vrije Universiteit amsterdam

Reading & Writing in Europe at Amsterdam 2006-07

Vanessa M. Cross, LL.M.

COMI, Corporate Groups and Forum Shopping: A Comparison of E.U. and U.S. Cross-Border Insolvency Law

COMI, Corporate Groups and Forum Shopping:

A Comparison of E.U. and U.S. Cross-Border Insolvency Law

Vanessa M. Cross

A research paper submitted in partial fulfillment of the
Requirements for the degree of Master of Laws in International Business Law (LL.M.)

Submission date: 25 June 2007
Supervisor: Prof. mr Bob Wessels, Dordrecht, The Netherlands

Published June 2007

COMI, Corporate Groups and Forum Shopping: A Comparison of E.U. and U.S. Cross-Border Insolvency Law

International Business Law, LL.M Thesis

Vanessa M. Cross, B.A., J.D.

TABLE OF CONTENT

Chapters **Page**

Preface and Acknowledgments

My decision to pursue legal studies in international business law with specific research on cross-border insolvency law was sparked by excellent courses in U.S. bankruptcy law under two bankruptcy scholars, Chief Judge David S. Kennedy and the Hon. Judge Paulette J. Delk, both now presiding judges in the United States Bankruptcy Court for the Western District of Tennessee.

It has been an honour to study cross-border insolvency with Prof. Bob Wessels at Vrije Universiteit ("VU"), Amsterdam. Thank you for your general support and your comments and suggestions on this research paper. Any deficiencies in this research are entirely my own.

My sincere appreciation is also owed to the VU International Faculty of Law for extending me the opportunity to study as a VU Fellow during the 2006-07 academic years.

I am indebted to the Hon. Judge Bernice B. Donald, former bankruptcy judge and current U.S. District Court judge, to whom I have the distinction of being a former law clerk. Your recommendations and kind words of support were central to my decision to pursue this less traveled road.

Additionally, many of my academic supporters are counted among the Faculty of Law at the Cecil C. Humphreys School of Law at the University of Memphis.

Last, but not least, to my husband Clyde, and my two sons Pharaoh and Malik, I thank you for supporting me during what were challenging separations while I studied in Amsterdam and you remained in Memphis. I look forward to rejoining you.

CHAPTER 1

COMI, Corporate Groups and Forum Shopping: A Comparison of E.U. and U.S. Cross-Border Insolvency Law

Vanessa M. Cross, B.A., J.D.[1]

"[Globalization is] one of the most powerful and pervasive influences on nations, businesses, workplaces, communities, and lives at the end of the twentieth century."[2]

Introduction

The complex issues encountered by a debtor enterprise with multinational operations can best be seen through a brief walk with the financially distressed entities, who I will illustrate as the fictional corporate group "Transgoods" as follows:

Transgoods' parent company was incorporated and headquartered in country X. Transgoods is a corporate group by virtue of its parent entity in Country X and subsidiaries in countries Y and Z. Transgoods X's workforce constitutes 5% of the corporate group employees. The raw goods used to produce Transgoods globally distributed products are derived from country Y, where they are partially processed because of country Y's relatively inexpensive workforce and favourable labour laws. Product refinement and packaging for distribution on the global market occurs in country Z by subsidiary Transgoods Z. Country Z is particularly favoured because of its location and reputation as a global distribution centre.

Unfortunately, the markets for Transgoods products have taken a turn. The distressed parent company has become an honest but unfortunate debtor who now seeks relief from creditor demands in a court of country X, which is known to have relatively debtor-friendly laws. The Transgoods Y and Transgoods Z subsidiaries, if viewed as separate entities, are not insolvent but would unlikely survive without a major reorganization of its parent company because of the level of economic integration. Creditors in country Z have heard the reports of the parent's insolvency petition in country X and are communicating with their lawyers about whether they should petition for an involuntary insolvency of

[1] Vanessa M. Cross is an 2007 LL.M. Candidate in International Business Law at Vrije University, Amsterdam. She practices law in Tennessee in the U.S. where she can be reached at vcross@217dclaw.com.

[2] Rosabeth Moss Kanter, *World Class: Thriving Locally in the Global Economy*, New York: Touchstone, 1997, p. 11.

Transgoods Z in country Z to protect their interest or submit their claims in the court of country X.

When the court of country X received the petition from the parent company with its list of creditors, it notes that the bulk of the corporate group's employees and creditors are located in country Y and Z, but its assets and liabilities are disbursed across the corporate group. Transgoods X's business operations are primarily administrative control of its subsidiary operations in countries Y and Z. The main connecting factor with country X is that Transgoods X has incorporated in that country and has a headquarter with an intimate work force of executives and a sales team for the global distribution of Transgoods products.

When the court in Country X receives a petition by Transgoods Y a few weeks later, it must also determine whether it has jurisdiction over an entity that has been incorporated in country Y, with operations primarily in country Y, but with managerial control exerted by its parent company from country X.

Additionally, some creditors from Country Z have convinced themselves to institute an involuntary insolvency proceeding against Transgoods Z. As the court in country Z considers the petition, it notices that the subsidiary is not "insolvent". This court does not have information before it regarding the cross guarantees entered into by Transgoods Z on behalf of its parent entity. This information would show that insolvency is imminent.

The first question is where is the centre of main interests for the separate entities where economic and organizational operations are so integrated? Where is the eye of the storm for the petitioning entities?[3]

When an insolvency of a multinational arises two legal issues come into play: 1) which jurisdiction will handle the proceeding, and 2) how can debtor assets, outside the jurisdiction of the insolvency proceeding, be brought into the estate for central management.[4] As to the latter question, complications arise where a corporate group[5] consists of a number of parent and subsidiaries across the globe, each of which may have operated relatively independent – or in contrast be closely related and dependent entities. The United States ("U.S.") and the European Union ("E.U.") are two major regulators with rules to facilitate coordination and cooperation of cross-border insolvency proceedings. Both, however, have failed to respond decisively to the dilemma posed by large corporate groups' insolvencies. This increases the risk that abusive forum shopping will occur among corporate groups with an array of forum choices on the eve of insolvency.

---

[3] *See* Jay Lawrence Westbrook, *Locating the Eye of the Financial Storm* (unpublished paper, 2007) (copy on file with the author).

[4] It should be noted that under U.S. Bankruptcy law a petition commencing a "case" is distinguished from "proceedings". *See* Part I, Rule 1001, U.S. Bankruptcy Code Rules of Procedure. In this paper "insolvency proceedings" will be used as a general term, consistent with its use by many courts to describe the commencement of what would be in the U.S. a "bankruptcy case".

[5] Reference to "corporate groups" is used in this paper as a broad term to include related inter-group entities of various company forms.

The discussion that follows considers three issues: 1) determining the centre of a debtor's main interest for purposes of insolvency proceedings or ancillary proceedings, 2) managing corporate group insolvencies, and 3) recognizing that a choice of forum for a multinational is inherent for corporate groups. In considering these issues I will first layout the scope of the E.U. Insolvency Regulation ("InsReg")[6] and highlight key provisions in the InsReg as it relates to opening insolvency proceedings. Particular attention will be made to the case law of the European Court of Justice ("ECJ") as it relates to understanding the all important role of establishing the centre of main interests ("COMI") of a debtor under the InsReg. Special attention will be given to the ECJ's analysis in the *Eurofood* case.

In the next chapter of this paper I describe the scope of the U.S. Bankruptcy Code's ("Code")[7] Chapter 15 and the jurisdiction of U.S. bankruptcy courts to open ancillary and other cross-border proceedings. With the aim of providing a more thorough analysis of Chapter 15, I will first discuss its predecessor under the former Section 304.[8] This is where the bulk of the U.S. case law considering cross-border insolvency exists. When Chapter 15 is discussed, special attention to the case of *SPhinX Strategy Fund* will be made as it is the first case where a full analysis of COMI was provided under Chapter 15 and the first bankruptcy case that considered ECJ case law in its analysis as persuasive law in construing COMI.

After reviewing the cross-border insolvency under the InsReg and Chapter 15, I will then discuss the problem posed by corporate groups and the express silence on regulating corporate groups within both the E.U. and U.S. regulatory schemes. Here, I will give attention to recommendations made by ALI and UNCITRAL in this area. Lastly, this paper will address the question of whether the E.U. and U.S. insolvency/bankruptcy regulations encourage forum shopping.

---

6 Council Regulation (EC) No 1346/2000 of 29 May 2000 on Insolvency Proceedings, Official Journal L 160 of 30 June 2000 (effective 31 May 2002). The latest consolidated version, including Annexes A, B and C that includes the proceedings of Bulgaria and Romania, is available at http://bobwessels.nl/wordpress/wp-content/uploads/2007/01/insreg-consolidated-as-per-jan-2007.pdf (last visited 24 June 2007). Denmark is excluded as it exercised its opt out right in accordance with Articles 1 and 2 Protocol on the position of Denmark, annexed to the Treaty on European Union and the Treaty establishing the European Community.

7 Part of the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") of 2005, Pub.L. No. 109-8, 119 Stat. 23, effective 17 October 2005. 11 U.S.C. §§ 1501, *et seq.* This is an adoption of the 1997 United Nations Commission on International Trade Law ("UNCITRAL") model law on cross-border insolvency ("Model Law on Cross-Border Insolvency" or "Model Law") in substantial part.

8 11 U.S.C. § 304.

