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Conflicts in insolvency jurisdiction

Gerard McCormack*

The Hague Judgments Convention 2019 contains an insolvency exception. The paper suggests that the proposed Hague Jurisdiction Convention should contain an insolvency exception that mirrors that contained in the existing Hague Judgments Convention. It is also submitted that international instruments in the field of insolvency, and related matters, are best dealt with by the United Nations Commission on International Trade Law (UNCITRAL).

Keywords: insolvency; private international law; centre of main interests; forum shopping

A. Introduction

The Hague Judgments Convention 2019 contains an insolvency exception. This paper asks whether a Hague Jurisdiction Convention should contain a similar exception. More positively and to put it another way, it asks whether any new Convention should contain rules on insolvency jurisdiction and what "insolvency" means in this context.

The paper consists of six parts. After this brief introduction, the second part looks at the scope of the existing insolvency exception in the Hague Judgments Convention. In many ways the rules on indirect jurisdiction in the Hague regime are similar to the direct jurisdiction rules in a regional economic integration instrument, namely the rules on jurisdiction and judgments applicable within the Member States of the European Union (EU) and contained in the Brussels 1a Regulation on jurisdiction and enforcement of judgments[1] and the Insolvency Regulation.[2] The third part therefore looks at this intra-EU jurisdiction regime to the extent that it deals with insolvency and compares the EU Insolvency Regulation with the UNCITRAL Model Law on Cross-Border Insolvency. The fourth part, and also by way of comparison, addresses insolvency jurisdiction

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[1]Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters recasting Regulation 44/2001.

[2]Regulation 2015/848 on insolvency proceedings recasting Regulation 1246/2000.

rules in the US and UK. The fifth part looks in more detail at what is meant by insolvency and whether it might be practicable and realistic to devise rules on insolvency jurisdiction on a worldwide basis. The sixth and final part concludes. The paper suggests that the proposed Hague Jurisdiction Convention should contain an insolvency exception that mirrors that contained in the existing Hague Judgments Convention. It is also submitted that international instruments in the field of insolvency and related matters are best dealt with by the United Nations Commission on International Trade Law (UNCITRAL).

B. Hague jurisdictional regime

The Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters 2019 is based on a desire to promote effective access to justice for all and to facilitate rule-based multilateral trade and investment, and mobility, through judicial co-operation. It refers to an international legal regime that provides greater predictability and certainty in relation to the global circulation of foreign judgments. But insolvency judgments are excluded from the Convention. Article 2(e) states that the Convention shall not apply to "insolvency, composition, resolution of financial institutions, and analogous matters".[3]

There is no autonomous international definition of insolvency. In broad terms however, insolvency signifies inability to pay debts whether on a going concern basis or balance sheet basis, that is the liabilities of a debtor exceeding its assets. There is necessarily some element of futurity built into both these two assessments of insolvency.

In this field, it is common to draw a distinction in terms of the law between bankruptcy law which applies to individuals, and corporate insolvency law which applies to legal persons. Bankruptcy law involves a process of collection and distribution of assets belonging to persons who cannot pay their debts and the subsequent distribution of these assets to creditors in full or partial satisfaction of debts owing to them. The process of individual execution by creditors against the debtor's assets is replaced by a process of collective execution. During the process of collection and distribution, the debtor is generally subject to certain restrictions and disqualifications. These may continue for a time while the debtor's affairs are investigated and attempts may be made to locate any secreted assets. After a period has elapsed, the debtor is given a debt discharge and a so-called "second chance" free, in general, from existing debt burdens.

Corporate insolvency law is divided between liquidation law and corporate rescue or restructuring law. Liquidation involves a process of collective

[3] A judgment is not however excluded from the scope of this Convention where a matter to which the Convention does not apply arose merely as a preliminary question in the proceedings in which the judgment was given, and not as an object of the proceedings (see Art 2(2)).

execution, realisation, and distribution against the assets of a legal person. Enforcement efforts by individual creditors are precluded with a stay/moratorium in place. Instead, the process is collectivised through a professional called a liquidator or insolvency practitioner who acts on behalf of all the creditors. Normally at the end of the process, the existence of the corporate debtor as a legal person is brought to an end.

Corporate rescue law involves consideration of the legal mechanisms in place to try to ensure the recovery and rehabilitation of viable but financially distressed businesses. Again, there is normally a moratorium on the enforcement of claims and debts against the debtor business; an insolvency practitioner may be appointed to stabilise the affairs of the ailing debtor; then either the insolvency practitioner and/or the debtor's management team may try to work out a restructuring plan with the debtor's creditors. This may involve the injection of new funds into the debtor on a priority basis and/or existing creditors agreeing to forego part of their existing debts or agreeing to swap these debts for equity in the debtor's business.[4]

The Garcimartin-Saumier report on the Judgments Convention 2019[5] captures some of these distinctions. It explains that the term "composition" refers to proceedings where the debtor enters into an agreement with their creditors to restructure or reorganise a company to prevent its liquidation. Such agreements usually imply a moratorium on the payment of debts and a discharge. Purely contractual arrangements, on the other hand, were not covered by the exclusion. It also said that the term "analogous matters" covered a wide range of other methods whereby insolvent or financially distressed persons were assisted to regain solvency while continuing to trade.

Article 2(e) of the Hague Convention on Choice of Court Agreements 2005 contains exactly the same language on insolvency, composition and analogous matters. It omits any reference however, to the exclusion encompassing "resolution of financial institutions". The Garcimartin-Saumier report explains that this is a "relatively new concept". It refers to the legal framework enacted in many jurisdictions to address the risk of the failure of financial institutions, though national proceedings of this ilk may already be subsumed under the concept of "composition" or under "analogous matters" or regarded as essentially administrative measures. Resolution of financial institutions may encompass the reimbursement of depositors, the transfer or sale of assets and liabilities of a failing financial institution to another financial institution or to a temporary bridge institution, and the write-down or conversion of debt into equity.

[4]See generally, S Paterson, "Bargaining in Financial Restructuring: Market Norms, Legal Rights and Regulatory Standards" (2014) 14 *Journal of Corporate Law Studies* 333.
[5]The text of the Convention and explanatory report is available at https://assets.hcch.net/docs/a1b0b0fc-95b1-4544-935b-b842534a120f.pdf. The relevant paras of the explanatory report are 49–53.

The report, at paragraph 44, explains the rationale for exclusions from the Convention on three grounds. Firstly, that the relevant matters are "already governed by other international instruments", and such instruments should operate without any interference by the Convention; secondly, the relevant "matter is of particular sensitivity for many States and it would be difficult to reach broad acceptance on how the Convention should deal with it". The third ground is that it is preferable expressly to "list the matter as excluded to avoid any uncertainty based on diverging interpretations under national law".

It is submitted that there is a lot of sense in these grounds.

C. The EU jurisdictional rules insofar as they relate to insolvency and how they compare with those under the UNCITRAL Model Law on Cross-Border Insolvency

The main EU instrument in the field is the (recast) Insolvency Regulation.[6] The recast Regulation deals with issues of jurisdiction to open insolvency proceedings, the applicable law in respect of such proceedings and recognition and enforcement of insolvency proceedings opened in other EU Member States.

