook. J. Int'l L., 2006-2007, ft. 54

[1024] Municipal Court of Fejer/Szekesfehervar 14 June 2004, ZInsO 2004, 861, qtd: Wessels, Bob, International Insolvency Law (3rd ed.), Vol.X, Deventer: Kluwer, 2012, para. 10595

[1025] High Court of Justice Chancery Division Birmingham 18 April 2005 (MG Rover I), qtd: Wessels, Bob, International Insolvency Law (3rd ed.), Vol.X, Deventer: Kluwer, 2012, para. 10595

[1026] *Re Daisytek-ISA Ltd*., [2003] B.C.C. 562, at 14

[1027] Vallender, Heinz, & Deyda, Stephan, Brauchen wir einen Konzerninsolvenzgericthsstand?, Neue Zeitschrift fur das Recht der Insolvenz uns Sanierung (NZI), 4 December 2009, p 825 - 834; qtd: Wessels, Bob, International Insolvency Law (3rd ed.), Vol.X, Deventer: Kluwer, 2012, para. 10425f (ii)

company as establishment.[1028] However, it is not supported by the fact that the Member States expressly rejected the concept of establishment found in Art 5 (5) of the 1968 Brussels Convention, which allows a subsidiary to be classified as an establishment.[1029] Nevertheless, the liquidator of the foreign main proceedings that was opened in favor of the subsidiary could request the opening of secondary proceedings in the Member State where its registered office is located pursuant to article 29 of the EC Regulation.[1030] Hence, the local creditors will be protected under their domestic law since the local law will be applicable to the secondary proceedings.[1031]

4.155 There are also suggestions without defining COMI or referring to establishment. Van Galen proposed a group insolvency regime, under which emphasis is laid on the power of the liquidators of the parent company. When a parent and one or more subsidiaries have entered into insolvency proceedings, the parent company's liquidator should have powers of coordination with respect to the subsidiary's proceedings as well as the power to effect the coordinated sale of the assets of the companies in question.[1032] Tollenaar further called for the introduction of the concept of a group liquidator for dealing with groups, who shall be appointed in the foreign main and secondary proceedings of all group companies.[1033] Mevorach advocates "global group-wide solutions" applied to integrated group companies[1034] and "an adaptive approach" to match economic realities of groups.[1035] According to Mevorach, if a group is classified as "business integration", in which the business was operated in the way of financial and administrative interdependence but the assets and liabilities are kept separate,[1036] procedural consolidation suffices.[1037] If a group is "asset integrated", in which the assets and liabilities are interwoven,[1038] it is suggested that substantive consolidation shall be applied.[1039] Fully aware of global nature of the group companies, Mevorach pointed out that "cooperative spirit" among

[1028] Fasquelle, Daniel, Les faillites des groupes de sociétés dans l'Union européenne : la difficile conciliation entre approches économique et juridique, Bulletin Joly Sociétés 2006, n°2, p.151-167
[1029] Pannen, European Insolvency Regulation, Berlin: De Gruyter Recht, 2007, p.65
[1030] Menjucq, Michel, EC-Regulation No 1346/2000 on Insolvency Proceedings and Groups of Companies, ECFR 2, 2008, p. 142
[1031] Dammann, R., et Podeur, G., "Le mandat ad hoc, une porte d'entrée pour l'application aux groupes de sociétés du règlement européen relatifs aux procédures d'insolvabilité", Revue Lamy droit des affaires, 10/2006, p. 104.
[1032] Van Galen, Robert, The European Insolvency Regulation and Groups of Companies, INSOL Europe Annual Congress Cork, Ireland October 16 – 18, 2003, p. 20.
[1033] Tollenaar, Nicolaes W.A., Proposals for Reform: improving the ability under the European Insolvency Regulation to rescue multinational enterprises, IILR 2011, p. 252.
[1034] Mevorach, Insolvency within Multinational Enterprise Groups, Oxford University Press, 2009, p. 327
[1035] Mevorach, Towards a Consensus on the Treatment of Multinational Enterprise Groups in Insolvency, 18 Cardozo J. Int'l & Comp. L., 2010, 359
[1036] Mevorach, Insolvency within Multinational Enterprise Groups, Oxford University Press, 2009, p. 132
[1037] Mevorach, Insolvency within Multinational Enterprise Groups, Oxford University Press, 2009, p. 212-215
[1038] Mevorach, Insolvency within Multinational Enterprise Groups, Oxford University Press, 2009, p. 132
[1039] Mevorach, Insolvency within Multinational Enterprise Groups, Oxford University Press, 2009, p. 224-229

courts and insolvency representatives could be deemed as one of the main challenges in dealing with international insolvencies in general and suggested that courts and insolvency representatives "refrain from a narrow national perspective".[1040]

4.2 Development of Legal Texts

4.156 The main concern about dealing with group insolvencies relates to whether it is possible to concentrate multiple group members within a single jurisdiction and how to achieve that goal. There are basically two solutions: one is to find the COMI of the entire group; the other is to accept the merits of corporate separateness in the group context and solve the problem through cooperation and coordination.

4.2.1 COMI-Based Solution

4.157 The EU Regulation (recast) does not prevent a court to open insolvency proceedings for members belonging to the same group in a single jurisdiction if the court considers that the center of main interests of those group members is located in a single Member State. In such cases, the court should also be able to appoint, if appropriate, the same insolvency practitioner in all proceedings concerned, provided that this is not incompatible with the rules applicable to them.[1041] The EU Regulation (recast), however, does not give any explanation concerning COMI of group companies.

4.158 The Working Group V (insolvency law) of UNCITRAL also gradually developed some draft legislative provisions to facilitate the cross-border insolvency of multinational enterprise groups.[1042] It is pointed out that several cases have occurred in practice in which the center of main interests (COMI) of a number of group members has been determined to be located in the same jurisdiction.[1043] In the group context, determination of COMI is suggested to refer to the factors relevant to determination of COMI concerning a single debtor (paragraphs 145-147 of the Guide to Enactment and Interpretation of the Model Law).[1044] In addition, it can also depend on the group structure, business model, degree and level of integration and reliance between the particular group members[1045] because the more decentralized the group is, the more dispersed

[1040] Mevorach, Insolvency within Multinational Enterprise Groups, Oxford University Press, 2009, p. 331-332
[1041] The EU Regulation (recast), recital (53)
[1042] To date, the latest version was released in May 2015. Working Group V (insolvency law), UNCITRAL, Facilitating the Cross-border Insolvency of Multinational Enterprise Groups, A /CN.9/WG.V/WP.128, 2015
[1043] Working Group V (insolvency law), UNCITRAL, Facilitating the Cross-border Insolvency of Multinational Enterprise Groups, A /CN.9/WG.V/WP.128, 2015, para.15
[1044] Working Group V (insolvency law), UNCITRAL, Facilitating the Cross-border Insolvency of Multinational Enterprise Groups, A /CN.9/WG.V/WP.128, 2015, para.16
[1045] Working Group V (insolvency law), UNCITRAL, Facilitating the Cross-border Insolvency of Multinational Enterprise Groups, A /CN.9/WG.V/WP.128, 2015, para.5, 15

the proceedings are, the more likely coordination and cooperation, instead of COMI-based solution, is to be of considerable assistance.[1046]

4.2.2 Cooperation and Communication

4.159 In December 2012, the European Commission presented its proposals of amendments to the EC Regulation. With respect to the group companies,[1047] it is recommended that

"This Regulation should ensure the efficient administration of insolvency proceedings relating to different companies forming part of a group of companies. Where insolvency proceedings have been opened for several companies of the same group, these proceedings should be properly coordinated. The various liquidators and the courts involved should therefore be under the same obligation to cooperate and communicate with each other as those involved in main and secondary proceedings relating to the same debtor. In addition, a liquidator appointed in proceedings relating to a member of a group of companies should have standing to propose a rescue plan in the proceedings concerning another member of the same group to the extent such a tool is available under national insolvency law."[1048]

4.160 In 2014, the Parliament made relevant proposal with respect to the group companies as follows:

"This Regulation should ensure the efficient administration of insolvency proceedings relating to different companies forming part of a group of companies. Where insolvency proceedings have been opened for several companies of the same group, these proceedings should be properly coordinated**,** in particular in order to avoid the possibility of the insolvency of one group member jeopardizing the future of other members of the group. The various insolvency representatives and the courts involved should therefore be under the same obligation to cooperate and communicate with each other as those involved in main and secondary proceedings relating to the same debtor."[1049]

4.161 It seems that the focus of both the Commission and the Parliament is not to solve group companies problems from the jurisdictional perspective because as aforementioned, it is quite difficult to reach consensus on a precise definition of "group" and thus "it is so far insoluble to determine which entity is to be the lead

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[1046] Working Group V (insolvency law), UNCITRAL, Facilitating the Cross-border Insolvency of Multinational Enterprise Groups, A /CN.9/WG.V/WP.128, 2015, para.18(f)

[1047] EU Commission Explanatory Memorandum, Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings, Strasbourg, 12.12.2012, COM(2012) 744 final, p.9

[1048] European Parliament legislative resolution of 5 February 2014 on the proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings (COM(2012)0744 – C7-0413/2012 – 2012/0360(COD)), Amendment 10

[1049] European Parliament legislative resolution of 5 February 2014 on the proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings (COM(2012)0744 – C7-0413/2012 – 2012/0360(COD)), Amendment 10

company (and the court of its COMI to host the lead proceeding)".[1050] Both the Commission and the Parliament have adopted the cooperation and communication approach. Moreover, it is noteworthy that the obligation of cooperation and communication has been extended to the courts of parallel proceedings as well. It has been demonstrated in the aforementioned case law that cooperation and communication is a neutral and more pragmatic way to overcome the obstacles set up by different legal systems and domestic legislations. Finally, the EU Regulation (recast) provides a new chapter concerning insolvency proceedings of group of companies, which is composed of two sections: Section 1 cooperation and communication; Section 2 coordination.

4.162 The Model Law itself does not address the issues of group of companies but in 2010, UNCITRAL released the Legislative Guide on Insolvency Law, Part III Treatment of enterprise groups in insolvency (hereinafter the Legislative Guide Part III) to assist national countries in handling cross-border insolvency of enterprise groups[1051]. The Legislative Guide Part III is composed of three parts. Part I introduces the general features of enterprise groups. Part II provides recommendations to the domestic legislation concerning insolvency of enterprise groups. Part III focuses on cross-border insolvency of enterprise groups based on the UNCITRAL Model Law. The Legislative Guide Part III lays emphasis on cooperation and communication of proceedings between courts and insolvency representatives. In fact, it has been envisaged to introduce a group COMI into this Legislative Guide Part III but this attempt has been given up in the end. It is stated in the report of the Working Group V that

"It was generally agreed that, although perhaps desirable, it would be difficult to reach a definition of an enterprise group COMI in order to limit, for example, the commencement of parallel proceedings or to facilitate coordination and cooperation of multiple proceedings commenced with respect to group members. It was emphasized that one key issue with respect to a definition of enterprise group COMI would be the extent to which that definition was accepted, widely adopted and voluntarily enforced by the courts of States affected by it in particular cross-border insolvency cases."[1052]

4.163 Both the EU Regulation (recast) and the Legislative Guide Part III attached importance to cooperation of insolvency proceedings concerning different entities of the same group by utilizing cooperation and communication measures. In fact, the relevant provisions under the EU Regulation (recast) have been greatly influenced by the Legislative Guide Part III, which share quite a lot in common with the latter.