CHAPTER 2

E.U. Insolvency Regulation

A. Jurisdiction and Scope

The principal source of law for international cooperation in an E.U. cross-border insolvency proceeding is the InsReg which came into effect on 31 May 2002.[9] Its aim is primarily efficiency of proceedings and to further cooperation and coordination between E.U. courts. The InsReg is directly applicable in the Member States for insolvency proceedings that falls within its scope after its 31 May 2002 enactment.[10] Recital 14 of the InsReg makes it clear that it applies only to insolvency proceedings where the COMI is located within the European Community. Prior national law governing cross border insolvency proceedings, including national private international law regimes, is superseded and replaced by the InsReg under the principle of mutual trust among E.U. countries.[11]

Art. 1(1) of the InsReg defines the scope of "insolvency proceedings", requiring the fulfilment of certain cumulative conditions. First, the insolvency proceedings must be collective, which means that individual actions by any creditor will be precluded.[12] Second, proceedings grounds must be because of the insolvency of the debtor as determined by the *lex concursus*, pursuant to Articles 4 and 28 of the InsReg.[13] The law of the main proceeding applies to all of the debtor's assets except for rights *in rem*, set off rights, and reservation of title. Third, the proceeding must entail the total or partial divestment of the debtor.[14] Some commentators have asserted that "divestment" does not include the appointment of a provisional liquidator. In the *Eurofood* case, the ECJ states that divestment of power under Article 1(1) InsReg "involves the debtor losing the powers of management which he has over his assets." In discussing the BenQ insolvency, Prof. Bob Wessels points to the Virgós/Schmit Report in support of the proposition that divestment of power for purposes of falling within the scope of the InsReg includes the power of "intervention and control" exercised by provisional liquidators.[15] The fourth condition is that the proceeding must entail the appointment of a 'liquidator.'[16] Article 2(b)

---

9 Council regulation (EC) No 1346/2000.

10 In accord with its position under the Treaty of Amsterdam, Denmark is excluded because it exercised its right under its E.U. accession treaty to opt out of the InsReg.

11 Member States within the E.U., such as England and Romania, have adopted the Model Law into their national law, which obviously does not conflict and is allowed under the E.C. Treaties.

12 *See also* Recital 10 of the InsReg.

13 InsReg Recital 23 provides that the *lex concursus* determining all the effects of the proceeding includes both substantive and procedural rules.

14 *See also* Miguel Virgós & Etienne Schmit, Report on the Convention on Insolvency Proceedings (Virgós-Schmit Report), ¶ 49 (under c). This report was the principal report on the E.U. Convention on Insolvency Proceedings, which was converted into the InsReg is considered authoritative.

15 *See infra*, note 39 (Bob Wessels, *BenQ Mobile Holding B.V. battlefield leaves important questions unresolved*) and *supra* note 8. Contrast this with the U.S. Chapter 11 debtor-in-possession bankruptcy provision which does not require divestment of managerial powers.

16 *See* InsReg, Annex C (liquidators referred to in Article 2(b).

provides that any person or entity (this can include a court) that functions to supervise the management of the debtor's business or realise assets qualifies as a liquidator.[17] Additionally, pursuant to Articles 2(a) and (c), 'insolvency proceedings' covered by the InsReg must also be expressly listed by the Member State in the InsReg's Annexes A and B.[18] Annex A provides the definitive list of recognized "insolvency proceedings" referred to in Article 2(a). Annex B contains the country listing of recognized winding-up or liquidation proceedings referred in Article 2(c). Only insolvency proceedings listed in these two Annexes will fall within the InsReg's scope.

Generally, the InsReg adopts a moderate universalist approach to managing cross-border insolvency. Main proceedings, where the debtor's COMI must exist, are universal and encompass all assets wherever obtained in the world. After the main proceeding is opened by a court in a Member State, recognition in all other Member States occurs automatically pursuant to Preamble 22 and Article 16 of the InsReg. The liquidator in the main proceeding may exercise its powers in every Member State. An important power of the liquidator in a main proceeding is the power to repatriate assets outside of the territory into the main proceeding.

Article 3(3) of the InsReg requires that, after the main proceeding is opened by the competent court within the meaning of Article 3(1), subsequent proceedings are to be secondary proceedings that require the presence of an establishment as provided in Article 3(2). Secondary proceedings under the InsReg are territorially administered. The secondary proceeding can only liquidate the debtor's assets in that country; reorganization is not possible in a secondary proceeding.[19] Additionally, at the request of the liquidator in the main proceeding, secondary proceedings can be opened pursuant to Article 29(a) or be placed on hold.[20]

B. COMI case law under the InsReg

The COMI determines whether the InsReg applies to the insolvency proceeding as the main proceedings. Article 3(1) provides:

> "The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary."[21]

---

[17] Considering the specific terminology used in Member States for liquidators, the InsReg sets out a list in Annex C of those titles deemed liquidators for purposes of meeting this condition.

[18] *See* Council Regulation amending Annexes A, B and C to Regulation (EC) No 1346/2000 on insolvency proceedings (presented by the Commission), available at http://bobwessels.nl/wordpress/wp-content/uploads/2007/01/insreg-consolidated-as-per-jan-2007.pdf (last visited 23 June 2007).

[19] Country listing of such liquidation proceedings are included in Annex B of the InsReg.

[20] InsReg, *supra* note 8, at Article 33(1) (referring to parallel proceedings as "secondary" proceedings and obligating the court in which they are pending to stay them at the request of the liquidator in the main proceedings).

[21] The role of the presumption in Article 3(1) InsReg should be considered in terms of its basic function, which is to place the burden of PROOF going forward on the rebutting party. *See* Virgós, Miguel & Garcimartín, Francisco, The EC

Recital 13 of the InsReg provides that COMI should relate to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties. The evidentiary requirement to comply with such a standard is where the uncertainty of COMI arises. Though COMI is introduced in the InsReg, instruction on determining where a debtor's COMI exists is developing out of ECJ case law. These issues will be considered in the cases *Eurofood*, *BRAC Rent-A-Car*, *BenQ Mobile Holding B.V.*, and *Daisytek*, respectively discussed in turn below.

1. Eurofood

The case of *Eurofood IFSC Ltd.* (*Eurofood*) involved an Irish subsidiary with its registered office in Dublin.[22] Eurofood was a wholly owned subsidiary of international dairy conglomerate Parmalat SpA, an Italian corporation, with operations of subsidiaries in more than 30 countries and with more than 30,000 employees. Parmalat SpA was admitted into insolvency under Italian extraordinary administration proceedings on 24 December 2003. On 27 January 2004, Bank of America petitioned the High Court of Ireland for an involuntary winding-up proceeding against the Parmalat SpA's Eurofood subsidiary. On 9 February 2004, the Italian liquidator proceeded in the court of Parma (Italy) to admit Eurofood into insolvency in Italy as an insolvent subsidiary of Parmalat SpA. The two courts had entered conflicting orders as to Eurofood's COMI and the Irish Supreme Court submitted questions to the ECJ in Luxemburg for a preliminary ruling. On the COMI question, the ECJ on 2 May 2006 ruled that where a debtor is a subsidiary company whose registered office and that of its parent company are situated in two different Member States, the presumption laid down in the second sentence of Article 3(1) of the InsReg, where the COMI of that subsidiary is situated in the Member State where its registered office is situated, can only be rebutted…

> "if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which location at that registered office is deemed to reflect. That could be so in particular in the case of a company not carrying out any business in the territory of the Member State in which its registered office is situated. By contrast, where a company carries on its business in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by that Regulation."[23]

Referencing Recital 13 of the InsReg, the ECJ first found that as to the place of the administration of its interests on a regular basis, substantial evidence existed that all of Eurofood's

Regulation on Insolvency Proceedings: A Practical Commentary, Kluwer Law International, nr. 57 (2004).

[22] C-341/04, *In re Eurofood IFSC Ltd*, with Opinion of Advocate General Jacobs, 2 May 2006. Parmalat's insolvency was to date one of the largest insolvencies in European history and its effects were closely akin to the collapse of the U.S.-based Enron.

[23] Id. at ¶¶ 34-36.

"administration of its interest" took place in Ireland. This was not contested, except regarding the meeting of its board of directors, which the Court found of little consequence. As to the second element found in Recital 13, relating to the ascertainableness by third parties, especially creditors, Eurofood creditors submitted evidence detailing the lengths to which they went to satisfy themselves that Eurofood's COMI was in Ireland. U.S. Bankruptcy Judge Samuel L. Bufford noted in his recent commentary that The ECJ did not decide "whether the presumption should have any weight once contrary evidence is presented, or whether it shifts the burden of proof or the burden of producing evidence."[24] The court did state that a "letterbox" company that is not carrying on any business in the country where its registered office is located would be insufficient.[25] In contrast, rebuttal by evidence that economic choices are or can be controlled by the parent would not be sufficient.[26] Though these examples provide the outer borders, it still leaves the weight given the presumption unclear. However, it is developing within the literature that under the InsReg the presumption that a debtor's COMI is located at its place of registration carries more evidentiary weight than the presumption under Chapter 15.[27]

Notwithstanding, pursuant to Article 16 of the InsReg the ECJ ruled that the main proceedings opened in Ireland must be recognized by the Italian court without subjecting the first court's jurisdiction to review. Thus, the 27 January 2004 judgment before the Irish High Court, which was first in time, was recognized as the ECJ found that the presumption under Article 3(1) had not been rebutted. Emphasis is placed on factors "objective and ascertainable by third parties". This objective test is based on what is apparent to third parties, especially creditors. The Virgós-Schmit Report explains this rationale by stating that

> "[i]nsolvency is a foreseeable risk. It is therefore important that international jurisdiction be based on a place known to the debtor's potential creditors. This enables the legal risks which would have to be assumed in the proceeding of the insolvency to be calculated."[28]

In relation to *Eurofood*, Advocate General Jacobs in Recital 125 of his opinion stated that "in determining the centre of a debtor's main interests, each case manifestly falls to be decided on its specific circumstances." This highlights the central weakness of the InsReg, namely, that such a crucial concept will ultimately fall to the individual Member States courts to interpret time and time again.[29]

---

[24] The Honorable Samuel L. Bufford, Center of Main Interests, International Insolvency Case Venue, and Equality of Arms: The Eurofood Decision of the European Court of Justice, 27 Nw. J. Int'l L. & Bus. 351, 384 (Winter 2007).

[25] See *supra* note 25 at ¶ 35.

[26] See *supra* note 25 at ¶36.

[27] See Michaël Raimon, *Centres des Intérêts Principaux et Coordination des Procédures dans la Jurisprudence Européen sur le Règlement Relatif aux Procédures d'Insolvabilité*, 3 J. Droit Int'l (Clunet) 739, 750 (2005). *See also* Westbrook, *supra* note 3 (*Locating the Eye of the Financial Storm*) (asserting that the Chapter 15/Model Law gives less weight to the presumption for the COMI than the InsReg).