The preamble to the recast Insolvency Regulation locates it in the context of creating a European area of freedom, security and justice. It refers to the cross-border activities of business entities as European markets become more integrated and also to the need to prevent asset transfers or forum manipulation to the detriment of the general body of creditors – so-called "forum shopping". Jurisdiction to open main insolvency proceedings is given to the State where a debtor has its centre of main interests (COMI), with jurisdiction to open secondary proceedings given to the State or States where the debtor has an "establishment".

The Insolvency Regulation is based on judicial cooperation in civil matters and is part of the overall EU framework on private international law. Therefore, it sits alongside the Brussels 1a Regulation (Regulation 1215/2012/EU) which applies generally in civil and commercial matters.

Like the Hague Judgments Convention, the overall objective of the Brussels 1a Regulation is to bring about the simplification of formalities that govern the reciprocal recognition and enforcement of judgments and to strengthen legal protection. Recital 21 in the preamble makes clear the need, in the interests of the harmonious administration of justice, to ensure that irreconcilable judgments will not be given in two EU States.

The EU Insolvency Regulation applies where a debtor that is the focus of the insolvency proceedings has its COMI in the EU. It should be noted, however, that the jurisdiction of the court that opens insolvency proceedings extends to an "insolvency-related action". Proceedings may be brought against the defendant

[6]Regulation 2015/848 recasting Regulation 1346/2000.

in such an action notwithstanding the fact that the defendant is resident in a State other than the EU State that opens the insolvency proceedings.

It is stated in Article 1(1) of the Insolvency Regulation that the proceedings to which the Regulation applies are listed in Annex A and this is reinforced in Article 2(4), which states that the "insolvency proceedings" means the proceedings listed in Annex A. It seems on the basis of Articles 1(1) and 2(4), as well as the judgment of the CJEU in the *Eurofood* case,[7] that once a proceeding is listed in the Annex it must be regarded as coming within the scope of the Regulation.

While the Brussels 1a Regulation applies generally to civil and commercial matters, there are certain exceptions stated, however, in Article 1(2). According to Article 1(2)(b), it does not apply to "bankruptcy, proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings". This exception mirrors a similar provision in the earlier Brussels Convention, which also covered jurisdiction and the enforcement of judgments in civil and commercial matters.[8] The scope of the exception in Article 1(2)(b) has been the subject of a number of decided cases and there are also a number of cases concerned with the relationship between the Brussels 1a Regulation and the Insolvency Regulation and whether actions fall within one Regulation rather than the other.[9]

Recital 7 of the preamble to the recast Insolvency Regulation states that the interpretation of this Regulation should as much as possible avoid regulatory loopholes between it and the Brussels 1a Regulation. It adds, however, that the mere fact that a national procedure is not listed in Annex A to the Regulation should not imply that it is covered by the Brussels 1a Regulation.[10] This recital does, however, clarify any ambiguities in the existing case law.

It was said in *Gibraltar Residential Properties v Gibralcon*[11] that the Brussels 1a Regulation and the Insolvency Regulation were intended to provide mutually

[7]Case C-341/04, *Re Eurofood IFSC Ltd* [2006] ECR I–03813, [2006] Ch 508.

[8]1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, Art 1(2).The wording of the provisions is the same: Case C-111/08 *SCT Industri AB (In Liquidation) v Alpenblume AB* [2009] IL Pr 43 at para 23.

[9]The main cases are discussed in the text accompanying footnotes 10–14. In Case C-47/18 *Skarb v Stephan Riel* [2019] IL Pr 851 where the European Court affirmed that the respective scopes of the two regulations are clearly defined and that an action which derives directly from insolvency proceedings and is closely connected with them falls outside the scope of the Brussels Ia Regulation but rather within the scope of the Insolvency Regulation.

[10]Jan-Jaap Kuipers, "Schemes of Arrangement and Voluntary Collective Redress: A Gap in the Brussels I Regulation" (2012) 8 *Journal of Private International Law* 225.

[11][2010] EWHC 2595 (TCC), [2011] BLR 126. See also Briggs J in *Re Rodenstock GmbH* [2011] EWHC 1104 (Ch), [2011] Bus LR 1245, who suggested at para 47 that the Brussels I Regulation and the Insolvency Regulation were "intended to dovetail almost completely with each other". He referred to para 53 of the Schlosser Report on the accession of the UK, Denmark, and Ireland to the Brussels jurisdictional regime (OJ 1979 C59, p 71).

exclusive codes in relation to jurisdiction: the former was confined to insolvency and analogous proceedings, and the latter applied to other civil and commercial proceedings. On the other hand, the European Court in the *German Graphics* case[12] considered the possibility that there may be judgments that fall outside both Regulations though it did not offer any concrete examples.

The EU jurisprudence has however stressed the need for a harmonious interpretation of the two instruments. While there are some indications in the case law that, in respect of certain insolvency-related matters, there may be overlaps and concurrent jurisdiction between the Brussels 1a Regulation and the Insolvency Regulation, more recently the CJEU in *Nickel and Goeldner Spedition GmbH v 'Kintra' UAB* affirmed that there should be no gaps and overlaps. It said that the two Regulations "must be interpreted in such a way as to avoid any overlap between the rules of law that those texts lay down and any legal vacuum".[13]

This view was confirmed in *Tunkers France v Expert France*,[14] where the court held that actions excluded from the application of Brussels 1a Regulation in so far as they come under "bankruptcy, proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings" fall within the scope of the Insolvency Regulation. Correspondingly, actions that fall outside the scope of the Insolvency Regulation fall within the scope of the Brussels 1a Regulation.[15]

This dovetailing principle cannot be accepted in its entirety, however, particularly when one considers the possible relevance of the Lugano Convention, where there is an equivalent Article 1(2)(b) provision. The Lugano Convention forms the basis of the EU's private international law relationship with Norway, Iceland and Switzerland and is based on the original version of the Brussels 1 Regulation.

