NOTTINGHAM TRENT UNIVERSITY

A DEVELOPING COUNTRY'S PERSPECTIVE ON FORUM SHOPPING AND LONG-ARM JURISDICTION IN LIGHT OF US AND UK INSOLVENCY LAW

Phoebe Njoki Gatoto
Nottingham Law School

A thesis submitted in partial fulfilment of the requirements of Nottingham Trent University for the degree of

Doctor of Philosophy

June 2021

COPYRIGHT

DECLARATION

This thesis was submitted according to the rules and regulations of Nottingham Trent University towards a PhD by way of research. I certify that this thesis has not been submitted for a comparable academic award.

ACKNOWLEDGEMENT

I am forever grateful for the support that I have received here at Nottingham Trent University. Thank you to my supervisory team, Prof. Rebecca Parry (Director of Studies), Dr Alexandra Kastrinou and Dr Jennifer L.L. Gant. The three of you have been incredible with the level of support that you have afforded me. Thank you for your patience, motivation, enthusiasm and wide breadth of knowledge. I appreciate Prof. Paula Moffatt's challenges during the internal assessment, which lead to deeper insights. I recognise that I was blessed with a great team to carry me through the whole process until the very last minute.

Throughout the whole process, my family has been a great source of comfort and encouragement. Dr Charles Darwin, Rev Ruth Charles, The Prince family (Elleigh, Mark, Nathan and Tiffany), Braitton Gatoto, Dr Serah Akelola and last but not least, Engineer Derick Gatoto, THANK YOU. At times, I felt the journey would never end, but you reminded me of where I have come from and where I am headed.

The phenomenal mentor, Dr Violet Gachago, I am grateful for holding my hand at the beginning of the process and introducing me to a community of like-minded individuals, 'The PhD Musketeers'.

To anyone that I have not mentioned, I still remember your support, and I am grateful for it.

This work was supported by Nottingham Trent University's Vice Chancellor's Research Scheme award, for the duration of 2017-2020.

Phoebe Njoki Gatoto

June 2021

ABSTRACT

The trend for multinational companies has been a preference to forum shop rather than to open insolvency proceedings in developing countries. The US and the UK are prime venues for such bankruptcy tourism enabled by long-arm jurisdiction through extraneous connection. At the same time, there has been a pattern in developing countries of insolvency law reforms which have been circumvented when multinational companies forum shop. Using doctrinal and comparative methodologies, this thesis examines how forum shopping and long-arm jurisdiction to the US and UK affect the efforts of developing countries to reform their insolvency laws and their possible effects on local stakeholders of multinational companies in developing countries. Additionally, the thesis proposes a longer-term strategy of dealing with forum shopping and long-arm jurisdiction by using the concept of centre of main interests ('COMI') as the basis for opening main insolvency proceedings. To ensure that the proposed insolvency procedural legal law is implemented uniformly, the thesis proposes the creation of a supranational court from which national courts, insolvency practitioners and multinational companies can request clarifications on the provisions of the proposed insolvency procedural legal framework. The thesis identified that developing countries require effective insolvency laws and institutions and highlighted key principles that should be included in the reforms. The hope is that developing countries can improve their insolvency laws and institutions to a global standard. Once the proposed insolvency procedural legal framework is implemented, multinational companies will be encouraged to utilise them once jurisdiction is identified through the COMI test rather than forum shopping.

TABLE OF CONTENT

ABBREVIATIONS

ADB	Asian Development Bank
APEC	Asian-Pacific Economic Cooperation forum
CAS	Court of Arbitration for Sport
CAS	Court of Arbitration of Sport
CEO	Chief Executive Officer
CIGA	The Corporate Insolvency and Governance Act 2020
CJEU	Court of Justice of the European Union
COMI	Centre of Main Interest
EAC	East African Community
EACJ	East African Court of Justice
EIR 2015/848 or The Recast Regulation	European Insolvency Regulation 2015/848
EU	European Union
FAIR	Forum for Asian Insolvency Reform
IBC	The Insolvency and Bankruptcy Code 2016 No. 31
ICC	International Criminal Court
ICJ	International Court of Justice
IMF	International Monetary Fund
OHADA	***Organisation for the Harmonisation of Corporate Law in Africa***
OECD	The Organisation for Economic Cooperation and Development
RPB	Recognised Professional Bodies
SARFAESI	The Securitisation and Reconstruction of Financial and Enforcement of Securities Interest Act 2002 No.54

TEEAC	The 1999 Treaty for the Establishment of the East African Community
EIR 1346/2000 or The 2000 Regulation	Council Regulation (EC) 1346/2000
The Code	Title 11 United States Code Annotated
UAE	United Arabs Emirates
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	United Convention for the Law of the Sea
US	United States of America
WTO	The World Trade Organisation

CHAPTER 1: INTRODUCTION

1.1 INTRODUCTION

It has long been the case that sophisticated approaches to the restructuring of struggling multinational enterprises from the developing world have only been possible through the use of long-arm jurisdiction, whereby some tangential connection with the United States of America (US) or the United Kingdom (UK) is used to enable the use of restructuring proceedings in those countries.[1] At the same time there has been a pattern of law reforms in developing countries, together with increasingly sophisticated coordinating approaches to insolvency law in mature economies.[2]

Developing countries are attractive prospects for doing business for multinational companies due to various reasons such as readily available low-cost raw materials and low labour costs.[3] As with doing business in any given place, there is a risk that multinational companies trading in developing countries will have financial difficulties. International organisations have recognised that developing countries require reforms to their insolvency laws to attract more foreign investors and companies. For example, the International Monetary Fund (IMF) and the World Bank Group (the World Bank) have identified that well-designed insolvency legal and regulatory frameworks enhance economic and financial activities in a country and across borders[4]. Therefore, for

[1] Lynn M. LoPucki and William C. Whitford, 'Venue Choice and Forum Shopping in Bankruptcy Reorganization of Large, Public Held Companies' (1991) Wis. L. Rev 11; Emil Petrossian, 'In Pursuit of the Perfect Forum: Transnational Forum Shopping in the United States and England' (2007) 40 Loy. L. A. L. Rev. 1257.
[2] Doing Business, 'Resolving Insolvency' (2019) Doing Business < https://www.doingbusiness.org/en/data/exploretopics/resolving-insolvency/reforms> accessed 23 May 2021.
[3] Sean Hagan, 'Promoting Orderly and Effective Insolvency Procedures' (2000) 37(1) Finance and development 1, 1.
[4] International Monetary Fund, 'Orderly & Effective Insolvency Procedures' (1999) International Monetary Fund < http://www.imf.org/external/pubs/ft/orderly/ > accessed 27 June 2018; The World Bank, 'Principles for Effective Insolvency and Creditor/Debtor Regimes' (2016) The World Bank < http://pubdocs.worldbank.org/en/919511468425523509/ICR-Principles-Insolvency-Creditor-Debtor-Regimes-2016.pdf> accessed 27 June 2018.

multinational companies in developing countries, well-designed insolvency legal and regulatory frameworks provide them with ways to resolve their insolvency issues in an orderly manner, thus offering predictability and enhancing the confidence of outside investors and potential trading partners in developing countries.[5] However, in the event of financial difficulties for a developing country-based multinational, due to their multinational natures, they may opt not to utilise developing countries' insolvency laws, and instead use an approach of forum shopping to another qualifying jurisdiction which exercises long-arm jurisdiction. As a consequence of forum shopping and long-arm jurisdiction, developing countries' insolvency law reform efforts may be hampered and bypassed.[6] This chapter aims to introduce key concepts in the thesis and the aim of the thesis.

In spite of the presence of forum shopping and long-arm jurisdiction, the IMF and the World Bank still push developing countries to continue with the efforts of developing or reforming their insolvency laws.[7] The reforms and advancements in insolvency can only occur in a country through the relevant decision-makers or regulatory bodies. There are internal and external driving forces behind the ability of decision-makers and regulatory bodies to reform or develop insolvency laws.[8] Regarding internal forces, such as the governments, business communities, and the judiciaries, they can reform their insolvency laws in accordance with local needs and policies.[9] As seen above, the IMF and the World

[5] The World Bank, 'Principles for Effective Insolvency and Creditor/Debtor Regimes' (2016) The World Bank < http://pubdocs.worldbank.org/en/919511468425523509/ICR-Principles-Insolvency-Creditor-Debtor-Regimes-2016.pdf> accessed 27 June 2018.
[6] See for example Rhona Schuz, 'Controlling Forum-Shopping: The Impact of MacShannon v. Rockerware Glass Ltd' (1986) 35(2) The International and Comparative Law Quarterly 374.
[7] International Monetary Fund, 'Orderly & Effective Insolvency Procedures' (1999) International Monetary Fund < http://www.imf.org/external/pubs/ft/orderly/ > accessed 27 June 2018; The World Bank, 'Principles for Effective Insolvency and Creditor/Debtor Regimes' (2016) The World Bank < http://pubdocs.worldbank.org/en/919511468425523509/ICR-Principles-Insolvency-Creditor-Debtor-Regimes-2016.pdf> accessed 27 June 2018.
[8] See for example Fancy Chepkemoi Too, 'Drivers of Insolvency Reforms in Kenya' (2016) 4(1) NIBLeJ 5.
[9] Fancy Chepkemoi Too, 'Drivers of Insolvency Reforms in Kenya' (2016) 4(1) NIBLeJ 5.

Bank are examples of external driving forces, particularly in developing countries.[10] The IMF and World Bank argue that all countries, including developing countries should evolve their insolvency laws because modern economies have become more globalised.[11] Aurelio Gurrea-Martinez highlights that insolvency laws are regarded as a necessary part of the financial architecture that can support entrepreneurship as well as enable the attraction of external finances.[12] Due to the globalised nature of the modern economy, insolvency laws ought to cater for business failures that may or may not have a global impact.[13]

Globalisation, which has enabled companies to transact in more than one country,[14] is one of the catalysts that has pushed external forces to call for insolvency law reforms.[15] The external forces operate in a similar global sphere and thus benefit from being internationally exposed.[16] Thus, the external drivers such as the World Bank and the IMF create insolvency best practice guidelines based on their observations that they then present to countries to encourage them to undertake insolvency law reforms.[17] At the same time, insolvencies of multinationals have tended to avoid using the insolvency laws of developing countries. The insolvencies of multinational companies will have connections

[10] International Monetary Fund, 'Orderly & Effective Insolvency Procedures' (1999) International Monetary Fund < http://www.imf.org/external/pubs/ft/orderly/ > accessed 27 June 2018; The World Bank, 'Principles for Effective Insolvency and Creditor/Debtor Regimes' (2016) The World Bank < http://pubdocs.worldbank.org/en/919511468425523509/ICR-Principles-Insolvency-Creditor-Debtor-Regimes-2016.pdf> accessed 27 June 2018.
[11] Simon Di Sano, 'The Third Road to Death with the Insolvency of Multinational Enterprise Groups' [2011] 26 (1) Journal of International Banking Law and Regulation 15.
[12] See Aurelio Gurrea-Martinez, 'Insolvency Law in Emerging Markets' (2020) Ibero-American Institute for Law and Finance, Working Paper 3/2020 accessed 18 May 2021.
[13] Edward I Altman, 'The Success of Business Failure Prediction Models: An International Survey' (1984) 8(2) Journal of Banking and Finance 171.
[14] Alina-Petronela Haller, 'Globalisation, Multinational Companies and Emerging Markets' (2016) 5(1)(8) Ecoforum 9, 9.
[15] Hikmahanto Juwana, 'Law and Development under Globalisation: The Introduction and Implementation of Competition Law in Indonesia' (2004) Forum of International Development Studies 27; Simona Di Sano, 'The Third Road to Deal with the Insolvency of Multinational Enterprise Groups' [2011] 26(1) Journal of International Banking Law and Regulation 15.
[16] Dani Rodrik, 'The Positive Economics of Policy Reforms' (1993) 83(2) The American Economic Review 356.
[17] International Monetary Fund, 'Orderly & Effective Insolvency Procedures' (1999) International Monetary Fund < http://www.imf.org/external/pubs/ft/orderly/ > accessed 27 June 2018; The World Bank, 'Principles for Effective Insolvency and Creditor/Debtor Regimes' (2016) The World Bank < http://pubdocs.worldbank.org/en/919511468425523509/ICR-Principles-Insolvency-Creditor-Debtor-Regimes-2016.pdf> accessed 27 June 2018.

to more than one insolvency jurisdiction.[18] The connections potentially give multinational companies other potential jurisdictions for dealing with their insolvency legal matters through forum shopping, in particular where those jurisdictions have low thresholds for opening proceedings. Such an approach has tended to be inevitable at a time when the insolvency laws of developing countries are new and the courts and insolvency practitioners are inadequate to satisfy the specific requirements of these multinational companies.[19] It is the aim of this thesis to consider a longer term approach that will both improve the suitability of developing countries laws and institutions and will enable a progressive approach to cross border insolvencies of multinationals.

A developing countries perspective has been chosen as the framework for this thesis. From this standpoint, there are obstacles that hinder the advancement or reforms to insolvency laws and institutions in developing countries, which likely contribute to multinational companies' forum shopping to the United States of America (US) and United Kingdom (UK).[20] This section will introduce some of the obstacles that hinder development or reform of insolvency laws in developing countries. Later chapters of this thesis will analyse in depth how the obstacles stated in this section can contribute to multinational companies' decisions to forum shop in the US or UK.

Governments are the main driving forces of changes in countries' insolvency laws,[21] including in developing countries, but they can be impediments to progress.[22]

[18] Hikmahanto Juwana, 'Law and Development under Globalisation: The Introduction and Implementation of Competition Law in Indonesia' (2004) Forum of International Development Studies 27; Simona Di Sano, 'The Third Road to Deal with the Insolvency of Multinational Enterprise Groups' [2011] 26(1) Journal of International Banking Law and Regulation 15.
[19] See for example *Re Aerovias Nacionales de Colombia SA Avianca* (2004) 303 BR 1 The case gives examples of some of the issues which include that insolvency laws in developing countries are new and untested, that there are no relevant type of insolvency proceedings that the multinational companies require.
[20] The US and UK have been selected as subjects for this thesis as they have strong histories of long-arm jurisdiction but it is also notable that in recent years jurisdictions such as the Netherlands and Singapore have sought to reposition themselves as restructuring hubs.
[21] Dani Rodrik, 'The Positive Economics of Policy Reforms' (1993) 83(2) The American Economic Review 356.
[22] Fancy Chepkemoi Too, 'Drivers of Insolvency Reforms in Kenya' (2016) 4(1) NIBLeJ 5.

Governments can bring about the required changes within the developing countries' insolvency laws, only if given the right incentives.[23] Arguably, governments elect to change laws that are either stated in their campaign manifestos, are popular with their citizens or have substantial backing from industries or organisations with actual or perceived influence in the countries.[24] In developing countries, as elsewhere, the political impetus is to remain in power at the end of the current term, which may be accomplished by reforming or enacting laws that are likely to ensure that it is achieved[25]. Developing countries' governments may opt to reform or develop insolvency laws if they perceive the effort will increase their chances of remaining in power rather than the proposed changes in the law that may benefit the citizens, companies, or others involved in insolvency. If such incentives are absent, developing countries' governments may be obstacles to the reform of insolvency laws.

Whereas legislative reform lies in the hands of the government, it is equally important to have adequate supporting institutions, particularly the courts and insolvency practitioners.[26] During insolvency companies may seek advice from legal professionals since they are expected to be knowledgeable in the insolvency process. Legal professions may not however be able to advise on the optimal usage of a particular insolvency process if they are not familiar with it, even though others in a similar position might perceive it as the best course of action for the company.[27] There are also problems with the inexperience of judges, as many countries do not have specialist courts that deal with

[23] Fancy Chepkemoi Too, 'Drivers of Insolvency Reforms in Kenya' (2016) 4(1) NIBLeJ 5.
[24] Dani Rodrik, 'The Positive Economics of Policy Reforms' (1993) 83(2) The American Economic Review 356; Christine Agimba, 'Global Trends in the Four Doing Business Indicators-Closing a Business: Kenya's Reform Experiences' (Paper given at doing business 2011 in Africa: Sharing Reform Experiences 2011) < https://www.wbginvestmentclimate.org/loader.cfm?csModule=security/getfile&pageid=16716> accessed 5 July 2018; Morshed Mannan 'Are Bangladesh, India and Pakistan Ready to Adopt the UNICITRAL Model Law on Cross-Border Insolvency?' (2016) 25 Int. Insolv. Rev. 195.
[25] Fancy Chepkemoi Too, 'Drivers of Insolvency Reforms in Kenya' (2016) 4(1) NIBLeJ 5.
[26] Asian Development Bank, 'Insolvency Law Reforms in the Asian and Pacific Region: Report of the Office of the General-Counsel on TA 5795-REG: Insolvency Law Reforms' (2000) 1 Law and Policy Reform at the Asian Development Bank 11.
[27] Asian Development Bank, 'Insolvency Law Reforms in the Asian and Pacific Region: Report of the Office of the General-Counsel on TA 5795-REG: Insolvency Law Reforms' (2000) 1 Law and Policy Reform at the Asian Development Bank 11.

insolvency matters, nor general courts that have experience in such cases, resulting in judges not having the required experience to deal quickly and efficiently with insolvency matters.[28] Therefore, inexperienced legal professionals and judges hinder the advancement of insolvency laws since they cannot identify weaknesses in current insolvency laws that ought to be reformed.

1.1.1 Territorialism, Extraterritoriality and Universalism

As stated earlier, globalisation has enabled companies to trade in more than one country, indeed cross border trade is common. As a result, insolvencies of multinational companies can bring exposure to more than one legal insolvency jurisdiction.[29] Multinational companies may be registered or present in more than one jurisdiction; hence may, in theory, be able to choose between those legal systems in the event of insolvency as venues for the opening of proceedings.[30]

Cross border trade has accordingly raised the issue of which insolvency laws ought to apply during the insolvency of multinational companies.[31] Cross border insolvency scholarship has given rise to the identification of approaches under domestic insolvency laws which are territorial, extraterritorial or universal. The category that the national insolvency laws fall within is based on their effect and how they apply to different types of multinational companies.[32] Therefore, it is beneficial to ascertain the meaning of

[28] Andres F. Martinez, Jean Pierre Brun and Chiara Lunetti, 'Anticipating Financial Distress: Could Developing Countries Borrow from the French and the U.S. Toolbox?' The World Bank Blog < https://blogs.worldbank.org/psd/anticipating-financial-distress-could-developing-countries-borrow-french-and-us-toolbox> accessed 17 May 2021.
[29] Hikmahanto Juwana, 'Law and Development under Globalisation: The Introduction and Implementation of Competition Law in Indonesia' (2004) Forum of International Development Studies 27.
[30] Simona Di Sano, 'The Third Road to Deal with the Insolvency of Multinational Enterprise Groups' [2011] 26(1) Journal of International Banking Law and Regulation 15.
[31] See Ian Fletcher, 'The 'Home Country' of a Multinational Enterprise Group Facing Insolvency' (2008) 57 ICLQ 427.
[32] Types of multinational companies depend on how they are categories by national laws, for example foreign or domestic companies.

territorialism, extraterritorialism or universalism to understand the geographical scope of national insolvency laws.

In territorialism, national insolvency laws apply within that nation's borders, meaning that insolvency laws apply to individuals, properties, and companies within a particular nation.[33] Issues may arise as to what can be termed as 'within the borders of a nation'. The following example, concerning a multinational company (X) based in state A and providing transport services in state B, highlights some of the issues. During the insolvency of X, insolvency proceedings may be opened in both A and B, assuming the criteria for opening proceedings in both those jurisdictions are met. In territoriality, A and B will deal with insolvency matters of X concerning those territories.[34] For example, State A may claim X's insolvency jurisdiction since X is based in A.[35] State B may claim X's insolvency jurisdiction because its insolvency will impact on services occurring within its borders and therefore the bulk of creditors may be in State B.[36] Where A and B's insolvency laws are territorial in scope, they will deal with issues occurring within their borders.[37]

Extraterritorial insolvency laws apply beyond the borders of a nation, affecting foreign individuals, properties and companies, thus giving effects to insolvency proceedings that are outside the borders of the nation where those proceedings are opened.[38] An example of national courts having extraterritorial power is where long-arm jurisdiction is exercised.[39] A nation with extraterritorial insolvency laws may be perceived as interfering

[33] Kenneth D. McRae, 'The Principle of Territoriality and the Principle of Personality in Multilingual States' (2009) 1975(4) International Journal of the Sociology of Language 33.
[34] Lynn LoPucki, "The Case for Cooperative Territoriality in International Bankruptcy." (2000) 98 Michigan Law Review 2216, 2218.
[35] See for example Hannah L. Buxbaum, 'Territory, Territoriality, and the Resolution of Jurisdictional Conflict' (2009) 57 The American Journal of Comparative Law 631; Anthony J. Colangelo, 'What is Extraterritorial Jurisdiction' (2014) 99(6) Cornell Law Review 1303.
[36] Hannah L. Buxbaum, 'Territory, Territoriality, and the Resolution of Jurisdictional Conflict' (2009) 57 The American Journal of Comparative Law 631.
[37] Kenneth D. McRae, 'The Principle of Territoriality and the Principle of Personality in Multilingual States' (2009) 1975(4) International Journal of the Sociology of Language 33.
[38] See e.g. 11 USC, s 541(a), applying to property 'wherever located'. Anthony J. Colangelo, 'What is Extraterritorial Jurisdiction' (2014) 99(6) Cornell Law Review 1303.
[39] G. W. Foster Jr, 'Long-Arm Jurisdiction in Federal Courts' (1969) Wis. L. Rev. 9.

with other nations' sovereignty in dealing with that nation's insolvent companies.[40] It has been contended that a sovereign nation ought to control activities, individuals, companies and properties within its borders without interference from other countries.[41] Taking a critical view, it might be regarded as interference if a nation allows a foreign company to start insolvency proceedings in its insolvency courts, rather than encouraging that company to utilise its home court (in its country of origin). In that case, the foreign court can be perceived as interfering with the home country's sovereign power to adjudicate on its subjects.

A nation ought to have the power to regulate commerce that affects it.[42] This power includes when a foreign company's insolvency involves the nation's subjects or property but these subjects and this property can be impacted by foreign insolvency proceedings that are extraterritorial. Several questions arise in relation to the extraterritorial powers of the insolvency law of a country. Should the insolvency laws of a nation have unlimited extraterritorial reach? A related question is where the jurisdiction for opening insolvency proceedings in respect of foreign companies should be. For example, should there be some connection between the company and the nation where a request for the opening of insolvency proceedings has been made? If there ought to be a connection, what level of connection can be considered sufficient for foreign companies to be eligible to utilise the insolvency laws of that nation? Where proceedings are opened in respect of a foreign company and they have extraterritorial effect, so as to impact on citizens and property in the company's home country, should there be limits to the extraterritorial insolvency power's effect? These are questions to be addressed in later chapters of this thesis, in particular Chapter 2: The US and Chapter 3: The UK.

[40] Harold G. Maier, 'Extraterritorial Jurisdiction at a Crossroads: An Intersection between Public and Private International Law' (1982) 76(2) The American Journal of International Law 280.
[41] Louis Henkins, 'That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera' (1999) 1 68 Fordham L. Rev. 1.
[42] Anthony J. Colangelo, 'The Foreign Commerce Clause' (2010) 96 Va. L. Rev. 949.

Universalism is a competing theory to territorialism in insolvency where a single court has the power to preside over all insolvency matters of a company even though the company's insolvency affects more than one nation.[43] The universalism concept entails extra-territorialism as a nation's insolvency laws are utilised, thus having only a single insolvency proceeding.[44] Universalism is a concept that promotes the ideal of having one jurisdiction dealing with all insolvency matters of a multinational company using the same insolvency laws no matter the country where a company within the group is registered.[45] However, there are issues with adopting this concept. One of the issues is that different governments adopt policies that differ when enacting insolvency laws, these policies may give rise to varied outcomes depending on where an insolvency proceeding is litigated.[46] This means that universalism can operate unfairly.

In recent decades the sophistication and coordination of cross-border insolvency proceedings has been increasing. Notable examples are the United Nations (UN) and the European Union (EU) through, respectively, the UNCITRAL[47] Model Law (Model Law) and European Insolvency Regulation 2015/848 (EIR 2015/848), which have endeavoured to adopt universalism, but a particular branch that can be described as modified universalism.[48] In insolvency, modified universalism entails the identification of a home country where proceedings would be centralised, except where it is efficient to open additional proceedings elsewhere.[49] Both the Model Law and EIR 2015/848[50] use the Centre of Main Interest (COMI) concept. In the EIR case it is used to give courts

[43] Donald T. Trautman, Jay Westbrook and Emmanuel Gaillard, 'Four Models for International Bankruptcy' (1993) 41 Am. J. Comp. L. 573.
[44] Gerard McCormack, 'Universalism in Insolvency Proceedings and the Common Law' (2012) 32(2) Oxford Journal of Legal Studies 325.
[45] Gerard McCormack, 'Universalism in Insolvency Proceedings and the Common Law' (2012) 32(2) Oxford Journal of Legal Studies 325.
[46] Gerard McCormack, 'Universalism in Insolvency Proceedings and the Common Law' (2012) 32(2) Oxford Journal of Legal Studies 325.
[47] United Nations Commission on International Trade Law.
[48] Lynn M. LoPucki, 'Cooperation in International Bankruptcy: A Post-Universalist Approach' (1999) 84 Cornell L. Rev. 696.
[49] Irit Mevorach, 'Modified Universalism as Customary International Law' (2018) 96 Texas Law Review 1403, 1403.
[50] European Insolvency Regulation 2015/848.

jurisdiction over insolvency matters as main proceedings.[51] In the Model Law context it is used by courts which are requested to give assistance to evaluate the status of the insolvency proceedings in the context of which the request has been made.[52] Therefore, even though these instruments use the concept of COMI in very different contexts, there is developing jurisprudence and growing acceptance of this concept.[53]

This thesis advocates, as a long-term approach, the adoption of a system of modified universalism that utilises COMI as the applicable test in identifying the appropriate jurisdiction for opening main insolvency proceedings in respect of multinational companies and a move away from forum shopping. For reasons to be outlined in this thesis it is acknowledged that there is much work to be done to improve insolvency laws and institutions in many countries and that this work would need to be done if the proposed system was to be adopted. Therefore, this thesis will also consider the improvements to be made, as well as a possible future approach based around COMI.

1.1.2 Forum Shopping

Forum shopping is the process in which the parties in a litigation process actively seek the most advantageous venue in which they can litigate.[54] In insolvency, forum shopping refers to companies seeking legal systems or courts that would offer better procedures or results during insolvency. Companies forum shopping during insolvency utilise venues that

[51] European Insolvency Regulation 2015/848, article 3(1).
[52] United Nations Commission on International Trade Law Model Law, article 16(3).
[53] COMI has also been used outside the context of the Model Law as a basis for recognition of foreign proceedings in Hong Kong (*Re Lamtex Holdings Limited* [2021] HKCFI 622.), Singapore (*Re Opti-Medix Ltd (in liquidation) and another matter* [2016] SGHC 108) and the People's Republic of China (Ropes & Gray, 'Hong Kong/Mainland Mutual Recognition Framework for Insolvency and Restructuring: What does it mean for Hong Kong restructuring & insolvency?' https://www.ropesgray.com/en/newsroom/alerts/2021/May/Hong-Kong-Mainland-Mutual-Recognition-Framework-for-Insolvency-and-Restructuring accessed 26 May 2021.
[54] See Lynn M. LoPucki and William C. Whitford, 'Venue Choice and Forum Shopping in Bankruptcy Reorganization of Large, Public Held Companies' (1991) Wis. L. Rev 11; Emil Petrossian, 'In Pursuit of the Perfect Forum: Transnational Forum Shopping in the United States and England' (2007) 40 Loy. L. A. L. Rev. 1257.

would not be considered the natural venue of first choice on first assessment.[55] These alternative venues may be available as options that offer a better outcome or process. Still, the venues need to be governed by insolvency laws that allow foreign companies to utilise them,[56] which primarily depends on having a low bar to enter insolvency proceedings, combined with extraterritorial effects of proceedings.[57] Therefore, forum shopping is likely to be an option for companies during insolvency if there are differences in the process or results in venues in which these companies are eligible to open proceedings. The parties to forum shopping utilise the venue that they deem advantageous depending on their main aim during insolvency.

Forum shopping arises because laws that deal with companies that are in financial difficulties differ from one country to the other.[58] Currently, there are no universal insolvency laws that apply to all nations dealing with corporate insolvency issues.[59] Universal insolvency laws would be difficult to achieve satisfactorily, as they could not consider all specific factors that may occur within a particular nation, as they would be drafted in such a vague way to accommodate most situations during insolvency in all nations where universal insolvency laws may apply. Most countries have developed insolvency laws due to historical influences, giving rise to path dependencies that make it difficult for them to adopt universal insolvency laws.[60] Some of the influences are that countries have different insolvency priorities; some countries are debtor-friendly while others are creditor-friendly.[61] Therefore, currently, there are no universal insolvency laws.

[55] Rhona Schuz, 'Controlling Forum-Shopping: The Impact of MacShannon v. Rockerware Glass Ltd' (1986) 35(2) The International and Comparative Law Quarterly 374.
[56] Christopher A. Whytock, 'The Evolving Forum Shopping System' (2011) 96(3) Cornell Law Review 481; Emil Petrossian, 'In Pursuit of the Perfect Forum: Transnational Forum Shopping in the United States and England' (2007) 40 Loy. L. A. L. Rev. 1257.
[57] Adrian Walters, 'United States' Bankruptcy Jurisdiction Over Foreign Entities: Exorbitant or Congruent?,' (2017) 17(2) Journal of Corporate Law Studies 367.
[58] Gerard McCormack, 'Universalism in Insolvency Proceedings and the Common Law' (2012) 32(2) Oxford Journal of Legal Studies 325.
[59] Lynn M. LoPucki, 'Cooperation in International Bankruptcy: A Post-Universalist Approach' (1999) 84 Cornell L. Rev. 696.
[60] Mark Elliott, 'Is the Harmonisation of Laws a Practical Solution to the Problems of Cross-Border Insolvency?' (2000) 16(6) IL&P 224.
[61] Harry Rajak, *Insolvency Law Theory & Practice* (1st edn, Sweet & Maxwell 1999), 10.

The lack of universal insolvency laws has of course not stood in the way of corporate cross-border insolvencies.[62] As stated in section 1.1, globalisation has enabled transnational trade, exposing companies to other nations' insolvency laws when issues of insolvency arise.[63] The exposure to insolvency laws of more than one country raises the question of which insolvency laws ought to apply in respect of multinational companies that trade, transact, or have interests in more than one country and it also raises the prospect of forum shopping.

Companies trading, transacting or having interests in more than one country may be eligible to utilise insolvency systems of more than one country, depending on where those companies have a link to.[64] The insolvency systems of those countries may be similar or different.[65] Consequently, different insolvency systems may provide different outcomes or procedures that may be viewed as advantageous by one of the parties in an insolvency process and this naturally leads to forum shopping.

1.1.2.1. What are the Advantages and Disadvantages of Forum Shopping?

There has been a lot of debate about whether forum shopping is good or bad, with both sides having valid reasons for their stance.[66] The perception of whether forum shopping is good or bad arguably is dependent on from whose viewpoint it is being analysed. For example, a party in an insolvency process may view forum shopping as advantageous,

[62] Lynn M. LoPucki, 'Cooperation in International Bankruptcy: A Post-Universalist Approach' (1999) 84 Cornell L. Rev. 696.
[63] Harald Koch, 'International Forum Shopping and Transnational Lawsuits' (2006) 31 The Geneva Papers 293.
[64] Anthony Fitzsimmons, 'Forum Shopping: A Practitioner's Perspective' (2006) 31 The Geneva Papers 314.
[65] Emil Petrossian, 'In Pursuit of the Perfect Forum: Transnational Forum Shopping in the United States and England' (2007) 40 Loy. L. A. L. Rev. 1257.
[66] See for example Pamela K. Bookman, 'The Unsung Virtues of Global Forum Shopping' (2017) 92(2) Notre Dame Law Review 579; C. Granger, 'The Conflict of Laws and Forum Shopping: Some Recent Decisions on Jurisdiction and Free Enterprise in Litigation' (1974) 6 Ottawa Law Review 416.

while the other party in the same insolvency process may view it as unfair.[67] The question then is whether if both sides view forum shopping differently, which side is right, that is, which side's rights or wishes should take precedent.

Forum shopping may be considered beneficial for various reasons. Firstly, during insolvency, multinational companies may use a forum that offers what they perceive as better options than those that the multinational companies would have attained had they used courts closer to home.[68] The perceived advantages may be in the form of a better outcome, better procedural strategies, more advanced insolvency laws or specialised insolvency courts in that jurisdiction.[69] These advantages are in the perception of the parties. However, there is a broader advantage of forum shopping.

Forum shopping may provide access to justice and drive substantive and procedural reforms.[70] Forum shopping promotes access to justice in cross-border insolvency in instances where national insolvency laws are underdeveloped or lacking, thus ensuring that multinational companies have options when dealing with insolvency issues.[71] Additionally, forum shopping may drive substantive and procedural reforms due to the exposure that multinational companies have to other insolvency legal systems enabling them to identify deficiencies in domestic insolvency systems which may be used to inspire

[67] See for example Rhona Schuz, 'Controlling Forum-Shopping: The Impact of MacShannon v. Rockerware Glass Ltd' (1986) 35(2) The International and Comparative Law Quarterly 374; C. Granger, 'The Conflict of Laws and Forum Shopping: Some Recent Decisions on Jurisdiction and Free Enterprise in Litigation' (1974) 6 Ottawa Law Review 416.
[68] Harald Koch, 'International Forum Shopping and Transnational Lawsuits' (2006) 31 The Geneva Papers 293.
[69] See for example example Franco Ferrari, 'Forum shopping: A Plea for a Broad and Value-Neutral Definition' (2014) 1 NYU Lectures on Transnational Litigation, Arbitration and Commercial Law; Pamela K. Bookman, 'The Unsung Virtues of Global Forum Shopping' (2017) 92(2) Notre Dame Law Review 579; C. Granger, 'The Conflict of Laws and Forum Shopping: Some Recent Decisions on Jurisdiction and Free Enterprise in Litigation' (1974) 6 Ottawa law Review 416.
[70] Pamela K. Bookman, 'The Unsung Virtues of Global Forum Shopping' (2017) 92(2) Notre Dame Law Review 579.
[71] See for example *Gulf Oil Corp v Gilbert* 330 U.S. 501, 507 (1947) (Justice Jackson stated that forum shopping offers a party options to access justice and enforce their rights in matters).

reforms.[72] Therefore, forum shopping may be a catalyst to reforms in domestic insolvency laws.

Conversely, forum shopping has been described as unfair.[73] One of the reasons is that forum shopping is considered unfair concerns the impact it may have on local creditors since forum shopping may enable one party to gain a substantive or procedural advantage.[74] There is a higher risk that local creditors may find it hard to represent their interests and they may find that they do not have the same benefits from foreign proceedings that they would have under proceedings under their home state. Similarly, the other party, or parties, in an insolvency process would not receive the results or have the same procedures that they may have received or utilised in domestic legal systems.[75] The other party may not be aware of the procedure of the insolvency legal system that the multinational company is forum shopping to, thus providing a disadvantage.[76] Additionally, there may be substantial costs associated with defending litigation arising from insolvency forum shopping which the other party may not be able to meet, impairing their ability to defend the matter, which might lead to them losing the case.[77] Costs and lack of procedural awareness may be perceived as making the ability of multinational companies to forum shop unfair from the perspective of other parties in their home jurisdiction.

[72] *Filártiga v Peña-Irala* 630 F. 2d 876 (2d Cir. 1980) (A group of lawyers in the US were able to identify that the law needed to be changed due to forum shopping).
[73] See for example Irit Mevorach, 'Forum Shopping in Times of Crises: A Directors' Duties Perspective' (2013) 4 ECFR 524, 527.
[74] Irit Mevorach, 'Forum Shopping in Times of Crises: A Directors' Duties Perspective' (2013) 4 ECFR 524.
[75] Rhona Schuz, 'Controlling Forum-Shopping: The Impact of MacShannon v. Rockerware Glass Ltd' (1986) 35(2) The International and Comparative Law Quarterly 374.
[76] Pamela K. Bookman, 'The Unsung Virtues of Global Forum Shopping' (2017) 92(2) Notre Dame Law Review 579.
[77] Mary Garvey Algero, 'In Defence of Forum Shopping: A Realistic Look at Selecting a Venue' (1999) 78(1) Nebraska Review 79.

Forum shopping may be perceived as subverting domestic insolvency laws.[78] The move to litigate in another country, by multinational companies may undermine developing countries' efforts to improve their insolvency laws. Domestic insolvency laws are bypassed when a company forum shops to another jurisdiction. In certain instances, forum shopping during insolvency to other legal systems is legitimate if there are no insolvency laws in developing countries that deal with certain insolvency situations, or if the laws or institutions that support them are inadequate. However, developing countries' insolvency laws may have been developed to cater to certain situations that other countries, where the multinational companies forum shop, may not have considered in their insolvency laws. This thesis will consider how international approaches to insolvencies of multinationals can develop in the long term towards a more home country centred approach through the development of a system based around COMI as a standard for opening proceedings.

1.1.3 A low threshold for opening proceedings of long-arm effects

The jurisdiction of insolvency courts may give courts the power to preside over insolvency proceedings from foreign entities, depending on the threshold for opening proceedings.[79] Foreign multinational companies bring evidence to the court to show that they have an interest in the jurisdiction for the courts to decide if the matter is in the right forum.[80] If there is a low threshold which must be crossed by companies the courts will have the ability to preside over insolvency issues concerning foreign multinational companies who wish to utilise the forum where the court is located and, when combined with long-arm effects of those proceedings, they can become attractive destinations for bankruptcy

[78] See *Erie R. R. v Tompkins* 304 U.S. 64, 78-79 (1938); Unknown, 'Forum Shopping Reconsidered' (1990) 103(7) Harvard Law Review 1677; Arpan Banerjee, 'Forum Shopping in Intellectual Property Rights Infringement Cases in India' (2015) ATRIP < http://atrip.org/wp-content/uploads/2016/12/2014-3.-Arpan-Banerjee-Forum-Shopping-in-IP-rights-infringements-in-India.pdf> accessed 21 June 2018.
[79] R. Michelle Boldon, 'Long-Arm Statutes and Internet Jurisdiction' (2011) 67(1) The Business Lawyer 313.
[80] Robert Allen Sedler, 'Judicial Jurisdiction and Choice of Law: The Consequences of Schaffer v. Heitner' (1978) 63 Iowa L. Rev. 1031.

tourists.[81] The combination of these factors is termed in this thesis as 'long-arm jurisdiction'.

The courts have the discretion to decide to allow insolvency proceedings from foreign multinational companies which cross the threshold of eligibility.[82] Judicial discretion allows judges to determine that their courts are or are not the right venue for the insolvency proceedings. In most jurisdictions, judicial discretion is not governed by statute, making the power wide and only governed by judges themselves.[83] Most forums lack clear guidelines as to what constitutes evidence towards allowing long-arm proceedings.[84] Thus, the evidence necessary to establish that the courts have long-arm jurisdiction varies depending on the court.

The flexibility to exercise long-arm jurisdiction is both positive and negative. The positive aspect of long-arm jurisdiction is that courts are able to consider a wide range of factors in deciding to open insolvency proceedings in respect of foreign multinational companies,[85] and those companies can potentially gain access to sophisticated laws and institutions. However, the flexibility may cause a variety of outcomes because the same facts, depending on the matter submitted to the court, may be taken differently before another court.[86] Despite this, courts need the flexibility to choose which facts to regard to ascertain that they have long-arm jurisdiction over foreign multinational companies. This thesis will examine the current insolvency laws in the US and UK that allow long-arm jurisdiction. Each will be briefly introduced in what follows.

[81] See e.g. O Couwenberg & SJ Lubben, 'Corporate Bankruptcy Tourists' (2015) 70 Bus L 719.
[82] Robert Allen Sedler, 'Judicial Jurisdiction and Choice of Law: The Consequences of Schaffer v. Heitner' (1978) 63 Iowa L. Rev. 1031.
[83] Kenneth Einar Himmar, 'Judicial Discretion and the Concept of Law' (1999) 19 Oxford Journal of Legal Studies 71.
[84] A. Ehrenzweig 'A Proper Law in a Proper Forum: A "Restatement" of the "Lex Fori Approach"' (1965) 18 Okla. L. Rev. 340.
[85] Peter Hay, 'The Interrelation of Jurisdiction and Choice of Law in United States Conflict of Law' (1979) 28(2) The International and Comparative Law Quarterly 161.
[86] Robert Allen Sedler, 'Judicial Jurisdiction and Choice of Law: The Consequences of Schaffer v. Heitner' (1978) 63 Iowa L. Rev. 1031.

1.1.4 US

The US is a popular jurisdiction for insolvency forum shopping, especially in the Southern District of New York and Delaware.[87] The Southern District of New York and Delaware have well-regarded specialised courts to deal with insolvency, combined with sophisticated insolvency laws. US insolvency laws have a reputation of being debtor-friendly.[88] The presumption in the US is that the company is having difficulties not as a result of any managerial fault but as part of unfortunate circumstances.[89] The debtor-friendly nature of US insolvency laws has often attracted foreign companies to commence insolvency proceedings in US courts.[90]

Additionally, the US offers more than one way for the companies to resolve their insolvency issues; it has a particularly strong reputation for restructuring under Chapter 11.[91] While it must be added that restructuring represents only a small proportion of US insolvency proceedings,[92] Chapter 11 is notable for its usage in relation to large companies. One of the advantages of seeking the US as a venue is that insolvency in the US does not require the company to go into liquidation as the only means to solve insolvency issues.[93] Additionally, the US insolvency system does not require companies to even be in financial difficulties to utilise the Title 11 United States Code Annotated (Bankruptcy Code).[94] The possibility of using Chapter 11 at earlier times during financial distress and before functional insolvency is an attraction for multinational companies to use the US as a venue

[87] Gerard McCormack, 'Jurisdictional Competition and Forum Shopping in Insolvency Proceedings' (2009) 68(1) The Cambridge Law Journal 169.
[88] Fancy Chepkemoi Too, 'A Comparative Analysis of Corporate Insolvency Laws: Which if the Best Option for Kenya?' (2015) Nottingham Trent University < http://irep.ntu.ac.uk/id/eprint/27951/1/Thesis%20post%20viva%20FINAL.pdf > accessed 24 September 2018.
[89] Gabriel Moss, 'Chapter 11: An English Lawyers Critique' (1998) 11 Insolvency Intelligence 17.
[90] See e.g. O Couwenberg & SJ Lubben, 'Corporate Bankruptcy Tourists' (2015) 70 Bus L 719.
[91] Gerard McCormack, 'Bankruptcy Forum Shopping: The UK and US as Venues of Choice for Foreign Companies' (2014) 63 ICLQ 815.
[92] Jones Day, 'The Year in Bankruptcy:2020' (2021) Jones Day https://www.jonesday.com/en/insights/2021/02/the-year-in-bankruptcy-2020 accessed 20 May 2021 Of 32,506 commercial bankruptcy proceedings in 2020 only 7,128 were filed under Chapter 11.
[93] Tally M. Wiener and Adrian J. Walters, 'All Along the Watchtower' (2017) 38(8) Comp. Law. 253.
[94] Title 11 United States Code Annotated.

of choice to restructure instead of waiting for a later time when liquidation may be the only option.

The US Bankruptcy Code offers sophisticated substantive insolvency laws that are further enhanced by case law dealing with companies during insolvency.[95] A unique feature of the Bankruptcy Code is that it does not differentiate between domestic and foreign companies.[96] Thus multinational companies, no matter their place of incorporation, can potentially utilise it. However, there are requirements that multinational companies have to fulfil.[97] In Chapter 2, this thesis will examine the current US insolvency laws that allow foreign companies including those from developing countries to apply to US courts to open insolvency proceedings. The chapter will demonstrate that the approaches taken presently set a low threshold for the exercise of long-arm jurisdiction. It will be acknowledged that the courts do exercise some restraint in exercising this jurisdiction and that there can be positive examples of forum shopping. However, the thesis will also consider a longer-term approach to move on from this.

1.1.5 UK

The UK, like the US, is a popular destination for foreign companies to utilise UK insolvency or restructuring procedures as well as the knowledgeable and skilled courts.[98] The UK offers specialist insolvency courts and insolvency practitioners, which attracts multinational companies.[99] The most popular UK insolvency court for multinational

[95] Gerard McCormack, 'Bankruptcy Forum Shopping: The UK and US as Venues of Choice for Foreign Companies' [2014] 63 ICLQ 815.
[96] Title 11 United States Code Annotated.
[97] Title 11 United States Code Annotated, section 109(a).
[98] Gerard McCormack, 'Bankruptcy Forum Shopping: The UK and US as Venues of Choice for Foreign Companies' [2014] 63 ICLQ 815.
[99] Lord Neuberger, 'Key Speech' (International Insolvency Institute Annual Conference, London, 19 June 2017) < https://www.supremecourt.uk/docs/speech-170619.pdf> (19 September 2018).

companies is located in London.[100] As a consequence of the popularity of the London insolvency court, London has a high concentration of specialist insolvency practitioners.

Unlike the US, the UK offers different requirements for domestic and foreign companies.[101] Thus, multinational companies have to establish in which category they qualify.[102] This thesis deals with multinational companies considered foreign. The UK offers foreign companies, who are forum shopping in the UK, the opportunity to wind up,[103] put their companies into administration,[104] obtain a brief restructuring moratorium,[105] or create restructuring plans[106] or schemes of arrangements.[107] The moratorium and restructuring plan are new procedures introduced by the Corporate Insolvency and Governance Act 2020 (CIGA 2020).[108] The restructuring plan has been used for forum shopping already.[109] It is advantageous for foreign companies to apply to open insolvency proceedings in the UK since there is a range of options for the companies with specialists readily available to advise which pathway is suitable for a particular company.

UK insolvency laws may be described as extraterritorial. For example, a winding-up order has extraterritorial effect because once issued by UK judges, the winding-up order applies

[100] Lord Neuberger, 'Key Speech' (International Insolvency Institute Annual Conference, London, 19 June 2017) < https://www.supremecourt.uk/docs/speech-170619.pdf> (19 September 2018).
[101] Gerard McCormack, 'Bankruptcy Forum Shopping: The UK and US as Venues of Choice for Foreign Companies' [2014] 63 ICLQ 815.
[102] Insolvency Act 1986 c.45, Sections 221, 225 and schedule B1; and Companies Act 2006 c.46, section 895(1).
[103] Insolvency Act 1986 c.45, Sections 221, 225(Section 221 deals with companies that have not been registered in the UK, which include foreign companies while as section 225 deals with companies that have not been registered in the UK but has been trading or carrying on business in the UK).
[104] Insolvency Act 1986 c.45, Schedule B1 (The Schedule states the circumstances that a company may be placed into administration. The Schedule applies also to foreign companies because section 435(11) Insolvency Act 1986 states a company under the Act includes companies incorporated in or outside the UK.)
[105] Insolvency Act 1986, s Part A1.
[106] Companies Act 2006, s 26A.
[107] See Companies Act 2006 c.46, section 895(1); Kathy Stones, 'UK Schemes and Forum Shopping' [2014] 7(4) Corporate Rescue and Insolvency 161.
[108] The Corporate Insolvency and Governance Act 2020, schedule 7 and section 4.
[109] Hogan Lovells, 'Hogan Lovells Advises Senior Lenders on Smile Telecoms' Restructuring Implemented Through High Court Sanction of Restructuring Plan and Cross-Class Cram-Down' (2021) < https://www.hoganlovells.com/en/news/hogan-lovells-advises-senior-lenders-on-the-restructuring-of-smile-telecoms-restructuring-implemented-through-high-court-sanction-of-restructuring-plan-and-cross-class-cram-down > accessed 25 May 2021.

worldwide, affecting the assets, creditors, and others involved with the company regardless of their location.[110] Additionally, winding up and schemes of arrangement apply beyond the UK because the statutes[111] allow foreign companies, which are not necessarily incorporated or registered in the UK, to utilise them.[112] Thus, UK insolvency laws apply beyond the UK because they allow foreign companies to utilise them.

The UK may exercise long-arm jurisdiction by allowing insolvency proceedings to commence in the UK courts; however UK judges must determine that the sufficient connection test is fulfilled before foreign companies can apply for UK insolvency procedures.[113] Thus insolvency laws allow foreign companies to utilise UK courts during insolvency, however, certain conditions must be fulfilled and these can act as safeguards against exorbitant jurisdiction.[114] This thesis will be analysing the criteria used by UK judges to determine that a foreign company may open insolvency proceedings in the UK. The thesis will focus on UK laws that allow forum shopping and long-arm jurisdiction to decide whether or not they hinder the efforts of developing countries to advance their insolvency laws.

1.1.6 Insolvency Reform in Developing Countries

While this thesis considers long-arm jurisdiction in the US and UK it is notable that those jurisdictions presently offer an alternative to weak insolvency laws and institutions in many countries. The thesis also addresses how to move on from this latter weakness in developing countries.

[110] See *Re Azoff-Don Commercial Bank* [1954] Ch. 315, 333; *Re Bank of Credit and Commerce International SA (No. 2)* [1992] B.C.L.C. 570, 577.
[111] Insolvency Act 1986 c.45, Sections 221, 225; and Companies Act 2006 c.46, section 895(1).
[112] Gerard McCormack, 'Jurisdictional Competition and Forum Shopping in Insolvency Proceedings' (2009) 68(1) The Cambridge Law Journal 169.
[113] *Re Real Estate Development Co* [1991] BCLC 210 and *Stocznia Gdanska SA v Latreefers Inc and Others Appeals* [2002] All ER (D) 148.
[114] *Re Rodenstock GmbH* [2011] EWHC 1104 (Ch), para 21.

The World Trade Organisation (WTO),[115] United Nations (UN)[116] and International Monetary Fund (IMF)[117] are recognised international organisations that use the term 'developing countries' but have not provided its definition. The lack of the definition has not prevented the WTO, UN, and the IMF from classifying developing countries.[118] As a general observation, most countries in Africa, South America, Eastern Europe, and Asia are considered developing countries by the WTO, UN, and the IMF.[119] The common factor in most of these countries is a underdeveloped economy, which[120] contributes to those countries being classified as developing rather than developed.

It has been identified that foreign companies are more likely to take a risk investing in developing countries if rigorous insolvency laws are present to safeguard their interests.[121] Institutions implementing insolvency laws in developing countries also attract investors to

[115] World Trade Organisation, 'Who are the Developing Countries in the WTO?' (unknown) World Trade Organisation < https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm > accessed 4 July 2018.
[116] United Nations, 'Country Classification. Data Sources, Country Classifications and Aggregation Methodology' (2012) United Nations <http://www.un.org/en/development/desa/policy/wesp/wesp_current/2012country_class.pdf> accessed 4 July 2018.
[117] International Monetary Fund, 'Proposed New Grouping in WHO Country Classifications: Low-Income Developing Countries' (2014) IMF Policy paper <https://www.imf.org/external/np/pp/eng/2014/060314.pdf> accessed 4 July 2018.
[118] See World Trade Organisation, 'Who are he Developing Countries in the WTO?' (unknown) World Trade Organisation < https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm > accessed 4 July 2018; United Nations, 'Country Classification. Data Sources, Country Classifications and Aggregation Methodology' (2012) United Nations <http://www.un.org/en/development/desa/policy/wesp/wesp_current/2012country_class.pdf> accessed 4 July 2018; International Monetary Fund, 'Proposed New Grouping in WEO Country Classifications: Low-Income Developing Countries' (2014) IMF Policy paper https://www.imf.org/external/np/pp/eng/2014/060314.pdf accessed 4 July 2018.
[119] The World Bank, 'World Bank Country and Lending Groups' (2021) The World Bank < https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups> accessed 20 May 2021; United Nations, 'Country Classification. Data Sources, Country Classifications and Aggregation Methodology' (2012) United Nations <http://www.un.org/en/development/desa/policy/wesp/wesp_current/2012country_class.pdf> accessed 4 July 2018; International Monetary Fund, 'Proposed New Grouping in WEO Country Classifications: Low-Income Developing Countries' (2014) IMF Policy paper https://www.imf.org/external/np/pp/eng/2014/060314.pdf accessed 4 July 2018.
[120] World Trade Organisation, 'Who are the Developing Countries in the WTO?' (unknown) World Trade Organisation < https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm > accessed 4 July 2018; United Nations, 'Country Classification. Data Sources, Country Classifications and Aggregation Methodology' (2012) United Nations <http://www.un.org/en/development/desa/policy/wesp/wesp_current/2012country_class.pdf> accessed 4 July 2018; International Monetary Fund, 'Proposed New Grouping in WEO Country Classifications: Low-Income Developing Countries' (2014) IMF Policy paper https://www.imf.org/external/np/pp/eng/2014/060314.pdf accessed 4 July 2018.
[121] Evan D. Flaschen and Timothy B. DeSieno, 'The Development of Insolvency Law as Part of the Transition from a Centrally Planned to Market Economy' (1992) 26 Int'l L. 667.

the countries if they effectively implement well-structured insolvency laws.[122] The IMF has made the development of insolvency laws a condition in its lending to developing countries.[123] Developing countries have begun reforming their insolvency laws in a bid to fulfil the IMF's and other international bodies' requirements.[124] The insolvency law reforms raise the question of whether those reforms are sufficient to give multinational companies confidence in developing countries' insolvency laws and institutions. Only if the laws and institutions are effective would multinational companies be encouraged to use developing countries' insolvency laws rather than forum shopping to the US and UK. In light of this, this thesis will assess how local insolvency laws and local stakeholders of multinational companies in developing countries may be impacted by forum shopping and long-arm jurisdiction as well as how laws globally can move on from this.

1.1.7 Local Stakeholders' Centred, Policy-Based Approaches

Various entities drive the creation of insolvency laws in a country.[125] Insolvency laws are mostly modelled in accordance with the needs within a nation during insolvency, to provide an outcome that reflects a nation's interest.[126] Therefore, developing countries' insolvency laws ought to reflect the needs present in the countries in their policy-based approach.

In particular, it is notable that the stakeholders of a company may influence the creation and reforms of insolvency laws.[127] The traditional view was that stakeholders of a company

[122] Katharina Pistor, Martin Raiser and Stanislaw Gelfer, 'Law and Finance in Transition Economies' (2000) 8(2) Economies of Transition 325.
[123] See International Monetary Fund, 'Kenya, Uganda and United Republic of Tanzania: Selected Issues' (2008) IMF Country Report No. 08/353; Fancy Chepkemoi Too, 'Drivers of Insolvency Reforms in Kenya' (2016) 4(1) NIBLeJ 5.
[124] Paula E. Garzon, Anthony M. Vassallo and Jeff Carruth, 'Cross-Border Insolvency and Structure Reform in a Global Economy' (2000) Int'L 533; and For a critical view see Gerard McCormack. 'Why "Doing Business" with the World Bank May Be Bad for You' (2018) 19 Eur Bus Org Law Rev 649.
[125] See some of the examples listed in Fancy Chepkemoi Too, 'Drivers of Insolvency Reforms in Kenya' (2016) 4(1) NIBLeJ 5. (Examples are government and interest groups).
[126] Oliver Morrissey, 'Politics and Economic Policy Reform: Trade Liberalization in Sub-Saharan Africa' (1995) 7(4) Journal of International Development 599.
[127] Adam Winker, 'Corporation Law or the Law of Business? Stakeholders and Corporate Governance at the End of History.' (2004) 67(4) Law and Contemporary Problems 109.

were its shareholders; however, most countries are moving away from this view and include other individuals and entities interested in the company financially or otherwise, such as employees, creditors, customers, and the wider society among others.[128] Not all stakeholders can absorb the impact of an insolvency equally well, nor bargain to improve their position in insolvency, as some creditors can. Therefore, it is in the country's public interest to ensure that the policies behind their insolvency laws cater to the protection of all stakeholders rather than protecting only the shareholders.[129] The level of protection afforded to different stakeholder classes varies from country to country depending on policy preferences.[130] For example, in some countries, employees may need more protection during insolvency to ensure their interests are taken into account.[131] Employee protection is likely to be more important in developing countries where there is a lack of other means for the employees to be taken care of if they lose their jobs, such as where there is a lack of a benefits system like the one available in the UK.[132] In light of the above, it is essential for insolvency laws to reflect the situations present in the country, thus ensuring that insolvency laws are centred on a policy providing for the protection of local stakeholders.

While a country may create a stakeholder-centred, policy-based approach of insolvency laws these efforts will be undermined by forum shopping since the laws that are utilised may not have the same regard for stakeholders.[133] Indeed the purpose of forum shopping

[128] Shelley D. Marshall and Ian Ramsay, 'Stakeholders and Directors' Duties: Law, Theory and Evidence' (2009) University of Melbourne Legal Studies Research Paper No.411; Sullette Lombard and Tronel Joubert, 'The Legislative Response to the Shareholders v Stakeholders Debate: A Comparative Overview' (2014) (14(1) Journal of Corporate Law Studies 211.
[129] Adam Winker, 'Corporation Law or the Law of Business? Stakeholders and Corporate Governance at the End of History.' (2004) 67(4) Law and Contemporary Problems 109.
[130] Sullette Lombard and Tronel Joubert, 'The Legislative Response to the Shareholders v Stakeholders Debate: A Comparative Overview' (2014) 14(1) Journal of Corporate Law Studies 211.
[131] Adam Winker, 'Corporation Law or the Law of Business? Stakeholders and Corporate Governance at the End of History.' (2004) 67(4) Law and Contemporary Problems 109.
[132] See for example Gordon W. Johnson, 'Insolvency and Social Protection: Employee Entitlements in the Event of Employer Insolvency' (2006) OECD < https://www.oecd.org/daf/ca/corporategovernanceprinciples/38184691.pdf> accessed 17 May 2021.
[133] See *Erie R. R. v Tompkins* 304 U.S. 64, 78-79 (1938); Unknown, 'Forum Shopping Reconsidered' (1990) 103(7) Harvard Law Review 1677; Arpan Banerjee, 'Forum Shopping in

may specifically be to evade stakeholder entitlements under home country laws. There may be little that developing countries can do to ensure that forum shopping does not hinder the local stakeholder-centred policy approach in their insolvency laws and there is a need for greater will among countries with developed insolvency systems to implement greater controls on forum shopping. This thesis will propose a system which represents a logical progression of current approaches in cross-border insolvency laws, implementing COMI as the threshold for opening main proceedings in relation to multinationals.

1.1.8 COMI

Globalisation has led to multinational companies[134] having options as to which jurisdictions in which they may choose to open insolvency proceedings. Some coordinating approach is desirable for a number of reasons. One problem is that this may lead to multiple insolvency proceedings being opened simultaneously dealing with the same multinational company.[135] Consequently, different jurisdictions may result in inconsistent outcomes. There is also an increased cost of having multiple litigations for the same multinational company. Finally, there might be legal uncertainty as to which judgment should be enforced, among other consequences discussed in later chapters of this thesis.[136] Therefore, there are a lot of consequences of globalisation that are experienced during the insolvency of multinational companies.