[28] Virgós-Schmit Report, *supra* note 17 at ¶ 75.

[29] A similar situation developed in the area of competition law in the Community. The vagueness of the treaty provision placed an undue burden on the judiciary. Reforms were instituted through directives to reallocate some of the burden from courts.

Such a development in an overwhelmingly civil law system makes the case law developing under the InsReg more akin to a common law system where judges are called upon and permitted to shape the course and development of the law. This is the case because of the lack of direction provided in the InsReg to guide courts in analysing the COMI and the vagueness of the factors courts are called upon to construe even in light of the case law developing out of the ECJ. As will be discussed further below, this lack of legal certainty allows multinational corporations to more easily forum shop among Member States.

2. Daisytek-Europe

The Daisytek corporate group was a global distributor of professional tape products and computer supplies.[30] Its subsidiaries were distributors and resellers of electronic office supplies throughout Europe. The Daisytek's U.S.-based entities first filed for bankruptcy reorganization in Texas. By 2003, Daisytek's European-based entities filed insolvency proceedings in England, France and Germany. Only the Daisytek-Europe proceedings will be considered here. In England, the High Court of Justice in Leeds held that England was the COMI for each of the sixteen Daiseytek entities and proceeded under the *lex concursus* of Section 8 of the Insolvency Act of 1986 as to these entities.[31] Of course, the English companies were registered in England and enjoyed a presumption of their COMI being in England. Even the six companies of the Daisytek-Europe corporate group that were found to be dormant entities by the Leeds court were deemed insolvent for purposes of establishing main proceedings because of financial guarantees they made on behalf of the insolvent members of the corporate groups. The dispute arose as to the foreign corporations in France and Germany. The Leeds court reasoned that various aspects of the businesses of these entities were controlled from England warranting main proceedings in England.

Subsequently, in France, the commercial court challenged England's jurisdiction by opening a main proceeding for Daisytek-France. On appeal in France, the Versailles court overturned the ruling of the commercial court and found that the Leeds court had validly opened a main proceeding for Daisytek-France under the InsReg that should be accorded automatic recognition by the French court. The appeals court held that when an E.U. Member States opens a main proceeding, courts of other E.U. Member States must recognize it under the requirement of mutual trust and absent a legitimate public policy exception under Article 26 of the InsReg.

Meanwhile, in Germany, commentators reacted to the English court's decision regarding Daisytek-Germany with surprise and anger.[32] Soon after, a German court also proceeded to open what it

[30] Sony Electrics, Inc. v. Daisytek, Inc (In re Daisytek, Inc.) No. 03-34762-HDH-11, 2004 WL 1698284, ¶ 1 (N.D. Tex. July 29, 2004). (Daisytek-US)

[31] In re Daisytek-ISA Ltd., [2003] B.C.C. 562, [2004] B.P.I.R. 30, 2003 WL 21353254 Ch. Leeds (May 16, 2003) (UK) (Daisytek-Leeds).

[32] Bob Wessels, International Jurisdiction to Open Insolvency Proceedings in Europe, In Particular Against (Groups of)

hoped would be the main proceeding for Daisytek-Germany. However, like the appellate court in France, the German's appeals court overruled this order opening main proceedings for substantially the same reasoning of the French appellate court: that the InsReg required that when an E.U. Member State opens a main proceeding, courts of other Member States must recognize it.[33]

As AG Jacobs states in his opinion regarding *Eurofood*, a parent company's control of a subsidiary does not necessarily determine the subsidiary's COMI. According to AG Jacobs, and wholly consistent with the InsReg provisions, the InsReg applies only to individual companies and not to corporate groups. The *Daiseytek* case raised an important issue under the InsReg as it relates to corporate groups. Though the English court in Daisytek did not analyse its jurisdiction over the French and German entities under a group theory, the outcome was effectively the same, so much so in light of the fact that the French and German entities had such a substantial relationship to their respective home countries. It is apparent that had *Daiseytek* been determined after *Eurofood*, the court's reliance on a control test would have been insufficient to rebut the presumption that the entities incorporated in France and Germany were not the COMI for those companies. Furthermore, Article 16's automatic recognition accorded the court that is first in time in opening a main proceeding, though efficient in that it creates certainty in times of disputes, poses a risk of creating a race-theory jurisprudence under the InsReg that has historically raised concerns of fairness. The issue of fairness is raised where even the vague standard for determining COMI under the InsReg would seem to lead to a contrary determination to a race-theory jurisprudence.[34]

3. BRAC Rent-A-Car

In re BRAC Rental-A-Car International, Inc. ("BRAC") is an example of a U.S. company in insolvency proceedings in a U.K. court under the provisions of the InsReg.[35] BRAC was a subsidiary incorporated with a registered office in Delaware, U.S. It had neither trade nor employees in the U.S. Its primary operation was in the U.K. with a branch office in Switzerland. BRAC filed for Chapter 11 bankruptcy protection in the U.S. but needed to restructure its operations in Europe. Thus, the debtor also petitioned the English court for an administration in England. Certain of BRAC's creditors objected to the U.K. jurisdiction, fearing that they would be unfavourably treated under the U.K. administration. The court in England concluded that the InsReg in fact conferred jurisdiction to the

Companies 19, 22, available at www.iiiglobal.org/country/netherlands.html (last visited 15 June 2007).

[33] InsReg, *supra* note 8, at Recital ¶ 22, Article 16 ("automatic recognition") (note exception to automatic recognition under Recital ¶ 24 "to protect legitimate expectations").

[34] Race theory jurisprudence under U.S. common law developed under real property recording statutes. States who adopted the race theory approach under their recording statutes provided that under the law the first to record, even with knowledge of a prior conveyance that was unrecorded, would prevail over the unrecorded prior conveyance. For instance, if O validly conveys property to A, but A does not record and subsequently O conveys the same property to B and B records before A (even if B has knowledge of the valid and superior title of A over O), B prevails because B recorded first. Thus, a race to the court house jurisprudence developed.

[35] In re Brac Rent-A-Car International, 2003 EWHC Ch. 28.

court to open an insolvency proceeding in connection with a company incorporated outside the E.U. if the company's COMI is in that Member State. The COMI not only determines whether the InsReg applies but determines this irrespective of the entity's incorporation outside of the E.U.

4. BenQ Mobile Holding

More recently, a District Court in Amsterdam was faced with making a COMI determination in the insolvency proceeding of BenQ Mobile Holding B.V. ("*BenQ Mobile*"), registered in The Netherlands and a full subsidiary of BenQ Corporation (Taiwan) who acquired the German telecom business of Siemens under its BenQ Mobile GmbH & Co OHG entity. The Amsterdam court found that its proceeding constituted the main proceeding by virtue of its finding that the German proceedings opened in Munich, two days after the Amsterdam proceedings were opened on the 27 December 2006, were insufficient to rebut the presumption that the Amsterdam proceedings were not the main proceedings.[36]

> "The court determines that [BenQ Mobile] Holding has in the Netherlands a permanent location (*vaste inrichting*), where at least nine employees were active, that there were two managing directors, one of whom had authority to act alone according to the extract of the Commercial Register and resided in the Netherlands, that in so far creditors were involved with Holding and maintained contacts via OHG in Munich, these creditors question were part of the group of companies of Holding and BenQ Corporation [(Taiwan)] and as such can not be equated with third parties. In these circumstances the fact that is decisive is that Holding performed activities in the Netherlands, ascertainable by third parties from a permanent location with staff and that it was not easily ascertainable by these third parties that in addition (and perhaps mainly) activities were performed in Munich."[37]

Accordingly, after the Amsterdam court's determination, Article 16 of the InsReg required the German court to automatically recognize the Dutch proceedings as main proceedings. The facts in BenQ Mobile suggest that both the Dutch and German courts had sufficient facts before them to legitimately hold that the respective national entities before them had their COMI within their respective jurisdictions. Here, the corporate group had at least a couple Member States it could have instituted main proceedings. Under the InsReg, where such a conflict arises Article 16 decisively resolves the dispute with its automatic recognition, under its first-in-time test. As illustrated in the

---

[36] Bob Wessels, *BenQ Mobile Holding B.V. battlefield leaves important questions unresolved*, available at http://bobwessels.nl/wordpress/wp-content/uploads/2007/05/benq-holding-battlefield-28-may-07.pdf, (last visited 17 June 2007), to be published in June or July in Insolvency Intelligence. The problem of relation-back of the Dutch court initially opening and subsequently terminating the provisional suspension of payments proceedings was also an important issue in the proceeding, but will not be discussed here.

[37] Id., citing District Court Amsterdam 31 January 2007, LJN: AZ9985 (Dutch text) (Wessels noted that his translation into English of the Court's holding from its original Dutch text were his and not official. Also, generally, Wessels respectfully disagreed with the COMI analysis of the Court, arguing that the Dutch *surseance* proceeding in the Netherlands should qualify as a judgment opening insolvency proceedings and, thus, effective as of said date (Article 2) and are to be recognised in other EU Member States (Article 16)).

discussion below in chapter 5 on forum shopping, entities – especially parent entities within a corporate group – may legitimately be faced with forum choices for instituting main proceedings within the E.U.

CHAPTER 3

III. U.S. Chapter 15 Bankruptcy Code

The Model Law on Cross-Border Insolvency ("Model Law") was adopted in May of 1997 by the United Nations Commission on International Trade Law ("UNCITRAL").[38] On 20 April 2005, the U.S. Congress adopted the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") of 2005, which included to a very large extent the text of the Model Law into a new "Chapter 15" of the Bankruptcy Code that went into effect on 17 October 2005. Chapter 15 expands on the U.S.'s prior provision for recognition of foreign proceedings involving cross-border insolvencies, namely section 304. Before discussing Chapter 15, a review of the prior law under section 304 will be provided because most of the case law developed in the U.S. on recognition of foreign insolvency proceedings lies here.

A. Section 304

The recognition of foreign insolvency proceedings under section 304 was not granted automatically, but instead was adjudicated on a case-by-case basis since its adoption in 1978.[39] It was thus considered by some commentators as a form of "modified universalism".[40] Section 304 was contained in Chapter 11 of the U.S. Bankruptcy Code and considered a codification of prior case law that demonstrated that recognition was available to any representative of a foreign bankruptcy proceeding who presented valid reasons for its approval.[41] Though six statutory criteria found in section 304(c) determined access to ancillary proceedings in U.S. courts, a strict reading of section 304 would limit a court's authority to turn over U.S.-based assets to situations where the foreign proceeding could be trusted to distribute them substantially the same way a U.S. court would.

