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Finding COMI in Group Insolvencies: Taking a Page from the Chapter 15 Playbook

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It is widely known that US Bankruptcy judges have for some time been shaping their own, flexible and modern approach to finding COMI for foreign entities applying for Chapter 15 recognition. This approach has facilitated and safeguarded global cross-border restructurings of international business enterprise groups by helping the concentration of such proceedings in one jurisdiction – or at least facilitating that one proceeding takes precedence as main proceedings. This has not been the case in the EU where the recast European Insolvency Regulation's COMI concept was not changed to facilitate group restructurings.

In this technical paper the case is made that practitioners and judges in the EU block should try and take a page from the Americans' playbook on finding COMI for groups. By applying similar criteria for finding COMI as under US Chapter 15 proceedings, it is submitted that the EIR could provide a real platform for international restructurings of multi-entity business enterprise groups – something it currently does not provide for.

INSOL International sincerely thanks Rob van den Sigtenhorst for this thought-provoking technical paper on finding COMI for groups in the context of the European Insolvency Regulation and the UNCITRAL Model Laws relating to insolvency.

April 2021

Finding COMI in Group Insolvencies: Taking a Page from the Chapter 15 Playbook[*]

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1. Introduction

US Bankruptcy judges[1] have for some time been shaping their own, flexible and modern approach to finding COMI for foreign entities applying for Chapter 15 recognition. This has effectively facilitated and safeguarded global cross-border restructurings of international business enterprise groups by helping the concentration of such proceedings in one jurisdiction, or at least facilitating that one proceeding takes precedence (as main proceedings). These judges have done so through granting recognition and relief in the US as needed for achieving those aims. This has not been the case in the EU. While major disaster[2] was perhaps avoided, the recast European Insolvency Regulation's[3] (EIR) COMI concept was not changed to help group restructurings[4] – if anything, quite the contrary.[5]

In this technical paper the case is made that practitioners and judges in the EU block should try and take a page from the Americans' playbook on finding COMI for groups.[6] By applying similar criteria for finding COMI as under US Chapter 15 proceedings, the EIR could provide a real platform for international restructurings of multi-entity business enterprise groups – something it currently does not provide for; this point applies equally to (other) countries implementing the UNCITRAL Model Laws. This might eliminate the

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[1] In this paper the bankruptcy court of the Southern District of New York is consciously equated with the US bankruptcy courts generally, as so often that venue appears to be the leading court on the issues at hand. Therefore, most, if not all, challenging complex cross-border cases seem likely to (continue to) be filed there, with practitioners sure to create a venue on Manhattan if at all possible.

[2] For example, in the form of new, truly "effective", more draconian anti-forum shopping measures. See also fn 5.

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

[4] Contrary to the hopeful words in para 51 *et seq* of the Preamble to the EIR. The EIR (recast) tries to facilitate group restructurings with group co-ordination proceedings. Many (including the author) are certain that these provisions will turn out to be a toothless and therefore still-born idea that might rarely, if ever, be used in practice; see further the discussion of this aspect below.

[5] The recast EIR does contain new safeguards against forum shopping, but these are largely ineffective, *cf* fn 24. The ineffectiveness of these provisions is fortunate, as COMI-shifting has been an important, *bona fide* tool in European (group) restructurings.

[6] Ideally, the EU legislator should do so too – but, as has already been set out, it has chosen to go in the opposite direction in this regard. Also, the EIR has only recently been recast, with the first "normal cycle" review and proposal for adaptation set for mid-2027 (article 90 EIR).

need for some of the trickery we have seen in the EU to date, including shifting the COMI of (key) group entities, or even filing for US chapter 11 proceedings for "foreign" groups and their entities, as a last resort to coherently reorganise an entire business group. At the very least, a US-like approach could (eventually) reduce execution risks and (advisor) costs;[7] it might even help avoid liquidation bankruptcies where restructuring would have been possible – with the associated loss of value that could then be avoided, too. The approach suggested in this paper would not only be helpful in the context of the EIR but also where, instead, (implementation of) the two relevant UNCITRAL Model Laws are in force.

2. The EIR framework

2.1 Boxed in – entity by entity approach

The EIR has in effect pretty much ignored the concept of multi-entity business groups and for its main goal of providing conflict of law rules for cross-border insolvency issues,[8] focused on single entities.[9] The COMI-test as included in article 3 EIR (both in the original and recast versions) looks at the debtor, that is, every single debtor.[10] The original EIR[11] noted quite curtly that the COMI of a company or legal person was presumed to be the place of its registered office, unless that presumption was rebutted (article 3, paragraph 1). That very concept, which survived in the recast version (same *locus*), enshrines an uphill battle for any argument that the COMI of debtors registered in various jurisdictions is actually in one and the same EU Member State, for instance where the parent or group headquarters is located and / or where a modern / suitable restructuring regime is available.[12] This means that in order to at least get the same insolvency laws to apply to all those entities (*lex concursus*),[13] it has to be actively disproven that each of their COMIs

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7 N Wouters and A Raykin, "Corporate Group Cross-Border Insolvencies Between the United States and European Union: Legal & Economic Developments", *Emory Bankruptcy Developments Journal Vol. 29 (2013),* pp 407, 408.

8 To be precise: ". . . the allocation of jurisdiction in cross-border matters, for resolution of conflict of laws, for the recognition and enforcement of judgements as well as for co-ordination between (…) proceedings" - P J Omar., "Post-Brexit Cooperation and Coordination of EU-UK Insolvencies", p 3; EIR (both versions), Recital (3).

