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The cross-border insolvency of corporate groups and the principles of universalism and territorialism

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ABSTRACT

The present project deals with the two main theories concerning the way cross-border insolvency proceedings may be structured, i.e. universalism and territorialism from the perspective of the insolvency of corporate groups in an international level. In particular, the first Chapter provides a brief historical and conceptual approach as regards the origins and the evolution of the aforementioned theories throughout the years and poses the main issues and concerns with respect to the insolvency proceedings against groups of companies. Subsequently, the second and third Chapters refer to Territorialism and Universalism theories respectively, as regards their provisions and their application, as well as to their alleged advantages and the relevant criticism, which they have attracted. The fourth Chapter, which is the lengthier one, concentrates on the definition and characteristics of the corporate groups and provides an analytic overview of the legislative framework applicable within the EU and all around the globe and also deals with the restructuring of the groups of companies in the course of or in replacement to the insolvency proceedings. Finally, the body of the present dissertation is completed by the provision of certain conclusions drawn throughout the research and the reference of the bibliography used.

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INTRODUCTION

According to Professor Ian Fletcher, cross-border insolvency (sometimes called international insolvency) regulates the treatment of financially distressed debtors where such debtors have assets or creditors in more than one country[1].

In general, insolvency proceedings for multinational enterprises have been almost developed as common practice and some sort of usual judicial issue, with dozens of foreign cases filed each year with the competent courts all around the globe.

However, it only sounds as self – evident that problems often arise in the context of such cross-border insolvencies on account of, inter alia, the different national legislations, the different relevant jurisprudence of the countries involved and –of course- their different cultural backgrounds. In this instance, the solutions offered by international or regional instruments along with their implementation by various countries consist a rapidly evolving international legal field and one of the greatest and most heated legal debates thus far.

The present essay shall try to provide an overview of the two initial different theories – approaches on the issues created, along with a glance over other relevant questions arisen going forward in the particular orientation of the insolvency of multinational corporate groups.

[1] *Ian Fletcher* (2005). *Insolvency in Private International Law* (2nd ed.). Oxford University Press. ISBN 978-0199262502

1. CHAPTER I: CONCEPTUAL APPROACH OF THE ISSUE

1.1. International Insolvency Phenomenon

Insolvency itself, as a subject of unquestioned importance undoubtedly attracts international interest as an area of study and critical comment. Practitioners and academics are aware of the global connection that exists between the essential circumstances of insolvency, its functional aspects, and the impact of such elements upon the ways in which debtor-creditor relations are conducted. Therefore, solutions and legal tools developed within one jurisdiction have immediate interest and relevance for those working elsewhere. The challenge that is constantly experienced is finding appropriate ways of adapting new methods and processes into the different structures of other systems confronted by functionally similar or identical problems.

It consists only a fact of our modern (and not only) economic life that businesses fail. It is also a necessary and reasonable consequence of a free market. And mathematically, the growth of the international business leads to growth in the number of international business failures. As companies nowadays have increased their international presence, cross-border insolvency has become more prevalent. Companies have formed complex corporate groups which contain many subsidiaries in multiple countries, each owning different assets.

But is insolvency a phenomenon necessarily bad? As noted by the National Bankruptcy Forum, "while it is true that filing for bankruptcy is evidence of trouble with personal finances, that's not the whole story"[2]. Insolvency, as a state of financial distress in which a person or business is unable to pay their debts, is not a univocal phenomenon: it can have both a negative but also a positive impact on individuals and corporations.

"Insolvency per se is not necessarily negative, since economic growth in general requires certain non-profitable activities to be phased out, in order to spare up room for new ones and therefore, failing projects and the replacement of non-profitable firms has to be seen as a fundamental element of economic growth"[3]. Furthermore, there are a lot of common "bankruptcy myths", such as that one will never own anything again or might have no accommodation for the foreseeable future etc. However, in case someone is in lots of debt, bankruptcy can actually provide them with a fresh start, at that very time the individual or the corporation needs it the most.

On the other end of the spectrum, one shall not go so far as to consider bankruptcy as a solely positive phenomenon. In particular, it may of course be a pressing, depressing or even emotionally devastating phenomenon, which affects some of the individual's or the legal entity's everyday activities. For instance, the data of the aforementioned persons become public domain, so trade names and other personal information will appear in court records, accessible to the public, and specifically to the banks, potential clients, employers etc. Moreover, other practical problems may also arise, such as the fact that it would be much more difficult for one to receive a loan or enter into a facility agreement in general from that point onwards.

[2] https://www.natlbankruptcy.com/is-filing-bankruptcy-bad-can-it-be-good/

[3] *Elina Moustaira*, "International Insolvency Law. National Laws and International Texts" (Chapter 2), Springer, 2019.

In any case, insolvency is not a straightforward or easy phenomenon for one to deal with – and has to be addressed as such -, but at the same time does not necessarily mean an irreversible catastrophe.

1.2. Nature and aim of insolvency proceedings

The globalization of business activity is rightfully celebrated as one of the triumphs of the second half of the twentieth century.

The benefits stemming from the globalization of commerce are substantial, but international transactions also bring with them important challenges for the world's legal systems. Traditionally, national governments could focus on their domestic economies without paying any attention to cross - border issues. Nowadays, however, a country's policymakers must respond to the growth in international business activity with appropriate legal changes. Failure to do so will cause their legal regimes to fall further and further out of step with the needs of the global marketplace.

From a legal perspective, whereas parties may, if they so wish, choose the governing law of their contract, the method of dispute resolution and so on, they cannot choose the law which will govern in the event of the insolvency of one (or both) of them.

Second, if insolvency does occur, the law which ultimately governs that insolvency may not be predictable. The parties will have considered what arrangements they wish to make to protect themselves in the event of insolvency, for example by taking security. They will test the validity and effectiveness of those measures against the laws, which they think are likely to apply in the event of supervening insolvency. But it may happen that an entirely different law will apply.

Collectively, the main issues arising out of international insolvency issues are the following: international jurisdiction, recognition and enforcement of the foreign judgment and the applicable law.

In this instance, the basic division of approaches in international insolvency is little different from the basic division of approaches in other areas of international relations affecting private interests e.g. whether in trade of goods and services, enforcement of judgments or intellectual property rights, or even pursuit of those suspected of committing crimes, when the field of application of a particular law spans national boundaries, the key question consistently boils down to the proper balance of the competing interests of "local protection" and "international cooperation".

There are, generally, three approaches to the regulation of cross-border insolvency[4] the territorial approach (generally referred to as territorialism), whereby each country exercises its own domestic insolvency laws in relation to all the debtor's property and all of the creditors located within its jurisdiction, the universalist approach (referred to as universalism), whereby any cross-border insolvencies are administered pursuant to a single global insolvency regime and, lastly, the hybrid approach. In fact the hybrid approach includes a number of different approaches seeking to "cure" any deficiencies arising out of the one or the other aforementioned approaches. Examples of such hybrid approaches consists the modified universalism theory or the so-called co-operative territorialism.

The debate between universalism and territorialism seems to centre, by way of an indication, on issues of predictability, certainty, national sovereignty and fairness and efficiency. Below, there is an attempt

[4] *Andrew Keay and Peter Walton* (2011). Insolvency Law (2nd ed.).

to present a comparative analysis of the aforesaid approaches in terms of their respective advantages and disadvantages, along with their function and capabilities within the international legal system.

1.3. Brief historical approach on bankruptcy law

Traditionally, national governments would focus on their domestic economies without attention to international issues. Therefore, most legal systems have developed on a territorial basis.

However, from an early stage there have been some attempts to develop cross-border cooperation in insolvency matters. In particular, in 1889 seven treaties were signed in Montevideo with regard to harmonising private international law in the signatory states. One of those treaties referred to the regulation of bankruptcies between member states. The treaty was updated in 1930, and broadly provided for a system more closer to territorialism than universality, providing for multi-jurisdictional bankruptcy administrations in different states for multinational companies. Subsequently, in 1933 Denmark, Finland, Iceland, Norway and Sweden signed the Nordic Bankruptcy Convention which, although not an exhaustive regulation, is still in force today and facilitates administration of cross border bankruptcies in the Scandinavia region.

By way of development, in the 1980s the International Bar Association published a model law, the Model International Insolvency Co-operation Act, which finally was proven unfruitful as it was not adopted by any country.

However, a comparatively early stage common law jurisdictions recognised the desirability of ensuring that insolvency officers from different jurisdictions received the necessary support to enable the efficient administration of estates. In *Galbraith v Grimshaw* [1910] AC 508 the judge stressed that there should be only one universal process of the distribution of a bankrupt's property and that, where such a process was pending elsewhere, the English courts should not let actions in its jurisdiction interfere with that process. However, the first significant developments in relation to cross-border insolvency regimes which were widely adopted was the UNCITRAL Model Law on one hand, and the EC Regulation on Insolvency Proceedings 2000 on the other. Fletcher states that the roots of bankruptcy law are sought into the following procedures of the Roman law: cessio bonorum (assignment of property); distractio bonorum (forced liquidation of assets); remission and dilatio (compositions with creditors). The procedures developed from individual debt collecting procedures which gave rise to the development of collective debt collecting devices (insolvency law) when the debtor was found to be insolvent.

Insolvency law in Europe further developed as a result of the lex mercatoria , which has been the customs and usages that developed between merchants on the continent. Many European countries introduced some form of bankruptcy legislation between the 13th and 17th century. The word ‘bankruptcy” is said to stem from Italian “banca rotta” meaning breaking the bench. This referred to the situation where a merchant who operated his business on the medieval market place could not pay his debt and his creditors closed his business by breaking his bench or counter[5].

By way of a general comment, the thirty-year history of the EU negotiations consists a clear proof of the difficulties arising even within a limited, regional group of states, although with a diversity of legal traditions.

[5] Insol Fellow, Study guide, Nature and Sources of International Insolvency Law

1.4. Concerns regarding groups of companies

During the course of the last century, businesses and companies pursuing international presence have increasingly organized themselves into multinational groups of companies. These groups have become "the prevailing form of European large-sized enterprises"[6]. It is therefore, at the same time, more and more essential to ensure that the available insolvency legal framework is able to address the issues and deal with the challenges that this new reality has brought about: issues and challenges relevant to cross-border insolvencies with the additional feature that such insolvencies concern groups of companies based in different jurisdictions. Whilst groups of companies consist separate legal entities, they more than often operate as an integrated enterprise from a financial and holistic perspective. Should that be the case, then the aim transforms into pursuing the most value-oriented solution of that business enterprise as a whole in case of financial difficulties and distress, compared to a piecemeal liquidation.

The European legal framework does not guarantee that the aforementioned value of the group will be maintained by virtue of special legislation to that end without saying. Conserving such value may often prove in fact difficult. This is because European insolvency legislation has traditionally been tailored towards individual debtors as the objects of insolvency proceedings and not groups of any kind. Each group of companies is legally deemed to have its own separate personality, real estate, its own insolvency proceedings and its own insolvency practitioner, who will move the proceedings forward. Such fact is possible to result in fragmentation of the group and inefficient management of those proceedings. The interdependency between the group companies will often also result in a "domino effect": if one or several group companies becomes insolvent, the financial difficulty will often push other group companies into insolvency proceedings, as well. Within national contexts, insolvency practices have regularly developed methods of dealing with these challenges. When international insolvency legislation comes into play, however, these difficulties increase exponentially[7].

Therefore – and to sum up – the key dilemma of the issue at hand is whether to give effect to the economic reality of integrated business operating through separate entities thus referring to the corporate entity as a whole or to strictly adhere to the corporate form and address each group member separately[8].

[6] *Sid Pepels*, Dec 2020 Defining groups of companies under the European Insolvency Regulation (recast): On the scope of EU group insolvency law

[7] *Sid Pepels*, Dec 2020 Defining groups of companies under the European Insolvency Regulation (recast): On the scope of EU group insolvency law

[8] *Risham Garg*, Issues in Insolvency of Enterprise Groups, 2019.

2. CHAPTER II: TERRITORIALISM

2.1 Definition and characteristics

Territorialism is the approach on international insolvency whereby each country exercises its own domestic insolvency laws in relation to all the debtor's property and all of the creditors located within its jurisdiction. In other words, "the courts in each national jurisdiction seize the property physically within their control and distribute it according to local rules"[9]. As already implied, territorialism consists historically the method adopted by most states: they simply ignored any implications of the insolvency of the enterprise falling outside their territory.

The aforesaid approach does not recognise any extraterritorial dimension to insolvency law in general, while it relies on a territorial notion of sovereignty. From this point of view, the competent court of the territorial proceedings has complete authority over all assets within the jurisdiction but cannot control assets outside that jurisdiction.

In case more than one such insolvency cases are initiated in different states, each case proceeds in parallel and regardless of the proceedings taking place in other states under the belief that "good borders make good neighbors". As a result, each jurisdiction administering such a case has every incentive to seize as much asset value as possible to be allocated to claims favored by that jurisdiction, notwithstanding the negative effects that such an approach might produce for claimants in other jurisdictions. This technique has contributed in territorialist approach being referred to as the "grab rule".

Consequently, the main characteristics of territorialism can be summarized as follows: plurality of insolvency proceedings (as many insolvency proceedings for each debtor, as the countries where its assets may be located), applicability of lex fori concursus and the participation of only local creditors, while the physical or constructive location of assets at the moment of the insolvency filing is the only aspect taken into account.