Under section 304, injunctive relief was first made available over the debtor's U.S. assets.[42] Secondly, under section 304, a turnover order could be pursued by the foreign representative to have the debtor's assets consolidated and brought into the debtor's estate in the foreign proceeding.[43]

---

[38] U.N. Commission on International Trade Law, Model Law on Cross-Border Insolvency with Guide to Enactment, Art. 1, U.N. Sales No. E.99V.3 (1997). Other nation's that have adopted the Model Law includes Eritrea, Japan, Mexico and South Africa (2000); Montenegro (2002); Poland and Romania (2003); Serbia (2004), British Virgin Islands, overseas territory of the United Kingdom of Great Britain and Northern Ireland (2005), Columbia, Great Britain, New Zealand (2006). Argentina, Australia, Canada, and Pakistan are considering enactment. The 2004 Spanish Insolvency Act contains provision which reflect in part the Model Law.

[39] U.S.C. 11 U.S.C. § 304 (2005).

[40] Helmut Gerlach, *Bankruptcy in the Czech Republic, Hungary, and Poland and Section 304 of the United States Bankruptcy Code, Proceedings Ancillary to Foreign Bankruptcy Proceedings*, 22 Md. J. Int'l L. & Trade 81, 106 (1998).

[41] Clarkson Co., Ltd. v. Shaheen, 544 F.2d 624, 632 (2d Cir. 1976).

[42] 11 U.S.C. § 304(b)(1) (2000).

[43] *See, e.g.*, In re Culmer, 25 B.R. 621, 627 (Bankr. S.D.N.Y. 1982). *See also* Gary Perlman, *The Turnover of Assets under Section 304 of the Bankruptcy Code: The Virtues of Comity*, 12 Fordham Int'l L.J. 521, 527 (1989).

Additionally, judges were allowed to grant "other appropriate relief".[44] Under section 305 the court could dismiss a case.[45] Unlike under Chapter 15, a foreign representative did not have the option of selling the debtor's assets or operating a debtor's business under section 304. In essence, it was primarily used to protect a foreign debtor's U.S.-based assets from capture by local creditors during the pendency of a foreign insolvency proceeding.

Courts and commentators reflecting on twenty-six years of litigation over these criteria agreed that section 304 by its terms required a wide exercise of judicial discretion and was due for an overhaul.[46] The six factors of section 304 have not been entirely discarded in the new Chapter 15 but are now found in section 1507, not as mandatory considerations, as under section 304, but to be used by Chapter 15 courts seeking "additional assistance."[47]

Having looked briefly at the prior regime, I will next discuss the new Chapter 15 and its wider accessibility. The recent case law construing the "centre of main interest" under Chapter 15 in the case of *In re SPhinX Strategy Fund, Ltd*. will be discussed. This was the first full analysis of COMI under Chapter 15.

B. Access to U.S. Bankruptcy Courts under Chapter 15

Chapter 15 substantially follows the language of the Model Law's 32 separate articles in its goal to promote uniformity and cooperation with foreign courts in foreign insolvency proceedings. Objectives include cooperation with foreign courts in dealing with multi-jurisdictional insolvency, administration of insolvencies in the best interests of the creditors and debtor, protection of the debtor's assets, facilitation in the reorganization of troubled business, and "greater legal certainty for trade and investment."[48] Special attention is paid to the goal of international coordination as Chapter 15 proceedings are intended to be ancillary to pending proceedings in a foreign jurisdiction, unless the foreign debtor is already a debtor in a case commenced under Chapter 11 of the Code.[49] Chapter 15 specifies that is applies to the traditional request for ancillary jurisdiction found under section 304 as well as main proceedings in the U.S. that require assistance in a foreign country, concurrent proceedings involving the same debtor, and foreign creditors with an interest in proceedings taking place in the U.S.[50]

---

[44] 11 U.S.C. § 304(b)(3) (2000).

[45] 11 U.S.C. § 305.

[46] These criteria included (1) just treatment of all holders of claims against or interest in such estate, (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceedings, (3) prevention of preferential or fraudulent dispositions of property of such estate, (4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title, (5) comity, (6) concerned only natural person under the Bankruptcy Code.

[47] 11 U.S.C. § 1507.

[48] Id.

[49] 11 U.S.C. § 1508 (stating, "in interpreting this chapter, the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions."). The forms of cooperation referred to in Chapter 15 are listed specifically in section 1527.

[50] 11 U.S.C. § 1501.

A "foreign representative" is a person or body authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative in such foreign proceedings. The foreign representative under the Code is read much broader than the liquidator under Article 2(b) of the InsReg. For instance, in *La Mutuelle du Mans Assurances IARD*, Scheme Advisers in the scheme of arrangement of the marine account of the U.K. branch of a French solvent insurer were recognized as foreign representatives under Chapter 15.[51] A foreign representative is permitted to petition for recognition of "foreign proceedings". The procedure is less cumbersome than under section 304 in that the foreign representative must merely show that a "foreign proceeding" has been commenced and that the petitioner is a "foreign representative." Upon the foreign representative filing a petition in accords with section 1515, the main documentary evidence attached is an authenticated foreign court order substantiating the preceding facts. The evidence submitted by the foreign representative concerning the existence of foreign proceedings is entitled to a presumption of genuineness and authentication.[52] The representative must also submit "a statement identifying all foreign proceedings with respect to the debtor that are known to the foreign representative."[53] Thus, as indicated in section 1501, Chapter 15 envisions coordinating all proceedings involving the debtor.

"Foreign proceedings" is a collective judicial or administrative proceeding in a foreign country. This includes an interim proceeding authorized under the foreign insolvency law where the foreign court exercises control or supervision over the affairs and assets of the debtor. Like "insolvency proceedings" under Article 2(a) of the InsReg, the proceedings must be collective and intended to benefit creditors as a whole. However, unlike the InsReg, which limits recognized proceedings to those specifically listed in its Annexes A and B, Chapter 15 will allow access from a wider scope of insolvency proceedings.

Two kinds of foreign insolvency proceedings are recognised under Chapter 15: "foreign main proceedings" and "foreign non-main proceedings". This language closely parallel's the InsReg's "main proceedings" and "secondary proceedings", requiring the existence of a COMI for foreign main proceedings and an "establishment" for foreign non-main proceedings. Chapter 15's requirement of an establishment is similar to the InsReg's definition of an "establishment". It is a place where the debtor carries out non-transitory economic activity with human means and goods or services. The most notable difference between the InsReg and the Code's definition of "establishment" is that the InsReg does not include "services" in its definition.

Chapter 15 further provides that once recognition is granted, the foreign representative has direct access to the courts and shall be granted "comity and cooperation."[54] The foreign representative may sue or be sued in U.S. courts, though the foreign representative is not subject to

---

[51] In re Les Mutuelles du Mans Assurances IARD, No. 05-60100 (BRL) (Bankr. S.D.N.Y. 7 December 2005), http://www.nysb.uscourts.gov/ (last visited 17 June 2007).

[52] 11 U.S.C. § 1516.

[53] 11 U.S.C. § 1515(c).

[54] 11 U.S.C. § 1509(b).

U.S. jurisdiction for any other purpose outside of Chapter 15 proceedings.[55] Additionally, section 1509 states that "[i]f the court denies recognition under this chapter, the court may issue any appropriate order necessary to prevent the foreign representative from obtaining comity or cooperation from courts in the United States."[56] This combats what was perceived as a weakness under section 304. "Section 304 was not the exclusive vehicle for a foreign representative to seek relief nor was there a single venue for a section 304 proceeding. Accordingly, foreign representatives were not precluded from proceeding to various U.S. courts to seek relief.[57]

Under both Chapter 15 and the InsReg, a rebuttable presumption exists that the debtor's registered office is its COMI. Professor Westbrook analogizes COMI with the "principal place of business" test used in corporation law in diversity cases.[58] U.S. case law provides that the principal place of business is at its headquarters, as opposed to the place where it has the bulk of its assets or operations. As such, the principal place of business test is different than the COMI which is more akin to the civil law's "real seat" theory, a theory of jurisdictional competence where functional realities may displace the effect of formal criteria such as the state of incorporation. A fuller discussion of COMI under Chapter 15 will be discussed below in the *SPhinX* case.

The most notable change from Section 304 is that Chapter 15 is not dependent on reciprocity or considerations of comity. However, Section 1506, the "public policy exception," does provide that "[n]othing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to public policy of the United States."[59] The Model Law included the language "manifestly contrary" to limit the public policy exception to constitutional issues, such as due process. Concern, however, was expressed by the drafters that "the exception could be read broadly and used to undermine the Model Law.

The addition of the word 'manifestly' was intended to insure a narrow reading of the exception."[60] Additionally, section 305 continues to serve the same purpose under BAPCPA as under the prior Bankruptcy Code in that, if the goals of ancillary proceedings or Chapter 15 would be furthered, section 305 authorizes a court to abstain from a related proceeding.[61]

When a petition has been filed and granted, notice is sent to the interested parties.[62] An order of recognition may be terminated or modified when circumstances change. Thus, filing a petition places a

---

55 11 U.S.C. § 1510.

56 11 U.S.C. § 1509(d).

57 Collier on Bankruptcy ¶ 1509.02 (15th ed. revised 2005).

58 *See, e.g.*, In re Winn-Dixie Stores, Inc., No. 05-03817-3F1 (Bankr. Mid. D. Fla. April 19, 2005) available at www.flmb.uscourts.gov/megacases.htm (last visited 24 June 2007).

59 11 U.S.C. § 1506.

60 Collier on Bankruptcy, *supra* note 60, ¶ 1506.2.

61 Id. at ¶ 1501.03. 11 U.S.C. § 305 (2005) now states, in relevant part: "(a) The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if (1) the interests of creditors and the debtor would be better served by such dismissal or suspension; or (2)(A) a petition under section 1515 fore recognition of a foreign proceeding has been granted; and, (B) the purposes of chapter 15 of this title would be best served by such dismissal or suspension."