9 As noted in the European Commission review of the EIR itself - see "Sources of International Insolvency Law", Ch 1, "Introduction to International Instruments: Commentary" in B Wessels and G J Boon, *Cross-Border Insolvency Law: International Instruments and Commentary* (2nd ed, Kluwer Law International, (2015)) at 86.

10 As confirmed by the ECJ, 15 December 2011, C-191/10, ECLI:EU:C:2011:838 (*Rastelli*).

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

12 P J Omar, "Post-Brexit Cooperation and Coordination of EU-UK Insolvencies", p 3.

13 Even then it remains a question of the *lex concursus* to what extent that law allows for a co-ordinated (or even integrated / procedurally, or even substantively consolidated) restructuring of the group. But even having just one applicable insolvency law that applies is a huge help and in many jurisdictions it is at least possible or customary to appoint one practitioner for affiliated companies and / or to procedurally co-ordinate or consolidate the cases, formally or informally.

are in their relevant home jurisdiction of incorporation / registration.[14] Or, put the other way around in practice, actively prove to the court in that one "right" jurisdiction for the group restructuring where certain entities are not registered, that the COMIs are there and that court could and should thus really and truly open main proceedings for each and every one of the foreign debtors.[15] To succeed, it would have to be shown that notwithstanding the registered office being elsewhere, "the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties",[16] is in the relevant jurisdiction.

Also due to the fact that (the operative provisions of) the original EIR did not define COMI,[17] the rules set out above caused a significant body of case law,[18] the essence of which was codified in the recast EIR in the wording added at the end of the first paragraph *et seq* of article 3. Most notably, it is now clear that (as the Recital in the preamble of the EIR and the Virgós-Schmit report[16] always suggested) the place where the debtor conducts the administration of its interests on a regular basis must be identified on the basis of objective criteria that must be ascertainable for third parties to be relevant, and what that means. The perception of the creditors in this regard warrants "special consideration".[19] One must look at "all the relevant factors" to determine "where the company's actual centre of management and supervision and of the management of its interests is located" – again, as ascertainable by third parties (importantly, by creditors).[20] However, this all still needs to be done on an entity-by-entity basis; these questions must be posed and answered in respect of each individual debtor entity (company).[21]

2.2 COMI at group headquarters?

In light of the above could the conclusion not simply be, in the case of a business enterprise group, that the COMI of the various group companies is where the group headquarters is situated, so that main insolvency proceedings for all of the companies can be opened in that one jurisdiction? Is it not there, where the CEO, CFO, COO, CIO

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14 Especially if a creditor files in the country of registration first; experience has shown that courts are eager to take, and loathe to relinquish, jurisdiction. In this case the court in the country of registration would have to deny jurisdiction for finding that COMI was not in fact in that country but elsewhere. For a recent example from the Netherlands, see the judgment from the Amsterdam Court of Appeal, 24 September 2020, ECLI:NL:GHAMS: 2020: 2646 (this judgment is available in Dutch only).

15 Or, theoretically, shift the registered office itself: but that invites a host of potential, usually prohibitive (tax, corporate law and other) issues, leaving aside the EIR's anti-COMI shifting rules: see fn 24.

16 Recital (13) EIR (original) / 28 (recast); *cf* also Virgós-Schmit Report (EC 6500/96), point 75.

17 G Van Calster, *European International Private Law* (2nd ed, Hart Publishing, 2016), p 297.

18 In respect of the ECJ, starting most notably with *Parmalat* (ECJ 2 May 2006, C-341/04, ECLI:EU:C:2005:579 (*Eurofood*)), via *Rastelli* (ECJ 15 December 2011, C-191/10, ECLI:EU:C:2011:838) and culminating in *Interedil* (ECJ 20 October 2011, C-396/09, ECLI:EU:C:2011:671).

19 EIR (recast), Recital 28.

20 G Van Calster, *European International Private Law* (2nd ed, Hart Publishing, 2016), pp 299-300.

21 ECJ 2 May 2006, C-341/04, ECLI:EU:C:2005:579 (*Eurofood*); ECJ 15 December 2011, C-191/10, ECLI:EU:C:2011:838 (*Rastelli*); G Van Calster, *European International Private Law* (2nd ed, Hart Publishing, 2016), pp 300-303.

and whatever other chiefs there may be who manage and supervise not only the interests of the group, but also (inherently) those of its constituent parts, the group companies, has its real COMI? Can the two even be distinguished? As always, it will depend on the facts of each case – but under the EIR this argument will often be an uphill battle because of the tests set out above and how they are applied in practice. As a starting point, we have learnt from the ECJ's case law (as codified in the recast EIR),[22] that the ascertainability of COMI for third parties / creditors is particularly important, perhaps the most important aspect. While the local entities may not even have local statutory directors,[23] creditors are confronted on a day-to-day basis with a local business address (displayed on local letterhead) together with a local bank account. When they have queries, they call the local phone number of the local company, also as displayed on the letterhead and in e-mail signatures. Those details can usually be found in the local equivalent of the companies register / chamber of commerce, plus perhaps on the local company website. The (local) person answering the phone might well call the group CFO to obtain authorisation for any action or response toward the creditor and thus only be a funnel for the administration interests elsewhere; but that's not what the creditor can see. The local front-end is exactly the point, according to the ECJ. From the perspective of protecting the legitimate interests of creditors, by providing predictability as to which laws would apply and which court would be competent should their counterparty go insolvent, that all makes sense.