Modern coordinating approaches have emerged in recent decades, as noted towards the end of 1.1.1 above, the leading examples of the EU Regulation and the UNCITRAL Model

Intellectual Property Rights Infringement Cases in India' (2015) ATRIP < http://atrip.org/wp-content/uploads/2016/12/2014-3.-Arpan-Banerjee-Forum-Shopping-in-IP-rights-infringements-in-India.pdf> accessed 21 June 2018.

[134] Charlotte Møller, Elizabeth McGovern, Eric Schaffer and Michael Venditto, 'COMI and Get It: International Approaches to Cross-Border Insolvencies' (2015) Corporate Rescue and Insolvency < https://www.globalrestructuringwatch.com/wp-content/uploads/sites/23/2016/01/Corporate-Rescue-and-Insolvency-1-December-2015-COMI-and-get-it-2.pdf> accessed 30 July 2018.

[135] Jennifer Payne, 'Cross-Border Schemes of Arrangement and Forum Shopping' (2013) 14(4) European Business Organization Law Review 563.

[136] Reinhard Bork, 'Principles of International Insolvency Law' (2018) 31(3) Insolv. Int. 83.

Law use the concept of 'centre of main interests' (COMI).[137] The EIR 2015/848[138] is binding on EU member states only, while the Model Law is opted into by members of the UN.[139] A multinational company's COMI is used to determine where the main insolvency proceedings ought to be opened, in the case of the Regulation,[140] and to determine the scope of assistance available, under the Model Law.[141] Hence, COMI is a concept that has been recognised internationally and may logically be useful in deciding matters of jurisdiction when there is the question of forum shopping and long-arm jurisdiction.

To develop the central concept of COMI, the thesis will analyse the interpretation of COMI provided by EU cases.[142] There have been various interpretations as to what evidence must be presented to establish a multinational company's COMI.[143] This thesis will examine what various courts have established as sufficient evidence to establish COMI, whether the evidence is conflicting, and how the proposed insolvency procedural legal framework can implement the COMI concept.

1.2 AIM

This thesis gives a developing country's perspective on forum shopping and long-arm jurisdiction in the US and UK, as well as the long-term way forward from this. This thesis will focus on the insolvency of multinational companies. There are complex questions raised when multinational companies intend to open insolvency proceedings. Since

[137] Reinhard Bork, 'The European Insolvency Regulation and the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency' (2017) 26(3) International Insolvency Review 246.
[138] European Insolvency Regulation 2015/848.
[139] Charlotte Møller, Elizabeth McGovern, Eric Schaffer and Michael Venditto, 'COMI and Get It: International Approaches to Cross-Border Insolvencies' (2015) Corporate Rescue and Insolvency < https://www.globalrestructuringwatch.com/wp-content/uploads/sites/23/2016/01/Corporate-Rescue-and-Insolvency-1-December-2015-COMI-and-get-it-2.pdf> accessed 30 July 2018.
[140] Charlotte Møller, Elizabeth McGovern, Eric Schaffer and Michael Venditto, 'COMI and Get It: International Approaches to Cross-Border Insolvencies' (2015) Corporate Rescue and Insolvency < https://www.globalrestructuringwatch.com/wp-content/uploads/sites/23/2016/01/Corporate-Rescue-and-Insolvency-1-December-2015-COMI-and-get-it-2.pdf> accessed 30 July 2018.
[141] United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency, article 16(3).
[142] European Insolvency Regulation 2015/848, Art 3.
[143] Irit Mevorach, 'The "Home Country" of a Multinational Enterprise Group Facing Insolvency' (2008) 57(2) I.C.L.Q. 427.

multinational companies have bases in more than one legal jurisdiction, the questions are which jurisdiction and laws ought to apply.

Forum shopping enables multinational companies to analyse different jurisdictions and insolvency laws available as possible venues for the opening of insolvency proceedings and determine which best suit the needs of those multinational companies' agendas during insolvency. The US and UK court have long-arm jurisdiction approaches enabling them to entertain multinational insolvency matters forum shopped into the US and UK. This thesis will consider the ability of multinational companies, with bases in developing countries, to forum shop in the US and UK. In particular, the thesis will examine US and UK insolvency laws that enable multinational companies to open insolvency proceedings in those jurisdictions under long-arm jurisdiction. As has been noted, this type of forum shopping has had some positive outcomes in enabling struggling multinationals to gain access to sophisticated restructuring laws and institutions, and it will be acknowledged that there is a need for some limited scope for forum shopping under the proposed framework.

This thesis will also consider how different stakeholders' interests are prioritised by local policy-based bankruptcy laws in chosen countries. This will be achieved by identifying and analysing potential problems encountered or perceived by multinational companies in developing countries during insolvency and whether these issues lead to multinational companies forum shopping to the US and the UK.

The thesis will also recommends an insolvency procedural legal framework that utilises centre of main interest (COMI) in identifying the choice of forum for opening main insolvency proceedings. The aim is to identify whether this proposed insolvency procedural legal framework can, as a longer-term approach, replace the fragmented approach for identifying the choice of venue for main insolvency proceedings for multinational companies. Leading on from the proposed framework, the thesis will identify whether there

should be a recommendation for creating a supranational court that would aid in interpreting the proposed insolvency procedural legal framework.

The thesis has four research questions:

1. What are the US and UK insolvency laws that allow forum shopping and long-arm jurisdiction;
2. What are the potential negative impacts of forum shopping on efforts to develop insolvency laws in developing countries;
3. What are the drivers and principles for insolvency law reform in developing countries and how might stakeholders' interests be prioritised locally in developing countries; and
4. Should there be procedural insolvency law reform that provides a straightforward means by which multinational companies can identify the choice of forum for opening insolvency proceedings for multinational companies based on a uniform application of COMI, supported by a supranational court?

1.3 METHODOLOGY

This methodology of this thesis is desked based. It will utilise primary and secondary sources. The primary sources will be legislation,[144] regulations,[145] model laws[146] and cases,[147] among others. Examples of secondary sources to be utilised in the thesis are books, journal articles, newspaper articles, reports by international organisations,[148] and any other appropriate source to the thesis. The information gathered from primary and secondary sources will be analysed using two methodologies: doctrinal and comparative legal methodologies.

[144] See for example Title 11 United States Code (US); Insolvency Act 1986 (UK); The Insolvency and Bankruptcy Code 2016 No. 31 (India); Insolvency Act 2015 (Acts No. 18) (among others).
[145] See for example European Insolvency Regulation 2015/848.
[146] See for example United Nations Commission on International Trade Law Model Law Model Law
[147] See for example *Re Drax Holdings* [2003] EWHC 2743 (Ch) (UK)(among others).
[148] Examples of international organisations are World Bank and United Nations.

The doctrinal methodology will be utilised in this thesis to analyse the current insolvency laws in the US, UK, and developing countries that allow insolvency proceedings to be commenced in those countries' courts, including through forum shopping.[149] Hence, primary sources in the US, UK, and some developing countries will provide the current law that will be analysed with the assistance of secondary sources to determine how opening insolvency proceedings laws are applied.

In the case of the US and UK, the doctrinal methodology will be used to assess the application of insolvency laws dealing with the opening of insolvency proceedings by foreign companies, including multinational companies, to identify their approaches to forum shopping and long-arm jurisdiction. In relation to developing countries, doctrinal methodology will be used to analyse previous and current laws that deal with insolvency of companies to determine whether they encourage or discourage multinational companies to forum shop in the US or UK. Additionally, the doctrinal methodology will be used to examine key policies that ought to be in any reformed insolvency law in developing countries.

Countries implement different laws dealing with the opening of main insolvency proceedings, therefore on face value, the laws appear different, but the function can, on closer inspection, be similar. For instance, the laws concerning the opening of insolvency proceedings in the US is primarily located in the Bankruptcy Code,[150] while in the UK, it is both in statutes and case law. Despite different locations and wording of those laws, the function of allowing the opening of insolvency proceedings by foreign companies is the same.[151] Globalisation has enabled companies to be exposed to more than one legal

[149] Vijay M. Gawas, 'Doctrinal Legal Research method a Guiding Principle in Reforming the Law and Legal Systems Towards the Research Development.' (2017) 3(5) International Journal of Law 128.
[150] Title 11 United States Code Annotated.
[151] See Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (3rd edn, Oxford University Press 2011) 34; and Konrad Zweigert and Hans-Jurgen Puttfarken, 'Critical Evaluation in Comparative Law' (1973-76) 5 Adelaide Law Review, 343.

jurisdiction, and through forum shopping, they may choose the best jurisdiction to deal with their insolvency matters. This thesis will utilise a comparative legal methodology to compare insolvency laws that determine jurisdiction in insolvency matters.

The comparative legal methodology will be used to compare how the US and UK allow forum shopping of multinational companies to open insolvency proceedings in their courts to benefit from certain insolvency procedures and advantages provided by the US and UK. The comparison will also assess the interests considered by US and UK courts in determining the jurisdiction of insolvency matters from multinational companies. The comparison will establish whether there are potential problems of abuse of forum shopping and long-arm jurisdiction by multinational companies.

1.4 CONCLUSION

Recent years have seen law reform efforts in many developing countries to improve their insolvency laws according to their local needs and policies. The interests of local individuals and companies in developing countries are more likely to be safeguarded by insolvency laws of those nations. The protection provided by developing countries' insolvency laws are however bypassed once a company chooses to use another country's insolvency laws. Therefore, there needs a fair means by which multinational companies can choose the appropriate forum for their main insolvency proceedings. It is desirable for progress to be made towards a uniform approach in choosing the insolvency main proceedings forum, while it is also acknowledged that this would be a difficult, long-term endeavour.

The next two chapters will consider approaches that enable forum shopping by insolvent multinational companies: Chapter 2 will concern the US as a venue, and Chapter 3 will examine the UK. Attention will then turn to the perspective of developing countries. Chapter 4 offers a developing countries' perspective on forum shopping. This chapter will

examine the impact that forum shopping, and long-arm jurisdiction can have on the development of insolvency laws. This chapter also acknowledges that improvements to the insolvency laws and institutions in many developing countries will be a necessary step if the progressive approach to opening proceedings proposed in this thesis is to be workable on a global scale. The proposed progressive framework is then the focus of the final two substantive chapters. Chapter 5 will suggest the creation of an insolvency procedural framework to provide a universal test for allocation jurisdiction for main insolvency proceedings based on COMI. Chapter 6 will address whether a supranational court is required to ensure uniform application of the proposed insolvency legal framework. The final chapter will be the conclusion of this thesis.

CHAPTER 2: THE US

> Critics are alarmed at the ease with which global bankruptcy jurisdiction can be engineered, through a combination of the Bankruptcy Code's low bar to entry and the worldwide effects of a bankruptcy case…[1]

2.1 OVERVIEW

The previous chapter, Chapter 1: Introduction, introduced the aim of the thesis and key concepts. This chapter examines the approach to the opening of proceedings under United States of America (US) insolvency law that enable forum shopping of multinational companies, particularly under the US courts' long-arm jurisdiction.

2.2 INTRODUCTION

The US is a popular destination for multinational companies' insolvencies.[2] Particularly attractive locations for foreign companies to apply for commencement of insolvency proceedings are Southern District of New York and Delaware.[3] During insolvency, multinational companies may evaluate the US as the optimal jurisdiction in which to commence insolvency proceedings. Where multinational companies are incorporated in the US the choice of venue is natural but it has also attracted multinationals that are incorporated in other countries, such as in developing countries, such as the filing of the Colombian airline Avianca.[4] The multinational companies, as a strategic manoeuvre, may opt to commence insolvency proceedings in the US.[5] This chapter evaluate the laws that

[1] Adrian Walters, 'United States' Bankruptcy Jurisdiction over Foreign Entities: Exorbitant or Congruent' (2017) 17(2) Journal of Corporate Law Studies 367 (368).
[2] Lynn M. Lopucki, *Courting Failure: How Competition for Big Cases is Corrupting the Bankruptcy Courts* (University of Michigan Press 2006) 184.
[3] Gerard McCormack, 'Bankruptcy Forum Shopping: The UK and US as Venues of Choice for Foreign Companies' [2014] 63 ICLQ 815.
[4] *In re Aerovias Nacionales de Colombia S.A. Avianca* (2003) 303 BR 1.
[5] AV Dicey and JHC Morris, *The Conflict of Laws* (11th end, L Collins 1987), 1369.

allow long arm jurisdiction and enable forum shopping by multinational companies, considering what multinational companies can do to utilise them.

The US insolvency laws are under the federal bankruptcy system, which appears in Title 11 of the US Code (The Bankruptcy Code).[6] The federal bankruptcy system ensures that all bankruptcy matters are dealt by US federal courts rather than US state courts.[7] Elizabeth Warren identifies that one reason why the Constitution allocates jurisdiction to the US federal courts to deal with bankruptcy law is to ensure uniform application of US insolvency law no matter the state where the matter is heard.[8] As a result multinational companies would, in theory, use the same US insolvency laws no matter the US federal court that they utilise. In practice "the decentralised administration of the Bankruptcy Code leaves scope for different local approaches"[9] and there can be variations in approach which lead to forum shopping within the US and, as noted, the Southern District of New York, has developed a reputation for expertise in the bankruptcies of multinationals.

There are several reasons why multinational companies choose to forum shop in the US. One reason why multinational companies may forum shop in the US is that it is regarded as a debtor-friendly insolvency jurisdiction. This view is primarily on account of the debtor in possession approach which means that the management of the multinational companies remain in charge of the companies during insolvency.[10] Multinational companies forum

[6] Baker McKenzie, 'Global Restructuring & Insolvency Guide' (2016) Baker McKenzie < https://www.bakermckenzie.com/-/media/files/expertise/banking-finance/bk_globalrestructuringinsolvencyguide_20170307.pdf?la=en> accessed 14 May 2021, 457.
[7] Elizabeth Warren, 'Why have a Federal Bankruptcy System' (1992) 77(5) Cornell Law Review 1093, 1095.
[8] United States Constitution, Article I, Section 8, Clause 4.
[9] Adrian Walters, 'United States' Bankruptcy Jurisdiction over Foreign Entities: Exorbitant or Congruent' (2017) 17(2) Journal of Corporate Law Studies 367, 397.
[10] The main significance is that a trustee is not automatically appointed. In practice creditors may place conditions on post commencement finance that require a change of management: David A. Skeel Jr. 'Creditors' Ball: The New "New" Corporate Governance in Chapter 11' (2003) 152 U. Pa. L. Rev. 917.

shopping in the US are not required, as a condition of opening proceedings, to hand over the companies' running during insolvency proceedings to insolvency practitioners.[11]

Another reason why multinational companies forum shop to the US is that the US is a jurisdiction that has extensive and well-developed insolvency laws and expert courts.[12] As a contrast, the 'home' countries of the multinational companies might not have developed insolvency laws and institutions.[13] The US offers flexibility in types of insolvency proceedings with advanced insolvency laws and using them might be deemed a pragmatic and strategic manoeuvre by the multinational companies.[14] The US has a long history of leading approaches to corporate reorganisation procedures.[15] The legislative framework for corporate reorganisation of companies is found in Chapter 11. Chapter 11 enables multinational companies, with the help of the US courts, to reorganise their debt and obligations.[16] 'Home' countries of multinational companies may not have reorganisation procedures and out of court reorganisation may not be feasible in the circumstances, hence utilising US insolvency laws. This thesis later considers what might be done to address this weakness in home country laws.

[11] Fancy Chepkemoi Too, 'A Comparative Analysis of Corporate Insolvency Laws: Which if the Best Option for Kenya?' (2015) Nottingham Trent University < http://irep.ntu.ac.uk/id/eprint/27951/1/Thesis%20post%20viva%20FINAL.pdf > accessed 24 September 2018.
[12] Gerard McCormack, 'Bankruptcy Forum Shopping: The UK and US as Venues of Choice for Foreign Companies' [2014] 63 ICLQ 815.
[13] Gerard McCormack, 'Bankruptcy Forum Shopping: The UK and US as Venues of Choice for Foreign Companies' [2014] 63 ICLQ 815.
[14] See for example Associate for Financial Market in Europe, 'Potential Economic Gains from Reforming Insolvency law in Europe' [2016] AFME < https://www.afme.eu/globalassets/downloads/publications/afme-insolvency-reform-report-2016-english.pdf> accessed 10 April 2018. (Appendix B lists the key benefits of filling for insolvency in the US provided by Title 11 United States Code Annotated such as automatic stay, presumption that the managers of the company will remain in control during insolvency, ability to obtain post-petition financing, discharge of debtor from any debt that arose before the date of confirmation of plan of reorganization among others); *In re Camera* (1933) 6 F Supp 267; *In re McTaGue,* (1996) 198 B.R. 428; *In re Head,* (1998) 223 B.R. 648; *In re Yukos Oil Co* (2005) 321 BR 396.
[15] Stephen J. Lubben, 'Railroad Receiverships and Modern Bankruptcy Theory' (2004) 89 Cornell L. Rev. 1420.
[16] Andrew Keay, 'Insolvency Law: A Matter of Public Interest?' [2000] 51 N. Ir. Legal Q. 509.

Another possible advantage of filing for insolvency proceedings in the US by multinational companies, is that they are not required to prove that they are insolvent.[17] In most jurisdiction, there is a requirement for multinational companies to be unable to pay their debt to utilise insolvency processes.[18] However, the US only requires that the multinational companies show to be a 'person' and have a link to the US.[19] Therefore, multinational companies which are still able to pay their debts can still utilise the US insolvency laws and the protection of the automatic stay is available without having to cross a jurisdictional hurdle requiring proof of insolvency.[20]

2.2.1 The aim

This chapter will evaluate US insolvency laws that allow forum shopping and long-arm jurisdiction. The aim is to identify whether US laws that allow forum shopping and long-arm jurisdiction have a low bar in particular in comparison to COMI, the approach that is suggested as a longer-term way forward for the development of cross-border insolvency jurisdiction. It will also identify why US long arm jurisdiction presently plays an important role in filling a present gap regarding viable restructuring opportunities under the domestic laws of non-US multinationals.

2.2.2 United States of America's Extraterritoriality and Bankruptcy

The effectiveness and utility of long arm jurisdiction of course depends on the extraterritoriality of proceedings and their impact on assets located abroad. The global economy has provided an environment where multinational companies' insolvencies affect

[17] Henry Peter and others, *The Challenges of Insolvency Law Reforms in the 21st Century* (Schulthess 2006) 18.
[18] Gerard McCormack, 'Bankruptcy Forum Shopping: The UK and US as Venues of Choice for Foreign Companies' [2014] 63 ICLQ 815.
[19] Title 11 United States Code Annotated, § 109 (a).
[20] Title 11 United States Code Annotated, Chapter 3, section 362.

more than one jurisdiction.[21] The Bankruptcy Code deals with insolvency in the US.[22] The question arising is whether the Bankruptcy Code is applicable beyond the US, especially in relation to multinational companies.[23] Generally, the US Congress, which makes laws, can enact insolvency laws whose effects are felt not only in the US but also beyond.[24] For example, 11 USC s 541(a)(1) states that the property of the bankruptcy estate includes property "wherever located".[25] The ability of the US insolvency laws to have an impact outside the US is called extraterritoriality.[26] Just because the US Congress can make extraterritorial insolvency laws does not mean that all US insolvency laws are extraterritorial in practical effect,[27] since extraterritoriality depends on recognition. In their effort to utilise US insolvency laws, multinational companies may wish to understand if the insolvency provisions apply to their situation.

In regards to the extraterritoriality of key provisions of the insolvency laws, the basic rule is that US congress has to express that the provision is extraterritorial.[28] There is a presumption against extraterritoriality.[29] The case of *French v. Liebmann (In re French)* highlighted that a clear statement does not need to be stated in the statute for it to be applicable beyond the US.[30] Under US insolvency law extraterritoriality is not precluded due to a lack of clear statements in relation to it.[31] *Smith v United States* clarified that

[21] Lynette C. Kelly, '*In re French*: Extraterritorial Application of the US Bankruptcy Code's Fraudulent Conveyance Provisions' (2006) 3(5) Kluwer Law International 294, 294.
[22] Title 11 United States Code Annotated.
[23] Title 11 United States Code Annotated.
[24] See *E.E.O.C. v Arabian Am. Oil Co. (Aramco),* 499 U.S. 244, 248 (1991); *Hong Kong & Shanghai Banking Corp. v Simon (In re Simon)*, 153 F.3d 991, 995 (9th Cir. 1998).
[25] Title 11 United States Code Annotated, s 541(a)(1).
[26] John Pottow, "Greed and Pride in International Bankruptcy: The Problems and Proposed Solutions to 'Local Interests'". Michigan Law and Economics Research Paper No. 05-005<http://ssrn.com/abstract=711125>(accessed 4 April 2018).
[27] Lynette C. Kelly, '*In re French*: Extraterritorial Application of the US Bankruptcy Code's Fraudulent Conveyance Provisions' (2006) 3(5) Kluwer Law International 294, 294.
[28] Lynette C. Kelly, '*In re French*: Extraterritorial Application of the US Bankruptcy Code's Fraudulent Conveyance Provisions' (2006) 3(5) Kluwer Law International 294, 294.
[29] *In re Rajapakse* 346 B.R. 233 (2005); *RJR Nabisco, Inc. v European Community* 136 S.Ct.2090 (2016).
[30] *French v. Liebmann (In re French)*, 440 F.3d 145 (4th Cir. 2006), petition for cert. filed, 75 U.S.L.W. 3020 (U.S. 15 May 2006) (No. 05-1459).
[31] See *U.S. v Belfast,* 611 f.3d 783 (2010); *Kiobel v Royal Dutch Petroleum Co.,* 569 U.S. 108 (2013); *Georgia Aquarium, Inc. v Pritzker,* 135 F.Supp.3d 1280 (2015); and Erin E Broderick, 'Replacing the Presumption Against Extraterritoriality for Bankruptcy Avoidance Actions ' [2017] 2017(2017) Norton Annual Survey of Bankruptcy Law 27.

there has to be 'clear intention of congressional intent' that the US (insolvency) provision is applicable extraterritorially.[32] As the US courts have stated, the clear congressional intent can be identified through, for example, the legislative history or overall statutory scheme.[33] Therefore, if there are any US insolvency provisions that multinational companies want to inquire if they apply beyond the US, the multinational companies have to look beyond the statute's language.

In relation to specific sections of the Bankruptcy Code, the US courts have identified applicability in the US and beyond.[34] The US courts' reasoning is that specified insolvency provisions regulate activities that have substantial effects in the US, or lack of application of the specified provisions extraterritorially would adversely impact the US.[35] An example of when the US courts have deemed that a US insolvency provision should apply extraterritorially due to the significant impact it had in the US was in the case of *Hong Kong & Shanghai Banking Corp., Ltd. v. Simon (In re Simon).*[36] *In re Simon* concerned the enforcement of a Bankruptcy Code's discharge injunction against Hong Kong & Shanghai Banking Corporation, a foreign creditor.[37] The US courts believed that even though the discharge injunction could not be directly enforced outside the US, it could still be enforced against the part of Hong Kong & Shanghai Banking's assets in the US.[38] Hence, multinational companies can provide evidence to US courts to show that the application of US insolvency law to their insolvency matters would have a significant impact in the US. As a result, the presumption against extraterritoriality would not apply.

---

[32] *Smith v. United States*, 507 U.S. 197, 204 (1993).
[33] See for example *Steele v. Bulova Watch Co.,* 344 U.S. 280 (1952); and *Hong Kong & Shanghai Banking Corp., Ltd. v. Simon (In re Simon),* 153 F.3d 991, 996 (9th Cir. 1998).
[34] See for example Title 11 United States Code Annotated, section 362 (deals with automatic stay) and section 524 (deals with discharge injuctions); *In re Simon*, 153 F.3d [997]; and *Underwood v. Hilliard (In re Rimsat, Ltd.),* 98 F.3d 956, 961 (7th Cir. 1996).
[35] *Steele v. Bulova Watch Co.,* 344 U.S. 280 (1952); and *Hong Kong & Shanghai Banking Corp., Ltd. v. Simon (In re Simon),* 153 F.3d 991, 996 (9th Cir. 1998).
[36] *Hong Kong & Shanghai Banking Corp., Ltd. v. Simon (In re Simon),* 153 F.3d 991, 996 (9th Cir. 1998).
[37] *Hong Kong & Shanghai Banking Corp., Ltd. v. Simon (In re Simon),* 153 F.3d 991, 996 (9th Cir. 1998).
[38] *Hong Kong & Shanghai Banking Corp., Ltd. v. Simon (In re Simon),* 153 F.3d 991, 996 (9th Cir. 1998).

There are both benefits and negatives for extraterritoriality of applicable US insolvency laws.[39] One positive aspect of specific provisions having extraterritoriality is that multinational companies can use provisions that are available in other jurisdictions.[40] One adverse effect of the extraterritoriality is that multinational companies are able to forum shop in the US. From a developing countries' perspective, forum shopping will result in developing countries insolvency laws not being utilised in cases which may be of particular local importance.[41] The presumption against the extraterritoriality principle, when used by the US courts, will hinder forum shopping by denying the use of specific US insolvency provisions to insolvency matters outside the US jurisdiction. However, as the next section outlines, a generous approach has been taken to the extraterritoriality of key provisions of the Bankruptcy Code of relevance to multinationals.

2.2.3 Which US Insolvency Provisions allow forum shopping and long-arm jurisdiction?

In applying US insolvency law, the US does not distinguish between foreign and domestic companies.[42] US courts derive jurisdiction to preside over insolvency proceedings of foreign companies, termed long-arm jurisdiction, because of how the Bankruptcy Code defines who a debtor is.[43] The Bankruptcy Code in § 109 (a) (section 109 (a)) states '*only a person that resides or has domicile, a place of business, or property in the United States, or municipality, may be a debtor…*'.[44] This provision, considered further in the next section,

[39] Jonathan Turley, '"When in Rome": Multinational Misconduct and the Presumption against Extraterritoriality' (1990) 84(2) Northwestern University Law Review 807; *French v Liebman (In re French)* 440 F.3d 145 (2006) 149-152.
[40] Samuel L Bufford, *United States International Insolvency Law 2008-2009* (Oxford University Press 2009), 26.
[41] *Kiobel v Royal Dutch Petroleum Co.,* 569 U.S. 108 (2013); John Pottow, "Greed and Pride in International Bankruptcy: The Problems and Proposed Solutions to 'Local Interests'". Michigan Law and Economics Research Paper No. 05-005<http://ssrn.com/abstract=711125> (accessed 4 April 2018) (The article deals with the effects of creditors and the local government).
[42] Philip A. Trautman, 'Long-Arm and Quasi in Rem Jurisdiction in Washington' (1975-1976) 51 Wash. L. Rev.1.
[43] See for example Erin K 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 U.S. Bankruptcy Courts' (2004) 12 Am. Bankr. Inst. L Rev. 535, 535..
[44] Title 11 United States Code Annotated.

section 2.3, sets a low threshold.[45] Therefore, multinational companies incorporated or centred in developing countries can forum shop in the US by proving to the US courts that they can be considered debtors under the Bankruptcy Code.[46] It is important to examine the requirements under section 109 (a)[47] to identify how multinational companies can forum shop in the US and US courts can exercise long-arm jurisdiction.

2.3 WHO MAY BE A DEBTOR UNDER THE CODE?

The first general requirement is that multinational companies must show that they are considered a 'person' under the Code.[48] The second requirement is that multinational companies must show a connection to the US.[49] The link is established by showing that the multinational companies have one of the following: residence/domicile, a place of business or property in the US.[50] Once the requirements are fulfilled, the multinational companies can forum shop in the US. These different ways in which a connection to the US can be established below. It will be noted that these requirements can fall short of the depth of connection required for the identification of the centre of main interests, 'COMI', which is proposed in this thesis as a desirable ultimate development of the international cross border insolvency framework.

2.3.1 A person

Since multinational corporations make domestic insolvency applications in the US, they ought to satisfy the criteria of 'person' under the Bankruptcy Code.[51] Multinational

[45] Shana Elberg, 'Using the Bankruptcy Code for International Restructuring' [2016] New York Law Journal <https://files.skadden.com/sites%2Fdefault%2Ffiles%2Fpublications%2FUsing_the_Bankruptcy_Code_For_International_Restructuring.pdf > accessed 10 January 2018.
[46] Title 11 United States Code Annotated, § 109 (a).
[47] Title 11 United States Code Annotated, § 109 (a).
[48] Title 11 United States Code Annotated, § 109 (a).
[49] Samuel L Bufford, *United States International Insolvency Law 2008-2009* (Oxford University Press 2009) 181.
[50] Title 11 United States Code Annotated, § 109 (a).
[51] Title 11 United States Code Annotated, § 109 (a).

companies are directed to section 101(4) of the Bankruptcy Code for the definition of a 'person'.[52] Section 101(41) states, 'the term "person" includes individual, partnership, and corporation…,'.[53] Two of the definitions may be applicable to multinational companies, partnership and corporation.[54] Section 101(41) is worded to give examples of who can be considered a 'person' under the Bankruptcy Code.[55] The specific words used are examples and not an exhaustive list of who is a 'person'. Therefore, other types of legal entities occurring in other jurisdictions have a possibility of fitting into the definitions of a 'person'.[56] As a result, multinational companies formed in other jurisdictions under different legal models can still access the Bankruptcy Code once they fulfil the other requirements.[57]

Conversely, section 101(41) of the Bankruptcy Code specifies various types of entities that can never be a 'person' for the purpose of the Bankruptcy Code, unless certain circumstances are satisfied, for example, government entities (which is beyond the scope of this thesis).[58] The general consensus of US courts is that most entities may be termed as legal persons for the purpose of insolvency.[59] US courts have provided another limitation through their interpretation of who is a legal person.[60] The limitation is through the test used by the US courts which relates to the business activities of the legal entity.[61] However, the business purpose of the entity in question does not have to be for-profit, thus the term can include not-for-profit organisations such as charities.[62]

---

[52] Title 11 United States Code Annotated, § 101(41).
[53] Title 11 United States Code Annotated, § 101(41).
[54] Title 11 United States Code Annotated, § 101(41).
[55] Title 11 United States Code Annotated, § 101(41).
[56] Title 11 United States Code Annotated, § 101(41).
[57]Title 11 United States Code Annotated.
[58] Title 11 United States Code Annotated, § 101(41).
[59] See for example *In re 4 WHIP, LLC,* 332 B.R. 670, 672; Shana Elberg, ibid; Title 11 United States Code Annotated, § 101(9).
[60] See for example Shana Elberg, 'Using the Bankruptcy Code for International Restructuring' [2006] New York Law Journal < https://files.skadden.com/sites%2Fdefault%2Ffiles%2Fpublications%2FUsing_the_Bankruptcy_Code_For_International_Restructuring.pdf > accessed 10 January 2018; Title 11 United States Code Annotated, § 101(9) (Offers various definitions of words such as corporation).
[61] See for example *In re 4 WHIP, LLC,* 332 B.R. 670, 672; Shana Elberg, ibid; Title 11 United States Code Annotated, § 101(9); Title 11 United States Code Annotated, § 101(41).
[62] See for example *In re 4 WHIP, LLC,* 332 B.R. 670, 672; Shana Elberg, ibid; Title 11 United States Code Annotated, § 101(9); Title 11 United States Code Annotated, § 101(41).

In the context of this thesis, the wide definition of a legal person is likely to enable most multinational companies to qualify to open insolvency proceedings in the US. In the event that further elaboration is needed for the meaning of whether a particular enterprise is to be regarded as a legal person, multinational companies may seek guidance from the US courts as to whether their entity is to be regarded as a legal person for the purposes of bankruptcy jurisdiction.[63] In the event of a case where there is a lack of clarity as to whether an enterprise meets the definition of a legal person there would inevitably be time and costs incurred by multinational companies during the insolvency process this would increase the costs to the detriment of various stakeholders of the company.[64] However, this is a hypothetical situation and the meaning of the term 'legal person' is wide enough to include almost all entities formed to conduct business and thus it is likely to include almost types of multinational companies. The breadth of this term can potentially encourage forum shopping to the US. It contrasts markedly with the depth of connection that would be required if an approach based on COMI was to be adopted, as proposed as a longer-term strategy in this thesis.

2.3.2 A Place of Business

One way that multinational companies may seek to establish a connection to the US to open main insolvency proceedings is to prove that they have a place of business in the US.[65] Fulfilling this requirement enables multinational companies to be considered 'debtors' under the Bankruptcy Code.[66] Certain activities of the multinational companies might occur in the US and also other countries, including in developing countries. The activities that might be evaluated in establishing a place of business in the US under the

[63] See for example *Sylvan Beach v. Koch*, C.C.A.8 (Mo.) (1944) 140 F.2d 852; *In re Brooke Corporation*, Bkrtcy.D.Kan. (2014) 506 B.R. 560; *In re Sugar Valley Gin Co.,* N.D.Ga (1923) 292 F. 508; *In Re Donald Verona & Bernard Green* (1994) 126 B.R. 113.
[64] John Pottow, "Greed and Pride in International Bankruptcy: The Problems and Proposed Solutions to 'Local Interests'". Michigan Law and Economics Research Paper No. 05-005<http://ssrn.com/abstract=711125> (accessed 4 April 2018).
[65] Title 11 United States Code Annotated, § 109 (a).
[66] Title 11 United States Code Annotated, § 109 (a).

Bankruptcy Code are those that occur within the US.[67] Not all activities carried out by a company in a particular location in the US are evidence towards satisfying that a company has a place of business in that location.[68] Hence, this section will examine the meaning of a 'place of business' to establish if it encourages forum shopping.

Multinational companies and their advisers will not find the definition of 'a place of business' in the Bankruptcy Code, since the term is used without elaboration.[69] However, US courts have endeavoured to provide its interpretation.[70] The US courts have a discretion in the interpretation of 'a place of business'. The discretion has led to various tests being identified.[71] However, there are two main tests mainly used by US courts to establish 'a place of business' to link multinational companies to the US.[72]

One of the tests focuses on the quantity of work that occurs in a particular place that the company is claiming is its place of business.[73] The other focuses on notoriety, meaning the extent to which those dealing with the companies know that the companies carry out business from the locations where they are claiming to have a place of business.[74] Since US judges developed the tests, they have discretion, depending on the hierarchy of the court, either to apply them as precedents[75] or distinguish[76] them. Conversely, the Code's[77] approach of not specifying facts to be taken into account in determining a place of business

[67] see Title 11 United States Code Annotated, § 109 (a); *In re Woodfield Furniture Clearance Ctr. of Suffolk, Inc.,* (1989) 102 B.R. 327, 333.
[68] See for example *In re Woodfield Furniture Clearance Ctr. of Suffolk, Inc.,* (1989) 102 B.R. 327, 333.
[69] Title 11 United States Code Annotated, § 109 (a).
[70] See for example *Ford Motor Credit Co. v Weaver* (1982) 680 F2d 451; *In re Carmichael Enterprises, Inc.* (1972) 460 F2d 1405.
[71] See *In re Pocono Airlines, Inc.,* (1988) 87 B.R. 325, [327] (the case lists the tests).
[72] See for example *Ford Motor Credit Co. v Weaver* (1982) 680 F2d 451; *Enark Industries, Inc. v Bush* (1976) 86 Misc 2d 985; *In re McCrary's Farm Supply, Inc.* (1983) 705 F2d 330, 332.
[73] See for example *In re Woodfield Furniture Clearance Ctr. of Suffolk, Inc.,* (1989)102 B.R. 327 [332]; *Ford Motor Credit Co. v Weaver* (1982) 680 F2d 451, 460 for further analysis of the test.
[74] See for example *Ford Motor Credit Co. v Weaver* (1982) 680 F2d 451, 460; *In re Carmichael Enterprises, Inc.,* (1971) 334 F. Supp. 94, 100–101 for further analysis of the test.
[75] See for example *In re Mimshell Fabrics Company, Ltd,.* (1974) 491 F.2d 21, 23 (quantity test); *In re McQuaide* (1968) 5 U.C.C.Rep 802.
[76] See for example *In re Pocono Airlines, Inc.,* (1988) 87 B.R. 325, 327; *Ford Motor Credit Co. v Weaver* (1982) 680 F2d 451, 460.
[77] Title 11 United States Code Annotated.

arguably gives US courts broad discretion in interpreting 'place of business' and it does not set as high a threshold as COMI, considered in Chapter 5. The broad discretionary power may have some advantages, such as perhaps allowing US courts to tailor their decisions based on facts before them.[78] The US courts' discretion might be viewed as creating uncertainty for multinational companies aiming to establish a place of business in the US. Conversely, multinational companies could regard the flexibility offered to the courts in identifying place of business as an incentive to forum shop in the US. Therefore, the presence of various tests might be viewed as either encouraging or discouraging forum shopping to the US by multinational companies.

In this context, the quantity and notoriety tests are aimed at making factual determination as to the multinational companies' location within the US that may be considered a 'place of business'.[79] Arguably, the use of the facts in determining 'place of business' means that cases can be considered on the basis of practical observation and common sense to determine the economic realities and less will turn on the tests if those facts clearly show that a certain location in the US is a place of business for the purpose of the Bankruptcy Code.[80] Multinational companies provide the evidence to US courts to prove that they have 'place of business' in the US, including a mailing address, an office, and a warehouse.[81] Thus, if multinational companies are able to provide irrefutable evidence that locations within the US are the 'place of business', US courts can exercise long-arm jurisdiction over their insolvencies.

Simply doing business in the US is not sufficient evidence that multinational companies have a place of business in the US.[82] Multinational companies may have business activities

[78] See for example *In re Woodfield Furniture Clearance Ctr. of Suffolk, Inc.,* (1989)102 B.R. 327 (The warehouse was found not to be a place of business); *Ford Motor Credit Co. v Weaver* (1982) 680 F2d 451 (The warehouse was found not to be a place of business)
[79] *In re Pocono Airlines, Inc.,* (1988) 87 B.R. 325, 327.
[80] Title 11 United States Code Annotated; *In re Pocono Airlines, Inc.,* (1988) 87 B.R. 325, 327.
[81]See for example *In re Woodfield Furniture Clearance Ctr. of Suffolk, Inc.,* (1989)102 B.R. 327; *Ford Motor Credit Co. v Weaver* (1982) 680 F2d 451 (All these placed have been established as places of business).
[82] *In re Pocono Airlines, Inc.,* (1988) 87 B.R. 325, 327.

in the US, such as selling their products in the US or entering into service contracts in the US to deliver goods that might be termed as doing business via the internet. Those activities on their own are not sufficient for US courts to find that multinational companies have a place of business in the US, per *In re Head*.[83] Arguably a location in the US is an important factor that must be present in addition to activities of the multinational companies in that US location for US courts to determine a place of business according to Section 109 (a).[84] Note that only having a location and not conducting business from that location is also not sufficient to show 'place of business' of multinational companies.[85] Therefore, it might be reasoned that US courts have provided a barrier for proving 'place of business'. The barrier requires that forum shopping multinational companies show both a location and the location is where they carry out business activities.

One of the advantages of the Bankruptcy Code is that multinational companies only have to have 'a' place of business and not a 'principal' place of business to be considered a debtor under the Code.[86] Multinational companies may not be carrying out or have carried out a majority of their activities in the US. Lack of significant business activities in the US does not prevent them from applying to be a debtor under the Bankruptcy Code.[87] Therefore, multinational companies have only to show that some of their business is conducted in the US to satisfy the 'place of business' basis.

The business performed in the US may not have to be done by the multinational companies themselves.[88] Forum shopping multinational companies may be operating in the US through agents. *In re Petition of Brierley* states that it is sufficient for multinational companies to have places of business if the agents are located in the US.[89] For example,

[83] *In re Head,* (1998) 223 B.R. 648, 651 – 652.
[84] *In re Head,* (1998) 223 B.R. 648, 651 – 652.
[85] *In re Head,* (1998) 223 B.R. 648, 651 – 652.
[86] *In re Paper I Partners, L.P.,* (2002) 283 B.R. 661, 672.
[87] *In re Zais Inv. Grade Ltd. VII*, (2011) 455 B.R. 839, 844 – 846; Title 11 United States Code Annotated.
[88] *In re Petition of Brierley,* (1992) 145 B.R. 151, 161 – 162.
[89] *In re Petition of Brierley,* (1992) 145 B.R. 151, 161 – 162.

multinational companies are able to show places of business if their account is located in the US, from where they conduct their business.[90] The person or company carrying out business on behalf of the multinational company does not have to be an employee of the company, they may be independent contractors, only contracted to carry out a specific function on behalf of the multinational company which would be sufficient for US court to find a place of business.[91] Arguably, this shows that US courts have widely interpreted a 'place of business' enabling multinational companies to have a wider range of factors to present to the courts to show that they have a place of business in the US to be eligible to open insolvency proceedings in the US. Hence, the wider approach might be seen as facilitating forum shopping in the US by multinational companies.

In conclusion, the US courts have interpreted the term 'place of business' widely to include most business activities connected to a particular location in the US, either done directly by the multinational company or on their behalf. The wide approach taken by the US courts may seem to enable more multinational companies to be considered eligible to open main insolvency proceedings in the US. Consequently, this approach may encourage forum shopping to US by multinational companies with bases outside the US, such as in developing countries. An approach based on COMI, by contrast, would be much more limiting.

2.3.3 Residence and Domicile

Multinational companies may attempt to establish connection to the US by showing that they have residence or domicile in the US.[92] Due to the nature of multinational companies

[90] *In re Petition of Brierley,* (1992) 145 B.R. 151 161 – 162 (The accountant was employed by the company to carry out their accountancy. There was no other connection to that location other than the accountant was located there. That was found to be sufficient evidence to show that the company had a place of business in the US).
[91] *In re Paper I Partners, L.P.,* (2002) 283 B.R. 661, 672 (An accountant who was conducting accountancy, on behalf of the company but was not employed directly by the company, was found to provide evidence that the location where they were based, was a place of business for the company by the US courts).
[92] Title 11 United States Code Annotated, § 109 (a).

they may have offices, employees, factories, headquarters and other aspects of the company in multiple jurisdictions, including the US, as well as in other countries, including developing countries. Therefore, multinational companies need to comprehend what evidence they can present to US courts for residence or domicile to be ascertained by US courts. This section will aim to examine the interpretation of ‘residence’ and ‘domicile’ established by US courts and whether the meaning enables forum shopping. Again, residence or domicile would tend to be far easier for a multinational company to establish than if a COMI in the US was required.

Multinational companies cannot rely on the Bankruptcy Code for the definitions of 'residence' nor 'domicile'.[93] US courts have provided their interpretations in various cases.[94] Most of the cases do not deal with insolvency; however, the Supreme Court of Arizona took the approach that the interpretation provided in other areas of law could be used to define the two in any US statute using 'residence' and 'domicile'.[95] The same approach could be taken by other US state courts. As a result, multinational companies can possibly rely on cases from other US areas of law to define 'residence' and 'domicile'.[96]

US courts have supported the idea that the Bankruptcy Code was intentionally worded with both 'residence' and 'domicile'.[97] 'Residence' and 'domicile' are not synonymous.[98] Various US courts dealing with bankruptcy proceedings have supported this idea by establishing that residence cannot be used in place of domicile nor vice versa as their meaning, and legal implications are different.[99] Therefore, multinational companies can

[93] Title 11 United States Code Annotated.
[94] See for example *In re Walter M. Marsico* 278 B.R. 1; *Mississippi Band of Choctaw Indians v. Holyfield,* 490 U.S. 30 *(1989)* [48]; *In re Tomko,* 87 B.R.372, 374.
[95] *MiIntosh v Maricopa County* 73 Ariz. 366, 368-369 (1952)..
[96] Title 11 United States Code Annotated.
[97] See for example *In re Tomko,* 87 B.R. 372, 375; *MiIntosh v Maricopa County* 73 Ariz. 366 (1952), 369.
[98] Title 11 United States Code Annotated, § 109 (a).
[99] See for example *In re Tomko,* 87 B.R. 372, 375; *MiIntosh v Maricopa County* 73 Ariz. 366 (1952), 369.

prove that they have either 'residence' or 'domicile' in the US and not necessarily both to forum shop in the US.

US courts have discretion in elaborating the meaning of 'domicile'.[100] According to *Mississippi Band of Choctaw Indians v. Holyfield*, 'domicile' is a permanent and fixed abode.[101] Therefore, multinational companies consider locations as domicile where they carry out activities permanently despite doing so elsewhere from time to time.[102]

In re Dissolution of Chris Cole Enterprises provided that evidence for the domicile of companies is incorporation documentation that shows the location of incorporation.[103] Most multinational corporations may have been incorporated outside the US and the incorporation documentation will reflect this. However, cases such as *AIU Ins. Co. v TIG Ins. Co.* stated that domicile may also be proved by showing their principal place of business.[104] Therefore, multinational companies incorporated outside the US are still able to show domicile through evidence of their principal place of business to commence main insolvency proceedings in the US.

The meaning of a principal place of business, which has been described to equate to domicile, is wide.[105] In *Johnson v SmithKline Beecham Corp.* the definition of principal place of business was said to be the locations where companies conduct their day to day business activities.[106] Additionally, the principal place of business is the location where multinational companies operate their most important, consequential or influential

[100] See for example *Snyder v. McLeod*, 971 So. 2d 166 (2007); *McIntosh v. Maricopa County*, 73 Ariz. 366 (1952); *Missouri Pacific R. Co. v. Lawrence*, 215 Ark. 718, 223 S.W.2d 823 (1949) (The cases highlighted that the Courts have a discretion to interpret domicile since the Code did not).
[101] See *Mississippi Band of Choctaw Indians v. Holyfield,* (1989) 490 U.S. 30[48]; *In re Tomko,* (1988) 87 B.R.372, 374.
[102] See *Mississippi Band of Choctaw Indians v. Holyfield,* (1989) 490 U.S. 30[48]; *In re Tomko,* (1988) 87 B.R.372, 374.
[103] See for *In re Dissolution of Chris Cole Enterprises,* (2001) 188 Misc.2d 207, 840.
[104] See for example *AIU Ins. Co. v TIG Ins. Co.* (2013) 934 F.Supp.2d 594; *DiTondo v Meagher* (2009) 24 Misc.3d 720.
[105] See for example *In re Suntech Power Holdings Co., Ltd.* (2014) 520 B.R. 399, 414;
[106] *Johnson v SmithKline Beecham Corp.,* (2012) 853 F.Supp.2D 487, 495.

decisions concerning the company.[107] Both of the meanings may be seen as describing the company's head office where most decisions are assumed to occur. The description may also fit other locations for multinational companies other than the headquarters that fulfils those criteria set by the US judges.[108] Therefore, multinational companies can show US locations where they conduct their day-to-day activities to forum shop in the US.

Additionally, the Bankruptcy Code does not define 'residence' enabling US courts to provide its meaning.[109] In *Wolinsky v Bradford Nat. Bank,* 'domicile,' was described as a place where people live but do not need to have their main residence.[110] Furthermore, the location may be temporary; however, US courts have provided the limitation that a 'residence' needs to be more than a transient place.[111] In application, multinational companies can have residence in the US if they operate from a particular place. The operations cannot be so temporary that they are considered transient. For example, multinational companies cannot book a meeting room to conduct business for a few short days and expect that location to be considered a residence.

The definition of residence provides for multiple locations to be considered for the purpose of commencing insolvency proceedings.[112] Offices of multinational companies in different places in the US can be considered as residences. This may enable forum shopping as multinational companies may establish more than one location as their residence for the purpose of opening insolvency proceedings in the US rather than other jurisdictions, such as developing countries where they have stronger involvement and indeed where the COMI may lie.

[107] *Hert Corp. v Friend* (2010) 559 U.S. 77, 92-93.
[108] *Johnson v SmithKline Beecham Corp.,* (2012) 853 F.Supp.2D 487, 495 and *Hert Corp. v Friend* (2010) 559 U.S. 77, 92-93.
[109] See Title 11 United States Code Annotated; *In re Tomko,* (1988) 87 B.R. 372, 374.
[110] *Wolinsky v Bradford Nat. Bank,* (1983) 34 B.R. 702, 704.
[111] *In re Pettit,* (1995) 183 B.R. 6, 8.
[112] See *Mississippi Band of Choctaw Indians v. Holyfield,* (1989) 490 U.S. 30; *In re Walters M. Marsico,* (2002) 278 B.R. 1, 4.

US courts have established that a corporation may have more than one residence but can only have one domicile.[113] Arguably, various factors can contribute to the establishment of residence of corporations in the US. Some of these factors are an office in a location in the US,[114] manufacturing plant,[115] among others.[116] Multinational companies do not have to show that that location is the principal place of business for US courts to establish residence.[117] Therefore, multinational companies may prove residence in the US by showing that they carry out part of their business in a particular location. Arguably the meaning of residence may enable forum shopping as multinational companies may have more than one location that can be termed as their residence as long as they are located in the US.

Additionally, there is an overlap in the definition of a domicile and residence. The place of incorporation has been found to be evidence of both domicile and residence.[118] Despite the fact that residence and domicile are not synonymous,[119] place of incorporation can be used to prove both, although this will not assist multinational companies which are incorporated elsewhere.

2.3.3.4 Property

The final possible link to the US for multinational companies to open main insolvency proceedings is through the presence of property in the US.[120] An important facet of the property requirement to commence insolvency proceedings in the US is that US judges are not required to consider other factors, such as if the multinational company has

[113] *American Employers' Ins. Co. v. Elf Atochem North America, Inc.,* (1999) 725 A.2d 1093, 1098.
[114] *Reimers v Honeywell, Inc.,* (1990) 457 N.W.2d 336, 338.
[115] *Hordis Bros., Inc. v Sentinel Holdings, Inc.,* (1990) 562 So.2d 715, 717.
[116] See for example *State ex rel. Cartwright v. Hillcrest Investments, Ltd.,*(1981) 630 P.2d 1253, 1259 (A Canadian company was found to be a residence of Oklahoma because it had a business licence in that state).
[117] *Ford Motor Credit Co. v Weaver* (1982) 680 F2d 451, 460; (A place of business has been discussed in 2.2.2.).
[118] *Int'l Milling Co. v Columbia Transp. Co.,* (1934) 292 U.S. 511, 519.
[119] See for example *In re Tomko,* 87 B.R. 372, 375; *MiIntosh v Maricopa County* 73 Ariz. 366, 396 (1952).
[120] Title 11 United States Code Annotated, § 109 (a).

business or offices in the US.[121] Once it has been proved there is property of the multinational company in the US, multinational companies are considered to be debtors under the Bankruptcy Code and US courts can accept an application to deal with insolvency issues pertaining to the multinational company.[122] The likely ease of establishing the presence of property enables forum shopping and potentially overcomes possible difficulties in establishing a place of business, domicile or residence, outlined above, and highlights that the availability of bankruptcy proceedings can be based on a connection far short of a COMI. The section examines what is considered property for the purposes of opening main insolvency proceedings by multinational companies in the US.

Similarly to place of business, residence and domicile, the meaning of property is not defined in the Bankruptcy Code.[123] Multinational companies can look to how the term 'property' has been described by US courts.[124] The approaches taken enable forum shopping. The most prominent description of property comes from the case of *In re McTague*[125] Several foreign multinational companies have used the case to access the US insolvency law.[126] *In re McTague*[127] describes 'property' as 'a dollar, a dime or a peppercorn' in the US.[128] *In re Globo Comunicacoes* described the description in *In re McTague*[129] as being virtually non-existent.[130] As a result, multinational companies may have a nominal amount of property in the US and US courts can exercise their long-arm jurisdiction over their insolvency matters.

---

[121] Shana Elberg, 'Using the Bankruptcy Code for International Restructuring' [2016] New York Law Journal <https://files.skadden.com/sites%2Fdefault%2Ffiles%2Fpublications%2FUsing_the_Bankruptcy_Code_For_International_Restructuring.pdf > accessed 10 January 2018.
[122] Title 11 United States Code Annotated, § 109 (a).
[123] Title 11 United States Code Annotated.
[124] Erin K. 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] AmBankrInstLRev 535.
[125] *In re McTague,* (1996) 198 B.R. 428, 432.
[126] See Gerard McCormack, 'Bankruptcy Forum Shopping: The UK and US as Venues of Choice for Foreign Companies' (2014) 63 ICLQ 815, 835; and Erin K 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 U.S. Bankruptcy Courts' (2004) 12 Am Bankr Inst L Rev 535, 536.
[127] *In re McTague,* (1996) 198 B.R. 428, 432.
[128] *In re McTague,* (1996) 198 B.R. 428, 432.
[129] *In re McTague,* (1996) 198 B.R. 428, 432.
[130] *In re Globo Comunicacoes*, 2004 WL 2624866, 9.

US judges are not required to evaluate the amount of property in the US in order to allow multinational companies to commence main insolvency proceedings in the US.[131] It is sufficient to have a property to fulfil the property requirement of section 109(a).[132] Section 109 (a) is clear in that US Congress only required for the property to be in the US for a person to qualify to open insolvency proceedings in the US since there are no other qualifiers listed in the establishment of property.[133] It appears that the threshold of gaining access to the Bankruptcy Code by multinational companies is low as the value of the property is inconsequential in determining eligibility to open insolvency proceedings in the US. Hence, multinational companies only have to establish that they have a property in the US in order to qualify to open proceedings in the US.

The multinational companies' property in the US might not be that significant compared to property found in other jurisdiction outside the US, let alone representing COMI, making the other jurisdictions more suitable for opening insolvency proceedings. It has been argued by parties in various litigations that a sufficient property test should be introduced in order to prevent abuse of forum shopping and prevent a situation similar to the one mentioned above.[134] However, US judges have highlighted that US Congress was unambiguous in the use of property without any qualifiers, as discussed above.[135] Additionally, it has been observed that the US Congress put in place other factors[136] in the

[131] *In re McTague,* (1996) 198 B.R. 428, 432.
[132] Title 11 United States Code Annotated, § 109 (a).
[133] See Title 11 United States Code Annotated, § 109 (a); Erin K. 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] AmBankrInstLRev 535; Henry Lewis Goodman, 'Use of the United States Bankruptcy Laws in Multinational Insolvencies: The Axona Litigation—Issues, Tactics, and Implications for the Future' (1992) 9 Bank.Dev.J. 19, 25.
[134] See *In re Global Ocean Carriers Ltd.,* 251 B.R. 31 (Bankr. D. Del. 2000); *In re McTague,* (1996) 198 B.R. 428; Erin K. 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] AmBankrInstLRev 535.
[135] See for example *In re Global Ocean Carriers Ltd.,* 251 B.R. 31 (Bankr. D. Del. 2000), 38 - 39; *In re McTague,* (1996) 198 B.R. 428, 431 - 432.
[136] See Erin K. 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] AmBankrInstLRev 535, 548- 550 (discusses some of the factors such as bad faith, substantial abuse of Chapter 7 or 11, abstention).

Bankruptcy Code that US courts can use to dismiss insolvency proceedings in the US and these factors can be used by the courts effectively to prevent or curb abusive forum shopping by foreign companies.

The property can be tangible[137] or intangible.[138] Multinational companies are not limited to proving that they have physical property in the US. There are other types of properties that are enough to constitute property under section 109 (a).[139] An example is a bank account in the US, and a bank account is not a tangible thing; however, it is enough for section 109 (a).[140] The bank account does not have to have a great amount or any amount in it to satisfy section 109 (a)[141] since the value of the money is not what the US judges look at.[142] Another example is the existence of a claim or cause of actions in the US or against US entities on behalf of the multinational company, which is also enough to satisfy section 109 (a).[143] US courts have also ascertained that contracts are property under section 109 (a) since once entered into by the parties, they create property rights even though the contract rights associated with those contracts are limited and/or of no value.[144] Arguably tenuous connection between the property and the multinational company is not sufficient for the purpose of section 109 (a), for example possession of copies of document when another is the rightful owner of the original is not sufficient,[145] nor is a remote claim on a trust.[146] Despite this, multinational companies have more ways in which they can prove that they have property in the US as long as the property was in

[137] See for example *In re Global Ocean Carriers Ltd.,* 251 B.R. 31 (Bankr. D. Del. 2000) (a bank account in the US is property even of it has little or no money in it, lawyers retainer fee paid on behalf of the debtor).
[138] See for example *In re Octaviar Admin. Pty Ltd.,* (2014) 511 B.R. 361 (claims and/or causes of action against US entities or property has been considered property for the purpose of Section 109 (a)).
[139] Title 11 United States Code Annotated, § 109 (a).
[140] *In re Global Ocean Carriers Ltd.,* 251 B.R. 31 (Bankr. D. Del. 2000).
[141] Title 11 United States Code Annotated, § 109 (a).
[142] *In re McTaGue,* (1996) 198 B.R. 428 [432].
[143] See for example *In re Octaviar Admin. Pty Ltd.,* (2014) 511 B.R. 361; Title 11 United States Code Annotated, § 109 (a).
[144] See for example *In re Berau Capital Resources Pte Ltd,* (2015) 580 B.R. 80 [83]; *In re Sherlock Homes of W.N.Y.,* (2000) 246 B.R. 19, 24-25.
[145] *In re Paper 1 Partners, L.P.,* (2002) 283 B.R. 661, 664.
[146] *In re McTaGue,* (1996) 198 B.R. 428, 429.

the US before an application for insolvency proceedings commences.[147] This might be perceived as facilitating forum shopping to the US by multinational companies.

The three bases on which eligibility to be a debtor to open main insolvency proceedings in the US, place of business, domicile/residence and property, have a low bar to satisfy by multinational companies. Therefore, there is a high likelihood that multinational companies can qualify to be debtors under the Bankruptcy Code.[148] An approach based on COMI, as suggested in this thesis as the long-term way forward for jurisdiction in main insolvency proceedings, would be much more limiting. It should be acknowledged that the US courts do exercise restraint. Cases such as *In re Head* have highlighted the fact that not in all situations do US courts accept insolvency jurisdiction over foreign companies.[149] *In re Head* demonstrated that some US courts do not accept evidence of satisfying any of the three bases if they have been manufactured for the purposes of opening insolvency proceedings in the US.[150] The position of *In re Head* appears to be contradictory to the approach taken in cases such as *In re Yukos.*[151] *In re Yukos,* the Russian company opened a bank account just before US courts accepted the insolvency petition and jurisdiction.[152] As the two cases demonstrate, different US courts treat the manufacturing of US link differently. Therefore, multinational companies that manufacture the link just before insolvency petitions may or may not have US courts accepting jurisdiction.

Importantly, multinational companies should note that US courts can refuse to accept jurisdiction if the link is too tenuous.[153] For example, if multinational companies are trying to claim jurisdiction over supposed properties in the US the case may be unconvincing.

---

[147] *In re Global Ocean Carriers Ltd.,* 251 B.R. 31 (Bankr. D. Del. 2000), 37.
[148] Title 11 United States Code Annotated, § 109 (a).
[149] *In re Head*, (1998) 223 B.R. 648, 654.
[150] *In re Head*, (1998) 223 B.R. 648, 654.
[151] *In re Yukos oil Co*. 321 B.R. 396 (Bankr. S.D. Tex. 2005).
[152] *In re Yukos oil Co*. 321 B.R. 396 (Bankr. S.D. Tex. 2005).
[153] *In re Head*, (1998) 223 B.R. 648, 654; Erin K. 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] AmBankrInstLRev 535, 548- 550; and Gerard McCormack, 'Bankruptcy Forum Shopping: The UK and US as Venues of Choice for Foreign Companies' [2014] 63 ICLQ 815, 834.