Below we will be analysing some of the most predominant pros and cons of this theory, but for now one can easily understand that while nations can gain advantages for their citizens through affirmative exercise of their sovereignty, they can also jeopardize equally important advantages by exercising sovereignty in a way that ignores the free movement of value across the globe out of one sovereign territory and into another.

2.2. "Expansive" territorial approach

According to Professor Jason J. Kilborn, there is also a territorialist approach going even further: many states have taken a more expansive view of the proper scope of their jurisdiction in international bankruptcy cases[10]. Thus, rather than limiting the scope of their insolvency

[9] *Westbrook, Jay L.*, Universalism and Choice of Law (January 3, 2004). Penn State International Law Review, Vol. 23, No. 3, 2005, Available at SSRN: https://ssrn.com/abstract=2196226

[10] *Jason J. Kilborn*, The Raging Debate Between Territorial and Universal Theories of Value

jurisdiction to assets located within their territories, they purport to exercise universal jurisdiction over all of the worldwide assets of a debtor whose insolvency case was initiated within their territory. Territorialism in such states expands the focus beyond the location of assets, looking instead to the location of any "holder" on which an insolvency case might be initiated within that state. Such holders include not only the location of the debtor's principal assets or command and control centre ("headquarters," "real seat," or "principle place of business"), but perhaps also the location of even a few assets.

However, it goes without saying that, given the lack of cooperation to be expected from other states within whose foreign territorial jurisdiction assets are located, this more expansive approach to international insolvency jurisdiction depends on indirect international oppression. Unless they can convince foreign courts to cooperate in an international compromise, courts in such expansive territorial jurisdictions can only exert indirect pressure over foreign creditors (by threatening a retribution against the creditors' own assets or other interests located within the court's territorial jurisdiction).

As Kilborn notes, "in this escalating war between national courts, the potential casualties include not only the value of the insolvency estate, but also the value of creditors' other assets and even those of their employees".

2.3. Advantages of Territorialism

Advocates of territorialist systems point to a variety of advantages, some of which are presented below.

In his paper, LoPucki considers different competing approaches to resolve the issues arising in cross-border insolvency cases and concludes that territorialism is the most adequate one: assets located in different countries should be administered in domestic cases, in the jurisdiction in which they are situated[11]. His greatest argument in favour of territorialism is that it offers greater ex ante predictability for lenders, "who would only need to know the countries in which their debtor's assets are located and the distributional priorities of those countries to predict their treatment in bankruptcy".

Towards the same direction, territorialism advocates stress that under a territorialist system, the bankruptcy administration of a multinational's assets and operations within a given country are governed by the laws of that country. This is the expectation that credit extenders have at the time they lend to the multinational concern. In this regard, their argument has to do with the expectation of the parties, which is a rather significant point in terms of equality and overall efficiency of the international stakeholder's handling of their particular insolvency case.

Sharing in International Bankruptcy, pg. 3-4

[11] *LoPucki*, "Cooperation in International Bankruptcy" (1999) 84 Cornell Law Review 696

Moreover, there are also numerous arguments in favour of territorialism, inspired from the fact that this approach respects differences among domestic policies and regimes, while it also protects state sovereignty. In fact, "a sovereign territorial focus avoids sacrificing the unique and valuable cultural preferences of individual nations and societies on the altar of international homogeneity[12]".

2.4 Drawbacks of Territorialism

Critics of territorialism mainly point to higher overall costs of a multinational insolvency, uneven results and unequal treatment of the stakeholders involved, thus violating the bankruptcy principle of treating similarly situated creditors equally, as well as practical difficulties arising out of the poor knowledge of the location of the assets a creditor may have or even out of the strategic behaviour that any party may show during the proceedings.

In particular, territorialism undoubtedly leads to higher overall costs of a multinational insolvency by initiating parallel insolvency cases in each country where assets are located: each jurisdiction requires separate administration, filing and prosecution of relevant litigation. Furthermore, a form of costs suggested by the Law and Economics theory, investigation costs, has to be taken into account as well, before entering into any agreement or pursuing a proceeding in a different country. There is also a lot of criticism as regards the difficulties in achieving the reorganization or package sale of as business as a whole with many different courts and respective legal systems being rendered as competent to hear parts of one and only international debtor. More specifically, reorganization is much more difficult to achieve in a territorialist regime particularly on account of the fact that it decreases liquidation values and makes coordination of cases extremely complex. Moreover, at the same time, there is always a risk that creditors cannot know in advance where the debtor's assets will be located when bankruptcy intervenes, which causes a less efficient ex ante allocation of capital (e.g. possibility of "malicious practices" such as an eve-of-bankruptcy transfer etc.).

Last but not least, it is only logical that in a territorialist system adopted by all countries involved, conflicts between jurisdictions and courts can easily develop.

3. CHAPTER III: UNIVERSALISM

3.1 Definition and characteristics

Universalism is the approach on international insolvency whereby any cross-border insolvencies are administered in accordance with a single international insolvency regime, and all of the debtor's assets are distributed by a single insolvency "practitioner", irrespectively of where the assets or claimants are located. At the same time, a unified set of procedural rules would also govern the case and would provide clear guidelines for its commencement, its administration, and its ending.

[12] *Jason J. Kilborn,* The Raging Debate Between Territorial and Universal Theories of Value Sharing in International Bankruptcy

The pure form of universalism advocates an idealistic world where courts and legal systems are bound to enforce the orders of the court of the "home country", the court which manages the whole case[13]. Therefore, the universalist model envisions that local courts in each country involved will be obliged by legal means (either domestic law or international convention) to enforce the orders of the home country court. Thus, universalism is not a single-court system, but a system regularly referred to as "dominant-court system".

Universalism suggests a single insolvency regime that reflects a global economic structure and that governs all international insolvency cases. In other words, the forum manages the case, collects the assets, regulates a reorganization, and provides for the payment of creditors all around the world.

Therefore the main characteristics of an universalist model could be concisely described as the unity of insolvency proceedings, having lex fori concursus as applicable law and the possibility of participation of both local and foreign creditors in a single proceeding

3.2. Advantages of Universalism

Professor Jay Westbrook is the most vivid proponent of a universal model for cross-border insolvency, describing it as "the administration of multinational insolvencies by a leading court applying a single bankruptcy law"[14].

Generally, advocates of universalism suggest that a single system of insolvency courts is able to achieve many of the benefits provided domestically by a single, national insolvency law. The said benefits usually concentrate on the following issues.

Firstly, the efficiency and fairness of the international creditors is hereby resolved, since similarly situated creditors in all countries around the world are to be "handled" by the same law and are therefore expected to be treated equally, whilst at the same time the many time-consuming and exhaustive conflicts about applicable laws would be eliminated at once.

Towards the same direction of legal certainty and increased predictability, as already mentioned above, a unified set of procedural rules would also govern the case and would provide clear guidelines for its commencement or opening, its administration, and its closing.

A rather important argument in favour of universalism is of course the one regarding the procedural costs. In particular, the transaction costs are to a great extent reduced due to the worldwide universalism legal procedure. Multiple insolvency cases in several countries for the same debtor duplicate the transaction costs and vastly decrease economic efficiency[15]. In this instance, it should

[13] *Emilie Ghio,* Cross-border insolvency and rescue law theory: moving away from the traditional debate on universalism and territorialism (2018).

[14] *Jay Westbrook*, "A Global Solution to Multinational Default" (2000) 98 Michigan Law Review

[15] US Case: Bd. Of Dirs. Of Multicanal S.A., 314 B.R. 486,521 (Bankr. S.D.N.Y. 2004).

be noted, although self - evident, that transaction costs are particularly important in bankruptcy proceedings, where the ultimate point of the whole procedure is the satisfaction of the creditors of the insolvent entity.

On a separate note, lending costs are also minimized or even eliminated within a universalist system; indeed, creditors or lenders around the world do not have to take into consideration before granting the facility, facts as, for instance, the possibility of an eve – of – bankruptcy transfer or the necessity for a respective investigation about each country's, where an asset is located, national law. Thus, in a potential non – universalist system, the possible lender/creditor would be deterred from entering into a facility agreement with an entity reserving assets in several countries, or simply would provide their services for a rather increased consideration.

Finally, another point usually raised by the supporters of universalism is that by reducing the incentive for each forum to increase its share of the pie administered for domestic creditors, a single court would improve dramatically the possibility of reorganization and the preservation of the value of an international business group[16].

3.3 Drawbacks of Universalism

Opponents of the universalist approach in international insolvency traditionally raise the below, more practical - oriented counter-arguments.

They usually stress the fact that in order for a country to adopt a universalist model in international insolvency cases, it is undeniable that will have to surrender its sovereignty in the said issues. In particular, it is only a consequence of the universalism's concept that national courts will have to accept the fact that the courts of another state will administer and resolve on issues and assets located and affecting their own national legal and economic affairs.

Further, an obvious obstacle emerging from the differences among political and social systems, legal cultures and judicial systems, as well as among enforcement of those regimes, consists a great impediment in delivering the promises of universalism. In fact, only an international convention ratified by all the countries around the world would only render such an attempt feasible or fruitful. However, given the current world circumstances and international relations, one could simply characterize such discussion as unrealistic.

Another issue raised by the opponents of universalism is that practically it is highly possible that states would be several times reluctant to accept the outcome of any differences, particularly because such an outcome may be completely irrelevant and contradictory to their own national legal or social system. Moreover, in case that no international convention applies to each and every country around the world, jurisdictions would be faced with a prisoner's dilemma in terms of states willing to apply universalism.

Lastly, it shall be noted, that many states (would) find it difficult to change their old attitude towards international insolvencies, in the sense that it is difficult to accept that the law of some

[16] *Jay Westbrook*, "A Global Solution to Multinational Default" (2000) 98 Michigan Law Review

other state will set the priorities. As stated by Jay L. Westbrook, the states nowadays are still "struggling like an adolescent with clothes that no longer fit". However, he also hastens to characterise such approaches as "old", namely stating that "the growing field of international insolvency has not so far put aside the old notion that local priorities must always be applied in distributing local assets[17]".

By way of a final comment, proponents of universalism regularly do not advocate the pure form of the model, because of the practical recognition of the enduring differences among political and economic systems, legal regimes, and court systems[18]", but rather one of the hybrid approaches mentioned earlier herein, like the modified universalism. Modified (or mitigated universalism) universalism is deemed today as the current most dominant approach in terms of addressing international insolvency and is the concept based on which the tools that are going to be described below (as to the cross-border insolvency of corporate groups in a European and international level) are developed. Briefly, this modified universalism theory combines the 'best of both worlds' supporting that it is more efficient for cross-border insolvencies to be managed by a single administrator rather than a series of piecemeal and unconnected proceedings in different countries, which should be recognised by all the parties (jurisdictions) involved). Further details as to how this concept has been implemented, are to be found in Chapter IV later on.

3.4. The examples of the United States, Singapore and Hong Kong

Following up on the above analysis, below there is an attempt to cite three characteristic examples of three major international insolvency approaches adopted by three different countries and briefly explain how and why they were the ones put forward in each jurisdiction.

The last example drawn out of Hong Kong refers to the modified universalism system and is hereby depicted for the sake of good order and comparison purposes, but shall be kept short and concise in order to avoid otherwise being lead off on too much of a tangent.

The example of the United States

The United States utilizes a universalism regime which requires that the countries having assets of the entity within their territory transfer them to the main court proceeding.

By way of an example, or merely a vivid illustration of the universalist model adopted by the United States, Ryan Halimi describes this as follows. "Universalism states that Court A—and any other courts dealing with the company's assets within its jurisdiction—should transfer the ability to deal with those assets to Court B where the main proceeding occurs. Court B can then make a unified distribution to creditors regardless of their location. Universalism's central idea provides

[17] *Jay L. Westbrook*, Breaking Away: Local Priorities and Global Assets

[18] *Edward Adams and Jason Fincke*, "Coordinating Cross-Border Bankruptcy: How Territorialism Saves Universalism" (2008) 15 Columbia Journal of European Law.

the judge of the main proceeding with the ability to make a more equitable allocation of resources as the court has more of the company's assets at its disposal".

In fact, United States have adopted the UNCITRAL Model Law on Cross-Border Insolvency (which will be further analysed in Chapter IV below). The said Model Law is a law issued by the secretariat of UNCITRAL on 30 May 1997 to assist states with regards to the regulation of legal entities' insolvency and financial distress involving companies which have assets or creditors in more than one jurisdiction. At present, 23 jurisdictions have adopted the Model Law, among which are also the United States. Chapter 15 of their Bankruptcy Code adopts the Model Law nearly verbatim. Unlike other statutes, the introductory section of Chapter 15 details the rationale and benefits of adopting the Model Law. Such ideas reflect the specific reasons for adopting the universalism regime including cooperation, legal certainty, fairness, maximizing value of debtor's assets, and rescuing financially troubled businesses.

The example of Singapore

On the opposite end of the spectrum, Singapore's territoriality system allows the country's courts to apply its local insolvency law without even deferring to other proceedings pending in other states. It is only logical that the country's statutes provided for more financial support for the local creditors (within the country) over other cross-border insolvency regimes.

As Ryan Halimi observes - and correctly to my opinion – "for a country of such small size, Singapore's decision to institute the initial territorialism regime earned the country many advantages[19]". In particular, such a system alleviated the need for the Singaporean courts to stress over proceedings in other jurisdictions for the same entity or the procedure of recognizing foreign judgments, which led to easier dispositions of claims.