However, the prevailing wisdom amongst restructuring professionals is that it is quite doable to argue for holding companies, "fincos" and (other) SPVs, that their COMI is at group headquarters – or to timely fully shift the COMI there to be entirely sure and to avoid execution risk (or to shift COMI to another jurisdiction where suitable restructuring proceedings are available for the group).[24] Not that "nerve-centre" or "head office" theories have not ever been proposed, or even followed,[25] in the context of the EIR, together with more exotic notions such as "the centre of main (restructuring) negotiations" or the "centre of main creditors' location"[26] as the place where COMI can be found, but since *Interedil* and thereafter the recast EIR itself, it seems to have been abundantly clarified and accepted that such concepts do not truly fly.[27] The fact that a company is part of a group, the interests of which are centrally managed / supervised /

22 See fn18.

23 Instead, central officers (directly or via a holding company who – in jurisdictions where it is allowed – act as directors of all subsidiaries), or actual directors who spend most of their time at group headquarters or perhaps travelling.

24 This paper does not address the new anti-COMI shifting provisions in the EIR (recast) – mainly art 3, s 1; *cf* also Recital 31 – in any depth. In any event, those provisions are less relevant in practice, as the registered office itself is rarely shifted (see fn 15). Rather, the aim is to change "all relevant factors" in a manner ascertainable by creditors so as to rebut the presumption – the address, phone numbers, bank accounts, place of decision making, etc – and to publicise it all well enough.

25 N Wouters and A Raykin, "Corporate Group Cross-Border Insolvencies Between the United States and European Union: Legal and Economic Developments", *Emory Bankruptcy Developments Journal* Vol 29 (2013), p 404.

26 *Ibid*.

27 P J Omar, "Post-Brexit Cooperation and Coordination of EU-UK Insolvencies", p 3.

controlled out of one Member State, or that it has a limited, subservient function ("fincos", "holdcos"), or limited or no operational activities separate from the parent or at all (SPVs), is all not relevant *as such*.[28]

When sticking with this now mainstream interpretation, the EIR does not provide us with a lot of flexibility to deal with group insolvencies in a coherent manner. Group co-ordination proceedings (GCPs) are not the ticket: first of all because of their non-binding nature,[29] but perhaps more importantly because even if GCPs are used, there are still separate local insolvency proceedings in each of which the local insolvency laws govern and are overriding. Given the large material and procedural differences between insolvency laws in the EU Member States, this will make an integrated restructuring of the entire group challenging, even if IPs and courts do follow the directions now explicitly given by the EIR to co-operate and co-ordinate. Moreover, any consolidation is explicitly excluded from the group co-ordination plan.[30] All of this explains the continuing focus, also under the recast EIR, on getting (key) group member debtors into one jurisdiction if at all possible, which all revolves around the COMI question.

Taking into account the case law discussed above and the codification of these principles in the recast EIR, it seems that a "stable" platform has been reached in regard to the possibilities and impossibilities of finding COMI for group entities in one jurisdiction. There have been notable examples where corporate groups have successfully had single proceedings in the home jurisdiction of the parent company,[31] but it is submitted that these are just examples of how it is sometimes possible to win the "uphill battle" described above. In other words, it is possible in the right case with the right facts and circumstances, with co-operative courts and creditors, zeal and creative supporting measures such as the synthetic secondary proceedings-undertaking (which was rightfully codified in the recast EIR). The remaining point to be made here is that courts and practitioners should, with the support of the courts, keep pushing to find a "group COMI" in a way that allows single proceedings to become more mainstream – using the US Chapter 15-approach as a shining example – instead of settling for the *status quo*.

Before looking at how US judges deal with these issues, this paper will first consider the UNCITRAL Model Law on Cross-Border Insolvency[32] (MLCBI) and, more importantly, the work of UNCITRAL Working Group V on the Model Law on Enterprise Group Insolvency (MLEGI). This is also useful due to the fact that the MLCBI was based on work relating to the European Bankruptcy Convention 1995 (which mainly later became the EIR),[33] and

28 G Van Calster, *European International Private Law* (2nd ed, Hart Publishing, 2016), p 301.

29 *Cf* EIR (recast), arts 64, 65 and 70, notably para 2.

30 EIR, art 72, para 3.

31 N Wouters and A Raykin, "Corporate Group Cross-Border Insolvencies Between the United States and European Union: Legal and Economic Developments", *Emory Bankruptcy Developments Journal* Vol 29 (2013), p 404.

32 https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency.

33 MLCBI Guide to Enactment, paras 31 and 72; P J Omar, "Post-Brexit Cooperation and Coordination of EU-UK Insolvencies", p 4.

Chapter 15 of the US Bankruptcy Code is of course the US version of the implementation of the MLCBI. So before examining Chapter 15, it is useful to first look at whether the MLEGI provides solutions to the issues identified above.

When doing so, one must not overlook the fact that the functioning and relevance of COMI and the distinction between main and non-main proceedings under both the MLCBI – and therefore Chapter 15 – and the MLEGI are different and (on closer inspection) perhaps less relevant than meets the eye when compared to their role under the EIR. Under the EIR, COMI dictates the *forum concursus* and the *lex concursus* and decisions by that court in accordance with that law are binding in every other Member State, while the MLCBI and the MLEGI do not deal with applicable law and nothing is "binding" pursuant to them as such; under the MLCBI (as well as under the MLEGI), COMI drives what relief is available and when,[34] whether automatically or not, but much the same relief *can* be made available to both main or non-main proceedings at the same point in time.[35] I will revisit (in paragraph 3) and factor this in when drawing a conclusion (in paragraph 4).