4.164 Generally speaking, the actors, involved in the process of cooperation and communication concerning members of a group of company, are insolvency

[1050] Moss, A very decent proposal: the European Commission's proposals for reforming the EC Regulation on insolvency proceedings 1346/2000, Insolv. Int. 2013, 26(4), 56

[1051] Legislative Guide Part III, para.4(a): "Enterprise group": two or more enterprises that are interconnected by control or significant ownership

[1052] UNCITRAL Report of Working Group V (Insolvency Law) on the work of its thirty-fifth session, A /CN.9/666, Vienna, 29 June-17 July 2009, para.26

practitioners[1053] (insolvency representatives, as addressed under the Model Law[1054]) and the courts.[1055] Cooperation is deemed necessary as long as such cooperation is appropriate to facilitate the fair and effective administration of the proceedings, is not incompatible with the rules applicable to them and does not entail any conflict of interests.[1056]

4.165 The contents of cooperation and communication between the insolvency practitioners (insolvency representatives) mainly include:

(1) timely communication of any relevant information concerning the group members subject to insolvency proceedings, provided appropriate arrangements are made to protect confidential information;[1057]
(2) coordination of the administration and supervision of the affairs of the group members subject to insolvency proceedings;[1058]
(3) coordination of the proposal and of reorganization plans;[1059]
(4)allocation of powers or responsibilities between insolvency representatives;[1060]
(5) by means of agreements or protocols[1061]

4.166 With respect to cooperation and communication involving courts, it is suggested under the Legislative Guide Part III that the proper time to cooperate and communicate shall not depend on the formal recognition of foreign proceedings, which allows communication to take place before, or irrespective of whether, an application for recognition is made.[1062] In accordance with the EU Regulation (recast), cooperation and communication with the participation of courts shall be initiated based on a pending request for the opening of proceedings or the proceedings that have been commenced.[1063] Courts can

[1053] The EU Regulation (recast), article 2(5):"insolvency practitioner" means any person or body whose function, including on an interim basis, is
(i) to verify and admit claims submitted in insolvency proceedings;
(ii) to represent the collective interest of the creditors;
(iii) to administer, either in full or in part, assets of which the debtor has been divested;
(iv) to liquidate the assets referred to in (iii); or
(v) to supervise the administration of the debtor's affairs.
Those persons and bodies are listed in Annex B
[1054] The Model Law, article 2 (d): a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding
[1055] The EU Regulation (recast), article 56-58; Legislative Guide Part III, Ch.3, para.7
[1056] The EU Regulation (recast), article 56(1), 57(1), 58 last paragraph; Legislative Guide Part III, Ch.3, para.7
[1057] The EU Regulation (recast), article 56(2)(a); Legislative Guide Part III, Recommendation 250(a)
[1058] The EU Regulation (recast), article 56(2)(b); Legislative Guide Part III, Recommendation 250(d)
[1059] The EU Regulation (recast), article 56(2)(c); Legislative Guide Part III, Recommendation 250(e)
[1060]The EU Regulation (recast), article 56(2), second paragraph; Legislative Guide Part III, Recommendation 250(c)
[1061] The EU Regulation (recast), article 56(1); Legislative Guide Part III, Recommendation 250(b)
[1062] Legislative Guide Part III, para.15
[1063] The EU Regulation (recast), article 57(1), 58(a)

communicate with each other or request information or assistance from each other on a direct basis.[1064] Courts can also appoint a court representative, acting on their behalf, to fulfill its duties in case of any hesitance or reluctance with respect to direct communication with courts from different jurisdictions.[1065] They can communicate and cooperate with each other by any appropriate means they consider appropriate.[1066] They can cooperate in matters of coordination of the administration and supervision of the assets and affairs of the members of the group,[1067] coordination of the conduct of hearings[1068] as well as coordination in the approval of protocols where necessary.[1069]

4.167 Between the insolvency practitioners (insolvency representatives) and the courts, the insolvency practitioners (insolvency representatives) are given the rights to directly request information or seek assistance from the courts concerning the proceedings regarding the other member of the group.[1070] Under the EU Regulation (recast), the insolvency practitioners can only request assistance concerning the proceedings in which he has been appointed.[1071]

4.168 As for the costs, the Legislative Guide Part III merely raised some concern about the costs of cooperation and communication in proceedings concerning members of a group of companies.[1072] It is stipulated under the EU Regulation (recast) that costs and expenses incurred in the process of cooperation and communication shall be borne by the respective proceedings.[1073]

4.2.3 Coordination

4.169 The single insolvency practitioner approach has been introduced into the EU Regulation (recast), which further substantiates that approach by establishing the system of group coordination proceedings.[1074] Provisions concerning the group coordination proceedings can be classified as twofold: rules on the procedure and rules on the group coordinator. Accordingly, there are also two main kinds of relationship, which play a crucial role in the group coordination proceedings. One is the relationship between the participant members of a group of companies in the group coordination proceedings and those members of non-participants. The other the relationship between the group coordinator and the insolvency practitioners appointed in relation to members of the group.

[1064] The EU Regulation (recast), article 57(2); Legislative Guide Part III, Recommendation 241(c)
[1065] The EU Regulation (recast), Article 57(1), 57(3)(a); Legislative Guide Part III, Ch.3, para.37
[1066] The EU Regulation (recast), article 57(3)(b); Legislative Guide Part III, Recommendation 241(a)
[1067] The EU Regulation (recast), article 57(3)(c); Legislative Guide Part III, Recommendation 241(b)
[1068] The EU Regulation (recast), article 57(3)(d); Legislative Guide Part III, Recommendation 245
[1069] The EU Regulation (recast), article 57(3)(e); Legislative Guide Part III, Recommendation 241(d)
[1070] The EU Regulation (recast), article 58(b); Legislative Guide Part III, Recommendation 248
[1071] The EU Regulation (recast), article 58(b);
[1072] Legislative Guide Part III, Ch.3, para.33
[1073] The EU Regulation (recast), article 59
[1074] The EU Regulation (recast), recital (50), Ch.5 Section II

4.170 Group coordination proceedings can be initiated by an insolvency practitioner appointed in insolvency proceedings opened in relation to a member of the group.[1075] Under the circumstance that the law applicable to the insolvency so requires, this insolvency practitioner should obtain the necessary authorization before making such a request.[1076] The competent court, which can assume its jurisdiction over group coordination proceedings, is either decided by the insolvency practitioner, who filed for the opening of the proceedings,[1077] or later chosen by two-thirds of all insolvency practitioners appointed in insolvency proceedings of the members of the group upon joint agreement.[1078]

4.171 Not all of the members of a group of companies have to participate in the group coordination proceedings. Objections to the inclusion within group coordination proceedings or to the person proposed as a coordinator can be raised within 30 days of receipt of notice of the request for the opening of group coordination proceedings.[1079] The court seized of the request will make its decision after considering appropriateness of the opening of such proceedings, no financial disadvantage on the creditor and eligibility of the proposed group coordinator.[1080] Upon the objection raised by the insolvency practitioner appointed in respect of any group member to the inclusion of the proceedings, the group coordination proceedings shall have no effect as regards that member.[1081] Nevertheless, the EU Regulation (recast) also provides for an alternative mechanism to achieve a coordinated restructuring of the group between the members of a group of companies, which are participating in the group coordination proceedings and those non-participants.[1082] Once a restructuring plan is presented for the members of the group concerned, which are subject to the group coordination proceedings, an insolvency practitioner should have standing to request a stay of any measure related to the realization of the assets in the proceedings opened with respect to any other member of the same group, including those that are not subject to group coordination proceedings.[1083]

4.172 The eligibility of the group coordinator shall be determined in accordance with the law of a Member State, in which they can be appointed to act as an insolvency practitioner.[1084] In order to avoid potential conflict of interest, it is stipulated that "the group coordinator must not be one of the insolvency practitioners appointed to act in respect of any of the group members, and shall have no conflict of interest in respect of the group members, their creditors and the insolvency practitioners appointed in respect of any of the group

[1075] The EU Regulation (recast), article 61(1)
[1076] The EU Regulation (recast), recital (52)
[1077] The EU Regulation (recast), article 61(1)
[1078] The EU Regulation (recast), article 66(1), (2)
[1079] The EU Regulation (recast), article 64(1), (2)
[1080] The EU Regulation (recast), article 63(1), 68(1)
[1081] The EU Regulation (recast), article 64, 65
[1082] The EU Regulation (recast), recital (56)
[1083] The EU Regulation (recast), recital (56), article 60(1)(b)(i)
[1084] The EU Regulation (recast), article 71(1)

members."[1085] The group coordinator has been vested with substantial rights and obligations.[1086] The relationship between the insolvency practitioners appointed in relation to members of the group and the group coordinator are required to cooperate with each other.[1087] The main tasks of the group coordinator are to outline recommendations for the coordinated conduct of the insolvency proceedings and propose a group coordination plan.[1088] However, an insolvency practitioner is not obliged to follow in whole or in part the coordinator's recommendations or the group coordination plan by reporting the reasons to coordinator and other persons or bodies concerned under his national law.[1089] Moreover, at the request of the insolvency practitioner, the court shall revoke the coordinator, who is considered to act to the detriment of the creditors of a participating group member or fail to comply with his obligations.[1090] Meanwhile, it is the duty of the insolvency practitioners to communicate any information that is relevant for the coordinator to perform his tasks.[1091]

4.173 With respect to the costs, they are estimated and proposed by the insolvency practitioner, who requests for the opening of the group coordination proceedings.[1092] The estimated costs and shares to be paid by each member concerned will be decided by the court that opens the group coordination proceedings.[1093] If it is estimated that a significant increase in the costs will occur and in any case, where the costs exceed 10% of the estimated costs, the coordinator shall inform without delay the participating insolvency practitioners and seek the prior approval of the court opening coordination proceedings.[1094] The final statement of costs and the share to be paid by each member shall be drafted by the group coordinator.[1095] The insolvency practitioners can raise objections to the statement within 30 days of receipt. Otherwise, it will be deemed to be agreed and submitted to the court opening coordination proceedings for confirmation.[1096]Upon receipt of application for objection, the court of opening the group coordination proceedings shall decide on the costs and the share.[1097]

4.174 UNCITRAL drafted an "enterprise group insolvency solution", which means

"a proposal for coordinated reorganization, sale as a going concern or liquidation (of the whole or part of the business or assets) of two or more members of an enterprise group

[1085] The EU Regulation (recast), article 71(2)
[1086] The EU Regulation (recast), article 69(2), 72
[1087] The EU Regulation (recast), article 74(1)
[1088] The EU Regulation (recast), article 72(1)(a)(b)
[1089] The EU Regulation (recast), article 70
[1090] The EU Regulation (recast), article 75
[1091] The EU Regulation (recast), article 74(2)
[1092] The EU Regulation (recast), article 61(3)(d)
[1093] The EU Regulation (recast), article 68(1)(c)
[1094] The EU Regulation (recast), article 72(6)
[1095] The EU Regulation (recast), article 77(2)
[1096] The EU Regulation (recast), article 77(3)
[1097] The EU Regulation (recast), article 77(4)

that would, or would be likely to, either maintain or add value to the enterprise group as a whole or to those group members."[1098]

4.175 The competent court to coordinate enterprise group insolvency solution shall be located in a State, which is the center of main interests of at least one enterprise group member.[1099] It is also stipulated that a single or the same insolvency representative can be appointed so as to facilitate coordination of multiple insolvency proceedings of the same group in different States as a whole. [1100] In light of that recommendation, whether or not the coordination can be carried out successfully depends greatly on the level of integration of its members and its business structure as well as the qualification of that single or the same insolvency representative.[1101] Considering that there may be potential conflicts of interest within the group members or different obligations of the insolvency representative under different insolvency laws, it is also suggested to include specialized provisions to prevent those conflicts from arising.[1102]

Ch.5 Cooperation and Communication

4.176 The Model Law has established more systematic framework concerning cooperation and communication to coordinate fair and efficient administration of cross-border insolvency proceedings than the EC Regulation has done. In the EU Regulation (recast), cooperation and communication has been stressed in particular by extending cooperation to courts, [1103] courts and insolvency practitioners in the insolvency proceedings involving the same debtor and group companies,[1104] in particular introducing the use of protocols.[1105] Cooperation and communication in the context of group companies has already been discussed in the former chapter.). Hence, in this chapter, the focus will be comparison of rules and development of cooperation and communication concerning the same debtor.