In the recent English case, *Re Gategroup Guarantee Ltd*,[16] Zacaroli J addressed the possible relevance of the "bankruptcy" exception in Article 1 (2)(b) in the context of the Lugano Convention. In his view, the principal "peculiarity" of insolvency proceedings, which meant that special rules relating to jurisdiction and recognition were required, is that they were a collective process, driven by the need to solve the problem that the debtor's assets are

[12]Case C-292/08, [2009] ECR I–8421 at paras 17, 18. See, however, Case C-157/13 *Nickel and Goeldner Spedition GmbH v 'Kintra' UAB* [2015] QB 96 at para 21; Case C-649/13 *Nortel Networks SA v Rogeau* [2015] 2 BCLC 349 at para 26; Case C-641/16 *Tunkers France v Expert France* [2018] IL Pr 75 at para 17.
[13]Case C-157/13, EU:C:2014:2145 at para 21.
[14]Case C-641/16, [2018] IL Pr 75 at para 17 and see also Case C-649/16 *Valach v Waldviertler Sparkasse Bank AG* [2018] IL Pr 109 at para 24; Case C-296/17 *Wiemer & Trachte GmbH, in liquidation v Tadzher* (EU:C:2018:902, [2019] BCC 339) at para 29.
[15]See also Case C-47/18 *Skarb v Stephan Riel* [2019] IL Pr 851.
[16][2021] EWHC 304 (Ch).

insufficient to satisfy the claims of all of the creditors, thus raising at least the possibility of competition among the debtor's creditors and stakeholders.[17]

A principle of "modified universalism" was said to underpin the Insolvency Regulation under which the courts should try to implement a single scheme of distribution applicable to all the debtor's assets. Moreover, insolvency proceedings opened in a debtor's "home" jurisdiction should be recognised and given effect in other countries.[18]

The Insolvency Regulation should also be seen in the context of the UNCITRAL Model Law on Cross-Border Insolvency. The Model Law has been implemented by certain EU Member States – Greece, Poland, Romania, and Slovenia.[19] The Model Law does not attempt a substantive unification of insolvency law and its scope is limited to some procedural aspects of cross-border insolvency cases.[20]

The Model Law does not go nearly as far as the Insolvency Regulation and this failure to cover the same field is understandable. The Insolvency Regulation is an emanation from the EU whose Member States have agreed to pool their sovereignty and agreed to work towards an ever-closer union. UNCITRAL, on the other hand, is a United Nations organ where the link between Member States is more diffuse and there is no commitment to work towards an ever-closer union.

The EU Regulation contains mandatory uniform rules on jurisdiction and conflict of laws and, to that extent, represents an encroachment on the sovereignty of individual Member States. The Model Law is looser and more exhortatory in tone. It does not deal directly with jurisdiction to open insolvency proceedings, whether main or secondary insolvency proceedings. Nor does it deal directly with applicable law issues and purport to say which law should govern insolvency proceedings that are opened in a particular State. Recognition of insolvency proceedings opened in another EU Member State is automatic whereas, under the Model Law, it is dependent upon an application to the court. By virtue of the Insolvency Regulation, insolvency proceedings have the same effect in other EU States as they have in the law of the insolvency forum, whereas under the Model Law the

[17] *Ibid* para 91.

[18] See generally, G McCormack, "Universalism in Insolvency Proceedings and the Common Law" (2012) 32 *Oxford Journal of Legal Studies* 325–47 and G McCormack, "COMI and Comity in UK and US Insolvency Law" (2012) 128 *Law Quarterly Review* 140–59.

[19] The model law is available on the UNCITRAL website at https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency and for a list of countries that have adopted the model law see https://uncitral.un.org/en/texts/insolvency/modellaw/crossborder_insolvency/status.

[20] For comparisons between the UNCITRAL Model Law and the EU Insolvency Regulation see Reinhard Bork, "The European Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency" (2017) 26 *International Insolvency Review* 246.

consequences of recognition depend on the law of the recognising State. There are many other differences, particularly of detail, between the two instruments.

The UNCITRAL Model Law on Cross Border Insolvency aims to achieve greater efficiencies in the administration of international insolvency cases.[21] The Model Law has attained a measure of international acceptance with the US and UK among the implementing States as well as the other major common law jurisdictions of Canada and Australia and jurisdictions in Africa and Asia including Japan, South Korea and Singapore.[22] In the UK, the Model Law has been implemented through the Cross Border Insolvency Regulations (CBIR) 2006.[23] In the US, it has been done through a new Chapter 15 of the US Bankruptcy Code.

The Model Law adopts a "modified universalist" principle.[24] It allows for the opening of more than one set of insolvency proceedings in States where the debtor has a business presence, and aims for maximum cooperation and coordination among the various proceedings. To this end, the Model Law provides for four main elements in the conduct of cross-border insolvency cases: access, recognition, relief (assistance) and cooperation.[25]

The underlying philosophy of the Model Law was expounded by the US court in *ABC Learning Centres Ltd*. It said:[26]

> The Model Law reflects a universalism approach to transnational insolvency. It treats the multinational bankruptcy as a single process in the foreign main proceeding, with other courts assisting in that single proceeding. In contrast, under a territorialism

[21]The Model Law (1997) is available at the United Nations Commission on International Trade Law (UNCITRAL) website – www.uncitral.org/. For analyses of the Model Law by those involved in its drafting – see A Berends, "UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview" (1998) 6 *Tulane Journal of International & Comparative La*w 309; J Clift, "The UNCITRAL Model Law on Cross-Border Insolvency: A Legislative Framework to Facilitate Coordination and Cooperation" (2004) 12 *Tulane Journal of International & Comparative Law* 307.

[22]But for a somewhat different view see S Chandra Mohan, "Cross-Border Insolvency Problems: Is the UNCITRAL Model Law the Answer?" (2012) 21 *International Insolvency Review* 199 who suggests that the belief that the adoption by the US and UK "might encourage adoption by a wider circle of countries" has simply not materialised. For the current list of adoptions see the UNCITRAL website – www.uncitral.org/.

[23]SI 2006/1030. Reg 2 provides that "(1) The UNCITRAL Model Law shall have the force of law in Great Britain in the form set out in Schedule 1 to these Regulations (which contains the UNCITRAL Model Law with certain modifications to adapt it for application in Great Britain)".

[24]See generally Irit Mevorach, "Modified Universalism as Customary International Law" (2018) 96 *Texas Law Review* 1403–36 and Irit Mevorach, *The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps* (Oxford University Press 2018).

[25]UNCITRAL, "Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency" (2013) (Revised Guide), para 24.

[26]*In re ABC Learning Centres Ltd* (2013) 728 F3d 301 at 307. The court cited Andrew Guzman, "International Bankruptcy: In Defense of Universalism" (2000) 98 *Michigan Law Review* 2177 at 2179.

> approach a debtor must initiate insolvency actions in each country where its property is found. This approach is the so-called 'grab' rule where each country seizes assets and distributes them according to each country's insolvency proceedings.[27]

The *ABC Learning* analysis has also been adopted by courts in other countries including the UK and Australia.[28] The Australian Federal Court in *Akers v Deputy Commissioner of Taxation*[29] has however, tempered the high-flown rhetoric in *ABC Learning* in at least two respects. First, it suggested that the universalism of the Model Law was qualified[30] and also that this description could only be accepted "for what it is worth".[31] Secondly, it suggested that "local" law may have to be applied in respect of the distribution of assets collected locally rather than the law of the main insolvency proceedings.[32] Allsop CJ said that "the sacrifice of the rights … of local creditors upon an altar of universalism may be to take the general informing notion of universalism too far".[33]

D. National jurisdictional rules outside the intra-EU framework – the US and UK

The US Bankruptcy Code contains a liquidation chapter in Chapter 7. Its main attractiveness however, to foreign companies lies in the restructuring provisions of Chapter 11 where the statutory goal is the preparation and confirmation of a reorganisation plan.[34] According to the US Supreme Court:[35]