The supposed property can be beneficiary to a US trust which also operates in the home jurisdiction of the multinational company. In such instances, US courts are likely to refuse to exercise their long-arm jurisdiction. The reason being that the connection is too remote and the closer connections lie with the branch of the US entity in their home country.

Finally, the opening of bankruptcy proceedings cannot be 'used as a sword' by multinational companies[154] to gain an unfair advantage over other stakeholders of the multinational companies.[155] Therefore, multinational companies cannot try and circumvent domestic insolvency laws in order to deprive their stakeholders of their rights. Hence, if US courts conclude that multinational companies are forum shopping to the US to gain an unfair advantage they can refuse to proceed with the case.

2.4 CONCLUSION

The eligibility criteria to forum shop in the US by multinational companies in the US has a low bar. For example, it is sufficient for multinational companies to have an empty bank account in the US, enabling US courts to claim jurisdiction.[156] Arguably this enables multinational companies to prove their existence more easily hence encourage them to utilise US courts during insolvency, thus promoting forum shopping. Once eligibility has been established under section 109 (a)[157] by the multinational companies, they may apply as domestic debtors for relief under the Code. The US courts determine whether requirements in section 109 (a)[158] have been fulfilled. Multinational companies are required to prove to the US courts that they fulfil section 109(a) requirements.[159] It should be added that the US courts have powers that will enable abusive forum shopping to be

[154] *In re Head*, (1998) 223 B.R. 648, 654.
[155] *In re Head*, (1998) 223 B.R. 648, 654.
[156] *In re McTaGue,* (1996) 198 B.R. 428, 432; and Erin K. 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] AmBankrInstLRev 535, 548- 550.
[157] Title 11 United States Code Annotated, § 109 (a).
[158] Title 11 United States Code Annotated, § 109 (a).
[159] Title 11 United States Code Annotated, § 109 (a).

curbed and also that the approach taken under long arm jurisdiction is in many ways commendable in enabling struggling debtors to gain access to world-leading insolvency procedures and courts without great difficulty. Such forum shopping is understandable and is arguably not to be regarded as abusive. Undoubtedly therefore, long-arm jurisdiction has been of benefit and is likely to continue to be of benefit, given the infancy of restructuring law in many countries, and that sophisticated approaches to insolvency law depend not only on suitable laws but also on expert institutions that take time to develop, as outlined in Chapter 4. What is proposed in this thesis is a longer-term approach based on a framework using COMI that would require greater scrutiny of the strength of linkage with the jurisdiction where the opening of insolvency proceedings is requested. Arguably such an approach represents the logical progression of modern cross border insolvency laws.

The next Chapter will examine insolvency laws in the UK that allows forum shopping and long-arm jurisdiction. The UK is also another popular destination for forum shopping by multinational companies.[160] Again, it will be seen that jurisdiction is based on a lower bar than if COMI was used as the

[160] Gerard McCormack, 'Bankruptcy Forum Shopping: The UK and US as Venues of Choice for Foreign Companies' [2014] 63 ICLQ 815.

CHAPTER 3: THE UK

'…the UK…may be attractive as a bankruptcy and restructuring venue because of certain legal possibilities that are denied to companies in their home jurisdiction.'[1]

3.1 OVERVIEW

The previous chapter (Chapter 2) dealt with forum shopping and long-arm jurisdiction in the United States of America (US), establishing that there was a low threshold of eligibility to apply to open bankruptcy proceedings as well as those proceedings being of wide geographical scope. It was noted that the present approach falls very far short of requiring a COMI in the United states. This chapter will examine United Kingdom (UK) insolvency laws that enable multinational companies to commence insolvency proceedings in the UK, a jurisdiction notable for a wide range of insolvency procedures as well as sophisticated approaches that have attracted foreign companies in need of restructuring. The chapter will address the following question, how do UK insolvency laws allow long-arm jurisdiction of UK courts for multinational companies to forum shop.

3.2 INTRODUCTION

The UK participates in cross-border trade through international commerce.[2] The UK has trade agreements with various countries. Countries in the European Union (EU) are major trading partners of the UK, accounting for a large amount of revenue from import and export, although the pattern of trade post-Brexit is yet to emerge.[3] The UK also trades

[1] Gerard McCormack, 'Bankruptcy Forum Shopping: The UK and US as Venues of Choice for Foreign Companies' [2014] 63 ICLQ 815, 824.
[2] Jennifer LeClaire, 'Cross-Border Trade' (2005) 40(7) Area Development Site and Facility Planning 58.
[3] Office of National Statistics, 'Who does the UK Trade with?' (Office of National Statistics, 2018) https://www.ons.gov.uk/businessindustryandtrade/internationaltrade/articles/whodoestheuktradewith/2017-02-21 accessed 24 April 2019.

with countries outside the EU, referred to as 'the rest of the world'.[4] At the time of writing progress was being made in reaching trade agreements with various countries. The trade agreements made by the UK government with other nations may be a facilitating factor in encouraging cross-border trade in the UK and with companies in the UK.

Some of the companies that carry out cross-border trade with the UK are multinational companies.[5] Multinational companies may trade in the UK using various business models, such as a group of companies, subsidiaries, agents, among others.[6] During insolvency of such multinational companies, the question might arise as to which jurisdiction is able to commence insolvency proceedings.[7] The issue of jurisdiction is a complex question since there might be more than one possible applicable insolvency jurisdiction.[8] The UK or any other country that the multinational companies have a presence in might be appropriate in dealing with the multinational companies' insolvency.

For example, a company can be incorporated under the English laws but conduct its business mainly, or a significant part of its business, in another country, such as Kenya, using the available business models. Finlays, a subsidiary of Swire Group, is an example of a multinational company incorporated in the UK but which conducts aspects of its business outside of the UK through other subsidiaries.[9] Finlays has its head offices for various regions in London (UK), Mombasa (Kenya), Fujian (China) and Lincoln (United States of America).[10] Also, Finlays has blending facilities, manufacturing sites, tea estates

[4] Office of National Statistics, 'Who does the UK Trade with?' (Office of National Statistics, 2018) https://www.ons.gov.uk/businessindustryandtrade/internationaltrade/articles/whodoestheuktradewith/2017-02-21 accessed 24 April 2019.
[5] The UK Government, 'Outward Foreign Affiliated Statistics' (2016) The UK Government < https://data.gov.uk/dataset/b8052950-787c-4258-b0f9-d069a99d485d/outward-foreign-affiliates-statistics> accessed 4 April 2021.
[6] Hans Schollhammer, 'Organization Structures of Multinational Corporations' (pre-1986) 14(3) Academy of Management Journal 345.
[7] Andrew Bell, *Forum Shopping and Venue in Transnational Litigation* (Oxford 2003) 49.
[8] Gerard McCormack, 'Bankruptcy Forum Shopping: The UK and US as Venues of Choice for Foreign Companies' [2014] 63 ICLQ 815, 822.
[9] Finlays, 'Heritage' (Finlays, 2019) < https://www.finlays.net/our-business/history/> accessed 20 April 2019.
[10] Finlays, 'Our Locations' (Finlays, 2019) < https://www.finlays.net/our-locations/> accessed 20 April 2019.

and packing facilities located in North and South America, Europe, Middle East, Africa and Asia.[11] If Finlays was to become insolvent, it might be challenging to decide the most appropriate insolvency jurisdiction because significant aspects of the business are located in different jurisdictions, even though the company is incorporated in the UK. Another complex issue is whether the subsidiaries can open insolvency proceedings in the UK rather than 'home' jurisdictions. This chapter will consider the UK approach to the opening of insolvency proceedings by foreign companies.

3.2.1 The Aim

This chapter aims to examine UK insolvency laws that allow forum shopping and long-arm jurisdiction. The chapter will first analyse the different UK insolvency procedures to examine how they allow forum shopping by multinational companies. The chapter will also examine the UK courts' approach in deciding whether to assert jurisdiction through the 'sufficient connection' test.

3.2.2 Why the UK is an Attractive Forum Shopping Destination

The United Kingdom (UK) is a popular destination for insolvency tourism, especially London,[12] which ranks alongside other popular destinations such as New York (United States of America (US)) and Hong Kong (China).[13] London's attraction lies with the expertise of qualified insolvency specialists who deal with complex insolvency issues relating to foreign companies.[14] The specialists include lawyers and judges, among others

[11] Finlays, 'Our Locations' (Finlays, 2019) < https://www.finlays.net/our-locations/> accessed 20 April 2019.
[12] Gerard McCormack, 'Bankruptcy Forum Shopping: The UK and US as Venues of Choice for Foreign Companies' [2014] 63 ICLQ 815; and Lord Neuberger, 'The Supreme Court, The Privy Council and International Insolvency' (International Insolvency Institute Annual Conference, London, 19 June 2017); Damian Wild, 'The UK: A Magnet to Bankrupts' (2011) The Estates Gazette 6.
[13] Ryan Halimi, 'An Analysis of the Three Major Cross-Border Insolvency Regimes' (2017) International Immersion Program Papers 47 http://chicagobound.uchicago.edu/international-_immersion_program_papers/47 accessed 15 July 2019. Notably in recent years the Netherlands and Singapore have sought to position themselves as prime centres for restructuring.
[14] Adrian Walters and Anton Smith, 'Bankruptcy Tourism under the EC Regulation on Insolvency Proceedings: A View from England and Wales' (2010) 19 INSOL International Law Review 181, 182.

knowledgeable in dealing with complex cross-border insolvency issues of multinational companies. As a result, multinational companies may opt to utilise the UK specialists to deal with complex issues relating to stakeholders and assets of the multinational companies located in multiple jurisdictions.

There are other reasons why foreign companies choose the UK as a jurisdiction to open insolvency proceedings. One of the attractions of utilising the UK during insolvency is that the UK offers more than one insolvency procedure, and therefore flexibility of approaches.[15] There are two main insolvency proceedings available for companies in the UK, liquidation[16] and administration[17] but significant insolvency tourism business was attracted by schemes of arrangements, which are not exclusively used for insolvent restructurings and appear in the Companies Act 2006.[18] A typical approach of restructuring by transfer would entail a prepack transfer of the business of a company (leaving behind out-of-the-money claimants) together with a scheme of arrangement to restructure the debts through a plan agreed by 'in the money' creditors voting in classes.[19] These procedures have different requirements and outcomes discussed in detail below. More recently the Corporate Insolvency and Governance Act 2020 (CIGA 2020) has introduced further procedures that can be used by multinational companies, restructuring plan and moratorium.[20] The restructuring plan is particularly notable, since it builds on the strengths of the scheme of arrangement but adds the possibility of a cross-class cramdown.[21] There has, by May 2021, already been use of a restructuring plan by an African telecoms company.[22] However the bulk of case law has been brought in relation

[15] Gerard McCormack, 'Bankruptcy Forum Shopping: The UK and US as Venues of Choice for Foreign Companies' [2014] 63 ICLQ 815, 825.
[16] Insolvency Act 1986, ss 220-221.
[17] Insolvency Act 1986, schedule B1.
[18] Companies Act 2006, Part 26.
[19] For an insightful and detailed discussion of high level and sophisticated restructurings by financial creditors see Sarah Paterson, *Corporate Reorganization Law and Forces of Change* (OUP, 2020), 75.
[20] The Corporate Insolvency and Governance Act 2020, schedule 1 to 7 and section 4.
[21] Companies Act 2006, s 901G.
[22] Hogan Lovells, 'Hogan Lovells Advises Senior Lenders on Smile Telecoms' Restructuring Implemented Through High Court Sanction of Restructuring Plan and Cross-Class Cram-Down'

to the pre-2020 procedures and therefore, this thesis will focus on liquidation, administration and schemes of arrangements.[23]

As an advantage of using the UK during the insolvency of multinational companies, UK insolvency procedures have been found to generally start and finish within 12 months, which might be beneficial to multinational companies that do not want to have a prolonged restructuring period.[24] The 12 months period is a low average when an insolvency matter is dealt with compared to other jurisdictions.[25] The estimated average of dealing with companies' insolvency that the World Bank published for 2017 is 2.52 years for countries associated with the World Bank, and the UK is part of the World Bank.[26] The average indicates that countries that are part of the World Bank, on average, take over two years from the commencement to the conclusion of the insolvency procedures. In comparison, the UK offers a quicker insolvency resolution period.

Arguably, the quicker the insolvency case resolution, the higher the probability of reduction of the insolvency costs.[27] Possibly, less lengthy insolvency proceedings may result in more assets at the end of insolvency than when the insolvency proceedings take a long period. Examples of costs of insolvency are insolvency practitioners' fees, court fees

(2021) < https://www.hoganlovells.com/en/news/hogan-lovells-advises-senior-lenders-on-the-restructuring-of-smile-telecoms-restructuring-implemented-through-high-court-sanction-of-restructuring-plan-and-cross-class-cram-down > accessed 25 May 2021; and Baker McKenzie, 'The New UK Restructuring Plan: An Overview' (2020) Baker McKenzie < https://restructuring.bakermckenzie.com/wp-content/uploads/sites/23/2020/09/Restructuring_Plan_under_the_UK_Corporate_Insolvency_and_Governance_Act_2020.pdf > accessed 26 May 2021 Both articles give an examples of the recent use of the restructuring plan by multinational companies Smile Telecoms and Virgin, respectively.

[23] Insolvency Act 1986, section 220, section 221 and schedule B1; and Companies Act 2006, Part 26.

[24] Rachael Singh, 'Bankruptcy Tourisms' Exploit UK's Lenient Insolvency Laws' (2009) Accountancy Age 1.

[25] The World Bank, 'Time to Resolve Insolvency' (unknown) < https://data.worldbank.org/indicator/IC.ISV.DURS?end=2017&start=2017&view=bar> accessed 3 January 2019.

[26] The World Bank, 'Time to Resolve Insolvency' (unknown) < https://data.worldbank.org/indicator/IC.ISV.DURS?end=2017&start=2017&view=bar> accessed 3 January 2019.

[27] Elizabeth Warren, 'Bankruptcy Policymaking in an Imperfect World' (1993) 92(2) Michigan Law Review 336.

among others.[28] Insolvency costs are paid from the realised assets of the company, which might be more the longer the litigation period is.[29] Therefore, compared with other countries, especially those associated with the World Bank, the UK has a shorter insolvency period, leading to additional benefits for the multinational companies. This thesis will later, in Chapter 4 section 4.4, consider what can be done to developing countries insolvency laws to make them more time efficient.

The UK is also a popular destination for forum shopping because it offers a moratorium.[30] A moratorium is a period during which the creditors cannot take actions against the company.[31] The moratorium enables multinational companies to be free from further possible actions that the creditors might be entitled to during insolvency in the UK. The moratorium period is predetermined and can be extended with permission from the UK courts.[32] The length of a moratorium in the UK depends on the type of insolvency procedure that the multinational companies utilise.[33]

It is not automatic that multinational companies, insolvency forum shopping in the UK, acquire a stay.[34] The moratorium is dependent on the type of proceedings and whether those proceedings provide automatic stay or on application.[35] Multinational companies that forum shop in the UK may acquire a moratorium if they opt for liquidation or

[28] Christopher Umfreville and Peter Walton, 'Insolvency Practitioner Fees in the UK-All Alone in the World?' 2014 27(6) Insolvency Intelligence 86.
[29] Association of Business Recovery Professionals, 'Worth the Costs?' (Association of Business Recovery Professionals, unknown) < https://www.r3.org.uk/media/documents/get_advice/business/R3_IPs_Fees_Paper_D3.pdf > accessed 20 April 2019.
[30] Gerard McCormack, 'Bankruptcy Forum Shopping: The UK and US as Venues of Choice for Foreign Companies' [2014] 63 ICLQ 815, 826.
[31] The Rt Hon the Lord Millett, Alister Alcock, Michael Todd and AJ Boyle (eds), *Gore-Browne on Companies* (45th edn, LexisNexis 2019), 49-19.
[32] Zoë Thirlwell, 'Bankruptcy Tourism: Will the Proposed Restructuring Moratorium Entice More to These Shores?' (2010) 6 Corporate Rescue and Insolvency 237.
[33] Rescue Recovery Renewal, 'A Moratorium for Businesses: Improving Businesses and Job Rescue in the UK' (2016) <https://www.r3.org.uk/media/documents/policy/research_reports/bus_distress_index/R3_Moratorium_Proposal_April_2016.pdf> accessed 19 January 2019.
[34] A stay is synonymous with a moratorium.
[35] Zoë Thirlwell, 'Bankruptcy Tourism: Will the Proposed Restructuring Moratorium Entice More to These Shores?' (2010) 6 Corporate Rescue and Insolvency 23.

administration.[36] However, schemes of arrangements used for restructuring do not have a moratorium, and creditors may pursue the company during that period, therefore the company might enter administration to gain the protection of that procedure's moratorium during the restructuring. CIGA 2020 has introduced a standalone moratorium which is not reliant on commencement of another procedure to be applicable.[37] As a result, the CIGA 2020 moratorium can potentially work hand in hand with schemes of arrangements and restructuring plans.[38] Therefore, it is advantageous for multinational companies to forum shop for insolvency proceedings in the UK as they may potentially be protected against further claims from their creditors within a specific period. However, the moratorium is not automatic nor a guarantee against other claims by creditors, since it may depend on recognition by foreign courts to be effective internationally.

3.2.3 UK Judicial Discretion

As parliament during the law-making process may not account for all possible scenarios, even in the detailed Insolvency Rules 2016, courts may face questions of interpretation.[39] In these instances, judges exercise discretion in their decisions. The judicial discretion may be in matters of law or facts. This section will analyse judicial discretion in UK insolvency law on issues relating to multinational companies' insolvency. The UK judges have a reputation for pragmatism and expert approaches to restructurings that are another attractive feature for bankruptcy tourists.[40]

Judicial discretion is an essential aspect of UK insolvency law. One of the reasons is that the circumstances present in each case are different and particularly so in cases involving

[36] Rescue Recovery Renewal, 'A Moratorium for Businesses: Improving Businesses and Job Rescue in the UK' (2016) <https://www.r3.org.uk/media/documents/policy/research_reports/bus_distress_index/R3_Moratorium_Proposal_April_2016.pdf> accessed 19 January 2019.
[37] The Corporate Insolvency and Governance Act 2020, schedule 1 to 7.
[38] The Corporate Insolvency and Governance Act 2020, schedule 4.
[39] H. Milles Foy III, 'On judicial Discretion in Statutory Interpretation' (2010) 62(2) Administrative Law Review 291; Andrew Jackson, 'UK vs US Debt Recovery Cultures and collections Strategies' (Unknown) < https://www.thegazette.co.uk/all-notices/content/100263> accessed 1 July 2019.
[40] Sarah Paterson, *Corporate Reorganization Law and Forces of Change* (OUP, 2020), 81.

multinationals. UK judges ought to have the liberty to assess these facts in the context that they appear to pass judgements rather than be restricted by strict guidelines that do not consider all circumstances.[41] In most multinational insolvencies, there are complex issues[42] at play that require judges to consider a variety of issues to make the right judgment in determining whether to assert jurisdiction to open proceedings and in effect, allow forum shopping to occur in the UK.

UK judges have discretion[43] in determining whether the UK is the appropriate jurisdiction for opening insolvency proceedings for multinational companies.[44] This ability enables multinational companies to forum shop in the UK by way of presenting the courts with a wide range of evidence to prove that the UK has jurisdiction over their insolvency proceedings. However, it has been argued that the flexibility of judges to consider such a wide range of evidence in determining jurisdiction may produce uncertainty for multinational companies attempting to forum shop in the UK.[45] The uncertainty may arise from the factors considered by the UK courts not always being consistent.[46] This thesis in later chapters aims to consider how an approach based on COMI as a test for opening proceedings can be adopted as a long-term aim. Such a test would hopefully provide a consistent means of identifying jurisdiction for insolvency proceedings in relation to multinational companies and a much tighter test than that currently applied by the UK.

Precedent assists in providing some guidelines for both the UK courts and multinational companies as to which factors are relevant.[47] Cases are highly fact-dependent but in most instances, if a factor has been considered in previous UK case law decisions that will assist

[41] Nicola Gennaioli and Stefano Rossi, 'Judicial Discretion in Corporate Bankruptcy' (2010) 23(11) The Review of Financial Studies 4078.
[42] Further analysis will occur in section 3.2.4.
[43] Judges discretion concerning UK jurisdiction over foreign multinational companies' insolvencies will be discussed in detail in section 3.2.4.
[44] See for example Janna Purdie, 'Winding-Up of Foreign Companies' (2008) 158 NLJ 1597; Shearman & Sterling LLP, 'UK: Jurisdiction – Schemes of Arrangement' (2012) J.I.B.L.R. N110.
[45] Tom Bingham, *The Business of Judging: Selected Essays and Speeches* (2000 Oxford) 28.
[46] Gerard McCormack, 'Bankruptcy Forum Shopping: The UK and US as Venues of Choice for Foreign Companies' [2014] 63 ICLQ 815, 824.
[47] John Hanna, 'The Role of Precedent in Judicial Decision' (1957) 2(3) Vill. L. Rev. 367.

UK courts to determine jurisdiction, and the UK courts tend to follow such decisions.[48] Accordingly, precedent can offer guidance to multinational companies if their case has similar facts. For the UK courts, the previous decisions are persuasive but each case will turn on its facts. Therefore, UK courts have discretion in which factors they can consider to exercise their long-arm jurisdiction over multinational companies' insolvencies.

3.2.4 Are UK Insolvency Laws Creditor or Debtor Friendly?

The traditional view is that the UK is a creditor-friendly insolvency regime.[49] The UK insolvency regime provided several recourses for creditors seeking to recover what they are owed.[50] In the UK, creditors of multinational companies can request the opening of insolvency proceedings against debtor companies.[51] This powerful tool can be used against multinational companies in the UK to threaten their business activities with insolvency proceedings for uncleared debts.[52] Multinational companies should be wary of the commencement of insolvency proceedings against them by creditors. Business disruptions can occur due to the insolvency proceedings in several ways. For instance, multinational companies can be in the middle of the negotiation of contracts. The other parties may back out if the parties acquire knowledge of pending insolvency proceedings against the company. Also, proceedings may lead to several possibilities such as the multinational companies being wound up when enforced.[53] The winding-up may enable creditors to

[48] Noted that there are factors that led the courts not to follow previous judgements. The court may determine that the situation is not similar to what is present before them. Higher courts as well may overrule a decision.
[49] Peter Manning and Robin Henry, 'United Kingdom Bankruptcy and Insolvency Law and Policy' in James R. Silkenat and Charles D. Schimerler (eds), *The Law of Insolvencies and Debt Restructurings* (Oceana Publications 2006).
[50] Insolvency Act 1986, ss 220-221, schedule B1 (liquidation and administration); Companies Act 2006, Part 26 (schemes of arrangements); and The Corporate Insolvency and Governance Act 2020, schedule 1 to 7 and section 4 (moratorium and restructuring plan).
[51] Insolvency Act 1986, section 122, For example, creditors of multinational companies can effectively force the company into liquidation if the outstanding debt is more than £750 and that the date to settle the debt has passed.
[52] See Andrew Jackson, 'UK vs US Debt Recovery Cultures' (unknown) The Gazette < https://www.thegazette.co.uk/all-notices/content/100263/#:~:text=Traditionally%2C%20the%20UK%20has%20been%20'creditor%2Dfriendly'.&text=In%20the%20Middle%20Ages%2C%20the,to%20seize%20assets%20and%20control.> accessed 26 May 2021.
[53] Insolvency Act 1986, Part IV.

realise the money that they are owed but this destruction will be something that a company will wish to avoid and payment of the creditor may be forthcoming. These are some examples showing the UK offers creditors tools in the form of insolvency proceedings to have the multinational companies settle their debt.

Additionally, creditors of a multinational company are afforded significant protection in the UK.[54] In practice, the insolvency proceedings available in the UK are mainly aimed at recovering the most amount per pound for creditors.[55] The UK has a list of priority of assets distribution during insolvency, which emphasises paying the expenses of the proceedings and secured creditors and insolvency practitioners before other creditors of the multinational companies.[56] For example during administration proceedings, where the rescue of the company as a going concern is not possible, the objective must be to either achieve higher returns for creditors than would be possible in an immediate liquidation or, in that is not possible, to enable sums to be made available for secured or preferential creditors.[57] Thus, the UK insolvency regime can be perceived as creditor-friendly aimed at ensuring that creditors are paid.

3.3 THE REQUIREMENTS FOR FOREIGN COMPANIES TO FORUM SHOP IN THE UK

Business failure is a risk of doing business and might be experienced by foreign companies trading in the UK. The issue that arises is whether the UK has jurisdiction over insolvency matters of multinational companies. Multinational companies can include companies

[54] See for example Andrew Jackson and Scott Taylor, 'UK vs US debt recovery cultures and collections strategies' (unknown) The Gazzett < https://www.thegazette.co.uk/all-notices/content/100263/#:~:text=Traditionally%2C%20the%20UK%20has%20been%20'creditor%2Dfriendly'.&text=When%20debts%20were%20not%20repaid,to%20marry%20risk%20with%20responsibility.> accessed 1 July 2019.
[55] Insolvency Act 1986, section 60; and Roy Goode, *Principles of Corporate Insolvency Law* (4th edition, 2011 Sweet & Maxwell), 393.
[56] Insolvency Act 1986, section 175, section 17ZA and section 176A..
[57] Insolvency Act 1986, schedule B1, paragraph 3; Ian Fletcher, 'UK Corporate Rescue: Recent Developments — Changes to Administrative Receivership, Administration, and Company Voluntary Arrangements — The Insolvency Act 2000, The White Paper 2001, and the Enterprise Act 2002' (2004) 5(1) European Business Organization Law Review 119; and Roy Goode, *Principles of Corporate Insolvency Law* (4th edition, 2011 Sweet & Maxwell), 393.

trading in the UK but registered in other countries.[58] Multinational companies can also include companies registered in the UK but trading in other nations.[59] There are other ways that multinational companies are structured to carry out business in the UK and other countries, such as subsidiaries, agents, parent companies.[60] This section will concentrate on foreign companies that are multinational companies trading in and outside of the UK and their eligibility under UK insolvency laws to commence insolvency proceedings in the jurisdiction. The examination will identify the present breadth of approach, which goes markedly far beyond the concept of COMI. This will to help lay the foundation argument for a longer-term approach of having one test applicable that uses COMI in determining jurisdiction.

Multinational companies not incorporated in the UK are foreign companies for the purposes of insolvency law.[61] There is no mandatory requirement for the registration of foreign companies while trading in the UK.[62] However, foreign companies with a physical presence, such as a warehouse or office, are required to register at Companies House in the UK.[63] Multinational companies registered in the UK can use the same processes as companies incorporated in the UK.[64] The question raised is whether foreign unregistered multinational companies can commence main insolvency proceedings in the UK. This

[58] Martin Feldstein, James R. Hines and R. Glen Hubbard, *Taxing Multinational Corporations* (1st edn, The University of Chicago Press 1995), 7-8.
[59] Martin Feldstein, James R. Hines and R. Glen Hubbard, *Taxing Multinational Corporations* (1st edn, The University of Chicago Press 1995), 7-8.
[60] Martin Feldstein, James R. Hines and R. Glen Hubbard, *Taxing Multinational Corporations* (1st edn, The University of Chicago Press 1995), 7-8.
[61] Companies Act 2006, section 1044; and Companies House, 'Overseas Companies Registered in the UK' (2015) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/415663/GP01_Overseas_companies.pdf> accessed 15 January 2019.
[62] Companies Act 2006, section 1043; and Companies House, 'Overseas Companies Registered in the UK' (2015) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/415663/GP01_Overseas_companies.pdf> accessed 15 January 2019.
[63] Companies Act 2006, section 1043(2); and Companies House, 'Overseas Companies Registered in the UK' (2015) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/415663/GP01_Overseas_companies.pdf> accessed 15 January 2019.
[64] Companies Act 2006, section 1043; and Insolvency Act 1986, Part II and Part IV.

chapter will deal with foreign unregistered multinational companies to ascertain whether UK courts can claim jurisdiction over their insolvency matters.

Additionally, there are different business vehicles that multinational companies may take while trading in the UK. Different business vehicles in the UK raise different rights and obligations under UK insolvency law. Multinational companies may opt to establish a subsidiary company, a branch, joint venture or to appoint a local agent, distributor or franchisee while trading in the UK.[65] Out of the above business vehicles, the subsidiary is the only option where a different legal entity is created, a separate company from the original multinational company.[66] Where the subsidiary is registered in the UK, the subsidiary will not be considered a foreign company and can access the insolvency proceedings as a domestic company.[67] Where the subsidiary is unregistered there are still possibilities for the court to open insolvency proceedings and these will be discussed below. All the other business structures listed previously are part of the original multinational company whose business may be diversified in the UK or other countries on varying proportionality.

The UK insolvency procedures have requirements that dictate whether multinational companies can begin main insolvency proceedings in the UK.[68] The following sections will examine the key UK insolvency procedures, namely, winding up, administration and schemes of arrangement and assess whether they can be utilised by foreign unregistered

[65] Companies House, 'Overseas Companies Registered in the UK' (2015) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/415663/GP01_Overseas_companies.pdf> accessed 15 January 2019.
[66] Chen Lin and Zhou Zongfang, 'The Analysis of Asset Correlation between Parent and Subsidiary Company' (2009) International Conference on New Trends in Information and Service Science 1021; and Practical Law, 'Glossary: Subsidiary' (2021) Thomson Reuters < https://uk.practicallaw.thomsonreuters.com/7-562-5046?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 6 May 2021; and *Salomon v A Salomon and Co Ltd* [1897] AC 22.
[67] For detailed analysis of insolvency as a domestic company in the UK see Kristin van Zwieten, *Goode on Principles of Corporate Insolvency Law* (5th edition, 2019 Sweet & Maxwell); Leonard Hoffman, 'Cross-Border Insolvency: A British Perspective' (1996) 64(6) Fordham Law Review 2507, 2514.
[68] Gerard McCormack, 'Bankruptcy Forum Shopping: The UK and US as Venues of Choice for Foreign Companies' [2014] 63 ICLQ 815, 826.

multinational companies forum shopping in the UK to commence main insolvency proceedings.[69] Similar principles are likely to apply to the new restructuring plan and restructuring moratorium. The aim will be to establish how UK courts exercise long-arm jurisdiction during multinational companies' insolvency and how this sets a much lower threshold than an approach based on COMI.

3.3.1 Winding Up[70] of Foreign Companies

One of the insolvency procedures available in the UK is winding up.[71] Winding up refers to the dissolution of a company, meaning that the company ceases to exist legally.[72] Some multinational companies may fall into the category of foreign companies under UK law if not incorporated in the UK.[73] Additionally, multinational companies may have assets or other parts of the business in another jurisdiction. There are circumstances in which foreign companies registered in the UK and those unregistered but with a connection to the UK can be liquidated and this creates the issue of whether a decision under UK insolvency law to liquidate a foreign multinational company can be enforced in another jurisdiction. However, this chapter concentrates on the ability of multinational companies, the type that are termed foreign unregistered multinational companies under the UK laws, to forum shop in the UK and it does not consider the enforcement of UK insolvency judgements in other nations, which depends on the private international laws of those nations and is beyond the scope of this thesis.

[69] Note as mentioned in section 3.2.2 the chapter will concentrate on the key procedures that have been tried and tested in the UK courts over a period of time and thus well established rather than the process in CIGA 2020.
[70] Also referred to as liquidation.
[71] Insolvency Act 1986, Part IV (deals with UK registered companies) and Part V (deals with unregistered companies in the UK).
[72] David Milman, 'Liquidation Law: A Review of Recent UK Developments' (2017) 402 Co. L.N. 1.
[73] Adrian Walters and Anton Smith, 'Bankruptcy Tourism under the EC Regulation on Insolvency Proceedings: A View from England and Wales' (2010) 19 INSOL International Law Review 181, 182.

The UK offers different forms of winding up: voluntary winding up[74] (members' voluntary winding up[75] and creditors' voluntary winding up)[76] and compulsory winding up[77] and these may be opened in respect of foreign companies registered in the UK. There is a significant difference between voluntary winding up and compulsory winding up. Voluntary winding up is commenced by the shareholders, while compulsory winding up is commenced by the creditors.[78] The type of voluntary winding up, members' or creditors', depends on the company's solvency.[79] Under UK law, overseas companies (unregistered companies) cannot be put into voluntary liquidation unless they are companies based in the EU.[80] One effect of this is that foreign multinational companies' shareholders cannot wind up companies not founded in the UK or the EU and not registered.

It is still possible for foreign multinational companies that are not registered in the UK to forum shop in the UK as unregistered companies.[81] Over the years, the courts have interpreted section 221 of the Insolvency Act 1986 (IA 1986) to include foreign companies that are not registered in the UK but have a sufficient connection to the UK.[82] Justice Knox in *Re Real Estate Development*[83] highlighted sections 221(1) and 221(5) of IA 1986 as the authority for the UK judges to claim jurisdiction over liquidating unregistered companies. This provision states:

> **221 Winding up of unregistered companies.**

[74] Insolvency Act 1986, Chapter II.
[75] Insolvency Act 1986, Chapter III. In Members' Voluntary Winding up, the shareholders of the company vote to dissolve the company. The company does not need to be insolvent for the process to commence.
[76] Insolvency Act 1986, Chapter IV. In Creditors' Voluntary Winding Up, the shareholders of the company vote and commence the proceedings of winding up the company when the directors have not provided a statement as to whether the company is solvent, Insolvency Act 1986, s. 90.
[77] Insolvency Act 1986, Chapter VI. A company's creditor who is owed more than £750 may commence the dissolution of a company in order to recover their money. There are strict procedures to be adhered to before a company can be liquidated through Compulsory Winding Up, Insolvency Act 1986, s. 90.
[78] Insolvency Act 1986, s. 89, 90, 91 and 98; David Milman, 'Liquidation Law: A Review of Recent UK Developments' (2017) 402 Co. L.N. 1.
[79] Insolvency Act 1986, s. 89 and 90; and John Tribe, 'Members Voluntary Liquidation: Part 1: A Declaration of Under Use?' (2005) 26(5) Company Lawyer 132.
[80] Insolvency Act 1986, ss 221(4) and 224(4).
[81] Insolvency Act 1986, s.221.
[82] See for example *Re ARM Assets Backed Securities SA* [2013] EWHC 3351, [2013] All ER (D) 107; *Re Drax Holdings Ltd* [2003] EWHC 2743 (Ch).
[83] *Re Real Estate Development Co* [1991] BCLC 210, 212.

> (1) Subject to the provisions of this part any unregistered company may be wound up under this Act; and all the provisions of this Act and the Companies Act about winding up apply to an unregistered company with the exception and additions mentioned in the following subsections ...
>
> (5) The circumstances in which an unregistered company may be wound up are as follows—(a) if the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs;(b) if the company is unable to pay its debts;(c) if the court is of opinion that it is just and equitable that the company should be wound up…[84]

Section 221 is a gateway provision for foreign unregistered companies, including multinationals, to liquidate in the UK.[85] Additionally, section 221 offers guidelines for UK courts in deciding whether they can exercise their discretion to preside over the winding up of foreign unregistered companies.[86] One guideline for the UK courts to exercise long-arm jurisdiction over unregistered companies is if they have either in England, Wales or Scotland a principal place of business.[87] Since the company is unregistered, the principal place of business would not be registered with the Companies House. According to Her Majesty's Revenue and Customs, the principal place of business is the location where the multinational companies' day-to-day running occurs.[88] Therefore, if the unregistered multinational companies can show that they have a principal place of business in UK except Northern Ireland this will provide grounds for opening proceedings.

[84] Insolvency Act 1986, s221.
[85] Insolvency Act 1986, s221.
[86] Insolvency Act 1986, s221.
[87] Insolvency Act 1986, s221(2).
[88] Her Majesty's Revenue and Customs, 'VATREG03550-Registration-General: Principal Place of Business (PPOB)' (2016) GOV.UK < https://www.gov.uk/hmrc-internal-manuals/vat-registration-manual/vatreg03550> accessed 5 May 2021.

The similarity of the concept of principal place of business and COMI can be noted but far less than this is in fact needed as a basis for opening proceedings, as is evident from Justice Megarry's summary:[89]

> (1) There is no need to establish that the company ever had a place of business here. (2) There is no need to establish that the company ever carried on business here, unless perhaps the petition is based upon the company carrying on or having carried on business. (3) A proper connection with the jurisdiction must be established by sufficient evidence to show (a) that the company has some asset or assets within the jurisdiction, and (b) that there are one or more persons concerned in the proper distribution of the assets over whom the jurisdiction is exercisable. (4) It suffices if the assets of the company within the jurisdiction are of any nature; they need not be 'commercial' assets, or assets which indicate that the company formerly carried on business here. (5) The assets need not be assets which will be distributable to creditors by the liquidator in the winding up: it suffices if by the making of the winding up order they will be of benefit to a creditor or creditors in some other way. (6) If it is shown that there is no reasonable possibility of benefit accruing to creditors from making the winding up order, the jurisdiction is excluded.

From Justice Megarry's summary it can be concluded that with regards to winding up foreign unregistered companies in the UK, the UK courts value the sufficient connection to the UK.[90] Other courts supported the idea of showing sufficient connection to the UK in order for foreign unregistered companies to be liquidated in the UK.[91] Unregistered companies can still show the requirement in s.221(2) and s.221(5), but lack of them does not prevent UK courts from exercising jurisdiction over them.[92]

[89] *In re Compania Merabello San Nicholas S.A.* [1973] Ch. 75, 91 – 92.
[90] *In re Compania Merabello San Nicholas S.A.* [1973] Ch. 75, 91 – 92.
[91] *Re Real Estate Development Co* [1991] BCLC 210 [212]; *In re A Company (No. 00359 of 1987)* [1987] 3 WLR 339, 348; and *In re Compania Merabello San Nicholas S.A.* [1973] Ch. 75, 86.
[92] Insolvency Act 1986, s221(2), s221(5); *Re Real Estate Development Co* [1991] BCLC 210, 212; *In re A Company (No. 00359 of 1987)* [1987] 3 WLR 339, 348; and *In re Compania Merabello San Nicholas S.A.* [1973] Ch. 75, 86.

It should be added that in addition, the unregistered companies have to show that they are unable to pay their debts for the UK courts to accept jurisdiction.[93] The debt is quantified to be £750 and above and has to be unpaid for more than three weeks.[94] The threshold seems to be low for multinational companies who can be assumed deal large amount of trade. Additionally, *In re Rodenstock GmbH*[95] further clarified that as an alternative to proving inability to pay their debts, multinational companies could instead show that they are dissolved in another jurisdiction, or it is equitable to liquidate the companies as in s. 221(5) of the IA 1986.[96]

In conclusion, multinational companies may forum shop to liquidate in the UK. However, it is important to identify whether they have been registered in the UK or not. The statutory gateway provisions of liquidation deal with registered (domestic) insolvencies and unregistered (foreign) companies differently. However, foreign unregistered multinational companies that fulfil the requirements of the statutory gateway provisions have no automatic right to forum shop in the UK. A key requirement to wind up in the UK is by showing that they have a sufficient connection. However, UK courts still have discretion on whether to allow forum shopping for foreign multinational companies.

3.3.2 Administration of Foreign Companies

The UK developed administration[97] as a company rescue procedure to provide companies in insolvency means of surviving rather than being liquidated in their entirety.[98] By using administration, it is possible for all or a part of the business to survive, which might be

[93] Insolvency Act 1986, s221(5)(b), s222; Kate Dawson, 'The Doctrine of Forum Non Conveniens and the Winding Up of Insolvent Foreign Companies' [2005] J.B.L 28.
[94] Insolvency Act, section 222.
[95] *In re Rodenstock GmbH [*2011] EWCA 1104 (Ch) [33], [2011] Bus LR 1245; and Insolvency Act 1986, s221(5).
[96] *In re Rodenstock GmbH* [2011] EWCA 1104 (Ch) [33], [2011] Bus LR 1245.
[97] In the UK, there is a process called pre-pack administration. Pre-pack administration enables agreements for business sales to be reached prior to administraton and implemented upon the company entering administration. See for example Rebecca McMillan, 'Judicial Support for Pre-Pack Administrations' (2007) 23 Tolley's Insolvency Law and Practice 196.
[98] Rizwan Jameel Mokal, *Corporate Insolvency Law: Theory and Application* (Oxford University Press 2005), 226.

attractive to multinational companies.[99] As a result of administration, the multinational companies may be rescued as a whole or a portion.[100] Consequentially, by preserving the viable parts of the business administration can lead to the preservation of jobs for some or all of the employees depending on the circumstances of the companies.[101] However, it often is implausible that all employees may retain their employment with the companies.[102] Therefore, it is important to understand the requirements that multinational companies have to fulfil to utilise the administration procedure in the UK. The consideration of the administration gateway provision will provide part of the basis of the argument later in thesis of whether a new test using COMI should be adopted in identifying jurisdiction.[103]

Before commencing administration in the UK, multinational companies ought to be aware that the companies' managers cease to act on behalf of the company once administrators are appointed.[104] Consequently, the administrators of multinational companies make business decisions on behalf of the companies.[105] Shareholders and management of the companies have the option of appointing administrators, and once they are assigned, the administrators take over the administration.[106] The ability for the shareholders and directors to appoint administrators highlights the fact that multinational companies can appoint administrators outside the court. Still, administrators may also be appointed by the court or a holder of a qualifying floating charge .[107] It is advantageous for multinational companies to have parties that are vastly knowledgeable in the administration process but

[99] Jessica Klein, 'Pre-Pack Administration: A Comparison Between Germany and the United Kingdom: Part 1' (2012) 33(9) Comp. Law 261.
[100] Insolvency Act 1986, schedule B1 para 3.
[101] Professor Andrew Keay and Dr Peter Walton, *Insolvency Law Corporate and Personal* (3rd ed, Jordan Publishing 2012), 87.
[102] David Pollard, *Corporate Insolvency: Employment Rights* (6th ed, Bloomsbury Professional Ltd 2016) 106.
[103] Chapter 5: COMI.
[104] Insolvency Act 1986, schedule B1 para 2; and Jessica Klein, 'Pre-Pack Administration: A Comparison Between Germany and the United Kingdom: Part 1' (2012) 33(9) Comp. Law 261.
[105] Insolvency Act 1986, schedule B1 para 3.
[106] Insolvency Act 1986, schedule B1 para 2(c) and para 22.
[107] Insolvency Act 1986, schedule B1 para 2 (a), para 2 (b), para 10, para 14.

until relatively recently there was no pattern for capable managers to remain in substantial control.[108]

Administration offers multinational companies the option of turning the business around under the control of an administrator,[109] acting in the interests of creditors as a whole.[110] Saving the company as a going concern is the primary objective of administration.[111] The next objective of the company's administrator is to achieve the better result for the company's creditors as a whole than would be likely if the company was liquidated prior to commencement of administration.[112] The final objective for the administrator applies if the two previous objectives are not reasonably practicable to achieve. The company can be broken down and sold to realise the money owed to secured or preferential creditors.[113] The approach may therefore have a similar outcome to liquidation by selling the company's assets to pool money to pay back pro-rata[114] the amount owed to preferential creditors.[115] By opting to appoint administrators, multinational companies need to be aware that the administrators have several options in dealing with the companies as mentioned above.

It would be difficult for administrators of the multinational company to try and rescue the company if creditors and others were attempting to frustrate the process.[116] For instance, creditors of the multinational company might demand their money through litigation or

[108] See now the possibility of 'light touch' administration, although it is unlikely that administrators will readily agree to such an arrangement. R3, 'A Light Touch Administration Protocol' https://www.r3.org.uk/press-policy-and-research/r3-blog/more/29357/page/1/light-touch-administration-a-new-protocol/.
[109] Insolvency Act 1986, Schedule B1 para 3(1)(a).
[110] Insolvency Act 1986, Schedule B1 para 3(2).
[111] Insolvency Act 1986, Schedule B1 para 3(1)(a).
[112] Insolvency Act 1986, Schedule B1 para 3(1)(b).
[113] Insolvency Act 1986, Schedule B1 para 3(1)(c).
[114] Pro-rata means that the debt it is settled proportionally according to the amount owed compared to the other creditors of the company.
[115] Insolvency Act 1986, schedule 6, sections 175,176, 328, 347 and 386, Preferential creditors are creditors with a claim that ranks higher than a unsecured creditor.
[116] See for example Margaret Hambrecht Douglas-Hamilton, 'Creditor Liabilities Resulting from Improper Interference with the Management of a Financially Troubled Debtor' (1975) 31(1) The Business Lawyer 365.

other processes,[117] landlords may demand rent owed or utilise the lease to demand money for the next rent period,[118] while the suppliers may demand the goods supplied to the multinational company back if the invoice cannot be paid.[119] The company may not be able to operate unless they have a business premises and goods that may be sold in order to save the business. Administration resolves such difficulties by providing a moratorium.[120] A moratorium provides for companies a period within which creditors or any other party cannot take actions against the company. This means that creditors cannot demand money or start processes within the UK to recover their money such as liquidation.[121] The moratorium period has no extraterritorial effect, meaning that litigations occurring outside the UK against a multinational company in insolvency can still proceed.[122] This period is a breathing space for the administrators to utilise the provisions with the company to rescue the company without the worry that the assets may be taken away or that they have to fulfil demands from parties with rights against the company.

Like winding up, there is a gateway provision that must be fulfilled for multinational companies to forum shop in the UK, although there is a greater level of complexity in respect of administration as well as narrower grounds.[123] The starting point is schedule B1(11), IA 1986:[124]

[117] See for example The Insolvency Service, 'Claim Money Back from a Bankrupt Person or Company in Compulsory Liquidation: Detailed Guidance for Creditors' (2019) GOV.UK < Margaret Hambrecht Douglas-Hamilton, 'Creditor Liabilities Resulting from Improper Interference with the Management of a Financially Troubled Debtor' (1975) 31(1) The Business Lawyer 365.> accessed 5 May 2021.
[118] See for example Shashi Rajani, 'Cost-Effectiveness of Corporate Rescue and Insolvency Procedures in the UK' (1993) 1 Am. Bankr. Inst. L. Rev 441, 446.
[119] See for example Hetal Doshi and Yashasvi Jain, 'The Insolvency and Bankruptcy Framework and Principle of Business Efficacy Across Different Jurisdictions in the COVID Era' (2021) 42(1) Business Law Review 45, 45.
[120] Insolvency Act 1986, Schedule B1 paras 42, 43 and 44. Note that additional protections applied in response to Coronavirus but they are temporary and not discussed in this thesis.
[121] Insolvency Act 1986, Schedule B1 paras 42 and 43.
[122] See for example *Mazur Media Ltd v Mazur Media GmbH* [2004] EWHC 1566, [2004] EWHC 1566, [2004] 1 WLR 2966; *Bloom v Harms Offshore AHT* [2009] EWCA Civ 632, [2010] Ch 187; and Gerard McCormack, 'Bankruptcy Forum Shopping: The UK and US as Venues of Choice for Foreign Companies' [2014] 63 ICLQ 815.
[123] Insolvency Act 1986, Schedule B1 para 11.
[124] Insolvency Act 1986, Schedule B1 para 11.

> **11** The court may make an administration order in relation to a **company** only if satisfied—(a) that the **company** is or is likely to become unable to pay its debts, and (b) that the administration order is reasonably likely to achieve the purpose of administration.

The wording of schedule B1(11) IA 1986 must be read together with Schedule B1, paragraph (111)(1A) IA 1986 if administration proceedings are to apply to foreign companies.[125] Schedule B1, paragraph (111)(1A) IA 1986 states:

> In this Schedule, "company" means—(a) a company registered under the Companies Act 2006 in England and Wales or Scotland,] (b) a company incorporated in an EEA State other than the United Kingdom, or (c) a company not incorporated in an EEA State but having its centre of main interests in a member State other than Denmark.

Therefore, multinational companies have three possibilities to show that they are 'company' for purposes of UK administration.[126] The first definition concerns companies registered in the UK.[127] As a consequence, multinational companies that have registered with Companies House can forum shop in the UK. The second definition involves companies that are incorporated in the EU but not the UK.[128] In practice, EU incorporated multinational companies can use UK administration under schedule B1, paragraph (111)(1A)(b) IA 1986 but not companies incorporated in other jurisdictions such as from developing countries.[129] Multinational companies incorporated outside the EU and UK but which have their centres of main interests inside an EU member state other than Denmark can use schedule B1, paragraph (111)(1A)(c) IA 1986.[130] Therefore multinational

[125] Insolvency Act 1986, Schedule B para 11 and para 111(1A).
[126] Insolvency Act 1986, Schedule B1 para 111(1A).
[127] Insolvency Act 1986, Schedule B1 para 111(1A)(a).
[128] Insolvency Act 1986, Schedule B1 para 111(1A)9(b).
[129] Insolvency Act 1986, Schedule B1 para 111(1A)9(b).
[130] Insolvency Act 1986, Schedule B1 para 111(1A)9(c).

companies incorporated outside the UK and EU are eligible to request the opening of administration proceedings if they have the centre of main interest (COMI) in the UK[131] and this will apply also to multinational companies based in developing countries. The use of COMI is the approach being advocated by this thesis in identifying jurisdiction for commencing main insolvency proceedings and it would not result in a narrowing of the threshold for administration.

Once multinational companies have proved that they satisfy the definition of a 'company', two further requirements must be satisfied if administration proceedings are to opened. One of the requirements is that the multinational company must be likely to become unable to pay its debts.[132] The requirement does not require that the multinational companies are previously or currently unable to be their debts. Only the likelihood that in the future, the multinational company will become unable to pay its debts. The other requirement is that it must be proved that an administration appointment is reasonably likely to achieve the purpose of administration.[133]

3.3.3 Schemes of Arrangements of Foreign Companies

Schemes of arrangement are compromises or arrangements made between the companies and their shareholders or creditors.[134] Multinational companies could use this procedure to enter into an agreement with either their creditors or/and shareholders to restructure its debts and/or capital. In the UK, schemes of arrangement between the company and the shareholders are for companies that have been incorporated in the UK.[135] The reasoning is that the countries of incorporation regulate the conduct between the company and it shareholders. The shareholders and UK courts would otherwise be exercising their powers exorbitantly over matters that could best be dealt with in another jurisdiction.

[131] Insolvency Act 1986, Schedule B1 para 111(1A)9(c).
[132] Insolvency Act 1986, Schedule B1 para 11(a).
[133] Insolvency Act 1986, Schedule B1 para 11(b).
[134] Companies Act 2006, s. 895(1).
[135] See *Re Drax Holdings Ltd* [2003] EWCA 2743 (Ch) [29].

There are some exemptions to this rule, but they will not be discussed in this thesis.[136] This section aims to identify when schemes of arrangement can be used by foreign multinational companies enabling UK courts to exercise long-arm jurisdiction. Additionally, the sections aim is to identify why foreign multinational companies opt to forum shop in the UK to use schemes of arrangement.

Notably, schemes of arrangement, unlike liquidation and administration are set out in the Companies Act 2006 thus technically not an insolvency procedure.[137] As mentioned, the Companies Act 2006 now also includes in Part 26A a restructuring plan which is designed to build on the strengths of the scheme of arrangement and improve on them in the insolvency context. The approach to jurisdiction is likely to follow the same principles as have been developed in relation to schemes of arrangement.[138]

To the advantage of foreign multinational companies, schemes of arrangement are available when the companies are both solvent or insolvent.[139] Schemes of arrangement can be used in conjunction with administration and liquidation in the UK.[140] Thus, foreign multinational companies can forum shop in the UK to utilise schemes of arrangement even when they are not in financial trouble if they fulfil the requirements.

Foreign multinational companies may utilise UK schemes of arrangement as strategic manoeuvres while dealing with their creditors.[141] One important aspect of schemes of

[136] For further details Jennifer Payne, *Schemes of Arrangement Theory, Structure and Operation* (Cambridge University Press, 2014), 26 – 28.
[137] Companies Act 2006, Part 26.
[138] In the Smile Telecom restructuring there has been a COMI shift to the UK prior to the restructuring plan being convened: Nick Turvey and Tracey Dovaston, ' Restructuring Plans: Who's In Control' (2021) Boies Schiller Flexner LLP<https://www.bsfllp.com/news-events/restructuring-plans-whos-in-control.html. > accessed 1 June 2021.
[139] See for example Mark Sterling and Moira Taylor, 'Issues Arising in Cross-Border Schemes of Arrangements' (1994) International Insolvency Review 122, 123.
[140] See for example Tomas Moravec, Jan Pastorcak and Petr Valenta, 'Is Scheme of Arrangement in Cross-Border Insolvency in Europe Over?' (2016) 19(8A) International Information Institute (Tokyo) 3107, 3108.
[141] Kristin van Zwieten, *Goode on Principles of Corporate Insolvency Law* (5th edition, 2019 Sweet & Maxwell), 12-17.

arrangement is that they enable compromises and therefore they can provide a give and take relationship between the creditors and foreign multinational companies.[142] Foreign multinational companies may seek to utilise schemes of arrangement to enter into agreements with their creditors when they are in financial crises, provided that what is proposed is either a compromise or an arrangement, terms that have been construed broadly.[143] For example, the agreements may state that the debt owed to the creditors is swapped for equity in the foreign multinational company. As a consequence of the debt swap, assets are not immediately sold off to settle the debt nor is the debt recalled by the creditors presently, among other possible consequences from failure to settle the debt. This might result in enabling the company to recover. In some other cases, agreements might be utilised as a quick means to distribute assets of the company without going through further insolvency proceedings that might take longer since the agreement is between the foreign company and its creditors.[144] It can also be a simple case of an agreement between the foreign multinational company and its creditors to increase the time for repayment, to give the company breathing space to restructure or recoup losses, among other things.[145] Therefore, foreign multinational companies can use schemes of arrangements to agree a wide range of variations of terms with their creditors in the UK.

Additionally, foreign multinational companies may be attracted to schemes of arrangement because they are formal agreements approved by the courts.[146] The formal aspect of the schemes of arrangements may give both parties the security that the arrangement can be enforced in UK courts, and in other instances, the schemes of arrangement may also be enforced in different jurisdictions.[147] This section does not deal with enforcement of UK schemes of arrangements in other jurisdictions as, again, that depends on the private international law of each jurisdiction.

[142] Shearman & Sterling LLP, 'UK: Jurisdiction – Schemes of Arrangement' (2012) J.I.B.L.R. N110.
[143] See for example *Re MyTravel Group Plc* [2005] 2 B.C.L.C. 123
[144] See for example *Re T&N Ltd (No 3)*) [2006] EWHC 1447, [2007] 1 B.C.L.C 563.
[145] See for example *APCOA (In the Matter of APCOA Parking (UK) Ltd & Ors* [2014] EWHC 997 (Ch), [2014] 4 All ER 150.
[146] Companies Act 2006, Part 26.
[147] See for example *In re Rodenstock GmbH* [2011] EWHC 1104 (Ch), 1248, [2011] Bus LR 1245.

Concerning schemes of arrangement, the UK courts have the power to ensure that proper procedures are adhered to when the agreement is made before it is presented to the court for sanctioning.[148] In forum shopping in the UK for schemes of arrangement, foreign multinational companies must ensure that the agreement with creditors has good representation[149] from the class of creditors thus enhancing the chance that the UK courts will approve the scheme.[150] Consequently, schemes of arrangement are a statutory agreement between the foreign multinational companies and their creditors which ensures that what is decided between them, once approved at the discretion of UK courts, is binding on the parties until the terms are fulfilled.

UK schemes of arrangement in relation to foreign multinational companies apply to matters that relate to the UK.[151] This ensures that UK courts only exercise powers over agreements between foreign multinational companies and their creditors that have elements linked with the UK.[152] According to *In re Rodenstock GmbH*,[153] to use UK schemes of arrangement a company must satisfy the 'sufficient connection' test.[154] The sufficient connection test ensures that UK courts do not exercise long-arm jurisdiction exorbitantly, but only when it is appropriate to do so. For example, a foreign multinational company may have both the centre of main interest (COMI) and a place of business outside the UK or only either one. As a result, it might be perceived that the UK is not the natural jurisdiction to govern the company's agreements with creditors. However, UK judges have discretion in deciding whether they have jurisdiction over foreign multinational schemes

[148] Philip HertzJohn MacLennan, 'Wish you were here? English Court becomes the Restructuring Destination for Foreign Companies' (2011) 7 JIBFL 405.
[149] 75% of each class of creditors in the agreement must approve it, together with a majority in number. In the event of failure to achieve these levels UK courts will not approve the scheme according to Companies Act 2006, Section 899. In contrast the court will have cross-class cramdown powers in relation to the restructuring plan.
[150] See for example *Re Hellenic & General Trust* [1976] 1 W.L.R. 123; *Primacom Holding GmbH v A Group of the Senior Lenders & Credit Agricole* [2012] EWHC 164 (Ch), 213.
[151] See for example *In re re Rodenstock GmbH* [2011] EWHC 1104 (Ch), 1253.
[152] *In re Rodenstock GmbH* [2011] EWHC 1104 (Ch) [1253].
[153] [2011] EWHC 1104 (Ch).
[154] The sufficient connection test will be discussed later on in this chapter.

of arrangements.[155] In particular, the sufficient connection test, to be discussed in section 3.2.4, assists UK courts in determining whether the agreements are adequately related to the UK jurisdiction for proceedings to be opened in the UK.

Before the courts can determine whether to open schemes of arrangement proceedings, the foreign multinational companies must prove that they meet the procedural requirements and can forum shop in the UK for schemes of arrangement. In order to utilise UK schemes of arrangement foreign multinational companies must fit the definition of 'company' in the Companies Act 2006, Part 26.[156] Foreign multinational companies are 'foreign' because they are not registered in the UK, but they are not barred from using the UK schemes of arrangement. If foreign multinational companies can prove that they can be wound up in the UK, they qualify to forum shop in the UK.[157] As discussed earlier, where a foreign company is an unregistered company it can be still be wound up in the UK.[158] These are statutory provisions that allow the consideration of forum shopping, but the final decision of whether a company can forum shop in the UK lies with the discretion of the UK courts.

In conclusion, multinational companies may forum shop in the UK, so as to use the scheme of arrangements procedure. As seen with liquidation and administration in order to forum shop UK schemes of arrangements, multinational companies have to overcome two hurdles, and one is statutory while the other is judicial. The statutory conditions are relatively straightforward and the main restriction on availability is the 'sufficient connection' test.

[155] *In re Rodenstock GmbH* [2011] EWHC 1104 (Ch) [1253]; *Re T&N Ltd (No 3)*) [2006] EWHC 1447, [2007] 1 B.C.L.C 563 among others.
[156] Companies Act, s. 895.
[157] Companies Act, s. 895.
[158] Insolvency Act 1986, s. 221 and *In re Rodenstock GmbH* [2011] EWHC 1104 (Ch), [2011] Bus LR 1245.

3.3.4 The Sufficient Connection Test

As established in the earlier sections, multinational companies, some of which are termed as foreign companies, may apply to UK courts to utilise insolvency proceedings in the UK. Insolvency procedures available in the UK, such as winding up, administration and schemes of arrangement have gateway provisions in acts of parliament or case law that lay out the requirements necessary for foreign companies to apply for them.[159] These were considered for each procedure in the preceding sections. Nevertheless, it is not adequate that foreign companies, including multinational companies, show that they comply with the procedural requirements as set out in UK insolvency laws. The presence of proof that the applicants satisfy the requirements of the above provisions is not enough for courts to establish that they have jurisdiction over their insolvency matters.[160] The UK courts have discretion to assert jurisdiction, and the sufficient connection test offers guidance on how to do so concerning foreign companies without exorbitance.[161] This section will analyse what the courts have held to be the 'sufficient connection test' and how it facilitates UK courts to exercise long-arm jurisdiction over insolvency matters of foreign companies (including multinational companies). The longer-term approach that this thesis proposes is the use of COMI as the test to be applied by countries in establishing jurisdiction.