5.1 General Rules under the Two International Regimes

5.1.1 The Model Law

4.177 Considering the lack of cooperation and communication between different jurisdictions in matters of cross-border insolvency, the Model Law provides a

[1098] Working Group V (insolvency law), UNCITRAL, Facilitating the Cross-border Insolvency of Multinational Enterprise Groups, A /CN.9/WG.V/WP.128, 2015, Article 2(i)
[1099] Working Group V (insolvency law), UNCITRAL, Facilitating the Cross-border Insolvency of Multinational Enterprise Groups, A /CN.9/WG.V/WP.128, 2015, Article 2(i)
[1100] Working Group V (insolvency law), UNCITRAL, Facilitating the Cross-border Insolvency of Multinational Enterprise Groups, A /CN.9/WG.V/WP.128, 2015, Article 18(1); Legislative Guide Part III, Recommendation 251
[1101] Working Group V (insolvency law), UNCITRAL, Facilitating the Cross-border Insolvency of Multinational Enterprise Groups, A /CN.9/WG.V/WP.128, 2015, Article 18(1); Legislative Guide Part III, Ch.3, para.44
[1102] Legislative Guide Part III, Ch.3, para.47, Recommendation 252
[1103] The EU Regulation (recast), recital (45), article 42, 57
[1104] The EU Regulation (recast), recital (45), article 43, 58
[1105] The EU Regulation (recast), recital (46), article 42(3)(e), 57(3)(e)

legislative framework for cooperation between the courts and insolvency representatives from two or more countries in order to "prevent dissipation of assets, to maximize the value of assets or to find the best solutions for the reorganization of the enterprise".[1106] Further, in 2009, UNCITRAL released Practice Guide on Cross-Border Insolvency Cooperation (the Practice Guide on Cooperation), which aims at introduction of information relating to cooperation and communication based on global development in recent years, including case law.

4.178 For national laws lacking rules providing a legal basis for cooperation by local courts with foreign courts in dealing with cross-border insolvencies, the Model Law mandates cross-border cooperation by stating that the court and the insolvency representative "shall cooperate to the maximum extent possible".[1107] The phrase "cooperate to the maximum extent possible", as pointed out by Berends, "provide a sufficient degree of flexibility".[1108]

4.179 For the States, which has already established the cross-border judicial cooperation framework, regardless of its legal basis that is either comity or reciprocity, Chapter IV of the Model Law may serve as a model for the development of such international cooperation. In the process of cooperation, the courts are left with discretion in matters of appropriate involvement of the parties, in either a direct or indirect way. It is suggested by UNCITRAL referring to reports of a number of cases involving judicial cooperation that the courts can take into consideration the following key points, when they use the discretion:

"(a) the protection of substantive and procedural rights of the parties;
(b) transparency of communication, including advance notice delivered to the parties involved;
(c) variety of communications that might be exchanged;
(d) means of communication; and
(e) considerable benefits for the persons involved in communication."[1109]

4.180 In accordance with article 25 and 26 of the Model Law, cooperation and communication can be established between courts, between courts and foreign representatives and between insolvency representatives. The participation of the courts in cooperation and communication has been emphasized because their involvement can significantly contribute to efficiency, which can "help to simplify the formalities and get rid of the use of time-consuming procedures, such as letters rogatory."[1110] In case of urgency, it is even suggested by UNCITRAL that the enacting State may consider to include "an express provision, which would authorize the courts, when they engage in cross-border communications, to forgo use of the formalities".[1111]

[1106] Guide and Interpretation, para. 211
[1107] The Model Law, article 25, 26
[1108] Berends, André, The UNCITRAL Model Law on Cross-border Insolvency: A Comprehensive Overview, in: 6 Tul. J. Int'l & Comp. L., at 357.
[1109] Guide and Interpretation, para. 217
[1110] Guide and Interpretation, para. 40
[1111] Guide and Interpretation, para. 218

4.181 Article 27 of the Model Law provides a list of possible forms of cooperation on a general basis. Further, in 2009, UNCITRAL released Practice Guide on Cross-Border Insolvency Cooperation (Practice Guide on Cooperation), which aims at introduction of information relating to cooperation and communication based on a collection of global development in recent years. It illustrates experience on the use of the instruments listed under the Article 27, in particular, cross-border insolvency agreements, which will be discussed later in this chapter.

5.1.2 Development in EU

5.1.2.1 Article 31 of the EC Regulation

4.182 In order to achieve the effective realization of the total assets, the EC Regulation designed the cooperation model through the liquidators' from both main proceeding and secondary proceeding as intermediary, which reduces the overall complexity.[1112] Article 31 provides that as a general principle the liquidator in the main proceedings and the liquidators in any secondary proceeding should communicate information to each other and in particular should immediately communicate any information, which might be relevant to the other proceedings. The information to be communicated includes information relating to the lodging and verification of claims and relating to the termination of the proceedings. However, it is merely a duty without specific measures.

4.183 Under the EC Regulation, liquidators from either the main proceeding or the secondary proceedings are obliged to cooperate and communicate, which is necessary to ensure the smooth course of operations in the proceedings.[1113] Unlike the Model Law, the EC Regulation does not allow cooperation and direct communication between the courts as well as between the courts and the foreign representatives. [1114] However, in EU's practice, the cooperation and communication has been extended to courts. In *Re Stojevic*, the Vienna Higher Regional Court considered that

> Although the wording of Article 31 of the EU Insolvency Regulation only obliges the trustees in bankruptcy to cooperate, this also applies to the court according to the prevailing opinion and under the UNCITRAL Model Law. [1115]

4.184 This judgment has been referred to in *Re Nortel Networks*, in which the High Court of UK was requested by the joint administrators to send letters of request to the courts of Member States in EU asking those courts to give notice of any application for the opening of the secondary proceedings and permit the joint administrators to make submissions on any such applications. The High Court considered there was an inherent jurisdiction of the court to issue a letter of request to a foreign court in appropriate circumstances,[1116] holding

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[1112] Virgós/Schmit Report (1996), at 34
[1113] Virgós/Schmit Report (1996), at 230
[1114] The Model Law, article 25, 26
[1115] *Re Stojevic*, 9 November 2004, 28 R 225/04w
[1116] *Re Nortel Networks SA*, [2009] B.C.C. 343, at 9

(1) The request for the assistance of the various foreign courts stems directly from the duty of co-operation imposed by art.31(2) of the EC Regulation;[1117]
(2) Although framed in terms of cooperation between office-holders, the duty has been treated by the courts of Member States as incorporating or reflecting a wider obligation which extends to the courts which exercise control of insolvency procedures in their respective jurisdictions ((*Re Stojevic* November 9, 2004, 28 R 225/04w considered));[1118]
(3) For this obligation to be effective it is obviously desirable for the court dealing with an application to open secondary insolvency proceedings to be provided with the reasons why such proceedings might have an adverse impact on the main proceedings. By referring to Court of Appeal of Versailles in *Public Prosecutor v Segard* (Administrator of Rover France SAS) [2006] I.L.Pr. 32, the High Court pointed out the advantage of permitting the joint administrators in English main proceedings to be heard in relation to the opening of secondary proceedings in another Member State[1119]
(4) In accordance with art.33(1) of the Regulation, the liquidator in the main proceedings can request the court which has opened the secondary proceedings to stay the process of liquidation. But it would not prevent the continuation of winding-up proceedings in the Member States in which each of the companies is incorporated and the effect of the commencement and continuation of such proceedings is likely to be to cause the relevant company to cease to trade save for the purposes of winding-up. The joint administrators take the view that the continuation of trading is necessary in order to achieve the re-organization of the Nortel Group, which is planned.[1120]

4.185 Nevertheless, it has been pointed out by Wessels that Austria lists the bankruptcy court in Annex C, which is the catalogue for lists of liquidators.[1121] That's why the bankruptcy court in Vienna can observe the cooperation and communication obligations under the EC Regulation since it has been listed in Annex C as liquidator. Thus it has been submitted by Vallender that the wording of Art. 31 of the EC Regulation unequivocally only speaks of the liquidators' duties to cooperate and communicate information, which cannot be interpreted as extending the scope of obliged cooperation and coordination to the courts.[1122] However, it is obvious in *Re Nortel Networks* case that it is necessary for the liquidators to be granted assistance and permission by the courts to prevent any side-effect on the rescue procedure of the main proceeding. There is also some example of cooperation between the courts.

4.186 In Germany, discussion on the feasibility of court-to-court cooperation and communication in a civil law jurisdiction has been invoked. Three German judges and a legal advisor to the German Ministry of Justice published an article to

[1117] *Re Nortel Networks SA*, [2009] B.C.C. 343, at 10
[1118] *Re Nortel Networks SA*, [2009] B.C.C. 343, at 11
[1119] *Re Nortel Networks SA*, [2009] B.C.C. 343, at 12
[1120] *Re Nortel Networks SA*, [2009] B.C.C. 343, at 13
[1121] Wessels, Bob, International Insolvency Law (3rd ed.), Vol.X, Deventer: Kluwer, 2012, para. 10846b
[1122] Vallender, Heinz, Judicial Cooperation within the EC Insolvency Regulation, p. 2 http://www.insolvenzrecht.jura.uni-koeln.de/fileadmin/sites/insolvenzrecht/ieei/discussion_papers/judicial_cooperation.pdf (Last visited on 14 June 2016)

defend the possibility.[1123] As Member State of EU, the EC Regulation is binding on Germany, under which duty of communication is only levied on liquidators. [1124] It has been argued that it falls in the ambit of the objective of procedural law, which is to find a way efficiently and fairly realizing substantial rights. Although it has not been explicitly permitted, it is not forbidden if the court considers it necessary to conduct cross-border communication between the courts to "the best possible satisfaction of the creditors".[1125] In addition, by referring to the principle of ex officio-investigation under section 5 of the German Insolvency Act, they consider that the courts are thus left with discretion to decide whether communicating with courts or liquidators abroad is admissible to the insolvency proceedings in order to "ascertain the essential facts" and "avoid inconsistent decisions".[1126] In *BenQ* case, the debtor applied for surséance van betaling as listed in Annex A to the Regulation in Amsterdam. Two days later, it also filed a petition for opening of an insolvency proceeding (Insolvenzverfahren) in Germany. The German Judge phoned the judge in Amsterdam in order to co-ordinate further developments.[1127] As the result, the Amsterdam court opened a main proceeding and a few days later the Munich court opened a secondary proceeding.

4.187 To fill in the gap, in July 2007, European Communication and Cooperation Guidelines For Cross-border Insolvency (hereinafter the CoCo Guidelines), which were drafted by Prof. Wessels and Prof. Virgós, was published. 18 Guidelines have been invented to "facilitate cooperation and coordination between insolvency proceedings pending in two or more member states relating to several practical issues, where the text of the EC Regulation is left open or is vague".[1128] In particular, in accordance with Guidelines 16.4, courts are allowed to communicate with each other directly. In 2012, the European Commission proposed to add a new line to recital 20 of the Regulation, which is

"In their cooperation, liquidators and courts should take into account best practices for cooperation in cross-border insolvency cases as set out in principles and guidelines on communication and cooperation adopted by European and international associations active in the area of insolvency law."[1129]

[1123] Busch, Peter, Remmert, Andreas, Rüntz, Stefanieand Vallender, Heinz, Communication between Courts in Cross-Border Insolvencies: What is possible and what is not, in: 23 No.5 J.Bankr.L. & Prac. NL Art.3

[1124] The EC Regulation, article 31

[1125] Busch, Peter, Remmert, Andreas, Rüntz, Stefanieand Vallender, Heinz, Communication between Courts in Cross-Border Insolvencies: What is possible and what is not, in: 23 No.5 J.Bankr.L. & Prac. NL Art.3, p.540

[1126] Busch, Peter, Remmert, Andreas, Rüntz, Stefanie and Vallender, Heinz, Communication between Courts in Cross-Border Insolvencies: What is possible and what is not, in: 23 No.5 J.Bankr.L. & Prac. NL Art.3, p.540

[1127] Paulus, The Aftermath of "Eurofood" – BenQ Holding BV and the Deficiencies of the ECJ Decision, in: 20 Insolvency Intelligence, 2007, p. 85.