62 11 U.S.C. § 1517.

duty on the foreign representative to notify the court of any "change of status" concerning the foreign proceeding, the foreign representative, or other proceedings involving the debtor.[63]

Recognition grants a right to administer the debtor's property as it would be available in a U.S. proceeding.[64] Other relief available upon recognition includes a stay of court action against a debtor's assets, rights, or obligations, a stay of execution, entrustment of a debtor's U.S. assets to the foreign representative, access to the U.S. discovery process, and any additional relief deemed necessary by the court.[65] Plenary proceedings are limited, however, a case under another Chapter of the Code may be commenced if the debtor has assets in the U.S. and the case is limited to those U.S. assets.[66]

C. COMI under Chapter 15: *In re SPhinX Strategy Fund*

The COMI determination under Chapter 15 does not have as much case law as the InsReg in the ECJ.[67] In *SPhinX* we see the first case under Chapter 15 where the central issue was analysing a debtor's COMI. Though Chapter 15 contains a rebuttable presumption that the location of a debtor's registered office is its COMI, we find the presumption to be a fairly weak one under the *SPhinX* court's analysis, which exercised broad judicial discretion to effect what it believed was more of an equitable solution.

The SPhinX off shore hedge funds were incorporated and registered in the Cayman Islands as hedge funds, organized as a group of related entities. No securities and commodities were traded in the Cayman Islands, nor did a physical address or employee exist in the name of SPhinX. The fund's investors were located throughout the world, including 14% in the States. SPhinX's U.S. assets included nearly a half-billion U.S. dollars in bank accounts with additional assets of an undisclosed amount under the custody of New York City's Deutsche Bank Trust Company Americas.[68] The fund was created by PlusFunds Group, Inc., a Delaware corporation, which was a debtor in a Chapter 11 case at the time of these events. It appeared, in fact, that the Cayman hedge funds were formed by PlusFunds as what would be called in the E.U. a "letter-box" entity. We will see later, in the court's analysis, that this was not central to the court's analysis.

Refco, Inc., one of SPhinX's largest clients, commenced Chapter 11 proceedings and sought a preference return of approximately $312 million transferred to SPhinX on the eve of their filing. Certain of SPhinX and Refco reached a settlement agreement that was approved by the bankruptcy court on 9 June 2006. Certain of SPhinX investors opposed the settlement agreement. A voluntary insolvency proceeding in the Cayman Islands were filed on 4 July 2006 by the hedge funds under

63 11 U.S.C. §§ 1517(d), 1518.
64 11 U.S.C. § 1520.
65 11 U.S.C. § 1521.
66 11 U.S.C. § 1528.
67 See www.chapter15.com which manages to keep track of Chapter 15 cases which includes court filings.
68 Id.

liquidators who sough to appeal the SPhinX-Refco settlement. SPhinX foreign representatives petitioned a U.S. bankruptcy court on 31 July 2006 for recognition of the Cayman Islands proceeding as a foreign main proceeding and to enjoin Refco litigation.[69]

If recognized as foreign main proceedings, a section 362 stay against all SPhinX's assets in the U.S. was automatic. If, alternatively, the Cayman insolvency proceedings were held to be non-main the liquidators would have needed to motion the court for a temporary restraining order to enjoin the Refco proceedings. The key issue before the court was whether Sphinx's COMI was in the Cayman Island, which would make it a foreign main proceeding under Chapter 15.

As discussed above, Chapter 15 contains a rebuttable presumption that the location of a debtor's registered office is its COMI. The legislative history under the U.S. House Report states that where there is no serious controversy, "[t]he presumption that the place of the registered office is also the centre of the debtor's main interest is included for speed and convenience of proof."[70] The text of Chapter 15 does not state a rule for assessing a debtor's COMI, leaving courts to determine its existence using factors.

In SPhinX, the court listed five factors it considered in determining whether the Cayman Islands was the COMI for SPhinX. Those factors included location of the debtor's headquarters, management, assets, creditors (and other interested parties), and which jurisdiction's law would apply to the debtor in a dispute. In its analysis the court held that the COMI for SPhinX did not exist in the Cayman Islands based on these factors.

Next, the court determined whether under Chapter 15 a foreign non-main proceeding could exist where no foreign main proceeding could be found. Finding no express prohibition in the Code, the court applied the establishment test and found that contacts were sufficient to find an establishment in the Cayman Islands. The Cayman Islands proceedings were recognized as a foreign non-main proceeding, a determination questioned by case commentators Jay Lawrence Westbrook and Mark Douglas.[71] The question is whether a foreign non-main proceeding can exist where no foreign main proceeding is found to exist by the court. Notwithstanding, there was no automatic stay instituted for foreign non-main proceedings. The SPhinX liquidators were under the discretion of the court as to a grant of any stay in the Chapter 15 proceeding.

In a close reading of the court's opinion we see a strong, unlisted "factor" shaping the decision. The court knew SPhinX's motive in filing Chapter 15 was to stall the release of the Refco-SPhinX settlement funds under appeal. Here, the court provided great detail on how recognition as a foreign main-proceeding would have the effect of staying the appeal of the Refco-SPhinX settlement. Chapter 15 has even less direction on construing COMI than the InsReg, which at least has Recital 13's "ascertainable by third parties" standard. Where a court is called upon to develop its own factors, as

[69] *In re SPhinX Fund,Ltd*, 351 B.R. 103 (Bankr. S.D.N.Y. 2006).

[70] H.R.Rep. No. 109-31, at 112-13.

[71] See Westbrook, *supra* note 3; Douglas, *infra* note 99.

courts are called upon to do in construing COMI under Chapter 15, we will see more opinion like SPhinX calling upon factors in law and in equity (as it appears here). The shape of case law under Chapter 15 indeed becomes a winding road with the standard for recognition being more discretionary, contrary to the purpose of the Model Law.

CHAPTER 4

IV. COMI and the Corporate Group Dilemma in Cross-Border Insolvency Law

Twenty five years ago, Professor Ian Fletcher expressed apprehension "that the correct identification of the location of a debtor's 'centre of administration' … may not in all cases be so straightforward as to produce total unanimity amongst the courts concerned."[72] The state of the COMI standards in both the E.U. and U.S. is also not as straightforward with its judicially developed factors. In a global economy where a multinational principal's asset may be its hard, tangible assets, such as seen in *SPhinX*, and not profits obtained from more tangible trade and services, a system must be devised that doesn't leave the development of COMI as squarely as it does on global judiciaries. Below, discussion of the corporate group dilemma is shown to be centrally tied to the uncertainty of the COMI standard.

A. Theoretical approaches to managing corporate group insolvencies

Multinational companies by their nature organize in fairly sophisticated corporate group structures. Some are composed of hundreds of entities such as seen in the corporate structure of General Motors, which consists of 500 corporations.[73] Neither Chapter 15 nor the InsReg provide for treatment of the multinational corporate group. Though adoption of both provisions are to be applauded as great developments in cross-border insolvency law, better governance of corporate groups must be developed or these new laws will soon lag behind the demands of a global economy.

It is argued by Robert K. Rasmussen that a territoriality approach is the best way to handle multinational subsidiaries of a bankrupt corporate structure.[74] "This global segmentation," writes Rasmussen,

> [p]rovides each country with a discrete firm to focus on. On the one hand, there may be firms that experience financial, but not economic distress, and whose constituent parts are so well integrated that any successful reorganization will need the active cooperation of all countries in which the firm has an affiliate. On the other hand, some firms may yield a higher return when administered on a territorial basis.[75]

Rasmussen goes on to say that "[b]y disrupting the harmony that would otherwise exist between bankruptcy and corporate law, universalism threatens the system of laws that nations have developed to

---

[72] Ian F. Fletcher, Conflict of Laws and European Community Law, p. 206 (1982)

[73] Subsidiaries of the Registrant, General Motors Corp., Form 10-K for the year ended 31-12-2003.

[74] Robert K. Rasmussen, *Resolving Transnational Insolvencies Through Private Ordering*, 98 Mich. L. Rev. 2252, 2259 (2000). Advocating for a contractual approach.

[75] Id.

police firm performance."[76]

Rasmussen argues that corporate groups should get to decide for themselves whether to apply the universal or territorial approach. The criticism waged against Rasmussen's approach is that a system that allows multinational companies to change their remedies and their creditors' priorities to some unrelated forum is unfair to parties who would be subjected to these proceedings, maybe in an unfamiliar jurisdiction, subject to unfamiliar laws. The counter-argument is that by requiring corporations to make these decisions early in their organization, e.g., in their articles of incorporation, it would put a future creditor on notice of these pre-arranged choices. Notwithstanding, this approach has not been adopted by any regulator to date and many insolvency professionals have instead accepted the home country standard as a starting point, as adopted by the E.U., the Model Law, and the American Law Institute ("ALI").[77] The problem with the home country approach, however, is that multinational companies often do not have clear "homes" as seen in the Transgoods case study at the beginning of this paper. Before they file for insolvency they may have an option among courts of two or more countries. This will be discussed further below when considering forum shopping for insolvency or bankruptcy forums.

Professor LoPucki joins in Rasmussen's position, but offers his alternative solution of "cooperative territorial system."[78] A cooperative territorial system as defined by LoPucki is one in which each country's courts administer the assets located in the country and authorise a representative to cooperate with representatives appointed in foreign proceedings to the extent cooperation benefits the local proceedings.[79] In such a system, once cases are filed and representatives appointed in each of the countries involved, the representatives could meet to determine whether cooperation could increase the total recovery of the group. Any increase in recovery is shared among the representatives for their respective estates. In most cases, under LoPucki's theory, the answer would be no cooperation. LoPucki illustrated the corporate group problem using the not-so hypothetical example of a financially distressed Daimler-Chrysler (Daimler) and the actual case of KPNQwest.