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[27]For the universalism versus territorialism debate see JL Westbrook, "A Global Solution to Multinational Default" (2000) 98 *Michigan Law Review* 2276; L Lo Pucki, "The Case for Co-Operative Territoriality in International Bankruptcy" (2000) 98 *Michigan Law Review* 2216; L. Lo Pucki, "Universalism Unravels" (2005) 79 *American Bankruptcy Law Journal* 143; R. Rasmussen, "Where are all the Transnational Bankruptcies?: The Puzzling Case for Universalism" (2007) 22 *Brooklyn Journal of International Law* 983.
[28]G McCormack and Anil Hargovan, "Australia and the International Insolvency Paradigm" (2015) 37 *Sydney Law Review* 389–416.
[29][2014] FCAFC 57 at para 111.
[30]See generally L Clark and K Goldstein, "Sacred Cows: How to Care for Secured Creditors' Rights in Cross-Border Bankruptcies" (2011) 46 *Texas International Law Journal* 513 at 518–19 describing "modified universalism" as a practical alternative to the difficulty of implementing a fully universal system of international insolvency.
[31][2014] FCAFC 57 at para 120.
[32]For a discussion of why "developed States" may prefer "universalist" insolvency norms see Lord Hoffmann in *Cambridge Gas Transport Corporation v Official Committee of Unsecured Creditors (of Navigator Holdings Plc)* [2007] 1 AC 508 and for some reasons why developing countries might want to ring-fence assets for the benefit of local creditors see the paper by the former Singapore Chief Justice Chan Sek Keong, "Cross-Border Insolvency Issues Affecting Singapore" (2011) 23 *Singapore Academy of Law Journal* 413 at 419.
[33]*Supra* n 31 at para 118.
[34]*Bank of America v 203 North LaSalle Street Partnership* (1999) 526 US 434.
[35]*US v Whiting Pools, Inc* (1983) 462 US 198 at 203. See also HR Rep No 595, 95th Congress, 1st Sess 220(1977).

> In proceedings under the reorganization provisions of the Bankruptcy Code, a troubled enterprise may be restructured to enable it to operate successfully in the future … By permitting reorganisation, Congress anticipated that the business would continue to provide jobs, to satisfy creditors' claims, and to produce a return for its owners … Congress presumed that the assets of the debtor would be more valuable if used in a rehabilitated business than if 'sold for scrap'.

US bankruptcy law in general and especially Chapter 11 is particularly attractive to foreign forum shoppers for probably five main reasons; (a) the worldwide automatic stay; (b) the debtor in possession norm; (c) the provisions for super-priority of new finance; (d) the statutory "cramdown" possibilities; and finally (e) the procedural consolidation possibilities. The automatic stay on enforcement proceedings operates in respect of the debtor or its property and this stay has worldwide effect.[36] The US courts have inferred extraterritorial effect from the language of the Bankruptcy Code provisions and they have also held that the bankruptcy estate comprises property of the debtor wherever situated throughout the world.[37]

In the US, the same (low) jurisdictional threshold applies in both liquidation and restructuring scenarios. Commentators have spoken of the tissue thin connection that suffices to found US Bankruptcy Code competence.[38] Section 109(a) of the US Bankruptcy Code provides that any person who "resides or has a domicile, a place of business, or property in the United States" may be a debtor under the Code. It seems that US bankruptcy jurisdiction could be exercised on the basis of a single bank account in the US. The presence of a "dollar, a dime or a peppercorn" provides a sufficient jurisdictional nexus and so too does a shareholding in a US-incorporated subsidiary company.[39] The US States courts may decline jurisdiction, however, on discretionary grounds, for example where a debtor is attempting to get around choice-of-forum clauses in its contracts with principal creditors.[40]

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[36]See *Nakash v Zur (In re Nakash)* (1996) 190 BR 763 where the automatic stay was enforced against a foreign receiver in respect of the foreign assets of a foreign debtor.

[37]See *Hong Kong & Shanghai Banking Corp v Simon (In re Simon)* (1998) 153 F 3d 991 at 996: "Congress intended extraterritorial application of the Bankruptcy Code as it applies to property of the estate."

[38]See S Shandro and B Jones, "Bankruptcy Jurisdiction in the US and Europe: Reconsideration Needed!" (2005) 18 *Insolvency lntelligence* 129, 131. Also generally, E Healy, "All's Fair in Love and Bankruptcy? Analysis of the Property Requirement for Section 109 Eligibility and Its Effect on Foreign Debtors Filing in US Bankruptcy Courts" (2004) 12 *American Bankruptcy Institute Law Review* 535.

[39]See the statement in *In re Globo Communicacoes E Participacoes SA* (2004) 317 BR 235 at 249 that "courts have required only nominal amounts of property to be located in the United States, and have noted that there is virtually no formal barrier to having federal courts adjudicate foreign debtors' bankruptcy proceedings".

[40]See *In re Head* (1998) 223 BR 648 where the links with the US were quite slight and the foreign debtors were attempting to circumvent contractual liability to a UK based creditor – Lloyds of London.

A leading case is that of *Re Yukos*[41] which involved a Russian oil company whose business operations, including exploration and refining, were based in Russia. A US bankruptcy filing was made essentially in an attempt to prevent a seizure of the company's assets in Russia to satisfy a Russian tax debt. US bankruptcy jurisdiction was held to be established on the basis of a bank account in the US opened shortly before the bankruptcy filing and on the presence of the debtor's chief financial officer in the US. The proceedings were later dismissed, however, on the basis of s 1112(b) of the US Bankruptcy Code, which allows dismissal of a case for cause, including the absence of a reasonable likelihood of achieving corporate restructuring.

The background to the Russian tax claim and the consequent US bankruptcy filing was a political dispute between the company controller and the Russian government. The "totality of circumstances" line of reasoning used by the court to dismiss the case referred to a number of factors including the very limited ability to implement a restructuring plan in the absence of cooperation from the Russian government, the transfer of funds to the US shortly before the bankruptcy filing and an attempt to upset the Russian scheme of creditor priorities by the use of US law and judicial structures.[42]

One of the most attractive features of the US Bankruptcy Code for debtors, including foreign debtors is the possibility of early stage intervention through Chapter 11 to address a debtor's financial difficulties. Early stage proceedings are designed to allow value to be preserved in an ailing business when there is still value that might be preserved.[43] Technically there is no requirement that the company should be "insolvent" in the sense of inability to pay debts as they fall due and so-called strategic bankruptcies are a conspicuous part of the US scene. In other words, companies may have a number of reasons, other than insolvency strictly so-called, to invoke the protective cloak of Chapter 11. For instance, a company may be faced with large potential tort liabilities and attempts to reach an overall settlement with plaintiffs have broken down. Well-publicised examples of this include the *Johns-Manville* case[44] involving asbestos-related liabilities where the court stated that a business foreseeing insolvency was not required to wait until actual inability to pay debts before entering Chapter 11. Another example concerns the restructuring of the *AH Robins Company* brought about by its liability to