3. The UNCITRAL Model Laws

3.1 UNCITRAL Model Law on Cross-Border Insolvency

As a starting point the MLCBI deals with COMI in much the same way as the EIR. Article 16(3) contains the same rebuttable presumption as the EIR. There is, however, no (further) definition of COMI. Given that the MLCBI's is in the form of a model law that is to be implemented as part of national law, any further definition of COMI would therefore have to come from each such local codification itself and / or local case law pursuant thereto. Because the MLCBI took the concept of COMI from the same source (the EIR/1995 Bankruptcy Convention), such codifications and strains of case law can certainly look at the EIR texts and the EJC case law as a point of reference. The underlying reason why the MLCBI took this approach was for "building on the emerging harmonization as regards the notion of a 'main' proceeding". [36] As a result, local implementations of the MLCBI and resultant case law have good reason to take the ECJ's case law into account, but in no way do they need to follow it.

34 MLCBI *Guide to Enactment*, paras 31 *et seq*.

35 G R Warner, (2018) GIPC presentation "Introduction to the UNCITRAL Model Law on Cross-Border Insolvency", pp 14, 25 to 26.

36 MLCBI *Guide to Enactment*, para 31.

Accordingly, US Chapter 15 judges do indeed take due note of what happens on the "old continent"[37] but then choose their own path, as will be demonstrated below.[38] What is relevant here is that it follows naturally from the above that the MLCBI deals just as little with enterprise business groups consisting of multiple entities as the EIR does; and it is not likely that local implementations of the MLCBI do either.[39]

3.2 UNCITRAL Model Law on Enterprise Group Insolvency

One of the reasons why UNCITRAL Working Group V drafted the Model Law on Enterprise Group Insolvency (MLEGI) was in order "to provide effective mechanisms to address cases of insolvency affecting the members of an enterprise group".[40] Working Group V considered a number of approaches, some of which are familiar from an EIR perspective:[41]

(a) co-ordination and co-operation of insolvency proceedings relating to an enterprise group;

(b) elements needed for the development and approval of a group insolvency solution involving multiple entities;

(c) the use of so-called "synthetic proceedings" in lieu of commencing non-main proceedings;

(d) the use of so-called "synthetic proceedings" in lieu of commencing main proceedings; and

(e) approval of a group insolvency solution on a more streamlined basis by reference to the adequate protection of the interests of creditors of affected group members.

UNCITRAL approved the MLEGI on 15 July 2019.

The Preamble, in Part A, Chapter 1 of the MLEGI, lists the Model Law's objectives. Briefly summarised, it aims at facilitating a *group insolvency solution*, as defined in article 2, recognised and implemented in the relevant States, to facilitate the rescue (Preamble at paragraph (f)) of *enterprise groups* and the protection / maximisation of the overall

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[37] For example, *In re Oi SA and Oi Brasil Holdings Coöperatief UA*, US Bankruptcy Court SDNY, Case Nos 16-11888, 11794 and 11791 (SHL), Post-Trial Memorandum of Decision 4 December 2017, p 38 and the cases cited there.

[38] "[T]he EU Regulation does not operate as an analog to Chapter 15": *In re Fairfield Sentry* as cited in *In re Oi SA and Oi Brasil Holdings Coöperatief UA*, US Bankruptcy Court SDNY, Case Nos 16-11888, 11794 and 11791 (SHL), Post-Trial Memorandum of Decision 4 December 2017, pp 57 to 59.

[39] It falls beyond the scope of this paper to review existing local implementations; *cf* P J Omar, "Post-Brexit Cooperation and Coordination of EU-UK Insolvencies", pp 7 to 9 on this point.

[40] MLEGI, p 1 at 1.

[41] Draft Model Law on the Insolvency of Enterprise Groups, A/CN.9/WG.V/WP.158, p 1 at 3.

combined value of the operations and assets of the group members and of the group as a whole (Preamble at paragraph (e)).

As tools to achieve this, the MLEGI prescribes co-ordination and co-operation between courts (and similar institutions) and insolvency practitioners in each of the cases in each of the jurisdictions in which an *enterprise group member* is involved (Preamble at paragraphs (a) and (b)). Of course, certain well-known key principles and safeguards are acknowledged: "fair and efficient administration (…) that protects the interests of all creditors and other interested persons, including the debtors" (Preamble at paragraph (d)), with "adequate protection of the interests of the creditors of each group member participating in a group insolvency solution" (Preamble at paragraph (g)). Interestingly, however, when reading paragraph (d) closely, it looks at the *insolvencies* (plural) of the enterprise group *members* (plural) – that is, as a whole, which together with paragraph (c) indicates a strong focus on the group as a whole. Paragraph (g) does not diminish this, as it also looks at the *debtors* (plural) and contains the words "adequate protection". The words "adequate protection" are (in)famous from their use in the US Bankruptcy Code[42] for providing quite a flexible, malleable prong to achieving practical outcomes. Indeed, article 27 of the MLEGI renders the protection in quite the same way but in an entirely open-ended manner without the (non-limitative) options provided in section 361 of the US Bankruptcy Code.