However, the most important benefit for Singapore by the decision to adopt a universalist approach on international insolvency was the fact that the local creditors obtained a higher percentage of the insolvency award ("part of the pie"), which would therefore increase the possibility that they loan money to Singaporean businesses. As a thought of internal policy, given also the economy and the size of the country, would thus offer a great opportunity for a self-sustained judicial and financial system, confirming the characterization of universalism as the "grab rule". However, "while this may have been true when Singapore became a country in 1962, Singapore's reign as one of the main centres for the global economy means transnational insolvency cases receive investments from international institutions", it is aptly commented[20].

In this instance, in 2017, by virtue of the Companies Amendment Act (Cap 50, 2017 Rev Ed) Singapore changed its insolvency statute to a universalism system, as the government suggested several reasons for Singapore's decision to move from a territoriality regime to adopting the

[19] *Ryan Halimi,* An Analysis of the Three Major Cross-Border Insolvency Regimes (2017)

[20] *Ryan Halimi,* An Analysis of the Three Major Cross-Border Insolvency Regimes (2017)

UNCITRAL Model Law on Cross-border Insolvency. One of the most persuasive reasons was the strong connection that exists between Singapore's national law and English case and common law.

The example of Hong Kong

A description of Hong Kong's insolvency regime must begin with a few words about legal and political history. Hong Kong was nominally under British rule until 1997 but had retained political and legal autonomy during this period. In 1997, the official handover to the People's Republic of China occurred, making Hong Kong a Special Administrative Region of China. The situation in Hong Kong has been best described as "one country, two systems," which gives a picture of Hong Kong's involvement with China.

Modified universalism allows Hong Kong to reap the benefits of both regimes. For example, local courts can cooperate with other countries during insolvency proceedings, but they are under no circumstances forced to cooperate.

It is observed that "The Hong Kong Court has long shown its willingness to use the principle of modified universalism in a pragmatic manner". This decision forms part of a series of other decisions of the Hong Kong Court that explicitly recognise the international nature of insolvency proceedings and the need for courts to assist insolvency practitioners appointed to companies with multi - jurisdictional dimensions in a realistic way through mutual assistance and recognition of judgements[21].

4. CHAPTER IV: CORPORATE GROUPS

4.1 Definition and characteristics

As corporations become globalised, cross-border insolvencies constitute the majority of insolvency cases that raise unique concerns, such as the determination of the venue, the choice of law and cultural differences between the States involved. In order to be successful, a corporate group insolvency regime shall aim at the accomplishment of several goals, such as the maximization of the groups' assets and the general enterprise value, clarity and predictability in the jurisdiction and application of law, equal treatment of creditors that are similarly situated (par condicio creditorum), respect on the employment and the separate legal status of each entity, whilst at the same time absolute procedural fairness shall be ensured[22]. Therefore, a legal regime should navigate its provisions into the satisfaction of these targets and the convergence of diverse interests and cultures which is in advance a very difficult task.

[21] *Hogan Lovells Publications*, Hong Kong Court confirms common law recognition and assistance for foreign voluntary liquidations (2018)

[22] *Samuel L.Bufford*, Coordination of Insolvency Cases for International Enterprise Groups: A Proposal, 2012,, pg. 692

There are various definitions granted to the term "corporate group" or "enterprise group" with slight differentiations on the broadness of the scope. The most prevalent ones when used for the purposes of group insolvency procedures are provided by the UNCITRAL and the International Insolvency Institute[23]. "Enterprise group structures may be simple or high complex, involving numbers of wholly or partly owned subsidiaries, operating subsidiaries, sub-subsidiaries, sub holding companies, service companies, dormant companies, cross directorships, equity ownership and so forth. They may also involve other types of entity, such as special purpose entities, joint ventures, off shore trust, income trusts and partnerships"[24]. The International Insolvency Institute offers a simpler and more concise definition of a corporate group stating that "enterprise group means a group of companies or enterprises established or centered in more than one country which are linked together by some form of control, whether director, indirect or ownership by which linkage their businesses are centrally controlled or coordinated." Pursuant to these definitions, the term "enterprise group" covers various forms of economic organizations with two or more distinct legal entities linked through either a direct or indirect form of control (parent- subsidiaries).

As a consequence of the incredible diversity of the formation of enterprise groups (referred to as structural dynamism of corporate groups[25]) it is very difficult to introduce a legal framework that will correspond and match ideally the features and complexities of each case. Corporate groups, pursuant to the "degree of integration" criterion for their classification adopted by Irit Merovach[26], might be centralized or decentralized. Specifically, subsidiaries in foreign countries may conduct their own operations and enter into commercial activities independently of their parent company and without giving any sign to third parties that they belong to a wider group of companies. On the other hand, subsidiaries may also convey the impression to the public that they operate under a single group corporate identity and thus the administration and management of their operations are heavily relied upon the parent's company decisions, despite consisting separate legal entities incorporated under the laws of a foreign country[27]. This is the so-called integrated enterprise, dispersed over many separate legal entities, but acting as a single organism.

There are many economic, tax and legal grounds to allowing a group to form the structure that makes most sense for it. Risk allocation among diverse legal entities that operate under different jurisdictions is particularly essential in order to attract different creditors, whilst the aggregation of many entities into a large group reduces the cost of the capital and facilitates the support of the companies through upstream and downstream financing (leverage effect). However, the enormous diversity of group structures creates a "tension" between the economic reality of the existence of corporate groups acting as a single unit and the legal hurdles associated to the respect of the corporate law principle of "separateness" of legal entities that undermine the efficient treatment of each group when it comes to insolvency[28].

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[23] Ibid, pg.689

[24] UNCITRAL, Legislative Guide on Insolvency Law, Part 3: Treatment of Enterprise Groups in Insolvency, 2012

[25] *Nora Wouters, Alla Raykin*, Corporate Group Cross-border Insolvencies between the United States and the European Union: Legal and Economic Developments 2012-2013

[26] *Irit Merovach.*, Appropriate Treatment of Corporate Groups in Insolvency: A Universal View, pg. 186

[27] Ibid, pg. 398

[28] *Irit Merovach*, INSOL Europe's Proposals on Groups of Companies(in Cross-Border Insolvency: A Critical

So the question inevitably arises: should the legislator treat groups of companies as a single enterprise with a common seat for the purpose of insolvency or should groups of companies be handled as a unit of separate entities that maintain their separateness even in case of insolvency? Towards this crucial question, two approaches have been developed: the single entity approach and the separate entity approach.

4.2 The separate entity approach

The separate entity approach is the most common approach in many countries of the world and especially in continental Europe because of the recognition and implementation of the principle of separate legal personality of each member of the group that is maintained also in the case of insolvency. Shareholders have limited liability and the board of directors has duties of each separate company within the group. As a consequence of the separate entity approach, in the event of a corporate group insolvency, individual insolvency proceedings are commenced in the COMI (as defined below) of each entity (each debtor subject to one insolvency proceeding) and coordination between the liquidators is pursued in order to prevent contradictory decisions that will undermine the reorganization or the liquidation of the group.

4.3 The single entity approach

The single enterprise approach "relies upon the economic integration of enterprise group members, treating the group as a single economic unit that operates to further the interests of the group as a whole, or of the dominant group member, rather than of individual members"[29]. In other words, according to this approach, there is a predominance of the group's or parent's interests over the interests of each of the subsidiaries which operate in the direction of the enhancement of the interests of the group as a whole. Thus, despite the maintenance of the legal personality of each subsidiary, the group is treated as an economic unit that pursues common interests. This approach mostly fits enterprises with a high degree of centralization, whereby the decisions with respect to the administration and the management of the group are taken wholly or to a significant extent by the parent company. US law follows this approach, allowing as we will see below the opening of main collective insolvency proceedings for all the members of the group in cases where the identification of the assets of each member is impossible.

For countries that adopt the single enterprise approach, two main methods are deployed in order to treat effectively group insolvency: the procedural and the substantive consolidation.

Procedural consolidation of two or more members of the enterprise group constitutes an administrative process under which the insolvency proceedings of these members of the group are

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[29] UNCITRAL, Legislative Guide on Insolvency Law, Part 3: Treatment of Enterprise Groups in Insolvency, 2012, Article 34

jointly handled by the same court or same administrator (consolidation of the procedural aspects of insolvency). Typically, a procedural consolidation involves a common court file, the appointment of the same administrator and joint proceedings in the court. Nevertheless, the individual entities retain their separate insolvency estates and the consolidation affects only the connection of the procedural proceedings.

Substantive consolidation, in contrast to procedural consolidation, pertains to the merger of the estates of the respective entities, so that a single insolvency estate occurs after pooling together assets and liabilities and establishing a common body of creditors (who are all treated as creditors of the single entity)[30]. Substantive consolidation abolishes the legal boundaries of the entities leading to a consolidation of their assets and therefore has a great impact on creditors, since their claims for recovery are directed against the consolidated assets of the single entity that has been created and not against the separate entity with which they contracted the credit agreement. The elimination of the legal boundaries and of the legal substance of each member of the group (one of the basic principles in corporate law) along with the creation of an unpredictable position for the creditors indicate that substantive consolidation shall be used sparingly and in well –defined circumstances, where other remedies are reasonably held as inappropriate to lead to an effective insolvency of the enterprise group.

Procedural and substantive consolidation constitute "the two options for a modernized treatment of group insolvencies[31]". It is generally claimed that in certain cases, application of these mechanisms has proved to be more effective mainly because of the centralized control, the coordination of the procedures, the provision of guidance to complete the insolvency, the reduction of the administrative costs and the maximization of the value of the assets through an integrated sale. Their characterization as "modernized" stems from the fact that the specific legal approach of group insolvency reflects in a more consistent way the current economic reality and can offer a more appropriate solution compared to the traditional approach that adheres to the separateness of the legal entity within a group. However, as it is already mentioned, not all groups are so strongly integrated in order to allow for procedural or substantive consolidation and any implementation of either of the two mechanisms shall follow very careful considerations.

4.4. EU Legislative Framework

According to the European Commission –and being also an undeniable fact of the century- "Companies and individuals in the EU are increasingly extending their business activities to new EU countries. If they become insolvent, this can directly affect the proper functioning of the internal market. The Council set up the first common framework for insolvency proceedings in Europe, a regulation on insolvency proceedings. These rules on cross-border insolvency have been updated and modernised in 2015. The new rules shift focus away from liquidation, helping

[30] *Samuel L.Bufford*, Coordination of Insolvency Cases for International Enterprise Groups: A Proposal, 2012, pg. 687

[31] *Christoph G. Paulus*, Groups Insolvencies-Some thoughts about New Approaches, 2006-2007, Texas International Law Journal

businesses overcome financial difficulties, all the while protecting creditors' right to get their money back"[32].

The cross-border characteristics of insolvency have grown increasingly in number in recent years. The European Parliament notices that "in an ever-expanding and interconnected single market, many companies have cross-border interests when it comes to their clients, supply chains, scope of activity, and investor and capital base. According to the accompanying impact assessment of Insolvency Recommendation of 2014, about 25 % of bankruptcies in the EU involve creditors and debtors in more than one Member State, while more than a million SMEs in Europe are active abroad. Insolvency rules also influence cross-border expansion and investment: for instance, the variety of national insolvency laws makes it difficult for investors to assess credit risks for cross-border transactions. In addition, insolvency proceedings in a cross-border context are often inefficient, complex and expensive, especially for SMEs. Therefore, a higher degree of harmonisation in insolvency law is essential for a well-functioning single market and capital markets union"[33]. Below there is an attempt to provide a brief overview of the first regulation enacted by the European Union and a more in – depth analysis of the second one, the Recast, with a particular focus on the insolvency of groups of companies.

4.4.1. Council Regulation (EC) No 1346/2000

The Council Regulation EC 1346/2000 on insolvency proceedings was adopted in 29 May 2000 and since 31 May 2002 has been applicable to all Member States, except Denmark. Its regulatory scope covered the international jurisdiction, the applicable law and the recognition and enforcement of judgments that are delivered directly in connection with formal insolvency proceedings in the Member States. Its introduction brought about a significant step towards the harmonization of the national insolvency laws, since it granted the possibility for the first time in the European history to have pan-European insolvency proceedings, thus encompassing all assets and liabilities of the debtor wherever located in the territory of the European Union. Following the model of modified universalism[34], the Regulation introduces two different types of insolvency proceedings: the main insolvency proceedings (Art.3 par.1) and the secondary insolvency proceedings (Art.3 par.2 and Art.4).

As far as the main insolvency proceedings are concerned, the debtor's centre of main interests (hereinafter referred to as 'COMI') constituted the key and decisive provision which determined the jurisdiction as well as the applicable law. The COMI, in particular, would determine in which Member State the main insolvency proceedings shall be opened and subsequently which substantial and procedural law shall be applied in connection with those procedures. However, despite the crucial role of the concept of the COMI in the context of the Regulation, there was only a general definition in Recital 13 of the Regulation Preamble which concretised a law and

[32] "Insolvency and the internal market", available at: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/civil-justice/civil-and-commercial-law/insolvency-proceedings_en

[33] Briefing of European Parliament " New EU insolvency rules give troubled businesses a chance to start anew", 2018

[34] *Chrysoula M. Mihailidou*, Forum Concursus Shopping- A Constant Threat in the EU Insolvency Law, Simultaneously a Reforming Proposal, Journal "Trial", page 3, July-September 2007

economics dimension in stipulating that "the centre of main interests shall correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties". A lot of criticism regarding Regulation 1346/2000 had been exercised over the absence of a more accurate legal definition of COMI[35] that contributed to the augmentation of the "insolvency tourism" phenomenon.[36] With respect to the secondary proceedings, the determining factor was whether the debtor had an "establishment"[37] and although the definition did not create significant interpretation problems, the exclusive character of these proceedings as winding-up constituted an unreasonable major obstacle in current trend towards reorganization proceedings.