[41] *Re Yukos Oil Co* (2005) 321 BR 396.
[42] (2005) 321 BR 396 at 410,
[43] See generally TH Jackson, *The Logic and Limits of Bankruptcy Law* (Harvard University Press 1986) at pp 1–19 who sees bankruptcy as addressing a collective action problem, an "over-fishing" or "tragedy of the commons" problem as it were. See also N Tollenaar, *Pre-Insolvency Proceedings: A Normative Foundation and Framework* (Oxford University Press 2019) at pp 9–37.
[44] (1984) 36 BR 727.

women who suffered injury as a result of using the Dalkon Shield birth control device.[45]

As far as UK proceedings are concerned, the UK Insolvency Act 1986 grants the court the authority to make a winding up order on various grounds including inability to pay debts. Once a UK winding up order is made it purports to have worldwide effect, but it is possible for UK courts to assist foreign courts by treating any liquidation as ancillary to one that was taking place in the debtor's place of incorporation. This has the consequence that the powers of the UK liquidator are limited to gathering the UK assets, paying off preferential and secured creditors and then remitting any remaining assets to the principal liquidation.[46] Section 221 Insolvency Act does not on its face fetter the discretion of the court to make a winding up order and a case could be advanced that there is no need to establish any UK connection before the discretion comes into play.

A "sufficient connection" test has been used as the overriding criterion for determining whether the court should make a winding up order in respect of a foreign company. It now seems clear that the "sufficient connection" test does not go to jurisdiction but to the exercise of discretion in relation to an already existing jurisdiction. The same "sufficient connection" test applies to the exercise of UK court jurisdiction to sanction (approve) schemes of arrangement under Part 26 UK Companies Act 2006 and restructuring plans under the new Part 26A of the same Act. The courts in cases like *Re Drax Holdings Ltd*[47] have applied the "sufficient connection" test in respect of schemes of arrangement. In *Re Rodenstock GmbH*,[48] for instance, a sufficient connection with England was found to exist by virtue of the fact that the credit facilities extended to the company contained English choice of law and jurisdiction clauses and also by expert evidence to the effect that the relevant foreign courts would recognise the English court order.[49]

[45]For an account of this case see Richard B Sobol, *Bending the Law: The Story of the Dalkon Shield Bankruptcy* (University of Chicago Press 1991) and see his comment at p 326: "Bankruptcy is the appropriate response when a business is unable, or can foresee that it will be unable, to pay the cost of mass tort liability. Novel and difficult questions are presented when the liabilities of a financially distressed business arise primarily out of personal injury claims, but no other mechanism is available and, with due regard for the exceptional context, these questions must be addressed and resolved within the bankruptcy system."

[46]*Banco Nacional de Cuba v Cosmos Trading Corp* [2001] BCC 910.

[47][2004] 1 WLR 1049.

[48][2011] EWHC 1104; [2012] BCC 459. See also on the jurisdiction to sanction schemes *Primacom Holdings GmbH v Credit Agricole* [2013] BCC 201 and *Re Seat Pagine Gialle SpA* [2012] EWHC 3686.

[49]See generally L Chan Ho, "Making and Enforcing International Schemes of Arrangement" (2011) 26 *Journal of International Banking Law and Regulation* 434.

E. Exercising insolvency jurisdiction and forum shopping

The question arises how a Hague instrument might set out a single set of rules to govern the institution of insolvency proceedings thereby providing a worldwide framework and how to deal with the potential issue of forum shopping. The universalist ideal calls for a single forum to administer the debtor's affairs on a worldwide basis.[50] A single forum should cut down on cost and inconvenience and achieve greater parity in the treatment of creditors.[51] According to a US court, the centralisation of insolvency proceedings:

> will frequently provide the optimal result for a debtor and its creditors alike by preventing certain creditors from gaining an advantage over others by virtue of differing judicial systems. A single primary proceeding also minimizes the time, expense and administrative burdens of managing full cases in multiple jurisdictions.[52]

It is less easy however, to determine where this single forum should be. Perhaps the most obvious forum is the country where the debtor came into existence, where the debtor is a company that is the country of incorporation. If the company has formally changed domicile or registered office, then the law of the new domicile or registered office should come centre stage.

But the country of incorporation may be a so-called letterbox jurisdiction offering the facilities to incorporate but little more.[53] Even if a company has not been incorporated in a letterbox jurisdiction, the company may have minimal contacts with its country of incorporation and have its corporate headquarters and/or the bulk of its business operations located elsewhere. Practical and political reasons may preclude the possibility of restructuring or liquidation proceedings in the country of incorporation even though such proceedings on an objective basis would best serve creditor and other interests. Having insolvency proceedings in a country other than the country of incorporation may produce a greater alignment of debtor and creditor interests.

This consideration highlights the attractiveness of a "centre of main interests" test rather than a place of incorporation test for determining main insolvency jurisdiction. Both could also in any international instrument serve as alternative jurisdiction tests. There are also other possibilities, but the availability of alternatives

[50] *Cambridge Gas Transport Corporation v Official Committee of Unsecured Creditors (of Navigator Holdings PLc)* [2007] 1 AC 508 at 516. See also *Re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852 and generally McCormack, "Universalism" (n 18).

[51] But a single forum does not necessarily resolve issues about choice of law; on which see H Buxbaum, "Rethinking International Insolvency: The Neglected Role of Choice-of-Law Rules and Theory" (2000) 36 *Stanford Journal of International Law* 23; JL Westbrook, "Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum" (1991) 65 *American Bankruptcy Law Journal* 457.

[52] See *In re Board of Directors of Multicanal SA* (2004) 314 BR 486 at 521 ; *In re Treco* (2001) 240 F 3d at 154.

[53] See the comments of Lord Hoffmann in *Re HIH Insurance* [2008] 1 WLR 852 at 862.

gives rise to the question of how conflicts of jurisdiction are to be resolved whether through a *lis pendens* test or otherwise.

In the modern business environment even the most superficially straightforward insolvency case may have an international element with payments to creditors being possibly routed, for instance, through foreign clearing systems or bank accounts. In many cases however, the foreign or international link is more substantial with the debtor company having assets in different countries. If the debtor becomes unable to service its debts this gives rise to the possibility of a multiplicity of separate insolvency proceedings in the countries where the debtor has a "presence", however defined. The greater the range of foreign "contacts", the greater the number of possible insolvency proceedings. The multiplication of insolvency proceedings compromises the goals of insolvency law to achieve a collective forum for the administration and resolution of the debtor's affairs.

One of the professed objectives of the EU Insolvency Regulation is to stop forum shopping,[54] that is the movement of assets or persons to a jurisdiction with what are seen to be more favourable laws on insolvency. The detailed provisions of the EU Insolvency Regulation are not necessarily very successful however, in this regard. There is nothing to stop a debtor from making an eve of insolvency COMI move to another jurisdiction so as to take advantage of a more favourable legal regime and to open insolvency proceedings there.[55]

The UNCITRAL Model Law on Cross-Border Insolvency is a less ambitious instrument than the EU Insolvency Regulation and does not directly allocate jurisdiction to open insolvency proceedings. National implementing legislation makes it clear that existing jurisdictional rules remain in place.[56]Model Law supporters argue that it impliedly restricts forum shopping in that foreign insolvency proceedings will only be "fully" recognised if they have been opened in a State where the debtor has its "centre of main interests" (COMI).[57] But critics point out that the concept of COMI is "fuzzy" and subject to manipulation and there is nothing to prevent local courts from opening insolvency proceedings on a wide jurisdictional basis.[58]

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[54]Recital 4 of the preamble.