As is to be expected from this clear intention of the MLEGI to provide strong tools to promote successful enterprise group restructurings or liquidations, the framework provided by the MLEGI is more far-reaching and more promising than that of the EIR.[43]

3.3 The role of COMI – delineation

If a State enacts the MLEGI and an enterprise group member has its COMI in that State, any other group member entities may participate in those proceedings for co-operation and co-ordination, including towards a group insolvency solution.[44] This is the key point and also applies to group members with their COMI in another State, unless their local court forbids it.[45] As is the case in the EIR, participation is voluntary and it does not imply a submission to jurisdiction other than for the purpose of that participation.[46] A proceeding aimed at developing and implementing a group insolvency solution, opened in respect of a group member of which the participation is essential for that solution to work in the COMI State of that group member and in which other group members participate, is promoted to a *planning proceeding*.[47] A group representative may then be appointed.[48]

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42 11 USC, § 361.
43 See fn 4.
44 MLEGI, art 18, para 1.
45 *Idem*, art 18, para 2.
46 *Idem*, art 18, para 4.
47 *Idem*, art 2, para (g).
48 *Idem*, art 19, para 1.

For planning proceedings, there are all sorts of (potentially far-reaching) relief available in enacting States to protect the group insolvency solution, the assets of a group member that is part of planning proceedings, or the interests of the creditors of such a group member. Article 20 of the MLEGI allows the courts of the State where the planning proceedings are running to grant relief to any (local or foreign) group member subject to or participating therein. However, this is only where the group member itself is subject to insolvency proceedings, or when there are (briefly stated) synthetic secondary proceedings in respect of it, if implemented.[49] Articles 15 and 17 provide similar powers to the court of a State to protect the same interests for a planning proceeding pending in another State, much like the MLCBI (and Chapter 15) system: interim upon application for recognition, thereafter upon actual recognition. Articles 13, 15 and 17 contain the limitation that the relevant group member must itself be subject to insolvency proceedings.

Once again COMI plays a delineating role here, similar to the EIR but in a slightly different way. Under each of articles 13, 15 and 17, the powers of the court are limited with reference to group members with their COMI in another State: under article 13, the court may grant relief in its State with respect to any participating group member but only if that relief does not interfere with the proceedings in the State where that member has its COMI (paragraph 3). This provision is quite broad and actively formulated, suggesting that the court must proactively address the question. Under articles 15 and 17, the court *may* refuse to grant such relief in the same case. As to the plan itself, the group insolvency solution, the court of the COMI State of group members must approve the parts affecting those group members.[50]

The difference is that under the EIR the main proceedings determined by the COMI of a debtor are automatically recognised in every other Member State and, except in the case of territorial / secondary proceedings, encompass the entire estate of the debtor, wherever located. There is no need for recognition (and therefore no system of relief in another State that has perhaps granted recognition) whereby the effects on those main proceedings need to be considered and perhaps curtailed. Under the EIR, with respect to the non-COMI Member State, it is all or nothing: there are either no territorial / secondary proceedings (because none have been opened, or because there is no establishment to begin with) and the main proceedings have full effect in accordance with their *lex concursus*,[51] or there are territorial / secondary proceedings and the establishment with an estate in the Member State is fully subject to the territorial /

[49] *Idem*, art 19, para 2. Optionally, an enacting State can include (briefly stated) synthetic non-main proceedings that can be offered in lieu of actual non-main proceedings in another State in proceedings in the enacting State, if that is where COMI is for the debtor (thus, the main proceedings). *Cf* the supplemental provisions contained in arts 30 to 32. This is similar to the EIR. See *Facilitating the cross-border insolvency of multinational enterprise groups: commentary and notes on the draft legislative provisions*, Note by the Secretariat, A/CN.9/WG.V/WP.142/Add.1.

[50] *Idem*, art 20.

[51] Barring, of course, in applicable cases the exception rules for "special" topics such as labour, the *actio Pauliana*, set-off, etc.

secondary proceedings. Under the MLCBI and the MLEGI, COMI does also drive the distinction between main and non-main, but that merely determines the availability of relief (as noted above) in the context of *recognition* of those foreign proceedings in a State where there is no COMI and / or the debtor has no establishment.

As to finding COMI, the MLEGI builds on the MLCBI and therefore equally does not provide any further definition or detail, so that the same principles apply as set out above in paragraph 3.1 in respect of the MLCBI.

Where does this leave us? In short, in essentially the same position as under the EIR but perhaps slightly better off. The MLEGI still is about *separate* "cases of insolvency affecting the members of an enterprise group" and cross-border co-operation *between those proceedings*.[52] It does provide a slightly more forward-thinking framework to try and bring together those separate proceedings, thereby raising hopes for its applicability in practice. However, the fact remains that "[r]eorganizations of corporate groups, treated as a single entity, have a greater chance at success than those treated as separate entities. A single proceeding affords economic efficiencies, lower administrative costs, and centralized control of restructuring."[53] The MLEGI does not provide for this either as it is not one of its objectives. The MLEGI is meant as a (relatively big) baby step in the right direction, aiming at being as bold as possible while remaining palpable in the current stage of development of global harmonisation / unification.[54]

3.4 Chapter 15 of the US Bankruptcy Code – a real world approach

So, what is the approach in the United States? Under Chapter 15 of the US Bankruptcy Code, foreign proceedings[55] can be recognised and obtain the benefit of automatic relief upon recognition as foreign main proceedings[56] if they are pending in the country where the debtor has its COMI.[57] Other foreign proceedings in regard to a debtor can also be recognised and their foreign representative[58] can also get relief, but only as foreign non-main proceedings and thus discretionarily (as is the case with main

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52 MLEGI, art 1.

53 N Wouters and A Raykin, "Corporate Group Cross-Border Insolvencies Between the United States and European Union: Legal and Economic Developments", *Emory Bankruptcy Developments Journal* Vol 29 (2013), p 388.