The sufficient connection test enables the courts to determine whether the UK is the appropriate insolvency jurisdiction for foreign companies, including foreign multinational companies.[162] A foreign company may satisfy the criteria for utilising winding up, administration or schemes of arrangement, but UK courts may still not be the natural jurisdiction for insolvency proceedings. It has been argued that natural jurisdiction is

[159] Insolvency Act 1986, section 221, Schedule B1; and Companies Act, Part 26.
[160] See sections 3.2.1, 3.2.2 and 3.2.3.
[161] See for example Janna Purdie, 'Winding-Up of Foreign Companies' (2008) 158 NLJ 1597; Shearman & Sterling LLP, 'UK: Jurisdiction – Schemes of Arrangement' (2012) J.I.B.L.R. N110. Note multinational companies that have been registered in the UK are not required to show that they have a sufficient connection to the UK. The reason is that the Insolvency Act 1986 and Companies Act 2006 provide specific guidelines for liquidation, administration and schemes of arrangement for registered companies under the Companies Act 2006. In a practical sense, the registered multinational companies in the UK are already part of the UK jurisdiction and thus should directly utilise the UK judicial systems.
[162] *Re Eloc Electro-Optieck and Communicatie BV* [1981] 2 All ER 1111 [226].

where companies are incorporated.[163] In practice, this argument may not be appropriate, as companies may be incorporated in one country but have all their business activities, workforce, and assets in other jurisdictions. In those circumstances, the country of incorporation may not be the most appropriate jurisdiction since there would be no other connecting factor to that jurisdiction other than a formality confirming that the company was formed in that jurisdiction.[164]

The UK courts in determining whether the UK is the appropriate jurisdiction to open insolvency proceedings, have developed a practical approach towards the sufficient connection test, which encompasses matters with the UK.[165] The test has three elements.[166] Firstly, there must be a connection to the UK, which must be proved. Secondly, the insolvency proceedings available will benefit the party applying. Finally, the UK laws govern one or more of interested parties in the insolvency of the company through the UK insolvency proceedings. All the elements of the sufficient connection test establish that the UK courts ought to be satisfied that there is a link with the UK rather than relying on the satisfaction of statutory grounds for foreign companies to open insolvency proceedings in the UK.

Multinational companies must be aware of the relevant evidence necessary to show that they fulfil the three elements of the sufficient connection test.[167] The first element requires that the applicant shows that the foreign company has sufficient connection to the UK.[168]

---

[163] *Stocznia Gdanska SA v Latreefers Inc and Others Appeals* [2002] All ER (D) 148 [22] per the Counsel for defence.
[164] See for example *Stocznia Gdanska SA v Latreefers Inc and Others Appeals* [2002] All ER (D) 148 where Latreefers was incorporated in Liberia with the aim to enter into contract with Stocznia on behalf of its parent company Latco (incorporate in Latvia). The 6 contracts for the designing, building, completing and delivering of the ships to Latreefers were signed in the UK and opted for UK as the choice of law jurisdiction.
but its business and assets were in UK
[165] See for example Janna Purdie, 'Winding Up Foreign Companies' 158 NLJ 1597.
[166] The sufficient connection test will be discussed fully in subsequent paragraphs. The test can be found in *Stocznia Gdanska SA v Latreefers Inc and Others Appeals* [2002] All ER (D) 148; *Re Real Estate Development Co* [1991] BCLC 210.
[167] *Re Real Estate Development Co* [1991] BCLC 210 and *Stocznia Gdanska SA v Latreefers Inc and Others Appeals* [2002] All ER (D) 148.
[168] *Re Real Estate Development Co* [1991] BCLC 210 and *Stocznia Gdanska SA v Latreefers Inc and Others Appeals* [2002] All ER (D) 148.

However, there is no definite guideline as to what constitutes evidence of a sufficient connection. As the test is judicial, there is no parliamentary guidance as to what amounts to proof of a sufficient connection.[169] Instead, judges have discretion as to what they can accept as proof. The flexibility of the test enables judges to consider a wide range of circumstances that may be present during the insolvency of foreign multinational companies in the UK.

Arguably, the easiest means for a foreign multinational company to show that they have sufficient connection is to prove that they have assets in the UK.[170] Examples of assets are shares, funds, buildings, contracts, materials, among other possessions.[171] Therefore, a wide range of things are considered assets for the purpose of establishing sufficient connection to the UK.

The presence of assets is easy to prove, but it is not an exclusive requirement that the foreign multinational company have them to establish sufficient connection to the UK.[172] In practice, a foreign multinational company may have assets in the UK but may shift the assets to another jurisdiction prior to insolvency claim. Moving of assets might be a consequence of online banking and online management of assets that has made it easy, with a click of a button, to move assets from one jurisdiction to another. If assets were a definite requirement, UK courts might not be able to allow the opening of insolvency proceedings in the UK where assets have been moved outside the UK prior to commencement of insolvency proceedings as such assets are not a must to prove sufficient connection.

---

[169] See *Re Cia Merabello San Nicholas* [1972] 3 All ER 448, 460 Megarry J stated what was required for UK courts to have jurisdiction over insolvency matters of foreign companies.
[170] See for example *International Westminister Bank Plc v Okeanos Maritime Corp* [1987] 3 All ER 137, 145; *Re Real Estate Development Co* [1991] BCLC 210, 214; *Siskina (Cargo Owners) v Distos Cia Naviera SA, The Siskina* [1977] 3 All ER 803, 825; *Stocznia Gdanska SA v Latreefers Inc and Others Appeals* [2002] All ER (D) 148 among others.
[171] See for example *International Westminister Bank Plc v Okeanos Maritime Corp* [1987] 3 All ER 137; *Re Drax Holdings Ltd* [2003] EWHC 2743 (Ch); *Stocznia Gdanska SA v Latreefers Inc and Others Appeals* [2002] All ER (D) 148.
[172] *International Westminister Bank Plc v Okeanos Maritime Corp* [1987] 3 All ER 137.

In the example above, a foreign multinational company may still be within the jurisdiction of the UK courts by either showing that it has a place of business or has been carrying on business in the UK, [173] as the company might have been trading in the UK before the insolvency application. The onus of proof is with the petitioner to prove that its business activities were in the UK.[174] In this thesis the petitioner is a foreign multinational company. The foreign multinational company may forum shop in the UK by showing that they have a place of business in the UK.[175] The place of business can be any physical location within the UK, such as a warehouse among others.[176] It is not a requirement that the place of business is a business premise.[177] Therefore, foreign multinational companies may send their employees or even a representative to carry out transactions on behalf of the company at a physical location in the UK.[178] It appears that foreign multinational companies may successfully prove a sufficient connection by showing that they have a physical location within the UK where they have carried on business without proving the length of time over which that has occurred.

Like assets, physical presence is not a pre-condition for foreign multinational companies to prove a sufficient connection to forum shop in the UK. Conducting business in the UK through an agent or an employee is also a sufficient connection to the UK.[179] There are no stringent requirements that the employees or agents carrying on business in the UK on behalf of the foreign multinational company must be UK citizens.[180] This allows foreign

[173] See for example *Stocznia Gdanska SA v Latreefers Inc and Others Appeals* [2002] All ER (D) 148.
[174] *Re Real Estate Development Co* [1991] BCLC 210, 214.
[175] See for example *Re a Company (No 003102 of 1991), ex p Nyckeln Finance Co Ltd.*
[176] See for example *Re a Company (No 003102 of 1991), ex p Nyckeln Finance Co Ltd.*
[177] See for example *Re a Company (No 003102 of 1991), ex p Nyckeln Finance Co Ltd,* conducting the business from a residential property.
[178] *Re a Company (No 003102 of 1991), ex p Nyckeln Finance Co Ltd* gives an example of a Portuguese company that sent an employee to conduct business on its behalf from a residential property.
[179] See *Re Mid East Trading Ltd* [1998] 1 All ER 577 (The Lehman Brothers were acting as agents for a Lebanese company in the UK)*; Banque des Marchands de Moscou (Koupetschesky)(in liq) v Kindersley* [1950] 2 All ER 549 (Employees acting on behalf of Dutch company in the UK.)
[180] See for example *Banque des Marchands de Moscou (Koupetschesky) (in liq) v Kindersley* [1950] 2 All ER 549. (The company was Dutch company and the employees were United States citizens.)

multinational companies to import their own employees into the UK without employing additional personnel during insolvency, which might be cost-effective, given the company's insolvency as they do not need to employ new staff.

The sufficient connection element of the sufficient connection test provides a wide range of elements to be considered in determining whether a foreign multinational company can forum shop in the UK. Links such as the ones discussed in the previous paragraphs[181] show that the courts have adopted a flexible approach in determining what they consider to be a connection to the UK. This determination is at the discretion of the UK courts. The courts, in some instances, have denied establishing a connection if the connection is too tentative;[182] therefore not all circumstances are acceptable.

The second element of the sufficient connection test is there must be a reasonable possibility that liquidation, administration and schemes of arrangement will benefit the petitioner.[183] The petitioner in this thesis is a foreign multinational company. The courts do not define the benefit and therefore a wide range of factors can be taken into account being sufficient to show that the foreign multinational company benefits from the insolvency proceedings.[184] The benefit can simply be presented as using any of the insolvency proceedings in the UK. In the case of administration and liquidation, the foreign multinational company may give its benefit by showing that a third party, who is an insolvency practitioner, will be appointed to deal with the insolvency matters.[185] Insolvency practitioners have experience in dealing with issues involving a company in financial difficulty and are more conversant with UK insolvency laws.[186] The appointment

[181] Place of business, carrying on business, assets, employees etc
[182] See for example *Re Titan International Inc* [1998] 1 BCLC 102 (The company was incorporated and run from another jurisdiction, the company was potrayed as an investment company)
[183] *Re Real Estate Development Co* [1991] BCLC 210 and *Stocznia Gdanska SA v Latreefers Inc and Others Appeals* [2002] All ER (D) 148.
[184] Tom Smith, 'Jurisdiction for Companies: Winding Up, Administration, CVAs and Schemes of Arrangement' in Richard Sheldon QC (ed), *Cross Border Insolvency* (3rd edition, Bloomsbury Professional 2011).
[185] *Stocznia Gdanska SA v Latreefers Inc and Others Appeals* [2002] All ER (D) 148.
[186] See for example Thomas Robinson, 'Corporate Insolvency: The Office-Holder's Investigatory Powers' (2021) Thomson Reuters 1.

of the insolvency practitioner is an example of the benefits that foreign multinational companies may rely on since they leave matters of the company's insolvency to a professional rather than having to deal with the matter directly.

Additionally, a further example of evidence of a reasonable benefit to the foreign multinational company, is the advantages of using UK insolvency proceedings.[187] In the case of winding up, the foreign multinational company may show that it will benefit from a winding-up order as it may enable it to access other benefits provided by UK insolvency law. To illustrate, in *Re Eloc Electro-Optieck and Communicatie BV*[188] the foreign company's employees were the petitioners; if a winding up order was to be granted the employees would be able to claim under Employment Protection (Consolidation) Act 1978[189] for a redundancy fund. The UK courts viewed the redundancy fund as a benefit, which proved that there was a sufficient connection between the Dutch company and the UK. Accordingly, notwithstanding the fact that the employees were American, their place of employment with the company was in the UK. Thus, insolvency orders can be labelled as benefits to fulfil the second requirement.

It is worth noting that the benefit need not be in existence when the insolvency petition is made.[190] It suffices that the benefit will occur later due to the insolvency order being declared by the UK courts. This may be perceived as UK courts exercising long-arm jurisdiction in instances where there is a tentative benefit linked to the UK. This is because the benefit may arise due to the decision the UK courts make after establishing jurisdiction in respect of insolvency matters concerning a foreign multinational company. Therefore, in the UK, courts may be perceived to take a flexible approach to evidence of the potential benefit element of sufficient connection test.

[187] *Re Eloc Electro-Optieck and Communicatie BV* [1981] 2 All ER 1111 [226].
[188] *Re Eloc Electro-Optieck and Communicatie BV* [1981] 2 All ER 1111 [226].
[189] The Act was repealed by Employment Rights Act 1996.
[190] See for example *Stocznia Gdanska SA v Latreefers Inc and Others Appeals* [2002] All ER (D) 148.

The last element of the sufficient connection test is there must be one or more persons interested in a distribution of the foreign multinational company's assets.[191] This means that the UK courts have jurisdiction over the beneficiary of the insolvency proceedings. The beneficiaries may be stakeholders of the foreign multinational company such as shareholders, employees, the multinational company's management, creditors, and others submitting to UK jurisdiction.[192] Subjecting to UK jurisdiction does not equate to the beneficiaries being UK citizens or being incorporated in the UK.[193] It is not a requirement that all the beneficiaries of the insolvency proceedings be under the jurisdiction of the UK laws. In theory, this enables the UK courts to exercise long-arm jurisdiction even when there is only one beneficiary under UK jurisdiction.

The third element of the sufficient connection test is not however a necessity for UK courts to establish that the foreign multinational company has a sufficient connection to the UK.[194] Once the first and second elements of the sufficient connection test are established, it is not necessary for the last element to be established.[195] In practice, companies are formed in other countries as a specific business vehicle, which means that they can be incorporated for one particular reason which is fulfilled via entry of contracts with other companies. Those contracts can state that the legal jurisdiction of any dispute is the UK despite not having any person over whom the UK can exercise jurisdiction, thus establishing a link. The UK courts take into account this link but in conjunction with other factors that connect the UK to the foreign multinational company, such as if the contracts are to be fulfilled in the UK.[196] Once that is established, it not necessary to prove that

[191] *Re Real Estate Development Co* [1991] BCLC 210 and *Stocznia Gdanska SA v Latreefers Inc and Others Appeals* [2002] All ER (D) 148.
[192] See for example [1981] 2 All ER 1111 [226] (The employees carried on their employment in the UK); *Stocznia Gdanska SA v Latreefers Inc and Others Appeals* [2002] All ER (D) 148 (The creditors were in the UK);
[193] See for example *Re Kailis Groote Eylandt Fisheries Pty Ltd* (1977) 2 ACLR 574, 579.
[194]See for example *In re Rodenstock GmbH* [2011] EWHC 1104 (Ch), [2011] Bus LR 1245 (The creditors who were the beneficiaries were not in the UK.)
[195] See for example *Re Drax Holdings Ltd* [2003] EWHC 2743 (Ch).
[196] See for example *Re Drax Holdings Ltd* [2003] EWHC 2743 (Ch).

there is a party subject to UK jurisdiction as it would be counter-intuitive to the terms of the contract.

The first element of the sufficient connection test helps the UK courts in their discretion to establish jurisdiction in the insolvency of foreign multinational companies by ensuring that they do not exercise exorbitant jurisdiction.[197] As mentioned earlier, the place of incorporation is an important aspect of establishing jurisdiction. From the analysis it can be argued that the sufficient connection test is aimed at establishing that the UK is the appropriate jurisdiction.[198]

Additionally, the first and second elements of the test ensure that there is impact in the UK of insolvency proceedings if jurisdiction is established, which might be perceived as curbing the long-arm jurisdiction of UK courts. It would be pointless for the UK courts to pass insolvency orders that would not be adhered to; for example, if there are no assets or people in the UK, that the order can be enforced against. Therefore, the UK courts exercise their discretion over the jurisdiction of foreign multinational companies through the sufficient connection test that provides guidance to ensure that if jurisdiction is established and insolvency proceeding are presided over in the UK, the outcome should impact the UK. This ensures that the courts' time and resources are not used in making decisions that might not be enforced extra-territorially.

3.4 CONCLUSION

This chapter has considered how the UK has developed laws that govern the ability of multinational companies to forum shop in the UK and the UK courts to exercise long-arm jurisdiction in insolvency matters. The current laws may be perceived as having checkpoints that curb forum shopping to ensure that forum shopping in the UK is not

[197] *In re Rodenstock GmbH* [2011] EWHC 1104 (Ch) [21], [2011] Bus LR 1245; *Re Real Estate Development Co* [1991] BCLC 210, 217.
[198] *Banco Nacional de Cuba v Cosmos Trading Corp* [2000] B.C.C. 910, 915.

exploited. These checkpoints have been shown through both statutory and judicial provisions. As it has been established in the previous sections, multinational companies may be in a position to forum shop for insolvency proceedings in the UK if they meet the statutory requirements of the individual insolvency procedure. However, a fulfilment of the statutory requirement does not guarantee that UK courts will exercise their long-arm jurisdiction over the insolvency proceedings. An additional link, which is to be deemed sufficient by the UK courts must be present. In this regard, the UK may be perceived as ensuring that forum shopping in the UK is used appropriately. A simpler approach of establishing UK insolvency jurisdiction can perhaps be adopted through the proposed use of COMI test to be applied. The UK already uses COMI in the schemes of arrangements in relation to foreign companies, and perhaps this can further be expanded to the other UK insolvency procedures.

The next chapter, chapter 4, will examine a developing countries' perspective on forum shopping. In the examination, the chapter will examine how developing countries are impacted by forum shopping. The section will also examine how developing countries can reform their insolvency laws and supporting institutions to be more attractive for multinational companies to utilise them. This latter point is important if the proposed approach to opening of insolvency proceedings, as set out in Chapters 5 and 6, is to be realistically achievable.

CHAPTER 4: A DEVELOPING COUNTRIES PERSPECTIVE ON FORUM SHOPPING

4.1 OVERVIEW

The previous chapter, Chapter 3: The UK, examined UK insolvency laws that enable multinational companies to open main insolvency proceedings in that jurisdiction under long-arm jurisdiction. This chapter examines forum shopping from the perspective of developing countries. This perspective is important because developing countries both face pressures to reform their insolvency laws in accordance with local conditions but, through forum shopping, those efforts are effectively bypassed. This chapter therefore examines the effect that forum shopping might have on local insolvency laws and how stakeholders in developing countries may be affected. In addition, the chapter examines how developing countries can implement effective insolvency laws and to encourage their use by multinational companies. This latter consideration is important to the proposed cross border insolvency framework as set out in later chapters.

4.2 INTRODUCTION

Multinational companies are attracted to activities in developing countries for several reasons.[1] Some of the reasons are that developing countries offer low costs of labour and readily available raw materials.[2] As with any enterprise in any part of the world, there is a risk of business failure when multinational companies trade in developing countries. Business failures of multinational companies with interests in developing countries raises the issue of where insolvency proceedings ought to be opened and often leads to forum shopping.

[1] See for example Joseph LaPalombara and Stephen Blank, 'Multinational Corporations and Developing Countries' (1980) 34(1) Journal of International Affairs 119
[2] See for example Joseph LaPalombara and Stephen Blank, 'Multinational Corporations and Developing Countries' (1980) 34(1) Journal of International Affairs 119.

Before dealing with the aims of this section, it is important to look at one example of where a multinational company has forum shopped either in the US or UK, citing local insolvency laws in developing countries not having effective insolvency frameworks. Aerovias Nacionales de Colombia SA Avianca (Avianca), a Colombian incorporated company which was trading mostly from Colombia in the aviation industry, experienced financial difficulties and sought to commence insolvency proceeding in the US.[3] The parent company was a US company, Avianca Inc, which acted as its agent in selling flight tickets out of Miami. Most of Avianca's business was conducted from Colombia, while most employees were based in Colombia (4,145) compared to 28 in the US and 148 outside the US and Colombia. The principal secured creditors were based in Colombia, where the principal debt was largely pensions and tax obligations. US creditors were lessors of planes used by Avianca, but money owed to them was less than that owed to the principal secured creditors. The facts that principal creditors, a majority of the employees and business were in Colombia arguably ought to have meant that the insolvency matter should most appropriately be dealt with in Colombia. However, Avianca opted to commence proceedings in the US, stating that Colombian insolvency law[4] at the time was new and did not have the kind of restructuring procedure that Avianca sought.[5] It can be deduced from Avianca's case that multinational companies that can seek a forum that offers insolvency legal procedures that align better with their needs would opt to use those systems rather than use local insolvency laws. In the case of Avianca, the multinational company sought to open proceedings in the US because it offered restructuring possibilities rather than utilising Colombian insolvency law, which did not provide for restructuring. Had it used the Colombian insolvency law, Avianca would have simply been liquidated rather than being able to try to rescue the business. While this case might be an example of pragmatic forum shopping it also highlights a more general issue of bypassing insolvency laws in developing countries and thereby impacting on local creditors.

[3] *In re Aerovias Nacionales de Colombia SA Avianca* (2003) 303 BR 1.
[4] Law 550 of 1999.
[5] *In re Aerovias Nacionales de Colombia SA Avianca* (2003) 303 BR 1.

It was observed in the Avianca case,[6] noted above, that multinational companies can state that the reason for opening proceedings in the US is due to an ineffective insolvency legal framework in the other possible jurisdictions where proceedings might be opened.[7] As discussed in Chapter 2, giving reasons for commencing the main insolvency proceeding in the US was not a necessity, provided that the low threshold for opening proceedings was met.[8] However, the US insolvency courts have the ability to listen to parties' reasons for opening proceeding in the US, such as ineffective legal systems in the other jurisdiction, among others, which is done when assessing if both the debtor (multinational company) and its creditors would be better served by filing in the US.[9] The UK insolvency legal framework is not set in a way that multinational companies can explicitly state that they seek to forum shop in the UK because local insolvency frameworks are ineffective.[10] The manner in which the UK insolvency law is set to accept opening main insolvency proceedings depends on the type of company and insolvency procedure being sought after and where there is a sufficient connection to the UK.[11] Therefore, the approaches taken by the US and the UK differ when dealing with multinational companies' forum shopping, without an obligation to state the reasons for forum shopping, which may include ineffective insolvency legal systems in developing countries.

Multinational companies trading in developing countries as part of corporate groups take different structures,[12] including subsidiaries and branches.[13] These business structures

[6] *In re Aerovias Nacionales de Colombia SA Avianca* (2003) 303 BR 1.
[7] Oscar Couwenberg and Stephen J Lubben, 'Corporate Bankruptcy Tourism' (2015) 70 Bus L 719.
[8] Chapter 2, section 2.2, Refer to it for a full discussions of the US gateway provision which requires to show that the company was a debtor under the Bankruptcy Code, section 109(a).
[9] See for example *Eastman v Eastman (In re Eastman)* 188 B.R. 621 (9th cir. BAP 1995), 624 – 625.
[10] Refer to Chapter 3, section 3.3 for detailed analysis of the UK gateway provision under different insolvency procedures and the sufficient connection test.
[11] See for example *Stocznia Gdanska SA v Latreefers Inc* [1999] 1 BCLC 271; and *Real Estate Development Co, Re* [1991] BCLC 210.
[12] See for example Hans Schollhammer, 'Organization Structures of Multinational Corporations' (pre-1986) 14(3) Academy of Management Journal 345.
[13] See for example Hans Schollhammer, 'Organization Structures of Multinational Corporations' (pre-1986) 14(3) Academy of Management Journal 345.

provide a starting point in deciding the forum for opening insolvency proceedings. Subsidiaries can be incorporated under developing countries' laws and are legal personalities in their own right under those laws.[14] Other ways in which multinational companies organise their business operations, such as branches, form part of the main body of the multinational company and do not have separate legal personality; thus they can be a part of a company which is incorporated in another jurisdiction, other than the developing countries or vice versa.[15] Multinational companies operating in developing countries, no matter the business vehicle used, may commence insolvency proceedings in the developing countries in which they conduct business, depending on the conditions for opening insolvency proceedings locally. However, due to their nature, multinational companies may also commence insolvency proceedings in other jurisdictions, other than developing countries, where they fulfil the alternative countries' requirements for opening insolvency proceedings, and this presents the possibility of forum shopping.[16]

Multinational companies may opt for forum shopping in other jurisdictions over developing countries as they may be favourable to the outcome or strategy that they are seeking.[17] For example, there may be a preference for the members of a multinational group to be handled under insolvency proceedings in one particular country.[18] This chapter is centred on insolvency issues encountered by multinational companies in developing countries and whether these issues must inevitably lead to forum shopping in the United States of America (US) and United Kingdom (UK) rather than utilising insolvency laws in developing countries. The aim is to identify ways in which developing countries may reform their laws

[14] Klaus Siemon and Frank Frind, 'Groups of Companies in Insolvency: A German Perspective Overcoming the Domino Effect in an (International) Group Insolvency' (2013) 22(2) International Insolvecy Review 61, 67 – 68.
[15] Klaus Siemon and Frank Frind, 'Groups of Companies in Insolvency: A German Perspective Overcoming the Domino Effect in an (International) Group Insolvency' (2013) 22(2) International Insolvecy Review 61, 67 – 68.
[16] Lynn M LoPucki and William C Whitford, 'Venue Choice and Forum Shopping in the Bankruptcy Reorganisations of Large Publicly Held Companies' (1991) 1991 Wis L Rev 11.
[17] See for example Samir D Parikh, 'Modern Forum Shopping in Bankruptcy' (2013) 46(1) Connecticut L Rev 159.
[18] O Couwenberg & SJ Lubben, 'Corporate Bankruptcy Tourists' (2015) 70 Bus L 719.

to encourage their use by multinational companies in financial distress. The following are the key features to be examined in the chapter in order to address the aim of the chapter:

1. To examine some of the justifications for forum shopping by multinational companies;
2. To make a general assessment of a selection of developing countries' insolvency laws and institutions; and
3. To identify what key values should be incorporated in developing countries' insolvency law reforms for effective insolvency laws.

Some of the above key features of this chapter will be dealt with simultaneously throughout the chapter.

4.3 JUSTIFICATIONS FOR FORUM SHOPPING

In their bid to forum shop in the US and UK, multinational companies have raised several substantial justifications to support the use of those jurisdictions.[19] This section will look at two of the issues raised by multinational companies as reasons for forum shopping: firstly, that some developing countries have new laws that may also be untested and secondly that they lack effective insolvency legal frameworks. These issues are considered as they are part of the reasons why forum shopping is at present practicably necessary and to identify ways that it is a problem.

[19] See for example *Re Aerovias Nacionales de Colombia SA Avianca* (2004) 303 BR 1. The case gives examples of some of the issues, which include that insolvency laws in developing countries are new and untested, and that there are no relevant types of insolvency proceeedings that the multinational companies require.

4.3.1 New and Untested Insolvency Laws in Developing Countries

Insolvency laws have been evolving in most countries.[20] Various factors have pushed countries to advance their insolvency laws to effectively deal with financially distressed companies, including multinational companies. These factors will be briefly considered as they have acted as drivers for the reform trend identified, as discussed further in 4.3.1.1 below. The 1997 Asian financial crisis affected Asian countries,[21] and impacted the IMF's global growth projection.[22] Some of the Asian countries at the time were termed as developing countries, examples being Philippines and Thailand.[23] In the Western Hemisphere, the 2008 US financial crisis was the precursor to a global economic downturn, credit crunch and a significant decrease in cross-border lending, trade finance and foreign direct investment.[24] The 2008 US financial crisis and the Asian financial crisis together negatively impacted cross-border trade.[25] Thus, one of the consequences of these crises was the financial distress encountered by companies trading in more than one country, which then needed to engage in cross-border insolvency.[26]

A financial crisis is not the only factor that has contributed to the advancement of insolvency laws. In the African continent, where most countries can be described as developing countries with some exceptions such as Mauritius and Seychelles, there has

[20] Doing Business, 'Resolving Insolvency' (2019) The World Bank < https://www.doingbusiness.org/en/data/exploretopics/resolving-insolvency> accessed 21 May 2020.
[21] The Asian financial crisis affected countries that were developed, such as Japan, South Korea and others that were developing such as Philippines, Thailand among others.
[22] Morris Goldstein, *The Asian Financial Crisis: Causes, Cures, and Systemic Implications* (Peterson Institute for International Economics 1998) 1.
[23] Morris Goldstein, *The Asian Financial Crisis: Causes, Cures, and Systemic Implications* (Peterson Institute for International Economics 1998) 1.
[24] Elena Cirmizi, Leora Klapper and Mahesh Uttamchandani, 'The Challenges of Bankruptcy Reform' (2012) 27(2) The World Bank Research Observer 185.
[25] See for example Morris Goldstein, *The Asian Financial Crisis: Causes, Cures, and Systemic Implications* (Peterson Institute for International Economics 1998) 1; and Randall D. Guynn and Davis Polk, 'The Financial Panic of 2008 and Financial Regulatory Reform' (2010) Harvard Law School Forum on Corporate Governance < https://corpgov.law.harvard.edu/2010/11/20/the-financial-panic-of-2008-and-financial-regulatory-reform/> accessed 4 May 2020.
[26] See for example Selcuk Kendirli, Muhammet Cankaya and Cagatay Altug, 'The Effects of Global Economic Crisis of the 2008 to Finacial Statements and Liquidity Ratios which Companies are Settled in BIST Energy Sector (2005-2013 Term Review) 6(1) Journal of Economic Development, Environment and People 6; and Paul G. Barr, 'Asian Turmoil Spaws Many Theories' (1997) 25(2) Pensions & Investments 32.

been an increase in foreign investment and cross-border financial transactions.[27] As part of the financial architecture to support increased foreign investments and cross-border transactions, African countries have been prompted to contemplate their insolvency laws with an aim to reform them in order to attract outside investments.[28] The change in African countries' insolvency laws caters to cross-border aspects of dealing with investors in more than one region.

The World Bank and UNCITRAL have been champions in advancing insolvency laws both on a national and international level to provide principles and guidelines to advise states on the optimal design of insolvency procedures.[29] They have encouraged the reform of insolvency laws in developing countries to be in line with other nations that are advancing their insolvency laws to cater to domestic insolvencies and on an international level as well.[30] Initiatives such as the 'Doing Business' reports have been influential as countries have tried to improve their rankings by inter alia enacting changes to insolvency laws.[31] As a by-product of the change, it can be hoped that multinational companies will utilise developing countries' insolvency laws, possibly mitigating the impact of forum shopping.

As mentioned in previous chapters, insolvency laws, specifically corporate insolvency laws, provide for means by which companies in financial crisis or near financial crisis can deal

[27] The World Bank, 'World Bank Country and Lending Groups' (2021) The World Bank < https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups> accessed 20 May 2021, some of the exemptions are Seychelles and Mauritius.
[28] Damilola Odetola, 'Corporate Insolvency Reforms in Emerging Africa: The Need, Challenges and Prospects' (2017) 28(10) I.C.C.L.R. 362.
[29] The World Bank, 'Principles for Effective Insolvency and Creditor/Debtor Regimes' (2016) The World Bank < http://pubdocs.worldbank.org/en/919511468425523509/ICR-Principles-Insolvency-Creditor-Debtor-Regimes-2016.pdf> accessed 27 December 2019; United Nations Commission on International Trade Law , 'Legislative Guide on Insolvency Law' (2005) United Nations Commission on International Trade Law < https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf > accessed 4 January 2020.
[30] The World Bank, 'Principles for Effective Insolvency and Creditor/Debtor Regimes' (2016) The World Bank < http://pubdocs.worldbank.org/en/919511468425523509/ICR-Principles-Insolvency-Creditor-Debtor-Regimes-2016.pdf> accessed 27 December 2019; United Nations Commission on International Trade Law , 'Legislative Guide on Insolvency Law' (2005) United Nations Commission on International Trade Law < https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf > accessed 4 January 2020.
[31] For a critical review of the methodology and impact of this system see however Gerard McCormack, 'Why "Doing Business" with the World Bank May Be Bad for You' (2018) 19 Eur Bus Org Law Rev 649.

with the issues that arise by way of liquidation or reorganisation, accounting for the stakeholders[32] and the companies themselves in accordance with local priorities. However, no matter how well they are designed, laws are insufficient in themselves, and it takes time for supporting institutions to develop. This section examines the challenges encountered by multinational companies in developing countries with new and untested insolvency law reforms and how those challenges affect their decisions to forum shop in other jurisdictions such as the US and UK. The sections will also examine how developing countries can attract multinational companies to use their new insolvency laws rather than forum shopping.

4.3.1.1 Drivers for Insolvency Law Reforms in Developing Countries

Before dealing with the challenges encountered by multinational companies in countries with new or reformed insolvency laws, it is important to understand in more detail how the above-stated factors affected insolvency laws in various countries. The section will return to the Asian financial crisis for a deeper examination, followed by the 2008 US financial crisis and finally, the increase of investment in Africa.

4.3.1.1.1 Asian Financial Crisis

The Asian crisis occurred in mid-1997.[33] Some of the countries affected by the Asian financial crisis were developing countries, such as Thailand, the Philippines, Malaysia and Indonesia.[34] Within a period of 6 months, investors in the East Asian region started moving money out of the area, reversing the trend of inward capital flow of the preceding years.[35] There was concern by the investors regarding transparency in the financial sector,

[32] Stakeholders of a company include creditors, employees among others that are affected by the insolvency of a company.
[33] Steven Radelet, Jeffrey D. Sachs, Richard N. Cooper and Barry P. Bosworth, 'The East Asian Financial Crisis: Diagnosis, Remedies, Prospects' (1998) 1998(1) Brookings Papers on Economics Activity 1.
[34] Elinor Kim, 'Corporate Insolvency Law & Practice in South Korea in the Aftermath of the Asian Financial Crisis' (2005) 21 Conn J Int'l L 155.
[35] Carmen Reinhart and Guillermo A Calvo, 'Capital Flow Reversals, The Exchange Rate Debate, and Dollarization' (1999) 36(3) Finance and Development 1.

specifically the financial market, of the East Asian countries that were affected.[36] Another factor contributing to the Asian financial crisis was that some of the Asian countries experienced a high number of short-term foreign investments in the country as opposed to long-term investments.[37] The short-term foreign investments exposed the countries to the risk of investors pulling out their investments with short notice, and the risk was realised when the Asian financial crisis occurred. The above-mentioned factors are some of the reasons that have been given for the Asian financial crisis, but they are not exhaustive. Most of the research on the factors that contributed to the Asian financial crisis has identified a lack of transparency and short-term foreign investment as significant.[38] No matter the reason for the crisis, the Asian financial crisis led to the change of legal frameworks in Asia, including reforms in insolvency laws.

The Asian financial crisis forced the Asian countries affected to evaluate their laws in order to avoid or mitigate another financial crisis.[39] The IMF played a significant role in encouraging legal reforms in Asia through the conditions that it attached to the funds that it provided to the Asian countries in the financial crisis. Those countries reformed their laws in line with the IMF requirements plus other international organisations[40] to receive

[36] Bruce G. Carruthers and Terence C. Halliday, 'Institutionalizing Creative Destruction: Predictable and Transparent Bankruptcy Law in the Wake of the East Asian Financial Crisis' in Meredith Jung-En Woo *Neoliberalism and Institutional Reform in East Asia a Comparative Study* (Palgrave Macmillan 2007).
[37] Steven Radelet, Jeffrey D. Sachs, Richard N. Cooper and Barry P. Bosworth, 'The East Asian Financial Crisis: Diagnosis, Remedies, Prospects' (1998) 1998(1) Brookings Papers on Economics Activity 1.
[38] See for example Steven Radelet, Jeffrey D. Sachs, Richard N. Cooper and Barry P. Bosworth, 'The East Asian Financial Crisis: Diagnosis, Remedies, Prospects' (1998) 1998(1) Brookings Papers on Economics Activity 1; Bruce G. Carruthers and Terence C. Halliday, 'Institutionalizing Creative Destruction: Predictable and Transparent Bankruptcy Law in the Wake of the East Asian Financial Crisis' in Meredith Jung-En Woo *Neoliberalism and Institutional Reform in East Asia a Comparative Study* (Palgrave Macmillan 2007); Gregory W. Noble and John Ravenhill, "Causes and Consequences of the Asian Financial Crisis" in Gregory W Noble and John Ravenhill (eds), *The Asian Financial Crisis and the Architecture of Global Finance* (Cambridge University Press 2000) among others.
[39] Stijn Claessens, Simeon Djankov and Ashoka Mody (eds), Resolution of Financial Distress An International Perspective on the Design of Bankruptcy Laws (The World Bank 2001) 25.
[40] International organisations formed the Forum for Asian Insolvency Reform, which brought together relevant parties to discuss and promote insolvency reform in the region: The World Bank, 'Forum for Asian Insolvency Reforms (FAIR)' (2016) < https://www.worldbank.org/en/topic/financialsector/brief/forum-for-asian-insolvency-reform-fair> accessed 1 May 2020.

the bailout funds and ensure that they provided confidence to foreign investors.[41] International organisations formed the Forum for Asian Insolvency Reform (FAIR), which brought together relevant parties to discuss and promote insolvency reform in the region. Asian developing countries were particularly keen to heed the conditions of the IMF because it showed that the countries had improved stability and the risk of investment could be calculated with greater confidence.[42] Additionally, legal reforms that included insolvency law reforms showed that the Asian developing countries in the crisis could deal with companies' insolvencies better than previously.[43] Thus, the Asian financial crisis was a catalyst in the reform of insolvency laws in East Asian developing countries, especially Thailand, the Philippines, Malaysia and Indonesia.[44]

The research conducted as to the reasons for the Asian financial crisis highlighted that there were no legal frameworks or that present legal frameworks were insufficient to deal with companies in insolvency sufficiently according to a global standard.[45] For example, before and during the Asian financial crisis, South Korea's insolvency laws did not have means to deal with distressed companies efficiently and fairly.[46] After the Asian financial crisis, new insolvency laws provided for insolvency legal frameworks that catered to South Korean companies' rehabilitation and winding up.[47] In addition, there was a provision of cross-border insolvency legal frameworks put in place for the first time.[48] In other East Asian countries in the financial crisis, such as Indonesia, a developing country, there was also a reform of the insolvency legal framework.[49] Therefore, east Asian countries in the

[41] See for example OECD, *Asian Insolvency Systems: Closing The Implementation Gap* (OECD 2007) 55-58, China, Japan, South Korea among others.
[42] The World Bank, 'Forum for Asian Insolvency Reforms (FAIR)' (2016) < https://www.worldbank.org/en/topic/financialsector/brief/forum-for-asian-insolvency-reform-fair> accessed 1 May 2020.
[43] OECD, *Asian Insolvency Systems: Closing The Implementation Gap* (OECD 2007), 55-58.
[44] Elinor Kim, 'Corporate Insolvency Law & Practice in South Korea in the Aftermath of the Asian Financial Crisis' (2005) 21 Conn J Int'l L 155.
[45] The World Bank, 'Forum for Asian Insolvency Reforms (FAIR)' (2016) < https://www.worldbank.org/en/topic/financialsector/brief/forum-for-asian-insolvency-reform-fair> accessed 1 May 2020.
[46] Elinor Kim, 'Corporate Insolvency Law & Practice in South Korea in the Aftermath of the Asian Financial Crisis' (2005) 21 Conn J Int'l L 155.
[47] OECD, *Asian Insolvency Systems: Closing The Implementation Gap* (OECD 2007) 56.
[48] OECD, *Asian Insolvency Systems: Closing The Implementation Gap* (OECD 2007) 56.
[49] Bankruptcy Act 1998 (Indonesia) followed by Amendment to Bankruptcy Act 2004.

crisis took the step to reform their insolvency laws to fill the gaps revealed during the crisis.[50]

The Asian region is a good example of regional best practice geared towards reforming insolvency laws.[51] This is because once the Asian crisis identified there was a need for insolvency reforms, several international bodies concerned came together to form FAIR. The organisations are Organisation of Economic Co-operation and Development (OECD), The Asian-Pacific Economic Cooperation forum (APEC), the World Bank and the Asian Development Bank (ADB) with the support from other private and public sector experts.[52] The one objective of FAIR contributes to the improvement of insolvency laws in the region in line with local legal systems, culture and practices.[53] FAIR also aims to support the region by monitoring and evaluating insolvency reforms to offer more assistance if needed in further insolvency reforms.[54] Other regions could emulate a similar approach that ensures that once insolvency laws are reformed they are monitored to identified if further interventions are required. FAIR was also a contributor to new insolvency laws in the Asian region.[55]

The new insolvency laws were aimed at reforming out-of-date insolvency laws, providing for reorganisation, in some instances creating specialist insolvency courts and promoting

[50] See for example Bankruptcy Act 1998 (Indonesia) followed by Amendment to Bankruptcy Act 2004; Pengurusan Danaharta National Berhad Act 1998 (Malaysia): 1998; 1998, 1999, and 2000 Amendments to the Bankruptcy Act, Bankruptcy Court Act 1999 (Thailand).
[51] The World Bank, 'Forum for Asian Insolvency Reforms (FAIR)' (2016) < https://www.worldbank.org/en/topic/financialsector/brief/forum-for-asian-insolvency-reform-fair> accessed 1 May 2020.
[52] OECD, 'Insolvency in Asia – Forum on Asian Insolvency Reform (FAIR)' (unknown) OECD < https://www.oecd.org/corporate/ca/corporategovernanceprinciples/insolvencyinasia-forumonasianinsolvencyreformfair.htm#:~:text=FAIR%20gathers%20key%20policy%20makers, meet%20on%20a%20regular%20basis.> accessed 29 May 2021.
[53] The World Bank, 'Forum for Asian Insolvency Reforms (FAIR)' (2016) < https://www.worldbank.org/en/topic/financialsector/brief/forum-for-asian-insolvency-reform-fair> accessed 1 May 2020.
[54] OECD, 'Insolvency in Asia – Forum on Asian Insolvency Reform (FAIR)' (unknown) OECD < https://www.oecd.org/corporate/ca/corporategovernanceprinciples/insolvencyinasia-forumonasianinsolvencyreformfair.htm#:~:text=FAIR%20gathers%20key%20policy%20makers, meet%20on%20a%20regular%20basis.> accessed 29 May 2021.
[55] The World Bank, 'Forum for Asian Insolvency Reforms (FAIR)' (2016) < https://www.worldbank.org/en/topic/financialsector/brief/forum-for-asian-insolvency-reform-fair> accessed 1 May 2020.

out-of-court insolvency settlements.[56] It was especially important for the East Asian countries falling into the category of developing countries to reform their insolvency laws. The insolvency law reforms had to be in line with international standards to attract investments and funding as they bore the financial crisis significantly and therefore required outside investment to recover.[57] The approaches taken provide examples for other developing countries in different parts of the globe, which arguably ought to take a similar approach of reforming their insolvency laws to attract inward investment and be in line with international insolvency standards. From that investment there may grow greater confidence in local insolvency laws: investors are likely to utilise reformed insolvency laws where they have chosen to invest in that country, in part due to the reformed insolvency laws. The use of 'home country' insolvency law is most predictable and predictable approaches are valuable for investors in assessing risk.

4.3.1.1.2 The 2008 US Financial Crisis

The 2008 US financial crisis, which began with the collapse of the US real estate market that started in 2007, left an impact on the global economy.[58] The 2008 US financial crisis led to a decline in the need for goods and services from both inside and outside the US.[59] Domestic and foreign companies that supplied goods and services to the US felt the decrease in demand, leading to some of the companies suffering financial difficulties that

[56] Soogeum Oh, 'Comparative Overview of Asian Insolvency Reforms in the Last Decade' (2006) OECD < http://siteresources.worldbank.org/GILD/Resources/Oh5.pdf> accessed 10 November 2019.
[57] Soogeum Oh, 'Comparative Overview of Asian Insolvency Reforms in the Last Decade' (2006) OECD < http://siteresources.worldbank.org/GILD/Resources/Oh5.pdf> accessed 10 November 2019; and The World Bank, 'Forum for Asian Insolvency Reforms (FAIR)' (2016) < https://www.worldbank.org/en/topic/financialsector/brief/forum-for-asian-insolvency-reform-fair> accessed 1 May 2020.
[58] Randall D. Guynn and Davis Polk, 'The Financial Panic of 2008 and Financial Regulatory Reform' (2010) Harvard Law School Forum on Corporate Governance < https://corpgov.law.harvard.edu/2010/11/20/the-financial-panic-of-2008-and-financial-regulatory-reform/> accessed 4 May 2020.
[59] Elena Cirmizi, Leora Klapper and Mahesh Uttamchandani, 'The Challenges of Bankruptcy Reform' (2012) 27(2) The World Bank Research Observer 185.

led them to commence insolvency proceedings in 2008 and 2009.[60] There was an increase in the number of companies entering into insolvency proceedings worldwide after the 2008 US financial crisis.[61] The impact of the 2008 US financial crisis was not only felt by developing countries but also developed countries as well.[62] For example, there was an increase by 5.88% in 2008 of corporate insolvencies in the UK compared to 2007, according to the Ministry of Justice.[63]

There was a decrease in foreign portfolio investments and foreign direct investment to developing countries due to the 2008 US financial crisis.[64] Foreign portfolio investments and foreign direct investments are how multinational companies operated before 2008 and continue to operate presently in developing countries.[65] It is important to understand what is meant by foreign portfolio investments and foreign direct investment in order to understand how multinational companies in developing countries may have been affected by the 2008 US financial crisis and how this led to them withdrawing their investments in developing countries.

[60] Elena Cirmizi, Leora Klapper and Mahesh Uttamchandani, 'The Challenges of Bankruptcy Reform' (2012) 27(2) The World Bank Research Observer 185; Paulo Correa and Mariana Lootty, 'The Impact of the Corporate Sector in Europe and Central Asia: Evidence from a Firm-Level Survey' (2011) 1(1) The World Bank < http://documents.worldbank.org/curated/en/742641468022737863/The-impact-of-the-global-economic-crisis-on-the-corporate-sector-in-Europe-and-Central-Asia-evidence-from-a-firm-level-survey> accessed 3 May 2020.
[61] See for example Ministry of Justice, 'Company Winding Up and Bankruptcy Petition Statistics (NS)' (2009) Ministry of Justice < https://webarchive.nationalarchives.gov.uk/+/http://www.justice.gov.uk/publications/companywindingupandbankruptcy.htm> accessed 2 July 2020, show the increase in figures of companies in distress in the UK during and after the 2008 financial crisis.
[62] Dirk Willem te Velde and et. all., 'The Global Financial Crisis and Developing Countries' (2010) Overseas Development Institute Working Paper 316.
[63] Ministry of Justice, 'Company Winding Up and Bankruptcy Petition Statistics (NS)' (2009) Ministry of Justice < https://webarchive.nationalarchives.gov.uk/+/http://www.justice.gov.uk/publications/companywindingupandbankruptcy.htm> accessed 2 July 2020.
[64] Dirk Willem te Velde and et. all., 'The Global Financial Crisis and Developing Countries' (2010) Overseas Development Institute Working Paper 316.
[65] Marcin Humanicki, Robert Kelm and Krzysztof Olszewski, 'Foreign Direct Investment and Foreign Portfolio Investment in the Contemporary Globalization World: Should They be Still Treated Separately?' (2014) MPRA Paper No. 58410.

Foreign portfolio investments are termed as a 'hands-off' type of investment by foreign investors where multinational companies invest in the shares or any other part of the company but do not play an active role in the management of the company, for example buying stocks in the stock market.[66] On the other hand, foreign direct investments are described as investments that enable the foreign investors to have a controlling ownership of the business, for example foreign investors merging with local companies or opening facilities in developing countries among other forms of direct involvement.[67] In the cases of both foreign portfolio investments and foreign direct investments during the 2008 US financial crisis, foreign investors in developing countries tried to mitigate the impact of the crisis on their businesses as a whole by withdrawing their investments.[68]

One example of the impact of the withdrawal of foreign investors from developing countries during the 2008 US financial crisis was the correlation between the decrease by 46% of the Nairobi Stock Exchange, in Kenya, in February 2009 as compared to the previous year.[69] Another example, in Bangladesh, $150 million worth of foreign portfolio investment was withdrawn between 2008 and 2009 according to a study carried out by Overseas Development Institute.[70] The impact of a decrease in foreign portfolio investment and foreign direct investment in developing countries led to an increase in the number of distressed companies in developing countries, since the investments were being taken out of the countries that were needed by some of the businesses in developing countries.

[66] Marcin Humanicki, Robert Kelm and Krzysztof Olszewski, 'Foreign Direct Investment and Foreign Portfolio Investment in the Contemporary Globalization World: Should They be Still Treated Separately?' (2014) MPRA Paper No. 58410.
[67] Marcin Humanicki, Robert Kelm and Krzysztof Olszewski, 'Foreign Direct Investment and Foreign Portfolio Investment in the Contemporary Globalization World: Should They be Still Treated Separately?' (2014) MPRA Paper No. 58410.
[68] Dirk Willem te Velde and et. all., 'The Global Financial Crisis and Developing Countries' (2010) Overseas Development Institute Working Paper 316.
[69] Dirk Willem te Velde and et. all., 'The Global Financial Crisis and Developing Countries' (2010) Overseas Development Institute Working Paper 316.
[70] Dirk Willem te Velde and et. all., 'The Global Financial Crisis and Developing Countries' (2010) Overseas Development Institute Working Paper 316.

As a result of the financial difficulties caused by these withdrawals of overseas investment, developing countries sought to reform their insolvency laws to more effectively deal with the issues with their insolvency laws that were highlighted by the crisis.[71] In particular, some developing countries lacked effective insolvency frameworks to deal with saving viable companies and winding up companies that were not viable at a low cost.[72] The 2008 US financial crisis highlighted that some of the insolvency laws in developing countries were out of date and required reforming to deal with global best practices of that period.

4.3.1.1.3 Growth in Developing Countries, specifically African Countries[73]

Africa, whose majority of countries are considered developing countries, has experienced immense growth since recovering from the global downturn experienced as a result of firstly from the Asian crisis and followed by the 2008 US financial crisis.[74] Some of the growth can be attributed to the increase of foreign investors in the continent, both from the west and east.[75] Foreign investment has been made in infrastructure, such as roads and rails in Africa. In Kenya, Chinese investors have contributed to improving the existing rail and road networks that have improved trade flow not only in Kenya but in the greater East African region.[76] The improvement of infrastructures in Africa, which is mostly due to foreign investors, as has been seen in the case of Kenya, has led in turn to the increase of foreign direct investment in Africa.

---

[71] Elena Cirmizi, Leora Klapper and Mahesh Uttamchandani, 'The Challenges of Bankruptcy Reform' (2012) 27(2) The World Bank Research Observer 185.
[72] Elena Cirmizi, Leora Klapper and Mahesh Uttamchandani, 'The Challenges of Bankruptcy Reform' (2012) 27(2) The World Bank Research Observer 185.
[73] The World Bank, 'World Bank Country and Lending Groups' (2021) The World Bank < https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups> accessed 20 May 2021, majority of African countries are classified as developing. Some of the exemptions are Seychelles and Mauritius.
[74]Damilola Odetola, 'Corporate Insolvency Reforms in Emerging Africa: The Need, Challenges and Prospects' (2017) 28(10) I.C.C.L.R. 362.
[75] United Nations Conference on Trade and Development, 'Foreign Direct Investment to Africa Defies Global Slump, Rises 11%' (2019) United Nations Conference on Trade and Development < https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=2109> accessed 1 July 2020.
[76] See for example Kenyan Investment, 'Massive Infrastructure Investment' (2020) Kenyan Investment <http://www.invest.go.ke/infrastructure/> accessed 1 July 2020.

The World Bank has pushed countries in Africa to reform their insolvency laws in order to ensure that African countries maximise their potential to attract foreign investments.[77] This push has not been influenced by a global financial crisis, unlike countries in Asia, that were given the condition for bailout assistance by the IMF that they should reform their insolvency legal frameworks in the aftermath of the crisis.[78] Additionally, the World Bank and IMF used financial assistance in the form of aid as an opportunity to attach conditions geared towards insolvency law reforms.[79] Examples of countries that have been influenced to reform their insolvency laws as part of their foreign aid are Ghana and Kenya.[80] Kenya introduced a new insolvency act called The Insolvency Act 2015 while Ghana introduced the Corporate Restructuring and Insolvency Act in 2020.

The World Bank considers that African countries stand a better chance of receiving foreign loans at better interest rates if they have effective insolvency legal frameworks that can improve their economy and thus attract multinational companies to invest in Africa.[81] Multinational companies are more likely to invest in countries where they can reasonably calculate their investment risk if an insolvency situation arises. Some African countries have reformed their insolvency laws to attract foreign investments and credit, such as Nigeria, Kenya, Malawi, among others.[82] Hence, an international organisation can influence developing countries to reform their insolvency laws, as has been observed in

[77] Antonia Menezes, Andres Martinez, Fernando Dancausa and Nina Mocheva, 'Insolvency and Debt Resolution' (2017) The World Bank Group <https://www.worldbank.org/en/topic/financialsector/brief/insolvency-and-debt-resolution> accessed 4 July 2020.
[78] Discussed in detail in section 4.3.1.1.1.
[79] Fancy Chepkemoi Too, 'Drivers of Insolvency Reforms in Kenya' (2016) 4(1) NIBLeJ 5 [30].
[80] Fancy Chepkemoi Too, 'Drivers of Insolvency Reforms in Kenya' (2016) 4(1) NIBLeJ 5 [30]; and David Dollar, Shantayanan Devarajan and Torgny Holmgren, *Aid and Reform in Africa* (World Bank Publications, 2001).
[81] Debt Resolution & Business Exit Team of the World Bank Group Competitiveness Global Practice, 'Debt Resolution and Business Exit' (2014) The World Bank Group <http://documents1.worldbank.org/curated/en/912041468178733220/pdf/907590VIEWPOIN003430Debt0Resolution.pdf > accessed 4 July 2020.
[82] Anthony I Idigbe, 'INSOL Africa Roundtable Tackles Key Market Issues' (2010) International Law Office < https://www.internationallawoffice.com/Newsletters/Insolvency-Restructuring/International/Punuka-Attorneys-Solicitors/INSOL-Africa-Roundtable-tackles-key-market-issues> accessed 4 July 2020.

some African countries, resulting in the developing countries' economic growth and attracting multinational companies.

4.3.1.2 Issues Raised Concerning using of New or Reformed Insolvency Laws

Reforming insolvency legal frameworks in developing countries does not guarantee that multinational companies will utilise local insolvency laws during insolvency. Since multinational companies by nature are multi-jurisdictional, they can potentially apply insolvency laws of more than one jurisdiction, including local developing countries insolvency laws,[83] whereas others may 'shop' for insolvency laws and institutions in jurisdictions where the threshold for opening proceedings is low enough. Some multinational companies forego the use of developing countries' insolvency laws and commence insolvency proceedings in the US or the UK instead, examples are Aerovias Nacionales de Colombia SA Avianca (Avianca), which commenced proceedings in the US[84] and Smile Telecom, a pan-African network, which recently made use of the new UK restructuring plan to resolve financial difficulties caused by the Coronavirus crisis.[85]

Some multinational companies state in their applications for opening insolvency proceedings in the US and UK that developing countries' new insolvency laws are not adequate and that is why they do not utilise them, for example Avianca.[86] Others identified issues are that the new laws are good on paper but are complex to apply; the new laws are untested; the new laws might not cater for the type of proceedings that the

[83] Irit Mevorach, 'European Insolvency Law in a Global Context' (2011) 7 JBL 666.
[84] *In re Aerovias Nacionales de Colombia SA Avianca* (2003) 303 BR 1; and Adrian Walters, 'United States' Bankruptcy Jurisdiction over Foreign Entities: Exorbitant or Congruent?' (2017) 17(2) Journal of Corporate Law Studies 367 [368]. The case will be discussed in more detail below.
[85] Hogan Lovells, 'Hogan Lovells advises senior lenders on Smile Telecoms' restructuring implemented through High Court sanction of restructuring plan and cross-class cram-down' https://www.hoganlovells.com/en/news/hogan-lovells-advises-senior-lenders-on-the-restructuring-of-smile-telecoms-restructuring-implemented-through-high-court-sanction-of-restructuring-plan-and-cross-class-cram-down (14 May 2021).
[86] See for example *Re Aerovias Nacionales de Colombia SA Avianca* (2004) 303 BR 1; Francisco Javier Illanes and Sergio Balharry, 'Assessing a New Evolution in Chile: In-Court Reorganization Proceedings' (2017-2018) 5 Emerging Market Restructuring Journal < https://www.clearygottlieb.com/-/media/files/emrj-materials/winter-2017-issue-no-5/assessing-a-new-evolution-in-chile--incourt-reorganization-proceedings.pdf> accessed 5 July 2020.

multinational companies require; new laws might not cater to the unique needs of multinational companies at all; new laws require further amendments and among other reasons.[87] It is important to look at the reasons that have been cited by multinational companies for not using the reformed insolvency laws in developing countries and whether those issues can be mitigated in order to respond to the risk of forum shopping.