[55]The recast Insolvency Regulation (Regulation 2015/848) in Art 3(1) contains some limited measures to prevent forum shopping carried out by last minutes changes of the registered office of a corporate debtor.

[56]Cross-Border Insolvency Regulations 2006, SI 2006/1030 sch 1, art 20(5) in the UK and section 1520(c) Bankruptcy Code in the US.

[57]See JL Westbrook, "Chapter 15 at Last" (2005) 79 *American Bankruptcy Law Journal* 713.

[58]See LM LoPucki, "Global and Out of Control?" (2005) 79 *American Bankruptcy Law Journal* 79; LM LoPucki, "Universalism Unravels" (2005) 79 *American Bankruptcy Law Journal* 143 and generally J Pottow, "The Myths (and Realities) of Forum Shopping in Transnational Insolvency" (2007) 32 *Brooklyn Journal of International Law* 785

Nevertheless, if forum shopping is defined as the search by a plaintiff for the international jurisdiction most favourable to its claims, then the phenomenon must be accepted as a natural consequence which is not open to criticism. It is natural and inevitable that a plaintiff would choose the place where it considers that its legitimate interests would be best advanced.[59]

In the US context there has been a lively debate on domestic bankruptcy forum shopping and various unsuccessful attempts, to reform the "venue" provisions in the US Code. These allow bankruptcy proceedings to be filed where a debtor is incorporated; where it has its principal place of business or where an affiliate has already filed for bankruptcy.[60]

While US bankruptcy law is federal law,[61] different bankruptcy courts in fact differ in their interpretation of particular Bankruptcy Code provisions; different courts adopt different procedural rules and some judges are more experienced in bankruptcy matters than others.[62] Since the so-called "great recession" in 2007, empirical evidence suggests that about 70% of large corporate bankruptcies are "forum shopped" to a district other than where the debtor has its principal place of business.[63] The Southern District of New York and Delaware are the prime forum shopping venues.

US venue reform efforts have stalled in part it seems because of the strength of the Delaware lobby which has an influential advocate in US President and former Delaware Senator, Joe Biden. Mr Biden has argued that some bankruptcy courts develop specialised knowledge and experience and it is understandable for parties to want cases to be adjudicated in locations where they feel most comfortable.[64]

[59]In the *Atlantic Star* case Lord Wilberforce commented that it was natural and inevitable that a plaintiff would choose the place where he considers that his legitimate interests would be best advanced. He suggested that if the law of one country was more favourable than the law of another country, a plaintiff was not to be criticised for choosing the former. Lord Simon said that this should be a matter neither for surprise nor for indignation – *Owners of the Atlantic Star v Owners of the Bona Spes (The Atlantic Star and The Bona Spes)* [1974] AC 436 at 461 and 471.

[60]28 USC 408.

[61]Art 1, section 8, cl 4 of the US Constitution.

[62]For a full-blooded critique of bankruptcy forum shopping in the US see LM LoPucki, *Courting Failure: How Competition for Big Cases Is Corrupting the Bankruptcy Courts* (University of Michigan Press 2005) but for rebuttals of the LoPucki thesis see MB Jacoby, "Fast, Cheap, and Creditor-Controlled: Is Corporate Reorganization Failing?" (2006) 54 *Buffalo Law Review* 401 and also K Ayotte and D Skeel, "An Efficiency-Based Explanation for Current Corporate Reorganization Practice" (2006) 73 *University of Chicago Law Review* 425.

[63]See UCLA-LoPucki Bankruptcy Research Database accessible at https://lopucki.law.ufl.edu/index.php.

[64]See J Biden, "Give Credit to Good Courts" *Legal Times* 20 June 2005: "One of the states … singled out for criticism is my state of Delaware, a jurisdiction widely respected for the quality, efficiency, expertise, and fairness of its bankruptcy courts."

Mr Biden's arguments can be translated into the international level and there is also the argument that creative competition among jurisdictions for the optimum set of insolvency law provisions will promote aggregate social welfare.[65] The existence of jurisdictional diversity creates the opportunity for competition among national legal orders and, on this analysis, the general welfare is maximised through the adoption of innovative rules at the national level and then giving parties a relatively free hand in selecting such rules to govern their relationships.[66]

There are, however, powerful countervailing considerations based upon the arguments that national insolvency law contains a set of normative provisions that parties, or one party, should not be allowed to bypass through the exercise of contractual and jurisdictional choice. Insolvency law normally contains a mandatory set of provisions on, inter alia, operation of the debtor's business; treatment of existing contracts, avoidance of pre-insolvency transactions and priority among creditors. National insolvency laws differ on the emphasis placed on restructuring of the debtor rather than liquidation; on the ranking accorded to different types of creditors, and on the conditions whether, and to what extent, creditors can be pressed into accepting a restructuring plan. The values that are, and ought to be, served by insolvency law, have excited a lot of debate and discussion among commentators.[67] In our fragmented world these values will bear different weights in different countries. If foreign parties are allowed to flock to the safe haven of US or even UK insolvency jurisdiction, then there is a risk of undermining national policies that foreign countries consider important such as special protection for the public purse and for employees. The *Yukos*[68] *case* provides a good example of this where a Russian oil company was held entitled to file for bankruptcy protection in the US to stave off Russian tax demands – demands that would not be recognised in the US.

On the other side of the ledger however, the scale of the US capital markets means that many foreign-incorporated borrowers owe debts under loan agreements that are governed by NY law and many also have assets in the US. The

[65]For the much-cited argument about forum shopping in a municipal context see C Tiebout, "A Pure Theory of Local Expenditures" (1956) 64 *Journal of Political Economy* 416.
[66]See generally A Ogus, "Competition between National Legal Systems: A Contribution of Economic Analysis to Comparative Law" (1999) 48 *International and Comparative Law Quarterly* 405; F Easterbrook, "Federalism and European Business Law" (1994) 14 *International Review of Law and Economics* 125.
[67]See generally V Finch, "The Measures of Insolvency Law" (1997) 17 *Oxford Journal of Legal Studies* 227.
[68]*Re Yukos Oil Co* (2005) 321 BR 396. For some consideration of the merits of the tax demands see the judgment of the European Court of Human Rights in *Yukos v Russia* (2012) 54 EHRR 1.

same may also apply in relation to English law governed assets and UK assets. The vicissitudes of global trade and economic fortune result in some debtors becoming financially distressed and seeking to restructure both their debts in insolvency or perhaps in pre-insolvency proceedings. The question arises whether these debts may be restructured in the same set of proceedings or whether parallel proceedings in different jurisdictions become necessary. A universalist, even a "modified" universalist approach would seek to obviate or reduce the necessity of separate proceedings. Transaction cost efficiencies would seek to minimise the multiplicity of proceedings and disincentivise hold-out behaviour by certain creditors that obstruct value-enhancing restructurings. Value enhancement may be achieved by channelling debt restructuring and debt restructuring negotiations into major financial centres such as London and New York (and possibly even Singapore) whose law is chosen to govern major finance agreements. Therefore, these locations have become popular forum shopping venues.