In the light of these problematic provisions and in conjunction with the omission of certain rules regarding pre-insolvency proceedings, the majority of such issues were stressed out in the proposal of the European Commission that was released on 12.12.2012[38], stating that the Regulation does not sufficiently correspond to the current EU priorities and national practices that have shifted their focus on more efficient insolvency tools, in particular in facilitating the restructuring of distressed enterprises at a pre insolvency stage rather than driving them into liquidation. In addition, while a significant number of cross-border insolvencies involve groups of companies, the Regulation does not contain specific rules with respect to their insolvency thus allowing in this way unacceptable practices leading to forum shopping. In December 2013, the Committee on Legal Affairs adopted its first-reading report, in that way welcoming the proposal[39]. A number of amendments were tabled, aiming at removing ambiguities and aligning the text with other EU legal acts, as well as enhancing the rescue of economic viable enterprises and the coordination of insolvency proceedings in a group of companies.

4.4.2. Regulation (EU) 2015/848

Most expectedly, the EU legislature finally addressed the above mentioned concerns with a new - in fact revised- version of the EU Insolvency Regulation, the Regulation (EU) 2015/848 on insolvency proceedings, which entered into force on the 26th of June 2017. After 15 years of service, the European Commission thought it time to retire the original EU Insolvency Regulation (Regulation 1346/2000) on insolvency proceedings and mark a new chapter in integrating its Member States' procedural insolvency frameworks. One of the main novel features of the Revised Regulation is the new Chapter V in regards to the "Insolvency Proceedings of Members of a Group of Companies". The said chapter contains new rules seeking to promote cross-border cooperation and coordination between courts and insolvency practitioners in insolvency proceedings

[35] *Ian Fletcher*, Insolvency in Private International Law-National and International Approaches, 2nd edition, OUP, 366 at par. 7.41," the absence of clear definition of the COMI is "singularly unhelpful"

[36] *Nis Carstens*, Die Internationale Zustandigkeit im europaischen Insolvenzrecht, 2005, page. 86

[37] EC Council Regulation No. 1346/2000, Art. 2, element (h) "establishment shall mean any place of operations where the debtor carries out a non-transitory economic activity with human means and goods".

[38] Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) NO.1346/2000 on insolvency proceedings, 2012/0360(COD)

[39] *Klaus-Heiner Lehne*, Report on the proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings

concerning groups of companies within the European Union, thus making use of and incorporating the above-mentioned approach of "mitigated or modified universalism".

Although Regulation 1346/2000 had worked relatively well in dealing with cross-border insolvency proceedings within the Union - and, as stated by the EU Commission in its Report, "The Commission concludes that the Regulation is generally regarded as a successful instrument for the coordination of insolvency proceedings in the Union. Its fundamental choices and underlying policies are largely supported by stakeholders"[40]-, it is generally admitted that the new text of the so called "Recast European Insolvency Regulation" has addressed a large number of gaps and ambiguities raised by the practical application of the previous version[41].

One could argue that the basic novelties brought in by virtue of the new text include inter alia (i) the extension of its scope of application to pre-insolvency or hybrid proceedings, (ii) a clarification of the concept of Center of Main Interests (COMI) and an endeavour to reduce the incentives for forum shopping, (iii) strengthening the role of the main proceedings when several proceedings are opened against the same debtor in different Member States, (iv) the introduction of new rules with regards to the publication of the proceedings and the submission of claims, (v) and the aforementioned wholly new chapter concerning the insolvency of groups of companies.

Admittedly, the most relevant addition to the issue at hand is the last observation regarding the framework applicable to the insolvency of corporate groups included in Chapter V of the Recast Regulation and in particular articles 56 – 77. After all, according to Recital 51 of the said Regulation "This Regulation should ensure the efficient administration of insolvency proceedings relating to different companies forming part of a group of companies".

4.4.2.1. Treatment of groups of companies

The EU Recast Regulation provides for a single insolvency practitioner that may be appointed over several group companies, subject to local qualification and licensing issues (Recital 50 of Regulation (EU) 2015/848) and subject to any contradiction with the rules applicable to them (Recital 53 of Regulation (EU) 2015/848). On practical terms, that means that in case there is sufficient time and several group companies exist in various European countries, COMI can be moved to a single common Member State and co-ordinated insolvency proceedings may be initiated for all of the companies – members of the group in that one designated Member State.

Where a corporate group is involved, an insolvency practitioner has various rights to facilitate the administration of proceedings. Such powers are listed under article 60 of the Regulation entitled "Powers of the insolvency practitioner in proceedings concerning members of a group of companies". In particular, the powers afforded the insolvency practitioner are the following: to be heard in any proceedings opened regarding another group company (Article 60(1)(a) of Regulation

[40] Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, COM (2012) 743 final, 4; see also *i.a. Horst Eidenmüller*, "A New Framework for Business Restructuring in Europe: The EU Commission's Proposal for a Reform of the European Insolvency Regulation and Beyond", *M.J.E.C.L.*, 2013, 133, at 134; *Stephen Taylor*, "Conference on Reform of the European Insolvency Regulation", ***I.I.****L.R.* 3, 2011, at 242.

[41] *Francisco Garcimartín* , The EU Insolvency Regulation Recast: Scope and Rules on Jurisdiction (2016)

(EU) 2015/848), to request a stay (of up to three months, extendable to six months) of any measure relating to the realisation of assets of another group company, if (Article 60(1)(b) and Recital 60 of Regulation (EU) 2015/848) the following conditions are met: a. a restructuring plan for all or some group members has been proposed and has a reasonable chance of success, b. the stay is necessary to ensure proper implementation of the restructuring plan, c. the restructuring plan would benefit creditors in the proceedings for which the stay is requested, d. neither the insolvency proceedings where the insolvency practitioner has been appointed nor the proceedings over which the stay is requested are subject to group co-ordination proceedings. Lastly, the insolvency practitioner may as well apply for the opening of group co-ordination proceedings, which will be further analysed below.

4.4.2.2. COMI of groups of companies

The EU Recast Regulation on Insolvency in fact codifies the previous case law in Re Eurofood IFSC, with the bottom-line being that one cannot automatically impose the centre of main interests (COMI) of the parent over all the subsidiaries, but rather has to take into consideration the COMI of each individual entity. Such perspective might inevitably not be straightforward in practice for large multi-national enterprise groups which are administered along divisional lines where corporate identities have become blurred.

In accordance with the EU Recast Regulation a given court should not be prevented from initiating proceedings for more than one members of the same group in a single jurisdiction provided that it finds that the COMI of each of those members is located in a single Member - State. Further, the court may also decide to appoint the same insolvency practitioner for each entity.

Even in the case of group co-ordination proceedings, the court shall respect each group member’s separate legal personality (Recital 54 of Regulation (EU) 2015/848).

4.4.2.3. Communication between insolvency practitioners and courts

Insolvency practitioners appointed in connection with groups of companies and courts involved with the same issue are under an obligation to co-operate and communicate. This is a mandatory provision under the Regulation and most of the relevant wordings use the word 'shall'. However, this is subject to the co-operation being appropriate to facilitate effective administration of the proceedings, conflicts of interest, any procedural rights of the parties and any confidentiality issues (Articles 56–58 and Recital 52 of Regulation (EU) 2015/848). The costs shall be regarded as costs and expenses in the respective proceedings (Article 59 of Regulation (EU) 2015/848). Both insolvency practitioners and courts are encouraged to take into account the UNCITRAL Communication and Co-operation Guidelines for Cross-border Insolvency and other best practices for co-operation (see Recital 48 of Regulation (EU) 2015/848 and below analysis regarding the international insolvency of corporate groups according to the UNCITRAL Model Law on Enterprise Groups).

The insolvency practitioners and courts involved where proceedings have been initiated for several companies belonging to the same group are under the same obligation to co-operate and

communicate as those involved in main and secondary proceedings of the same debtor (see Recital 52 of Regulation (EU) 2015/848).

In particular, and in accordance with the relevant Articles of the Recast Regulation, an insolvency practitioner appointed in relation to a member of a group of companies shall co-operate and communicate with any court which has initiated or is considering opening proceedings over another group member (Article 58(a) of Regulation (EU) 2015/848), whilst at the same time the practitioner may request information from that court concerning the proceedings of the other group member or request assistance regarding their proceedings (Article 58(b) of Regulation (EU) 2015/848)

An insolvency practitioner responsible for a particular member of a multi-jurisdictional group has various powers at his/her disposal and might, to the extent appropriate to facilitate the effective administration of the proceedings (Article 60 of Regulation (EU) 2015/848) proceed to any of the following actions set out in the aforesaid Article: be heard in any of the other group members' proceedings; request a stay of any asset realisation measure in the other group members' proceedings, in case that a restructuring plan for all or some of the group members in insolvency proceedings has been proposed and presents a reasonable chance of success, in case such a stay is necessary to ensure the proper implementation of the restructuring plan, in case the restructuring plan would benefit the creditors in the proceedings over which the stay is requested; or in the case that neither proceedings are subject to group co-ordination proceedings or apply to open group co-ordination proceedings under Article 61 of Regulation (EU) 2015/848.

If requested to stay proceedings, the court must hear the insolvency practitioner appointed in the Member - State where the stay is requested, but must stay any measure in connection with the realisation of assets in whole or in part if the above conditions are met. The stay may be for any period up to three months, which the court considers is appropriate and compatible with the rules applicable to the proceedings (Article 60(2) of Regulation (EU) 2015/848). This may be extended up to six months in total if the court considers it appropriate and in case the conditions continue to be fulfilled (Article 60(2) of Regulation (EU) 2015/848).

In return, the court ordering the stay may require the insolvency practitioner requesting the stay to take any suitable measure available under national law to guarantee creditors' interests (Article 60(2) of Regulation (EU) 2015/848).

4.4.2.4. Co-operation between insolvency practitioners

Co-operation between the insolvency practitioners should not be conducted against the interests of the creditors in each of the proceedings and the co-operation should be aimed at finding a solution that would leverage synergies across the group (Recital 52 of Regulation (EU) 2015/848).

In particular, co-operation between insolvency practitioners may take any form, including conclusion of agreements or protocols (Article 56(1) of Regulation (EU) 2015/848), shall as soon as possible communicate any information which may be relevant to the other proceedings, shall consider where possibilities exist for co-ordinating the administration and affairs of the group members subject to insolvency proceedings and if so, co-ordinate such administration and

supervision; and shall consider what possibilities exist for restructuring group members subject to insolvency proceedings and if so, co-ordinate with regard to the proposal and negotiation of a co-ordinated restructuring plan (Article 56(2) of Regulation (EU) 2015/848).

For the purposes of communicating information and co-ordinating administration and supervision, of some or of the entirety of the insolvency practitioners involved might agree (if permitted by the rules applicable to each of the proceedings) (Article 56 of Regulation (EU) 2015/848) to grant further (additional) powers to an insolvency practitioner appointed in one of the proceedings or allocate certain tasks among themselves.

The same measures apply even if there is no insolvency practitioner in debtor-in-possession proceedings (Articles 41, 76 of Regulation (EU) 2015/848).

4.4.2.5. Co-operation between courts involved with group companies

Mutatis mutandis, similar rules apply to co-operation between courts engaged in cases of insolvency of different entities of the same multi-national group of companies. What is ground-breaking is the fact that this is the very first time that an obligation is placed upon courts (and not merely upon insolvency practitioners) to co-operate. The courts have also at their disposal the discretion to appoint an independent person or body acting on its instructions to fulfil this role. Such communications may be direct, provided that procedural rights of the parties and confidentiality are respected (Article 42(2) of Regulation (EU) 2015/848). Where insolvency proceedings relate to two or more group members, a court which has initiated such proceedings shall co-operate with any court which has initiated proceedings (or before which a request to open is pending) to the extent that such co-operation is appropriate to facilitate the effective administration of the proceedings, not incompatible with the rules applicable to them, and at the same time does not entail any conflict of interest (Article 57(1) of Regulation (EU) 2015/848). The above mentioned requirements shall be respected and met cumulatively.

In particular, and in accordance with the relevant Articles of the Regulation, the courts in implementing the co-operation may appoint an independent person or body to act on its instructions to facilitate such co-operation, provided that it is appropriate and not incompatible with the rules applicable to them (Article 57(1) of Regulation (EU) 2015/848); communicate directly with each other, provided that such communication respects procedural rights and confidentiality (Article 57(2) of Regulation (EU) 2015/848); request information or assistance directly from each other, provided that such communication respects procedural rights and confidentiality (Article 57(2) of Regulation (EU) 2015/848); and/or take action towards the following: (a) coordination in the appointment of insolvency practitioners; (b) communication of information by any means considered appropriate by the court; (c) coordination of the administration and supervision of the assets and affairs of the members of the group; (d) coordination of the conduct of hearings; (e) coordination in the approval of protocols where necessary.