54 This is not to suggest that there is (still) a trend towards substantive harmonisation / unification as there perhaps was for a brief period before. The three impediments to achieving a globally applicable framework remain important and are perhaps even resurgent, especially (3) below: "(1) adhering to creditors' rights and expectations under their country's laws, so as to not discourage cross-border lending; (2) inducing creditors of diverse and conflicting interests to cooperate for collective asset maximization; and (3) respecting national sovereignty." – N Wouters and A Raykin, "Corporate Group Cross-Border Insolvencies Between the United States and European Union: Legal and Economic Developments", *Emory Bankruptcy Developments Journal* Vol 29 (2013), p 388.

55 11 USC, § 101(23).

56 *Idem*, § 1520.

57 *Idem*, § 1502(4).

58 *Idem*, § 101(24).

proceedings) either upon filing for recognition[59] or upon recognition.[60] Therefore, as indicated above, the significance of this distinction is relative as both proceedings may in practice obtain the same relief at the same time: the menu of relief available in both sections 1519 and 1521 is non-limitative (the word "including" is used) so that the foreign representative of non-main proceedings can request the same relief as offered by section 1520 in both cases or, if that is not sufficient, (also) on the basis of section 105(a) with its broad equitable powers for the bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions" of the Bankruptcy Code which, through section 103(a), is also applicable in Chapter 15 cases. As the court in the *Constellation* case put it:

> "However, once the decision to grant recognition is made, principles of comity and the provisions of chapter 15 can provide substantially similar relief to a debtor – whether a proceeding is recognized as main or nonmain. This Court repeatedly emphasized during the Recognition Hearing that there may be no statutory and practical effects of distinguishing recognition as a foreign main proceeding, as opposed recognition as a foreign nonmain proceeding. Indeed, a foreign nonmain proceeding can be granted nearly identical relief as the relief provided to a main proceeding."[61]

Still, it is relevant whether a foreign proceeding is designated as a main proceeding, especially in cases where there are multiple proceedings in respect of a single debtor which are (or have the potential to be) competing, or where they may lead to different outcomes. Such competing proceedings may disrupt exactly the kind of insolvency restructuring process we are looking to promote: single / jurisdictionally centralised main proceedings for a group of companies. Even raising the spectre of such disruption may give certain constituencies of creditors undue leverage, potentially affecting the outcome of the restructuring or liquidation. When there is competition between proceedings, the main proceeding must be the one that is given prevalence and protection by the courts (although it is not stated as such, this is the entire fabric that runs through the EIR, MLCBI and the MLEGI).[62]

Generally, "[t]he U.S. approach to determining the COMI is a 'command and control Test'", that is, a head office test in which "any relevant activities, including liquidation activities and administrative functions", can be considered[63] but where a number of non-

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59 *Idem*, § 1519.

60 *Idem*, § 1521.

61 *In re Serviços de Petróleo Constellation SA, et al*, US Bankruptcy Court SDNY, Case No 18-13952 (MG), Memorandum Opinion Recognizing Foreign Debtors' Foreign Main and Foreign Nonmain Proceeding, 5 September 2019, pp 51-52.

62 *Idem*, p 6 – court's fn 8.

63 *Fairfield Sentry*, 714 F.3d at 137.

exclusive factors are guiding. [64] While it appears from the text of the statute that the registered office presumption is similar to the EIR and the MLCBI,[65] case law suggests that the place of registration of the entity in question is (merely) one of those factors.[66] A debtor's COMI is in principle determined at the time of the filing of a Chapter 15 petition.[67]

For the purposes of this paper the focus will be on the determination of COMI in two cases of the kind referred to in the previous paragraph: *OAS*[68] and *Oi Telecom*,[69] while giving some attention to another similar Brazilian case, *Constellation*,[70] where relevant. *OAS* is considered a textbook example; this case concerned a Brazilian company in which the three relevant entities were all involved in Brazilian *recuperação judicial* (RJ) restructuring proceedings, which are not entirely unlike Chapter 11 proceedings. One of the entities, a financing SPV (note issuer of New York-governed notes) was Austrian, with its registered office in Vienna; it was wholly owned by the Brazilian parent, OAS SA. The Brazilian court had allowed the Austrian debtor into the RJ proceeding, considering that the COMI of the parent was in Brazil and that the Austrian SPV was part of the economic group of OAS SA and controlled by it. A number of the RJ proceeding debtors, including the Austrian entity, eventually filed for recognition of the RJ proceeding as main proceedings. Creditors objected, *inter alia* on the ground that the Austrian company's COMI was in Vienna.

In the first instance the New York court listed the already established (statutory and case law) framework for finding COMI under Chapter 15 (discussed above). The court further emphasised that in the Chapter 15 context (as is the case in "international sources of law that the court may consider",[71] most importantly the MLCBI and the EIR and its ECJ case law),[72] factors indicating the ascertainability and regularity of the COMI are important.[73] Further, the party seeking recognition as a foreign main proceeding must prove that the debtor's COMI is where the foreign main proceeding is pending.[74] The court then turned

64 *Fairfield Sentry*, 714 F.3d at 137; N Wouters and A Raykin, "Corporate Group Cross-Border Insolvencies Between the United States and European Union: Legal and Economic Developments", *Emory Bankruptcy Developments Journal* Vol 29 (2013), pp 400 and 403 and the case law cited there.

65 11 USC, § 1516(c): "In the absence of evidence to the contrary, the debtor's registered office (…) is presumed to be the center of the debtor's main interests".

66 *Fairfield Sentry*, 714 F.3d at 137, cited in *OAS SA*, 533 BR 83 (2015), at C.

67 *Fairfield Sentry*, 714 F.3d at 133.