4.3.1.2.1 Insolvency Laws being Good on Paper but Complex in Application

One of the reasons given for not utilising the reformed insolvency laws of developing countries is that the laws are good on paper but complex in application.[88] The majority of reforms introduced in developing countries are not new concepts. International bodies such as the World Bank, the IMF and the UN through UNCITRAL have guidelines and principles that recommend the content and function of insolvency laws and countries that have advanced insolvency laws offer further practical examples.[89] The Chapter 11 framework in the US provides a good example of an effective reorganisation procedure .[90] This concept of reorganisation has been adopted by both developed countries and by developing countries.[91] Since restructuring has been a long-standing feature in US law and has been shown to work well as a mechanism to save the business of a company, developing countries in the process of reforming their insolvency law frameworks may choose to adopt a Chapter 11 style of reorganisation procedure. Transplanting legal

[87] See for example Benny S Tabalujan, 'Indonesia: Issues in Insolvency Law — I International Briefings' (1998) 5 JIBFL 199; and *Re Aerovias Nacionales de Colombia SA Avianca* (2004) 303 BR 1.
[88] Benny S Tabalujan, 'Indonesia: Issues in Insolvency Law — I International Briefings' (1998) 5 JIBFL 199, noting preferences for out of court resolution in Indonesia, but the same reasons could also be used to justify forum shopping.
[89] The World Bank, 'Principles for Effective Insolvency and Creditor/Debtor Regimes' (2016) The World Bank < http://pubdocs.worldbank.org/en/919511468425523509/ICR-Principles-Insolvency-Creditor-Debtor-Regimes-2016.pdf> accessed 27 December 2019; United Nations Commission on International Trade Law , 'Legislative Guide on Insolvency Law' (2005) United Nations Commission on International Trade Law < https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf > accessed 4 January 2020.
[90] Title 11 United States Code Annotated, Chapter 11.
[91] See for example Wai Yee Wan and Gerald McCormack, 'Transplanting chapter 11 of the US Bankruptcy Code into Singapore's Restructuring and Insolvency Laws: Opportunities and Challenges' (2018) Journal of Corporate Law studies < https://ink.library.smu.edu.sg/sol_research/277> accessed 5 July 2020.

frameworks such as Chapter 11 is challenging, however, as there is a question as to whether an exact replica of a law in one country can function effectively in the legal system into which it has been transplanted.[92]

Developing countries may find it difficult to successfully transplant insolvency processes from other countries.[93] The manner in which an insolvency concept has been adopted in another country that is being borrowed from may not work in the developing country that it is transplanted to, due to the difference in certain matters such as legal and social culture, policies behind legal insolvency principles and laws among others.[94] In the example of reorganisation, US reorganisation, at least as it is drafted,[95] is geared towards the debtor being in control of the reorganisation process,[96] subject to court oversight and monitoring by the US Trustee and a creditors' committee. This approach might not be suitable for adoption in developing countries; developing countries insolvencies may lack adequate supporting institutions, as they appear in the US, to those developing countries might prove application difficult.[97] Reformed insolvency laws in developing countries, including those that have been transplanted, ought to take into account the developing countries' culture and policies in order to ensure that they are adapted to needs of the country.[98] The adaptation of the transplanted laws in a manner that is matched to the

[92] See for example Pierre Lagrand, 'The Impossibility of 'Legal Transplant'' (1997) 4(2) Maastricht Journal of European and Comparative Law 111, 114.
[93] Pierre Lagrand, 'The Impossibility of 'Legal Transplant'' (1997) 4(2) Maastricht Journal of European and Comparative Law 111, 114.
[94] Charles W Mooney Jr., 'Lost in Transplantation: Modern Principles of Secured Transactions Law as Legal Transplants' (2020) Faculty Scholarship at Penn Law 2174.
[95] In practice, creditors may gain significant control as a condition of post-commencement financing: David A. Skeel Jr. 'Creditors' Ball: The New New Corporate Governance in Chapter 11' (2003) 152 U. Pa. L. Rev. 917.
[96] Alan Watson, *Legal Transplant: An Approach to Comparative Law* (2st ed, 1993 University of Georgia Press) 96; Wai Yee Wan and Gerald McCormack, 'Transplanting chapter 11 of the US Bankruptcy Code into Singapore's Restructuring and Insolvency Laws: Opportunities and Challenges' (2018) Journal of Corporate Law studies < https://ink.library.smu.edu.sg/sol_research/277> accessed 5 July 2020.
[97] Alan Watson, *Legal Transplant: An Approach to Comparative Law* (2st ed, 1993 University of Georgia Press) 96; Wai Yee Wan and Gerald McCormack, 'Transplanting chapter 11 of the US Bankruptcy Code into Singapore's Restructuring and Insolvency Laws: Opportunities and Challenges' (2018) Journal of Corporate Law studies < https://ink.library.smu.edu.sg/sol_research/277> accessed 5 July 2020.
[98] Wai Yee Wan and Gerald McCormack, 'Transplanting chapter 11 of the US Bankruptcy Code into Singapore's Restructuring and Insolvency Laws: Opportunities and Challenges' (2018) Journal of Corporate Law studies < https://ink.library.smu.edu.sg/sol_research/277> accessed 5 July 2020.

needs of the developing countries may give multinational companies some confidence to utilise these laws since their provisions will be more familiar as tried and tested processes in other jurisdictions.[99]

Some developing countries have adopted transplanted laws to cater to national needs and improve their insolvency legal frameworks; an example is Chile.[100] Developed countries as well transplant insolvency laws from other developed countries. For example, China modelled its restructuring law based on the German model (note that the German model was modelled after the US Chapter 11).[101] However, China's restructuring includes a requirement of an employee resettlement plan, in keeping with the socialist market economy.[102] The courts are also required to safeguard the employees' rights and interests. In the Chilian, Chile adapted procedures for the reorganisation of companies into the Chilean insolvency law, which commenced in 2014, but was not a copy and paste approach of the US reorganisation but was rather adapted to the characteristics of the jurisdiction.[103] One effect of the US reorganisation process is that the reorganisation plan applies to all creditors once adopted; however, Chilean insolvency laws are geared toward the protection of the rights and interests of the creditors. This is reflected by the fact that the new Chilean reorganisation plan, once adopted, does not apply to all creditors; there is a

[99] In a different context see the Association for Financial Markets in Europe's preference for Chapter 11 modelled procedures: https://www.afme.eu/Key-issues/Insolvency-Reform.
[100] See Francisco Javier Illanes and Sergio Balharry, 'Assessing a New Evolution in Chile: In-Court Reorganization Proceedings' (2017-2018) 5 Emerging Market Restructuring Journal < https://www.clearygottlieb.com/-/media/files/emrj-materials/winter-2017-issue-no-5/assessing-a-new-evolution-in-chile--incourt-reorganization-proceedings.pdf> accessed 5 July 2020; Rebecca Parry and Yingxiang Long 'China's Enterprise Banking Law, Building and Infrastructure Towards a Market-Based Approach' (2020) 20(1) Journal of Corporate Studies 157.
[101] Rebecca Parry and Yingxiang Long 'China's Enterprise Banking Law, Building and Infrastructure Towards a Market-Based Approach' (2020) 20(1) Journal of Corporate Studies 157.
[102] Rebecca Parry and Yingxiang Long 'China's Enterprise Banking Law, Building and Infrastructure Towards a Market-Based Approach' (2020) 20(1) Journal of Corporate Studies 157.
[103] See Francisco Javier Illanes and Sergio Balharry, 'Assessing a New Evolution in Chile: In-Court Reorganization Proceedings' (2017-2018) 5 Emerging Market Restructuring Journal < https://www.clearygottlieb.com/-/media/files/emrj-materials/winter-2017-issue-no-5/assessing-a-new-evolution-in-chile--incourt-reorganization-proceedings.pdf> accessed 5 July 2020.

qualifying factor to be met in the application of the Chilean reorganisation plan to creditors.[104]

The approach taken by Chile shows that developing countries may transplant insolvency laws from other jurisdiction but the laws ought to be adapted in a manner that is reflective of the legal, social, and economic culture of the developing country: such a need is inherent in the flexibly, soft law, approach taken under the UNCITRAL Legislative Guide on Insolvency Law.[105] The soft law approach of the Model Law leaves countries to adapt it into domestic law in line with local policies and needs.[106] This might enable the developing countries' reformed insolvency laws to be applied more satisfactorily in that country but also to enhance the developing countries' insolvency laws to a global standard.

4.3.1.2.2 Insolvency Laws are New thus Untested

Another reason given for the lack of utilisation by multinational companies of developing countries' new or reformed insolvency laws, is that the laws are new and thus untested.[107] The concept of insolvency law being new can be looked at in different ways. One way of looking at the issue is that the new insolvency law is novel, and thus, the users, such as multinational companies (debtors), creditors or practitioners, may not be familiar with concepts in the new insolvency laws.[108] There is a possibility that multinational companies may not be willing for their matters to be a test case for the practitioners to gain their

[104] Francisco Javier Illanes and Sergio Balharry, 'Assessing a New Evolution in Chile: In-Court Reorganization Proceedings' (2017-2018) 5 Emerging Market Restructuring Journal < https://www.clearygottlieb.com/-/media/files/emrj-materials/winter-2017-issue-no-5/assessing-a-new-evolution-in-chile--incourt-reorganization-proceedings.pdf> accessed 5 July 2020.
[105] United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency.
[106] For a detailed discussion of hard and soft law see Irit Mevorach, 'A Fresh View on the Hard/Soft Law Divide: Implications for International Insolvency of Enterprise Groups' (2019) 40(3) Michigan Journal of International Law 505.
[107] See for example *Re Aerovias Nacionales de Colombia SA Avianca* (2004) 303 BR 1; Francisco Javier Illanes and Sergio Balharry, 'Assessing a New Evolution in Chile: In-Court Reorganization Proceedings' (2017-2018) 5 Emerging Market Restructuring Journal < https://www.clearygottlieb.com/-/media/files/emrj-materials/winter-2017-issue-no-5/assessing-a-new-evolution-in-chile--incourt-reorganization-proceedings.pdf> accessed 5 July 2020.
[108] See for example *Re Aerovias Nacionales de Colombia SA Avianca* (2004) 303 BR 1.

knowledge in the area.[109] The usage of inexperienced practitioners may be perceived by creditors as entailing a high unpredictable risk. Since they could not be sure if by applying the new or reformed insolvency laws the practitioners can achieve an agreeable outcome, the multinational companies may not be able to reasonably calculate their risk if proceedings are opened in the new or reformed insolvency jurisdiction,[110] rather than forum shopping. Additionally, the new or reformed laws in developing countries may not cater to the multinational companies' specific issues.[111] Therefore, multinational companies may prefer to forum shop to other jurisdictions such as the US or the UK, where there are well-established insolvency laws.[112]

Some multinational companies may opt not to forum shop to other jurisdictions but instead may choose to use older insolvency laws, if they have not been explicitly repealed and replaced by the new insolvency laws in developing countries.[113] A good example is a practice in United Arab Emirates (UAE), back when the new insolvency law was enacted in the early 2000s and had not been tested as of 2008.[114] The UAE, even though considered a developed country, offers a good example of reformed insolvency laws and their minimal

[109] See for example Wai Yee Wan and Gerald McCormack, 'Transplanting chapter 11 of the US Bankruptcy Code into Singapore's Restructuring and Insolvency Laws: Opportunities and Challenges' (2018) Journal of Corporate Law studies < https://doi.org/10.1080/14735970.2018.1491680> accessed 5 July 2020; Francisco Javier Illanes and Sergio Balharry, 'Assessing a New Evolution in Chile: In-Court Reorganization Proceedings' (2017-2018) 5 Emerging Market Restructuring Journal < https://www.clearygottlieb.com/-/media/files/emrj-materials/winter-2017-issue-no-5/assessing-a-new-evolution-in-chile--incourt-reorganization-proceedings.pdf> accessed 5 July 2020.

[110] See for example Wai Yee Wan and Gerald McCormack, 'Transplanting chapter 11 of the US Bankruptcy Code into Singapore's Restructuring and Insolvency Laws: Opportunities and Challenges' (2018) Journal of Corporate Law studies < https://ink.library.smu.edu.sg/sol_research/277> accessed 5 July 2020; Francisco Javier Illanes and Sergio Balharry, 'Assessing a New Evolution in Chile: In-Court Reorganization Proceedings' (2017-2018) 5 Emerging Market Restructuring Journal < https://www.clearygottlieb.com/-/media/files/emrj-materials/winter-2017-issue-no-5/assessing-a-new-evolution-in-chile--incourt-reorganization-proceedings.pdf> accessed 5 July 2020.

[111] See for example Unknown, 'Russia' (2003) International Financial Law Review 1.

[112] See for example Gerard McCormack, 'Bankruptcy Forum Shopping: The UK and US as Venues of Choice for Foreign Companies' (2014) 63 ICLQ 815.

[113] Latham & Watkins Restructuring & Special Situation Practice, 'COVID-19 Managing Financial Difficulties in the United Arab Emirates' (2020) Client Alert Commentary 2644, gives example of the practice in Dubai, which is not a developing country but the same approach can be taken in developing countries.

[114] Latham & Watkins Restructuring & Special Situation Practice, 'COVID-19 Managing Financial Difficulties in the United Arab Emirates' (2020) Client Alert Commentary 2644.

use by multinational companies.[115] Despite the fact that the UAE had introduced new insolvency laws, safeguarding creditors' rights during insolvency, they had not been engaged with as of writing this thesis; thus the laws have remained untested for an extended period.[116]

Another example of new insolvency laws not being engaged with is in Bahrain, a developing country, which enacted its insolvency laws at the end of 2018.[117] This jurisdiction provides an example of insolvency laws being bypassed through out of court agreements, rather than through forum shopping, but it still provides an example of the difficulties of new laws. Before the COVID-19 pandemic caused financial difficulties, companies were hesitant to resort to the newly reformed insolvency laws, despite them being overall beneficial to the debtors as they remove the punitive approach taken by the previous laws.[118] Companies were used to circumventing the punitive nature of the law by making informal and private agreements and out-of-court settlements with individual creditors and the practice still continues today.[119] Currently, there have been applications commenced using the new Bahrain insolvency law but they have not gone through the court system.[120] If multinational companies in developing countries take the approach of

[115] Unknown, 'Press Release: S&P: Debt Recovery, Insolvency Laws Remain Untested In UAE' (2008) Middle East Financial News; and Rebecca Parry and Yingxiang Long 'China's Enterprise Banking Law, Building and Infrustructure Towards a Market-Based Approach' (2020) 20(1) Journal of Corporate Studies 157, which highlighted a similar practice in China of use of debt enforcement laws instead of the new restructuring laws.

[116] Latham & Watkins Restructuring & Special Situation Practice, 'COVID-19 Managing Financial Difficulties in the United Arab Emirates' (2020) Client Alert Commentary 2644; Bashir Ahmed and Rahat Dar, 'The Restructuring Review: United Arab Emirates' (2020) The Law Review < Latham & Watkins Restructuring & Special Situation Practice, 'COVID-19 Managing Financial Difficulties in the United Arab Emirates' (2020) Client Alert Commentary 2644.> accessed 21 May 2021;and Unknown, 'Press Release: S&P: Debt Recovery, Insolvency Laws Remain Untested In UAE' (2008) Middle East Financial News.

[117] Asli Orbay, 'Bahrain's Bankruptcy Law One Year On: An Untested Revolution' (2019) Debtwire CEEMEA < https://events.debtwire.com/emerging-markets/bahrains-bankruptcy-law-one-year-on-an-untested-revolution> accessed 15 July 2020.

[118]See for example Noor Radhi, Noora Janahi and Hassan Alkoofi, 'Insolvency 2020 Bahrain' (2020) Chambers and Partners <https://practiceguides.chambers.com/practice-guides/insolvency-2020/bahrain> accessed 21 May 2021.

[119] Asli Orbay, 'Bahrain's Bankruptcy Law One Year On: An Untested Revolution' (2019) Debtwire CEEMEA < https://events.debtwire.com/emerging-markets/bahrains-bankruptcy-law-one-year-on-an-untested-revolution> accessed 15 July 2020.

[120] Noor Radhi, Noora Janahi and Hassan Alkoofi, 'Insolvency 2020 Bahrain' (2020) Chambers and Partners <https://practiceguides.chambers.com/practice-guides/insolvency-2020/bahrain> accessed 21 May 2021.

forum shopping to other jurisdictions, using the old law or not engaging entirely with the new or reformed insolvency law, then the new or reformed insolvency laws will be likely to remain untested.

In conclusion, developing countries may reform their insolvency laws due to pressures from international organisations,[121] an economic crisis or even the increase in foreign investment. Even if such laws are well-designed, multinational companies may be hesitant to use the new or reformed insolvency laws, claiming that they are new and thus untested.[122] Unless companies, such as multinational companies, choose to utilise the new and reformed insolvency laws they will remain untested, and opportunities for knowhow to be gained locally will be missed. Not utilising new or reformed developing countries' laws undermines the efforts of developing countries to progress their insolvency legal systems. Part of the task is for effective insolvency laws to be enacted while it is also necessary for supporting institutions to gain expertise and capacity to handle cases. The next section will address the former.

4.4 EFFECTIVE INSOLVENCY LEGAL FRAMEWORK

As already noted, multinational companies may forum shop in the US and UK due to local insolvency laws in developing countries not having effective insolvency legal frameworks and institutions to deal with issues arising from their insolvency.[123] To deal with the issue of promoting effective insolvency legal frameworks, the World Bank, the IMF and UNCITRAL have suggested key features that should be included in domestic insolvency legal frameworks.[124] This section will assess the key features of effective insolvency legal

[121] Such as the World Bank Group (the World Bank), the International Monetary Fund (IMF)or the Unites Nations Commission of International Trade Law (UNCITRAL).
[122] See for example *Re Aerovias Nacionales de Colombia SA Avianca* (2004) 303 BR 1.
[123] See for example *Re Aerovias Nacionales de Colombia SA Avianca* (2004) 303 BR 1.
[124] The World Bank, 'Principles for Effective Insolvency and Creditor/Debtor Regimes' (2016) The World Bank < http://pubdocs.worldbank.org/en/919511468425523509/ICR-Principles-Insolvency-Creditor-Debtor-Regimes-2016.pdf> accessed 27 December 2019; United Nations Commission on

frameworks proposed by the World Bank, the IMF and UNCITRAL and how some developing countries have adopted them. The intention is to determine whether introducing effective insolvency legal frameworks in developing countries may produce an increased sophisticated coordination approach similar to insolvency law in mature economies, such as the UK and the US.

It is important to understand what is meant by 'insolvency legal framework'. Insolvency legal frameworks include the laws, rules, courts and professionals concerned with the rights and responsibilities of individuals and companies during insolvency.[125] Effective insolvency legal frameworks are important in more ways than providing guidance during insolvency. One possible consequence of an effective insolvency legal framework in developing countries is that effective legal frameworks may contribute to developing countries' economic growth.[126] As part of a country's financial architecture insolvency laws can help to attract investments from both domestic and foreign investors.[127] Creditors of, and investors in, companies could be better able to predict their rights and responsibilities as a result of well-formed insolvency laws if a company was to become insolvent or commence insolvency proceedings, which may encourage the decision to invest due to the potentially calculated risk. Probably, corporate rescue laws by themselves would otherwise be low down on the list of legislative priorities of developing countries.

International Trade Law , 'Legislative Guide on Insolvency Law' (2005) United Nations Commission on International Trade Law < https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf > accessed 4 January 2020.

[125] See Aurelio Gurrea-Martinez, 'Insolvency Law in Emerging Market' (2020) Ibero-American Institute for Law and Finance Working Paper 3/2020 < delivery.php (ssrn.com)> accessed 21 May 2021; and Benny S Tabalujan, 'Indonesia: Issues in Insolvency Law - I' (1998) 5 JIBFL 199.

[126] The World Bank, 'Principles for Effective Insolvency and Creditor/Debtor Regimes' (2016) The World Bank http://pubdocs.worldbank.org/en/919511468425523509/ICR-Principles-Insolvency-Creditor-Debtor-Regimes-2016.pdf accessed 28 October 2019.

[127] The World Bank, 'Principles for Effective Insolvency and Creditor/Debtor Regimes' (2016) The World Bank http://pubdocs.worldbank.org/en/919511468425523509/ICR-Principles-Insolvency-Creditor-Debtor-Regimes-2016.pdf accessed 28 October 2019.

On a global scale, effective insolvency legal frameworks have been advancing with the push coming mostly from the World Bank, the IMF, and UNCITRAL.[128] Historically, an insolvency legal framework aimed to provide means by which companies could be wound up.[129] The encouragement by international organisations was for developing countries to advance their insolvency laws with more key features other than only providing for the liquidation of troubled companies, in particular through reorganisation.[130] This has been the trend set by countries that have reformed their insolvency laws in recent years.[131] It is prudent for developing countries to have effective insolvency frameworks as a financial strategy with a view to reaching the same level as advanced insolvency jurisdictions. The following sections will examine some key features identified by the World Bank, IMF and UNCITRAL as to what developing countries ought to consider while reforming insolvency legal frameworks to ensure that they are effective and to a global standard. If laws are satisfactorily revised and supporting institutions developed the case for forum shopping is diminished.

[128] The World Bank, 'Principles for Effective Insolvency and Creditor/Debtor Regimes' (2016) The World Bank < http://pubdocs.worldbank.org/en/919511468425523509/ICR-Principles-Insolvency-Creditor-Debtor-Regimes-2016.pdf> accessed 27 December 2019; United Nations Commission on International Trade Law , 'Legislative Guide on Insolvency Law' (2005) United Nations Commission on International Trade Law < https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf > accessed 4 January 2020.

[129] See for example Paolo Di Martino, 'The Historical Evolution of Bankruptcy Law in England, the US and Italy up to 1939: Determinants of Institutional Change and Structural Differences' (2005) unknown < http://sh.diva-portal.org/smash/get/diva2:213033/FULLTEXT01> accessed 21 May 2021.

[130] See for example Ibrahim F I Shihata, 'Legal Framework for Development: Role of the World Bank in Legal Technical Assistance' (1995) 23 Int'l bus Law 360; International Monetary Fund, 'General Objectives and Features of Insolvency Procedures' (1999) https://www.elibrary.imf.org/view/IMF071/05062-9781557758200/05062-9781557758200/ch02.xml?lang=en&redirect=true accessed 4 January 2020; United Nations Commission on International Trade Law , 'Legislative Guide on Insolvency Law' (2005) United Nations Commission on International Trade Law < https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf > accessed 4 January 2020.

[131] A summary of countries and their reforms can be found in The World Bank, 'Resolving Insolvency' (unknown) The World Bank < https://www.doingbusiness.org/en/data/exploretopics/resolving-insolvency/reforms> accessed 18 February 2020.

4.4.1 Integrating Insolvency Laws with Broader Legal and Commercial Systems.

According to the World Bank, one of the key features of an effective insolvency legal framework is that the insolvency system should aim to integrate with broader local legal and commercial systems.[132] Generally, there is a link between more than one area of law with insolvency law. In theory, an effective insolvency legal framework should be concordant with other areas of law or should at least acknowledge them. This section aims to examine how developing countries' insolvency laws should integrate with broader legal and commercial systems to ensure effective insolvency legal systems, thus attracting multinational companies to utilise them.

Employment law is a prime example of how effective insolvency legal framework may interlink with other areas of law locally. Employees are affected during insolvency, and local insolvency laws might provide for rights of employees, such as ensuring that their pension funds are protected.[133] Contract law is another example, since the insolvency of a multinational company will affect enforcement rights under contracts that the company has with others, be it individuals or companies or both.[134] For example the other parties to the contracts might have claims under local laws for breach of contract against the multinational company but these claims are likely to amount to only worthless personal claims in an insolvency.[135] There are also clear linkages with property law and secured transactions.[136] There are numerous examples as to how insolvency law may be linked

[132] The World Bank, 'Principles for Effective Insolvency and Creditor/Debtor Regimes' (2016) The World Bank < http://pubdocs.worldbank.org/en/919511468425523509/ICR-Principles-Insolvency-Creditor-Debtor-Regimes-2016.pdf> accessed 27 December 2019.
[133] See for example Donald R. Korobkin,'Employee Interests in Bankruptcy' (1996) 4 Am. Bankr. Inst. L. Rev. 5.
[134] See for example George G. Triantis, 'The Effects of Insolvency and Bankruptcy on Contract Performance and Adjustment' (1993) 43(3) The University of Toronto Law Journal 679.
[135] The Policy Development and Review and Legal Departments, 'Involving the Private Sector in the Resolution of Financial Crises-Restructuring International Sovereign Bonds' (2001) The International Monetary Fund < https://www.imf.org/external/pubs/ft/series/03/IPS.pdf> accessed 27 December 2019.
[136] See e.g. Sarah Paterson (2018) 'Finding our way: secured transactions and corporate bankruptcy law and policy in America and England', (2018) 18 Journal of Corporate Law Studies, 247.

with more than one area of law and the insolvency system must be designed with these linkages in mind. Therefore, an effective legal framework in developing countries needs to ensure that systems are in place through active acknowledgement of the linkages in written form and practice.

Given this need for insolvency law to accord with a country's broader legal system, there may be a need for insolvency law to provide entitlements to parties such as stakeholders.[137] These policy provisions might be undermined if forum shopping occurs.[138] In illustration, an effective insolvency legal framework may offer solutions which address peculiarities of that developing country.[139] For example, setting aside funds for pensions or in the case of torts or breaches of contract, there can be provisions to halt or prevent proceedings during insolvency against a company unless the court grants leave.[140] To illustrate this point, in sub-Saharan Africa, the push has been to advance laws and commercial systems that work to protect more vulnerable stakeholders, such as the employees, and ensure that the company survives for the benefit of all the stakeholders.[141] Therefore, if insolvency legal frameworks are being reformed in sub-Saharan countries, the right balance of integrating insolvency legal frameworks with broader local legal and commercial systems should take into account vulnerable stakeholders of the company in a clear and predictable way while prioritising saving the company for their benefit where reasonably possible. From a multinational companies' perspective, clear approaches to the treatment of stakeholders would still offer the predictability that they need in order to

[137] For example, in countries with underdeveloped social security systems there may be provision for employee protection. In China the bankruptcy law contains employee protection terms: Haizheng Zhang, 'Bankruptcy of State-owned Enterprises and Planned Bankruptcy' in Rebecca Parry, Yongqian Xu and Haizheng Zhang, *China's New Enterprise Bankruptcy Law: Context, Interpretation and Application* (Ashgate, 2010).
[138] Laura Napoli Coordes, 'The Geography of Bankruptcy' (2015) 68 Vand L Rev 381.
[139] See for example Timothy M. Lupinacci and Bill D. Bensinger, 'Adequately Protect Your Interest in an Economic Crisis' (2008) 17(5) 51; Dr Kyriaki Noussia and Dr Katarina Durdenic, 'The Financial Crisis 10 Years on: Creditors' Protection in Insolvency Law' (2019) 34(9) JIBLR 325.
[140] Timothy M. Lupinacci and Bill D. Bensinger, 'Adequately Protect Your Interest in an Economic Crisis' (2008) 17(5) 51; Dr Kyriaki Noussia and Dr Katarina Durdenic, 'The Financial Crisis 10 Years on: Creditors' Protection in Insolvency Law' (2019) 34(9) JIBLR 325.
[141]See for example Benhajj Shaaban Masoud, 'The Context for Cross-Border Insolvency Law Reform in Sub-Saharan Africa' (2014) 23(3) International Insolvency Review 181.

reasonably calculate their risk during insolvency. The same may apply to other rights provided by the other local laws. However, the general assumption is that the insolvency of multinational companies does not negate other existing legal entitlements for both the multinational companies and other stakeholders (who include shareholders, creditors, employees, among others) unless expressly stated.[142] The active linking of the insolvency legal framework and other areas of law might normatively require multinational companies to utilise local insolvency laws as the local insolvency systems may cater to issues that they experience during insolvency, such as the ones mentioned above.

Admittedly, local effective insolvency legal frameworks ought to strike a balance when aiming to integrate with local broader legal and commercial systems.[143] The integration should not be to the detriment of the substance of the insolvency legal framework.[144] There is no hard rule of what can be considered as the right balance. Conversely, the right balance of integrating the insolvency legal framework and local broader legal and commercial systems may be determined by the needs of developing countries. Some of the examples that might determine the right balance are the rights and interests of stakeholders[145] of the multinational company that ought to be taken into account by insolvency laws. This is because these rights and interests also appear in the backdrop of relevant local social, political, and other policy considerations in developing countries.[146] This means that effective local legal frameworks may take into account the situation the

[142] See for example Robert Miller, 'Effects of Bankruptcy on Contracts for the Purchase or Sale of Realty' (1927) 6 Tex. L. Rev. 358
[143] United Nations Commission on International Trade Law, 'Legislative Guide on Insolvency Law' (2005) United Nations Commission on International Trade Law < https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf > accessed 4 January 2020.
[144] See for example Muge Adalet McGowan and Dan Andrews, 'Design of Insolvency Regimes Across Countries' (2018) OECD < https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=ECO/WKP(2018)52&docLanguage=En> accessed 21 May 2021.
[145] The Multinational company, the shareholders, the creditors, employees, guarantors of debt, suppliers among others.
[146] United Nations Commission on International Trade Law, 'Legislative Guide on Insolvency Law' (2005) United Nations Commission on International Trade Law < https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf > accessed 4 January 2020.

country is in, integrating with local broader legal and commercial systems, rather than for example following a generic Chapter 11 blueprint.[147]

4.4.2 Protection and Maximisation of Value of the Insolvent Company's Assets and Value.

UNCITRAL suggests that effective legal frameworks in developing countries ought to protect and maximise the value of the insolvent companies' assets or value.[148] The aim of insolvency, whether that is liquidation or reorganisation, is to maximise an insolvency companies' assets and values for the benefit of the collective creditors.[149] The main concern of this section is when multinational companies are in financial distress, that is they cannot generate enough revenue to pay off their debt,[150] and where an effective legal framework would ensure that the multinational company's assets are maximised.[151]

The maximisation of multinational companies' assets means that the creditors receive the best value for the money owed.[152] Multinational companies in developing countries may have tangible and intangible assets. Tangible assets of multinational companies in developing countries are physical in nature and include things such as warehouses, raw materials, products, among others.[153] Intangible assets of multinational companies in

[147] For a sceptical view of the level of improvement of insolvency law in countries which have transplanted Chapter 11 in order to improve their 'Doing Business' rankings see Gerard McCormack, 'Why "Doing Business" with the World Bank May Be Bad for You' (2018) 19 Eur Bus Org Law Rev 649.
[148] United Nations Commission on International Trade Law, 'Legislative Guide on Insolvency Law' (2005) United Nations Commission on International Trade Law < https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf > accessed 4 January 2020; and The World Bank, 'Principles for Effective Insolvency and Creditor/Debtor Regimes' (2016) The World Bank < http://pubdocs.worldbank.org/en/919511468425523509/ICR-Principles-Insolvency-Creditor-Debtor-Regimes-2016.pdf> accessed 27 December 2019.
[149] See for example Irit Mevorach, 'The Role of Enterprise Principles in Shaping Management Duties at Times of Crisis' (2013) 14(4) EBOR 471.
[150] Phillippe Aghion and Oliver Hart and John Moore, 'Improving Bankruptcy Procedure' (1994) 72 Wash U L Q 849, financial distress is when the company cannot produce enough money to pay off its debts.
[151] Chrispas Nyombi, 'The Objective of Corporate Insolvency Law: Lessons for Uganda' (2013) 60(1) International Journal of Law and Management 2, 4 – 5.
[152] Andrei Shleifer and Robert W Vishny, 'Liquidation Values and Debt Capacity: A Market Equilibrium Approach' (1992) XLVII(4) The Journal of Finance 1343.
[153] See for example Verna Allee, 'Value Network Analysis and Value Conversion of Intangible Assets' (2008) 9(1) Journal of Intellectual Capital 5.

developing countries could include intellectual property, business reputations and relationships, which may be deemed valuable in the business's running, for example, the relationship between the company and the clients.[154] Some assets are hard to value, for example an idea that has not yet been acted upon but, if actualised, may yield a high return. An example is a patent for a revolutionary way of recycling wastewater.[155] A multinational company that has patented that idea but has not commenced creating equipment that works towards realising the theory in a practical form may have a hard time valuing the intellectual asset for the benefit of insolvency. On the other hand, some assets may depreciate in value over time, but during insolvency, it might be deemed that the depreciation occurs more sharply, given the difficulties of achieving full value in liquidation sales. Additionally, the value of the assets of the company may be dictated by the demand that they have on the day, for example if assets are quickly sold to generate cash.[156] Even though a number of factors may dictate the value of the multinational companies' assets, insolvency legal frameworks ought to ensure that there is a higher likelihood that the value of the assets would be maximised.

The protection of multinational companies' assets or value by developing countries may take various forms. The World Bank and IMF have highlighted that effective legal frameworks ought to aim to protect multinational companies' assets and value.[157] Despite pointing out that one aim of effective insolvency legal frameworks should be protection of

[154] See for example Verna Allee, 'Value Network Analysis and Value Conversion of Intangible Assets' (2008) 9(1) Journal of Intellectual Capital 5.
[155] See for example Irena Rodov and Philippe Leliaert, 'FiMIAM: Financial Methos of Intangible Assets Measurement' (2002) 3(3) Journal of Intellectual Capital 323.
[156] See for example A. M. Callejón, A. M. Casado, M. A. Fernández and J. I. Peláez, 'A System of Insolvency Prediction for Industrial Companies using a Financial Alternative Model with Neural Networks' (2013) 6(1) international Journal of Computational Intelligence Systems 29.
[157] The World Bank, 'Principles for Effective Insolvency and Creditor/Debtor Regimes' (2016) The World Bank < http://pubdocs.worldbank.org/en/919511468425523509/ICR-Principles-Insolvency-Creditor-Debtor-Regimes-2016.pdf> accessed 27 December 2019; International Monetary Fund, *Orderly and Effective Insolvency Procedures* (International Monetary Fund 1999) 9.

companies' assets and value, there are no clear substantial guidelines for the protection of assets and values that developing countries can emulate or implement.[158]

Even though it has not given substantial guidelines, the IMF offers examples of how countries can maximise the assets and value of companies in insolvencies.[159] The two examples provided by the IMF are the nullification of fraudulent transactions and powers that give insolvency practitioners (IPs) ability to interfere with terms of contracts entered into between the company and third parties.[160] The World Bank also identifies the possibility in some instances of maximising asset value before the sale of the viable part of the business, through continued operation of the business.[161] The intricate details of how companies' assets and value are protected, what standard is necessary to enable maximisation of companies' assets and value and what measures are needed to ensure that that standard is met are to be determined by each jurisdiction in accordance with their local contexts.

One way of reforming insolvency law is to look for examples of best practice in other jurisdictions and adapt those for the local context. The US and UK have taken various approaches in protecting assets and value of companies in insolvency which may be considered as examples of effective legal insolvency frameworks.[162] The two insolvency systems, the US and the UK, have been developed over a long time and been tested to

[158] The World Bank, 'Principles for Effective Insolvency and Creditor/Debtor Regimes' (2016) The World Bank < http://pubdocs.worldbank.org/en/919511468425523509/ICR-Principles-Insolvency-Creditor-Debtor-Regimes-2016.pdf> accessed 27 December 2019; and International Monetary Fund, *Orderly and Effective Insolvency Procedures* (International Monetary Fund 1999) 9.
[159] International Monetary Fund, *Orderly and Effective Insolvency Procedures* (International Monetary Fund 1999) 9.
[160] International Monetary Fund, *Orderly and Effective Insolvency Procedures* (International Monetary Fund 1999) 9.
[161]The World Bank, 'Principles and Guidelines for Effective Insolvency and Creditor Rights Systems' (2001) The World Bank < https://www.iiiglobal.org/sites/default/files/media/126_World_Bank.PDF> accessed 21 May 2021, 31.
[162] See for example Kermit Roosevelt III, 'Understanding Lockups: Effects in Bankruptcy and the Market for Corporate Control' (2000) 17 Yale J. on Reg. 93; Kyriaki Noussia and Katarina Durdenic, ' The Financial Crisis 10 Years on: Creditors' Protection in Insolvency Law' (2019) 34(9) JIBLR 325; Gerard McCormack, 'COMI and Comity in UK and US Insolvency Law' (2012) 128(Jan) LQR 140.

protect companies' asset and values, including that of multinational companies. In the UK and US, there are provisions enabling the retrieval of assets of the company that were sold at an undervalue before the commencement of the multinational companies' insolvency.[163] The retrieval of assets sold at an undervalue is a form of protection of the multinational companies' assets in insolvency.[164] The provision is available because the undervalue transaction depletes the multinational companies' estate which is available to meet the claim of the creditors.[165] This type of transaction is common and provisions for this type of transaction are a necessary component of any effective insolvency system. The UK also has a strong feature of holding directors financially responsible where their conduct lead to insolvency, which decreases the amount to be distributed to creditors.[166]

In the US, the legal framework offers a means by which multinational companies may be able to restructure their debts to ensure that the core part of the business that is viable may be saved and off-loading those parts of the multinational company that are not viable, during which the company still remains in the hands of the directors.[167] This shows that the US insolvency law protects the most valuable parts of the distressed multinational companies in order to ensure that they can continue to trade, hence ensuring that the value of the multinational companies is maximised. The UK has achieved similar outcomes through schemes of arrangements and with the new restructuring plan it moved in this direction more recently, while maintaining a different approach.[168]

[163] Insolvency Act 1986, s 238; 11 USC, s 548(a)(B). See for example Joseph Curl, 'Remote, Doubtful, Dubious, Probable, Likely: What are the Conclusions from BTI v Sequana' (2019) 16(6) Int. C.R. 333.
[164] See also Insolvency Act 1986, section 423.
[165] Insolvency Act 1986, section 423; Rebecca Stubbs, 'Section 423 of the Insolvency Act in Practice' (2008) 21(2) Insolvency Intelligence 25, gives a detailed discussion of what s.423 entails.
[166] See for example Insolvency Act 1986, s.212; and Kristin van Zwieten, 'Disciplining the Directors of Insolvent Companies' (2020) 33(1) Insolv. Int. 2.
[167] See for example David A Grigorian and Faezeh Raei, 'Government Involvement in Corporate Debt Restructuring: Case Studies from the Great Recession' (2010) IMF Working Paper WP/10/260.
[168] For a detailed and nuanced discussion of the different approaches to high-end restructurings in these to jurisdictions see Sarah Paterson, *Corporate Reorganization Law and Forces of Change* (OUP Oxford, 2020).

There may be a temptation to borrow features of mature systems such as these as a way of improving the laws in developing countries. Naïve transplants are to be avoided and there are dangers when sophisticated approaches are grafted into systems that have immature supporting institutions, whether courts, practitioners, related laws or social institutions. An example is Nicaragua which transplanted insolvency laws and it did not have the right institutions to handle it therefore the reformed law was unusable and had to further reform the law.[169] Any country should ensure that the form of implementation reflects the developing countries' policies to avoid pitfalls of legal transplants.[170]

In conclusion, developing countries may be able to ensure that their insolvency legal frameworks include features that protect and maximise the value of the insolvent multinational companies' assets and value. Some of the examples discussed could be avoiding transactions under which assets were sold at an undervalue, holding directors financially responsible for the insolvency of the multinational companies, among others. If developing countries opt to transplant approaches taken by other jurisdiction, they should ensure that the provisions reflect the policies and needs in developing countries to work within the jurisdiction, hence encouraging their use by multinational companies.

4.4.3 Who should be in charge during insolvency?

The IMF suggests that in advancing effective insolvency legal frameworks, there should be a consideration of who should be in charge of the companies during insolvency.[171] There are several possible approaches that developing countries might consider as to who ought to be in charge during insolvency proceedings.[172] It is important for an effective

[169] See for example Joshua Pasanisi, 'Nicaragua:New Secured Transactions Law' (2017) < https://www.iflr.com/article/b1lv05p7yvk8zb/nicaragua-new-secured-transactions-law> accessed 29 May 2021.
[170] The issues of legal transplants are still applicable, as discussed in section 4.2.1.2.1.
[171] International Monetary Fund, *Orderly and Effective Insolvency Procedures* (International Monetary Fund 1999) 9.
[172] See for example Thomas G. Kelch, 'The Phantom Fiduciary: The Debtor In Possession in Chapter 11' (1991-1992) 38 Wayne L. Rev. 1323; and David Milman, *Governance of Distressed Firms* (Edward Elgar 2013), 78.

legal framework to have a clear decision making structure in insolvency to dictate how the insolvency will be handled. Therefore, this section will examine possibilities as to who could be in charge of the multinational companies during insolvency and the consequence of having them in charge. Clear approaches to this issue as part of robust insolvency frameworks may attract their use by multinational companies.

One of the approaches to control of companies during insolvency is debtor-in-possession.[173] Developing countries can define what debtor-in-possession is depending on the policies of the countries. On a basic level, debtor-in-possession insolvencies are where companies in insolvency are still controlled by the management of the companies during the insolvency procedure.[174] Multinational companies' management can be a complicated issue to determine. For instance, some multinational companies are operating as part of a group in the developing countries, either incorporated in the developing countries or other jurisdictions.[175] Other multinational companies are managed by the main companies in their activities in the developing countries.[176] However, the approach to debtor-in-possession in the reformed developing countries' insolvency laws should apply to any type of management structure in multinational companies.

Leaving the management of the multinational companies in the hands of directors that were present in decision making during the period preceding the financial difficulties might not be viewed positively. It might be viewed as leaving the multinational companies in the hands of those that led them into insolvency.[177] On the other hand, it can also be viewed

[173] Thomas G. Kelch, 'The Phantom Fiduciary: The Debtor In Possession in Chapter 11' (1991-1992) 38 Wayne L. Rev. 1323.
[174] See for example Dr. Klaus Pannen, 'Debtor-in-Possession Proceedings in Germany' (2005) International Insolvency Institute < https://www.iiiglobal.org/sites/default/files/klauspannen.pdf> accessed 18 May 2020; Lijie Qi, 'Managerial Models During the Corporate Reorganisation Period and their Governance Effects: The UK and US Perspective' (2008) 29(5) Comp. Law. 131.
[175] See for example Hans Schollhammer, 'Organization Structures of Multinational Corporations' (pre-1986) 14(3) Academy of Management Journal 345.
[176] See for example Hans Schollhammer, 'Organization Structures of Multinational Corporations' (pre-1986) 14(3) Academy of Management Journal 345.
[177] Jennifer Payne, 'Debt Restructuring in England Law: Lessons from the United States and the Need for Reform' (2014) 130(Apr) L.Q.R. 282.

positively as the management are already knowledgeable of the circumstances of the multinational companies more so than an outsider might be.[178] Thus it can be argued the management can swiftly make decisions during the insolvency. The Covid-19 pandemic also clearly highlighted the potential for well-run companies to run into difficulties due to unexpected and unpredictable events.[179] Therefore, developing countries might adopt a debtor-in-possession style of insolvency legal framework as a means of control, enabling directors to remain in charge of the multinational companies and make the process possibly swift in nature and contribute to the effectiveness of the procedures.

If developing countries opt for a debtor-in-possession model, there should be safeguards put in place. The safeguards are to prevent the possibility of abusing their powers and causing more harm to the business, such as selling off the companies' assets.[180] Additionally, the safeguards, might be there to guide the management on the right procedures to undertake during the insolvency. The safeguards in the US, a system that uses the debtor-in-possession in Chapter 11, include that the courts oversee the companies' management.[181] The US courts must approve any activities conducted by the management outside the normal business activities.[182] Another type of safeguard is shown in Germany, where debtor-in-possession is monitored by a creditors' trustee.[183] The role of the German creditors' trustees is not to manage or dispose of the insolvency estate but rather, to supervise the conduct of the management of the company.[184] The supervision

[178] See for example Dr. Klaus Pannen, 'Short Statement on the Occasion of the panel Discussion "American College of Bankruptcy": Debtor-in-Possession Proceedings in Germany' (2005) 39 American College of Bankruptcy < https://www.iiiglobal.org/sites/default/files/klauspannen.pdf> accessed 22 May 2021 [5]; and Jennifer Payne, 'Debt Restructuring in England Law: Lessons from the United States and the Need for Reform' (2014) 130(Apr) L.Q.R. 282.
[179] For a detailed analysis Brent H. Meyer, Brian Prescott, and Xuguang Simon Sheng, 'The Impact of the COVID-19 Pandemic on Business Expectations' (2020) Federal Reserve Bank of Atlanta Working Paper 2020-17a.
[180] For the previous law discussion see Afra Afsharipour, 'Corporate Governance Convergence: Experience' (2009) 29 Nw J Int'l L & Bus 335; Lessons from the Indian for the current approach see Abhiman Das , Anurag K. Agarwal, Joshy Jacob, et al., 'Insolvency and Bankruptcy Reforms: The Way Forward' (2020) 45(2) Vikalpa 115.
[181] Title 11 United States Code Annotated, Chapter 11, section 1108.
[182] Title 11 United States Code Annotated, Chapter 11, section 1108.
[183] German Insolvency Code, section 270 para 3.
[184] Dr. Klaus Pannen, 'Short Statement on the Occasion of the panel Discussion "American College of Bankruptcy": Debtor-in-Possession Proceedings in Germany' (2005) 39 American College of

entails supervising the running of the business;[185] approving any business activities outside the normal business activities;[186] handling money and transfer of payments;[187] exercising the powers of transaction avoidance;[188] or notifying creditors and courts that continuing with debtor-in-possession is detrimental to the creditors.[189] The approach to be undertaken by developing countries regarding safeguards in possible reformed insolvency laws using debtor-in-possession should be tailored to the needs and institutions of the developing countries to ensure that they are effective and thus attract the use by multinational companies.

On the other hand, in establishing who ought to be in charge during insolvency proceedings, developing countries might adapt a practitioner-in-possession approach.[190] In a practitioner-in-possession model, the directors relinquish their roles in making decisions for the on behalf of the company once insolvency commences or immediately before the commencement of formal insolvency.[191] Developing countries might adopt a practitioner-in-possession approach to create an effective insolvency framework because of the assumption that the insolvency practitioners are knowledgeable in matters concerning insolvency, the laws and options available for insolvent companies.[192] The assumption can be based on experience in general of the area of insolvency; unlike the directors who might not have a comprehensive understanding of the options available and the relative benefits of various insolvency proceedings.[193] It is notable that in countries where insolvency systems are under-developed there may be a skills gap and this might

Bankruptcy < https://www.iiiglobal.org/sites/default/files/klauspannen.pdf> accessed 22 May 2021 [6] – [7].
[185] German Insolvency Code, section 274 para 2.
[186] German Insolvency Code, section 275 para 1.
[187] German Insolvency Code, section 275 para 2.
[188] German Insolvency Code, section 280.
[189] German Insolvency Code, section 274 para 3.
[190] Wai Yee Wan and Gerald McCormack, 'Transplanting chapter 11 of the US Bankruptcy Code into Singapore's Restructuring and Insolvency Laws: Opportunities and Challenges' (2018) Journal of Corporate Law studies < https://ink.library.smu.edu.sg/sol_research/277> accessed 5 July 2020.
[191] Lijie Qi, 'Managerial Models During the Corporate Reorganisation Period and their Governance Effects: The UK and US Perspective' (2008) 29(5) Comp. Law. 131.
[192] See for example Bo Xie, 'Role of Insolvency Practitioners in the UK Pre-Pack Administrations: Challenges and Control' (2012) 21(2) International Insolvency Law 85, 85; European Law Institute, 'Rescue of Business in Insolvency Law' (2017) European Law Institute 1, 64.
[193] David Milman, *Governance of Distressed Firms* (Edward Elgar 2013), 78.

be addressed through training and the development of a regulated professional body. Therefore, the adoption of a practitioner-in-possession approach in the insolvency legal frameworks of developing countries ought to be in light of the countries policies, which are dependent on local needs, as well as local institutions.

In ascertaining which approach to take to the control of insolvency proceedings, whether under debtor control or practitioner control, clarity is needed regarding the responsibilities of the parties in charge.[194] Directors usually answer to shareholders, but in insolvency they answer to creditors and the court, while insolvency practitioners are more concerned with creditors of the companies.[195] It is, therefore, important to ensure that the insolvency legal frameworks of developing countries have clear guidance on the parties in charge and their responsibilities during insolvency. Having clear guidelines may enable multinational companies to appropriately calculate their risk hence choose to use the reformed developing countries' insolvency laws.

India is an example of an emerging market that has prioritised the recouping of the companies' assets in their local policies, as well as achieving clarity regarding the responsibilities of directors.[196] Prior to the enactment of the Insolvency and Bankruptcy Code 2016, the shareholders of the companies and the directors were able to sell the assets of the companies on a piecemeal basis over the lengthy period of the insolvency of

[194] International Monetary Fund, *Orderly and Effective Insolvency Procedures* (International Monetary Fund 1999), 9.
[195] See for example David Milman, *Governance of Distressed Firms* (Edward Elgar 2013), 78 – 79; Lijie Qi, 'Managerial Models During the Corporate Reorganisation Period and their Governance Effects: The UK and US Perspective' (2008) 29(5) Comp. Law. 131; International Monetary Fund, *Orderly and Effective Insolvency Procedures* (International Monetary Fund 1999), 9.
[196] See for example Anonymous, 'Opinion: An Exam to Test the Watchdog on the Board' (2019) Mint < https://ntu.idm.oclc.org/login?url=https://www-proquest-com.ntu.idm.oclc.org/newspapers/opinion-exam-test-watchdog-on-board/docview/2238827512/se-2?accountid=14693 > accessed 22 May 2021; and Justin Bharucha, 'Insolvency Law, Policy and Procedure' (2019) The Insolvency Review < https://thelawreviews.co.uk/edition/the-insolvency-review-edition-7/1211488/india> accessed 26 May 2020.

the companies.[197] The directors could do so because there was no legal framework in place to prevent the occurrence.[198] A possible perception of the situation before the Insolvency and Bankruptcy Code 2016 enactment is that the parties in charge of the companies in India, the directors, may have been more concerned with the interests of the shareholders and ensuring that they gained financially or recouped financial loss despite the companies being in financial distress, hence selling on the companies' assets during insolvency.[199] This consequently enabled policies that underpinned the Insolvency and Bankruptcy Code 2016.[200] The new Indian insolvency laws protects the assets of the multinational companies by preventing them from being sold on without the court's permission.[201]

Using the above example, the clarity of who is in charge of the company during insolvency ought to cover the responsibilities of those parties. The priorities might be to save the company by using restructuring procedures or even to ensure that the best value proportional to the money owed to the creditors is returned without unfairly favouring one or more parties of the companies' stakeholders over the others. Clear identification and stating of responsibilities of the parties in charge during insolvency in the legal insolvency infrastructure may encourage multinational companies to use local insolvency laws rather than forum shopping to other jurisdictions.

If insolvency practitioners control insolvency proceedings in the developing countries' legal frameworks, there should also be strict guidelines provided to guide over the actions they

[197] See for example Bob Sherwood, 'Tread Carefully when on the Brink: Insolvency: When Disaster Looms, Directors Face Unfamiliar Responsibilities. But New Legislation may Ease the Burden, Says:' (2003) Financial Times 16; and Justin Bharucha, 'Insolvency Law, Policy and Procedure' (2019) The Insolvency Review < https://thelawreviews.co.uk/edition/the-insolvency-review-edition-7/1211488/india> accessed 26 May 2020.
[198] Justin Bharucha, 'Insolvency Law, Policy and Procedure' (2019) The Insolvency Review < https://thelawreviews.co.uk/edition/the-insolvency-review-edition-7/1211488/india> accessed 26 May 2020.
[199] Ibid.
[200] Ibid.
[201] See for example Sui-Jim Ho and Surya Kiran Banerjee, 'Indian Bankruptcy Code-How Does it Compare' (2018-2019) 8 emerging Markets Restructuring Journal 1, 3.

are permitted to take during an insolvency process.[202] The governments in developing countries may take on the task of providing guidance and regulating the actions of the insolvency practitioners.[203] The developing countries' governments can do so either directly or through regulatory bodies that would be in charge of overseeing insolvency practitioners' conduct.[204] Having insolvency practitioners overseen by an independent party, either by the state or a regulatory body, may boost the confidence of multinational companies in developing countries' legal insolvency systems and this may contribute to a lesser need for forum shopping.

Developing countries' governments may find it tedious and arduous as well as impracticable in time and finances if they opt to directly oversee insolvency practitioners' work.[205] Additionally, the states of developing countries may not be knowledgeable in insolvency law as a specialist insolvency governing body may be.[206] Hence, developing countries may opt to create insolvency practitioners' regulatory bodies with the mandate to create governing rules and procedures as well as disciplinary actions against insolvency practitioners not adhering to them.[207] Note that establishing an insolvency practitioners' regulatory body will take time.

---

[202] Anirudh Burman and Shubho Roy, 'Building an Institution of Insolvency Practitioners in India' (2015) Indira Gandhi Institute of Development Research <http://www.igidr.ac.in/pdf/publication/WP-2015-033.pdf> accessed 15 July 2020.
[203] Lorraine Conway, 'Regulation of Insolvency Practitioners (IPs)' (2019) House of Commons Library 5531.
[204] For example the province of Shenzhen in China has developed a Bankruptcy Administration Department to advise on the new personal insolvency laws: Shenzhen Special Economic Zone Personal Bankruptcy Regulations, Articles 6 and 155; Rebecca Parry, Haizheng Zhang and Jiahui Fu, 'Personal Insolvency in China" Necessities, Difficulties and Possibilities' (2021) 46 Brooklyn Journal of International Law (forthcoming).
[205] Anirudh Burman and Shubho Roy, 'Building an Institution of Insolvency Practitioners in India' (2015) Indira Gandhi Institute of Development Research <http://www.igidr.ac.in/pdf/publication/WP-2015-033.pdf> accessed 15 July 2020.
[206] See for example Maria Koumenta, Amy Humphris, Morris Kleiner and Mario Pagliero, 'Occupational Regulation in the EU and UK: Prevalence and Labour Market Impacts' (2014) The Department for Business, Innovation and Skills <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/343554/bis-14-999-occupational-regulation-in-the-EU-and-UK.pdf> accessed 18 July 2020 The paper included a discussion of regulatory bodies dealing with law.
[207] Lorraine Conway, 'Regulation of Insolvency Practitioners (IPs)' (2019) House of Commons Library 5531.

An established approach to insolvency practitioners' regulatory bodies can be found in the UK under the Insolvency Act 1986.[208] UK insolvency regulatory bodies have a statutory mandate to ensure that insolvency practitioners advise companies sufficiently on business recovery and restructuring and any other insolvency procedure available in the UK.[209] The UK insolvency practitioners have a statutory duty which dictates what they ought to do.[210] Additionally, the insolvency practitioners are professionally regulated by a regulatory body as well as the courts, since the statutory powers of insolvency practitioners can significantly affect the companies.[211] The approach of having a standard that the work of insolvency practitioners can be measured against ought to be emulated by developing countries to ensure that insolvency legal frameworks are managed effectively, which might give confidence for their use by multinational companies.

There are developing countries that have recognised that it is vital to mandate statutory insolvency regulatory bodies. For example, it has been an ongoing debate in South Africa, an emerging country, to try and create statutory insolvency governing bodies that oversee insolvency practitioners' conduct and their appointment.[212] In South Africa, any person who purports to act in relation to a company during and for the purpose of insolvency can claim that they are an insolvency practitioner.[213] The call for an insolvency regulatory body in South Africa is with the hope that irregularities in the industry can be quelled. For example, the manner in which insolvency practitioners are appointed varies, and instead

[208] Insolvency Act 1986, Part XIII.
[209] Jenny Willot MP, 'Strengthening the Regulatory Regime and Fee Structure for Insolvency Practitioners Consultation' (2014) The Insolvency Service <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/280880/Strengthening_the_regulatory_regime_and_fee_structure_for_insolvency_practitioners.pdf> accessed 19 July 2020.
[210] Insolvency Act 1986, Parts II, III, IV, duties of administrators, liquidators and receivers.
[211] Lorraine Conway, 'Regulation of Insolvency Practitioners (IPs)' (2019) House of Commons Library 5531.
[212] See for example Anneli Loubser, 'An International Perspective on the Regulation of Insolvency Practitioners' (2007) 19 S. Afr. Mercantile L.J. 123; J.C. Calitz and D. A. Burdette, 'The Appointment of Insolvency Practitioners in South Africa: Time for Change?' (2006) 4 TSAR 721.
[213] See for examples Insolvency Act 24 of 1936, s 18, 56 or 57 Provisional and final trustees of estates under sequestration; Companies Act 61 of 1973, s 368 or 369 Provisional and final liquidators of companies in liquidation; Close Corporation Act 69 of 1984, s 74 Provisional and final liquidators of close corporations being would up among others.

can be given a specific standard by which the appointments are carried out and the manner in which they must conduct their roles.[214]

South Africa is a good example of an emerging country that has recognised the need for their insolvency legal framework to provide for an insolvency regulatory body but none has yet been put in place.[215] It takes a significant time to set up a well-functioning insolvency regulatory body as was the case in the UK. *The Insolvency Law and Practice: Report of the Review Committee (The Cork Report)* which made the recommendation in the early 1980s that an insolvency regulatory body be established.[216] However, it took over 30 years for the Small Business Enterprise and Employment Act 2015 to give powers to Recognised Professional Bodies (RPB) to regulate the insolvency practitioners' profession.[217] The UK requires that all the insolvency practitioners be licenced which is done through the RPBs.[218] South Africa may also take a similar length of time more or less. In the meantime, South Africa has enabled the voluntary sign in up for an international regulatory body called International Association of Insolvency Regulators by insolvency practitioners.[219] The hope is that by South African insolvency practitioners joining the International Association of Insolvency Regulators international best practices can be adopted in their profession.[220] However, developing countries can adopt a similar

[214] J.C. Calitz and D. A. Burdette, 'The Appointment of Insolvency Practitioners in South Africa: Time for Change?' (2006) 4 TSAR 721.
[215] J.C. Calitz and D. A. Burdette, 'The Appointment of Insolvency Practitioners in South Africa: Time for Change?' (2006) 4 TSAR 721.
[216] Sir Kenneth Cork, *Insolvency Law and Practice: Report of the Review Committee* (Her Majesty's Stationary Office, 1982), 201 – 202.
[217] The Small Business Enterprise and Employment Act 2015; Lorraine Conway, 'Regulation of Insolvency Practitioners (IPs) (2019) House of Commons Library < https://commonslibrary.parliament.uk/research-briefings/sn05531/> accessed 30 May 2021.
[218] The Insolvency Service, 'Insolvency Practitioner Regulation – Regulatory Objectives and Oversight Powers legislative changes Introduced on 1 October 2015' (2015) The Insolvency Service < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/482904/Guidanceforpublication.pdf> 30 May 2021.
[219] International Association of Insolvency Regulators, 'The Regulatory Regime for Insolvency Practitioners' (2018) International Association of Insolvency Regulators <https://www.insolvencyreg.org/sites/iair/files/uploads/IAIR%20Principles%20-%20version%201.2%20for%20uploading%20to%20web.pdf > accessed 19 July 2020 Identifies South African insolvency practitioners as members.
[220] For a detailed analysis of the South African reform see J. C. Calitz, 'A Reformatory Approach to State Regulation of Insolvency Law in South Africa' (2010) <

approach to ensure that their insolvency practitioners' conduct is regulated to an international standard as they create their regulatory bodies.

It is vital not only for the developing countries to enable the insolvency practitioners' regulatory body to regulate the conduct of the insolvency practitioners, but they also ought to set a minimum standard for appointment and conduct.[221] By establishing minimum entry and working standards through an insolvency legal framework, developing countries' insolvency laws will ensure that multinational companies are protected against any misconducts or sub-par conduct by insolvency practitioners. Additionally, developing countries can take the UK's approach of requiring insolvency practitioners have insurance and bond to compensate for any misconduct.[222] The results could be that multinational companies are more confident in using developing countries' insolvency laws because the law clearly sets out the standard of work and entry requirements for the insolvency practitioners.

In developing countries that opt to retain directors in charge during insolvency, there should also be clear statutory guidelines for the directors to follow.[223] It is not feasible to hold directors at the same standard as would be expected of insolvency practitioners, who are assumed to be knowledgeable in the insolvency legal framework; but that does not negate the need to ensure that their conduct during insolvency is at an appropriate standard. Directors can be provided with clear statutory outlines of the steps that they ought to take if they are in charge of multinational companies during insolvency.[224] The

https://repository.up.ac.za/bitstream/handle/2263/30839/04part6-7.pdf?sequence=5&isAllowed=y > accessed 20 May 2021 [308].

[221] Anirudh Burman and Shubho Roy, 'Building an Institution of Insolvency Practitioners in India' (2019) 5 Bus & Bankr LJ 118.

[222] Insolvency Practitioners Regulations 2005 (SI 2005 No. 524).

[223] Maria Koumenta, Amy Humphris, Morris Kleiner and Mario Pagliero, 'Occupational Regulation in the EU and UK: Prevalence and Labour Market Impacts' (2014) The Department for Business, Innovation and Skills <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/343554/bis-14-999-occupational-regulation-in-the-EU-and-UK.pdf> accessed 18 July 2020.

[224] See for example D D Prentice, 'Creditor's Interests and Director's Duties' (1990) 10(2) Oxford Journal of Legal Studies 265 The journal shows the approach taken by the UK in

issue that developing countries have to address is how the directors' actions during insolvency can be reviewed. In some instances, if the directors are in charge, they can conduct out-of-court insolvency proceedings, not normally subject to control by trustees.[225] In those instances, it might be difficult to assess if their conduct is sufficient for the benefit of the stakeholders of the multinational companies. Developing countries may take a pre-emptive measure to ensure that directors' actions are overseen to ensure that they conduct the insolvency to a sufficient standard set out in the statute. These potential safeguards may contribute to the attractiveness of local insolvency legal frameworks as an alternative to forum shopping because multinational companies would have clearly set out rights and responsibilities during insolvency, making their work easier.