Moreover, both insolvency practitioners and courts are encouraged to make good use of protocols, in the cases that this is compatible with the rules applicable to each of the main and secondary proceedings (Article 41(1) and Recital 49 of Regulation (EU) 2015/848). Such protocols might as

well comprise either a written or an oral and generic instrument (e.g. emphasising the need for close co-operation between the parties without addressing specific issues) or specific in scope.

It is possible that such protocol be approved by the relevant courts in case that this is provided for and required by national legal framework.

4.4.2.6. The group co-ordination proceedings

A new concept called 'group co-ordination proceedings' was put forwards by the European Parliament and is introduced under the Article 61 of Regulation (EU) 2015/848. The new procedural rules on co-ordination are proposed with the aim of improving co-ordination of the insolvencies of group members and to allow for co-ordinated restructuring of the group. This co-ordination should strive to ensure the efficiency of co-ordination but also respect each group member's separate legal personality (Recital 54 of Regulation (EU) 2015/848). The new framework is also striving to facilitate the effective administration of the insolvency proceedings of the group members (Recital 57 of Regulation (EU) 2015/848) and, lastly, use their best endeavours to have a generally positive impact for group members (Recital 57 of Regulation (EU) 2015/848).

The rules on co-operation, communication and co-ordination apply exclusively in cases that proceedings in regards to different members of the same group of companies have been opened in more than one Member - State (Recital 62 of Regulation (EU) 2015/848). It derives therefore from this observation, that, prima facie, such rules will not be applicable if proceedings are initiated in one Member - State and several non-Member States (eg UK, Switzerland, Denmark, US).

Any insolvency practitioner appointed over a group company may request the opening of group co-ordination proceedings by the submission of a relevant request (Article 61(1) of Regulation (EU) 2015/848) with any court having jurisdiction over the insolvency proceedings of any group company. In order to be admissible, such request shall include at least the information that will be analysed below. In particular, the request shall contain the name of the proposed group co-ordinator (details of his or her eligibility, details of his or her qualifications and his or her written consent to act "agreement to act as coordinator"). The regulation makes here a particular note flagging up the fact that one may not be eligible as an insolvency practitioner appointed over any of the existing group companies and must have no conflict of interest in respect of the members of the group, their creditors and the insolvency practitioners appointed over any group companies (Article 71(2) of Regulation (EU) 2015/848). Furthermore, an outline of the proposed group co-ordination and the reasons why the court has jurisdiction shall be also depicted in the request and accompany the document to be submitted. In addition, the Regulation requires also a list of the insolvency practitioners appointed in regards to the members of the group in their entirety and, where relevant, the names of all courts and competent authorities involved in such insolvency proceedings against the members of the group. Lastly, it is essential that also an outline of the estimated costs and the share of those costs to be paid by each member of the group is included in the aforesaid request to the court.

In general, the court first seised of a request to open co-ordination proceedings has jurisdiction and other courts are under an obligation to decline jurisdiction (Article 62 of Regulation (EU)

2015/848). In accordance with Recital 57 of the Regulation (EU) 2015/848 under question, the court must make an assessment of the criteria (i.e. facilitating effective administration of the group members and having a generally positive impact on creditors) before proceeding to initiate group co-ordination proceedings. As soon as possible, the court first seised shall give notice to all other members of the group, provided that certain conditions are met. These conditions are laid down in Article 63 of Regulation (EU) 2015/848 and comprise the following. First, the court must be satisfied that such co-ordination proceedings are appropriate to facilitate the effective administration of the insolvency proceedings in relation to different members of the group. Second, it must be ensured that no creditor of any member of the group expected to participate in the proceedings is likely to be financially disadvantaged by its inclusion in group co-ordination proceedings, and, lastly, the proposed co-ordinator fulfils the relevant requirements set out in the Article 71 of the Regulation.

This may as well lead to a race of the courts to take control of the new group co-ordination proceedings. The criteria for initiating proceedings take no consideration in which Member - State is conducting main proceedings for the parent company. However, at least two-thirds of all insolvency practitioners appointed in insolvency proceedings of group companies may agree in writing that another court has exclusive jurisdiction on account of the fact that such court is deemed to be the "most appropriate" group for the opening of group coordination proceedings (Article 66 of Regulation (EU) 2015/848). As described, The choice of court shall be made by virtue of a joint agreement in writing or at least evidenced in writing and may be agreed upon until such time as group coordination proceedings have been opened in accordance with the procedure defined in Article 68 of the Regulation. The competent court to hear the request for the opening of group coordination proceedings will be the court agreed in accordance with Article 61, as explained hereunder.

In accordance with Article 68 of Regulation (EU) 2015/848, after the 30-day period for objections to inclusion in the group co-ordination proceedings and choice of co-ordinator has elapsed, the court may initiate group co-ordination proceedings and shall proceed to the following actions: it shall appoint a co-ordinator, decide on the outline of the co-ordination, decide on the costs estimate and share to be paid by each group member and give notice of the decision opening group proceedings to the participating insolvency practitioners and group co-ordinator.

The group co-ordinator must communicate with the insolvency practitioners in either any language agreed upon with them or, in the absence of any agreement, the official language or one of the official languages of the proceedings opened for that member of the group (Article 73 (1) of Regulation (EU) 2015/848). As to the communication between the coordinator and the court, the co-ordinator must co-ordinate with a court in the official language applicable to that court (Article 73(2) of Regulation (EU) 2015/848). In practice, this means that group co-ordinators will often have to be multilingual.

Furthermore, and in accordance with Article 75 of Regulation (EU) 2015/848 the court which appointed the co-ordinator has the power to act of its own motion and revoke their appointment if they act to the detriment of creditors of a participating group member or fail to comply with their obligations under the Regulation.

Recital 61 of the Regulation makes it clear that Member - States can still create their own national rules to supplement the rules on co-operation, communication and co-ordination, provided that they are limited to their own domestic area and their application does not impair the efficiency of the rules in the EU Recast Regulation on Insolvency.

The European Parliament is willing to track the progress and closely monitor this newly imposed tool and the European Commission is required to report on the application of group co-ordination proceedings by the 27th of June 2022 to the European Parliament, the European Council and the European Economic and Social Committee (Article 90(2) of Regulation (EU) 2015/848).

It shall be noted though that consolidation of the proceedings or various estates is expressly prohibited under Article 72(3) of Regulation (EU) 2015/848.

However, and according to Recital 60 of the Regulation, there is an alternative mechanism to achieve a co-ordinated restructuring of the group in place in respect of groups of companies not participating in the group co-ordination proceedings. In particular, any insolvency practitioner appointed in proceedings relating to a member of a group of companies has a "standing" to request a stay of any measure related to the realisation of the assets in the proceedings opened with respect to other members of the group which are not subject to group coordination proceedings. It is however only possible to request such a stay if the following conditions are cumulatively met: a restructuring plan is presented for the members of the group concerned, the proposed plan is to the benefit of the creditors in the proceedings in respect of which the stay is requested, and the stay is necessary to ensure that the plan can be properly implemented.

4.4.2.7. Inclusion in group co-ordination proceedings

The insolvency practitioners involved should be informed at an early stage of the essential elements of the co-ordination to allow them to take an informed decision on whether to take part in the first place (Recital 56 of Regulation (EU) 2015/848). In accordance with Article 64(3) of the Regulation, ahead of taking any decision as to whether to participate in the co-ordination proceedings or not, the objecting insolvency practitioner is still subject to any local requirements to get approval from their creditors' committee or local court (if required by the law of the State where the certain proceedings have been initiated). The aforesaid Recital suggests also that in order to ensure the voluntary nature of group co-ordination proceedings (Recital 56 of Regulation (EU) 2015/848), insolvency practitioners of the other groups of companies may object within 30 days by making use of a new standard form to be used by insolvency practitioners appointed in respect of members of a group for the submission of objections in group co-ordination proceedings (see annex III of Regulation (EU) 2017/1105 of 12 June 2017 and specifically form entitled "Objection with regard to group co-ordination proceedings".

According to Article 64, an insolvency practitioner appointed in respect of any group member may object to one or both of the following: (a) the inclusion within group coordination proceedings of the insolvency proceedings in respect of which it has been appointed; or (b) the person proposed as a coordinator.

Once an insolvency practitioner has objected, he / she will not be included in the co-ordination proceedings, the group co-ordinator will have no powers over them and they will not be liable to the costs of the group co-ordination proceedings (Article 65 of Regulation (EU) 2015/848). He / she, however, may at a later stage request to opt in to the co-ordination proceedings (subject to the group co-ordinator being satisfied the criteria for jurisdiction still exist or all insolvency practitioners involved agreeing) (Recital 56 and Article 69 of Regulation (EU) 2015/848). All of the insolvency practitioners should be informed of the co-ordinator's decision and be therefore offered the opportunity to challenge such decision before the court that has opened co-ordination proceedings. It can (and has been) supported that the aforesaid possibility, together with the fact that any insolvency practitioner is under no obligation to follow the group co-ordination plan (by merely being required to give their reasons to the co-ordinator and any persons or bodies they report to under their national law), that reduces the strength of co-ordination proceedings and results in unpredictably for creditors and other stakeholders, which is exactly the situation whose avoidance the introduction of the Regulation was aiming at.

4.4.2.8. Powers of the group co-ordinator

One of the most important aspects of the group coordination proceedings is the powers and rights of the appointed group co-ordinator. This is because it is only essential that the persons entrusted with the overall control and conduct of the venture described above, are also similarly empowered with all the necessary rights and procedural powers that will render them sufficiently ready to perform their (rather essential) role.

Article 72 of Regulation (EU) 2015/848 provides that the group co-ordinator must perform their duties impartially and with due care and has various powers to identify and outline recommendations for the co-ordinated conduct of the insolvency proceedings and to propose a group co-ordination plan, that identifies, describes and recommends a comprehensive set of measures appropriate to an integrated approach to the resolution of the group members' insolvencies. In particular, the plan may contain proposals for: (i) the measures to be taken in order to re-establish the economic performance and the financial soundness of the group or any part of it; (ii) the settlement of intra-group disputes as regards intra-group transactions and avoidance actions; (iii) agreements between the insolvency practitioners of the insolvent group members.

The group co-ordinator reserves also the right to be heard and participate in any creditors' meetings of the companies of the group, to mediate any dispute between insolvency practitioners of group members, to request information from any insolvency practitioner in respect of any member of the group where that information is or might be of use when identifying and outlining strategies and measures in order to coordinate the proceedings; and, lastly, to request a stay for a period of up to 6 months of the proceedings opened in respect of any member of the group, provided that such a stay is necessary in order to ensure the proper implementation of the plan and would be to the benefit of the creditors in the proceedings for which the stay is requested; or accordingly request the lifting of any existing stay. Article 72 notes that such a request shall be made to the court that opened the proceedings for which a stay is requested.

Participating insolvency practitioners are under an obligation to communicate any information relevant for the co-ordinator to perform their tasks (Article 74(2) of Regulation (EU) 2015/848).

Although the insolvency practitioners of participating group members must co-operate with the co-ordinator (to the extent not incompatible with rules applicable to the respective proceedings (Article 74(1) of Regulation (EU) 2015/848) and consider the co-ordinator's recommendations and content of the group co-ordination plan as they conduct their own insolvency proceedings, they are expressly, by virtue of Article 70 (2) of the Regulation, under no obligation to follow them in whole or in part, which in practice means that the recommendations are not binding. Where an insolvency practitioner does not follow the co-ordinator's recommendations or the proposed group plan, they must merely provide a certain reasoning to that end to any person or bodies they report to under national law (e.g. creditors' committee) along with the co-ordinator himself / herself.

4.4.2.9. Costs of group co-ordination proceedings

A parallel review of Article 77(1) of the Regulation along with the Recital 58 of the said Regulation, concludes that the advantages of the group co-ordination proceedings should not be outweighed by the costs of the proceedings and the costs of the co-ordination and share which each group member bears must be adequate, proportionate to the tasks fulfilled and reflect reasonable expenses. The costs will be determined in accordance with the national law of the Member State where the group co-ordination proceedings have been opened. The INSOLVENCY practitioners involved should also have the chance to control the costs from an early stage and the national law of a particular insolvency practitioner could require them to seek approval from their local court or creditors' committee (Recital 58).

In cases that the co-ordinator considers that the fulfilment of their tasks requires a significant increase in costs or costs exceed 10% of the estimated costs (Article 72(6) and Recital 59 of the Regulation) the co-ordinator must give notice immediately ("inform without delay") to the participating insolvency practitioners and subsequently seek and get authorisation from the court which opened the group co-ordination proceedings. Ahead of taking its decision, the court should give the possibility to the participating insolvency practitioners to be heard before it, in order to allow them to communicate their observations on the appropriateness of the coordinator's request. (Recital 59 of Regulation (EU) 2015/848).

In the absence of any objections, participating insolvency practitioners must pay within 30 days or file an objection with the court which opened the co-ordination proceedings (Article 77(3) of Regulation (EU) 2015/848) and any participating insolvency practitioner may challenge that court's decision (Article 77(5) of Regulation (EU) 2015/848), which is possible to have as an outcome prospective delay and uncertainty.

In the event of an objection, the court that opened the group coordination proceedings shall, upon the application of the coordinator or any participating insolvency practitioner, decide on the costs and the share to be paid by each member in accordance with the criteria set out in paragraph 1 of this Article, and taking into account the estimation of costs already provided.