[1128] Wessels, Bob, International Insolvency Law (3rd ed.), Vol.X, Deventer: Kluwer, 2012, para.10855f; See also Wessels, Bob, Themes of the Future: Rescue Businesses and Cross-border Cooperation, Insolv. Int. 2014, 27(1), 4-9

[1129] EU Commission Explanatory Memorandum, Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings, Strasbourg, 12.12.2012, COM(2012) 744 final, p.17

5.1.2.2 New Articles under the EU Regulation (recast)

4.188 The EU Regulation (recast) incorporates rules of cooperation and communication between the actors involved in all the concurrent proceedings, including the courts and insolvency practitioners. [1130] The insolvency practitioners in the main proceedings and secondary proceedings shall at the earliest opportunity communicate to each other any relevant information about the other proceedings and discover the rescue potential of the debtor by preparing a restructuring plan if possible.[1131] Different from the Model Law, the main proceedings have the dominant role under the Regulation. Therefore, in the process of coordination, the insolvency practitioner in the main proceedings is given "an early opportunity" to submit proposals on the administration of the realization or use of the debtor's assets and affairs.[1132]

4.189 The courts in the main and territorial or secondary insolvency proceedings are required to cooperate and communicate with each other to the extent such cooperation is not incompatible with the rules applicable to each of the proceedings.[1133] It is suggested that the courts may appoint an independent person or body acting on its instructions if that this is not incompatible with the rules applicable to them,[1134] which corresponds to the form of cooperation stipulated under Article 27(a) of the Model Law.[1135] The courts can directly request information or assistance from each other unless that direct communication may jeopardize the procedural rights of the parties to the proceedings or the confidentiality of information.[1136] Besides, the courts may not charge costs to each other in the course of cooperation and communication.[1137]

4.190 With respect to cooperation and communication between the insolvency practitioners and the courts, it is required that the insolvency practitioner in the main proceedings shall cooperate with any courts, which open or receive a request to open the secondary proceedings.[1138] The insolvency practitioner in the territorial proceedings (including territorial insolvency proceedings and secondary proceedings) shall cooperate with the court, which open or receive a request to open the main proceedings. [1139] In addition, the insolvency practitioner in the territorial proceedings shall cooperate with the court, which open or receive a request to open the territorial proceedings.[1140]

[1130] The EU Regulation (recast), recital (48)
[1131] The EU Regulation (recast), article 41(2)(a)(b)
[1132] The EU Regulation (recast), article 41(2)(c)
[1133] The EU Regulation (recast), article 42(1)
[1134] The EU Regulation (recast), article 42(1)
[1135] The Model Law, article 27(a): Appointment of a person or body to act at the direction of the court
[1136] The EU Regulation (recast), article 42(2)
[1137] The EU Regulation (recast), article 44
[1138] The EU Regulation (recast), article 43(1)(a)
[1139] The EU Regulation (recast), article 43(1)(b)
[1140] The EU Regulation (recast), article 43(1)(c)

5.1.2.3 EU-wide Interconnection of Insolvency Registers

4.191 In EU, the accessibility of the information about insolvency proceedings to the public also varies considerably. According to Heidelberg-Luxembourg-Vienna Report, the most effective way of notification is through internet but not all of the Member States provide for online registers in which the opening of insolvency proceedings is published.[1141] The transparency problems result in parallel opening of main proceedings[1142] and raise difficulty of lodging of claims for creditors.[1143]

4.192 In order to avoid opening of parallel insolvency proceedings and facilitate due notification of creditors, the EU Regulation (recast) requires the Member States to establish one or several insolvency registers, which publish information of insolvency proceedings as soon as possible after they are opened.[1144] As the European Commission observed, information about insolvency proceedings is hardly collected at a central point on national level.[1145] Hence, the EU Regulation (recast) establishes a system in a decentralized way by interconnecting the individual insolvency registers on the basis of implementing act.[1146] The EU-wide interconnection of insolvency registers system is composed of central public electronic access point through the European e-Justice Portal, which provides links to information of the individual insolvency registers through a search service in all the official languages of the institutions of the Union.[1147] The EU Regulation (recast) provides mandated information,[1148] which has to be made publicly available in the insolvency registers and the optional information that the Member States can choose to make available through the European e-Justice Portal.[1149]

4.193 Costs incurred by the establishment, maintenance and future development concerning the system of interconnection of insolvency registers shall be

[1141] The Member States that provide online registers (with websites) include Austria, Czech Republic, Estonia, France, Germany, Italy, Latvia, Luxembourg, Malta, Netherlands, Slovenia and Spain. See Hess, Oberhammer, Pfeiffer, European Insolvency Law-The Heidelberg-Luxembourg-Vienna Report on the Application of Regulation No.1346/2000/EC on Insolvency Proceedings (External Evaluation JUST/2011/JCIV/PR/0049/A4), C.H.Beck.Hart.Nomos, 2014, para.943

[1142] Case example: County Court Croydon 21/10/2008 1258/08, NZI 2009, 136. See EU Commission Explanatory Memorandum, Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings, Strasbourg, 12.12.2012, COM(2012) 744 final, p.25

[1143] See all National Reports on Q37 of the Heidelberg-Luxembourg-Vienna Report, in particular, Austria, Belgium, Czech Republic, Estonia, Ireland, Italy, Lithuania, Malta; See Hess, Oberhammer, Pfeiffer, European Insolvency Law-The Heidelberg-Luxembourg-Vienna Report on the Application of Regulation No.1346/2000/EC on Insolvency Proceedings (External Evaluation JUST/2011/JCIV/PR/0049/A4), C.H.Beck.Hart.Nomos, 2014, p.679-685

[1144] The EU Regulation (recast), article 24(1)

[1145] EU Commission Explanatory Memorandum, Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings, Strasbourg, 12.12.2012, COM(2012) 744 final, p.28

[1146] The EU Regulation (recast), article 25(1)

[1147] The EU Regulation (recast), article 25(1)

[1148] The EU Regulation (recast), article 24(2)

[1149] The EU Regulation (recast), article 25(1)

covered by the general budget of the Union.[1150] As for the establishment and improvement of national insolvency registers, the costs shall be borne by each Member State.[1151] Besides, the Member States have to make sure that access to the mandated information published on insolvency registers shall be free of charge.[1152]

5.2 Best Practices in Soft Law

4.194 In addition to the Model Law and the Regulation, there are two sets of soft law, which are specialized at providing generally accepted guidance with respect to cross-border insolvency cooperation and communication. Each of them is established based on consultation of opinions of related experts (including scholars, judges, insolvency practitioners). The first one is the American Law Institute (ALI) and International Insolvency Institute (III) Transnational insolvency: global principles for cooperation in international insolvency cases published in 2012 (hereinafter, the Global Principles). The second one is the EU Cross-Border Insolvency Court-to-Court Cooperation Principles (hereinafter, EU JudgeCo Principles) published in 2015.

5.2.1 The Global Principles

4.195 In 2012, Fletcher and Wessels, appointed by the American Law Institute (ALI)[1153] and the International Insolvency Institute (III)[1154], issued a report, which established 37 Global Principles for cooperation in international insolvency cases and 18 Guidelines for court-to-court communications in international insolvency cases, accompanied, in each case, by commentary. Those Global Principles were built up further on the basis of the ALI's Principles of Cooperation among the member-states of the North American Free Trade Association (the ALI-NAFTA Principles). In order to obtain a worldwide acceptance, the text of the Global Principles was created through consultation, discussion and debate among a number of experts from a wide and diverse array of international jurisdictions and reflected their consensus.[1155]

4.196 The Global Principles have influenced the judicial practice in matters of cross-border insolvency. For example, the Supreme Court of the United Kingdom

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[1150] The EU Regulation (recast), article 26(1)
[1151] The EU Regulation (recast), article 26(2)
[1152] The EU Regulation (recast), article 27(1)
[1153] ALI is the leading academic institute in the United States "producing scholarly work to clarify, modernize", and improve the law. Its most renowned work includes Restatements of the Law. Its membership is composed of judges, legal practitioners and academics. For more information, please visit https://www.ali.org/about-ali/ (Last visited on 14 June 2016)
[1154] III is a non-profit organization aims at "improving international co-operation in the insolvency area and achieving greater co-ordination among nations in multinational business reorganizations and restructurings". For more information, please visit: http://iiiglobal.org (Last visited on 14 June 2016)
[1155] Wessels, A Global Approach to Cross-Border Insolvency Cases in a Globalizing World, in: The Dovenschmidt Quarterly, Issue 1, 2013, available at: http://www.elevenjournals.com/tijdschrift/doqu/2013/1/DQ_2013_002_001_003/fullscreen (Last visited on 14 June 2016)

has directly referred to the Principle 13 of the Global Principles in the judgment shortly after its publication in 2012.[1156] In 2013, the United States Court of Appeals for the Third Circuit has also made reference to the Principle 1 and Principle 24 of the Global Principles in re ABC Learning Centres Limited.[1157] In Germany, three judges of the insolvency division of the local courts wrote an article about the feasibility of communication between courts from civil law jurisdiction and common law jurisdiction in cross-border insolvencies, in which it is stated that the Global Principles "are not to be the benchmark but a basis for discussion"[1158].

5.2.2 EU JudgeCo Principles

4.197 In 2015, the EU Cross-Border Insolvency Court-to-Court Cooperation Principles (EU JudgeCo Principles) [1159] was published, which contain 26 principles and 18 guidelines to assist European courts in their cross-border cooperation and communication in cross-border insolvency cases. As stated in the Introduction of the EU JudgeCo Principles, the draft texts of these principles have been "tested on their suitability in practice by experts as well as during training and discussion sessions with over 100 judges, with positive results".[1160]

4.198 According to Wessels, who was the principal drafter of the EU JudgeCo Principles, it is expected that the EU JudgeCo Principles can be a timely tailor-made soft law instrument for the EU recast situation based on the following six criteria.[1161] First of all, taking into account the existing global best practice in the matters addressed therein, the EU JudgeCo Principles were built up further on the basis of the CoCo Guidelines and the Global Principles[1162] and thus are consistent with international norms. Secondly, the EU JudgeCo Principles aims at assisting in the effective and efficient operation of international insolvency proceedings, which will strengthen the judicial cooperation in the EU. Thirdly, the non-binding nature of the EU JudgeCo Principles can help to eliminate obstacles to the proper functioning of insolvency proceedings, which provides guidance to the existing related national laws. Fourthly, as suggested under the EU Regulation (recast), best practices for cooperation in cross-border insolvency

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[1156] *Rubin and another (Respondents) v Eurofinance SA and others (Appellants); New Cap Reinsurance Corporation (In Liquidation) and another (Respondents/Cross Appellants) v A E Grant and others as Members of Lloyd's Syndicate 991 for the 1997 Year of Account and another (Appellants/Cross Respondents)* [2012] UKSC 46, para.13

[1157] *Re ABC Learning Centres Limited*, No.12-2808 (3rd Cir. 2013)

[1158] Busch, Peter, Remmert, Andreas, Rüntz, Stefanieand Vallender, Heinz, Communication between Courts in Cross-Border Insolvencies: What is possible and what is not, in: 23 No.5 J.Bankr.L. & Prac. NL Art.3, p.541

[1159] The EU JudgeCo Principles was a project sponsored by the European Union and the International Insolvency Institute. The project was produced by a team of scholars, in particular coordinated by the Turnaround, Rescue and Insolvency research group of Leiden Law School, who worked with over 40 experts (scholars, judges, insolvency practitioners). For detailed information, please visit http://www.tri-leiden.eu/ (Last visited on 14 June 2016)

[1160] EU JudgeCo Principles, Introduction.