If it has proved impossible to stop forum shopping in a US domestic context, then it is likely to be even more impossible to stop it in an international context. Moreover, it has become customary to acknowledge a distinction between "good" and "bad" forum shopping particularly in the context of "quasi-insolvency", that is debt restructuring procedures and agreements. In the UK context, Snowden J in *Re Van Gansewinkel Groep BV*[69] commented:

> In recent years schemes of arrangement have been increasingly used to restructure the financial obligations of overseas companies that do not have their COMI or an establishment or any significant assets in England … The use of schemes of arrangement in this way has been prompted by an understandable desire to save the companies in question from formal insolvency proceedings which would be destructive of value for creditors and lead to substantial loss of jobs. The inherent flexibility of a scheme of arrangement has proved particularly valuable in such cases where the existing financing agreements do not contain provisions permitting voluntary modification of their terms by an achievable majority of creditors, or in cases of pan-European groups of companies where co-ordination of rescue procedures or formal insolvency proceedings across more than one country would prove impossible or very difficult to achieve without substantial difficulty, delay and expense.

[69][2015] EWHC 2151 (Ch), [2015] Bus LR 1046. Note too the same judge in *Re Global Garden Products Italy SpA* [2016] EWHC 1884 (Ch). See also the full discussion of the relevant considerations by Trower J in *Re Lecta Paper UK Ltd* [2020] EWHC 382 (Ch) and see generally LC Ho, "Making and Enforcing International Schemes of Arrangement" (2011) 26 *Journal of International Banking Law and Regulation* 434; J Payne, "Cross-Border Schemes of Arrangement and Forum Shopping" (2013) 14 *European Business Organization Law Review* 563.

The matter was further considered by Newey J in *Re Codere Finance (UK) Ltd*[70] who drew a distinction between "good" and "bad" forum shopping. Newey J said:[71]

> Plainly forum shopping can be undesirable. That can potentially be so, for example, where a debtor seeks to move his COMI with a view to taking advantage of a more favourable bankruptcy regime and so escaping his debts. In cases such as the present, however, what is being attempted is to achieve a position where resort can be had to the law of a particular jurisdiction, not in order to evade debts but rather with a view to achieving the best possible outcome for creditors. If in those circumstances it is appropriate to speak of forum shopping at all, it must be on the basis that there can sometimes be good forum shopping.

Such considerations tend to favour a degree of jurisdictional flexibility rather than a straightforward test of place of incorporation and/or COMI. It has been argued that new and creative approaches are needed to maintain jurisdictional flexibility; to permit centralised group restructurings; to control abuse and to protect the interests of creditors and other parties. An alternative solution might simply entail relaxation of the rules relating to COMI and establishment enshrined in the UNCITRAL Model Law and the EU Insolvency Regulation when these rules are applied to the restructuring of financial obligations. The argument is that restructuring requires a contractual solution. Therefore, the legal framework supporting the restructuring should be based on contract and company law principles rather than on insolvency law principles.

There is increased emphasis now placed on restructuring the business and affairs of a business debtor rather than simply liquidating its assets and distributing them to creditors. If restructuring tools are regarded as part of insolvency law, then one might simply apply existing insolvency law frameworks such as the EU Insolvency Regulation including the COMI test for the exercise of jurisdiction. There is however the question of demarcation between corporate law with its place of incorporation reference point and insolvency law which refers to COMI.[72]

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[70][2015] EWHC 3778 (Ch). Note too *Re Algeco Scotsman PIK SA* [2017] EWHC 2236 (Ch) where Hildyard J commented at [57] that although "forum shopping" had been used as a pejorative description of a situation where a company resorted to an inappropriate court for inappropriate purposes, the company's resort to the English court in the present case was appropriate and understandable given the lack of any viable or efficient alternatives. The judge also reiterated what he said in *Re Apcoa Parking Holdings GmbH* [2014] EWHC 3849 (Ch) that whenever there is a change in jurisdiction clause for the purpose of opening the gateway to the English scheme jurisdiction, the court should be careful to scrutinise whether the change of law or jurisdiction or the resort more generally to the English court was inappropriate.

[71]*Ibid* at para 18.

[72]On the classification problem, see C Gerner-Beuerle and EP Schuster, "The Costs of Separation: Conflicts in Company and Insolvency Law in Europe" (2014) 14 *Journal of*

An "insolvency approach" to restructuring law is also found in the US Bankruptcy Code, which in Chapter 11 permits a debtor voluntarily to use reorganisation proceedings anytime and without any insolvency test as long as it acts in good faith. All restructuring proceedings (regardless of the actual insolvency of the debtor) are bankruptcy proceedings under the US Code. Chapter 15 of the US Bankruptcy Code which implements the UNCITRAL Model Law permits the recognition in the US of foreign insolvency proceedings including proceedings for the adjustment of debts.

To some extent at least, restructuring proceedings are about enhancing and adjusting the future income of a debtor rather than addressing the common pool of existing assets of the debtor being insufficient to pay all creditors in full.[73] The German Professor, Professor Horst Eidenmüller has argued that what defines insolvency proceedings is not the material insolvency of the debtor, but rather that the proceeding attempt to resolve a common pool problem affecting creditors.[74] In his view, restructuring proceedings do not address a common pool problem and, therefore, insolvency law should not regulate them. Instead, private international law rules on judgments and contracts fit better to their structure and principles.

Another German Professor, Stephan Madaus, similarly argues that simply expanding insolvency rules to all restructurings does not seem convincing.[75] Taking a different tack however, is the Anglo-Israeli pair, Professors Mevorach and Walters. They recognise the risk is over-inclusivity of cross-border insolvency law, based on universality and unity, which might defeat contractual expectations. They argue, however, that one should be slow to exclude pre-insolvency proceedings from cross-border insolvency law. Such proceedings are initiated in the zone of insolvency: their effectiveness depends on a statutory mandate and not purely on private ordering, they interact and intersect with formal proceedings, and can benefit from the unique system developed by cross-border insolvency law. In their view, modified universalism which is the leading norm of cross-border insolvency and international insolvency instruments, should be able to adjust to the peculiarities of pre-insolvency

Corporate Law Studies 287, 320–23 and C Gerner-Beuerle and M Schillig, "The Mysteries of Freedom of Establishment after *Cartesio*" (2010) 59 *International and Comparative Law Quarterly* 303.

[73]See generally N Tollenaar, *Pre-Insolvency Proceedings: A Normative Foundation and Framework* (Oxford University Press 2019).

[74]See H Eidenmüller, "What Is an Insolvency Proceeding?" (2018) 92 *American Bankruptcy Law Journal* 53–71.