4.5. International Legislative Framework

4.5.1. UNCITRAL Model Law on Cross-Border Insolvency

The UNCITRAL Model Law on Cross-Border Insolvency was a model law issued by the Secretariat of UNCITRAL on 30 May 1997 to assist states in relation to the regulation of corporate insolvency and financial distress involving companies which have assets or creditors in more than one state. The UNCITRAL Model Law is designed to assist states in developing a modern, harmonized and fair insolvency framework to more effectively address instances of cross-border proceedings concerning debtors experiencing severe financial distress or insolvency[42].

In essence, it comprises a framework of legislation, which, when enacted into a country's legislation, it sets out when that country's national courts must recognise insolvency proceedings that have been started in a different country. Following recognition, the court may provide certain assistance to the foreign insolvency office holder. The Model Law on Cross-Border Insolvency does not attempt a substantive unification of insolvency law and any country can choose whether and how to implement it[43]. Although this Model Law does not contain any provisions on the coordination of international insolvency proceedings as regards enterprise groups, it seems essential that a brief overview of the mechanism and the basic tools and concepts is briefly depicted. This is for two reasons: one, it is the first and only attempt to regulate international insolvency on a global level rather than regionally and, secondly and most importantly, it will consist the basis upon which - and much later on in history -, the new legal instrument will depend to regulate specifically the insolvency groups of companies in international cases.

4.5.1.1. Objectives of the Model Law

The Model Law is designed to provide uniform legislative provisions to deal with the recognition of foreign insolvency proceedings and the coordination of concurrent proceedings. Its objectives, as expressed in the preamble to the Model Law, are the following: co-operation between the courts and competent authorities involved in cases of cross-border insolvency, greater legal certainty for trade and investment, fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor, protection and maximisation of the value of the debtor's assets, helping to rescue financially troubled businesses.

As regards the legal status of the Model Law and further to the indications above, it has no legal or binding status but serves as a model which may be adopted or not, with or without modification, by jurisdictions. In order to take legal effect in a jurisdiction, the Model Law must be actively incorporated into that jurisdiction's national legislation by virtue of a national law. Legislation based on the Model Law has been adopted in jurisdictions including Great Britain (through the

[42] United Nations Commission on International Trade and Law. Available at: https://uncitral.un.org/en/texts/insolvency

[43] Practical Law, Thomson Reuters, UNCITRAL Model Law on Cross-Border Insolvency

CBIR 2006), the US (in Chapter 15 of the US Bankruptcy Code), South Africa and Japan. Legislation based on the Model Law has been adopted in 49 States in a total of 53 jurisdictions[44].

There is no legal requirement that, if the Model Law is adopted in a jurisdiction, it must be adopted in its original form. National legislatures are generally free to "pick and choose" from the Model Law and adapt such provisions according to their state's particular needs. This means that the manner and degree of enactment of the Model Law varies amongst jurisdictions. Accordingly, implementation of the Model Law is voluntary and, in most cases, where it has been adopted into domestic legislation, it has been adopted without a requirement of reciprocity. That means that the courts of an enacting jurisdiction may recognise foreign insolvency proceedings regardless of whether the home jurisdiction of those proceedings has also implemented legislation based on the Model Law[45].

As regards the scope of application, Article 1 specifies that Model Law applies where assistance is sought in a State by a foreign court or a foreign representative in connection with a foreign proceeding; or assistance is sought in a foreign State in connection with a proceeding under [*identify laws of the enacting State relating to insolvency*]; or a foreign proceeding and a proceeding under [*identify laws of the enacting State relating to insolvency*] in respect of the same debtor are taking place concurrently; *or* creditors or other interested persons in a foreign State have an interest in requesting the commencement of, or participating in, a proceeding under [*identify laws of the enacting State relating to insolvency*].

It is essential to note that Model Law contains numerous blanks and placeholders with parenthetical instructions and options for the states that are willing to pass national legislation based on it, leaving them the freedom to complete or amend as they deem fit.

Model Law also stresses expressly that it is not applicable to a proceeding concerning specific types of entities, such as banks or insurance companies, that are subject to a special insolvency regime in each State.

4.5.1.2. Key provisions

United Nations find that Model Law focuses on four elements identified as key to the conduct of cross-border insolvency cases: access, recognition, relief (assistance) and cooperation[46].These concepts are set out and explained below.

(a) Access

[44] United Nations Commission on International Trade and Law. Available at: https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status

[45] Thomson Reuters Practical Law, The UNCITRAL Model Law on Cross-Border Insolvency and the Cross-Border Insolvency Regulations 2006, by Practical Law Restructuring and Insolvency

[46] United Nations Commission on International Trade and Law. Available at: https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status

These provisions give representatives of foreign insolvency proceedings and creditors a right of access to the courts of an enacting State to seek assistance and authorize representatives of local proceedings being conducted in the enacting State to seek assistance elsewhere.

(b) Recognition

One of the key objectives of the Model Law is to establish simplified procedures for recognition of qualifying foreign proceedings in order to avoid time-consuming legalization or other processes that often apply and to provide certainty with respect to the decision to recognize. These core provisions accord recognition to orders issued by foreign courts commencing qualifying foreign proceedings and appointing the foreign representative of those proceedings. Provided it satisfies specified requirements, a qualifying foreign proceeding should be recognized as either a main proceeding, taking place where the debtor had its centre of main interests at the date of commencement of the foreign proceeding or a non-main proceeding, taking place where the debtor has an establishment. Recognition of foreign proceedings under the Model Law has several effects - principal amongst them is the relief accorded to assist the foreign proceeding.

(c) Relief

A basic principle of the Model Law is that the relief considered necessary for the orderly and fair conduct of cross-border insolvencies should be available to assist foreign proceedings. By specifying the relief that is available, the Model Law neither imports the consequences of foreign law into the insolvency system of the enacting State nor applies to the foreign proceedings the relief that would be available under the law of the enacting State. Key elements of the relief available include interim relief at the discretion of the court between the making of an application for recognition and the decision on that application, an automatic stay upon recognition of main proceedings and relief at the discretion of the court for both main and non-main proceedings following recognition.

(d) Cooperation and coordination

These provisions address cooperation among the courts of States where the debtor's assets are located and coordination of concurrent proceedings concerning that debtor. The Model Law expressly empowers courts to cooperate in the areas governed by the Model Law and to communicate directly with foreign counterparts. Cooperation between courts and foreign representatives and between representatives, both foreign and local, is also authorized. The provisions addressing coordination of concurrent proceedings aim to foster decisions that would best achieve the objectives of both proceedings, whether local and foreign proceedings or multiple foreign proceedings.

4.5.1.3. The structure of the Model Law

The Model Law comprises 32 articles split into five sections (referred to as chapters).

The greater part of the Model Law refers to the recognition (and its consequences) and cooperation of the courts of one jurisdiction (the jurisdiction that transposes the Model Law into its domestic legislation in regards to insolvency proceedings initiated in another jurisdiction.

Before diving into the applicability of Model law specifically as regards the insolvency of groups of companies, below there is an attempt to briefly provide an overview of the five different parts, referred to as "Chapters" of the Model Law.

4.5.1.4. Overview of the five Chapters

To begin with, Chapter 1 contains the general provisions including definitions and interpretation clauses. In particular the provisions of Chapter 1 Allows "enacting jurisdictions" to exclude certain types of entities from the ambit of the Model Law (with specific details to be enacted in the relevant jurisdiction), disapplies the Model Law as enacted in any jurisdiction if or to the extent that it would offend or conflict with the public policy or treaty (or other agreements) obligations of the enacting jurisdiction and it clarifies that other mechanisms for assistance already existing under the laws of the enacting jurisdiction are not limited by the enactment of the Model Law into local laws.

Subsequently**,** Chapter 2 deals with the access that a foreign representative of a foreign insolvency proceeding should have in the courts of the enacting jurisdiction. In particular a foreign representative has the right to apply to the court in the state where the Model Law has been enacted, and can do so without exposing the foreign representative, or the debtor that he or she represents, to the courts of that jurisdiction for any other purpose. Further, the foreign representative has standing to start insolvency proceedings in respect of the debtor in the enacting jurisdiction or participate in one already underway or otherwise started. Lastly, foreign creditors should have the same rights to claim and to receive communications in relation to the insolvency proceedings as domestic creditors.

Chapter 3 comprises the often referred to as the "core of the substance of the Model Law". Its provisions set out the following main rules:

- A foreign representative may make an application for recognition of the foreign proceedings in respect of which he or she has been appointed, and the documentary requirements that should accompany the application.

- The debtor's registered office (or habitual residence, if an individual) is rebuttably presumed to be the place of the debtor's centre of main interests.

- From the time an application for recognition is made, the court to which the application is made may (provided that the interests of local creditors are adequately protected) make interim orders, pending the decision on recognition, to stay execution against the debtor's assets; entrust the administration or realisation of the debtor's assets located in the jurisdiction to the foreign representative or some other person acceptable to the court, in order to preserve and protect the value of assets that are perishable, susceptible to devaluation or otherwise in jeopardy; suspend the debtor's right to deal with its assets; provide for the examination of witnesses and the delivery of information concerning the

debtor's affairs; grant any other relief that would be available to an equivalent office-holder or proposed office holder under the laws of the enacting state.

- On recognition of a foreign proceeding as a foreign main proceeding, a stay (commonly referred to as the "automatic stay") will come into operation: that stay will not prevent the commencement of claims against the debtor where that is necessary to preserve a claim against the debtor (for example where otherwise claims may become time-barred), nor does it prevent a person commencing insolvency proceedings in the jurisdiction against the debtor or filing claims in any insolvency proceeding.

- On recognition of any foreign insolvency proceeding (whether main or non-main) the court may entrust the assets of the debtor in the jurisdiction to the foreign representative for distribution, provided that the court is satisfied that the interests of the local creditors are adequately protected.

- On recognition as a foreign non-main proceeding, the court may (provided that the interests of local creditors are adequately protected) impose a stay or other protective measures in relation to the assets of the debtor in the jurisdiction.

- The foreign representative may be entitled to initiate actions under the laws of the enacting jurisdiction to challenge antecedent transactions, under the laws of the enacting jurisdiction.

- The foreign representative is entitled to intervene in any local proceedings.

Chapter 4 provides that the courts of, and any office holder in insolvency proceedings in, the enacting jurisdiction are to cooperate with foreign courts and foreign representatives of foreign insolvency proceedings, and entitles them to communicate directly with the foreign courts and foreign representatives.

Lastly, Chapter 5 of the Model Law deals with concurrent insolvency proceedings in more than one jurisdiction.

Once an enacting jurisdiction has recognised that foreign main proceedings have been initiated in another jurisdiction and from that point onward, insolvency proceedings may only be started in the enacting jurisdiction if the debtor has assets there (note that there is no requirement, here, for there to be an establishment in the enacting jurisdiction). Furthermore, the effects of any insolvency proceedings in the enacting jurisdiction must be limited to assets in that jurisdiction or other assets that "should" (so as to give effect to the obligations of cooperation and coordination under Chapter 4) be administered in the same proceedings.

Where insolvency proceedings are taking place concurrently in more than one jurisdiction (including the enacting jurisdiction) the court in the enacting jurisdiction must seek cooperation and coordination under Chapter 4, and, in granting or continuing any interim or discretionary relief in respect of a foreign insolvency proceeding, ensure consistency with any insolvency proceedings in the enacting state. Moreover, the court in the enacting jurisdiction must be satisfied, in granting or continuing any relief to a representative of a foreign non-main proceeding, that any such relief relates to assets that (under the laws of the enacting jurisdiction) should be administered in the foreign non-main proceedings or concerns information required in that proceeding.

Where there is more than one set of foreign proceedings, similar rules apply to ensure cooperation and coordination in respect of the various proceedings, and that any interim and discretionary relief

given in the enacting jurisdiction is consistent with the foreign proceedings and (where there may be inconsistency otherwise) so as to be consistent with any foreign proceeding that is a foreign main proceeding).

4.5.2. UNCITRAL Model Law on Enterprise Groups

The United Nations Commission on International Trade Law ('UNCITRAL') has recently adopted the Model Law on Enterprise Group Insolvency alongside a Guide to Enactment and a guide for directors of enterprise groups. This new Model Law focuses on the coordination of multiple insolvency proceedings, allows for 'planning proceedings' to develop a group insolvency solution and provides for relief that might be needed when managing and coordinating an enterprise group insolvency[47].

The UNCITRAL Model Law on Enterprise Groups (for ease of reference, hereinafter it shall be referred to and abbreviated as "MLEG") was approved by Working Group V (the UNCITRAL working group dealing with insolvency issues) at their 54th session (Vienna, 10–14 December 2018). The supporting guide to enactment was approved at its 55th session (New York, 28–31 May 2019) and was forwarded to the UN Commission on International Trade Law (the Commission) for finalization and adoption at the 53rd session (New York, 6–17 July 2019) The UN Commission has finalised and adopted all the texts without modification. Countries are free to enact it either in full or in part, with or without modifications, so it is essential to look at the relevant enacting legislation in detail. As previously, it does not have automatic effect but needs specific enacting legislation in each country[48].

The earlier UNCITRAL Model Law on Cross Border Insolvency did not cover groups of companies and this was perceived as an unfortunate omission leading to limited available tools in such cases. For instance, in Lehmans, more than 100 affiliated entities filed for insolvency in over 16 jurisdictions and although a degree of coordination was achieved through a protocol, not all affiliates signed up. This led to Working Group V's work on this new model law specifically to cover group enterprises, including both domestic and cross-border aspects of that insolvency.