In conclusion, developing countries may opt to have either debtor-in-possession or insolvency practitioner-in-possession legal frameworks in identifying the parties in charge of the multinational companies during insolvency. A hybrid of debtor-in-possession or insolvency practitioner-in-possession legal frameworks may also be used, similar to the German approach discussed above. The approach that the developing countries may take will depend on the local insolvency policies and institutions. Whichever approach to be taken to identify the parties in charge of the multinational companies during insolvency, the legislation ought to include clear guidelines for the parties to carry out their insolvency duties, and the means by which their conduct can be assessed and dealt with. The result might be that the insolvency legal frameworks could be effective enough to attract multinational companies to open insolvency proceedings in developing countries.

establishing clear guidelines of directors' duties during insolvency. See also the clear information provided for directors by the Australian Securities and Investments Commission: https://asic.gov.au/regulatory-resources/insolvency/insolvency-for-directors/.

[225] See for example J William Boone and Doroteya N Wozniak, 'Insolvency and Directors' Duties in the United States: Overview' (2017) < https://uk.practicallaw.thomsonreuters.com/1-605-6165?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1> accessed 1 August 2020.

4.4.4 Timely Resolution of Insolvency

According to the World Bank and UNCITRAL, effective insolvency legal systems in developing countries ought to have timely insolvency resolutions.[226] Time in insolvency of multinational companies can be a high priority issue for a number of reasons,[227] examined in this section, and may be a major reason why the insolvency laws of developing countries may be considered non-viable for use by multinationals. The section will also look at how time may contribute to forum shopping by multinational companies to other jurisdictions, rather than utilising developing countries' insolvency systems. Finally, the section will examine some of the key features that ought to be present in order to ensure that time is dealt with in an effective insolvency legal system.

According to the World Bank, the average number of years to resolve insolvency in the least developed countries is 3.063.[228] On the higher spectrum is Cambodia, where if multinational companies opened insolvency proceedings it would take 6 years for the insolvency matter to be concluded.[229] In comparison the average number of years to resolve insolvency in the US and UK is 1 year.[230] Multinational companies may be persuaded to commence insolvency proceedings in the US or UK instead of opening

[226] The World Bank, 'Principles for Effective Insolvency and Creditor/Debtor Regimes' (2016) The World Bank < http://pubdocs.worldbank.org/en/919511468425523509/ICR-Principles-Insolvency-Creditor-Debtor-Regimes-2016.pdf> accessed 27 December 2019; United Nations Commission on International Trade Law , 'Legislative Guide on Insolvency Law' (2005) United Nations Commission on International Trade Law < https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf > accessed 4 January 2020.
[227] Amy Coburn, 'The Growth of Bankruptcy Tourism in the United Kingdom' (2012) 25(1) Insolv. Int. 8.
[228] The World Bank, 'Time to Resolve Insolvency (Years) – Least Developed Countries UN Classification' (2019) The World Bank <https://data.worldbank.org/indicator/IC.ISV.DURS?end=2019&locations=XL&start=2019&view=bar> accessed 4 June 2020.
[229] The World Bank, 'Time to Resolve Insolvency (Years) – Least Developed Countries UN Classification' (2019) The World Bank <https://data.worldbank.org/indicator/IC.ISV.DURS?end=2019&locations=XL&start=2019&view=bar> accessed 4 June 2020; Doing Business, 'Doing Business in a More Transparent World' (2012) The World Bank < https://www.ihk-krefeld.de/de/media/pdf/international/doing-business/kamdodscha-doing-business-in-cambodia-2012.pdf> accessed 4 June 2020 (The number of years have not changed despite the document being from 2012).
[230] The World Bank, 'Time to Resolve Insolvency (Years) – Least Developed Countries UN Classification' (2019) The World Bank <https://data.worldbank.org/indicator/IC.ISV.DURS?end=2019&locations=XL&start=2019&view=bar> accessed 4 June 2020.

proceedings in developing countries because the US and UK offer a better guarantee that the matter would be resolved quickly within an year, rather than dragging on for years, time a company cannot afford to have insolvency processes hanging over the business. It would therefore be prudent for developing countries to ensure that their insolvency legal frameworks are time efficient to entice multinational companies to use local insolvency systems rather than forum shop to the US and UK.

The length of time that an insolvency matter takes can have a direct correlation with the cost of multinational companies' insolvencies.[231] The cost of insolvency can include expenses such as fees for insolvency practitioners, court fees, fees associated with selling of properties of the multinational companies among others.[232] The longer the insolvency process takes the higher the costs are likely to be. For example, insolvency practitioners may bill the multinational companies according to the work that they have carried out and if the work takes years to complete this will be reflected in the invoice presented. The cost of insolvency proceedings is paid out from the companies consolidated assets before any of the stakeholders of the multinational companies are paid, therefore longer processes diminish potential stakeholder returns.[233] It would therefore be prudent, for developing countries' insolvency framework to ensure that the amount of time insolvency procedures are conducted have a clear and short period to keep the costs of insolvency low. Multinational companies may be more inclined to utilise local insolvency laws if they are aware they can both save time and costs of insolvency.

One important factor is the avoidance of bottlenecks in courts and the preference may be to limit the role of courts in insolvency proceedings, a point that is returned to in the next

[231] See for example Shashi Rajani, 'Cost-Effectiveness of Corporate Rescue and Insolvency Procedures in the UK' (1993) 1 Am Bankr Inst L Rev 441.
[232] Adrian Walters, 'Recovering Costs of Litigation Expense' (2003) 24(3) Company Lawyer 84; E Bruce Leonard, 'Professional Costs of Insolvency Proceedings: The Canadian Perspective' (1993) 1 Am Bankr Inst L Rev 429.
[233] E Bruce Leonard, 'Professional Costs of Insolvency Proceedings: The Canadian Perspective' (1993) 1 Am Bankr Inst L Rev 429.

section.[234] One factor is the number of applications that can be made to courts. Parties to the insolvency proceedings may apply to the court to extend the statutory period given between one step in the insolvency proceedings to the other, for example creditors may apply to be given more time to gather relevant information pertaining to the proceedings.[235] The length of extensions plays a part in the duration of insolvencies of multinational companies and an effective legal framework ought to have reasonable time frames clearly stated.[236] It is important that the insolvency legal framework ensure that the number and length of extensions are curtailed to a specific reasonable number to ensure that they are not used to prolong the insolvency process in unreasonable manner or worse abused by any of the parties involved. Clearly stated lengths and numbers of permissible extensions may contribute to multinational companies using developing countries insolvency legal frameworks since they may be able to predict the amount of time that the insolvency proceedings may take.

In conclusion, developing countries ought to ensure that their insolvency legal frameworks provide workable timeframes that limit the length of time that insolvency proceedings may take. Multinational companies may be encouraged to use local insolvency laws, rather than forum shopping, if they provide for a reasonably swift time for insolvency proceedings rather than dragging on for years without a conclusion. In ensuring that developing countries' insolvency legal frameworks are effective, there ought for example, to be provisions that cater for the amount of extensions that can be reasonably applied for by the parties. There ought to be a finite number of extensions available as that would limit the length of insolvency proceedings. As such, for developing countries to have effective legal framework there need to be provisions that clearly deal with the amount of time within which insolvency proceedings can be reasonably expected to conclude.

[234] Aurelio Gurrea-Martinez, 'Insolvency Law in Emerging Market' (2020) Ibero-American Institute for Law and Finance Working Paper 3/2020 < delivery.php (ssrn.com)> accessed 21 May 2021.
[235] See for example Geoffrey Yeowart, 'Encouraging Company Rescue: What Changes are Required to UK Insolvency Law' (2009) 3(6) Law and Financial Markets Review 517.
[236] Diana Mota, 'Resolving Bankruptcy' (2015) 117(5) Business Credit 18.

4.4.5 Insolvency Courts

The World Bank and the IMF recognise that the judiciary is a key component to ensure that the insolvency laws are effective.[237] It is often the judiciary's role to oversee the implementation of insolvency laws, including in developing countries.[238] Developing countries can create insolvency laws which implement key principles recognised by international bodies such as the IMF and the World Bank. However, having global standard insolvency laws is insufficient if there are no judiciaries to ensure that insolvency is implemented well. The task of the courts in most multinational companies' insolvencies will entail them having to deal with complex issues.[239] Hence, the court systems in developing countries need to be equipped to handle such tasks and may encourage their use by multinational companies, a process that may take time.

The IMF recognises that having specialist insolvency courts is ideal.[240] In a study on specialist courts, the World Bank noted that the advantage of having specialist courts, including insolvency courts, is that there is a high likelihood of higher-quality decisions,

[237] The World Bank, 'Principles and Guidelines for Effective Insolvency and Creditor Rights Systems' (2001) The World Bank < https://edisciplinas.usp.br/pluginfile.php/35888/mod_resource/content/1/CHY%20Principles_and_Guidelines_for_Effective_Insolvency_and_Creditors_Rights_Systems.pdf> accessed 22 May 2021 [56]; and International Monetary Fund, 'Orderly & Effective Insolvency Procedures' (1999) International Monetary Fund <https://www.imf.org/external/pubs/ft/orderly/#institu> accessed 22 May 2021.

[238] International Monetary Fund, 'Orderly & Effective Insolvency Procedures' (1999) International Monetary Fund <https://www.imf.org/external/pubs/ft/orderly/#institu> accessed 22 May 2021.

[239] Unknown, 'Insolvency Reforms in Asia: An Assessments of the Implementation Process and the Role of Judiciary' (2001) Forum for Asia Insolvency Reform < https://www.oecd.org/corporate/ca/corporategovernanceprinciples/1873992.pdf> accessed 22 May 2021, 3.

[240] International Monetary Fund, 'Orderly & Effective Insolvency Procedures' (1999) International Monetary Fund <https://www.imf.org/external/pubs/ft/orderly/#institu> accessed 22 May 2021.

especially in complex issues.[241] Nevertheless, it is time-consuming and costly to establish new courts, especially in developing countries.[242]

One step that developing countries can take in creating specialist insolvency courts is training judges. The existing judges could be trained in dealing with the complex issues arising from insolvency proceedings, especially those of multinational companies. Insolvency knowledge of the judges is fundamental in effectively dealing with insolvency matters. A lack of insolvency knowledge in developing countries may create situations where there are differing outcomes for similar insolvency situations.[243] In those situations, multinational companies are unable to calculate their risks. Even when there are specialist insolvency courts, if the judges are not appropriately trained in corporate insolvency and some aspects of business and finance processes, the result would be the weak implementation of the reformed insolvency laws.[244] This was the case in Indonesia in the late 1990s and early 2000.[245] Indonesia created specialist insolvency courts, but the judges were inexperienced in insolvency matters; hence insolvency parties were reluctant to use them. Developing countries can learn from Indonesia in regards to judges tasked with insolvency matters. The judges should be well trained in dealing with insolvency and knowledgeable in business and finance matters. It should not matter whether they form part of a specialist insolvency court or a pool of judges from the judicial system tasked

[241] Dr. Heike Gramckow and Barry Walsh, 'Developing Specialist Court Services: International Experiences and Lessons Learned' (2013) The International Bank for Reconstruction and Development/The World Bank < https://openknowledge.worldbank.org/bitstream/handle/10986/16677/819460WP0Devel00Box379851B00PUBLIC0.pdf?sequence=1&isAllowed=y> accessed 22 May 2021, 6.
[242] Dr. Heike Gramckow and Barry Walsh, 'Developing Specialist Court Services: International Experiences and Lessons Learned' (2013) The International Bank for Reconstruction and Development/The World Bank < https://openknowledge.worldbank.org/bitstream/handle/10986/16677/819460WP0Devel00Box379851B00PUBLIC0.pdf?sequence=1&isAllowed=y> accessed 22 May 2021, 25.
[243] International Monetary Fund, 'Orderly & Effective Insolvency Procedures' (1999) International Monetary Fund <https://www.imf.org/external/pubs/ft/orderly/#institu> accessed 22 May 2021.
[244] Unknown, 'Insolvency Reforms in Asia: An Assessments of the Implementation Process and the Role of Judiciary' (2001) Forum for Asia Insolvency Reform < https://www.oecd.org/corporate/ca/corporategovernanceprinciples/1873992.pdf> accessed 22 May 2021, 8.
[245] Unknown, 'Insolvency Reforms in Asia: An Assessments of the Implementation Process and the Role of Judiciary' (2001) Forum for Asia Insolvency Reform < https://www.oecd.org/corporate/ca/corporategovernanceprinciples/1873992.pdf> accessed 22 May 2021, 8.

with dealing with insolvency. The presence of specialist insolvency knowledge may give confidence to multinational courts to utilise the developing countries' insolvency laws.

Another step to ensure that court systems in developing countries dealing with insolvency are efficient is by having independent courts.[246] Judicial independence is important in insolvency as it ensures that the decisions taken by the judges are not as a result of outside interference but rather following the rule of law.[247] There have been examples where the executive arm of the government has interfered with the judicial role in the insolvency of courts, for instance, in China, where specialist judges are subject to interference from local governments.[248] Similar situations may be experienced in developing countries. There is the precedence of executive interference in other areas of law in developing countries, such as in Kenya, interfering in the adjudication of human rights issues, which can extend to insolvency proceedings.[249] Developing countries should put in place safeguards to ensure judicial independence. The main safeguard is a guarantee in law that the state does not interfere with the functions of the insolvency judges.[250] Therefore, multinational companies may be more inclined to use insolvency courts in developing countries where they are confident that there will be no undue interference.

[246] The World Bank, 'Principles and Guidelines for Effective Insolvency and Crediror Rights Systems' (2001) The World Bank < https://edisciplinas.usp.br/pluginfile.php/35888/mod_resource/content/1/CHY%20Principles_and_Guidelines_for_Effective_Insolvency_and_Creditors_Rights_Systems.pdf> accessed 22 May 2021 [56]; and International Monetary Fund, 'Orderly & Effective Insolvency Procedures' (1999) International Monetary Fund <https://www.imf.org/external/pubs/ft/orderly/#institu> accessed 22 May 2021.
[247] Troy A. McKenzie, 'Judicial Independence, Autonomy, an the Bankruptcy Courts' (2010) 62(3) Standford Law Review 747, 756.
[248] Bo Li and Jacopo Ponticelli, 'Going Bankrupt in China' (2020) National Bureau of Economic Research Working Paper 27501, 2.
[249] Victor Lando, 'The Domestic Impact of the Decision of the East African Court of Justice' (2018) 18 African Human Rights Law Journal 463, 470.
[250] United Nations Human Rights Office of the High Commissioner, 'Basic Principles on the Independence of the Judiciary' (1985) The United Nations < https://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx> accessed 23 May 2021.

In conclusion, there needs to be well-functioning courts for there to be efficient implementations of the developing countries insolvency laws. Since most developing countries lack courts with relevant expertise and have the potential for proceedings to be delayed by bottlenecks there is a need for long-term development of suitable systems. A first step would be ensuring that judges are trained in regards to insolvency, business and finance matters and are not subject to undue interference. In that case, multinational companies may be encouraged to use developing countries courts for insolvency purposes rather than forum shopping.

4.5 CONCLUSION

Developing countries need to do more to eliminate disincentives to opening of local insolvency proceedings. The manner in which developing countries may do so is by ensuring that that they create effective insolvency legal frameworks which will in turn hopefully attract multinational companies in utilising them rather than forum shopping to other jurisdictions. Effective insolvency legal frameworks may negate some of the issues raised by multinational companies while forum shopping. New or reformed insolvency legal systems, if done to a sufficient standard may attract their use by multinational companies. This may be because multinational companies may recognise that it is easier and cheaper to use readily available local insolvency processes in developing countries, rather than seeking the same processes in another jurisdiction such as the US or the UK. Admittedly, this is a long-term process as suitable laws are needed and practitioners and courts need to gain familiarity with laws. Until this is done forum shopping is inevitable. However this thesis aims to consider how, if necessary improvements can be made to the laws of developing countries, a more ambitious approach to the resolution of cross-border insolvencies of multinational companies can be achieved. The suggested approach is set out in the next two chapters.

The next chapter, Chapter 5:COMI, identifies an insolvency procedural legal framework that utilises the centre of main interest (COMI) in identifying the choice of forum for opening insolvency proceedings for multinational companies, in place of the current low thresholds that enable forum shopping. The proposed insolvency procedural legal framework will aim to encourage the fair and appropriate use of all insolvency systems by multinational companies, even the reformed insolvency laws of developing countries.

CHAPTER 5: COMI

> "Modified universalism" is to date the dominant approach for addressing cross-border insolvency... it has evolved into a set of norms that can guide parties in actual cases. Adapted to the reality of a world divided into different legal systems and myriad business structures and insolvency scenarios, modified universalism seeks to achieve global collective processes with efficient levels of centralisation of insolvency proceedings. It thus requires the identification of a home country where proceedings would be centralised, except where it is efficient to open additional proceedings elsewhere.[1]

5.1 OVERVIEW

The previous chapter, Chapter 4, dealt with the developing countries perspective on forum shopping. Chapter 4 identified and analysed potential issues encountered by multinational companies in developing countries during insolvency and whether these issues lead to multinational companies engaging in forum shopping to the US and the UK. Chapter 4 also examined how local insolvency laws and local stakeholders of multinational companies may be impacted by forum shopping. Additionally, the chapter suggested the ways in which developing countries could reform their insolvency laws to bring them up to a global standard. In order to resolve the issues raised in the previous chapter, in particular, non-engagement with developing countries' insolvency laws, this chapter recommends the development of a global insolvency framework that utilises the centre of main interest (COMI) in determining the choice of forum for opening insolvency proceedings for multinational companies.

The application of COMI instead of looser tests that more readily allow for forum to be established by multinational companies in alternative jurisdictions with little real

[1] Irit Mevorach, 'Modified Universalism as Customary International Law' (2018) 96 Texas Law Review 1403.

connection would make it more difficult to engage in abusive forum shopping that may be to the detriment of domestic creditors and stakeholders and which may also reduce the incentives for developing countries to develop their own insolvency law frameworks. The chapter therefore addresses the question:

- should a procedural insolvency law be developed on an international level that provides for the uniform application of COMI as a straightforward means by which multinational companies can identify the appropriate choice of forum for opening insolvency proceedings?

5.2 INTRODUCTION

In a cross-border insolvency, multinational companies may potentially commence insolvency proceedings in one or several jurisdictions, depending on where they do business and the best perceived choices that they have to maximise the benefit of the procedures available. Currently, there is no obligatory universal insolvency law providing multinational companies with rules for coordinating proceedings that may be opened in multiple jurisdictions.[2] Although the UNCITRAL Model Law provides for procedural coordination of cross-border insolvency cases, it is a soft law instrument with a variety of carveouts for member states who chose to implement it.[3] The Model Law has also not been implemented by every single jurisdiction in which a multinational company may have a branch or subsidiary, so it may not even be available to apply in every instance. Consequently, multinational companies remain subject to national insolvency laws and procedures in whatever jurisdiction they or one of their connected companies find themselves. Therefore, determining the appropriate jurisdiction for multinational companies to open main insolvency proceedings in a cross-order insolvency is a question

[2] Irit Mevorach, 'Modified Universalism as Customary International Law' (2018) 96 Texas Law Review 1403.
[3] UNCITRAL Model Law on Cross-Border Insolvency; and Gabrielle Kaufmann-Kohler, 'Soft Law in International Arbitration: Codification and Normativity' (2010) Journal of International Dispute Settlement 1, 1.

that is not necessarily easily answered.[4] Additionally, academics such as Jay Lawrence Westbrook[5], Lynn M. LoPucki[6] and Hannah Buxbaum[7] have raised the issue of how the choice of forum can be decided in the insolvency of multinational companies. This chapter advocates the establishment of a universal insolvency procedural framework that uses the COMI test in determining the choice of forum for multinational companies to open main insolvency proceedings. In the proposed insolvency framework, countries will still apply local insolvency laws to the insolvencies of multinational companies but as a matter of procedure may cede jurisdiction to a different country should the COMI test be met elsewhere.

It is feasible for countries to claim jurisdiction over multinational companies' main insolvency proceedings if their national insolvency criteria for establishing jurisdiction are met.[8] If a multinational company meets the jurisdiction criteria for more than one country, then it is possible that more than one country may claim jurisdiction to open main insolvency proceedings.[9] However, Irit Mevorach and Jay Lawrence Westbrook are among those that have called for a uniform standard, such as COMI, to be applied universally in deciding the choice of forum in a cross-border insolvency case.[10] The universal approach advocated in this chapter is a progressive form of modified universalism. A system espousing modified universalism will contain procedural insolvency laws that assist both

[4] See for example Irit Mevorach, 'Modified Universalism as Customary' (2018) 96 Texas Law Review 1403; Robert K. Rasmussen, 'A New Approach to Transnational Insolvencies' (1997) 19 Mich. J. Int'L L. 26

[5] Jay Lawrence Westbrook, 'Choice of Avoidance Law in Global Insolvencies' (1991) 17 Brook. J. Int'L L. 499; Jay Lawrence Westbrook, 'Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum' (1991) 65 Am. Bankr. L.J. 457.

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

[7] Hannah Buxbaum, 'Rethinking International Insolvency: The Neglected Choice-of-Law Rules and Theory' (2000) 36 Stanford J. Int'L L. 23.

[8] Wolf-Georg Ringe, 'Forum Shopping under the EU Insolvency Regulation' (2008) 9 European Business Organization Law Review 579.

[9] Wolf-Georg Ringe, 'Forum Shopping under the EU Insolvency Regulation' (2008) 9 European Business Organization Law Review 579.

[10] See for example Irit Mevorach, 'Modified Universalism as Customary' (2018) 96 Texas Law Review 1403 advocates fo the 'home country' to be the choice of forum; Jay Lawrence Westbrook, 'Choice of Avoidance Law in Global Insolvencies' (1991) 17 Brook. J. Int'L L. 499; Jay Lawrence Westbrook, 'A Global Solution to Multinational Default' (2000) 98 Mich L Rev 2276. Also advocated for the standard test should utilise the 'home country' test.

the national courts and multinational companies in identifying the appropriate insolvency jurisdiction and that focus on minimising a proliferation of cases in multiple jurisdictions, thereby encouraging the use of a universal single procedure as far as possible, while also acknowledging and allowing for the consideration of certain domestic interests. This chapter advocates that COMI, which is found in several standard versions of procedural cross-border insolvency frameworks based upon the concepts of modified universalism,[11] should be the primary test for establishing a universally recognised main insolvency proceeding in circumstances of cross-border insolvency.

COMI should be the test for establishing primary jurisdiction by nations utilising a universal procedural insolvency framework because by applying, each national court can evaluate whether it is the proper forum for opening main insolvency proceedings rather than the relying on different national approaches dependent on domestic private law rules. A singular insolvency procedural framework may provide practical benefits such as a more efficient resolution of proceedings and savings on costs and time.[12] For nations to adopt COMI as a universal means of establishing jurisdiction, there should be a clear understanding of what the term means. Therefore, this chapter defines COMI as it is used by the European Union's (EU) cross-border insolvency framework.[13] Since the EU's cross-border insolvency system is arguably the most advanced system of modified universalism,[14] its use of COMI provides a benchmark of how an effective universal insolvency procedural framework might be applied.

[11] The Recast Insolvency Regulation (Regulation (EU) 2015/848); and UNCITRAL Model Law on Cross-Border Insolvency (Model Law).
[12] See for example Annika Wolf, 'A Global Cross-Border Insolvency Framework for Financial Institutions' (2015) 1 < https://cadmus.eui.eu/bitstream/handle/1814/34519/MWP_2015_01.pdf?sequence%253D1> accessed 20 January 2021 [4], She has a detailed discussion on the benefits of having singular supra-national procedural insolvency framework.
[13] The Recast Insolvency Regulation (EU) 2015/848 which replaced the Council Regulation (EC) 1346/2000 applies to all EU member states except Denmark in accordance with the Treaty of Amsterdam.
[14] The Recast Insolvency Regulation (EU) 2015/848 which replaced the Council Regulation (EC) 1346/2000 applies to all EU member states except Denmark in accordance with the Treaty of Amsterdam.

As discussed in detail in Chapter 1: The Introduction,[15] there have been competing approaches to dealing with where main insolvency proceedings should be opened for multinational companies. The competing theoretical approaches are described as territorialism, universalism and modified universalism.[16] The three theoretical cross-border insolvency theories take a different approach in the manner as to where the insolvency of multinational companies should be dealt with and how the coordination of multiple insolvency jurisdictions should be effected.[17] However, this chapter concentrates on modified universalism as the appropriate theoretical underpinning of a procedural insolvency framework for establishing insolvency jurisdiction in which COMI should be applied as the primary test due to its effectiveness in the EU framework and its flexibility allowing for certain domestic interests to be asserted.

5.2.1 The concept of COMI under Art 3 (1) of the Recast Regulation: How does it relate to national laws?

The Recast Insolvency Regulation (Regulation (EU) 2015/848) (Recast Regulation), which replaced the Council Regulation (EC) 1346/2000 (The 2000 Regulation), has unique characteristics that are mainly associated with the applicability and scope of EU regulations. The Recast Regulation is directly applicable and binding to all EU member states.[18] Direct applicability and binding mean that EU member states[19] have automatically (in most cases) adopted the Recast Regulation[20] precisely as enacted

[15] The section is *Territorialism, Extraterritoriality and Universalism*.
[16] See for example Lynn M LoPucki, 'Cooperation in International Bankruptcy: A Post-Universalist Approach' (1998-1999) 84 Cornell L Rev 696 Advocates for territorialism; Jay Lawrence Westbrook, 'Universalism and Choice of Law' (2005)23 Penn St Int'l L Rev 625 advocates for modified universalism as the world prepares for universalism; Robert K Rasmussen, 'A New Approach to Transnational Insolvencies' (1997) 19 Mich. J. Int'l L 26 advocates for universalism.
[17] A detailed discussion can be found in the section headed *Territorialism, Extraterritoriality and Universalism* in Chapter 1: The Introduction.
[18] Recast Insolvency Regulation (EU) 2015/848, Recital 6 except Denmark following the Treaty of Amsterdam.
[19] Except Denmark.
[20] Recast Insolvency Regulation (EU) 2015/848.

without further implementation steps from national laws; there is little room to manoeuvre when applying the Regulation.[21]

The Recast Regulation was enacted in June 2017 to resolve a number of issues identified by a review mandated by the 2000 Regulation and to incorporate as far as possible ten years of European case law.[22] The Recast Regulation aims to ensure an orderly framework that facilitates the coordination of cross-border insolvency proceedings.[23] It provides private international law measures that are procedural in nature rather than introducing provisions aimed at the harmonisation of substantive insolvency laws in the European Union.

There has been harmonisation of substantive insolvency laws by 17 African countries part of the Organisation for the Harmonisation of Corporate Law in Africa (OHADA).[24] The OHADA compromises of mainly French-speaking countries, which might be assumed to be one of the features, together with shared historical and cultural background, that helped create the harmonised substantive insolvency law.[25] The OHADA countries being mainly former French colonies have similar legal systems and language which has made it easier in the effort of harmonisation of the substantive insolvency laws. However, harmonisation of substantive insolvency laws can be difficult to replicate at a

[21] Treaty Functioning of the European Union, Art 288.
[22] Recast Insolvency Regulation (EU) 2015/848; Ilya Kokorin and Bob Wessels, 'Communication and Cooperation in Cross-Border Restructuring and Insolvency Matters in the EU' (2018) 37(12) American Bankruptcy Institute Journal 32, 32.
[23] Volker Kammel, 'New EU Directive on Restructuring Frameworks' (2019) Reed Smith Client Alerts < https://www.reedsmith.com/en/perspectives/2019/08/new-eu-directive-on-restructuring-frameworks> accessed 20 December 2020.
[24] Organisation for the Harmonisation of Business Law in Africa, 'Insolvency Law' (2015) Organisation for the Harmonisation of Business Law in Africa < https://www.ohada.org/en/insolvency-law/> accessed 13 November 2021.
[25] Organisation for the Harmonisation of Business Law in Africa, 'State Members' (2021) Organisation for the Harmonisation of Business Law in Africa < https://www.ohada.org/en/state-members/> accessed 13 November 2021; and Babatunde Fagbayibo, 'Towards the Harmonisation of Laws in Africa: Is OHADA The Way to Go?' (2009) 42(3) The Comparative and International Law Journal of Southern Africa 309, 312.

global scale which is made more difficult by different legal systems and cultures.[26]

The EU recently has tried to harmonise some aspects of substantive insolvency laws concerning preventive restructuring, insolvency and debt discharge through Directive (EU) 2019/1023, which, unlike the Recast Regulation, is not directly applicable due to its institutional nature as a Directive.[27] EU member states have to pass legislation to implement Directive (EU) 2019/1023 into law.[28] This is a good example that shows that even the EU recognises it is difficult to have provisions whose aim is to harmonise substantive insolvency law that are mandatory for the states to apply without any changes. The effect is that EU member states continue to rely on their national insolvency laws.[29] The Recast Regulation provides companies a means of identifying the appropriate choice of the forum for the opening of main insolvency proceedings within the EU for companies whose COMI is within the EU.[30] This chapter advocates that countries should adopt a similar approach as the EU on a global level by enacting an insolvency procedural framework that applies a modified universal approach by providing an orderly framework that facilitates the coordination of cross-border proceedings without requiring countries to harmonise insolvency laws and allows for certain domestic interests to remain separate from a universal proceeding.

Art 3(1) of the Recast Regulation, provides that:

---

[26] Babatunde Fagbayibo, 'Towards the Harmonisation of Laws in Africa: Is OHADA The Way to Go?' (2009) 42(3) The Comparative and International Law Journal of Southern Africa 309, 312.
[27] Directive (EU) 2019/1023.
[28] Directive (EU) 2019/1023; and Volker Kammel, 'New EU Directive on Restructuring Frameworks' (2019) Reed Smith Client Alerts < https://www.reedsmith.com/en/perspectives/2019/08/new-eu-directive-on-restructuring-frameworks> accessed 20 December 2020.
[29] There has been steps taken by the EU to encourage domestic insolvency reforms in certain areas such as preventive restructurings, insolvency and the debt discharge through Directive (EU) 2019/1023 as mentioned above.
[30] Council Regulation (EC) 1346/2000;Recast Insolvency Regulation (EU) 2015/848; and see Gerard McCormack, 'Something Old, Something New: Recasting the European Insolvency Regulation' (2016) M.L.R. 102, 123; and Bob Wessels, 'Current Developments Towards International Insolvency in Europe' (2004) 13(1) International Insolvency Review 43, 43.

> The courts of the Member State within the territory of which the centre of the debtor's main interests is situated shall have jurisdiction to open insolvency proceedings ('main insolvency proceedings')...[31]

A similar approach should be taken on a global level in how multinational companies should identify the appropriate jurisdiction to open main insolvency proceedings using COMI.[32]

The concept of COMI under the Recast Regulation recognises that each country has national laws that may differ in written form, application and effect.[33] As national insolvency laws in the EU differ and are not universal, they can sometimes conflict in a cross-border insolvency situation.[34] Art 3(1) of the Recast Regulations helps to resolve these conflicts between the insolvency laws of EU member states.[35] Art 3(1) provides COMI as a test to determine which country has the right to open main insolvency proceedings whose decisions in relation to a cross-border insolvency case will then potentially affect the domestic interests of creditors and stakeholders in other EU member states.[36] This approach aligns with the theory of modified universalism, advocated for by

[31] Recast Insolvency Regulation (EU) 2015/848, Art 3(1), the quote only concerns the part that deals with companies, the other part not quoted concerns individuals.
[32] Council Regulation (EC) 1346/2000, Art 3(1); and Recast Insolvency Regulation (EU) 2015/848, Art 3(1).
[33] Edward S Adams and Jason K Finche, 'Coordinating Cross-Border Bankruptcy: How Territorialism Saves Universalism' (2008) 15 Colum J Eur L 43; Jay Lawrence Westbrook, 'Breaking Away: Local Priorities and Global Assets' (2011) 46(3) Texas International Law Journal 601.
[34] Recast Insolvency Regulation (EU) 2015/848, Art 3(1) which replaced Council Regulation (EC) 1346/2000, Art 3(1); Edward S Adams and Jason K Finche, 'Coordinating Cross-Border Bankruptcy: How Territorialism Saves Universalism' (2008) 15 Colum J Eur L 43; Jay Lawrence Westbrook, 'Breaking Away: Local Priorities and Global Assets' (2011) 46(3) Texas International Law Journal 601.
[35] With the exemption of Denmark.
[36] Council Regulation (EC) 1346/2000, Art 3(1); See for example Emilie Ghio, 'Cross-Border Insolvency and Rescue Law Theory: Moving Away from the Traditional Debate on Universalism and Territorialism' (2018) I.C.C.L.R. 713; The American Law Institute, 'Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases' (2012) The American Law Institute <https://www.iiiglobal.org/sites/default/files/alireportmarch_0.pdf> accessed 17 September 2020 This is a report that was created with coordination from expert from various regions around the world.

Jay Westbrook, insofar as COMI promotes the opening of a single unified main insolvency proceeding that uses the country's insolvency laws where commenced.[37]

5.2.2 The aim of Chapter 5: COMI

The chapter aims to propose creating a uniform and universal insolvency procedural legal framework that will use COMI as the test to identify the appropriate jurisdiction for main insolvency proceedings for multinational companies. In order to apply the test of COMI, it must first be fully defined and explained. The application of COMI under the Recast Regulation provides a transferable definition upon which COMI for the purposes of the recommended insolvency procedural framework can be modelled.[38] In defining COMI for the purpose of the proposed insolvency framework[39], this section will explore the cases that have clarified the definition of COMI under the European Insolvency Regulation 2000, which were incorporated into the Recast Regulation.[40] Note that there have been no cases heard at the time of writing under the Recast Regulation at an EU level regarding COMI interpretation, which is why this chapter examines cases only under the 2000 Regulation.[41]

[37] Jay Lawrence Westbrook, 'Breaking Away: Local Priorities and Global Assets' (2011) 46(3) Texas International Law Journal 601, 616 "*…the main jurisdiction will apply its own rules to all claimants, producing a single global scheme of distribution*."
[38] Council Regulation (EC) 1346/2000; Recast Insolvency Regulation (EU) 2015/848.
[39] Recast Insolvency Regulation (EU) 2015/848.
[40] Council Regulation (EC) 1346/2000.
[41] Edward S Adams and Jason K Finche, 'Coordinating Cross-Border Bankruptcy: How Territorialism Saves Universalism' (2008) 15 Colum J Eur L 43; Jay Lawrence Westbrook, 'Breaking Away: Local Priorities and Global Assets' (2011) 46(3) Texas International Law Journal 601.

5.3 THE CONCEPT OF COMI UNDER THE RECAST REGULATION AND HOW IT CAN PROVIDE A FRAMEWORK THAT CAN BE ADAPTED UNIVERSALLY IN DEALING WITH CHOICE OF FORUM FOR MULTINATIONAL COMPANIES IN INSOLVENCY

The "centre of main interests" (COMI) is an autonomous concept i.e. a concept peculiar to the Insolvency Regulation.[42]

COMI should be applied as an autonomous concept unaffected by the interpretation of individual countries according to Miguel Virgós and Etienne Schmit.[43] Virgós and Schmit wrote a report which preceded the 2000 Regulation offering some clarification on the 2000 Regulation which included the COMI concept.[44] The importance of applying COMI as an autonomous concept was also emphasised in the cases of *In re Eurofood IFSC Ltd (Eurofood)* and *Interedil Sri v Fallimento Interedil Sri and Intesa Gestione Crediti SpA* (*Interedil*).[45] It has also been emphasised by Virgós and Francisco Garcimartín that COMI under in the 2000 Regulation ought not to rely on national laws for its definition (which extends to the Recast) [46] The reasoning behind the need for an autonomous meaning of COMI is that there may be inconsistencies in the interpretation of COMI, if various national insolvency laws within the EU are applied.[47] This section aims to provide a guideline for defining COMI that is not reliant on national insolvency laws in order to

[42] Miguel Virgós and Francisco Garcimartín, *The European Insolvency Regulation: Law and Practice* (Kluwer Law International 2004), 37.
[43] Miguel Virgós and Francisco Garcimartín, *The European Insolvency Regulation: Law and Practice* (Kluwer Law International 2004), 37 Miguel Virgós was one of the authors responsible for a report that was presented to the European Council, additionally the report was quoted in the judgement of *In re Eurofood IFSC* Ltd Case C-341/04 [111], [117], [[118], [121] in regards to identifying COMI.
[44] Miguel Virgós and Etienne Schmit, 'Report on the Convention of Insolvency Proceedings' (1996) The Council of European Union 6500/96.
[45] *In re Eurofood IFSC* Ltd Case C-341/04; *Interedil Sri v Fallimento Interedil Sri and Intesa Gestione Crediti SpA* Case C-396/09 [43]; and Miguel Virgós and Etienne Schmit, 'Report on the Convention of Insolvency Proceedings' (1996) The Council of European Union 6500/96; *In re Eurofood IFSC* Ltd Case C-341/04 [111], [117], [[118], [121].
[46] Miguel Virgós and Francisco Garcimartín, *The European Insolvency Regulation: Law and Practice* (Kluwer Law International 2004), 37.
[47] Recast Insolvency Regulation (EU) 2015/848.

ensure a uniformity of application that should then be adapted in the insolvency legal procedural framework advocated in this thesis.

5.3.1 The general concept of COMI

Article 3(1) of the Recast Regulation is central to the line of argument in this chapter. It states that:

> The courts of the Member State within the territory of which the centre of the debtor's main interests is situated shall have jurisdiction to open insolvency proceedings ('main insolvency proceedings'). The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.
>
> In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary. That presumption shall only apply if the registered office has not been moved to another Member State within the 3-month period prior to the request for the opening of insolvency proceedings...[48]

COMI is defined as the place where the debtor conducts the administration of its interests on a regular basis and is ascertainable by a third party.[49] It is not a full and clear definition of COMI, however, the lack of clear definition of the COMI concept in the 2000 Regulation did not preclude the Recast Regulation from adopting some of the wording in Art 3(1).[50] Virgós and Garcimartín argued that the COMI concept should be defined by reference to the focal point of the company's economic life and to take account, to a certain degree, of the companies' institutionalised presence.[51] Therefore, there are an array of factors that

[48] Recast Insolvency Regulation (EU) 2015/848, Art 3(1).
[49] Recast Insolvency Regulation (EU) 2015/848, Art 3(1).
[50] Council Regulation (EC) 1346/2000, Art 3(1); and Recast Insolvency Regulation (EU) 2015/848, Art 3(1).
[51] Miguel Virgós and Francisco Garcimartín, *The European Insolvency Regulation: Law and Practice* (Kluwer Law International 2004), 37.

multinational companies may use to establish COMI, resulting in confusion in some cases as to its location.[52]

Generally, Art 3 (1) of the Recast Regulation provides the presumption that the registered office is the location of COMI.[53] Additionally art 3(1) of the Recast Regulation provides for the rebuttal of the registered office presumption through identifying the location where the companies conduct their administrative interests on a regular basis and that parties can ascertain that location.[54] Art 3 (1) of the Recast Regulation is similar to Art 3 (1) of the 2000 Regulation, as it gives the presumption that COMI can be located where the registered office is.[55] The main difference in the content of art 3(1) of the Recast Regulation from art 3(1) of the 2000 Regulation is that the recast includes in the text of the article how to rebut the registered office presumption, as follows:

> 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.[56]

As seen previously, Art 3(1) of the Recast Regulation states that the effect of COMI on proceedings relating to more than one jurisdiction in cross-border insolvency will be that insolvency proceedings can be opened in the territory where the debtor's COMI is situated ('main insolvency proceedings').[57] Also, it gives a presumption of the location of COMI as

[52] Miguel Virgós and Francisco Garcimartín, *The European Insolvency Regulation: Law and Practice* (Kluwer Law International 2004), 37.
[53] Recast Insolvency Regulation (EU) 2015/848, Art 3(1).
[54] Recast Insolvency Regulation (EU) 2015/848, Art 3(1).
[55] Recast Insolvency Regulation (EU) 2015/848, Art 3(1); and Council Regulation (EC) 1346/2000, Art 3(1).
[56] Council Regulation (EC) 1346/2000, Art 3(1).
[57] Recast Insolvency Regulation (EU) 2015/848, Art 3(1).

the place of registered office.[58] Additionally, it fails to define COMI for ease of use by companies that might rely on the article.[59]

In the original Art 3(1) in the 2000 Regulation, the meaning of COMI was not precise.[60] Thus, as Alexander J Bêlohlávek observed, multinational companies turned to national courts to provide a more accurate definition of COMI.[61] In his analysis, Bêlohlávek identified that due to the lack of a clear definition or guideline, there was inconsistency in how national courts applied COMI.[62] The inconsistency in the definition of COMI resulted in encouraging forum shopping rather than discouraging it, contrary to the aim of the 2000 Regulation.[63] The implication is that multinational companies, under the previous version of Art 3(1) of the 2000 Regulation, turned to national courts to provide guidance on the appropriate application of COMI to establish jurisdiction of main insolvency proceedings. Some of the matters went all the way to the Court of Justice of the European Union (CJEU), for example, the cases of *Eurofoood* and *Interedil.*[64]

Further guidance on the interpretation of Art 3 (1) of the 2000 Regulation was provided by case law dealing with other sections of the 2000 Regulation.[65] Briefly, according to

[58] Recast Insolvency Regulation (EU) 2015/848, Art 3(1).
[59] Recast Insolvency Regulation (EU) 2015/848, Art 3(1); See for example Alexandra Kastrinou, 'Cross Border Insolvency and the EC Regulation on Insolvency Proceedings' (2012) 23(1) I.C.C.L.R. 1, 3.
[60] Recast Insolvency Regulation (EU) 2015/848, Art 3(1); and Council Regulation (EC) 1346/2000.
[61] Recast Insolvency Regulation (EU) 2015/848, Art 3(1); Council Regulation (EC) 1346/2000; and Alexander J Bêlohlávek, 'Centre of Main Interest (COMI) Principle in the New EU Regulation on Insolvency Proceedings' (2016) International Conference on European Integration 80.
[62] Alexander J Bêlohlávek, 'Centre of Main Interest (COMI) Principle in the New EU Regulation on Insolvency Proceedings' (2016) International Conference on European Integration 80 ,81.
[63] Alexander J Bêlohlávek, 'Centre of Main Interest (COMI) Principle in the New EU Regulation on Insolvency Proceedings' (2016) International Conference on European Integration 80, 81; Council Regulation (EC) 1346/2000.
[64] See for example *In re Eurofood IFSC Ltd* Case C-341/04; *Re BRAC Rent-A-Car International Inc* [2003] EWCA (Ch) 128, [2003] 2 All ER 201; *Re Daisytek-ISA Ltd & Ors* [2003] 5 WLUK 491, [2003] B.C.C. 562; *Interedil Sri v Fallimento Interedil Sri and Intesa Gestione Crediti SpA* Case C-396/09 among others.
[65] Council Regulation (EC) 1346/2000; *Interedil Sri v Fallimento Interedil Sri and Intesa Gestione Crediti SpA* Case C-396/09 [47]; *In re Eurofood IFSC Ltd* Case C-341/04 [32].

Eurofood[66] and *Interedil,*[67] multinational companies could potentially use Recital 13 of the 2000 Regulation in establishing COMI, which states:

> The "centre of main interests" should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by the third party.[68]

It should be noted that Recital 13 of the 2000 Regulation is not an operative provision of the 2000 Regulation; therefore, it was not binding but highly persuasive to provide further guidance on establishing COMI for multinational companies in particular jurisdictions.[69] In drafting Art 3 (1) of the Recast Regulation, it was deemed necessary to incorporate Recital 13 into the operative provisions following *Eurofood* and *Interedil*.[70] It gives further guidance to multinational companies as to factors that can be used to identify the COMI.[71] The incorporation of Recital 13 into the main text of the Recast Regulation ensures that it is binding and must be applied as a part of the test of COMI.[72] The location where multinational companies conduct the administration of their interests regularly and are ascertainable by the third parties has therefore become one of the key factors of establishing COMI under the Recast Regulation.[73] These factors should also be included in the proposed insolvency procedural frameworks to ensure that COMI can be established if it is possible to show that the relevant jurisdiction for opening main proceedings is where

[66] *In re Eurofood IFSC Ltd* Case C-341/04.
[67] *Interedil Sri v Fallimento Interedil Sri and Intesa Gestione Crediti SpA* Case C-396/09
[68] Council Regulation (EC) 1346/2000.
[69] Council Regulation (EC) 1346/2000; *Interedil Sri v Fallimento Interedil Sri and Intesa Gestione Crediti SpA* Case C-396/09 [47]; *In re Eurofood IFSC Ltd* Case C-341/04 [32].
[70] Recast Insolvency Regulation (EU) 2015/848, Art 3(1); *Interedil Sri v Fallimento Interedil Sri and Intesa Gestione Crediti SpA* Case C-396/09 [47]; and *In re Eurofood IFSC Ltd* Case C-341/04 [32].
[71] Recast Insolvency Regulation (EU) 2015/848, Art 3(1); *Interedil Sri v Fallimento Interedil Sri and Intesa Gestione Crediti SpA* Case C-396/09 [47]; and *In re Eurofood IFSC Ltd* Case C-341/04 [32].
[72] Recast Insolvency Regulation (EU) 2015/848, Art 3(1).
[73] Recast Insolvency Regulation (EU) 2015/848, Art 3(1); and Council Regulation (EC) 1346/2000, Recital 13.

the company conducts the administration of its interests on a regular basis and that, importantly, that this is ascertainable as well by third parties.[74]

Recital 13 of the 2000 Regulation attempted to indicate where COMI can be located but again did not provide a clear definition of the terms it used.[75] Despite Recital 13 of the 2000 Regulation stating that there were two elements to establish COMI, these two requirements were also not explained and left it for national courts to provide further guidance.[76] The CJEU provided some guidance on Recital 13 in the *Eurofood* and *Interedil* cases.[77] The proposed insolvency procedural framework may adopt the guidelines set out in the case law to provide a means by which multinational companies may rebut the registered office presumption, discussed in more detail below.

One of the elements incorporated into Art 3 (1) of the Recast Regulation is that COMI should correspond to the location that the companies conduct the administration of their interests regularly, which is an objective element according to *Eurofood.*[78] The objective element may be fulfilled by the factual presence of the headquarters of the companies in a jurisdiction. The other requirement to establish COMI, aside from the presumption of registered office in Art 3 (1) of the Recast Regulation,[79] is that third parties can ascertain the location where companies conduct the administration of their interests regularly.[80] The

[74] Recast Insolvency Regulation (EU) 2015/848, Art 3(1).
[75] *Interedil Sri v Fallimento Interedil Sri and Intesa Gestione Crediti SpA* Case C-396/09 [47]; *In re Eurofood IFSC Ltd* Case C-341/04 [32] In both cases the ECJ supported the notion that Recital 13 provides further guidance on what is meant by the term COMI.
[76] Council Regulation (EC) 1346/2000, Recital 13.
[77] *Interedil Sri v Fallimento Interedil Sri and Intesa Gestione Crediti SpA* Case C-396/09 [47]; *In re Eurofood IFSC Ltd* Case C-341/04 [32]; Recast Insolvency Regulation (EU) 2015/848, Art 3(1); and Council Regulation (EC) 1346/2000, Recital 13.
[78] Recast Insolvency Regulation (EU) 2015/848, Art 3(1); *Interedil Sri v Fallimento Interedil Sri and Intesa Gestione Crediti SpA* Case C-396/09 [49]; *In re Eurofood IFSC Ltd* Case C-341/04 [33]; and Mark Arnold, The Insolvency Regulation. in Richard Sheldon qc (ed), Cross Border insolvency (Bloomsbury Professional 2011) [33]-[34].
[79] The presumption is that COMI is located where the registered office is.
[80] Recast Insolvency Regulation (EU) 2015/848, Art 3(1); *Interedil Sri v Fallimento Interedil Sri and Intesa Gestione Crediti SpA* Case C-396/09 [49]; *In re Eurofood IFSC Ltd* Case C-341/04 [33]; and Mark Arnold, The Insolvency Regulation. in Richard Sheldon qc (ed), Cross Border insolvency (Bloomsbury Professional 2011) [33]-[34].

element concerning ascertainability by third parties is a subjective element.[81] The subjective element may be demonstrated by creditors being able to identify the headquarters of the multinational companies. Thus, in creating the proposed insolvency legal structure, COMI ought to have both objective and subjective requirements to consider the economic realities relevant to the companies, including multinational companies. Therefore, it is essential to understand what is meant by the objective and subjective requirements of Art 3 (1) of the Recast Regulation to ensure that the proposed insolvency procedural framework is sufficiently clear for use by all companies.[82] The following sections will discuss what is meant by a registered office under the Recast Regulation and what factors can rebut this presumption according to case law.

5.3.2 The registered office presumption of identifying COMI

> The "main insolvency proceedings" can be opened only in the Contracting State where the debtor has established the "centre of his main interest"... Normally it will be the place of the registered office in the case of legal persons.[83]

Commentators have agreed that insolvency is a foreseeable risk for any company doing business regardless of jurisdiction or size; hence multinational companies ought to be able to predetermine which jurisdiction applies to their insolvency matters so that they can calculate their risks to some extent.[84] In light of insolvency being a foreseeable risk, the registered office is an easily identifiable and certain characteristic of a company that can be used as the presumption for identifying the jurisdiction for COMI in Art 3(1) of the

[81] Recast Insolvency Regulation (EU) 2015/848, Art 3(1).
[82] Recast Insolvency Regulation (EU) 2015/848, Art 3(1).
[83] Miguel Virgós and Etienne Schmit, 'Report on the Convention of Insolvency Proceedings' (1996) The Council of European Union 6500/96, 15.
[84] Miguel Virgós and Etienne Schmit, 'Report on the Convention of Insolvency Proceedings' (1996) The Council of European Union 6500/96, 51; Miguel Virgós and Francisco Garcimartín, *The European Insolvency Regulation: Law and Practice* (Kluwer Law International 2004), 44.

Recast Regulation.[85] The registered office presumption is an important criteria and more than a mere factor to be considered in determing COMI.[86]

The presumption that the registered office is the COMI intended to provide certainty and predictability because it was assumed to be easier to identify as a fact.[87] However, neither the 2000 Regulation nor its Recast provides a definition or factors that can be used to identify where the registered office of multinational companies is located.[88] Arguably, it is easy to establish through paperwork that multinational companies' specific locations are the registered office for COMI purposes. Thus, the focus is not the definition of the registered office as this is not generally disputable. However, a conflict arises with the presumption that the registered office should be the COMI when the multinational companies have both a registered office and a place where the company's main activities are administered, which is different from the registered office.[89] In practice, national courts have been tasked with identifying, in line with EU laws, which jurisdictions in the EU have should be considered the appropriate jurisdiction for multinational companies to open main insolvency proceedings in circumstances in which despite the clearly identifiable registered office, other factors present may indicate a different and more appropriate venue.[90] The issue that this raises is what criteria should be used to determine when the registered office presumption should be rebutted in light of criteria to the contrary. This will be discussed in detail

[85] Recast Insolvency Regulation (EU) 2015/848, Art 3 (1) which was a recast of the Council Regulation (EC) 1346/2000, Art 3 (1).
[86] *In re Eurofood IFSC Ltd Case* C-341/04; *Re Stanford International Bank Ltd* [2009] BPIR 1157 [63].
[87] Miguel Virgós and Etienne Schmit, 'Report on the Convention of Insolvency Proceedings' (1996) The Council of European Union 6500/96, 15.
[88] Recast Insolvency Regulation (EU) 2015/848; and Council Regulation (EC) 1346/2000.
[89] Recast Insolvency Regulation (EU) 2015/848, Art 3(1); and Council Regulation (EC) 1346/2000, Art 3(1).
[90] *Interedil Sri v Fallimento Interedil Sri and Intesa Gestione Crediti SpA* Case C-396/09 [41].

5.3.2.1 'Real Seat' versus 'Statutory Seat' theory

It is important to note that the term 'registered office' is a concept that only appears in the English versions of the Recast Regulation.[91] The other versions of the Recast Regulation use the term which, if directly translated into English, will equate to 'statutory seat'; they are *siège statutaire*', '*satzungsmäßiger Sitz*',' *sede statutaria*',' *sede astatutária*' and '*domicilio social*'.[92] One reason for this is that the UK (which left the EU but was a member state at the time of the drafting of the Recast Regulation) and the Republic of Ireland do not use the statutory seat concept when defining registered office in their company law as opposed to most but not all of the other EU member states.[93] Similarly, lack of the same concepts in respective countries can cause interpretative issues particularly when trying to adopt universally applicable legislation. The terms that might be used on the proposed insolvency legal framework might not be familiar in some jurisdictions, or that the interpretation may point to a different concept, thus concepts need to be defined carefully with consideration to avoid confusion with similar concepts which may not share all of the key important features.

Gerard McCormack suggests that most civil law countries rely on the 'real seat' doctrine while most common law countries usually use the 'statutory seat' concept when interpreting registered office.[94] However, some civil law countries are exceptions to the above norm due to certain aspects of their individual legal cultures that influence the way in which laws are enacted and interpreted.[95] The 'real seat' of a company is associated

[91] Miguel Virgós and Francisco Garcimartín, *The European Insolvency Regulation: Law and Practice* (Kluwer Law International 2004), 45.
[92] Recast Insolvency Regulation (EU) 2015/848, Art 3 (1); and Council Regulation (EC) 1346/2000, Art 3(1). Miguel Virgós and Francisco Garcimartín, *The European Insolvency Regulation: Law and Practice* (Kluwer Law International 2004), 45.
[93] Miguel Virgós and Francisco Garcimartín, *The European Insolvency Regulation: Law and Practice* (Kluwer Law International 2004), 45.
[94] Gerard McCormack, 'Something Old, Something New: recasting the European Insolvency Regulation' (2016) 79(1) MLR 102, 129 – 130.
[95] Gerard McCormack, 'Something Old, Something New: recasting the European Insolvency Regulation' (2016) 79(1) MLR 102, 129 – 130.

with where the central management decisions are implemented on a day-to-day basis.[96] Whereas, a company's statutory seat is associated with the place where a company is incorporated.[97]

Countries such as the UK, Republic of Ireland and Netherlands have adopted 'statutory seat' theory while countries such as France, Greece and Germany have adopted the 'real seat' theory.[98] The Netherlands is an example of a civil law country that uses the 'statutory seat' theory.[99] On the broader application of the insolvency framework, other countries might exhibit characteristics that are contrary to McCormack's general rule.[100] There is a need for a means above the influence of national laws by which national courts may converge the two approaches of 'real seat' and 'statutory seat' theories. The result of the convergence would ideally be that multinational companies can better predict where the registered office is located to establish COMI in the adoption of the proposed universal insolvency procedural legal framework.

In the EU, a company's registered office or 'statutory seat'[101] ought to be defined in line with EU law. Possibly national courts can look at the interpretation of the term where it is included under another EU regulation, for clarification, such as Council Regulations (EC) 44/2001 at Art 60 (2), which is also contains an insolvency provision, which states:[102]

[96] Werner f. Ebke, 'The "Real Seat" Doctrine in the Conflict of Corporate Laws' (2002) 36(3) The International Lawyer 1015, 1016.
[97] Gerard McCormack, 'Something Old, Something New: recasting the European Insolvency Regulation' (2016) 79(1) MLR 102, 129 – 130.
[98] Alexandra Kastrinou, 'Cross Border Insolvency and the EC Regulation on Insolvency Proceedings' (2012) 23(1) I.C.C.L.R. 1, 4.
[99] Gerard McCormack, 'Something Old, Something New: recasting the European Insolvency Regulation' (2016) 79(1) MLR 102, 129 – 130; and Alexandra Kastrinou, 'Cross Border Insolvency and the EC Regulation on Insolvency Proceedings' (2012) 23(1) I.C.C.L.R. 1, 4.
[100] Gerard McCormack, 'Something Old, Something New: recasting the European Insolvency Regulation' (2016) 79(1) MLR 102, 129 – 130; and Alexandra Kastrinou, 'Cross Border Insolvency and the EC Regulation on Insolvency Proceedings' (2012) 23(1) I.C.C.L.R. 1, 4.
[101] Statutory seat is the direct linguist translation of the words used to refer to registered office in other linguist versions of the Recast Insolvency Regulation (EU) 2015/848, Art 3 (1) and Council Regulation (EC) 1346/2000, Art 3(1).
[102] Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters.

> For the purposes of the United Kingdom and Ireland "statutory seat" means the registered office or, where there is no such office anywhere, the place of incorporation or, where there is no such place anywhere, the place under the law of which the formation took place.[103]

According to Virgós and Garcimartín, following Art 60 (2) of Council Regulation (EC) 44/ 2001, 'registered office' and 'statutory seat' would be interchangeable in the application of Art 3(1) of the 2000 Regulation[104] and in its Recast.[105] The proposed insolvency framework should adopt a similar approach by ensuring that it explicitly addresses where terms used are not readily found in all the jurisdiction adopting it. The proposed insolvency legal framework may do so by ensuring that it clearly states that the concepts found in jurisdictions are interchangeable in a similar manner as what has been provided by Art 60(2) Council Regulations (EC) 44/2001. The result may be close to seamless practical adoption of the proposed insolvency framework, thus providing clear guidance for multinational companies in cross-border insolvency.

5.3.2.2 Registered Office for the Purposes of COMI

In practice, multinational companies, in one way or another, are registered in either one or multiple countries in line with national company laws. The issue is whether all registered offices can be considered registered offices as described by Art 3(1) of the Recast Regulation.[106] It might not be an issue where multinational companies have one registered office, which can then be used to fulfil the presumption of them being the COMI for Art 3(1) of the Recast Regulation.[107] However, multinational companies may be forced to

[103] Council Regulation (EC) 44/2001, Art 60 (2).
[104] Council Regulation (EC) 1346/2000, Art 3(1); and Miguel Virgós and Francisco Garcimartín, *The European Insolvency Regulation: Law and Practice* (Kluwer Law International 2004), 45.
[105] Recast Insolvency Regulation (EU) 2015/848, Art 3 (1).
[106] Council Regulation (EC) 1346/2000; and Recast Insolvency Regulation (EU) 2015/848.
[107] Recast Insolvency Regulation (EU) 2015/848.

register an office in any country that they operate in for various reasons, such as for tax purposes or fulfilment of statutory requirements concerning their types of businesses.[108]

National laws may provide opportunities for multinational companies that are not incorporated in that jurisdiction to register there. The question is whether those countries can be considered the registered office for COMI under Art 3(1) of the Recast Regulation.[109] For example, the UK has provisions that enable multinational companies to be registered using various company models, such as establishments, among others, if incorporated in another jurisdiction.[110] It is important to note that the registered office is a presumption used to establish COMI. Still, evidence may be provided to prove to the contrary as explained by the Honourable Judge McGonigal in *Re Daisytek-ISA Ltd & Ors* (*Daisytek-ISA*) in the UK and also the ECJ in *Interedil Sri v Fallimento Interedil Sri and Intesa Gestione Crediti SpA* (*Interedil*).[111] Art 3(1) of the Recast Regulation incorporates the rebuttable presumptions identified in case law.[112] (The rebuttal of the registered office presumption is addressed in section 5.3.3.) Thus, according to Art 3(1) of the Recast Regulation, despite the presence of legally registered offices in several jurisdictions, the presumption of COMI in relation to any of those registered offices can be rebutted if the evidence is provided that COMI should be elsewhere.[113] The proposed insolvency framework should ensure that there is a rebuttable presumption as to the establishment of COMI according to the location of the company's registered office, in order to introduce flexibility and pragmatism into the test of COMI.