[75]See S Madaus, "Leaving the Shadows of US Bankruptcy Law: A Proposal to Divide the Realms of Insolvency and Restructuring Law" (2018) 19 *European Business Organization Law Review* 644, suggesting a differentiated solution based on private international law rules concerning judgments and contracts.

proceedings; to address concerns about inclusivity and to accommodate pre-insolvency proceedings adequately.[76]

The debate on the appropriate forum for insolvency and restructuring proceedings is ongoing but this debate us perhaps best conducted through UNCITRAL rather than through the Hague Conference. It should be noted that UNCITRAL's work on cross-border insolvency cooperation did not stop with the enactment of the Model Law on Cross-Border Insolvency in 1997.[77] UNCITRAL has now adopted two new Model Laws and taken three additional "non-legislative" measures.[78]

On the legislative front, UNCITRAL has completed two initiatives to further cross-border insolvency cooperation; firstly, a Model Law on Recognition and Enforcement of Foreign Insolvency Related Judgments,[79] and secondly, an even newer Model Law on Enterprise Group Insolvency.[80] On the non-legislative front, it has adopted a practice guide on cross-border cooperation;[81] secondly, a document setting out the judicial perspective on these matters;[82] and thirdly, in 2013 a *Revised Guide To Enactment of the Model Law*.

To go full circle and back to the reasoning in the Garcimartin-Saumier report, insolvency is dealt with in other instruments and these instruments should be allowed to operate without interference by another Hague Convention instrument. As we have seen however, the extent of the insolvency exclusion is highly contested. It may be that different implementing States will interpret and apply the exclusion in different ways.

[76]Irit Mevorach and Adrian Walters, "The Characterization of Pre-insolvency Proceedings in Private International Law" (2020) 21 *European Business Organization Law Review* 855, 877 (noting that in skinny restructurings, "the creditors are invariably sophisticated multinational parties whose expectations will be shaped as much by prevailing trends in the restructuring market as by contract.").

[77]See generally, Mevorach, "Modified Universalism" and *The Future of Cross-Border Insolvency* (n 24).

[78]It has also produced a digest of case law on the Model Law – see https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/20-06293_uncitral_mlcbi_digest_e.pdf.

[79]https://uncitral.un.org/en/texts/insolvency/modellaw/mlij, on which see generally R Mason, "Cross-Border Insolvency: Recognition of Insolvency-Related Judgments and Choice of Law Characterization" (2018) 27 *Norton Journal of Bankruptcy Law and Practice* 639–72.

[80]https://uncitral.un.org/en/MLEGI.

[81]Adopted 1 July 2009 and see UNCITRAL, "UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009)" (2009) www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2009PracticeGuide.html accessed 30 August 2019.

[82]Adopted 1 July 2011 and updated 2013 – UNCITRAL, "UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective" (2013) http://www.uncitral.org/pdf/english/texts/insolven/Judicial-Perspective-2013-e.pdf. The principal author of the guide is the former New Zealand Judge, Paul Heath.

Moreover, one area where the Hague Conference might learn from UNCITRAL is in the development of a possible mechanism on how courts communicate with each other in respect of parallel proceedings in civil and commercial matters other than insolvency. A central plank of the UNCITRAL Model Law on Cross Border Insolvency is the encouragement of cooperation between courts and insolvency practitioners in different jurisdictions.[83] In many cases, such cooperation can take place without specific legislative sanction, but the existence of a dedicated legislative framework is useful for promoting international cooperation in cross-border cases.[84]

F. Conclusion

Modern insolvency law is designed to deal with a multilateral situation where there are a number of potentially competing parties to a necessarily limited asset pool. Collective action is preferred instead of individual action by individual creditors because it prevents "overfishing" and the depletion of stock in the common pool. Individual rights have to be curtailed and compromised so as to enhance the common pool.

The question arises where insolvency jurisdiction should be exercised. One theory that is favoured in the realm of corporate law refers to the place of incorporation, the country under whose laws the corporation is created. That legal system will determine the capacity of the corporation and all matters commonly regarded as falling within the ambit of corporate law, and in particular issues relating to the corporation's internal management.

In the field of insolvency law however, the concept of COMI (centre of main interests) has taken centre stage rather than the place of incorporation and this is reflected in major international instruments such as the UNCITRAL Model Law and the EU Insolvency Regulation. It is well-known to insolvency scholars and practitioners and its origins can be traced to a 1980 Draft Bankruptcy Convention in the European arena.[85] Even though the draft Convention was not adopted, the

[83]The matter is dealt with in Arts 25-27 of the Model Law.

[84]See generally O Casasola and S Madaus, "Cross-border Insolvency Protocols: Cooperation, Coordination, and Communication Duties under the European Insolvency Regulation Recast" (2022) 33 *European Business Law Review* 839–80. For specific instances, see *European Communication and Cooperation Guidelines for Cross-border Insolvency* developed under the aegis of the Academic Wing of INSOL Europe by Professor Bob Wessels and Professor Miguel Virgós (July 2007) and available at https://www.insol-europe.org > documents and *Guidelines-for-Communication-and-Cooperation-in-Cross Border Insolvency* developed by the Judicial Insolvency Network of INSOL International and available at https://www.jin-global.org > content > jin > pdf.

[85]Draft Convention on bankruptcy, winding-up, arrangements, compositions, and similar proceedings, Report on the draft Convention on bankruptcy, winding-up, arrangements, compositions, and similar proceedings. Bulletin of the European Communities, Supplement 2/82, art 3(1), 1982 (laying down the rule that "[w]here the centre of

idea of using a jurisdictional link based on a debtor's place of administration of main interests survived. The same concept was replicated in multiple documents drafted in the 1990s, including the Istanbul Convention[86] and a 1995 European Convention on Insolvency Proceedings that was never in fact implemented.[87] These documents strongly influenced both the UNCITRAL Model Law and the EU Insolvency Regulation.

These are most interesting and challenging debates but are best conducted in an UNCITRAL forum rather than in a Hague Conference on Private International Law context. Therefore, there appears to be much in favour of having the same insolvency exclusion in a new Hague Jurisdiction Convention as in the existing Hague Judgments Convention 2019.

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administration of the debtor is situated in one of the Contracting States, the courts of that State shall have exclusive jurisdiction to declare the debtor bankrupt."). See also Ignacio Tirado, "An Evolution of COMI in the European Insolvency Regulation: From 'Insolvenzimperialismus' to the Recast", in [2015] *Annual Review of Insolvency Law* 691–722 (J Sarra and B Romaine eds, Carswell, 2015) discussing the origins of COMI in Europe.

[86]European Convention on Certain International Aspects of Bankruptcy, developed by the Council of Europe and available at https://rm.coe.int/168007b3d0. The Istanbul Convention was signed by 8 countries [Luxemburg, Turkey, Italy, Greece, Germany, France, Cyprus and Belgium], but ratified only by Cyprus. The Istanbul Convention never entered into force, as this would have required ratification by at least 3 countries.

[87]Convention on Insolvency Proceedings, art 3, Nov 23, 1995, 1995 OJ (C 279) 1, 5.