4.5.2.1. Purpose

Much like the UNCITRAL Model Law on Cross Border Insolvency, MLEG's purpose is stated in the preamble. In particular, its purpose is defined as the provision of effective mechanisms to address cases of insolvency affecting the members of an enterprise group, in order to promote the objectives of cooperation between courts and other competent authorities of the enacting state and foreign states involved in those cases, cooperation between insolvency representatives appointed in the enacting state and foreign states in those cases, development of a group insolvency solution for the whole or part of an enterprise group and cross-border recognition and implementation of that solution in multiple states. 'Group insolvency solution' (defined at MLEG. Article 2(f)) is intended to be a flexible concept which may include: the reorganization or sale as a going concern of the whole or part of the business or assets of one or more of the enterprise group members or a

[47] Kathlene, Burke, "UNCITRAL Adopts the Model Law on Enterprise Group Insolvency", 2019

[48] Lexis Nexis "UNCITRAL Model law on enterprise group insolvency"

combination of liquidation and reorganization proceedings for different enterprise group members. The solution should seek to include measures that would, or would be likely to, either maintain or add value to the enterprise group as a whole or at least to the enterprise group members involved. Further objectives are the fair and efficient administration of insolvencies concerning enterprise group members that protects the interests of all creditors of those enterprise group members and other interested persons, including the debtors, the protection and maximization of the overall combined value of the assets and operations of enterprise group members affected by insolvency and of the enterprise group as a whole, the facilitation of the rescue of financially troubled enterprise groups, thereby protecting investment and preserving employment; and, lastly, the adequate protection of the interests of the creditors of each enterprise group member participating in a group insolvency solution and of other interested persons.

4.5.2.2. Scope of Application

As regards its scope of application, Article 1 provides that MLEG applies to enterprise groups: defined in MLEG, Article 2(b) as two or more enterprises that are interconnected by control (defined at MLEG. Article2(c) as the capacity to determine, directly or indirectly, the operating and financial policies of an enterprise) or significant ownership. It also applies where insolvency proceedings have commenced: defined as a collective judicial or administrative proceeding, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of an enterprise group member debtor are or were subject to control or supervision by a court or other competent authority for the purpose of reorganization or liquidation (MLEG, Article 2(h)) and, lastly, for one or more of its members: 'Enterprise group member' means an enterprise that forms part of an enterprise group (MLEG, Article 2(d)).

4.5.2.3. Interpretation

When interpreting MLEG, one shall take into consideration its international origin and the need to promote uniformity in its application and the observance of good faith (MLEG, Article 7).

UNCITRAL itself has published various helpful guides and resources, the most relevant for MLEG being the MLEG guide to enactment (the MLEG Guide) Working Group V's working papers (Working Group V: Insolvency law) along with the Case Law on UNCITRAL Texts reporting system,which comprises case law on decisions which interpret conventions and model laws emanating from UNCITRAL are available on the UNCITRAL website. Abstracts of relevant cases are provided in all six official languages of the United Nations (i.e. Arabic, Chinese, English, French, Russian and Spanish)

4.5.2.4. Cooperation and coordination

MLEG recognises that cooperation is essential not just as regards different insolvency proceedings of the same debtor, but also for different insolvency proceedings of different enterprise group members (MLEG Guide, paragraph 69) and is further to any pre-existing remedies available locally.

MLEG contains a chain of articles imposing an obligation for the following parties to cooperate to the maximum extent possible on insolvencies of groups of companies: the courts (MLEG, Article 9 imposes the obligation on courts to cooperate), insolvency representatives (i.e. the insolvency practitioners) (MLEG, Article 14) and any group representative appointed (MLEG, Article 13).

This legislation assigns by way of an obligation to the these parties, the fact that they must cooperate (it is not a matter within their sole discretion) and that such cooperation has also to be of the maximum extent possible (MLEG, Article 9(1)). In practice, helpful guidance is provided in relation to what 'cooperation to the maximum extent possible' in fact means for courts in the following non-exhaustive list set out in Article 10: communication of information by any means considered appropriate by the court, participation in communication with other courts, an insolvency representative or any group representative appointed, coordination of the administration and supervision of the affairs of enterprise group members. coordination of concurrent insolvency proceedings commenced with respect to enterprise group members, appointment of a person or body to act at the direction of the court, approval and implementation of agreements concerning the coordination of insolvency proceedings relating to two or more enterprise group members, including where a group insolvency solution is being developed, cooperation among courts as to how to allocate and provide for the costs associated with cooperation and communication, use of mediation or, with the consent of the parties, arbitration, to resolve disputes between enterprise group members concerning claims, approval of the treatment and filing of claims between enterprise group members, and finally, recognition of the cross-filing of claims by or on behalf of enterprise group members and their creditors.

As regards to the obligation of the group representative (MLEG, Article 13) and the insolvency representative (MLEG, Article 14) to cooperate with others, Article 15 provides a non-exhaustive list by way of indicative examples of what 'cooperation to the maximum extent' includes for them in practice. Thus, such extent may mean sharing and disclosure of information concerning enterprise group members, provided appropriate arrangements are made to protect confidential information (the fact information is confidential should not provide a basis to refuse to share that information, but safeguards should be put in first, also negotiation of agreements concerning the coordination of insolvency proceedings relating to two or more enterprise group members, including where a group insolvency solution is being developed, allocation of responsibilities between an insolvency representative appointed in [the enacting] state, insolvency representatives of other group members and any group representative appointed, coordination of the administration and supervision of the affairs of the enterprise group members, coordination with respect to the development and implementation of a group insolvency solution, where applicable.

MLEG also allows each enacting state to list any additional forms or examples of cooperation under Article 10(k)) and expressly stresses that courts are entitled to communicate directly with or request information or assistance directly from other courts, other insolvency representatives or any other group representative appointed (who may be the same person as the insolvency representative appointed in the relevant main proceeding or a different person) according to Article 17.

The intent of direct communication is to avoid the need for time-consuming procedures like letters rogatory or diplomatic channels (MLEG guide, para 72).

Regardless of the foregoing, in accordance with Article 11 para 1, courts still retain their discretion and may at all times exercise their independent jurisdiction and authority on matters presented and the conduct of parties appearing before them. MLEG in its Article 11 para 2, contains various safeguards in order to ensure that when a court participates in communication, it does not imply a waiver of compromise of any powers, responsibilities or authority, neither a substantive determination of any matter before the court, nor a waiver by any of the parties of any of their substantive or procedural rights, nor a diminution of the effect of any orders made by the court, nor submission to the jurisdiction of other courts participating in the communication and of course any limitation, extension or enlargement of the jurisdiction of the participating courts.

More specifically and in accordance with Article 12, courts may coordinate hearings with other courts. MLEG may not prescribe how these hearings should be coordinated precisely, but allows parties the freedom to reach an agreement, provided that they also receive court approval, on the conditions governing such hearings (Article 12 para 2). In practice, examples of what this agreement might cover (MLEG guide, para 88) include the following: use of pre-hearing conferences, conduct of the hearings, including the language to be used and need for interpretation, requirements for the provision of notice, methods of communication to be used so that the courts can simultaneously hear each other, conditions applicable to the right to appear and be heard, documents that may be submitted, the courts to which participants may make submissions, the manner of submission of documents to the court and their availability to other courts, questions of confidentiality, limitations on the jurisdiction of each court with respect to the parties appearing before it (MLEG, Articles 18(4) and 21(5)); and, lastly, the rendering of decisions.

Moreover, under Article 17 a single or the same insolvency representative may be appointed over several members of the same enterprise group to administer and coordinate the insolvency proceedings. This practical approach has already been used in various complex cross-border insolvencies before the creation of MLEG by way of a protocol. This will help mostly in the cases that the members are integrated on a high level. The person will need to fulfil the applicable requirements in the appointing jurisdictions but shall help coordination and reduce costs and delays (although confidentiality requirements of separate group enterprise members must be observed) (MLEG Guide, paras 98–101). That insolvency representative could also be a debtor in possession (MLEG Guide, para 102). Any potential or existing conflicts of interest should be disclosed (for example, arising from: cross-guarantees, intra-group claims and debts, post-commencement finance, lodging and verification of claims or wrongdoing of one member against another). A separate conflicts insolvency representative could be appointed or the enacting state could impose a requirement to seek the court's directions (MLEG Guide, para 103).

4.5.2.5. Group representative

In accordance with Article 19, the court may appoint a group representative if the following conditions are met: one or more other enterprise group members are participating in that main proceeding for the purpose of developing and implementing a group insolvency solution (MLEG,

Article 2(g)(i)), and the enterprise group member subject to the main proceeding is likely to be a necessary and integral participant in that group insolvency solution (MLEG, Article 2(g)(ii)).

A group representative has several powers at his disposal in a foreign state on behalf of the planning proceeding (as defined at MLEG, Article 2(g)), and in particular and by way of an indication including to seek recognition of the planning proceeding and relief to support the development and implementation of a group insolvency solution (MLEG, Article 19(3)(a)), to seek to participate in a foreign proceeding relating to an enterprise group member participating in the planning proceeding (MLEG, Article 19(3)(b)), to seek to participate in a foreign proceeding relating to an enterprise group member not participating in the planning proceeding (MLEG, Article 19(3)(c)), to apply to the court to stay execution against the assets of the enterprise group member (MLEG, Article 20(1)(a)), to apply to the court to suspend the right to transfer, encumber, or otherwise dispose of any assets of the enterprise group member (MLEG, Article 20(1)(b)), to apply to the court to stay the commencement or continuation of individual actions or individual proceedings concerning the assets, rights, obligations, or liabilities of the enterprise group member (MLEG, Article 20(1)(c)), to apply to the court to entrust the administration or realisation of all or part of the assets of the enterprise group member located in [the enacting] state to the group representative or another person designated by the court, in order to protect, preserve, realize or enhance the value of assets (MLEG, Article 20(1)(d)), to apply to the court to provide for the examination of witnesses, the taking of evidence, or the delivery of information concerning the assets, affairs, rights, obligations, or liabilities of the enterprise group member (MLEG, Article 20(1)(e)), to apply to the court to stay any insolvency proceeding concerning a participating enterprise group member (MLEG, Article 20(1)(f)), to apply to the court to approve arrangements concerning the funding of the enterprise group member and authorizing the provision of finance under those funding arrangements (MLEG, Article 20(1)(g)), to apply to the court to grant any additional relief that may be available to an insolvency representative under the laws of [the enacting] state (MLEG, Article 20(1)(h)), and, lastly, upon recognition of a foreign planning proceeding to participate in any proceeding concerning an enterprise group member that is participating in the foreign planning proceeding (MLEG, Article 25(1)). Paragraph 181 of the MLEG Guide provides a clarification as to what exactly 'participation' includes: the ability to petition, request or make submissions to the court concerning issues such as protection, realisation or distribution of the assets of the enterprise group member or cooperation with the planning proceeding.

The aforesaid power applies also to an enterprise group member that is not participating in the foreign planning proceeding, with the court's approval (MLEG, Article 25(2)).

The relief provided for under Article 20 may not be granted if that particular enterprise group member is not subject to an insolvency proceeding (it is irrelevant whether the member is solvent or insolvent according to MLEG Guide, paragraph 132), unless synthetic proceedings were commenced (MLEG, Article 20(2)), or it would interfere with the administration of insolvency proceedings taking place in that other state (MLEG, Article 20(3)).

Furthermore, and in accordance with Articles 21(2)–(3)), the group representative may also apply to the enacting state for recognition of a foreign planning proceeding over which they are appointed by providing the following documents: a certified copy of the decision appointing the group

representative, or a certificate from the foreign court affirming the appointment of the group representative, or (in the absence of evidence referred to above) any other evidence concerning the appointment of the group representative that is acceptable to the court , or a statement identifying each enterprise group member participating in the foreign planning proceeding, or a statement identifying all members of the enterprise group and all insolvency proceedings that are known to the group representative that have been commenced in respect of enterprise group members participating in the foreign planning proceeding, or a statement to the effect that the enterprise group member subject to the foreign planning proceeding has the centre of its main interests in the state in which that planning proceeding is taking place and that that proceeding is likely to result in added overall combined value for the enterprise group members subject to or participating in that proceeding.

The above mentioned information is aimed to provide the court with an idea of the overall structure of the group and the relationship between group members to help the court tailor the relief appropriately and ensure it doesn't interfere with other insolvency proceedings (MLEG Guide, paragraph 145). The court may at all times require a translation of some or all of the documents (MLEG, Article 21(4)), but may also proceed without any translations if it is able to do so (MLEG Guide paragraph 146).

4.5.2.6. Provisional Relief

In cases that the relief is urgently required, Article 22 stresses that the group representative may apply to the court for various provisional relief including staying execution against the assets of the enterprise group member, suspending the right to transfer, encumber, or otherwise dispose of any assets of the enterprise group member, staying any insolvency proceeding concerning the enterprise group member, staying the commencement or continuation of individual actions or individual proceedings concerning the assets, rights, obligations, or liabilities of the enterprise group member, in order to protect, preserve, realize or enhance the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation, or otherwise in jeopardy, entrusting the administration or realization of all or part of the assets of the enterprise group member located in the enacting state to an insolvency representative appointed in this enacting state. Where that insolvency representative is not able to administer or realise all or part of the assets of the enterprise group member located in this enacting state, the group representative or another person designated by the court may be entrusted with that task.