LoPucki argues that the management of the sale or reorganization of a Mexican subsidiary of Daimler should be territorial where the Mexican subsidiary operated economically independent of its German parent company. The economically independent test seemed not-well suited to a corporate group of multinational automobile companies without considering how integrated the supply and production of equipment and parts are distributed among the corporate group. For instance, when a liquidation of the Mexican subsidiary's assets occurs who really owns the automobiles produced or production equipment in the Mexican plant under an insolvency proceeding? If all of the automobile steering wheels were produced at a plant in Detroit, Michigan for the world wide subsidiaries, would

---

[76] Id. at 2260.

[77] Transnational Insolvency Project: International Statement of United States Bankruptcy Law, 109 (Am. L. Inst. Tentative Draft 1997).

[78] LoPucki, Lynn M., *Global and Out of Control?* 79 Am. Bankr. L.J. 79 (Winter 2005).

[79] Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy*, 98 Mich. L. Rev. 2216 (2000).

Daimler U.S. perhaps have an interest in the proceeds from the Mexican insolvency proceeding? If the tires were produced by Daimler Canada for world wide distribution among Daimler manufacturers, including Mexico, would it also have an interest in the Mexican proceeding?

Without considering the type of fire sale that would occur if the assets of a Daimler subsidiary were liquidated, the interest of the corporate group's parents and subsidiaries that collectively contribute to the production of the corporate group's central product would seem unfair and unrealistic. The liability of one subsidiary to a creditor would ultimately have an impact on the financial well being of other affiliates with the group structure. Fortunately, both Mexico and the U.S. have adopted the Model Law, thus, under the Daimler hypothetical the courts of the two countries would be obligated to cooperate in any liquidation or reorganization of Chrysler Mexico and Chrysler U.S.

C. Corporate Groups under the InsReg

The *KPNQwest* insolvency cases involved a pan-European telecom corporate group with production and sales concentrated throughout Germany, France, Belgium and The Netherlands. The KPNQwest corporate group was organized like many multinationals with subsidiaries organized under the laws of the country where they primarily operate. KPNQwest, N.V., the Dutch parent company, filed under the Dutch bankruptcy act in a court in Haarlam, Netherlands in 2002. Soon after, subsidiaries entered insolvency proceedings throughout Europe. Coordination and cooperation between the proceedings would have created substantial efficiencies. The trustees from the several Member States, however, were unable to effectively coordinate their proceedings to maximize the value of selling the assets of the telecom as a bloc.[80]

Though LoPucki illustrates this as a failure of universalism, he doesn't illustrate how cooperative territorialism would have made the liquidators operate more efficiently.[81] The cooperation in "cooperative territorialism" was not clearly developed by LoPucki. KPNQwest seems to illustrate that though regulations can authorize cooperation, the effectiveness of any cooperative initiative will be contingent upon the effective synergies of the cooperating parties, in this case the liquidators.[82]

D. Corporate Groups under Chapter 15

The question is whether consolidating insolvent corporate groups increases the welfare of all

[80] Robert van Galen, *The European Insolvency Regulation and Groups of Companies*, available at www.iiiglobal.org/country/european_union/Cork_paper.pdf (last visited 24 June 2007).

[81] Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 Cornell L. Rev. 696 (1999).

[82] Professors Bob Wessels and Miguel Virgós are currently drafting a set of "Guidelines for Cross-Border Communication and Cooperation Between Liquidators in Cross-border Insolvency Cases" for publication this year. For more information see http://bobwessels.nl/wordpress/wp-content/uploads/2007/06/2007-june-iii-guiding-coordination.pdf (last visited 22 June 2007).

parties involved. This question is left open under Chapter 15. Though the body of case law under section 304 will continue to be instructive to courts going forward under the new bankruptcy provision,[83] Chapter 15's section 1515 may provide some guidance on addressing the problem posed by corporate groups.

In section 1515, "[a] petition for recognition shall also be accompanied by a statement identifying all foreign proceedings with respect to the debtor that are known to the foreign representative."[84] Though limited, this statement may be interpreted to include all bankruptcy proceedings of subsidiary corporations where a bankrupt parent applies for relief under Chapter 15. Paragraphs 117-118 of the Guide to Enactment[85] states that the information is needed not as a factor for considering whether the foreign proceeding should be granted recognition, but "for any decision granting relief in favour of the foreign proceeding." The purpose is to fulfil the Model Law's role in furthering coordination and cooperation among other insolvency proceedings. More specifically, paragraph 117 states that "the court needs to be aware of all foreign proceedings concerning the debtor that may be under way in third States." The use of the language "concerning the debtor" makes clear that the foreign proceedings that must be disclosed are not limited to those of the debtor entity. It easily follows that disclosure to the bankruptcy court of other insolvency proceedings of the debtor entity's subsidiary or parent within the corporate group would fall under the foreign representative's disclosure duty this provision. Accordingly, such an interpretation includes an obligation of a subsidiary corporation applying for recognition or relief under Chapter 15 to report the insolvency proceedings of not only its parent, but the corporation's sister subsidiaries.

Procedural consolidation may be made under Chapter 15 as an effort of cooperation and coordination between parallel proceedings and ancillary proceedings in multiple foreign jurisdictions. Section 1527 extends the form of cooperation to include concurrent proceedings of the debtor, while section 1530 requests coordination with related foreign proceedings, whether they are main or non-main proceedings. Under these statutes, and in the spirit of "coordination" reiterated as policy throughout Chapter 15, a strong argument may be made towards the procedural consolidation of parent and subsidiary corporations into one main bankruptcy proceeding. This argument is stronger if the facts at hand indicate an overall disregard of corporate form towards the security held by secured creditors, such as seen in over collateralization within the corporate group.

Additionally, in considering substantive consolidation of legal entities in an insolvency proceeding, the question would arise of whether all the entities in the corporate group must be insolvent. In *Daiseytek*, the court found that though a number of the so-called dormant subsidiaries

---

[83] For instance, the adjudication of certain "criteria" present in section 304 and continues in section 1507 of Chapter 15 will inevitably call for a comparison of substantive law, which may sometimes be irreconcilable.

[84] 11 U.S.C. § 1515(c).

[85] See Model Law on Cross-Border Insolvency with Guide to Enactment, as amended, UN Sales No. E.99V.3. *See* para 117-118 of the Guide to Enactment (available at http://www.iiiglobal.org/organizations/uncitral/model_law.pdf) (last visited 22 June 2007).

were not insolvent at the time of their petitions, the cross guarantees entered into on behalf of their insolvent affiliates met the insolvency requirement under England's Insolvency Act of 1986. The financial industries customary practice of requiring cross-guarantees in corporate groups will make this the case in most corporate group structures.

E. Initiatives developing within the ALI & UNCITRAL

1. *ALI*

The American Law Institute ("ALI") Transnational Insolvency project consists of its proposed best-practice principles of cooperation and coordination in transnational insolvency cases among the members of the North American Free Trade Agreement ("NAFTA"). The ALI Principles aim to develop cooperative procedures in cross-border insolvency cases involving companies with assets or creditors in more than one of the NAFTA countries. The ALI cross-border insolvency project is unique in that, unlike the Model Law, it has published proposals that address cross-border insolvencies that involve corporate groups under ALI Principles 23 and 24.[86]

First, ALI reports that consolidation of cross-border insolvency proceedings is not recognized in Mexico and that substantive consolidation of a domestic parent entity and its foreign subsidiary is rarely permitted in the United States and Canada.[87] The project, however, encourages coordination and cooperation through either procedural or substantive consolidation of a subsidiary corporation into the bankruptcy proceedings of its parent entity.

ALI Principle 23 aims at coordinating parent and subsidiary proceedings. It provides that where a subsidiary is insolvent and has not filed a proceeding in its "country of []main interest[]", but its parent has filed for insolvency, the subsidiary should be allowed to file and have either substantive or procedural consolidation under the applicable law. In respect of corporate form, Principle 24 states that parallel proceedings are anticipated to allow for different determinations on certain decisions respecting the separate entities.

One would anticipate that the most contested part of these ALI Principles 23 and 24 would be raised among creditors regarding the applicable law where creditors would have received more favourable treatment as to certain decisions under the *lex consursis* of the subsidiary's country of main interest. However, where the subsidiary's creditors submit to the applicable law of the parent entity, this becomes a very viable option to consolidating insolvent entities within a corporate group. Furthermore, after commencement in the jurisdiction of its parent, the insolvent subsidiary can proceed in its home

[86] An excerpt from The American Law Institute's Principles of Cooperation Among the NAFTA Countries, published as part of ALI's Transnational Insolvency project along with three other volumes, is available at http://www.ali.org/ali/InsolvencyPrinciples.pdf (last visited 22 June 2007).

[87] Phillip I. Blumberg et al, Blumberg on Corporate Groups § 90.07[B].

country through ancillary jurisdiction to seek cooperation and coordination. This works among NAFTA countries because Canada, Mexico and the U.S. all have adopted the Model Law on Cross Border Insolvency under their domestic laws.

While the ALI Principles consider corporate group treatment, it does not provide guidance on when it would be appropriate to consolidate corporate groups. As noted briefly below, an UNCITRAL working group has been formulated to consider the treatment of corporate groups in more depth. The ALI Principles allow subsidiaries from anywhere in the world to file for insolvency in the parent's home country. Will such an approach encourage forum shopping, especially where parent corporations are simple holding companies that have no assets other than the stock of their subsidiaries? The issue of forum shopping among corporate groups will also be considered below.

2. UNCITRAL

As to general insolvency, the UNCITRAL Legislative Guide does consider possible approaches to the treatment of corporate groups.[88] More specifically, however, the UNCITRAL Working group V on treatment of corporate groups in insolvency gathered recently in New York on 14-18 May 2007 to continue work that had begun as early as December 2006 in the previous session in Vienna.[89] They considered and reported on two key issues. The first related to the requirement of "insolvency" for commencement of insolvency proceedings. The second addresses the degree of economic and organization integration required among entities to justify treatment as a corporate group.