[1161] See also Wessels, EU Courts Can Rely on Soft Law Principles for Cooperation in International Insolvency Cases, in: 6 International Insolvency Law Review 2015/2, p. 145-160.

[1162] Wessels, Towards A Next Step in Cross-border Judicial Cooperation, in: Insolvency Intelligence, Vol.27, No.7, 2014, p. 101

cases on regional or international level adopted by European and international organizations active in the area of insolvency law should also be referred to.[1163] Although both the Global Principles and the EU JudgeCo Principles are qualified as the best practices, part of the Global Principles that might be incompatible with the mandatory rules stipulated under the EU Regulation (recast), such as Global Principles 7 (Recognition), 13 (International Jurisdiction), should be excluded. Meanwhile, the EU JudgeCo Principles have already intended to avoid those contradictory contents. Fifthly, the EU JudgeCo Principles also try to address the related issues arising from the ongoing case law. Last but not least, they are also a reflection of relevant developments within the EU legislature and the European Judicial community.[1164]

5.3 Instruments of Cooperation

5.3.1 General Introduction

4.199 The EC Regulation does not have specific provisions concerning means of cooperation but they are incorporated into the EU Regulation (recast). Some of them are literally are identical to those under the Model Law or carry the similar sense, including

(a) communication of information by any means considered appropriate by the court[1165]
(b) coordination of the administration and supervision of the debtor's assets and affairs[1166]
(c) coordination in the approval of protocols, where necessary[1167]/approval or implementation by courts of agreements concerning the coordination of proceedings[1168]
(d) appointment of a person or body to act at the direction of the court[1169]
(e) coordination of the conduct of hearings[1170] / coordination of concurrent proceedings regarding the same debtor[1171]

4.200 In addition, the EU Regulation (recast) also provides the possibility of appointment of a single insolvency practitioner for several insolvency proceedings concerning the same debtor or for different members of a group of companies. [1172] As aforementioned, appointment of a single insolvency representative is recommended only in the context of enterprise group under the Legislative Guide Part III by referring to some existing case law.[1173] Generally

[1163] The EU Regulation (recast), recital (48)
[1164] Wessels, Towards A Next Step in Cross-border Judicial Cooperation, in: Insolvency Intelligence, Vol.27, No.7, 2014, p. 101-103
[1165] The EU Regulation (recast), article 42(3)(b), the Model Law, article 27(b)
[1166] The EU Regulation (recast), article 42(3)(c), the Model Law, article 27(c)
[1167] The EU Regulation (recast), article 42(3)(e)
[1168] The Model Law, article 27(d)
[1169] The EU Regulation (recast), article 42(1), the Model Law, article 27(a)
[1170] The EU Regulation (recast), article 42(3)(d)
[1171] The Model Law, article 27(e)
[1172] The EU Regulation (recast), recital (47); article 42(3)(a)
[1173] Legislative Guide Part III, para. 46; Recommendation 251

speaking, it is quite difficult to reconcile the various requirements concerning qualification and licensing of the insolvency representatives under the national law, in particular, on international level. Hence, it is not surprising that the appointment of a single insolvency representative concerning a single debtor has not been suggested under Practice Guide on Cooperation. Instead, the Practice Guide on Cooperation compiles practice and experience with the use of cross-border insolvency agreements.

4.201 Among all those instruments available to achieve cooperation and communication, discussion will be expanded only on three of them in this section, which are considered to be helpful in China's context and the reasons will be explained in the following Part V. In addition to the EU Regulation (recast) and relevant guidelines prepared by UNCITRAL as well as other related soft law rules, in particular, the Global Principles and the EU JudgeCo Principles will also be taken into consideration.

5.3.2 Cross-border Insolvency Agreements (Protocols)

5.3.2.1 Development of Cross-border Insolvency Agreements under the Model Law

4.202 What are cross-border insolvency agreements (protocol)? In accordance with Chapter III of Practice Guide on Cooperation, it refers to "an oral or written agreement intended to facilitate the coordination of cross-border insolvency proceedings and cooperation between courts, between courts and insolvency representatives and between insolvency representatives, sometimes also involving other parties in interest."[1174] Before UNCITRAL adopted the specific term, a number of other titles have been used, including "protocol"(most commonly), "insolvency administration contract", "cooperation and compromise agreement" and "memorandum of understanding".[1175]

4.203 The diversity of titles exemplifies that cross-border insolvency agreements were inventions developed through individual attempts of the insolvency profession to resolve practical cross-border insolvency coordination issues in the absence of relevant national or international laws.[1176] The earliest reported case involving use of cross-border insolvency agreement dated back to 1908.[1177] A firm went bankrupt in England and India. The trustee in bankruptcy in England and the official assignee in India entered into an agreement for pooling and distributing the assets amongst English and Indian creditors. Considering it is "clearly a proper and common-sense business arrangement to make, and one manifestly for the benefit of all parties interested",[1178] the English court held that it had jurisdiction "to sanction such an agreement, notwithstanding that the

[1174] Practice Guide on Cooperation, Introduction-Glossary, 2(i)
[1175] Practice Guide on Cooperation, Introduction, para.9
[1176] Practice Guide on Cooperation, II, para.12
[1177] *Re P MacFadyen & Co, ex parte Vizianagaram Company Limited* [1908] 1 KB 675
[1178] Ibid

Bankruptcy Act, 1883, contained no express provisions authorizing such a scheme".[1179]

4.204 The standardization of cross-border insolvency agreements is mostly rooted in the common law jurisdictions, in particular, between the U.S. and Canada. The first guidelines for cross-border insolvency agreements were prepared by insolvency practitioners, the Committee J-Insolvency and Creditors' Rights of the International Bar Association, which issued a Cross-border Insolvency Concordat in 1995.[1180] According to Bellissimo and Johnston, the Cross-Border Concordat "helped to rebut concerns that it would be difficult and expensive to develop ad hoc protocols".[1181] In the *Everfresh* case, the courts of the United States and Canada entered into the first insolvency agreement based on the Cross-border Insolvency Concordat.[1182] The development of the cross-border insolvency agreements did not stop there. Instead, they have been continuously streamlined and improved in practice.

4.205 Practice Guide on Cooperation especially addresses the issues of use of cross-border insolvency agreements. The Annex I to Practice Guide on Cooperation, UNCITRAL has collected some 44 relevant cases, which related to utilization of cross-border insolvency agreements.[1183] In addition to 26 cases between the U.S. and Canada, the application of cross-border insolvency agreements has been extended to jurisdictions such as Switzerland, [1184] Bermuda, [1185] Bahamas, [1186] Germany, [1187] France, [1188] UK, [1189] British Virgin Islands,[1190] Cayman,[1191] Israel[1192] and Hong Kong SAR.[1193] In particular, in the Lehman Brothers case, there were over 75 separate proceedings with more than

[1179] Ibid
[1180] The Concordat is available at the website of the IBA. http://www.ibanet.org/LPD/Insolvency_Section/Insolvency_Section/Default.aspx (Last visited on 14 June 2016)
[1181] Bellissimo, Joseph J., Johnston, Susan Power, Cross-Border Insolvency Protocols: Developing an International Standard, Norton Annual Review of International Insolvency, 2010, Art.2, p.2
[1182] Ontario Court of Justice, Toronto, Case No. 32-077978 (20 December 1995), and the United States Bankruptcy Court for the Southern District of New York, Case No. 95 B 45405 (20 December 1995)
[1183] In *the United Pan-Europe Communications N.V.* case, which involved the U.S. and the Netherlands, there was no written agreement between the two sides. The insolvency representatives from the both sides worked closely with each other and enabled the parallel proceedings closed on the same day. In: Practice Guide on Cooperation, Annex I, No. 44 case.
[1184] Practice Guide on Cooperation, Annex I, No.3, No.41
[1185] Practice Guide on Cooperation, Annex I, No.4, No.30
[1186] Practice Guide on Cooperation, Annex I, No.6
[1187] Practice Guide on Cooperation, Annex I, No.8, No.14
[1188] Practice Guide on Cooperation, Annex I, No.8, No.38
[1189] Practice Guide on Cooperation, Annex I, No.10, No.13, No.14, No.20, No.24, No.30, No. 38, No.41
[1190] Practice Guide on Cooperation, Annex I, No.12, No.21
[1191] Practice Guide on Cooperation, Annex I, No.13
[1192] Practice Guide on Cooperation, Annex I, No.26
[1193] Practice Guide on Cooperation, Annex I, No.4, No.12, No.30

16 Official Representatives.[1194] Ten of those Official Representatives signed the cross-border insolvency protocol for Lehman Brothers, who representing Australia, the Netherlands, the Netherlands Antilles, Hong Kong, Germany, Luxembourg, Singapore, Switzerland, and the United States.[1195]

4.206 The possible content of the cross-border insolvency agreements has also been suggested in a more extensive way. Farley (judge in *Everfresh* case), Leonard and Birch used to stress that cross-border insolvency agreements should coordinate "procedural, rather than substantive, issues between jurisdictions". [1196] According to their suggestions, cross-border insolvency agreements typically deal with co-ordination of

"(a) court hearings in the two or more jurisdictions,
(b) procedures dealing with the financing or sale of assets,
(c) recoveries for the benefit or creditors generally and equality of treatment among the general body of unsecured creditors,
(d) claims filing processes, and,
(e) ultimately, plans in different jurisdictions."[1197]

4.207 Later it is further summarized in Practice Guide on Cooperation that the basic contents of the cross-border insolvency protocol, including:

"(a) Allocation of responsibility for various aspects of the conduct and administration of proceedings between the different courts involved and between insolvency representatives, including limitations on authority to act without the approval of the other courts or insolvency representatives;
(b) Availability and coordination of relief;
(c) Coordination of the recovery of assets for the benefit of creditors generally;
(d) Submission and treatment of claims;
(e) Use and disposal of assets;
(f) Methods of communication, including language, frequency and means;
(g) Provision of notice;
(h) Coordination and harmonization of reorganization plans;
(i) Issues related specifically to the agreement, including amendment and termination, interpretation, effectiveness and dispute resolution;
(j) Administration of proceedings, in particular with respect to stays of proceedings or agreement between the parties not to take certain legal actions;
(k) Choice of applicable law;
(l) Allocation of responsibilities between the parties to the agreement;
(m) Costs and fees;

[1194] Alvarez & Marsal Holdings LLC. Lehman Brothers International Protocol Proposal, 11 Feb. 2009, p.4, available at http://dm.epiq11.com/LBH/Document#maxPerPage=25&page=1 (Last visited on 14 June 2016)
[1195] Lehman Bros. Holdings Inc., Cross Border Insolvency Protocol for the Lehman Brothers Group of Companies, approved on 17 June, 2009, p.2
available at http://dm.epiq11.com/LBH/Document#maxPerPage=25&page=1 (Last visited on 14 June 2016)
[1196] Farley, J.M, Leonard, Bruce, Birch, John M, Cooperation and Coordination in Cross-Border Insolvency Cases (paper delivered on the INSOL conference in May 2006), p.9 available at http://www.iiiglobal.org/component/jdownloads/viewcategory/362.html (Last visited on 14 June 2016)
[1197] Ibid

(n) Rights of appearance before the courts involved;
(o) Safeguards"[1198]

4.208 Do all of the cross-border insolvency agreements address all the issues in the aforementioned list? Actually not. Protocols vary in form and scope and are tailored to address the specific issues of a case and the needs of the parties involved. For example, in Lehman Brothers protocol, besides the regular provisions such as court-to-court communication, special procedure is formulated to promote the consistency of the calculation and adjudication of intercompany claims.[1199] A Procedures Committee is allowed to be established so as to reconcile the possible conflicts incurred by those intercompany claims.[1200]

5.3.2.2 Development of Protocols in the EU

4.209 In EU, it has been observed by Maltese that protocols do not play a role as active as they do in the common law countries. Although there are a few examples of protocols applied also in civil law jurisdictions, such as *Daisytek*,[1201] *SENDO* [1202] and *Swissair*, [1203] protocols is more frequently used and more developed in common law jurisdictions. The significant reason is that the EC Regulation does not specify the legal basis of cross-border insolvency agreements. To reach a cross-border insolvency agreement, it is usually required "the active participation of judges". [1204] Nevertheless, Article 31 of the EC Regulation merely establishes the duty of liquidators to cooperate and communicate information but it does not provide legal basis of cooperation and communication between courts. That's why the reluctance of the judges, most of whom are from the civil law jurisdictions, to conduct cooperation through a binding agreement is understandable.