68 *In re OAS SA*, 533 BR 83 (2015).

69 *In re Oi SA and Oi Brasil Holdings Coöperatief UA*, US Bankruptcy Court SDNY, Case Nos 16-11888, 11794 and 11791 (SHL).

70 *In re Serviços de Petróleo Constellation SA, et al*, US Bankruptcy Court SDNY, Case No 18-13952 (MG).

71 11 USC, § 1508.

72 *In re Oi SA and Oi Brasil Holdings Coöperatief UA*, US Bankruptcy Court SDNY, Case Nos 16-11888, 11794 and 11791 (SHL), Post-Trial Memorandum of Decision 4 December 2017, p 35 and the authorities cited there.

73 *Fairfield Sentry*, 714 F.3d at 138 as cited in *OAS SA*, 533 BR 83 (2015), at C; *In re Oi SA and Oi Brasil Holdings Coöperatief UA*, US Bankruptcy Court SDNY, Case Nos 16-11888, 11794 and 11791 (SHL), Post-Trial Memorandum of Decision 4 December 2017, p 38 and the authorities cited there.

74 *Fairfield Sentry*, 714 F.3d at 138 as cited in *OAS SA*, 533 BR 83 (2015), at C.

to the case at hand. It considered that the Austrian company had its registered office in Vienna so that the COMI presumption was Austria, but that in this case there was evidence to the contrary. The company had been incorporated solely as an SPV to issue the notes and "on-lend" the proceeds. At the address in Vienna, the company did not have a physical place, did not own assets, employ people, or conduct business. Its few (local) trade creditors were service providers to maintain the registered office. The key creditors were the (beneficial) note holders. The entity's real and only business was to pay off the notes issued, with the RJ proceeding as the only realistic chance to do so given its total lack of own earning capacity and the financial predicament of its group.

The court therefore found that Brazil was the Austrian entity's nerve centre, with its parent OAS SA, which as sole shareholder appointed its board, capable of determining the participation and thus outcome in the RJ proceeding. Finally, the court turned to the question of ascertainability for creditors. In view of the setup of the notes, their documentation and the way they functioned, including the guarantee by OAS SA and the sending of notices only to Brazil and the status of the Austrian entity as SPV without a real presence in Austria, its key creditors (the noteholders) could not have had any realistic or legitimate expectation that Austria and its courts would play a real role in recovering their claims if it ever came to that. Austria played no role in their decision whether to buy the notes. In view of all this, the court found COMI to be in Brazil and the RJ proceeding could therefore be recognised as main proceedings also for the Austrian entity.

In the *Oi Telecom* case,[75] the *recuperação judicial* (RJ) proceeding had already been recognised as a Chapter 15 main proceeding by the SDNY Bankruptcy Court, including for one of the two Dutch financing SPVs of the Oi group, Oi Brasil Holdings Coöperatief UA (Coop). Coop was also a debtor in the RJ proceeding but Dutch local insolvency proceedings had also been opened, which eventually turned into liquidation bankruptcy proceedings. Other than that, the facts in the *Oi* case were quite similar to the OAS case, especially as regards the functioning of Coop as an SPV and its place in the group. Accordingly, the SDNY Bankruptcy Court had found Coop's COMI to be in Brazil, as the nerve centre, taking into account the expectations of its key creditors (noteholders) – directly alluding to *OAS*.[76] At some point, however, the Dutch liquidator of Coop, prompted by certain activist creditors (the same ones as in *OAS*), turned out to be adverse to the restructuring as envisaged by the Oi group and decided that his Dutch liquidation proceeding should instead be recognised as main proceedings and he himself as foreign representative of that proceeding, all with the more or less explicit goal of trying to effectuate a different outcome of the Oi group's central group restructuring.

[75] Full disclosure: the author was involved in the case as Dutch counsel to the other Dutch financing SPV: PTIF.

[76] As the court itself notes: *In re Oi SA and Oi Brasil Holdings Coöperatief UA*, US Bankruptcy Court SDNY, Case Nos 16-11888, 11794 and 11791 (SHL), Post-Trial Memorandum of Decision 4 December 2017, p 19.

This paper does not deal with many of the nuanced discussions in the case (for example, regarding the correct test under Chapter 15 to revisit a recognition already made) and will focus solely on the court's considerations as to determining COMI, which it was asked to revisit. The movants, the Dutch liquidator and supporting creditors, effectively stress-tested the court's initial decision and approach (in line with prevailing case law) to finding COMI for an entity such as Coop at the nerve centre of the group (even when different from its registered office). An interesting difference with *OAS* was that the Dutch court that opened the Dutch liquidation proceeding for Coop had found, as required by the EIR and the Dutch Bankruptcy Code, that Coop's COMI was in the Netherlands. This prompted the US court to extensively discuss the differences between the EIR, the MLCBI and Chapter 15 and the role and proper determination of COMI under each.[77] The COMI finding of the Dutch court was the main leverage used by the movants in their attempt to try and overturn or modify the prior decision of the SDNY Bankruptcy Court.