The requirements for commencement of insolvency is important to the treatment of corporate groups because the general rule under insolvency law, as under company law, is that the separate legal status of each enterprise is respected. Accordingly, each entity would have to satisfy the insolvency test. The issue noted by the working group is how to treat potential liabilities under a cross guarantee and intra-group indebtedness. An imminent insolvency was faced by the Leeds court in *Daiseytek*. The court expressly established its jurisdiction over the solvent dormant subsidiaries based on the cross-guarantees that created an imminent insolvency sufficient to meet the English statute's insolvency test. The alternative would have left six dormant Daiseytek subsidiaries remaining where both the parent and its sister affiliates had undergone administration. In such cases, involving corporate groups with a high level of cross-collateralization, allowing for an imminent insolvency test for purposes of commencement of a proceeding appears to be the only reasonable solution. This is consistent with the UNCITRAL Legislative Guide's recommendation 15, which states that a debtor petition should be recognized if the debtor can show either that "[i]t is or will be generally unable to pay its debts as they

[88] UNCITRAL Legislative Guide at www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf, p. 277-281 (last visited 22 June 2007).

[89] Working Group Reports developed from these working groups – including the most recent one which is referenced here – are available at http://www.uncitral.org/uncitral/en/commission/working_groups/5Insolvency.html (last visited 22 June 2007).

mature."[90] Also, in considering whether solvent entities should be allowed to commence an insolvency proceeding when its insolvent parent has opened a proceeding, the working group noted that the general interest of cooperation and coordination sufficiently warrants such an allowance.

The second key issue considered at the New York session was how to determine when integration of the corporate group is sufficient to warrant consolidated treatment. Here, the 'control' question is considered along with economic and organizational factors. How much inter-independence, linked debts and assets, is enough to warrant separate treatment? Even the traditional U.S. corporate veil piercing jurisprudence doesn't clearly answer the question of how much control over a subsidiary is needed for a parent to actually control its subsidiary for purposes of consolidating legal entities. Where a conglomerate is at issue and the entities' respective businesses and assets are separate there exist a clear case for separate treatment within the corporate group. Where it is not so clear, the working group listed factors that may be relevant in making this determination. Theses factors include:

> "that there is a relationship between the companies that is variously described, but involves, for example, a significant degree of interdependence or control; intermingling of assets; the fictitious nature of the group; unity of identity, reliance on management and financial support or other similar factors that need not necessarily arise from the legal relationship (such as parent-subsidiary) between the companies."[91]

Additionally, it was suggested that the consent of all interested parties should be considered by a court. The objective belief of the creditors is also a consideration when dealing with the questions of the sufficiency of integration for purposes of corporate group treatment. This is somewhat reminiscent of the InsReg's requirement that factors which are both objective and ascertainable by third parties be considered in determining the COMI.

To conclude, the initiatives of the ALI and the UNCITRAL working group are pushing forward the scholarship on treatment of corporate groups in cross-border insolvencies. As will be seen below, the related problem of forum shopping makes the need for developments more urgent.

---

[90] Id. at 4 (citing the UNCITRAL Legislative Guide).

[91] UNCITRAL Working Group Reports, *supra* note 91 at ¶14 (May 2007 New York Session Report V0781138)

V. Do the E.U. and U.S. cross-border insolvency regulations encourage forum shopping?

In 2003, after the InsReg's enactment, John Willcox, an international bankruptcy commentator, said that forum shopping for the most favourable place to go bust seem set to flourish. Inevitably, differences among insolvency and bankruptcy laws will be a major consideration to distressed multinational entities considering their options where a choice of forum exists and with it maybe a guaranteed choice of law. Assisted by creative lawyers, commencement of an insolvency or bankruptcy case in a debtor-friendly jurisdiction before being involuntarily placed into insolvency in a creditor-friendly jurisdiction are considerations more likely faced by corporate groups.

Commentators have reported that with the enactment of the InsReg, forum shopping has increased in Europe, with financially distressed multinationals seeking restructure or liquidation under the *lex concursus* of the most flexible insolvency systems in the E.U.[92] In the U.S., the problem with forum shopping will not be so much of an issue under Chapter 15, as ancillary proceedings that require the existence of either a foreign main or non-main proceeding. The issue of forum shopping under the Code will more likely be a problem as it relates to multinationals under the plenary proceedings of Chapter 11 of the Bankruptcy Code.

Chapter 11's automatic stay and debtor-friendly relief, even under the more creditor-friendly BAPCPA amendments of the U.S. Bankruptcy Code, continues to make the U.S. a very attractive forum for debtors. Section 109 of the Code authorises filing by a debtor with "property" in the U.S. with no requirement that a certain amount of property exist. As a result, recent cases such as *In Re Cenargo International plc* (*Cenargo International*) illustrate that what constitutes "property" under section 109 for purposes of instituting a bankruptcy case under a chapter of the Code is at best *de minimis*

Cenargo International was a ferry and shipping operation incorporated in England. As is common practice in the shipping industry, the parent was organized as a holding company with each vessel owned by separate subsidiaries. Cenargo International was first placed into liquidation proceedings and later into an administration (a reorganization procedure) in the U.K. by its main creditor, Lombardo. The debtor entities in the Cenargo corporate group established joint bank accounts in the U.S. shortly before filing for Chapter 11 relief.[93] No Cenargo vessels had ever sailed to the U.S.,

---

[92] See Craig Martin, *Eurofood Fight: Forum Shopping Under The E.U. Regs*, Am. Bankr. Inst. J. (Mar. 2005). For creditors considering institution of involuntary proceedings a forum whose laws will offer the most protection for creditors is also an aim.

[93] *In re Cenargo International, plc*, et al., 294 B.R. 571 (Bankr. S.D.N.Y. 2003). *See also, e.g., In re Yuko Oil Company*, 43 BCD 278 (Bankr. S.D. TX Dec. 16, 2004) (example of defensive forum shopping by a Russian company seeking use of Chapter 11's automatic stay under section 362 to discourage foreign banks from financing buyers at Yukos' auction in Europe. With bank branches in the U.S., a violation of the stay could subject the banks to sanctions for contempt of court.

but Cenargo had issued approximately $175 million in "high yield" bonds in the U.S. Under pressure from the U.S. bondholders, Cenargo filed for Chapter 11. Two main proceedings were in effect, one in the U.K. and one in the U.S. Conflicting injunctions were issued from both courts. A stalemate was in effect. After much haggling on the part of the U.K. and U.S. parties, the U.S. court suspended the Chapter 11 proceedings in deference to the administration and held that the "center of gravity" (pre-COMI case law) for Cenargo was the U.K.

This appears to be a case of creditor forum shopping by the U.S. bondholders, with Cenargo effectively using Chapter 11 as a negotiating tool with Lomardo that served no aim of the bankruptcy court and was an inefficient and costly negotiation among the parties. The use of such tactics is only available because access to Chapter 11 is accessible to foreign debtors who can show the presence of section 109 property in the U.S. with its low threshold.

To conclude, forum shopping is an inevitable consequence of the choices made available to multinational entities. Currently, the use of the *lex concursus* in the InsReg provides more efficiencies than a more complex conflict of laws rule would provide. In the U.S., access to Chapter 11 bankruptcy is not likely to change in the near future. This is especially true considering the substantial amendments recently instituted under the 2005 enactment of BAPCPA, which effectively reduced access to bankruptcy courts to honest but unfortunate domestic consumer debtors. The ability to manage abusive forum shopping by multinationals is a huge challenge. In cross-border insolvency law it must be recognized that forum choices are an inherent part of the life of multinational corporate groups. Hopefully, the ability to curb abusive forum shopping will occur as better tools are developed determine COMI and to manage and regulate corporate group insolvencies.

VI. Conclusions

Cross-border insolvency proceedings have become increasingly more common with the globalization of the world's economies. Though commentators like Rasmussen argue that the number of cross-border insolvency proceedings don't justify the type of response generated by the global community, the empirical data indicates otherwise.[94] At the end of the third quarter of 2006, foreign representatives in foreign proceedings filed nearly 70 Chapter 15 petitions at the end of the third quarter of 2006 alone.[95] The recent enactment of both Chapter 15 and the InsReg makes it too soon to predict how courts will ultimately shape the factors used to tackle the uncertainty of the crucial COMI determination. U.S. and E.U. regulators must consider key questions going forward. The first question is whether a clearer and more definitive COMI rule can be formulated to achieve a greater level of legal predictability and judicial efficiency.

In *SPhinX* we see a U.S. court making a COMI determination based on what the court believed was the tainted motives of the Chapter 15 petitioner, without relying on the public policy exception in Chapter 15. This hampers legal certainty by making it hard for a debtor to predict what the COMI rule will be in a U.S. Chapter 15 decision. On the other hand, we also see in *SPhinX* a U.S. court willing to expressly consider the *Eurofood* case in its decision. This shows judicial recognition of the shared trans-Atlantic challenge relating to COMI. It is the type of international interplay contemplated in the Model Law and embodied in the InsReg. This is the case despite what Westbrook describes as a bit of a "club" mentality within the E.U. "where non-members are distinctly second class citizens."[96] In this respect, I agree with Westbrook's approach in encouraging more countries in the E.U. to take the lead of England and Romania and adopt the Model Law. Even better, initiatives should be developed to study the feasibility of a Community-wide adoption of the Model Law to bring more global cooperation within a prospering Europe. This is no longer a world for building castles.

Secondly, both E.U. and U.S. regulators must address the complex dilemma insolvent corporate groups pose. Currently, there is no authorization under either regulatory system to open in one jurisdiction a consolidation, procedural or substantive, of insolvency proceedings for related entities simultaneously undergoing insolvency. The work of the ALI Transnational Insolvency Project and UNCITRAL recommends this type of high level coordination of parent and subsidiary proceedings.

---

[94] See Robert K. Rasmussen, *Where are All the Transnational Bankruptcies?: The Puzzling Case for Universalism* (unpublished paper, 2007) (paper on file with the author).

[95] See Mark G. Douglas, Business Restructuring Review, Chapter 15 Turns One: Ironing Out the Details, available at http://www.jonesday.com/pubs/pubs_detail.aspx?pubID=S3869 (last visited 22 June 2007).

[96] Jay Lawrence Westbrook, "Managing Defaulting Multinationals within NAFTA": in Fletcher, Ian F., *et al*, Foundations and Perspectives of International Trade Law, London: Sweet & Maxwell, 2001, pp.478, nr. 30-043-30-044 (noting as an example the *lex situs* rule that protects only EU member secured creditors. Also of note is the disparate treatment of creditors as it relates to notice, with notice duties only required to creditors within the E.U.).