4.210 In addition, the intra-E.U. cross-border insolvency agreements also have limited contents, which do not address any matters related to jurisdiction or recognition.[1205] As stated in the *SENDO* Protocol,

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[1198] Practice Guide on Cooperation, at 28
[1199] Proposed Cross-border Insolvency Protocol for the Lehman Brothers Group of Companies, para.9, 2009, available at http://www.ekvandoorne.com/files/CrossBorderProtocol.pdf (Last visited on 14 June 2016)
[1200] Proposed Cross-border Insolvency Protocol for the Lehman Brothers Group of Companies, para.9.3, 9.4, 2009, available at http://www.ekvandoorne.com/files/CrossBorderProtocol.pdf (Last visited on 30 June, 2014)
[1201] Practice Guide on Cooperation, Annex I, at 14
[1202] Pannen, Klaus (ed.), European Insolvency Regulation, De Gruyter Recht, 2007, p.660-666
[1203] Practice Guide on Cooperation, Annex I, at 41
[1204] Paulus, Christoph, Judicial Cooperation in Cross-Border Insolvencies-An outline of some relevant issues and literature, p.1, available at http://siteresources.worldbank.org/GILD/Resources/GJF2006JudicialCooperationinInsolvency_PaulusEN.pdf
[1205] Maltese, Michele, Court-to Court Protocols in Cross-border Bankruptcy Proceedings: Differing Approaches between Civil Law and Common Law Legal Systems, 2013, p. 39 http://iiiglobal.org/images/pdfs/maltese_michele%20submission.pdf (Last visited on 14 June 2016)

"this protocol … is not intended to create a binding precedent and should not be considered appropriate for all other secondary proceedings in France pursuant to the EC Regulations, however may be regarded indicative of achieving good practice. It is established for the purposes of implementing such operating means by the Joint Administrators and the French Liquidators agreeing to act in conformity with the following principles:

- mutual trust,
- Adherence to the duty to communicate information and to cooperate as defined by Article 31 of the (EC) regulation,
- Precedence of the main proceedings over the secondary proceeding."[1206]

4.211 The Regulation itself provides comprehensive procedural rules in matters of cross-border insolvency, especially concerning jurisdiction and recognition. It does not leave a lot of space for the courts and insolvency practitioners to exercise their discretions in that regard. To address that issue, Virgós and Wessels provide customized solutions, which fit into the characteristics of the EC Regulation. It incorporates the basic requirements with respect to the protocols, the liquidators, the debtor and the proceedings. In addition, it provides more detailed discretionary indications of what a protocol may contain in the form of checklist.[1207]

4.212 As result, although agreements or protocols do find the way into the EU Regulation (recast) and becomes the official legal instrument for cooperation and communication in EU, they have not been defined in the text of the EU Regulation (recast). Nevertheless, it has been pointed out the objective of protocols is to facilitate cross-border cooperation of multiple insolvency proceedings in different Member States concerning the same debtor or members of the same group of companies.[1208] The form and scope of protocols are not limited. However, the EU Regulation (recast) gives an example of simple generic agreements, which do not address specific issues but establish a framework of principles to govern multiple insolvency proceedings for the purpose of close cooperation between the parties concerned.[1209]

5.3.3 Joint Hearing

4.213 What is joint hearing? In accordance with Practice Guide on Cooperation, joint or coordinated hearing enables the courts to solve the complex problems of different insolvency proceedings directly and in a timely manner and bringing relevant parties in interest together at the same time for direct contact and the opportunity to share information and discuss and resolve outstanding issues or potential conflicts in other jurisdiction.[1210]

[1206] Pannen, Klaus (ed.), European Insolvency Regulation, De Gruyter Recht, 2007, p.661

[1207] Virgós and Wessels, European Communication and Cooperation Guidelines for Cross-border Insolvency, Developed under the aegis of the Academic Wing of INSOL Europe, July 2007, Appendix I

[1208] The EU Regulation (recast), recital (46)

[1209] The EU Regulation (recast), recital (46)

[1210] UNCITRAL Legislative Guide on Insolvency Law, Part Three: Treatment of enterprise groups in insolvency (2010), para. 38; Practice Guide on Cooperation, at 154

4.214 How should the joint hearing be conducted? Neither the Model Law nor the Regulation gives a clear answer. The EU Regulation (recast) merely provides the general legal basis for courts to conduct coordination of hearings.[1211] UNCITRAL has collected a list of cases, in which joint hearings have been contemplated or implemented.[1212] Interestingly, all those examples were U.S.-Canadian insolvency cases and the use of joint hearing was referred to in the insolvency agreements (protocols). On 12 May, 2014, in the latest case, which is the *Nortel Networks Corp.*, a joint hearing was simultaneously conducted also between the Delaware court in the USA and the Toronto court in Canada.[1213] Among them the earliest case occurred in 1995[1214] and later *Livent* case and *Loewen* case in 1999; which were prior to "the Court-to-Court Guidelines" that came into existence. It seems that joint hearing was developed based on common law practice, in particular, the experience between the United States and Canada.

4.215 In the meantime, the application of joint hearing have been mutually recommended by both the Global Principles and the EU JudgeCo Principles. In particular, the EU JudgeCo Principles have to a great extent reached consensus with the Global Principles on the contents of the relevant guidelines. According to both of them, a court may conduct a joint hearing with another Court that shall be conducted in the following manners:

"(a) Each Court should be able to simultaneously hear the proceedings in the other Court.
(b) Evidentiary or written materials filed or to be filed in one Court should, in accordance with the Directions of that Court, be transmitted to the other Court or made available electronically in a publicly accessible system in advance of the hearing. Transmittal of such material to the other Court or its public availability in an electronic system should not subject the party filing the material in one Court to the jurisdiction of the other Court.
(c) Submissions or applications by the representative of any party should be made only to the Court in which the representative making the submissions is appearing unless the representative is specifically given permission by the other Court to make submissions to it.
(d) Subject to Global Guideline 8(b)[1215]/EU JudgeCo Guideline 8(ii)[1216], the Court should

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[1211] The EU Regulation (recast), article 42(3), 57(3)
[1212] Practice Guide on Cooperation, Annex I: no.2 *AgriBioTech Canada Inc.*(2000); no.9 *Everfresh* (1995); no.11 *Financial Asset Management* (2001); no.15 *Laidlaw* (2001); no.17 (1999); no.18 *Loewen* (1999); no.25 *Mosaic* (2002); no.27 *360Networks* (2001); no.33 *Pope & Talbot* (2007); no.34 *Progressive Moulded* (2008); no.35 *PSINet* (2001); no.36 *Quebecor* (2008); no.40 *Solv-Ex* (1998); no.42 *Systech* (2003)
[1213] Wessels, Bob, Nortel Network Joint hearing as a test case for EU JudgeCo Principle 10?, 13 May, 2014, http://bobwessels.nl/2014/05/2014-05-doc8-nortel-network-joint-hearing-as-a-test-case-for-eu-judgeco-principle-10/ (Last visited on 14 June 2016)
[1214] Practice Guide on Cooperation, Annex I, no.9 *Everfresh* (1995);
[1215] Global Guidelines, Guideline 8(b): The communication between the Courts should be recorded and may be transcribed. A written transcript may be prepared from a recording of the communication which, with the approval of both Courts, should be treated as an official transcript of the communication.
[1216] EU JudgeCo Guidelines, Guideline 8(ii): The communication between the courts should be recorded and may be transcribed (a written transcript may be prepared from a recording of the communication which, with the approval of both courts, should be treated as an official transcript of the communication.

be entitled to communicate with the other Court in advance of a joint hearing, with or without counsel being present, to establish Guidelines for the orderly making of submissions and rendering of decisions by the Courts, and to coordinate and resolve any procedural, administrative, or preliminary matters relating to the joint hearing.
(e) Subject to Global Guideline 8(b)/EU JudgeCo Guideline 8(ii), the Court, subsequent to the joint hearing, should be entitled to communicate with the other Court, with or without counsel present, for the purpose of determining whether coordinated orders could be made by both Courts and to coordinate and resolve any procedural or non-substantive matters relating to the joint hearing."[1217]

4.216 Due to lack of specific rules, it is expected that the provisions concerning conduct of joint hearings under Global Guidelines and the EU JudgeCo Guidelines will be of great reference value.

4.217 In reality, joint hearing was developed based on common law practice, in particular, the experience between the United States and Canada. The latest example is the *Nortel Networks* case. The affiliates of Nortel Networks Corporation, who is the ultimate corporate parent, filed chapter 11 of the Bankruptcy Code in the U.S.A, filed an application with the Canadian Court in accordance with the Companies' Creditors Arrangement Act and also nineteen of Nortel's European affiliates was put into administration by the High Court of Justice in UK. The American, Canadian and English courts recognized each proceeding as the main proceeding in their own jurisdictions. An "Interim Funding and Settlement Agreement" (IFSA) has been reached among the UK, US and Canadian proceedings and was approved by the U.S. court. . Pursuant to section 12 of the IFSA, the parties agreed that the proceeds of any sale of their material assets (less taxes and costs) would be held in escrow until the parties either reached a consensual allocation of the proceeds, or

"in the case where the Selling Debtors fail to reach agreement, determination by the relevant dispute resolver(s) under the terms of the Protocol . . . applicable to the Sale Proceeds . . . which Protocol shall provide binding procedures for the allocation of Sales Proceeds. . . ."[1218]

4.218 Nevertheless, the parties concerned cannot enter into an agreement that could govern the allocation process. Instead, they attempted to reach agreement on the proper way of resolving allocation disputes. Unfortunately, as pointed out by Judge Gropper, there was no single cross-jurisdictional forum acceptable to all of the parties or able to assume control over the dispute despite extensive negotiations and formal mediations.[1219] Nortel's U.S. and Canadian debtors opted for judicial proceedings,[1220] whereas Nortel's UK joint administrators opted for arbitration,[1221] which was opposed by the U.S. and Canadian creditors.[1222] In the

[1217] Global Principles, Section III Global Guidelines for Court-to-Court Communication (Global Guidelines), Guideline 10; EU JudgeCo Principles, 3. EU Cross-Border Insolvency Court-to-Court Communications Guidelines (EU JudgeCo Guidelines), Guideline 10
[1218] In *re Nortel Networks Corp*, 426 B.R. 84 (Bankr. D. Del. 2010)
[1219] Gropper, Allan L., The Arbitration of Cross-border Insolvencies, 86 Am. Bankr. L.J., 201, 2012, p.211
[1220] Motion, In *re Nortel Networks, Inc.* (Apr. 25, 2011), ECF No. 5307
[1221] Opposition & Cross-Motion to Compel Arbitration, In *re Nortel Networks, Inc.* (May 19, 2011), ECF No.5444

end, the U.S. and Canadian courts agreed to hold a cross-border coordinated joint hearing on allocation.[1223] Moreover, the conditions for conducting such a joint trial have been clarified. First of all, both the US court and the Canadian Court have jurisdiction in a joint hearing pursuant to the IFSA.[1224] Secondly, although it was fully acknowledged that a joint hearing "will confront practical and logistical difficulties" and the courts could arrive at inconsistent decisions on allocations,[1225] it is believed that the parties concerned, very ably represented, would assist the courts in minimizing any practical problems to "avoid the travesty of reaching contrary results which would lead to further and potentially greater uncertainty and delay" and in reaching the correct decision to seek timely solutions in the best interest of all parties concerned.[1226] Thirdly, both the US court and the Canadian court have worked through numerous difficulties on the Nortel case for years based on shared information, coordinated pre-trial discovery and schedule.[1227] That generated "enormous respect" between the courts from both sides, which further fueled confidence in the courts' ability to "continue to work together seamlessly".[1228] Fourthly, the practical difficulties, such as distance in space, were overcome through simultaneous hearings by using closed-circuit video, which both the US and Canadian courts can afford.[1229]

5.3.4 Independent Intermediaries

4.219 Who are intermediaries? According to Practice Guide on Cooperation, independent intermediaries can be regarded as medium, through which communication between the courts can be conducted indirectly.[1230] In *Maxwell Communications Corporation plc* case (*Maxwell* case), an examiner was appointed by the U.S. court in order to harmonize the proceedings between the U.S. and the UK and "permit a reorganization under U.S. law which would maximize the return to creditors".[1231] In re Joseph Nakash, the US bankruptcy court entered an order, appointing an examiner to develop a protocol for harmonizing and coordinating the United States Chapter 11 proceedings before the Courts of the

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[1222] Reply, In *re Nortel Networks, Inc.* (June 2, 2011), ECF No. 5571

[1223] In *re Nortel Networks, Inc.,* Case No. 09-10138(KG), Re Dkt No. 13208 (Bankr. D. Del. Apr. 3, 2013); *Nortel Networks Corp.* (Re), 09-CL-7950, 2013 O.N.S.C. 1757 (Can. Ont. Sup. Ct. J. Apr. 3, 2013).