Further such provisional relief may receive any form of providing for the examination of witnesses, the taking of evidence, or the delivery of information concerning the assets, affairs, rights, obligations, or liabilities of the enterprise group member; approving arrangements concerning the funding of the enterprise group member and authorizing the provision of finance under those funding arrangements; and, lastly, granting any additional relief that may be available to an insolvency representative under the laws of this enacting state.

However, paragraphs 4 and 5 of Article 22 draw certain limits over the power to seek provisional relief. In particular, the court may not grant provisional relief in two cases, that is to say if with respect to the assets and operations located in the enacting state, that group member was not subject to an insolvency proceeding (unless an insolvency proceeding was not commenced for the purpose

of minimizing the commencement of insolvency proceedings in accordance with MLEG; or such relief would interfere with the administration of an insolvency proceedings taking place where a participating enterprise group member has its COMI.

4.5.2.7. Recognition of a foreign planning proceeding

MLEG envisages that there may be more than one planning proceeding (MLEG Guide, paragraph 44), particularly where the group is organised horizontally in relatively independent units. The planning proceeding is the mechanism through which a group insolvency solution could be developed.

MLEG stresses that a foreign planning proceeding shall be recognised if the application meets the requirements of MLEG Articles 21(2)-(3) (i.e. relevant documents to be submitted with the application, as mentioned above), the proceeding is a planning proceeding defined at MLEG, Article 2(g) as a main proceeding commenced in respect of an enterprise group member provided that one or more other enterprise group members are participating in that main proceeding for the purpose of developing and implementing a group insolvency solution, the enterprise group member subject to the main proceeding is likely to be a necessary and integral participant in that group insolvency solution, and a group representative has been appointed. The last case referred to in MLEG that foreign planning proceeding shall be recognised it in case the application has been submitted to the competent court (the enacting state will specify which courts are the competent courts to hear such applications within its jurisdiction; MLEG, Article 5).

The court shall decide on the application at the earliest possible time (MLEG, Article 23(2)), so parties could expect an expedited hearing within a few days where the matter is simple and uncontested, or a matter of weeks, where contested (MLEG Guide, para 167); interim relief may be available if protection is required while the recognition application is pending. The foreign representative is required to notify the court if there are any material changes, meaning the recognition may be modified or terminated if the grounds for granting the relief were lacking (fully or partially) or have ceased to exist (MLEG, art 23(3)).

According to Article 23 paragraph 4, such material changes include changes in the status of the foreign planning proceeding, in the status of the foreign representative's own appointment occurring after the application for recognition is made, or that might bear upon the relief granted on the basis of recognition.

The court has power to grant additional relief upon recognition of a foreign planning proceeding upon the request of the group representative where that relief is either necessary (MLEG, Article 24) to preserve the possibility of developing or implementing a group insolvency solution or protect, preserve, realise or enhance the value of assets of an enterprise group member subject to or participating in the foreign planning proceeding or the interests of the creditors of such an enterprise group member or the interests of the creditors of such an enterprise group member.

In accordance with Article 24 paragraph 1, the said additional relief comprises various powers to stay proceedings, ring-fence assets and gather information, including extending any relief granted under the recognition of the foreign planning proceeding, staying execution against the assets of

the enterprise group member, suspending the right to transfer, encumber, or otherwise dispose of any assets of the enterprise group member, staying any insolvency proceeding concerning the enterprise group member, staying the commencement or continuation of individual actions or individual proceedings concerning the assets, rights, obligations, or liabilities of the enterprise group member. Furthermore, and in order to protect, preserve, realise or enhance the value of assets for the purpose of developing or implementing a group insolvency solution, entrusting the administration or realisation of all or part of the assets of the enterprise group member located in the enacting state to an insolvency representative appointed in the enacting state. Where that insolvency representative is not able to administer or realise all or part of the assets of the enterprise group member located in the enacting state, the group representative or another person designated by the court may be entrusted with that task. Lastly, additional relief may also include providing for the examination of witnesses, the taking of evidence, or the delivery of information concerning the assets, affairs, rights, obligations, or liabilities of the enterprise group member, approving arrangements concerning the funding of the enterprise group member and authorizing the provision of finance under those funding arrangements or granting any additional relief that may be available to an insolvency representative under the laws of the enacting state.

Again, however, Article 24 paragraphs 3 and pose certain limitations upon the additional relief which may be granted. More specifically, the court may not grant relief in the following two circumstances: with respect to the assets and operations located in [the enacting] state of any enterprise group member participating in a foreign planning proceeding if that enterprise group member is not subject to an insolvency proceeding, unless synthetic proceedings are used (MLEG, Article 24(3)), or if such relief would interfere with the administration of an insolvency proceeding taking place where an enterprise group member participating in the foreign planning proceeding has its COMI (MLEG, Article 24(4)).

4.5.2.8. Participation in other insolvency proceedings

Members may participate or opt out at any stage of the proceedings (MLEG, Article 18(3)). Members may wish to participate because they have something to contribute to the insolvency solution being developed (e.g. own intellectual property key to the development of the solution) or may seek to protect their own interests (MLEG Guide, para 110). In particular, participating group members have the following rights (MLEG, Articles 18(4)–(5)) to appear in the insolvency proceedings, to make written submissions in the insolvency proceedings, to be heard in the insolvency proceedings on matters affecting that enterprise group member's interests, to take part in the development and implementation of a group insolvency solution, to be notified of actions taken with respect to the development of a group insolvency solution.

4.5.2.9. Impact on creditors

The court must ensure that the interests of (i) creditors of each enterprise group member subject to or participating in a planning proceeding (this does not include creditors of the enterprise group generally or creditors of enterprise group members not involved in the planning proceeding; MLEG Guide, paragraph 188) and (ii) other interested persons, are adequately protected whenever granting, denying, modifying or terminating relief under MLEG (MLEG, Article 27(1)).

The ways that such interests are to be adequately protected are not specified leaving the court free to grant such relief it considers appropriate (MLEG, Article 27(2)), but such relief may include the provision of security to such creditors. The aim is to establish a balance between the relief available and the protection of interests of persons (natural and legal) that may be affected by such relief (MLEG Guide, paragraph 188) and is not limited to local creditors; the general policy is that all creditors wherever they are located should be treated fairly and as far as possible be accorded the same treatment (MLEG Guide, paragraph 190). According to paragraph 188 of the MLEG Guide, 'Other interested persons' may include the enterprise group member subject to the relief, other enterprise group members participating in the planning proceeding, creditors of participating enterprise group member, and other stakeholders.

4.5.2.10. Synthetic non-main proceedings

Admittedly influenced to a great extent from the EU Recast Regulation on Insolvency, MLEG introduces the concept of synthetic proceedings in order to limit the commencement of non-main proceedings, or facilitate the treatment of claims. It allows the insolvency representative in the main proceedings to provide an undertaking (jointly, where a group representative is appointed), subject to obtaining court approval, that a claim may be treated in the main proceedings as it would be treated in the non-main proceeding (MLEG, Articles 28–31).

Synthetic non-main proceedings have several advantages including minimising the number of insolvency proceedings required to administer the insolvency of enterprise group members, shorter time frames for completion of the proceedings with fewer disputes and less competition between different proceedings, more efficient creditor participation, reduced need for coordination and cooperation between potentially numerous concurrent proceedings, more effective cross-border reorganisation, and reduction of the obstructions caused by the removal of part of the assets of the debtor from the control of the insolvency representative of the main proceeding (MLEG Guide, paragraph 196).

However, the use of synthetic proceedings may not be of assistance in certain instances , for example in case the law applicable to the foreign claims in their state of origin cannot be applied in the main proceedings in the other state or the claims in the state of origin are not of a purely monetary nature and cannot realistically be treated in the main proceeding as they may require, for example, some kind of sanction by the courts of the state of origin; or there are irreconcilable differences between the insolvency law of the state of origin of the claims and the law applicable to the main proceeding (MLEG Guide, paragraph 197).

4.6 Restructuring

4.6.1. Directive (EU) 2019/1023

Restructuring is the tendency of the national laws during the last years, when countries try to handle corporate economic crises[49] Today, when a company is facing some kind of distress, there are three basic in-court or extrajudicial instruments for restructuring at its disposal. Depending on the degree of financial and operational restructuring that is required, the following instruments are available by various European jurisdictions: (i) Consensual solutions with all stakeholders outside of insolvency (e.g., based on an independent business review or restructuring concept); (ii) early insolvency instruments (e.g. protective shield procedure, insolvency under self-administration) based on an insolvency plan and approved by the insolvency court; and (iii) regular insolvency proceedings executed by the insolvency administrator and approved by the insolvency court.

Currently, there is, however, also one more restructuring option, with only minor procedures to be performed by way of a court proceeding, which has recently been put forward by the EU. After lengthy negotiations, the EU Directive 2019/1023 on "Preventive Restructuring Frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt" (the "Restructuring Directive") was published in the Official Journal of the European Union on June 26, 2019[50]. The said Directive allows 'viable business in distress to be rescued and honest but bankrupt individuals to be given a second chance[51]'. Key elements of the procedure envisaged by the Restructuring Directive include: (a) debtors remaining in possession of their assets and day-to-day operation of their business; (b) a stay of individual enforcement of actions; (c) the ability to propose a restructuring plan that includes a cross-class cram-down mechanism whereby the plan is imposed on dissenting creditors in a class (holding no less than 25 percent of claims in that class) and across classes (subject to certain protections); and (d) protection for new financing and other restructuring-related transactions.

A restructuring practitioner only needs to be appointed where (i) a general stay of enforcement actions is granted and the judicial authority determines that the appointment of a practitioner is necessary to safeguard stakeholders' interests; (ii) a restructuring plan needs to be confirmed by means of a cross-class cram-down; or (iii) the appointment is requested by the debtor or the majority of creditors. Otherwise, the need to appoint a practitioner is decided on a case-by-case basis, although member states may provide for additional circumstances where the appointment of a practitioner is mandatory.

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[49] *Elina Moustaira*, "International Insolvency Law. National Laws and International Texts" (Chapter 2), Springer, 2019.

[50] International Insolvency and Restructuring Report 2020/1, A case for the European Preventive Restructuring Framework in times of COVID-19,*Dr. Rainer Bizenberger, Dr. Gunnar Gerig and Richard Koch,* December 2020

[51] European Commission, Restructuring and Second Chance Directive, available at: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/civil-justice/civil-and-commercial-law/insolvency-proceedings_en

The cross-border effectiveness of the preventive restructuring procedures adopted by a Member State of European Union is ensured by the EIR Recast specifically regarding those national restructuring proceedings that are included in Annex A of the Regulation[52].

The Restructuring Directive has been received not without criticism or considerations. There is a vivid discussion amongst jurists as to whether insolvency proceedings must be functionally distinguished from the restructuring proceedings and, even further, whether this kind of proceedings, that are aimed in the avoidance of insolvency, should be deemed as provisions of insolvency law. In any case, as in most EU directives, the Restructuring Directive does not define any exact means of transposing its provisions into national laws, which means that we should be waiting to see how each jurisdiction approaches the issue in due course. The experience from the EU Recast Regulation, though, indicates that there is a possibility that the Member States may as well endeavour to establish themselves as the best choice for the commencement of multi – jurisdictional restructurings, a fact which is not good or bad itself: it remains to be seen whether such approach will lead to an unlawful jurisdiction competition or in the Member States doing their best in the implementation of the directive into their national legal mentality.

[52] *Elina Moustaira*, "International Insolvency Law. National Laws and International Texts" (Chapter 2), Springer, 2019.

Conclusion

Undoubtedly, the world is heading towards some sort of globalization even in the very field of insolvency. At the end of the day, this is what is more in its interests anyway. The influence of the English and, especially, the USA approaches to bankruptcy are more apparent in the current regimes governing insolvency of corporate groups regionally (EU) and internationally (UNCITRAL) than ever. Efficiency is promoted over complex legal structures addressing theoretical issues. Also, addressing insolvency and business failures is not merely a corporate issue, as is often perceived, in the sense that fewer insolvencies should mean that workers keep their jobs and businesses can contribute to growth across the EU and the rest of the world. It is therefore essential that legal tools of a high level are ensured for each and every jurisdiction.

In order to sum up, it has been demonstrated, that one of the main legal issues pertaining to the cross-border insolvency in regards to corporate groups is whether a territorialist approach should be adopted or, on the contrary, the universalist one instead. The latter is criticised as a solution that would lead even to the lift of the corporate veil of the group by pooling any assets and debts of the different group entities together in the course of insolvency, while a strict territorialist approach would result expensive and probably ineffective as jurisdictions would sacrifice the promotion of international efficiency on the altar of their ability to satisfy their own ego or treat their own businesses and creditors preferentially.

In this debate, the approach of modified universalism, thus the conduct of cross-border insolvencies through cooperation and centralisation of group proceedings has admittedly emerged as a solution, which addresses effectively (to the extent possible and only according to the current available tools) the issues arisen and at the same time seems to respect the cultural and legal differences amongst the different jurisdictions of the world.

By way of a last remark, it should be noted that searching for the ideal solution in order to structure an effective mechanism of international insolvency is in fact a search for the ideal legal tool that would find all countries of the world agreeable: and that is the ultimate uphill – and not only as regards international insolvency law but the very international law itself.

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