Universal consolidation of parent and subsidiary corporate group entities, as proposed under ALI Principles 23 and 24, moves the challenge of efficient management forward, but issues, such as what level of integration justifies toying with the sanctity of the corporate form must be addressed. These considerations are now being considered by UNCITRAL's insolvency working groups. There work includes addressing central issues faced by corporate groups, such as the requirement of "insolvency" for each entity commencing insolvency proceedings. Work is being done to set a workable standard for determining how much integration within a corporate group is sufficient to justify consolidation. Additionally, though discussed only briefly here, the issue of choice of procedural and substantive law must be addressed as it relates to consolidated insolvency proceedings of integrated corporate groups. This consideration is explicitly excluded by the ALI.

The work of ALI and UNCITRAL continues the global initiatives to more efficiently manage cross-border insolvencies. It provides hope that regulators will soon be presented with better regulatory tools to respond to the challenges of treatment of corporate groups in cross-border insolvencies and in managing the problem of abusive forum shopping.[97]

[97] See the reports of the Working Groups on the Treatment of Corporate Groups in Insolvency at http://www.uncitral.org/uncitral/en/commission/working_groups/5Insolvency.html (last visited 22 June 2007).

BIBLIOGRAPHY

E.U. Regulation:

Council Regulation (EC) No 1346/2000 of 29 May 2000 on Insolvency Proceedings Official Journal L160, 30 June 2000 (effective 31 May 2002), with amended Annexes per 1 January 2007.

U.S. Statute & Legislative History:

11 U.S.C. §§ 109, 304, 305, 362, 1501, *et seq*., U.S. Bankruptcy Code
BAPCPA, Pub.L. No. 109-8, 119 Stat. 23
H.R.Rep. No. 109-31

Model Laws:

American Law Institute Principles of Cooperation Among the NAFTA Countries, published as part of ALI's Transnational Insolvency Project

UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment (1997)

UNCITRAL Legislative Guide on Insolvency Law (2005)

Books:

Blumberg, Phillip I. & Kurt A. Strasser, THE LAW OF CORPORATE GROUPS: ENTERPRISE LIABILITY IN COMMERCIAL RELATIONSHIPS INCLUDING FRANCHISING, LICENSING, HEALTH CARE ENTERPRISES, SUCCESSOR LIABILITY, LENDER LIABILITY, AND INHERENT AGENCY, New York: Aspen Law & Business, 1998

Blumberg, Phillip I, *et al*, BLUMBERG ON CORPORATE GROUPS (5 Vol), New York: Wolters Kluwer/Aspen Publishers, as supplemented, 2007

Boyle, Carolyn, CROSS-BORDER INSOLVENCY: A COMMENTARY ON THE UNCITRAL MODEL LAW, London: Global Business Publishing Ltd., 2006

Collier on Bankruptcy, 15th ed. revised, New York: Reed Elsevier, 2005

Declercq, Peter J.M., NETHERLANDS INSOLVENCY LAW: THE NETHERLANDS BANKRUPTCY ACT AND THE MOST IMPORTANT LEGAL CONCEPTS, The Hague: T.M.C. Asser Press, 2002

Fletcher, Ian F., Conflict of Laws and European Community Law, Amsterdam: North-Holland Publishing Company, 1982

Kanter, Rosabeth Moss, World Class: Thriving Locally in the Global Economy, New York: Touchstone, 1997

Marshall, Jennifer (general editor), European Cross-Border Insolvency: A Guide to Insolvency Procedures Across the European Union, loose leaf, published by Allen & Overy, 2002

Mason, Richard G., "United States" in: Ho, Look Chan (General Editor), Cross-Border Insolvency: A Commentary on the UNCITRAL Model Law, London: Globe Business Publishing Ltd, 2006, pp. 197-217.

Smits, Anthony J. & O'Hearn, Ilia M., "Multinational Insolvency Forum Shopping", in: Silkenat, James R. & Schmerler, Charles D. (eds.), The Law of International Insolvencies and Debt Restructurings, Oxford: Oceana Publications, 2006, pp 479-500

Wessels, Bob, European Union Regulation on Insolvency Proceedings: An Introductory Analysis, Second Edition, Alexandria, VA: American Bankruptcy Institute, 2007

Wessels, Bob, Insolvency Law: International Insolvency (Volume X), Alphen aan den Rijn, The Netherlands: Kluwer, 2006

Westbrook, Jay Lawrence, "Managing Defaulting Multinationals within NAFTA": in Fletcher, Ian F., *et al*, Foundations and Perspectives of International Trade Law, London: Sweet & Maxwell, 2001, pp.465-479.

Case Law

European Case Law

In re Brac Rent-A-Car International, 2003 EWHC Ch. 28.

In re Daisytek-ISA Ltd., [2003] B.C.C. 562, [2004] B.P.I.R. 30, 2003 WL 21353254 Ch. Leeds (May 16, 2003) (UK) (Daisytek-Leeds).

C-341/04, *In re Eurofood IFSC Ltd*, with Opinion of Advocate General Jacobs, 2 May 2006.

U.S. Case Law

*In re Cenargo International, plc, et a*l., 294 B.R. 571 (Bankr. S.D.N.Y. 2003).

Clarkson Co., Ltd. v. Shaheen, 544 F.2d 624 (2d Cir. 1976).

In re Culmer, 25 B.R. 621 (Bankr. S.D.N.Y. 1982).

In re Les Mutuelles du Mans Assurances IARD, No. 05-60100 (BRL) (Bankr. S.D.N.Y. 7 December 2005)

In re Winn-Dixie Stores, Inc., No. 05-03817-3F1 (Bankr. Mid. D. Fla. 19 April, 2005)

In re SPhinX Fund,Ltd, 351 B.R. 103 (Bankr. S.D.N.Y. 2006)

In re Yuko Oil Company, 43 BCD 278 (Bankr. S.D.T.X. 2004)

Law Review Articles:

Bufford, Hon. Samuel L., *International Insolvency Case Venue in the European Union: The Parmalat and Daisytek Controversies*, 12 Colum. J. Eur. L. 429 (Spring 2006)

Bufford, Hon. Samuel L., *Center of Main Interests, International Insolvency Case Venue, and Equality of Arms: The Eurofood Decision of the European Court of Justice*, 27 Nw. J. Int'l L. & Bus. 351 (Winter 2007)

Gerlach, Helmut E., *Bankruptcy in the Czech Republic, Hungary, and Poland and Section 304 of the United States Bankruptcy Code, Proceedings Ancillary to Foreign Bankruptcy Proceedings*, 22 Md. J. Int'l L. & Trade 81 (1998)

LoPucki, Lynn M., *Global and Out of Control?* 79 Am. Bankr. L.J. 79 (Winter 2005)

LoPucki, Lynn M., *The Case for Cooperative Territoriality in International Bankruptcy*, 98 Mich. L. Rev. 2216 (2000)

LoPucki, Lynn M., *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 Cornell L. Rev. 696 (1999)

Martin, Craig, *Eurofood Fight: Forum Shopping Under the E.U. Reg*., Am. Bankr. Inst. J. (2005)

Perlman, Gary, *The Turnover of Assets under Section 304 of the Bankruptcy Code: The Virtues of Comity*, 12 Fordham Int'l L.J. 521 (1989)

Rasmussen, Robert K., *Where are All the Transnational Bankruptcies?: The Puzzling Case for Universalism* (unpublished paper, 2007)

Rasmussen, Robert K., *Resolving Transnational Insolvencies Through Private Ordering*, 98 Mich. L. Rev. 2252 (2000)

Raimon, Michaël, *Centres des Intérêts Principaux et Coordination des Procédures dans la Jurisprudence Européen sur le Règlement Relatif aux Procédures d'Insolvabilité*, 3 J. Droit Int'l (Clunet) 739 (2005)

Salafia, Lesley, *Cross-Border Insolvency Law in the United States and its Application to Multinational Corporate Groups*, 21 Conn. J. Int'l L. 297 (Spring 2006)

Wessels, Bob, *Comparative and International Insolvency Law, Current Positions and Future Trends from a Continental European Perspective*, (Paper presented to Insolvency International Academics meeting on 'Significant Developments in International Insolvency Law', Sydney, Australia, 12/13 March 2005), reprinted in Vrije Universiteit (VU) 2007 *Reader*, International Insolvency Law, LL.M International Business Law, pp. 5-10

Westbrook, Jay Lawrence, *A Global Solution to Multinational Default*, 98 Mich. L. Rev. 2276 (1999-2000)

Westbrook, Jay Lawrence, *International Judicial Negotiation*, 38 Tex. Int'l L.J. 567 (2003)

Other Sources:

American Law Institute, Principles of Cooperation in Transnational Insolvency Cases among Members of the North American Free Trade Agreement (2002)

Cross-border Insolvency Concordat (1995)

Douglas, Mark G., Business Restructuring Review, Chapter 15 Turns One: Ironing Out the Details (2007)

UNCITRAL Transnational Insolvency Project: International Statement of United States Bankruptcy Law Report of the Working Group V on the Treatment of Corporate Groups in Insolvency (2007)

Van Galen, Robert, The European Insolvency Regulation and Groups of Companies, INSOL Europé Annual Congress, Cork, Ireland (16-18 October 2003)

Virgós, Miguel & Schmit, Etienne, Report on the (EC) Convention on Insolvency Proceedings, internal unpublished report (July 1996)

Virgós, Miguel & Garcimartín, Francisco, The EC Regulation on Insolvency Proceedings: A Practical Commentary, Kluwer Law International (2004)

Wessels, Bob, *The EC Insolvency Regulation: Three Year in Force, European Company Law*, Issue 2, pp. 50-58 (June 2005) (See 2007 *Reader*, International Insolvency Law, pp. 146-152)

Wessels, Bob, International Jurisdiction to Open Insolvency Proceedings in Europe, In Particular Against (Groups of) Companies (25 November 2003)

Wessels, Bob, *BenQ Mobile Holding B.V. battlefield leaves important questions unresolved* (unpublished paper, 2007)

Westbrook, Jay Lawrence, *Locating the Eye of the Financial Storm* (unpublished paper, 2007)