[1224] IFSA, ¶ 16(b), the parties agree "to the non-exclusive jurisdiction of the U.S. and Canadian Courts (in a joint hearing conducted under the Cross-Border Protocol adopted by such Court, as it may be in effect from time to time), for purposes of all legal proceedings to the extent relating to the matters agreed" In *re Nortel Networks INC,* 737 F.3d 265 (2013), at 269

[1225] In *re Nortel Networks, Inc.,* No. 09-10138, 2013 WL 1385271 (Bankr. D. Del. Apr. 3, 2013), at 4; see also *Nortel Networks Corp.* (Re), 09-CL-7950, 2013 ONSC 1757 (Can. Ont. Sup. Ct. J. Apr. 3, 2013), at 35 - 37

[1226] *In re Nortel Networks, Inc.*, No. 09-10138, 2015 WL 2374351 (Bankr. D. Del. May 12, 2015), at 27; *Nortel Networks Corp.* (Re), 09-CL-7950, 2015 ONSC 2987 (Can. Ont. Sup. Ct. J. May 12, 2015), at 10.

[1227] In *re Nortel Networks*, *Inc*., No. 09-10138, 2013 WL 1385271 (Bankr. D. Del. Apr. 3, 2013); Robert W. Miller, Economic Integration: An American Solution to the Multinational Enterprise Group Conundrum, 11 RICH. J. GLOBAL L. & BUS. 185 (2012), at 217

[1228] In *re Nortel Networks*, *Inc.*, No. 09-10138, 2013 WL 1385271 (Bankr. D. Del. Apr. 3, 2013)

[1229] See Order Entering Allocation Protocol, In *re Nortel Networks, Inc*., No. 09-10138 (May 17, 2013), ECF No. 10565, at Ex. 1¶ 4(e)

[1230] Practice Guide on Cooperation, at III-152-153

[1231] In *Re Maxwell Communication Corp. Plc*, 170 B.R. 800 (Bankr. S.D.N.Y. 1994)

United States and State of Israel.[1232] In Matlack case, the Canadian court appointed an information officer to summarize the status of the U.S. proceeding and such other information in reports, which were periodically or upon request delivered to the court.[1233]

4.220 Wessels has also suggested a further expansion of Article 27(a) of the Model Law by introducing a so-called independent intermediary as an alternative or an addition to court-to-court communication.[1234] The suggestion later became the Global Principle 23, which created "a new professional function to overcome any hurdles in global communication".[1235] It is stated in the comment to the Global Principle 23 that

"Under certain circumstances, the court may wish to refrain from conducting direct communication with another foreign court… The court could consider appoint an independent intermediary, whose task is to ensure that an international insolvency case is operated in accordance with these Global Principles and with any specific provisions that are either set out in a protocol or specified in the order made by the court."[1236]

4.221 It has been addressed that the Global Principle 23 "fully fits within the structure of UNCITRAL Model Law"[1237] because appointment of an independent intermediary is consistent with the appropriate means stipulated under Article 27(a) of the Model Law, which is appointment of a person or body to act at the direction of the court. In addition, the UNCITRAL Legislative Guide, Part Three: Treatment of enterprise groups in insolvency (Legislative Guide Part III) has adopted a "court representative".[1238] The potential functions of the court representative, which are regarded as similar as those of an independent intermediary.[1239]

[1232] In *re Joseph Nakash*, United States Bankruptcy Court for the Southern District of New York, Case No. 94 B 44840 (23 May 1996)

[1233] In *Matlack, INC*., Superior Court of Justice of Ontario, Case No. 01-CL-4109

[1234] Wessels, Bob, International Insolvency Law (3rd ed.), Vol.X, Deventer: Kluwer, 2012, para. 10334d

[1235] Wessels, A Global Approach to Cross-border Insolvency Cases in a Globalizing World, in: Eleven Journals, 2013, Issue 1, p.23

[1236] ALI/III, Transnational insolvency: global principles for cooperation in international insolvency cases: report to the ALI, Philadelphia. PA: Executive Office, The American Law Institute, 2012, the Comment to Global Principle 23 http://www.iiiglobal.org/component/jdownloads/finish/557/5932.htm, (The online version did not provide any page number. Last visited on 14 June 2016)

[1237] American Law Institute and International Insolvency Institute, Transnational insolvency: global principles for cooperation in international insolvency cases: report to the ALI, Philadelphia. PA : Executive Office, The American Law Institute, 2012, http://www.iiiglobal.org/component/jdownloads/finish/557/5932.htm, ft. 111 (Last visited on 14 June 2016)

[1238] Legislative Guide Part III, para.37

[1239] American Law Institute and International Insolvency Institute, Transnational insolvency: global principles for cooperation in international insolvency cases: report to the ALI, Philadelphia. PA : Executive Office, The American Law Institute, 2012, http://www.iiiglobal.org/component/jdownloads/finish/557/5932.htm, ft. 112 (Last visited on 14 June 2016)

4.222 As the latest outcome of the development in the field of international insolvency, it is noteworthy that the EU Regulation (recast) also permits appointment of an independent person or body to act on the instructions of the court, who is authorized to deal with the cooperation and communication concerning the same debtor or the different members of a group of companies.[1240] Moreover, the Global Principles and the EU JudgeCo Principles also provide special rules for independent intermediary.[1241]

Provisional Conclusion

4.223 As leading international insolvency regimes assisting states in operating transnational insolvency systems in an efficient, fair and cost-effective manner, the Regulation attempts to provide comprehensive private international law rules, including jurisdiction, applicable law, recognition and enforcement, on Union level, whereas the Model Law, as a soft law mechanism on global level, covers less ground and mainly focuses on simplified recognition, through which jurisdiction is considered indirectly, and cross-border cooperation and communication between courts and insolvency representatives, to which the EU Regulation (recast) attaches great value after revision. The Regulation and the Model Law have very similar objectives in common. The EU Regulation (recast) brings them closer, by extending the obligation of cooperation and communication between liquidators to insolvency practitioners and courts and expanding its scope by adding rescue measures into the existing European cross-border insolvency regime. In addition, the EC Regulation alone literally sets up the aim of prevention of forum shopping and the EU Regulation (recast) further attempts to rule out forum shopping in a fraudulent or abusive manner by introducing a look back period of three month for companies. Such an arrangement is tied to the characteristics of cross-border insolvency law and the requirement of the effective functioning of the internal market.

4.224 With respect to the scopes, the EC Regulation is applicable to both individuals as well as legal persons and explicitly excludes financial institutions. Although the Model Law intends to cover all kinds of debtors, regardless of their nature, it is still up to the enacting State whether or not to extend the application scope to natural persons or financial institutions. For the purpose of promoting the rescue culture, the EU Regulation (recast) broadens the definition of insolvency proceedings, which also covers pre-insolvency proceedings on an interim or provisional basis and hybrid proceedings. In addition, the annexes serve as indispensable parts of the Regulation and only proceedings mentioned in Annex A can benefit from the Regulation. The Model Law, in principle, can cover any proceedings, regardless of whether they are interim proceedings and collective judicial or administrative proceedings for the purpose of reorganization or liquidation. The Model Law is also accompanied by several Guides released by UNCITRAL for better understanding and implementation of the Model Law.

[1240] The EU Regulation (recast), article 42(1), 57(1)
[1241] Global Principles, Principle 23; EU JudgeCo Principles, Principle 17

4.225 As a Union legal instrument, the interpretation of the EC Regulation must be governed consistently by its superior Union law and the CJEU is granted the jurisdiction to give preliminary rulings concerning the interpretation of the EC Regulation, who safeguards the coherent interpretation of autonomous meanings inherent in the Regulation. Fully aware of its the contribution in that regard, the EU Regulation (recast) even directly refers to the case law of the CJEU in its recitals. The non-binding mechanisms, such as the recitals of the EC Regulation as well as the Virgós/Schmit Report have proved their value in promoting proper understanding of the EC Regulation. That probably explains why the amount of the recitals grows proportionally to those of the articles under the EU Regulation (recast). The flexibility of the Model Law allows modification of its texts. Although it has been stipulated under the article 8 that in order to interpret the Model Law, regard has to be given to the international origin and to the need to promote uniformity, the harmonized interpretation might not be very easy to be achieved in the Model Law context.

4.226 The Regulation and the Model Law employ the same terminologies, i.e. COMI and establishment, to indicate jurisdiction, both of which can find the origins from the relevant sources in the EU context. Center of main interests is designed in a way of rebuttable presumption, which reflects the compromise between the theory of real seat and the place of incorporation because a consensus was hard to be reached between the common law and the civil law at the beginning. How to rebut the presumption of registered office has raised quite a lot of problems in EU as well as on global level. In EU, with the continuous efforts made by the CJEU, the relevant factors to rebut the COMI presumption has been gradually made clear at the Union level, which has attached more importance to the place where the company has its central administration on the basis of a comprehensive assessment of all the relevant factors. Ascertainability by third parties, in particular the creditors, is also a crucial factor that needs to be taken into account. Those decisions handed down by the CJEU, in particular Interedil, have been literally codified into the EU Regulation (recast), which help to sets up all those conditions to rebut the presumption if possible. When the countries that have adopted the Model Law made interpretation of COMI, some of them chose to follow the European approach and some opted for different understanding, which resulted in incoherence among the enacting states. That is particular the case with respect to the timing COMI. Based on the case law, the EU Regulation (recast) provides that COMI assessment shall be initiated at the time of the request for the opening of insolvency proceedings and adds a restriction of a look-back period of 3 months on the presumption to make sure that the registered office has not been shifted for the purpose of fraudulent or abusive forum shopping. However, according to the case law of the U.S.A, the American jurisprudence not only holds different opinions from the Regulation and the Model Law, but also has split of views on the timing issues among the federal courts. The majority considers that the time to determine COMI shall be the date of the filing of the Chapter 15 petition, which allows assessment of COMI to start later after the opening of insolvency proceedings. That directly results in expansion of the scope of factors that can be taken into account to determine COMI so that liquidation activities and administrative functions are validated as

effective factors for the COMI analysis. Consequently, more factors can be manipulated for COMI relocation.