However, the US Bankruptcy Court would not budge. Instead, after a painstaking analysis of the very topics addressed in this paper, including the international frameworks and of course Chapter 15 itself, Judge Lane roundly dismissed the motions of the Dutch liquidator and his supporters. While the dismissal was based on impeccable legal reasoning, it permeates very strongly through this judgment that the court was not prepared to jeopardise the Oi group's central group restructuring through the Brazilian RJ proceedings unless it really had to in view of the applicable rules.[78]

In the view of the court, the right reasons clearly appear to have been in achieving the same objectives as those of the MLEGI, which the court cites explicitly at pp 117 and 118 of its opinion. In short, those objectives are the promotion and protection of successful international / cross-border group restructurings, co-operation, value maximisation and enterprise preservation; although, interestingly enough, through a single, centralised proceeding in one jurisdiction. All of this becomes especially apparent in the paragraphs of the opinion in which the court falls short of castigating the movants for disregarding the objectives cited and instead "weaponizing Chapter 15" in a premeditated way aimed at their own benefit to the detriment of the group and its other creditors and stakeholders.[79]

The aforegoing does not mean that the US Bankruptcy Courts (or at least not the SNDY Bankruptcy Court) have no regard for the discussion highlighted in this paper; quite the contrary. In its opinion on recognition in the *Constellation* case, the court explicitly states "[w]hile the Constellation Group is discussed as a group entity at times throughout this opinion's opening sections for context, it is important to bear in mind that the Court's

[77] *In re Oi SA and Oi Brasil Holdings Coöperatief UA*, US Bankruptcy Court SDNY, Case Nos 16-11888, 11794 and 11791 (SHL), Post-Trial Memorandum of Decision 4 December 2017, pp 56 *et seq*.

[78] But even then not for the wrong reasons, as rules are only one half of the equation of what a court will find – the other half being the right outcome in the circumstances.

[79] These are the author's own words and not those used by the court in this case (except for "weaponizing Chapter 15", which the court did use to characterise the creditors' behaviour, "to collaterally attack both the Brazilian RJ Proceeding and the Oi Group's proposed Brazilian RJ Plan": *idem,* p 116).

recognition is granted on an individual debtor by debtor basis",[80] while noting that while UNCITRAL Working Group V was (at that time) working on a framework for enterprise groups, it appeared that the new Model Law would retain the concept of COMI for each individual enterprise within a group enterprise.[81] Indeed, the court went on to painstakingly analyse each individual Chapter 15 debtor,[82] eventually finding COMI for most of them in Brazil and thus recognising their Brazilian proceedings as main proceedings, but recognising those for one of the debtors (the Luxemburg parent Constellation Oil Services Holding SA) as non-main only.[83]

In sum, while fully recognising that there is no true concept of a "group COMI" in the Model Laws (and, therefore, by extension in Chapter 15) or – it may be added – in the EIR, the court diligently applies the existing COMI concepts and does so in a manner befitting the realities of a cross-border restructuring of "a highly interrelated enterprise group whose management and operations are increasingly becoming detached from any specific locale as the business aims towards increased globalization".[84]

4. Conclusion

It is this strong conviction and belief in promoting a successful group restructuring (or liquidation, if need be) shown by the SDNY Bankruptcy Court that would be good to see upheld by all the courts and judges in the Netherlands and other EU Member States who deal with the EIR (and in countries that implement the UNCITRAL Model Laws), as well as by the practitioners who bring cases there. This would result in a stronger, real world-oriented approach to finding COMI for group entities so that they can be part of one centralised restructuring "main" proceeding in one jurisdiction, whenever possible. This would undoubtedly help to protect outcomes that are most often likely better than what separate local proceedings can bring if an enterprise group faces insolvency; even if those separate proceedings are co-ordinated under the EIR or the MLEGI. This is especially the case for SPVs (finance, holding and the like) but also for other group companies.

As is clear from the discussion above, this paper does not deny the different meanings and implications of the COMI concept under the various frameworks, most importantly the more far-reaching mandatory consequences under the EIR versus the more limited consequences under the two UNCITRAL Model Laws. Also, in the same vein, courts should take cognisance of the interests of creditors when they find COMI in a different

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[80] *In re Serviços de Petróleo Constellation SA, et al*, US Bankruptcy Court SDNY, Case No 18-13952 (MG), Memorandum Opinion Recognizing Foreign Debtors' Foreign Main and Foreign Nonmain Proceeding 5 September 2019, p 4.

[81] *Idem*, court's fn 4.

[82] *In re Serviços de Petróleo Constellation SA, et al*, US Bankruptcy Court SDNY, Case No 18-13952 (MG), Memorandum Opinion Recognizing Foreign Debtors' Foreign Main and Foreign Nonmain Proceeding 5 September 2019, pp 27 to 46.

[83] *Idem*, pp 7 and 65 to 68.

[84] *Idem*, p 7.

jurisdiction to the one where the registered office is located. However, this should not be overly formalistic but rather consist of a realistic assessment on the merits of each case. The courts should not only look at what was ascertainable by creditors as to the place where the interests of the entity where truly managed and their realistic expectations, but also to which insolvency laws and courts they might face if their counterparty where ever to come into financial difficulties. In addition, the courts should look at whether creditors' would be truly worse off if their debtor is subject to (main) insolvency proceedings in a different jurisdiction. For example, in many restructurings trade creditors are not impaired at all or bear the smallest burden. Such creditors would generally be less likely to anticipate COMI being in another jurisdiction and would therefore warrant protection. However, if there are real guarantees that they will not be worse off while the overall solution is better for all stakeholders, there should be no reason why entities of a group can be subjected to the same insolvency process.

It is submitted that courts and practitioners should not let themselves be unduly and unnecessarily limited by the (perceived) limitations within the EIR and the UNCITRAL Model Laws, but should rather take a page from the book of the SDNY (and other United States) Bankruptcy Court judges who have demonstrated how one can deal with the COMI concept in the context of international enterprise groups in a manner that protects their restructuring by aiding the concentration of (main) insolvency proceedings in one jurisdiction.

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