---

[108] *In re Eurofood IFSC Ltd* Case C-341/04 [16].
[109] Recast Insolvency Regulation (EU) 2015/848, Art 3(1).
[110] Companies Act 2006 sections 1044-1059; Overseas Companies Regulations 2009/1801; Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009/1917; and Overseas Companies (Execution of Documents and Registration of Charge) (Amendment) Regulations 2011.
[111] *Re Daisytek-ISA Ltd & Ors* [2003] 5 WLUK 491, [2003] B.C.C. 562 [12]; *Interedil Sri v Fallimento Interedil Sri and Intesa Gestione Crediti SpA* Case C-396/09 [53] A detailed discussion of the cases will be dealt with in the section *Factors that can rebut the registered office*.
[112] Recast Insolvency Regulation (EU) 2015/848, Art 3(1); *Re Daisytek-ISA Ltd & Ors* [2003] 5 WLUK 491, [2003] B.C.C. 562 [12]; and *Interedil Sri v Fallimento Interedil Sri and Intesa Gestione Crediti SpA* Case C-396/09 [53].
[113] Council Regulation (EC) 1346/2000, Art 3(1); and Recast Insolvency Regulation (EU) 2015/848, Art 3(1).

The Recast Regulation aims to ensure there are not multiple insolvency proceedings in different jurisdictions, which can cause inefficiencies in cross-border insolvencies.[114] Instead, it provides for one main proceeding, and any other insolvency proceedings are considered secondary proceedings or territorial proceedings that can be opened in other jurisdictions should certain criteria be met.[115] The ability to determine a single main jurisdiction, regardless of number of registered offices, is a key benefit of the operation of COMI under the Recast Regulation.[116] This should be the approach taken by the proposed insolvency procedural framework.

An issue concerning the correct determination of COMI arose with respect to *Re Daisytek-ISA Ltd & Ors (Daisytek).*[117] This case concerned a UK registered subsidiary of an American international corporation with other subsidiaries in the UK and other European countries. The question raised in *Daisytek*[118] was whether the UK could claim jurisdiction over insolvency matters of all the American Daisytek International Corporation subsidiaries registered in Europe, including the UK, despite the multiple jurisdictions of registration. As the case demonstrated, a multinational companies' structure may influence the number of registered offices that could be used to open main insolvency proceedings, which can then

[114] Recast Insolvency Regulation (EU) 2015/848, Art 3(1); Thomas Biermeyer, 'Case C-396/09 Interedil Sri, Judgement of the Court of 20 October 2011, Not yet Reported Court Guidance as to the COMI Concept in Cross-Border Insolvency Proceedings' (2011) 18 Maastricht J Eur & Comp L 581, 583; and Alexandra Kastrinou, 'Cross Border Insolvency and the EC Regulation on Insolvency Proceedings' (2012) 23(1) I.C.C.L.R. 1, 3.
[115] Council Regulation (EC) 1346/2000, Art 3(1); Recast Insolvency Regulation (EU) 2015/848, Art 3(1); Thomas Biermeyer, 'Case C-396/09 Interedil Sri, Judgement of the Court of 20 October 2011, Not yet Reported Court Guidance as to the COMI Concept in Cross-Border Insolvency Proceedings' (2011) 18 Maastricht J Eur & Comp L 581, 583; and Alexandra Kastrinou, 'Cross Border Insolvency and the EC Regulation on Insolvency Proceedings' (2012) 23(1) I.C.C.L.R. 1, 3.
[116] Miguel Virgós and Francisco Garcimartín, *The European Insolvency Regulation: Law and Practice* (Kluwer Law International 2004), 37; Alexander J. Bělohlávek, 'Centre of Main Interest (COMI) and Jurisdiction of National Courts in Insolvency Matters (Insolvency Status)' (2008) 50(2) International Journal of Law and Management < https://www.emerald.com/insight/content/doi/10.1108/17542430810862333/full/html#idm44900873688864> accessed 1 October 2020.
[117] *Re Daisytek-ISA Ltd & Ors* [2003] 5 WLUK 491, [2003] B.C.C. 562.
[118] *Re Daisytek-ISA Ltd & Ors* [2003] 5 WLUK 491, [2003] B.C.C. 562.

cause confusion as to the establishment of the appropriate forum to open main cross-border insolvency proceedings.[119]

National laws may also influence where multinational companies are required to have registered offices.[120] For example, the UK requires that foreign multinational companies, also referred to as overseas companies in the UK, with an office in the UK should register their UK offices with Companies House, which keeps company records in the UK. For example, in relation to UK registration requirements issue the matter was experienced in *Re BRAC Rent-A-Car International Inc.,*[121] a single international company registered in Delaware also registered in the UK as an overseas company. In this case, it was established that the UK courts should have jurisdiction because most of the administrative and economic activities were carried out in the UK. Nonetheless from *Re BRAC Rent-A-Car International Inc*[122] it could be implied that the national rules of registration requiring that branches register in the company registering body can cause confusion when trying to establish COMI due the proliferation of registered offices.

The effect of these situations where multinational companies have more than one valid registered office is that jurisdictions will race to be the first to declare that they have the registered office in order to open proceedings in a jurisdiction where there are the greatest perceived benefits.[123] The first proceeding filed will then be the jurisdiction with COMI for main insolvency proceedings unless it can be proved to the contrary.[124] Thus the proposed

[119] A detailed discussion of why COMI was found to in the UK will be discussed later in this Chapter in *Factors that can rebut the registered office presumption* section.
[120] See for example Robin Henry, 'The EC Insolvency Proceedings Regulation becomes "centre of main interest"' (2003) 13 Co. L.N. 1.
[121] *Re BRAC Rent-A-Car International Inc* [2003] EWCA (Ch) 128, [2003] 2 All ER 201.
[122] *Re BRAC Rent-A-Car International Inc* [2003] EWCA (Ch) 128, [2003] 2 All ER 201.
[123] Council Regulation (EC) 1346/2000, Art 3(1); Recast Insolvency Regulation (EU) 2015/848, Art 3(1); Thomas Biermeyer, 'Case C-396/09 Interedil Sri, Judgement of the Court of 20 October 2011, Not yet Reported Court Guidance as to the COMI Concept in Cross-Border Insolvency Proceedings' (2011) 18 Maastricht J Eur & Comp L 581, 583; and Alexandra Kastrinou, 'Cross Border Insolvency and the EC Regulation on Insolvency Proceedings' (2012) 23(1) I.C.C.L.R. 1, 3.
[124] Council Regulation (EC) 1346/2000, Art 3(1); Recast Insolvency Regulation (EU) 2015/848, Art 3(1); Thomas Biermeyer, 'Case C-396/09 Interedil Sri, Judgement of the Court of 20 October

insolvency procedural framework should provide a clear, certain, and foreseeable means of establishing COMI that takes into account situations where there are more than one registered office so that it can be definitively established where the real seat of operations for the multinational company is, which should be considered the true COMI for the purpose of opening main proceedings despite the existence of multiple registered offices.

5.3.2.3 Shifting of Registered Office

Multinational companies have the right to move their registered office anytime they deem necessary, either before or after commencing insolvency proceedings.[125] In establishing COMI, this raises the question of whether the registered office's new location can be considered COMI under Art 3 (1) of the Recast Regulation.[126] Arguably, multinational companies immediately before the commencement of insolvency proceedings may forum shop for most favourable jurisdictions and shift the registered offices to those jurisdictions to take advantage of those jurisdictions' benefits.[127] Another reason for multinational companies to move their registered office during insolvency may be that the shareholders may prefer insolvency jurisdictions that they are familiar with.[128] There needs to be a balance between multinational companies' ability to shift their registered office, their freedom of movement from one location to another, and the multinational companies' flexibility to commence insolvency proceedings in areas that best serve their creditors' interests.

2011, Not yet Reported Court Guidance as to the COMI Concept in Cross-Border Insolvency Proceedings' (2011) 18 Maastricht J Eur & Comp L 581, 583; and Alexandra Kastrinou, 'Cross Border Insolvency and the EC Regulation on Insolvency Proceedings' (2012) 23(1) I.C.C.L.R. 1, 3.

[125] See for example R. J. de Weijs and M. S. Breeman, 'COMI-Migration: Use or Abuse of European Insolvency Law?' (2014) 11(4) European Company and Financial Law Review 495; Companies Act 2006, s.87(1) gives companies in the UK the ability to move their registered offices.

[126] Recast Insolvency Regulation (EU) 2015/848, Art 3(1).

[127] Angel Carrasco Perera, 'Presumed COMI and Registered Office of Company subject to Insolvency Proceedings under the New EU Regulation on Insolvency Proceedings' (2015) Gómez-Acebo & Pombo < https://www.ga-p.com/wp-content/uploads/2018/03/presumed-comi-and-registered-office-of-company-subject-to-insolvency-proceedings-under-the-new-eu-regulation-on-insolvency-proceedings.pdf> accessed 23 August 2020.

[128] Anna Kaczor, 'Moving a Company's COMI to achieve a Restructuring: Factors for Consideration' (2010) 83 Amicus Curiae 1.

Art 3 (1) of the Recast Regulation attempts to achieve the balance by introducing a time limit during which companies can move their registered offices outside of which the jurisdiction will not amount to a registered office for the purpose of the Recast Regulation.[129] The time limit is 90 days before the commencement of insolvency proceedings, described as a look-back period.[130] Within the look-back period, COMI cannot be presumed to be the new registered office.[131] The 90 days may be viewed as too short of a time. Some member states of the EU and lobbyists wanted the period to be two years before the commencement of insolvency proceedings.[132] However, as noted by Angel Carrasco Perera, a more extended look-back period may interfere with the freedom of movement of multinational companies' legal national identity.[133] In enacting the proposed insolvency legal framework, there ought to be a vote among the legislators to decide on the most appropriate length of the look-back period. The proposed look-back period should consider the provision of certainty for the creditors and the freedom of movement of the multinational companies associated with their business affairs. However, the length of the look-back period proposed might not be agreeable to all countries signing up to the insolvency legal framework. Establishing a look-back period for the insolvency procedural framework should take into account as far as possible the competing policies of countries and attempt to strike a balance between them.

[129] Recast Insolvency Regulation (EU) 2015/848, Art 3(1); Richard Tett and Katharina Crinson, 'The Recast EC Regulation on Insolvency Proceedings: A Welcome Revision' (2015) 2 CRI 64.
[130] Recast Insolvency Regulation (EU) 2015/848, Art 3(1); Richard Tett and Katharina Crinson, 'The Recast EC Regulation on Insolvency Proceedings: A Welcome Revision' (2015) 2 CRI 64.
[131] Recast Insolvency Regulation (EU) 2015/848, Art 3(1); Richard Tett and Katharina Crinson, 'The Recast EC Regulation on Insolvency Proceedings: A Welcome Revision' (2015) 2 CRI 64.
[132] Recast Insolvency Regulation (EU) 2015/848, Art 3(1); Richard Tett and Katharina Crinson, 'The Recast EC Regulation on Insolvency Proceedings: A Welcome Revision' (2015) 2 CRI 64.
[133] Angel Carrasco Perera, 'Presumed COMI and Registered Office of Company subject to Insolvency Proceedings under the New EU Regulation on Insolvency Proceedings' (2015) Gómez-Acebo & Pombo < https://www.ga-p.com/wp-content/uploads/2018/03/presumed-comi-and-registered-office-of-company-subject-to-insolvency-proceedings-under-the-new-eu-regulation-on-insolvency-proceedings.pdf> accessed 23 August 2020.

It is important to note that even though the registered office may have been shifted before the 90 days look-back period, the presumption of COMI as the registered office can still be rebutted.[134] The factors that can be used to rebut the registered office presumption are if there is another location that the multinational company carries out its administrative activities regularly and is ascertainable by its creditors.[135] For example, suppose the previous location of the registered office is where the company's decision making is carried out and that the creditors are able to ascertain this. In that case, that location can be used to rebut the presumption and thus considered the COMI under Art 3 (1) of the Recast Regulation.[136] A more detailed discussion on rebutting registered office presumption will be discussed in section 5.3.3. The discussin will be in relation to case law under which the means to rebut the registered office presumption was first developed. Creditors of the multinational companies are the ones who are most likely to take active steps to prove that the registered office ought not to be presumed to be the COMI if the jurisdiction against which they are arguing is not as beneficial to their interests as another.

On a practical level, multinational companies may aim to ensure that the creditors know of the registered office's shift by any practical means. Multinational companies may take steps such as pointing out the new address in correspondences or newsletters and/or any other means that is practical. There will be a greater chance that the new registered office outside the look-back period can be presumed to be the new COMI within the meaning of Art 3 (1) of the Recast Regulation.[137] Therefore, the proposed insolvency procedural

[134] Recast Insolvency Regulation (EU) 2015/848, Art 3(1); Angel Carrasco Perera, 'Presumed COMI and Registered Office of Company subject to Insolvency Proceedings under the New EU Regulation on Insolvency Proceedings' (2015) Gómez-Acebo & Pombo < https://www.ga-p.com/wp-content/uploads/2018/03/presumed-comi-and-registered-office-of-company-subject-to-insolvency-proceedings-under-the-new-eu-regulation-on-insolvency-proceedings.pdf> accessed 23 August 2020.
[135] Recast Insolvency Regulation (EU) 2015/848, Art 3(1); Angel Carrasco Perera, 'Presumed COMI and Registered Office of Company subject to Insolvency Proceedings under the New EU Regulation on Insolvency Proceedings' (2015) Gómez-Acebo & Pombo < https://www.ga-p.com/wp-content/uploads/2018/03/presumed-comi-and-registered-office-of-company-subject-to-insolvency-proceedings-under-the-new-eu-regulation-on-insolvency-proceedings.pdf> accessed 23 August 2020.
[136] Recast Insolvency Regulation (EU) 2015/848, Art 3(1).
[137] Recast Insolvency Regulation (EU) 2015/848, Art 3(1); Kathy Stone, 'Recast Regulation on Insolvency: A Guide to the Key Provisions' (2017) 3 CRI 104.

framework should ensure that the registered office presumption is still rebuttable even outside of the look-back period.

In conclusion, the term 'registered office' used in Art 3 (1) Recast Regulation[138] is identifiable using several factors as the definition is flexible. The most straightforward manner of identifying the COMI is by providing a certificate of incorporation for the company's office registration. Contrary evidence can be provided to rebut the presumption that registered office is the COMI of multinational companies, which provides a means by which creditors and, in some cases, the multinational companies themselves may argue against the registered office presumption.[139] Similarly, any potential insolvency procedural framework to be created ought to offer similar provisions as those in Art 3 (1) of the Recast Regulation[140] to provide predictability for multinational companies.[141] There should also be provisions that provide for rebutting the registered office presumption of establishing COMI. One of the reasons why it is essential to have provisions for rebutting the registered office presumption is to ensure that companies do not abuse the ability to shift the registered office to the detriment of multinational companies' stakeholders.[142] The following section examines in more detail factors identified that could rebut the presumption in Art 3(1) of the Recast Regulation as identified by case law in Art 3(1) of the Regulation.[143]

[138] Recast Insolvency Regulation (EU) 2015/848, Art 3(1).
[139] Recast Insolvency Regulation (EU) 2015/848, Art 3(1).
[140] Recast Insolvency Regulation (EU) 2015/848, Art 3(1).
[141] Recast Insolvency Regulation (EU) 2015/848, Art 3(1).
[142] Anna Kaczor, 'Moving a Company's COMI to achieve a Restructuring: Factors for Consideration' (2010) 83 Amicus Curiae 1.
[143] Council Regulation (EC) 1346/2000, Art 3(1); and Recast Insolvency Regulation (EU) 2015/848, Art 3(1).

Should there be development of a global procedural insolvency framework that utilises COMI in determining the choice of forum for opening insolvency proceedings?

5.3.3 Factors that can Rebut the Registered Office Presumption as Identified by Caselaw

Court decisions have helped identify factors that may rebut the registered office presumption, which have now been incorporated into the Recast Regulation.[144] The cases were heard under the 2000 Regulation continue to have effect on the interpretation of COMI today.[145] The following section will examine some key cases that have provided guidelines for rebutting the registered office presumption, aiming to adopt similar guidelines in the insolvency framework.

5.3.3.1 *Daisytek-ISA*[146]

Daisytek-ISA was an international company that experienced financial difficulties in more than one jurisdiction.[147] The question arose as to where the COMI was located for some of the subsidiaries in other EU member states.[148] The *Daisytek-ISA* judgment considered how COMI under art 3 (1) of the 2000 Regulation could be determined by rebutting the registered office presumption.[149]

The structure of *Daisytek-ISA*[150] is an essential factor in understanding why there was a question about which jurisdiction could be considered the COMI. Daisytek International Corporation (Daisytek) was registered in the US and was a holding company for its national and international subsidiaries.[151] ISA International PLC (ISA) was one of the international

[144] Recast Insolvency Regulation (EU) 2015/848; Gerard McCormack, 'Recasting the European Insolvency Regulation' (2016) 79(1) The Modern Law Review 102, 130.
[145] Council Regulation (EC) 1346/2000, Art 3(1); and Recast Insolvency Regulation (EU) 2015/848, Art 3(1).
[146] *Re Daisytek-ISA Ltd & Ors* [2003] 5 WLUK 491, [2003] B.C.C. 562.
[147] *Re Daisytek-ISA Ltd & Ors* [2003] 5 WLUK 491, 2003] B.C.C. 562.
[148] *Re Daisytek-ISA Ltd & Ors* [2003] 5 WLUK 491, [2003] B.C.C. 562; Alexandra Kastrinou, 'Cross Border Insolvency and the EC Regulation on Insolvency Proceedings' (2012) 23(1) I.C.C.L.R. 1, 6.
[149] *Re Daisytek-ISA Ltd & Ors* [2003] B.C.C. 562; Council Regulation (EC) 1346/2000, Art 3(1); and Recast Insolvency Regulation (EU) 2015/848, Art 3(1).
[150] *Re Daisytek-ISA Ltd & Ors* [2003] 5 WLUK 491, [2003] B.C.C. 562.
[151] *Re Daisytek-ISA Ltd & Ors* [2003] 5 WLUK 491, [2003] B.C.C. 562.

subsidiaries called the European holding company of Daisytek.[152] Daisytek is an excellent example of the complex nature of multinational companies' structure, which may lead to the question of which jurisdiction is appropriate for opening insolvency proceedings. Therefore, it is prudent to have an insolvency procedural framework to guide the multinational companies and courts, as occurred in *Daisytek-ISA,*[153] which relied on article 3(1) of the 2000 Regulation.[154] Notably, the proposed insolvency framework should provide guidelines regarding the COMI of a group of companies.

The UK court claimed jurisdiction over all the subsidiaries of ISA, including the ones in Germany and France by relying on Art 3 (1) and Recital 13 of the 2000 Regulation.[155] As mentioned earlier in section 5.3.1: *General Concept of COMI,* Art 3 (1) and Recital 13 of the Regulation are not clearly defined in the Regulation; hence Judge McGonigal in *Daisytek-ISA*[156] had to support his reasoning as to why COMI was in Bradford, UK and not in Germany nor France.

Regarding the UK subsidiaries, Judge McGonigal relied on the presumption that the registered office location is the location of COMI per Art 3 (1) of the 2000 Regulation.[157] However, Judge McGonigal did not rely on the registered office presumption in respect of the 3 German subsidiaries and 1 French subsidiary.[158] This is an example of the inconsistency of the interpretation of COMI under the 2000 Regulation which has occurred, particularly between EU member states and the UK.[159] Arguably, after enacting the 2000

[152] *Re Daisytek-ISA Ltd & Ors* [2003] 5 WLUK 491, [2003] B.C.C. 562.
[153] *Re Daisytek-ISA Ltd & Ors* [2003] 5 WLUK 491, [2003] B.C.C. 562.
[154] Council Regulation (EC) 1346/2000, Art 3(1).
[155] *Re Daisytek-ISA Ltd & Ors* [2003] 5 WLUK 491, [2003] B.C.C. 562 [12]; Council Regulation (EC) 1346/2000, Art 3(1) which are now found in Recast Insolvency Regulation (EU) 2015/848, Art 3(1).
[156] *Re Daisytek-ISA Ltd & Ors* [2003] 5 WLUK 491, [2003] B.C.C. 562; and Council Regulation (EC) 1346/2000, Art 3(1) and Recital 13.
[157] *Re Daisytek-ISA Ltd & Ors* [2003] 5 WLUK 491, [2003] B.C.C. 562, 2 – 3; Samuel L Bufford, International Insolvency Case Venue in the European Union: The Parmalat and Daisytek Controversies' (2006) 12 Colum J Eur L 429, 456.
[158] *Re Daisytek-ISA Ltd & Ors* [2003] 5 WLUK 491, [2003] B.C.C. 562, 2 – 3.
[159] Alexander J Bêlohlávek, 'Centre of Main Interest (COMI) Principle in the New EU Regulation on Insolvency Proceedings' (2016) International Conference on European Integration 80.

Regulation, the UK readily applied an extensive interpretation of COMI to claim jurisdiction, which was an interpretation broader than that of continental European Union countries as seen in this case.[160] Judge McGonigal turned to assess whether the COMI of the four subsidiaries was located by identifying where their administrative interests were conducted regularly and were therefore ascertainable by third parties.[161]

It was determined in *Daisytek-ISA* that factors that can show that COMI is located where the administration of multinational companies' main interests is conducted depends on the facts of the case.[162] The test that Judge McGonigal used to determine whether the main administrative interests of the four subsidiaries of ISA were in the UK, Germany or France was to gauge the interests administered in the UK and their importance against the interests administered in Germany and France.[163] The evidence had to be fact-based to determine where the management of the four subsidiaries was located. Judge McGonigal identified eight factors, and all led to the determination that the four subsidiaries of ISA were located in the UK rather than Germany and France.[164]

It is not necessary to discuss in detail the eight factors identified by Judge McGonigal; however, it is prudent to highlight them as below:

1. Concerned where the funding of the subsidiaries came from;
2. The level of control that ISA had over the spending powers of the subsidiaries;

[160] Council Regulation (EC) 1346/2000, Art 3(1); *Re Kaupthing Capital Partners II Masters LP Inc* [2010] EWHC 836, [2011] BCC 338; *Re European Directories* [2010] EWHC 3472 (Ch) [2011] BPIR 408; *Re Arm Asset Backed Securities SA* [2013] EWHC 3351 (Ch), [2013] All ER (D) 107.
[161] *Re Daisytek-ISA Ltd & Ors* [2003] 5 WLUK 491, [2003] B.C.C. 562, 2 – 3; Samuel L Bufford, International Insolvency Case Venue in the European Union: The Parmalat and Daisytek Controversies' (2006) 12 Colum J Eur L 429, 457; Alexandra Kastrinou, 'Cross Border Insolvency and the EC Regulation on Insolvency Proceedings' (2012) 23(1) I.C.C.L.R. 1, 6.
[162] *Re Daisytek-ISA Ltd & Ors* [2003] 5 WLUK 491, [2003] B.C.C. 562; and Council Regulation (EC) 1346/2000, Art 3(1) and Recital 13.
[163] *Re Daisytek-ISA Ltd & Ors* [2003] 5 WLUK 491, [2003] B.C.C. 562 [14]; and Alexandra Kastrinou, 'Cross Border Insolvency and the EC Regulation on Insolvency Proceedings' (2012) 23(1) I.C.C.L.R. 1, 6.
[164] *Re Daisytek-ISA Ltd & Ors* [2003] 5 WLUK 491, [2003] B.C.C. 562 [13] and [17].

3. Where the German subsidiaries management functions were carried out (the UK or Germany), and whether ISA played a role in the recruitment of the senior-level employees of the subsidiaries;
4. Where the information technology and support were run from for the subsidiaries;
5. The level of involvement of ISA in the management of service to customers of the subsidiaries;
6. What extent were contracts negotiated and entered into by ISA with customers as opposed to the ones entered into directly with the subsidiaries;
7. What level of involvement in identity and branding of the subsidiaries was ISA involved in; and
8. The level of involvement of the CEO of ISA in the management of the subsidiaries.[165]

It would seem from the list above that Judge McGonigal used a fact-finding method that is particular to the case at hand to determine that the registered office presumption did not apply to the four subsidiaries of ISA.[166]

The French raised some concerns, and German insolvency proceedings were commenced to refute the UK jurisdiction claim.[167] The management of the 4 German and French subsidiaries argued that the subsidiaries were separate legal entities with their own registered offices that ought to have been used to establish their COMI.[168] That each subsidiary has its own COMI is a valid point that has to be considered when dealing with multinational companies with parent and subsidiary group structures.

[165] *Re Daisytek-ISA Ltd & Ors* [2003] 5 WLUK 491, [2003] B.C.C. 562 [13].
[166] Recast Insolvency Regulation (EU) 2015/848, Art 3(1); Samuel L Bufford, International Insolvency Case Venue in the European Union: The Parmalat and Daisytek Controversies' (2006) 12 Colum J Eur L 429, 459 – 461.
[167] Samuel L Bufford, International Insolvency Case Venue in the European Union: The Parmalat and Daisytek Controversies' (2006) 12 Colum J Eur L 429, 459 – 464.
[168] See for example Rolf Dotevall, 'EU Insolvency Regulation and Multiregulational Combines' (2015) Scandinavian Studies in Law 64, 66.

Should there be development of a global procedural insolvency framework that utilises COMI in determining the choice of forum for opening insolvency proceedings?

The proposed insolvency procedural framework ought to cater for multinational companies' insolvency structured with parent and subsidiaries since legally, they are separate legal entities as identified by the management of the 4 Daisytek's subsidiaries.[169] However, the appeal courts in both Germany and France recognised that even though they were separate entities, their management operations were mainly conducted by the UK holding company.[170] Therefore, it would be prudent for the proposed insolvency legal framework to provide a clear guideline of when the COMI of the subsidiaries is taken to be the same as the COMI of the parent company. The approach may be similar to *Daisytek-ISA*[171] by assessing the facts on a case-per-case basis and deciding on a balance of probability.

Daisytek-ISA showed that in rebutting the registered office presumption of COMI, the courts could use the 'mind of management' or 'head office function' approach rather than the registered office's actual location.[172] As seen in the factors identified by Judge McGonigal, the 'real' head office of the subsidiaries was in the UK rather than the actual location in Germany and France; thus, the application of Recital 13 now incorporated in Art 3(1) of the Recast Regulation.[173] The part in article 3 (1) states '…The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties…'.[174] From this, it is not enough to show that the head office functions are carried out from a particular location. Still, the creditors must be aware of that location to rebut the registered office presumption and to establish that the COMI is elsewhere.[175] In practice, creditors need to be aware of

[169] See for example Rolf Dotevall, 'EU Insolvency Regulation and Multiregulational Combines' (2015) Scandinavian Studies in Law 64, 66.
[170] Samuel L Bufford, International Insolvency Case Venue in the European Union: The Parmalat and Daisytek Controversies' (2006) 12 Colum J Eur L 429, 459 – 461.
[171] *Re Daisytek-ISA Ltd & Ors* [2003] 5 WLUK 491, [2003] B.C.C. 562 [13].
[172] *Re Daisytek-ISA Ltd & Ors* [2003] 5 WLUK 491, [2003] B.C.C. 562 [13]; Bob Wessel, 'Cross-Border Insolvency Law in Europe: Present Status and Future Prospects' (2008) 11 Potchefstroom Electronic Law Journal 68, 78 – 79.
[173] Samuel L Bufford, International Insolvency Case Venue in the European Union: The Parmalat and Daisytek Controversies' (2006) 12 Colum J Eur L 429 [455]; and Recast Insolvency Regulation (EU) 2015/848, Art 3(1).
[174] Recast Insolvency Regulation (EU) 2015/848, Art 3(1).
[175] *Re Daisytek-ISA Ltd & Ors* [2003] 5 WLUK 491, [2003] B.C.C. 562 [14] – [15].

the locations that the day to day activities of the multinational companies are conducted from to establish COMI in a location that is not where the company's main office is registered.

5.3.3.2 *Eurofood*[176]

Daisytek-ISA[177] did not sufficiently deal with the relationship between parent and subsidiary companies to make it absolutely clear how to establish to the location of COMI by relying on factors other than the registered office. Further clarification required whether the COMI of the parent company's COMI location should also be the COMI of all the multinational companies' subsidiaries and under what circumstances. *Eurofood*[178] concerned such a relationship. It is, therefore, vital to examine how the CJEU defined COMI in *Eurofood.*[179] Note that a national UK court heard *Daisytek-ISA* while *Eurofood*[180] was heard by the highest court in the EU.

The CJEU was tasked with determining whether the COMI of Eurofood was in Ireland or Italy.[181] In applying the criteria to determine the location of Eurofood's COMI, the CJEU acknowledged the decision in *Daisytek-ISA's* heard in the UK.[182] The approach taken for the decision recognised that Recital 13 provides more of a guideline for establishing COMI by looking at where the main administrative interests of Eurofood were carried out and that Eurofood's creditors were aware of that location.[183] In doing so, the court asked the following question:

[176] *In re Eurofood IFSC Ltd* Case C-341/04.
[177] *Re Daisytek-ISA Ltd & Ors* [2003] 5 WLUK 491, [2003] B.C.C. 562.
[178] *In re Eurofood IFSC Ltd* Case C-341/04.
[179] *In re Eurofood IFSC Ltd* Case C-341/04.
[180] *In re Eurofood IFSC Ltd* Case C-341/04.
[181] *In re Eurofood IFSC Ltd* Case C-341/04 [27].
[182] *In re Eurofood IFSC Ltd* Case C-341/04 [29].
[183] *In re Eurofood IFSC Ltd* Case C-341/04 [32]; *Re Daisytek-ISA Ltd & Ors* [2003] 5 WLUK 491, [2003] B.C.C. 562; and Council Regulation (EC) 1346/2000, Art 3(1) and Recital 13.

> The referring court asks how much relative weight should be given as between, on the one hand, the fact that the subsidiary regularly administers its interests, in a manner ascertainable by third parties and in respect for its own corporate identity, in the Member State where its registered office is situated and, on the other hand, the fact that the parent company is in a position, by virtue of its shareholding and power to appoint directors, to control the policy of the subsidiary.[184]

The above question related to subsidiaries managing their affairs in circumstances where the only input from the parent company was the fact that it was a shareholder of the subsidiary that could appoint directors, thereby exercising certain management functions over the subsidiaries. The question was then whether the subsidiaries' autonomy as individual companies should be considered weightier evidence for the establishment of COMI or if the controlling power of the parent company should be given more weight, i.e. which of these companies exercised a 'head office function'. To answer the question, the CJEU elaborated the test to identify the location of COMI when rebutting the registered office presumption.[185] The test states that the factors to be considered must be both objective and ascertainable by third parties.[186] This approach did not consider the 'head office function' test taken by the UK court in *Daisytek-ISA,*[187] which Rolf Dotevall criticised as being too subjective.[188] Alexandra Kastrinou argued that the CJEU might not have considered the 'head office function' approach as they might not have viewed it as relevant on the facts of *Eurofood.*[189]

[184] *In re Eurofood IFSC Ltd* Case C-341/04 [27].
[185] *In re Eurofood IFSC Ltd* Case C-341/04 [33]; Alexandra Kastrinou, 'Cross Border Insolvency and the EC Regulation on Insolvency Proceedings' (2012) 23(1) I.C.C.L.R. 1, 9 – 10; and Jente Dengler, 'Coordination or Centralisation? Group Insolvencies and COMI-Shifting under the Recast EIR' (2017) 14(6) Int. C.R. 441, 442.
[186] *In re Eurofood IFSC Ltd* Case C-341/04 [33].
[187] *Re Daisytek-ISA Ltd & Ors* [2003] 5 WLUK 491, [2003] B.C.C. 562; and Council Regulation (EC) 1346/2000, Art 3(1) and Recital 13.
[188] Alexandra Kastrinou, 'Cross Border Insolvency and the EC Regulation on Insolvency Proceedings' (2012) 23(1) I.C.C.L.R. 1, 10.
[189] *In re Eurofood IFSC Ltd* Case C-341/04.

In analysing the facts of *Eurofood*[190] to determine COMI, the CJEU took a different approach to the UK court in *Daisytek-ISA*[191] regarding the control that Parmalat, as the parent company, had over Eurofood. The CJEU believed that objectively the fact that Parmalat could appoint directors of Eurofood due to the shareholding that it had, was not sufficient to show that it controlled the administrative interests of Eurofood.[192] The CJEU went further and stated that if a parent company can make economic choices for the subsidiary or control it, it is not sufficient to rebut the registered office presumption even though the creditors can ascertain this.[193] This seemed to have placed a higher threshold for multinational companies to rebut the registered office presumption as COMI. The proposed insolvency legal framework can incorporate the higher threshold to provide for situations where parent companies can potentially somehow interfere with the subsidiaries through their shareholding. The proposed insolvency procedural framework should include a 'head office function' test[194] to deal with a group of companies that have relegated their managerial functions to one company in the group, as a minimum standard in addition to the discussions below.

The CJEU stated that if a registered office is used only as a 'letter box' location, meaning that no other activities are carried out from that location, then that location cannot be considered the COMI.[195] Ringe argued that there was criticism of having the applicable insolvency laws different from the company's nationality, which is usually associated with the place of registered office.[196] Ringe states that this line of argument seems to take the approach that company law and insolvency law should be viewed separately, which is not necessarily a helpful view since both areas of law aim to ensure that the business thrives

[190] *In re Eurofood IFSC Ltd* Case C-341/04.
[191] *Re Daisytek-ISA Ltd & Ors* [2003] 5 WLUK 491, [2003] B.C.C. 562 [180].
[192] *In re Eurofood IFSC Ltd* Case C-341/04 [36].
[193] *In re Eurofood IFSC Ltd* Case C-341/04 [36].
[194] *Re Daisytek-ISA Ltd & Ors* [2003] 5 WLUK 491, [2003] B.C.C. 562 [180].
[195] *In re Eurofood IFSC Ltd* Case C-341/04 [35].
[196] Wolf-Georg Ringe, 'Forum Shopping under the EU Insolvency Regulation' (2008) 9 European Business Organization Law Review 579, 613.

effectively and fairly.[197] It would not be appropriate to consider locations that are only used as postal addresses to establish the COMI of multinational companies because it offers no further proof that locations is used to carry out from any other functions for the company.

In *Eurofood,* the CJEU agreed with the Irish court that COMI was in Ireland and not in Italy.[198] The reasoning for this was that the registered office of Eurofood was in Ireland fulfilling the registered office presumption of Art 3 (1) of the Regulation.[199] COMI in Ireland could not be refuted as, objectively, most of Eurofood's day-to-day management activities were in Ireland. COMI in Ireland was ascertainable by its creditors even though Parmalat had the ability as its shareholder to appoint its directors. However, the CJEU did not elaborate on fundamental factors that should be considered when determining the test's objective part for rebutting the registered office as COMI.

Additionally, *Eurofood* failed to put in place a means by which there can be coordination of group companies' insolvency, which is the organisational structure used by most multinational companies. The position that *Eurofood* took was that a group of companies ought to be dealt with separately rather than as one, no matter how integrated they are.[200] The basis of this reasoning was that the 2000 Regulation did not provide for situations in which a group of companies could be dealt with in one insolvency proceeding, which could arguably be better for creditors to have all their matters dealt with by one insolvency court.[201] Nevertheless, as noted by Jente Dengler, *Eurofood* did not rule out the 'group

[197] Wolf-Georg Ringe, 'Forum Shopping under the EU Insolvency Regulation' (2008) 9 European Business Organization Law Review 579, 613.
[198] *In re Eurofood IFSC Ltd* Case C-341/04 [37]
[199] *In re Eurofood IFSC Ltd* Case C-341/04 [37].
[200] *In re Eurofood IFSC Ltd* Case C-341/04 [30]; Jente Dengler, 'Coordination or Centralisation? Group Insolvencies and COMI-Shifting under the Recast EIR' (2017) 14(6) Int. C.R. 441, 442.
[201] Council Regulation (EC) 1346/2000; and Michele Reumers, 'What is in a Name? Group Coordination or Consolidation Plan – What is Allowed under the EIR Recast?' (2016) 25 Int. Insolv. Rev. 225, 225.

COMI approach'.[202] Another concern that the CJEU did not address in *Eurofood*[203] was whether the possession by multinational companies of immovable properties or substantial contracts such as lease agreements could be sufficient to enable the rebuttal of the registered office presumption. These questions were addressed in *Interedil.*[204]

In summary, following *Eurofood,* the proposed insolvency procedural framework ought to ensure that the test for rebutting the registered office presumption as COMI is not too subjective.[205] There ought to be a balance between the objective and subjective elements in assessing matters on a case per case basis. The assessment of the location of COMI in the proposed insolvency legal framework should ensure that 'letter box' registered offices can be rebutted as COMI by looking at the location where the administrative functions of the multinational companies are carried out and can be ascertained by their creditors.

5.3.3.3 *Interedil*[206]

Interedil Srl (Interedil) was initially incorporated in Italy and had a registered office in Monopoli (Italy).[207] In 2001, Interedil's registered office was transferred to London, UK and removed from the Italian company registry.[208] Interedil Srl and Intesa Gestione Crediti SpA (Intesa) in 2003 filed in Italy a petition to commence bankruptcy proceedings against Interedil. This company had changed ownership and was consequently dissolved after the registered office transferred to the UK.[209] Interedil contested that the Italian courts had jurisdiction over its insolvency proceedings as it had transferred its registered office to the

[202] Jente Dengler, 'Coordination or Centralisation? Group Insolvencies and COMI-Shifting under the Recast EIR' (2017) 14(6) Int. C.R. 441, 443.
[203] *In re Eurofood IFSC Ltd* Case C-341/04.
[204] *Interedil Sri v Fallimento Interedil Sri and Intesa Gestione Crediti SpA* Case C-396/09.
[205] *In re Eurofood IFSC Ltd* Case C-341/04 [36].
[206] *Interedil Sri v Fallimento Interedil Sri and Intesa Gestione Crediti SpA* Case C-396/09.
[207] *Interedil Sri v Fallimento Interedil Sri and Intesa Gestione Crediti SpA* Case C-396/09 [10].
[208] *Interedil Sri v Fallimento Interedil Sri and Intesa Gestione Crediti SpA* Case C-396/09 [10] – [11].
[209] *Interedil Sri v Fallimento Interedil Sri and Intesa Gestione Crediti SpA* Case C-396/09 [10] - [12].

UK.[210] On this basis, the matter was referred to the CJEU to decide Interedil's COMI location, and in its judgement, the CJEU offered more clarification of the method of identifying COMI. Therefore, it is essential to examine the method of identifying COMI's location of a company identified by the CJEU in *Interedil* to further clarify the criteria for establishing COMI outside of the registered office that can be used in the insolvency framework.[211]

In *Interedil,* the CJEU agreed with the decision in *Eurofood* that Recital 13 of the Regulation could be used as a means to rebut the registered office presumption set out in Art 3 (1) of the Regulation.*[212]* The use of Recital 13 meant that CJEU placed greater importance on the fact that COMI should correspond with the location of where Interedil conducted its administrative interests regularly.[213] That location should also be ascertainable by its creditors.[214] The presence of the headquarters and the registered office together in the same place makes it more difficult to rebut the presumption of COMI at the location of a compamy's registered office.[215] In defining what was meant by the location where Interedil carried out its main administrative interests regularly, the CJEU stated that the test laid out in *Eurofood* was the one to be used.[216] Applying the test in *Eurofood* meant that the factors to determine rebuttal of the registered office presumption as COMI are viewed objectively and should be ascertainable to the creditors (in this case, Intesa).[217]

---

[210] *Interedil Sri v Fallimento Interedil Sri and Intesa Gestione Crediti SpA* Case C-396/09 [13].
[211] *Interedil Sri v Fallimento Interedil Sri and Intesa Gestione Crediti SpA* Case C-396/09 [59].
[212] *Interedil Sri v Fallimento Interedil Sri and Intesa Gestione Crediti SpA* Case C-396/09 [47]; *In re Eurofood IFSC Ltd* Case C-341/04 [32]; and Council Regulation (EC) 1346/2000, Art 3(1) and Recital 13.
[213] *Interedil Sri v Fallimento Interedil Sri and Intesa Gestione Crediti SpA* Case C-396/09 [47].
[214] *Interedil Sri v Fallimento Interedil Sri and Intesa Gestione Crediti SpA* Case C-396/09 [47].
[215] *Interedil Sri v Fallimento Interedil Sri and Intesa Gestione Crediti SpA* Case C-396/09 [59]; Rolf Dotevall, 'EU Insolvency Regulation and Multiregulational Combines' (2015) Scandinavian Studies in Law 64, 66.
[216] *In re Eurofood IFSC Ltd* Case C-341/04 [33]; *Interedil Sri v Fallimento Interedil Sri and Intesa Gestione Crediti SpA* Case C-396/09 [48]; and Gerard McCormack, 'Recasting the European Insolvency Regulation' (2016) 79(1) The Modern Law Review 102, 132.
[217] *Interedil Sri v Fallimento Interedil Sri and Intesa Gestione Crediti SpA* Case C-396/09 [49].

In ascertaining which factors should be taken into account to show that COMI was not in the registered office location, the CJEU gave a guideline rather than stating all the relevant factors. The guideline stated: '…all the places in which the debtor company pursues economic activities and all those in which it holds assets, in so far as those places are ascertainable by third parties…'.[218] The statement can be construed as the factors to be considered concerning a particular multinational company rather than as a general view.[219] Thus, the test would be subjective in application to a specific multinational company. Additionally, the courts are left to determine whether those facts are sufficient to rebut the registered office presumption of COMI by weighing all the factors available.[220] Also, the courts have to consider whether creditors are aware that the location that is not the registered office is actually where main administrative activities are carried out; or information concerning that location that is easily discoverable by the creditors.[221]

In applying the above guidelines, the CJEU in *Interedil* assessed whether the immovable assets and contracts between Interedil and a financial institution were enough to rebut the registered office presumption to establish COMI.[222] In *Interedil,* the CJEU concluded that it was not enough that Interedil had immovable assets and contracts and that they were ascertainable by the creditors.[223] It appears that the CJEU was relying on the fact that when the registered office was in the same place as where the main administrative activities were conducted then the registered office presumption could not be rebutted.[224] Before the commencement of insolvency proceedings, one question is whether

[218] *Interedil Sri v Fallimento Interedil Sri and Intesa Gestione Crediti SpA* Case C-396/09 [52].
[219] *Interedil Sri v Fallimento Interedil Sri and Intesa Gestione Crediti SpA* Case C-396/09 [53]; Thomas Biermeyer, 'Case C-396/09 Interedil Sri, Judgement of the Court of 20 October 2011, Not yet Reported Court Guidance as to the COMI Concept in Cross-Border Insolvency Proceedings' (2011) 18 Maastricht J Eur & Comp L 581, 584.
[220] Jente Dengler, 'Coordination or Centralisation? Group Insolvencies and COMI-Shifting under the Recast EIR' (2017) 14(6) Int. C.R. 441, 443.
[221] *Interedil Sri v Fallimento Interedil Sri and Intesa Gestione Crediti SpA* Case C-396/09 [53].
[222] *Interedil Sri v Fallimento Interedil Sri and Intesa Gestione Crediti SpA* Case C-396/09 [53].
[223] *Interedil Sri v Fallimento Interedil Sri and Intesa Gestione Crediti SpA* Case C-396/09 [53].
[224] *Interedil Sri v Fallimento Interedil Sri and Intesa Gestione Crediti SpA* Case C-396/09 [59].

multinational companies can move their registered office to where they conduct their administrative interest (or any other location) or vice versa.

As discussed in detail in section 5.3.1.3, if the registered office has been moved within three months before the insolvency proceedings, then the new registered office cannot be considered the COMI unless the main administrative interests of the multinational company are conducted from there.[225] Therefore, courts can take account of various facts, on a case-by-case basis, to determine COMI. Still, COMI should shift three months before the commencement of the insolvency proceedings in order to ensure that companies do not abuse the shifting of COMI to obtain outcomes that are in the debtor company's best interest alone. A similar approach should be adapted in the proposed insolvency legal framework.

It should be noted that the guidelines in *Eurofood* and explained in *Interedil* were codified in the Recast Regulation in Art 3 (1) and Recital 30:[226]

> Accordingly, the presumptions that the registered office, the principal place of business and the habitual residence are the centre of main interests should be rebuttable, and the relevant court of a Member State should carefully assess whether the centre of the debtor's main interests is genuinely located in that Member State. In the case of a company, it should be possible to rebut this presumption where the company's central administration is located in a Member State other than that of its registered office, and where a comprehensive assessment of all the relevant factors establishes, in a manner that is ascertainable

[225] Recast Insolvency Regulation (EU) 2015/848, Art 3 (1).
[226] *In re Eurofood IFSC Ltd* Case C-341/04 [33]; *Interedil Sri v Fallimento Interedil Sri and Intesa Gestione Crediti SpA* Case C-396/09 [48] – [49]; Recast Insolvency Regulation (EU) 2015/848 Art 3 (1) and Recital 30 Note that recital 30 is not binding by highly persuasive as it is not in the main text of the regulation.

> by third parties, that the company's actual centre of management and supervision and of the management of its interests is located in that other Member State….

According to Dengler, arguably, Interedil addressed the particular issues associated with the insolvency of groups of companies' which are often shared by multinational companies in financial distress.[227] The reason is that the test laid out for establishing COMI was similar to the approach taken by *Daisytek-ISA.*[228] The approach is that the location where administrative interests are conducted and ascertainable by third parties can rebut the registered office presumption. In the case of *Daisytek-ISA*[229] one of the subsidiaries was running the administrative interest of other subsidiaries from its registered office rather than their registered office; hence the registered office was in the UK. This approach was different from the more hard-line approach taken in *Eurofood* in that each company should be viewed as an individual entity rather than part of a group.[230]

In conclusion, *Interedil* provided a practical means by which facts to rebut the registered office presumption could be weighed in determining COMI.[231] The test to be adopted in the proposed insolvency legal framework should be that the registered office presumption can be rebutted by proving that administrative interests of the multinational companies are conducted in another location that is ascertainable by third parties. Additionally, in circumstances where there is both the presence of a registered office and the conduct of administrative interests, it should be more difficult to reject the establishment of COMI. Consequently, multinational companies and courts would be able to better make judgements on the places where COMI can be established.

---

[227] Jente Dengler, 'Coordination or Centralisation? Group Insolvencies and COMI-Shifting under the Recast EIR' (2017) 14(6) Int. C.R. 441 [443].
[228] *Re Daisytek-ISA Ltd & Ors* [2003] 5 WLUK 491, [2003] B.C.C. 562 [13].
[229] *Re Daisytek-ISA Ltd & Ors* [2003] 5 WLUK 491, [2003] B.C.C. 562 [13].
[230] *In re Eurofood IFSC Ltd* Case C-341/04 [30]; Jente Dengler, 'Coordination or Centralisation? Group Insolvencies and COMI-Shifting under the Recast EIR' (2017) 14(6) Int. C.R. 441, 442.
[231] *Interedil Sri v Fallimento Interedil Sri and Intesa Gestione Crediti SpA* Case C-396/09 [59].

Should there be development of a global procedural insolvency framework that utilises COMI in determining the choice of forum for opening insolvency proceedings?

5.3.4 Insolvency of Groups of Companies

Multinational companies trading as groups of companies are likely to be interdependent on each other and commencement of an insolvency proceeding against one of the companies can affect other companies in the group.[232] The proposed insolvency procedural framework should address how insolvency proceedings of the group of companies should be handled. The Recast Regulation still maintains that each company in the group can have its own insolvency proceeding commenced, what Chapter V of the Recast Regulation addresses is the issue of cooperation, communication and coordination of group insolvency, which also should be adopted by the proposed insolvency legal framework.[233]

The Recast Regulation did not provide for one unified insolvency proceeding for multinational companies; instead, it provided cooperation and communication duties for insolvency practitioners and courts involved in the insolvency proceedings.[234] The cooperation and communication are mandatory on behalf of the insolvency practitioners and courts.[235] This means that in situations where groups of companies are in insolvency the insolvency practitioners and the courts have to cooperate and communicate with each other in relation to the insolvency as far as possible.[236] However, there is no obligation to coordinate with one another.[237] Therefore, if the same communication and cooperation obligations were to be adopted by the proposed insolvency procedural framework, all the courts and insolvency practitioners would have to ensure that they share information and work together to ensure that the group of companies is dealt fairly and efficiently.

[232] Sid Pepels, 'Defining Groups of Companies under the European Insolvency Regulation (recast): On the Scope of EU Group Insolvency Law' (2020) International Insolvency Review 96 [97].
[233] Recast Insolvency Regulation (EU) 2015/848, chapter v.
[234] See for example Recast Insolvency Regulation (EU) 2015/848, Art 92, Art 8, Art 70, Art 72 (1), Arts 56-60 and chapter v; Michele Reumers, 'What is in a Name? Group Coordination or Consolidation Plan – What is Allowed under the EIR Recast?' (2016) 25 Int. Insolv. Rev. 225, 226.
[235] Jente Dengler, 'Coordination or Centralisation? Group Insolvencies and COMI-Shifting under the Recast EIR' (2017) 14(6) Int. C.R. 441; Recast Insolvency Regulation (EU) 2015/848, Arts 41-43 and, Art 56-57.
[236] Recast Insolvency Regulation (EU) 2015/848, Arts 41-43 and, Art 56-57.
[237] Recast Insolvency Regulation (EU) 2015/848, Art 61.

In order to apply a similar approach to the Recast Regulation, cooperation, communication it should be understood that coordination are not synonymous terms.[238] According to Virgós and Schmit's report, communication involves sharing of information.[239] The information to be shared between the national courts, supranational court and insolvency practitioners involves what will assist in the insolvency proceedings of the companies in the groups no matter the location of the proceedings. The examples of what should be shared include and not limited to: assets; if assets might be liquidated; claims commenced; list of priority for creditors; possible restructuring plans; progress of the insolvency proceedings and any further possible actions being anticipated.[240] There might be issues of communicating confidential company information where countries have enacted data protection legislations.[241] For example, the UK has enacted Data Protection Act 2018 and the EU's General Data Protection Regulation (EU) 2016/679 that prevent sharing of computerised confidential information unless it is lawful to do so.[242] There is nothing preventing countries from passing similar laws which may be more stringent and prevent sharing of the company information which will hinder the proposed communication obligation in the insolvency procedural framework. In any case, the proposed procedural framework should provide an obligatory communication requirement among the national courts, supranational court and insolvency practitioners of the group of companies in insolvency.

[238] Bernard Santen, 'Communication and cooperation in international insolvency: on best practices for insolvency office holders and cross-border communication between courts' (2015) 16 ERA Forum 229, 231 – 232.
[239] Miguel Virgós and Etienne Schmit, 'Report on the Convention of Insolvency Proceedings' (1996) The Council of European Union 6500/96, 230 – 231.
[240] Miguel Virgós and Etienne Schmit, 'Report on the Convention of Insolvency Proceedings' (1996) The Council of European Union 6500/96, 230; and Bernard Santen, 'Communication and cooperation in international insolvency: on best practices for insolvency office holders and cross-border communication between courts' (2015) 16 ERA Forum 229, 231.
[241] Miguel Virgós and Etienne Schmit, 'Report on the Convention of Insolvency Proceedings' (1996) The Council of European Union 6500/96, 231.
[242] Data Protection Act 2018; and General Data Protection Regulation (EU) 2016/679.

Bernard Santen describes cooperation as working together towards same end goal.[243] This means that the obligation to cooperate among the national courts, supranational court and insolvency practitioners involving the insolvency of a groups of companies would require all the parties to work together to achieve the same goal. The goal can be liquidating the companies with the group in insolvency or restructuring. As a consequence, the insolvency practitioners or national courts cannot come to different outcomes, one cannot pursue restructuring while the other seeks liquidation. On the other hand, coordination has been described as the parties involved with each insolvent company in the group of companies negotiating with each other to effectively work with each other, but they do not need to come to the same conclusion.[244] Coordination will be better suited for companies within the group that are less integrated as they can be better served separately.[245] Therefore, in the situation where the same goal is being sought involving a particular group of companies the proposed insolvency procedural framework must ensure that all parties involved work together to achieve it. However, the proposed insolvency procedural framework should not make it an obligation to coordinate insolvencies of individual companies within a group if the outcome being sought differs.

In practice, it might be hard to implement obligations of cooperation, coordination and communication. As stated earlier, each country has its own insolvency law which deal with insolvency matters depending on their time scale.[246] In some countries, it takes years to complete insolvency proceedings, which can lead to the assumption that the insolvency

[243] Bernard Santen, 'Communication and cooperation in international insolvency: on best practices for insolvency office holders and cross-border communication between courts' (2015) 16 ERA Forum 229, 231.
[244] Bernard Santen, 'Communication and cooperation in international insolvency: on best practices for insolvency office holders and cross-border communication between courts' (2015) 16 ERA Forum 229, 231; Bernard Baujet, 'New Concept in The Recast European Insolvency Regulation: The Coordinating Insolvency Office Holder' (2016) Eurofenix 16, 16 –17.
[245] H. Bourbouloux and A. Loste, 'Towards the Improvement of The Treatment of the Insolvency of Groups of Companies' (2015) Collective Proceedings Review File 8.
[246] Irit Mevorach, 'Modified Universalism as Customary International Law' (2018) 96 Texas Law Review 1403; The World Bank, 'Time to Resolve Insolvency (Years) – Least Developed Countries UN Classification' (2019) The World Bank <https://data.worldbank.org/indicator/IC.ISV.DURS?end=2019&locations=XL&start=2019&view=bar> accessed 4 June 2020.

steps take longer in those jurisdictions, such as the appointment of insolvency practitioners. Consequently, by the time one court or one insolvency practitioner dealing with one of the companies realises they need to cooperate, communicate and coordinate with the other courts or insolvency practitioner, the others may have already dealt with their related company of the group. The previous chapter, chapter 4, highlighted insolvency reforms adapting best practice in relation to time of insolvency which might eliminate this issue.[247] Since reforming insolvency laws take a long time, in the meantime the proposed insolvency procedural framework can take a similar stance with the Recast Regulation of ensuring that the communication occurs as soon possible.[248] The coordination and cooperation of the insolvency of groups of companies may result in realisation of an overall better outcome for the whole group than would have been achieved by lack of coordination and communication.[249]

5.4 CONCLUSION

In conclusion, there is a need for an insolvency procedural framework to help multinational companies identify the proper forum for opening main insolvency proceedings. The insolvency framework ought to adhere to a modified universalism approach by ensuring that it does not make substantive changes to national insolvency laws but rather it is procedural and is also flexible where required to cater to certain national interests. To ensure that the insolvency framework provides for the flexibility and pragmatism that is encouraged by the modified universalism approach, COMI should be the concept that is used to identify the correct jurisdiction for the opening of main proceedings for multinational companies. The use of COMI and the associated tests and presumptions will provide a consistent manner for dealing with the choice of forum issues rather than the fragmented manner in which choice of forum issue is dealt with currently on an

[247] See section 4.3.2.4.
[248] Recast Insolvency Regulation (EU) 2015/848, Arts 41-43 and, Art 56-57.
[249] Sid Pepels, 'Defining Groups of Companies under the European Insolvency Regulation (recast): On the Scope of EU Group Insolvency Law' (2020) International Insolvency Review 96, 97.

international level. Therefore, developing countries' insolvency laws will be utilised if appropriate rather than being ignored in favour of other jurisdictions, such as the UK and the US.

The adoption of the proposed insolvency framework may not happen all at once. The adoption of new international law and procedure is a slow process.[250] Countries require convincing that the proposed insolvency legal framework will benefit them domestically for them to agree to such a framework and implement it in their own legal systems. One of the benefits that can be highlighted is effective coordination of multinational companies insolvency, which can reduce time spent by national courts on unnecessary parallel proceedings, which would also positively impact the maximisation of assets and value of the debtor for the benefit of all stakeholders.

Additionally, countries will be more inclined to adopt the proposed insolvency legal framework if a reputable international organisation were to champion it. Currently, one of the foci international organisations such as the World Bank, International Monetary Fund (IMF) and United Nations Commission on International Trade Law (UNCITRAL) is the coordination of cross-border insolvency.[251] Therefore, the World Bank, IMF or UNCITRAL should be approached to create and host the proposed insolvency procedural framework reliant on the COMI concept for fairly establishing jurisdiction and champion it to work towards a more flexible, pragmatic and certain approach espousing the benefits of modified universalism in the coordination of the cross-border insolvencies of multinational companies. UNCITRAL can be a good champion for the adoption of the proposed insolvency

[250] See for example Jean-Luc Vallens, 'Reform of the European Insolvency Regulation on Cross-Border Insolvency Proceedings: A French Point of View' (2010) Revenue des Procedures Collective 25, 25.

[251]The World Bank, 'Principles for Effective Insolvency and Creditor/Debtor Regimes' (2016) The World Bank < http://pubdocs.worldbank.org/en/919511468425523509/ICR-Principles-Insolvency-Creditor-Debtor-Regimes-2016.pdf> accessed 27 December 2019; United Nations Commission on International Trade Law , 'Legislative Guide on Insolvency Law' (2005) United Nations Commission on International Trade Law < https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf > accessed 4 January 2020.

legal framework because it has already introduced the UNCITRAL Model Law[252] as a soft law mechanism that can be implemented in national legal systems and adapted to their specific needs.[253] In recommending the adoption of the proposed insolvency law by countries, UNCITRAL will be progressing further toward a global universal procedural harmonisation of cross-border insolvency. Its experience in creating and promoting Model Laws on insolvency, both procedural and substantive, make them a prime candidate to champion this approach toward enhancing global cross-border procedural coordination.[254] No matter the organisation that will champion the proposed insolvency legal framework, it should ensure that it highlights the benefits of it in terms of time and finances to convince countries to adopt the framework and implement it within their individual legal systems.

Given the foregoing discussion, clearly there are often conflicts when trying to coordinate cross-border insolvency cases, particularly for complex multinational corporate structures. Interpretation of concepts such as COMI have proven to be time-consuming to resolve, which in the EU context has led to referrals to the CJEU on a number of occasions. Since the interpretation of the proposed insolvency legal framework needs to be met with an equitable approach that is not contingent on differential interpretation by individual national courts, an additional issue to consider is whether a supranational court should be created to ensure autonomous and singular interpretation of the legal concepts that could cause interpretative issues. The following chapter will examine the issue of creating a supranational court.

[252] UNCITRAL Model Law on Cross-Border Insolvency.
[253] Gabrielle Kaufmann-Kohler, 'Soft Law in International Arbitration: Codification and Normativity' (2010) Journal of International Dispute Settlement 1, 1.
[254] Gabrielle Kaufmann-Kohler, 'Soft Law in International Arbitration: Codification and Normativity' (2010) Journal of International Dispute Settlement 1, 1.