4.227 In light of establishment, which is also a concept of European origin, it cannot be understood as the mere presence of assets of the debtor under both the Regulation and the Model Law. The EU Regulation (recast) synchronizes the reference date to determine establishment with the reference date to assess COMI, which represents the subordinate nature of territorial proceedings under the Regulation. The concept of establishment serves as the basis for the opening of territorial proceedings, which was considered a deviation from the principle of universality and accordingly the main tone set on the conditions to commence the territorial proceedings was restriction under the Regulation.

4.228 In order to ensure the dominant role of the main proceedings and efficient administration of assets as well as promote the business rescue, the EU Regulation (recast) provides several possibilities for the insolvency practitioner in the main proceedings to intervene in secondary insolvency proceedings, which are pending at the same time. First of all, the insolvency practitioner in the main proceedings shall be given an early opportunity to propose a restructuring plan, a composition or a comparable measure as permissible under the law of the Member State where the secondary proceedings have been opened to close the proceedings without liquidation. Secondly, the insolvency practitioner in the main proceedings can also give a unilateral undertaking to the local creditors in the Member State, where there is an establishment, in order to avoid the opening of the secondary proceedings. Given its virtual nature, however, that kind of synthetic proceedings makes the landscape of rules of applicable law more complicated because they enable *lex fori concursus*, *lex fori concursus secondarii* and relevant EU law to run parallel to each other. Thirdly, the EU Regulation (recast) provides possibility of a temporary stay on the opening of secondary proceedings for a period not longer than three months when a temporary moratorium of individual enforcement proceedings has been granted in the main proceedings. The debtor and his creditors are allowed to conduct negotiations during that period of time and suitable measures shall be taken to protect the interests of local creditors. Fourthly, it is required under the EU Regulation (recast) that the court shall immediately give notice to the insolvency practitioner or the debtor in possession in the main proceedings and give him an opportunity to be heard on the pending request to open secondary proceedings.

4.229 Opening of concurrent proceedings under the Model Law receives far less restrictions than as under the EU Regulation (recast). First of all, concurrent insolvency proceedings can be opened on the basis of establishment or even mere presence of assets. Secondly, a foreign main proceeding will be granted automatic recognition and reliefs in the enacting State where a concurrent proceeding has already been opened in the receiving court. In case that the foreign proceeding is a foreign main proceeding, the stay and suspension should be modified or terminated if inconsistent with the proceeding in this enacting State. In a word, the foreign main proceeding pursuant to the Model Law does not have the same superior status as the main insolvency proceedings under the Regulation.

4.230 The EU insolvency regime is an international jurisdiction dominant system. The effect of international recognition is closely related to the jurisdiction. Once the insolvency proceedings are opened as the main proceedings, the automatic and universal effects throughout the EU will be incurred, which is based on the principle of mutual trust between the EU Member States. The recognition system under the Regulation is based on a singular criterion, which is directly linked to jurisdiction. A judgment commencing a main insolvency proceeding rendered by a court of a Member State shall be automatically recognized in all other Member States as long as the court that opened the proceeding has jurisdiction. That arrangement is peculiar to EU because automatic recognition is guaranteed by the principle of mutual trust. On the ground the principle of mutual trust, the effects flowing from automatic recognition are universal to the extent the exception applies, which means without further formalities, the effects of the main proceeding are extended to all other Member States. Besides, the scope of the effects of cross-border insolvency proceedings is also connected with choice of law rules. In order to approach the universal effect, the Regulation adopted *lex fori concursus* as the fundamental rule of its uniform choice of law system, which requires that the law of the State of the opening of proceedings shall determine the conditions for the opening, conduct and closure of insolvency proceedings. That reinforces the dominant influences of the main proceedings. Upon recognition, the effects are mainly realized by the insolvency practitioners, who exercise the powers vested in them under the Regulation. If an insolvency practitioner is appointed by the opening of the main proceedings, the nature, content and extent of his power is determined subject to the *lex fori concursus* automatically exercisable in other Member States, though with some exceptions.

4.231 The Model Law is a recognition dominant system. One of the key objectives of the Model Law is to establish simplified procedures for recognition of qualifying foreign proceedings. In addition, the Model Law also uses the jurisdictional basis, i.e. COMI and establishment, for the court to distinguish recognition of the foreign proceedings as the main or non-main proceedings. To be recognized as main or non-main proceeding differ quite substantially in the legal consequences because the effects and reliefs flowing from recognition may depend upon the category into which a foreign proceeding falls. Due to various insolvency systems from State to State influenced by respective social, political, financial and other considerations, UNCITRAL found it difficult to provide uniform choice of law rules on global level. To fill in the gap and give necessary support to the recognized proceedings, the Model Law introduced a "minimum" list of effects or measures that would be triggered by recognition, while at the same time leaving room for the recognizing court to provide additional effects or measures. Those effects or measures are addressed as reliefs in the context of the Model Law. The Model Law mainly provides two types of reliefs, provisional reliefs before the recognition and reliefs upon the recognition. Once recognized as a foreign main proceeding, automatic relief will be granted although it might be subject to certain exceptions, limitations, modifications or termination in accordance with the law of the enacting State. With respect to discretionary reliefs, including provisional relief under Article 19 and discretional relief under

Article 21 upon recognition of both main and non-main proceedings, the court may, at the request of the foreign representative, subject the relief granted to any conditions it considers appropriate.

4.232 In the EU, the public policy, which is the only ground for opposing recognition, is interpreted by the CJEU in a very restrict manner and is expected to be applied in exceptional cases. In accordance with the Model Law, public policy has a wider scope than that of the Regulation, a notable example is that public policy is not only an exception for recognition but also can be extended to entitlement to relief in the American jurisprudence. The contents of the public policy are two-folded, i.e. procedural and substantive. Procedural contents are more foreseeable, mainly related to due process, whereas substantive contents are more variable. In the EU, more restrictive requirements are set up for the Member States to refuse to recognize insolvency proceedings based on substantive contents and according to statistic information, it also seldom succeeds in practice. The public policy exception is more frequently incurred in the context of the Model Law for the sake of protection the interests of local creditors, although it is expected that the public policy exception will be rarely used and shall be understood more restrictively than domestic public policy.

4.233 Due to the complexity of enterprise groups, there were no specific provisions either under the EC Regulation or the Model Law but plenty of theoretical suggestions. The main concern about dealing with group insolvencies relates to whether it is possible to concentrate multiple group members within a single jurisdiction and how to achieve that goal. There are basically two solutions: one is to find the COMI of the entire group; the other is to accept the merits of corporate separateness in the group context and solve the problem through cooperation and coordination. Neither the EU nor the UNICTRAL prevents a court to open insolvency proceedings for members belonging to the same group in a single jurisdiction if the court considers that the center of main interests of those group members is located in a single Member State. However, more explanation concerning determination of COMI of group companies is needed to support that approach. In addition, it can also depend on the group structure, business model, degree and level of integration and reliance between the particular group members because the more decentralized the group is, the more dispersed the proceedings are, the more likely coordination and cooperation, instead of COMI-based solution, is to be of considerable assistance.

4.234 The approach the EU Regulation (recast) and the Legislative Guide Part III have chosen is to attach importance to cooperation of insolvency proceedings concerning different entities of the same group by utilizing cooperation and communication measures. The EU Regulation (recast) provides a new chapter concerning insolvency proceedings of group of companies, which is composed of two sections: Section 1 cooperation and communication; Section 2 coordination. Cooperation and communication provisions in the context of group companies under the EU Regulation (recast) mainly involve cooperation and communication between insolvency practitioners and the courts, which have been greatly influenced by the Legislative Guide Part III and share a lot in common with the latter.

4.235 The single insolvency practitioner approach has been introduced into the EU Regulation (recast), which further substantiates that approach by establishing the system of group coordination proceedings. Provisions concerning the group coordination proceedings can be classified as twofold: rules on the procedure and rules on the group coordinator. Accordingly, there are also two main kinds of relationship, which play a crucial role in the group coordination proceedings. One is the relationship between the participant members of a group of companies in the group coordination proceedings and those members of non-participants. The other the relationship between the group coordinator and the insolvency practitioners appointed in relation to members of the group. In the context of group coordination, the Working Group V (insolvency law) proposed a enterprise group insolvency solution, which aims at facilitating coordinated reorganization as a going concern or liquidation of two or more members of an enterprise group that would, or would be likely to, either maintain or add value to the enterprise group as a whole or to those group members. It is also recommended by the Working Group V as well as under the Legislative Guide Part III that a single or the same insolvency representative can be appointed so as to facilitate coordination of multiple insolvency proceedings of the same group as a whole.

4.236 The EC Regulation merely provides an article concerning duty of cooperation and communication between the liquidators. To fill in the gap, the CoCo Guidelines provide some soft law standards concerning cross-border cooperation and communication between courts. The EU Regulation (recast), by referring to international best practice in matters of cooperation and communication, in particular, the relevant guidelines prepared by UNCITRAL (eg. Practice Guide on Cooperation), has stressed cooperation between courts, courts and insolvency practitioners in the insolvency proceedings involving the same debtor and group companies, in particular introducing the use of protocols. In addition, in order to avoid opening of parallel insolvency proceedings and facilitate due notification of creditors, the EU Regulation (recast) requires the Member States to establish one or several insolvency registers, which publish information of insolvency proceedings. A decentralized EU-wide interconnection of insolvency registers system will be established, which is composed of central public electronic access point through the European e-Justice Portal and is linked to information of the individual insolvency registers through a search service in all the official languages of the institutions of the Union. The forms of cooperation incorporated into the EU Regulation (recast) are either literally identical to those under the Model Law or carry the similar sense. Only three of them will be discussed in detail, which are considered to be helpful in China's context and the reasons will be explained in the following Part V. In addition to the EU Regulation (recast) and relevant guidelines prepared by UNCITRAL, best practices for cooperation in cross-border insolvency cases, such as the Global Principles and the EU JudgeCo Principles shall also be taken into account.

4.237 Cross-border insolvency agreements (protocols) are the most common means that facilitates cross-border cooperation and coordination of multiple insolvency proceedings in different States. Cross-border insolvency agreements

originated from practice in order to make up for the absence of relevant coordination rules. The common law jurisdictions have made influential contribution to the standardization of cross-border insolvency agreements. With the development of the soft law as well as judicial practice, the application of cross-border insolvency agreements has been gradually extended. The contents of cross-border insolvency agreements have also shifted from the pure procedural nature to procedural-substantial combined pattern, which may vary in form and scope and are tailored to address the specific issues of a case and the needs of the parties involved. In the EU, cross-border insolvency agreements do not play a role as active as they do in the common law countries. Most of the EU member states governed by the EC Regulation are civil law countries. It will be easier for civil law jurisdiction to utilize protocols if there is an appropriate statutory basis. The existing cross-border insolvency agreements, which were entered into by the EU member states, mostly addressed minor procedural issues because the Regulation has already provided comprehensive procedural rules in matters of cross-border insolvency, especially concerning jurisdiction and recognition. Therefore, different weight should be given to the discretionary coordination contents. As result, although agreements or protocols do find the way into the EU Regulation (recast) and becomes the official legal instrument for cooperation and communication in EU, it has not been defined and exemplified through an example of simple generic agreements, which do not address specific issues but establish a framework of principles to govern multiple insolvency proceedings.

4.238 The merits of joint hearing is to promote the efficiency of current proceedings, by enabling the courts to solve the complex problems of different insolvency proceedings directly and in a timely manner and bringing relevant parties in interest together at the same time. Joint hearing is a means of direct cooperation, which is developed from common law practice. The EU Regulation (recast) provides statutory basis for coordination of hearings without specific rules. It is thus expected that the provisions concerning conduct of joint hearings under the Global Principles and the EU JudgeCo Principles will be of great reference value in the future. Under certain circumstances, the court may wish to refrain from conducting direct communication with another foreign court. In such a case, intermediaries, which is furnished by the Global Principle 23, can be appointed by the courts as medium, through which communication between the courts can be conducted indirectly, which is consistent with the appropriate means stipulated under the Model Law and also permitted in accordance with the EU Regulation (recast).