CHAPTER 6: SUPRANATIONAL COURT

> The most effective way towards cross-border group resolution probably is by establishing a supranational resolution authority... a 'global sheriff'....[1]

6.1 INTRODUCTION

As discussed in the previous chapter, the proposed insolvency framework will be an international framework that aims to provide procedural guidance for cross-border insolvency matters. The insolvency framework will provide a set of procedures by which parties to cross-border insolvencies can more easily and consistently identify in which forum to open insolvency proceedings. Once the appropriate forum has been identified under the insolvency procedural framework, the chosen jurisdiction can open main insolvency proceedings and apply its insolvency laws to the insolvencies of multinational companies. Consequently, the insolvency legal framework must operate at a supranational level to ensure that national laws do not dictate the procedure for identifying the choice of forum. Since the insolvency legal framework is superior to national insolvency laws in the sense that it should not undergo differential application and interpretation and domestic level, the proper enforcement of the insolvency legal framework should be the duty of an international court specifically designed for that purpose.[2]

The current system of national courts would arguably not offer consistency of approach nor the same outcomes regarding any matter brought under the proposed insolvency framework. National courts have developed their interpretations of their insolvency laws, which will highly likely influence how they interpret the international insolvency procedural

[1] Shuai Guo, 'Cross-Border Resolution of Financial Institutions: Perspectives from International Insolvency Law' (2018) III Prize in International Insolvency Studies < https://www.iiiglobal.org/sites/default/files/media/Submission%20for%20the%20III%20Prize%20in%20International%20Insolvency%20Studies%202018_Shuai%20Guo.pdf> accessed 6 April 2021, 27.
[2] See for example Laurence R. Helfer and Anne-Marie Slaughter, 'Towards a Theory of Effective Supranational Adjudication' (1997) 107(2) The Yale Law Journal 273 [267].

framework.[3] Thus, there might be several differing interpretations of terms used in the insolvency framework, which creates an environment in which forum shopping can thrive. The potential for varying interpretations of a common system of rules can be demonstrated by the United States system. It is notable that even though bankruptcy law is federal law in the United States, this has not eliminated forum shopping among several states which are perceived as having excellent professional standards in insolvency law and practice.[4]

A uniform approach to interpreting the insolvency framework is arguably required to curb forum shopping by parties willing to move jurisdictions to achieve favourable outcomes. It is not however suggested that all situations of forum shopping are negative. Amir Adl Rudbordeh supports the idea of there being the potential for positive forum shopping, stating that '…forum shopping is able to create more efficiencies in the internal market once it has been accepted and regulated'.[5] Rudbordeh acknowledges that positive forum shopping also requires regulation in his statement. The proposed insolvency legal framework will provide the regulation needed by providing a process of identifying the appropriate jurisdiction of opening insolvency proceedings in the cross-border insolvencies of multinational companies. In aiding the positive forum shopping advocated by Rudbordeh,[6] an international adjudication body can provide a uniform interpretation of the insolvency framework the aim of which is to provide procedures for identifying the appropriate jurisdiction for opening multinational companies' main insolvency proceedings. Thus, there is a need for the creation of a supranational court that applies the test of COMI to determine the appropriate jurisdiction for the opening of main insolvency proceedings, but there might be included some potential for "good" forum

[3]See for example Antoine Vauchez, 'Keeping the Dream Alive: The European Court of Justice and the Transnational Fabric of Integrationist Jurisprudence' (2012) 4(1) European Political Science Review 51, 52; Mark Elliot, 'Is the Harmonisation of Laws a Practical Solution to the Problems of Cross-Border Insolvency?' (2000) 16(6) I. L. & P. 224.
[4] See for example Lynn Lo Pucki, *Courting Failure: How Competition for Big Cases is Corrupting the Bankruptcy Courts* (University of Michigan Press, 2006).
[5] Amir Adl Rudbordeh, 'A Theory on Abusive Forum Shopping in Insolvency Law' (2016) 4(1) NIBLeJ 1, 15.
[6] Amir Adl Rudbordeh, 'A Theory on Abusive Forum Shopping in Insolvency Law' (2016) 4(1) NIBLeJ 1, 15.

shopping to be encouraged in cases where this would be optimal for the debtor, its stakeholders, and the broader economic interests particular to each cross-border insolvency case.

A supranational court is not influenced by national laws and acts outside the national court systems.[7] The insolvency legal framework would require a supranational court to adjudicate on matters regarding its interpretation which could promote the uniform application of the law by all countries.[8] It is noted that the presence of the CJEU did not prevent variations in how domestic courts, in cases such as *Daisytek*,[9] which was heard and decided by UK courts without reference to the EU's court of justice, interpreted the issue of COMI in the early years of the EU Regulation. However, there is now significant case law that helps to clarify the term and this can be built upon under the proposed framework. Having a uniform application of the concept of COMI would enhance the insolvency procedural framework's aim to limit negative or abusive forum shopping. Therefore, it is essential to examine how the supranational court can be created. The chapter also aims to examine possible issues in establishing the supranational court and the potential solutions available to counteract them. Account can be taken of these issues in mind in developing guidelines for the supranational court's powers and responsibilities.

6.1.1 Possible Forms of the Supranational Court

In creating the proposed supranational court, states should prioritise clarity as to its responsibilities and powers. Various forms of supranational courts are currently present, and their models give their judges certain responsibilities and powers. Examples of supranational courts are the International Court of Justice (ICJ), the International Criminal

[7] See for example Antoine Vauchez, 'Keeping the Dream Alive: The European Court of Justice and the Transnational Fabric of Integrationist Jurisprudence' (2012) 4(1) European Political Science Review 51, 52; Mark Elliot, 'Is the Harmonisation of Laws a Practical Solution to the Problems of Cross-Border Insolvency?' (2000) 16(6) I. L. & P. 224.
[8] See for example Laurence R. Helfer and Anne-Marie Slaughter, 'Towards a Theory of Effective Supranational Adjudication' (1997) 107(2) The Yale Law Journal 273 [267].
[9] *Re Daisytek-ISA Ltd & Ors* [2003] 5 WLUK 491, [2003] B.C.C. 562.

Court (ICC), the Court of Justice of the European Union (CJEU), the Court of Arbitration for Sport (CAS) and the East African Court of Justice (EACJ). By examining these examples of international courts, the insolvency legal framework can identify how to achieve the supranational insolvency court's powers and responsibilities also with the assistance of best practice principles from various international organisations.

The CJEU represents one possible form of the supranational court, which has already been touched upon in this thesis. The role of the CJEU is to interpret European Union (EU) laws to make sure that EU member states uniformly apply them.[10] To carry out its role, the CJEU exercises supranational powers superseding some powers of the national laws and courts of member states.[11] The interpretation of the EU laws that the CJEU makes takes precedence over the interpretation made by national courts.[12] As Lady Arden highlighted, the CJEU wields a lot of power over the EU member states' domestic courts,[13] particularly over matters related to the interpretation of EU laws. National courts directly implement decisions of the CJEU due to the unique set up of the EU, where the EU member states have ceded some of their powers, such as some of the decision-making, to the EU institutions, including the CJEU.[14] Outside of the areas where the EU has exclusive competence, there is an approach of subsidiarity, under which the EU does not take action

[10] The UK Parliament, 'The Role of the Court of Justice of the European Union (CJEU)' (Unknown) The UK Parliament < https://publications.parliament.uk/pa/ld201719/ldselect/ldeucom/130/13005.htm#:~:text=13.,of%20Member%20States'%20national%20courts.> accessed 20 April 2021, 13.
[11] The European Union, 'Overview' (Unknown) The European Union < https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en#overview> accessed 19 April 2021.
[12] The UK Parliament, 'The Role of the Court of Justice of the European Union (CJEU)' (Unknown) The UK Parliament < https://publications.parliament.uk/pa/ld201719/ldselect/ldeucom/130/13005.htm#:~:text=13.,of%20Member%20States'%20national%20courts.> accessed 20 April 2021, 13.
[13] Rt Hon Lady Justice Arden DBE, 'Peaceful or Problematic? The Relationship between National Supreme Courts and Supranational Courts in Europe' (2009) The Honourable Society of Lincoln's Inn, The Annual Sir Thomas More Lecture 1 [6] "*By contrast, the courts have the power and duty to displace domestic legislation if that is necessary to comply with European Union law because of the doctrine of primacy enunciated by the Luxembourg court*".
[14] Barbara Crutchfield George, 'The Dilemma of the European Union: Balancing the Power of the Supranational EU Entity against the Sovereignty of its Independent Member Nations' (1997) 9(3) Pace International Law Review 111, 112, Member states have agreed to cede some of their powers to the EU in order to achieve common goals such as free movement of goods and services, a free economic market among others; and Hakan Kolcak, 'The Sovereignty of the European Court of Justice and the EU's Supranational Legal System' (2014) 6(4) Inquiries Journal 1, 2; and *Internationale handelsgesellschaft GmbH* (Case 11/70).

unless to do so is more effective than action taken at national, regional or local level.[15] Therefore, national courts do not cede all their decision-making to the CJEU in regards to the interpretation of EU laws.[16]

A major problem for the proposed supranational insolvency court will be persuading states to 'buy in' to the proposed framework for cross-border insolvencies. This court will be in a very different position from that of the CJEU, which is an institution of the EU. One of the reasons for ceding sovereign power to the EU is that the countries benefit from the common market of the EU, where businesses can trade freely between states.[17] The proposed insolvency framework would not create benefits on a scale that is anything like those of a common market but rather a procedure of clearly and consistently identifying a choice of forum for cross-border insolvency. However, the manner in which the CJEU operates might provide a benchmark in the creation of the supranational court and the 'buy in' incentives can be approached differently.

One way in which the CJEU operates, which can be considered as a possible approach for the operating guidelines of the proposed framework, is by providing preliminary rulings on matters referred to it,[18] including insolvency matters such as in *Eurofood* and *Interedil*, as discussed in Chapter 5.[19] Preliminary rulings are interpretations in response to questions that national courts ask the CJEU.[20] After the preliminary ruling has been made, the matter is referred back to the national court to make a decision in regards to the case. The

[15] Treaty on European Union and the Treaty on the Functioning of the European Union 2012/C 326/01, Article 5.
[16]The UK Parliament, 'The Role of the Court of Justice of the European Union (CJEU)' (Unknown) The UK Parliament < https://publications.parliament.uk/pa/ld201719/ldselect/ldeucom/130/13005.htm#:~:text=13.,of%20Member%20States'%20national%20courts.> accessed 20 April 2021, 13.
[17] European Union, 'The EU in Brief' (unknown) European Union < https://europa.eu/european-union/about-eu/eu-in-brief_en> accessed 5 April 2021.
[18] Treaty Functioning of the European Union, Art 267.
[19] *In re Eurofood IFSC Ltd* Case C-341/04; and *Interedil Sri v Fallimento Interedil Sri and Intesa Gestione Crediti SpA* Case C-396/09.
[20] Emmanuel Ugirashebuja, ' Preliminary References under EAC Law' in Emmanuel Ugirashebuja, John Eudes Ruhangisa, Tom Ottervanger and Armin Cuyvers (eds), *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (1st, Brill, Leiden Boston 2017), 267.

decisions in *Eurofood* and *Interedil* were a result of questions that were referred regarding the interpretation of COMI.[21] A lesson from both cases concerning preliminary rulings is that the court can only answer the questions asked. (The two cases were discussed in detail in Chapter 5 regarding the COMI concept proposed as a test to determine jurisdiction in cross-border insolvency in the proposed insolvency framework.) National courts directly applied the preliminary ruling in those cases in their decisions.[22] ***As a consequence, in matters relating to the interpretation of the insolvency procedural legal framework, the CJEU will not be involved as the matters will be dealt with directly by the supranational court. By the supranational court dealing with preliminary questions from the national courts over issues of jurisdictions governed by the proposed framework, there will be consistency in the interpretation and application of the framework.***

National courts will refer to ***the supranational court*** questions regarding the interpretation of the insolvency framework. There must be clear guidelines as to when preliminary rulings can be sought by the national courts. In the case of the CJEU, Article 267 of the Treaty Functioning of the European Union (TFEU) provides for the national courts[23] to seek preliminary rulings from the CJEU regarding the interpretation of EU laws.[24] Such an approach would likely be too cumbersome and time-consuming for use in insolvencies, where the pace of opening proceedings can make a real difference to the

[21] *In re Eurofood IFSC Ltd* Case C-341/04; and *Interedil Sri v Fallimento Interedil Sri and Intesa Gestione Crediti SpA* Case C-396/09, The cases have been discussed in detail in chapter 5 in regards to the interpretation of the COMI concept.
[22] *In re Eurofood IFSC Ltd* Case C-341/04; and *Interedil Sri v Fallimento Interedil Sri and Intesa Gestione Crediti SpA* Case C-396/09.
[23] Armin Cuyvers, Preliminary References under EU Law. in , East African Community Law: Institutional, Substantive and Comparative EU Aspects (Brill 2017) 276 "The CJEU by now has clarified that to qualify as a court or tribunal, a body must meet all, or at least most, of the following criteria to a high degree:
i. It has to be established by law;
ii. It has to be permanent;
iii. It must have compulsory jurisdiction;
iv. It must deal with procedures inter partes;
v. It must apply rules of law
vi. And lastly it must be independent.4
Whether a specific body qualifies has to be assessed" meaning that a variety of court and tribunals can refer to the CJEU to get a preliminary ruling.
[24] Treaty Functioning of the European Union, Article 267.

prospects for a struggling company as well as the amounts available for creditors.[25] If, in the countries that have implemented the insolvency framework, only the highest courts are able to ask for clarification of the interpretation via preliminary rulings, as opposed to the lower courts, or insolvency practitioners, this would lead to delays and alternative approaches for the opening of proceedings, which are considered below at 6.2.2. Even if the manner of referring was different, the effect of the preliminary rulings made by the supranational court would be the same as those of the CJEU and they would have a direct application on national courts due to the supranational court's nature.

In modelling the supranational court after the CJEU, the question arises whether it can effectively function outside a similar framework of political and economic union as that of the EU, particularly as regards to 'buy in'. There has been an attempt to model a supranational court after the CJEU, the East African Court of Justice (EACJ), whose mandate is to interpret and apply the Treaty for the Establishment of the East African Community.[26] Like the EU, the East African Community (EAC) member states in joining ceded some of their decision-making powers to create a common market.[27] The ceding of the decision-making power has enabled the EACJ to make preliminary rulings directly applicable in the national court.[28] However, issues have been raised on the powers of the EACJ in interpreting the 1999 Treaty for the Establishment of the East African Community (TEEAC).

[25] Christopher Grierson, 'Issues in Concurrent Insolvency Jurisdiction' in Jacob Ziegel, Current Developments in International and Comparative Corporate Insolvency Law, 580.
[26] The 1999 Treaty for the Establishment of the East African Community; Victor Lando, 'The Domestic Impact of the Decision of the East African Court of Justice' (2018) 18 African Human Rights Law Journal 463, 463.
[27] John Eudes Ruhangisa, ' The Scope, Nature and Effect of EAC Law' in Emmanuel Ugirashebuja, John Eudes Ruhangisa, Tom Ottervanger and Armin Cuyvers (eds), *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (1st, Brill, Leiden Boston 2017), 140.
[28] Karen J. Alter, James T. Gathii and Laurence R. Helfer, 'Backlash against International Courts in West, East and Southern Africa: Causes and Consequences' (2016) 27(2) The European Journal of International Law 293, 294.

Tanzanian and Ugandan courts agree that the role of the EACJ is to interpret the TEEAC and for the national courts implement the preliminary rulings.[29] However, Kenyan courts have argued that the national courts have the role of interpreting the TEEAC concurrently with the EACJ.[30] The Kenyan courts have further argued that the national courts can decide whether or not to refer a matter on the interpretation of the TEEAC to the EACJ. A similar scenario might occur if the proposed insolvency framework is implemented and a supranational court is created to interpret it through preliminary rulings, similar to the CJEU and EACJ. Thus, the insolvency framework should clarify that its interpretation ultimately is within the scope of powers for the supranational court, rather than any individual national courts. The national courts, similar to the approach in the EU,[31] can, in the first instance, interpret the insolvency framework and, if they need further clarification or if conflicts arise, can refer the matter to the proposed supranational court.

The ICC, ICJ and CAS provide other examples of the form that the proposed supranational insolvency court might take. The ICC, ICJ and CAS can adjudicate on matters in their totality.[32] This means that cases commence in the three courts, the judges listen to evidence from parties and pass judgement. The aim of creating the ICC, ICJ and CAS was to provide effective and efficient ways of dealing with the areas of law over which they adjudicate.[33] Consent from national courts is not required for matters to be heard by the

[29] Emmanuel Ugirashebuja, ' Preliminary References under EAC Law' in Emmanuel Ugirashebuja, John Eudes Ruhangisa, Tom Ottervanger and Armin Cuyvers (eds), *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (1st, Brill, Leiden Boston 2017), 268.
[30] Emmanuel Ugirashebuja, ' Preliminary References under EAC Law' in Emmanuel Ugirashebuja, John Eudes Ruhangisa, Tom Ottervanger and Armin Cuyvers (eds), *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (1st, Brill, Leiden Boston 2017), 268.
[31] Treaty Functioning of the European Union, Article 267.
[32] See for example Claire Felter, 'The Role of the International Criminal Court' (2021) Council on Foreign Relations < https://www.cfr.org/backgrounder/role-international-criminal-court> accessed 1 March 2021; Karen Mingst, 'International Court of Justice' (2019) Encyclopedia Britannica < https://www.britannica.com/topic/International-Court-of-Justice> accessed 1 March 2021; and Loise Reilly, 'Introduction to the Court of Arbitration for Sport (CAS) & the Role of National Courts in International Sports Disputes, An Symposium' (2012) 2012(5) Journal of Dispute Resolution 1.
[33] See for example Claire Felter, 'The Role of the International Criminal Court' (2021) Council on Foreign Relations < https://www.cfr.org/backgrounder/role-international-criminal-court> accessed 1 March 2021; Karen Mingst, 'International Court of Justice' (2019) Encyclopedia Britannica < https://www.britannica.com/topic/International-Court-of-Justice> accessed 1 March 2021; and Loise Reilly, 'Introduction to the Court of Arbitration for Sport (CAS) & the Role of National Courts in International Sports Disputes, An Symposium' (2012) 2012(5) Journal of Dispute Resolution 1.

ICC, ICJ and CAS. The means by which proceedings will be referred to the proposed insolvency court will be discussed in 6.2.4. and are more flexible. Also, proceedings before the insolvency court would not deal with cases in their totality in the same way as the three courts. The proposed supranational court would be an independent court that can deal with the issues of interpreting the cross-border aspects of the proposed insolvency framework in their totality, including the identification of the venue in which proceedings should be opened. However, the case would then be administered in national courts in accordance with domestic laws but following any interpretative decision made by the supranational court in the matter which caused conflict in the cross-border case.

As noted, the procedures for referring cases to the proposed insolvency court will be considered below at 6.2.4. However, the experience of the EACJ highlights one important point. One justification for direct access to the supranational courts by parties in the litigation is to hinder potential harmful interference from the national court or state. In cross-border insolvency matters, the multinational companies' ability to seek guidance directly from the supranational court, regarding the insolvency legal framework, would hinder any potential national courts' refusal to engage with supranational courts, as seen with the Kenyan court and EACJ.[34] Therefore, multinational companies and their stakeholders ought to have the ability to refer matters, directly or via a representative insolvency practitioner, regarding the interpretation of the proposed insolvency legal framework directly to the supranational courts.

The appropriate circumstances in which national courts can be circumvented in the interpretation of the insolvency framework would be similar to the Kenyan example. One of the underlying motivations in the Kenyan example of failing to refer interpretation

[34] Emmanuel Ugirashebuja, ' Preliminary References under EAC Law' in Emmanuel Ugirashebuja, John Eudes Ruhangisa, Tom Ottervanger and Armin Cuyvers (eds), *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (1st, Brill, Leiden Boston 2017), 268.

matters to the EACJ was due to political pressure within Kenya on the Kenyan court.[35] There could be circumstances in which the parties to the insolvency proceedings have sufficient reasons that external forces are impacting on efficient and equitable application and interpretation of the proposed insolvency framework. In that case, the matter can be taken directly to the supranational court.

The judicial architecture of ICC, ICJ, and CAS depends on member states' consent to engage in one way or another in the process.[36] If a country refuses to actively engage in the ICC, ICJ and CAS' adjudication process, the courts have more difficulties fulfilling their roles. To put it in perspective, the US recognises the ICJ and participates in its court system.[37] The ICJ is dubbed 'the world court' as it deals with issues between countries.[38] In the past the US has appeared before the ICJ in relation to issues with a number of countries such as Italy, Mexico, Iran, Hungarian People's Republic, among so many others.[39] Actually, the US has appeared in the ICJ more than any other country in recent years.[40] Being an active participant in the ICJ does not equate to acknowledging all the authority of the ICJ. Particularly, the US does not recognise the plenary authority of ICJ concerning some matters against it.[41] In other situations the US, has refused to participate in proceedings brought against it by other countries, for example in the case brought against it by Nicaragua.[42] Thus, the US chooses when to engage and not engage in some

[35] Emmanuel Ugirashebuja, ' Preliminary References under EAC Law' in Emmanuel Ugirashebuja, John Eudes Ruhangisa, Tom Ottervanger and Armin Cuyvers (eds), *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (1st, Brill, Leiden Boston 2017), 268.
[36] See for example Aloysius P. Llamzon, 'Jurisdiction and Compliance in Recent Decision of the International Court of Justice' (2007) 18(5) European Journal of International Law 815, 815.
[37] Sean D. Murphy, 'The United States and the International Court of Justice: Coping with Antinomies' (2008) GW Law Faculty Publications & Other Works <https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1902&context=faculty_publications> accessed 28 February 2021.
[38] Stephen P. Mulligan, 'The United States and the "World Court"' (2018) Congressional Research Service < https://fas.org/sgp/crs/row/LSB10206.pdf> accessed 28 February 2021.
[39] The following link gives a list of all the cases the US has participated in in the ICJ, <https://www.icj-cij.org/en/cases-by-country/us>.
[40] Stephen P. Mulligan, 'The United States and the "World Court"' (2018) Congressional Research Service < https://fas.org/sgp/crs/row/LSB10206.pdf> accessed 28 February 2021.
[41] Stephen P. Mulligan, 'The United States and the "World Court"' (2018) Congressional Research Service < https://fas.org/sgp/crs/row/LSB10206.pdf> accessed 28 February 2021, the article refers to the cases brought against US by Iran and Palestine.
[42] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America).

of the cases brought before the court against it, which renders the power of the ICJ to some extent impotent.[43] A similar hold-out problem may occur with countries that have signed up to the insolvency framework. The hold-out may appear in the form of multinational companies in insolvency refusing to engage in some instances with the proposed supranational court despite the fact that their concerns relate to the proposed insolvency framework.

There must be clear guidelines to address the issue of non-compliance with or acknowledgment of the jurisdiction of the supranational court. The non-compliance is likely to be a matter of sensitivity. In the case of the ICJ, cases concern civil matters between states, hence giving rise to complex issues that involve politics, which would be one reason for nonengagement.[44] The insolvency legal framework's mandate to the supranational court would offer guidance on which countries have the right to commence insolvency proceedings of multinational companies rather than create any substantial changes to their domestic insolvency laws and it might be thought that political tensions would be less likely to arise in the limited circumstances of the application and interpretation of an insolvency framework than in the frequently more politically charged cases heard before the ICJ. The areas that the insolvency court covers can be seen as less controversial than what the ICJ and ICC cover, civil matters between states and grave crimes, respectively.[45] It is however notable that insolvency cases can give rise to political concerns, particularly when they concern large companies having potentially significant impact on a domestic economy, as may be common for many multinational companies.

[43] Stephen P. Mulligan, 'The United States and the "World Court"' (2018) Congressional Research Service < https://fas.org/sgp/crs/row/LSB10206.pdf> accessed 28 February 2021, the article refers to the cases brought against US by Iran and Palestines.
[44] Stephen P. Mulligan, 'The United States and the "World Court"' (2018) Congressional Research Service < https://fas.org/sgp/crs/row/LSB10206.pdf> accessed 28 February 2021.
[45] See The International Court of Justice, 'About the Court' (unknown) The International Court of Justice < https://www.icc-cpi.int/about > accessed 28 May 2021; and Stephen P. Mulligan, 'The United States and the "World Court"' (2018) Congressional Research Service < https://fas.org/sgp/crs/row/LSB10206.pdf> accessed 28 February 2021.

Political sensitivity may therefore be connected to the cross-border insolvencies of multinational companies if their continued viability may significantly affect the economies of the countries in which they perform significant business activities. An example of a multinational company that affected the economy of multiple countries is the Lehman Brothers Holdings Inc insolvency whose downfall contributed to the economic downturn in the US and was felt around the globe.[46] Aurelio Gurrea-Martinez highlighted that politics, which mostly drive the controversies connected to cross-border cooperation in cases affecting multiple jurisdictions, can be one of the driving forces for reforming insolvency laws, especially in emerging markets.[47] It stands to reason, then, that multinational companies' insolvencies can also have political impact or influence, as shown by cases where there has been pressure for bailouts, such as MG Rover in the UK and General Motors in the United States.[48] In those situations, countries would be interested in dealing with the insolvency of those multinational companies in order to mitigate their effects in their jurisdictions and this may prompt hold outs. However, establishing the supranational court should be viewed beyond the scope of politics and this should not jeopardise the benefits that can be derived from it. Various commentators have noted that a well-functioning insolvency legal framework can promote economic growth in countries, hopefully encouraging countries to implement the insolvency procedural framework and, consequently, adhere to any rulings of the supranational court that would interpret it.[49]

[46] Rosalind Z. Wiggins, Thomas Piontek and Andrew Metrick, 'The Lehman Brothers Bankruptcy A: Overview' (2014) Yale Program on Financial Stability Case Study < https://som.yale.edu/sites/default/files/files/001-2014-3A-V1-LehmanBrothers-A-REVA.pdf> accessed 28 May 2021.

[47] Aurelio Gurrea-Martinez, 'Insolvency Law in Emerging Markets' (2020) Ibero-American Institute for Law and Finance Working Paper 3/2020, 1.

[48] See for example Jean Shaoul, 'Britain: Asset Stripping following Government Bailout of MG Rover' (2009) World Socialist Web Site < https://www.wsws.org/en/articles/2009/09/rovr-s21.html> accessed 28 May 2021; and David Kelly, 'As Obama Takes Victory Lap Over Auto Industry Rescue, Here are The Lessons of The Bailout' (2016) < https://www.forbes.com/sites/davidkiley5/2016/01/20/obamas-takes-victory-lap-over-auto-industry-rescue/> accessed 28 May 2021.

[49] Joseph E Stiglitz, 'Bankruptcy Laws: Basic Economic Principles' in Stijn Claesens, Simeon Djankov and Ashoka Mody (eds), Resolution of Financial Distress: An International Perspective on the Design of Bankruptcy Laws (World Bank Publications 2001); Jeffrey Sachs (eds), The Transition in Eastern Europe (vol 2, Chicago University Press 2004) 215–244; Jeremy Berkowitz and Michelle J White, 'Bankruptcy and Small Firms' Access to Credit' (2004) 35 The Rand Journal of Economics 69; and Stijn Claessens and Leora F Klapper, 'Bankruptcy around the World: Explanations of its Relative Use' (2005) 7(1) American Law and Economics Review 253.

Countries may be persuaded to let the proposed supranational court decide the appropriate jurisdiction to commence main insolvency proceedings of those multinational companies by presenting that a better outcome will be achieved in dealing with one main insolvency proceeding,[50] as well as avoiding delays caused by disputes as to jurisdiction.

In conclusion, there are several forms that the proposed supranational court can take. It can be a supranational court that provides preliminary rulings after being asked preliminary questions. The possible form of the court can be to deal with the cross-border insolvency matters of the proposed insolvency legal framework in their entirety and allow direct applications. Alternatively, a hybrid of the two approaches can be used. However, the discussion above highlights several issues concerning potential practical issues to create the supranational court.

The following section addresses how the proposed insolvency legal framework can deal with the potential practical issues of establishing the supranational court. The approaches taken in respect of other international organisations might suggest solutions to the potential issues. The following section will assess whether the insolvency legal framework should adopt the solutions to encourage countries to sign up to the supranational court.

6.2 RESOLVING ISSUES THAT MIGHT ARISE IN THE CREATION OF THE SUPRANATIONAL COURT FOR COUNTRIES TO BUY INTO IT.

According to Laurence R. Helfer and Anne-Marie Slaughter, having a supranational court does not guarantee effective legal framework implementation.[51] The most effective implementation method is to ensure that national governments and courts can recognise

[50] Irit Mevorach, 'The 'Home Country' of a Multinational Enterprise Group Facing Insolvency' (2008) 57(2) The International Comparative Law 427, 427.
[51] Laurence R. Helfer and Anne-Marie Slaughter, 'Towards a Theory of Effective Supranational Adjudication' (1997) 107(2) The Yale Law Journal 273, 277.

the supranational court's authority.[52] The supranational court's authority ought to be autonomous and not be held accountable to the practices of the nations that have signed up for the insolvency legal framework.[53] Hence, the insolvency legal framework should ensure the supranational court's autonomy through clear and direct provisions in its content.

6.2.1 Interference with Domestic Law Fabric

Lady Justice Arden argued that supranational courts might introduce concepts that conflict with national courts, affecting the fabric of domestic law.[54] The effect on the fabric of domestic law can also occur in situations where there is no conflict.[55] Supranational courts affect the fabric of domestic law through the direct applicability of their decisions on the decision-making of domestic courts.[56] This can be seen from the case of *Van Gend en Loos v Nederlandse Administratie der Belastingen.*[57] This case dealt with the concept of direct effect in EU and reinforced the supremacy of EU laws over domestic laws.[58] In some EU countries, such as Italy, there were not any domestic laws allowing for supranational law to exercise supremacy.[59] In Italy's case, the fabric of the domestic law was changed by the decision of *Van Gend en Loos v Nederlandse Administratie der Belastingen*[60] to ensure EU legal supremacy. From this example, it can be assumed that similar situations might occur on a global scale when the proposed supranational court passes judgements that are either incompatible with the fabric of domestic law or where there are no rules

[52] See for example Lady Justice Arden DBE, 'Peaceful or Problematic? The Relationship between National Supreme Courts and Supranational Courts in Europe' (2010) 29(1) Yearbook of European Law 3, 5 – 6.
[53] Anand Menon and Stephen Weatherill, 'Democratic Politics in a Globalising World: Supranationalism and Legitimacy' LSE Law, Society and Economics Working Papers 13/2007, 3.
[54] Rt Hon Lady Justice Arden DBE, 'Peaceful or Problematic? The Relationship between National Supreme Courts and Supranational Courts in Europe' (2009) The Honourable Society of Lincoln's Inn, The Annual Sir Thomas More Lecture 1, 4.
[55] See for example J. H. H. Weiler, 'Van Gend en Loos: The individual as subject and object and the dilemma of European legitimacy' (2014) 12(1) I.CON 94.
[56] Laurence R. Helfer and Anne-Marie Slaughter, 'Towards a Theory of Effective Supranational Adjudication' (1997) 107(2) The Yale Law Journal 273, 276.
[57] *Van Gend en Loos v Nederlandse Administratie der Belastingen* (1963) Case 26/62.
[58] See for example Derrick Wyatt, 'New Legal Order, or Old?' (1982) 7 Eur. L. R 147; and *Van Gend en Loos v Nederlandse Administratie der Belastingen* (1963) Case 26/62.
[59] J. H. H. Weiler, 'Van Gend en Loos: The individual as subject and object and the dilemma of European legitimacy' (2014) 12(1) I.CON 94, 96.
[60] *Van Gend en Loos v Nederlandse Administratie der Belastingen* (1963) Case 26/62.

present that allow for the applicability of the court's decisions over domestic matters. To resolve this issue, the proposed insolvency legal framework can make provisions that clearly outline that the proposed supranational court's decisions are superior to national laws, similar to the decision in *Van Gend en Loos v Nederlandse Administratie der Belastingen*,[61] but only in relation to the specific cross-border insolvency issues before it. As a consequence, domestic courts ought not to refuse to implement the proposed supranational court's decision as it would relate only to supranational issues and would not change of the fabric of domestic law.

There are examples of countries that are resistant to having international adjudication interfering with the constitution, which provides the fundamental principles upon which the fabric of domestic law is woven, such as the US.[62] This means that the US is resistant to having supranational courts that make decisions contrary to their constitution.[63] In the Italian example given above, Italy did not have a choice not to implement the decision of the ECJ even though it was contrary to the fabric of domestic law because of the structure of the EU.[64] Countries in the EU give up some of their decision-making powers to the CJEU as a condition of membership of the economic and political union of the EU while the US is not in a similar position. A situation similar to the US example might arise in recognition of the proposed supranational insolvency court, given the lack of the wider incentives that the EU has. The supranational court's ability to, in effect, interfere with some of the provisions of national insolvency law as regards cross-border insolvency should be viewed positively. One of the positive aspects of the supranational court is that it will simplify the approach for identifying the choice of forum for cross-border insolvency as well as potentially legitimise the opening of proceedings that represent "good" forum shopping. Consequently, domestic insolvency laws may become more globally oriented

[61] *Van Gend en Loos v Nederlandse Administratie der Belastingen* (1963) Case 26/62.
[62] See for example Rex D. Glensy, 'The Use of International Law in U.S. Constitutional Adjudication' (2011) 25 Emory International Law Review 197, 198.
[63] See for example Rex D. Glensy, 'The Use of International Law in U.S. Constitutional Adjudication' (2011) 25 Emory International Law Review 197, 198.
[64] J. H. H. Weiler, 'Van Gend en Loos: The individual as subject and object and the dilemma of European legitimacy' (2014) 12(1) I.CON 94.

for economic growth, which is the aim of some leading international organisations such as the World Bank.[65] The World Bank is one of the international organisations leading the push for countries to reform their insolvency laws, especially in developing and emerging countries.[66] The greater control of forum shopping and long-arm jurisdiction may aid in the predictability of how insolvency proceedings may be handled. Thus, there is a possibility of encouraging cross-border trade by multinational companies by having effective systems that determine where insolvency proceedings are commenced.

6.2.2 Implementing Instrument

Currently, there are no supranational insolvency courts. As noted, some examples of supranational courts are the CJEU and the ICJ, which apply only to the member states of the international organisations of which they form a part.[67] These supranational courts derive their powers and responsibilities from treaties or other instruments governed by international law.[68] Similarly, if the proposed supranational court was to be created to deal with cross-border insolvency matters at the highest level, this could be done through an international instrument such as a treaty. It is of course likely to be a complex process to achieve such an instrument, but it represents the logical progression of approaches to cross border insolvency law.

[65] Elena Cirmizi, Leora Klapper and Mahesh Uttamchandani, 'The Challenges of Bankruptcy Reform' (2012) 27(2) The World Bank Research Observer 185, 186.
[66] The World Bank, 'Principles for Effective Insolvency and Creditor/Debtor Regimes' (2016) The World Bank < http://pubdocs.worldbank.org/en/919511468425523509/ICR-Principles-Insolvency-Creditor-Debtor-Regimes-2016.pdf> accessed 27 June 2018. For a critical view of this role, as it currently is shaped, see Gerard McCormack, 'Why 'Doing Business' with the World Bank May Be Bad for You' (2018) 19 Eur Bus Org Law Rev 649.
[67] See for example Hermann Mosler, 'Supra-National Judicial Decisions and National Courts' (1981) 4(3) Hastings International and Comparative Law Review 425, 426; and The United Nations, 'UN Documentation: International Law Courts and Tribunal' (2021) United Nations Library https://research.un.org/en/docs/law/courts accessed 1 February 2021.
[68] Loise de Gouyon Matignon, 'The Difference between International and Supranational Organizations' (2019) Space Legal Issues < https://www.spacelegalissues.com/the-differences-between-international-and-supranational-organizations/> accessed 1 February 2021.

The international instrument creating the supranational court ought to clearly outline its powers and responsibilities.[69] The powers and responsibilities enable the supranational court to adjudicate on matters concerning the insolvency legal framework. The question raised is what kind of provisions would enable the supranational courts to be effective in their adjudication. Countries will be more inclined to accept the jurisdiction of a supranational insolvency court if they perceive that it will be effective in interpreting the insolvency framework to the benefit of those companies that rely upon it.

According to Helfer and Slaughter, the provisions that underpin effective adjudication are one of the main attracting factors to enable the recognition and implementation of the supranational court's decisions in states.[70] The supranational court would be working against the backdrop of varying political, legal, social and cultural backgrounds.[71] Due to the background in which the supranational court would be operating, countries might not be readily receptive to the idea of an adjudication organisation that is superior to the states to interfere in domestic law matters even though those matters pertain to cross-border insolvency.[72] Specific key provisions, such as judicial appointment and cooperation, may offer countries the push to adopt the proposed framework and, in doing so, recognise the supranational court.

6.2.3 Judges Appointments

Commentators have emphasised the importance of provisions addressing the personnel that constitute supranational courts in their creation.[73] Countries need to have confidence

[69] Hermann Mosler, 'Supra-National Judicial Decisions and National Courts' (1981) 4(3) Hastings International and Comparative Law Review 425, 426.
[70] Laurence R. Helfer and Anne-Marie Slaughter, 'Towards a Theory of Effective Supranational Adjudication' (1997) 107(2) The Yale Law Journal 273, 278.
[71] See for example Simon Boyes, 'Sports in Court: Assessing Judicial Scrutiny of Sports Governing Bodies.' (2017) Public Law 363, 363.
[72] See for example Richard H. Pildes, 'Supranational Courts and The Law of Democracy: The European Court of Human Rights' (2018) 9 Journal of International Dispute Settlement 154, 154.
[73] See for example Ernest A. Young, 'Toward a Framework Statute for Supranational Adjudication' (2008) 57 Young Galleys Final 56 [101]; Laurence R. Helfer and Anne-Marie Slaughter, 'Towards a Theory of Effective Supranational Adjudication' (1997) 107(2) The Yale Law Journal 273, 300.

in those involved in adjudicating their cross-border insolvency matters, and this requires a structure of how the supranational court's judges are appointed or elected. There are already principles established and used in international law regarding the appointment of judges.[74] The appointment of the supranational court's judges may draw upon these principles. The application of already established and utilised principles governing the appointment of judges may offer more confidence to the adopting countries since they are tried and tested in other international courts.

One example of an international organisation that has identified principles for the appointment of judges is the Commonwealth. The Commonwealth[75] has identified certain fundamental principles that should underpin the appointment of judges. The principles include that appointed judges should be independent, impartial, honest, and competent[76] and these principles would also be a suitable beginning for principles governing judicial appointments under the proposed insolvency framework. From the possible signatory countries' perspective, the supranational court's credibility and legitimacy may depend on appointments being made in compliance with these four principles. The insolvency legal framework should include provisions based on at least the four principles noted above to underpin the judges' provisions of appointment and conduct. The insolvency framework may emulate some of the provisions from international organisations that achieve the minimum of those four principles since they are tried and tested.

It must be acknowledged that the supranational court's judges will still be connected to their home countries from which they will have been enculturated and educated.

[74] See for example J. van Zyl Smit, 'The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice [Report of Research Undertaken by Bingham Centre for the Rule of Law' 2015 British Institute of International and Comparative Law i [xv].
[75] Commonwealth is an association of countries that were previously colonised by the UK together with the UK.
[76] J. van Zyl Smit, 'The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice [Report of Research Undertaken by Bingham Centre for the Rule of Law' 2015 British Institute of International and Comparative Law i [xv].

Regardless of the method of appointment, appointed judges will still exhibit characteristics connected to the culture of their home countries, which will also influence perspectives and potentially the nature of some decisions. It is recognised that there may be one difficulty that can arise in showing that supranational court judges are independent and impartial.[77] The issue that this may raise is unconscious bias that they are more inclined to favour their countries of origin without meaning to should a case come before them that has a bearing on the domestic interests of their home country.[78] It is essential that the judicial appointment process reduces unconscious bias through clear guidelines and preferably judicial training. Countries that are considering the implementation of the insolvency framework and the adherence to its supernational court's decisions need to be confident that those who make up the supranational court panel are not biased in favour of their countries of origin, a manifestation of home-state power and influence.[79] It is not enough to have principles of judicial independence and impartiality in the insolvency framework. Provisions that offer practical means by which judges can be seen to be independent and impartial are also required.

For judges to be seen as being independent, there are general provisions that can be included in the insolvency legal framework. One area that the provisions should address is the activities that the judges can engage in. According to the ICC, its judges should ensure that the activities they are involved in should not interfere with their judicial functions or affect confidence in their independence.[80] For example perceived and actual bias by judges may arise from their shares or their close social ties with those involved with the multinational companies or related companies. In those situations, it would be

[77] See for example Ruth Mackenzie and Philippe Sands, 'International Courts and Tribunal and the Independence of International Judges' (2003) 44(1) Harvard international Law Journal 271, 272.
[78] Stavros Brekoulakis, 'Systemic Bias and Institution of International Arbitration: A New Approach to Arbitral Decision-Making' (2013) Journal of International Dispute Settlement 553, 555.
[79] See for example Shimon Shetreet, Judicial Independence: New Conception Dimensions and Contemporary Challenges. in Shimon Shetreet and Jules Deschenes (eds), Judicial independence: The Contemporary Debate (Martinus Nijhoff Publishers 1985), 590-593.
[80] Rome Statute of the International Criminal Court, Article 40(2), Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.

prudent for the judges to recuse themselves from dealing with the matter. In adopting a similar approach in the insolvency legal framework, the supranational court's judges would ensure that they are not involved with activities that could jeopardise the independence of their role in the court. The activities can include not associating with potential parties to cases or having strong public opinions on potential matters that can come before them. The judges of the supranational court should refrain from potential situations that can raise the perception of bias and unfair adjudication in which case, the signatory countries are more likely to have confidence in the adjudication of the court.

Additionally, there needs to be detailed guidance for the supranational court's judges on situations where they have an interest in the matter before the court.[81] How the insolvency legal framework deals with conflicts of interest situations may also provide persuasion for the potential signatory countries to adhere to the decisions of the supranational court. To avoid conflicts of interest by the judges, the insolvency framework may adopt the stance of the United Convention for the Law of the Sea (UNCLOS), for example.

UNCLOS offers detailed guidance on conflicts of interest, particularly article 7(1), which states:

> No member of the Tribunal may exercise any political or administrative functions, or associate actively with or be financially interested in any of the operations of any enterprise concerned with the exploration for or exploitation of the resources of the sea or the seabed or other commercial use of the seabed.[82]

The effect of article 7(1) of UNCLOS is to ensure that judges with conflicts of interest recuse themselves from adjudication on the matter.[83] From matters with conflict of interest, the recusal of judges ensures that there is a practical means by which a

[81] See for example Ruth Mackenzie and Philippe Sands, 'International Courts and Tribunal and the Independence of International Judges' (2003) 44(1) Harvard international Law Journal 271, 272.
[82] United Convention for the Law of the Sea, Article 7(1).
[83] United Convention for the Law of the Sea, Article 7(1).

supranational court's judges are independent and impartial. The effect is that countries and multinational companies have confidence in the supranational court.

The process by which judges are appointed to the supranational court should be a priority that further enhances the potential signatory countries' confidence in the proposed system. In judicial appointments, the background and area of practice in the national courts of appointees should be centred on insolvency law.[84] It is acknowledged that to achieve suitable regional representation there may be instances where it is necessary to appoint skilled judges with expertise in other areas. Such judges can be appointed to serve as capacity building or offer expertise on legal areas related to insolvency law. The lack or limited knowledge in insolvency by appointed judges who may have expertise in other areas can be addressed through training in adjudicating cross-border insolvency law cases.[85] Admittedly, the cost of training might not be agreeable to possible signatory countries as they may be required to fund such training. The cost of training of non-experts is likely to be more than that of those who are already experts in national insolvency as they need to be trained more.[86] Therefore, it is recommended that non-expert judges in insolvency be appointed as the last resort. No matter the level of expertise, training should be offered to the supranational court's judges to build trust in the supranational court to deal with cross-border insolvency matters effectively,[87] as well as sharing of best practices and development of harmonised approaches.

[84] Ernest A. Young, 'Toward a Framework Statute for Supranational Adjudication' (2008) 57 Young Galleys Final 56, 101;
[85] Olof Larsson, Theresa Squatrito, Oyvind Stiansen and Taylor St John, 'Selection and Appointment in International Adjudication: Insights from Political Science' (2019) Academic Forum on ISCS Concept Paper 2019/10, 7.
[86] European Commission, 'Advice for Training Providers: European Judicial Training' (2015) European Commission < https://ec.europa.eu/competition/calls/practical_advice_for_training_providers.pdf> accessed 21 April 2021.
[87] Directorate General for Internal Policies of the Union, 'The Training of Judges and Legal Practitioners' (2017) Policy Department for Citizens' Rights and Constitutional Affairs < https://www.europarl.europa.eu/RegData/etudes/IDAN/2017/583134/IPOL_IDA%282017%29583134_EN.pdf> accessed 21 April 2021.

Knowledge by a supranational court's judge can fulfil the principle of competency required in the appointment of judges.[88] There are different types of knowledge that the supranational court's judges can possess. There is knowledge in terms of understanding of cross-border insolvency matters. Another type of knowledge is understanding the countries' domestic insolvency legal systems that the parties litigating are from although the main role of the judges in the supranational court will be to adjudicate as to which domestic system the proceedings should be opened in. ***The level of knowledge for the judicial candidate can be demonstrated in a number of ways. Similar to the approach taken by the ICC where the proposed candidates need to demonstrate that they have experience in criminal law and procedure through experience in various positions in the national judicial system such as judges, prosecutors, advocates or other similar capacities.[89] In application of a similar approach to the appointment of judges in the proposed supranational court, the candidates can demonstrate that they have experience in dealing with insolvency matters through previous roles such as judges, insolvency practitioners, legal advisors, advocates, among other similar roles. Additionally, the candidates should demonstrate that their knowledge were it to be taken into account in their home countries would lead to them being appointed to the highest domestic court, similar to the approach of the ICJ.[90] The reason for this is to demonstrate that the candidates have the expertise to deal with complex matters that they will be faced with in the supranational court. Once the judges are appointed,*** as discussed earlier, ***the*** appointed judges can be trained to understand the proposed supranational insolvency legal framework. Their insolvency background also demonstrates to potential

[88] J. van Zyl Smit, 'The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice [Report of Research Undertaken by Bingham Centre for the Rule of Law' 2015 British Institute of International and Comparative Law i [xv].
[89] International Criminal Court, 'The Judges of the Court' (unknown) International Criminal Court < JudgesENG.pdf (icc-cpi.int)> accessed 13 November 2021.
[90] International Court of Justice, 'How The Court Works' (unknown) International Court of Justice < https://www.icj-cij.org/en/how-the-court-works> accessed 13 November 2021.

signatory countries when deciding to adopt the insolvency framework that the judges are competent enough to deal with cross-border insolvency matters.

Going back to the issues of conflicts of interest and potential unconscious bias, an issue arises in relation to circumstance in which a judge may be assigned to adjudicate a case who is from the same country as one of the litigating parties. There might be a perceived conflict of interest in such a case. The EU's stance on the matter is that it is advantageous to have a judge who understands the domestic legal system.[91] However, the insolvency legal framework ought to ensure that judges connected to the matter, even from the same countries as the parties, do not adjudicate in order to ensure that there is no hindrance to the impartiality and independence of the supranational court' judges, which should encourage countries 'buy in' to the whole insolvency framework and supranational court system.

6.2.4 Referral Process

The insolvency legal framework should require that national courts seriously consider referring matters relating to the framework directly to the supranational court for preliminary rulings. Such an approach may model on the preliminary reference procedure of the CJEU but some differences should be noted. The criticism has been made that in the early years of the CJEU's system, there was a desire to encourage the referring of questions and a tendency not to consider the pertinence of the questions referred, which led to inefficiencies due to the repetition of similar questions being asked multiple times or questions being asked that should have been answerable without the need for a lengthy and costly reference to the EU court.[92] The proposed supranational court should avoid

[91] Olof Larsson, Theresa Squatrito, Oyvind Stiansen and Taylor St John, 'Selection and Appointment in International Adjudiction: Insights from Political Science' (2019) Academic Forum on ISCS Concept Paper 2019/10, 7.
[92] Diana Mocanu, 'Short Insight into the Problem of the Preliminary Ruling System in the European Union' (2015) lawyr.It < https://www.lawyr.it/index.php/articles/international-focus/401-short-insight-into-the-problems-of-the-preliminary-ruling-system-in-the-european-union> accessed 5 April 2021.

falling into this trap and should confine itself to interpretation of the framework, in particular to avoid the potential for references designed to waste time and achieve some ulterior tactical end.

In the proposed structural framework, the preliminary questions' appropriateness should concern whether the supranational court has already addressed the matter.[93] If the supranational court has addressed the matter, the national court would not be required to refer the matter to the supranational court and should instead rely on the decisions made in previous jurisprudence. The exception to the rule should be in instances when more clarity is required; hence matters being rereferred back to the supranational court. National courts would therefore have a margin of appreciation for deciding matters concerning the insolvency legal framework rather than referring all matters concerning the framework to the supranational court as previous jurisprudence should often provide answers to the conflicts in question. Additionally, when matters can be referred to the supranational court, the clear guideline would ensure that there are no judicial holdouts, which means that national courts cannot refuse to engage with the supranational court when required to do so.

As proposed earlier in 6.1.1, insolvency matters concerning the insolvency procedural framework may potentially be brought directly to the supranational court, subject to safeguards regarding abuses of the process, such as intentional creation of delays.[94] In cases where insolvency practitioners have been appointed on an interim basis in respect of multinational companies, these IPs can be gatekeepers and would be responsible for

[93] Diana Mocanu, 'Short Insight into the Problem of the Preliminary Ruling System in the European Union' (2015) lawyr.It < https://www.lawyr.it/index.php/articles/international-focus/401-short-insight-into-the-problems-of-the-preliminary-ruling-system-in-the-european-union> accessed 5 April 2021.

[94] Jurian Langer, 'The Preliminary Ruling Procedure: Old Problems or New Challenges' (2015) Rijsuniversiteit Groningen < https://ssrn.com/abstract=2885256> accessed 31 May 2021; *Davide Gullotta, Farmacia di Gullotta Davide & C. Sas v Ministero della Salute, Azienda Sanitaria Provinciale di Catania* Case C-497/12 [12].

taking matters to the supranational court.[95] In situations where there are preliminary rulings referred to the supranational court by the national court, the IPs may litigate on behalf of the parties to the multinational companies' insolvency.[96] In cases where no IP has yet been appointed it may be more appropriate for the court, upon the application of the company's directors or for representative creditors, to be able to refer questions regarding the appropriate venue for insolvency proceedings.[97] The insolvency procedural framework should provide clear guidelines on how courts, IPs and other referring parties can cooperate in referring matters to the supranational court, national court and other IPs related to the multinational companies' insolvencies.

There is a likelihood that secondary insolvency proceedings may be commenced when the proposed insolvency legal framework is enacted. Robert Arts aptly describes secondary proceedings as '... a separate insolvency proceeding that can be opened in a Member State after a main proceeding has already commenced in another Member State'.[98] After identifying the main proceedings through COMI in the insolvency legal framework, some issues that cannot be dealt with in the main proceedings may be dealt with through secondary proceedings.[99] Examples of issues may be related to local stakeholders of other countries, such as creditors who want their issues to be dealt with by their national courts.[100] The insolvency legal framework should offer clear guidelines on how to achieve cooperation between the main and secondary insolvency proceedings.

---

[95] Practice Law, 'Glossary: Insolvency Practitioner' (Unknown) Thomson Reuters Practice Law < https://uk.practicallaw.thomsonreuters.com/5-107-6261?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 22 April 2021.
[96] Jasper Krommendijk, 'Wide Open and Unguarded Stand Our Gates: The CJEU and References for a Preliminary Ruling in Purely Internal Situations' (2017) 18 German Law Journal 1359 [1316].
[97] See for example David O'Keeffe, 'Is the Spirit of Article 177 Under Attack? Preliminary References and Admissibility' (1998) 23 Eur. L. Rev. 509.
[98] Robert Arts, 'Main and Secondary Proceedings in the Recast of the European Insolvency Regulation: The Only Good Secondary Proceeding is a Synthetic Secondary Proceeding' (unknown) International Insolvency Institution < https://www.iiiglobal.org/sites/default/files/media/Arts%20-%20Main%20and%20Secondary%20Proceedings.pdf> accessed 21 April 2021, 3.
[99] See for example Reinhard Bork, 'The European Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency' (2017) 26 International Insolvency Review 256, 255 – 258.
[100] See for example Bernard Santen, 'Opening Secondary Insolvency Proceedings in the EU' (2015/Autumn) Eurofix 20, 20.

Opening of secondary proceedings detracts from the purpose of modified universalism of having only one proceeding commenced in relation to a particular multinational company.[101] As mentioned in the previous paragraph some issue may be better served in the secondary proceeding. However, the proposed insolvency procedural framework may put clear guidelines in place to prevent circumventing the main insolvency proceedings. The Recast Regulations deals with this issue by providing under article 37 that where main insolvency proceedings have been opened, secondary proceedings in national court can only be open with permission from the main proceedings.[102] Once the request has been approved, there is an obligation to communicate and cooperate between the main and secondary proceedings, involving the courts and insolvency practitioners.[103] A detailed discussion of communicate and cooperate will be discussed in section 6.2.5. Additionally, insolvency practitioners of the main insolvency proceeding can propose restructuring plan in the secondary proceedings.[104] This seems to show that the Recast Regulation has provided a means of working together of the main proceeding's insolvency practitioners and the local insolvency practitioners. The proposed insolvency proceedings can provide safeguards to ensure that the main insolvency proceeding is not being circumvented by requiring that permission be sought for their opening and that the main proceedings' insolvency practitioners can participate in the secondary proceedings if permission is granted.

6.2.5 Judicial Cooperation

The system of referring questions to the supranational court for a preliminary ruling on the interpretation of the insolvency framework requires national courts to engage with the process actively.[105] To some extent, some countries, Kenya being an example which was

[101] Bob Wessels, 'Modified Universalism in European Cross-Border Insolvency' (2019) Prof. Dr. Bob Wessels Blog < https://bobwessels.nl/blog/2019-01-doc3-modified-universalism-in-european-cross-border-insolvency/> accessed 3 June 2021.
[102] European Insolvency Regulation 2015/848.
[103] European Insolvency Regulation 2015/848, article 41 to article 44.
[104] European Insolvency Regulation 2015/848, article 51.
[105] Clifford J. Carrubba and Lacey Murrah, 'Legal Integration and use of the Preliminary Ruling Process in the European Union' (2005) 59(2) International Organization 399 [399].

previously noted, have shown that national courts can refuse to refer interpretation of matters to the supranational court or acknowledge the preliminary rulings. In the case of Kenya, the refusal was motivated by domestic politics since the ruling parties did not agree with the EACJ's interpretation of the TEEAC.[106] The Kenyan courts that were meant to be independent of the executive arm of the government yielded to it because the Kenyan government was able to select the judges, thereby exercising power over judicial appointment and introducing an obstacle to judicial independence.[107] There can be other reasons why national courts refuse to cooperate with the proposed supranational court not limited to political pressures only, such as the need to exert their jurisdiction on domestic matters. Therefore, it is essential to have clear guidelines to facilitate judicial cooperation between domestic courts and the proposed supranational court.

Issues of cooperation are not limited to courts only. An insolvent multinational company may have different insolvency office holders in the countries that it is associated with. An example is the EU case of *Interedil Sri v Fallimento Interedil Sri and Intesa Gestione Crediti SpA (Interedil)*[108] where there were insolvency officers in Germany, the UK and France. A similar occurrence can happen on a global scale. As highlighted by Bernard Santen, cooperation between insolvency practitioners (IPs) will increase efficiency in dealing with multinational companies' insolvencies for the benefit of their stakeholders as a whole rather than individual stakeholders.[109] In doing so, there will be value maximisation of the

[106] Karen J. Alter, James T. Gathii and Laurence R. Helfer, 'Backlash against International Courts in west, East and Southern Africa: Causes and Consequences' (2016) 27(2) The European Journal of International Law 293, 300 – 306.
[107] Karen J. Alter, James T. Gathii and Laurence R. Helfer, 'Backlash against International Courts in west, East and Southern Africa: Causes and Consequences' (2016) 27(2) The European Journal of International Law 293, 300 – 306.
[108] *Interedil Sri v Fallimento Interedil Sri and Intesa Gestione Crediti SpA* Case C-396/09
[109] Bernard Santen, 'Communication and Co-operation in International Insolvency: On Best Practices for Insolvency Office Holders and Cross-Border Communication between Courts' (2015) 16 ERA Forum 229 [233]; and Chapter 6: 'Survey of Frameworks and Best-Practice Guidelines for Judicial Cooperation' in JCOERE Project Consortium, *Judicial Co-operation Supporting Economic Recovery in Europe: Report 2 on Judicial Cooperation in Preventive Restructuring and Insolvency in the EU* (UCC 2020), 113-132 <https://www.ucc.ie/en/jcoere/research/report2/report2chapter/report2chapter2/> accessed 19 March 2021, Gives a detailed discussion of cooperation of courts and IPs.

multinational companies' assets for the benefit of all stakeholders as a whole.[110] Therefore, it is important for the proposed framework to include guidelines as to how IPs should cooperate between themselves and the courts. This approach would build upon important developments of cooperation in insolvency matters that has emerged in recent years.[111]

As Lech Garlicki has observed, there needs to be a level of cooperation between the supranational court and the national courts in matters relating to the interpretation and implementation of any international provision.[112] Leah Barteld went a step further and highlighted that judicial cooperation is among the main factors determining whether insolvency proceedings will achieve value maximising reorganisation or liquidation.[113] The insolvency legal framework should not only make it clear that cooperation of main insolvency actors (supranational court, national courts, and IPs) is highly encouraged but should provide guidelines on how to achieve it.

In cooperation, the supranational court ought to ensure that it provides the minimum standard of interpreting the insolvency framework and ensures that it respects the margin of appreciation the insolvency framework would provide in utilising national law.[114] The insolvency framework would provide the mechanism for identifying the correct forum for multinational companies' cross-border insolvency matters. The national courts of countries identified as having COMI would deal with the insolvency of the multinational companies.

---

[110] Chapter 6: 'Survey of Frameworks and Best-Practice Guidelines for Judicial Cooperation' in JCOERE Project Consortium, *Judicial Co-operation Supporting Economic Recovery in Europe: Report 2 on Judicial Cooperation in Preventive Restructuring and Insolvency in the EU* (UCC 2020) 113-132 <https://www.ucc.ie/en/jcoere/research/report2/report2chapter/report2chapter2/> accessed 19 March 2021, 119.

[111] See e.g. Bob Wessels and Miguel Virgos, European Communication and Cooperation Guidelines for Cross-border Insolvency (INSOL Europe, 2007); Chapter 6: 'Survey of Frameworks and Best-Practice Guidelines for Judicial Cooperation' in JCOERE Project Consortium, *Judicial Co-operation Supporting Economic Recovery in Europe: Report 2 on Judicial Cooperation in Preventive Restructuring and Insolvency in the EU* (UCC 2020), 113-132 <https://www.ucc.ie/en/jcoere/research/report2/report2chapter/report2chapter2/> accessed 19 March 2021.

[112] Lech Garlicki, 'Cooperation of Courts: The Role of Supranational Jurisdictions in Europe' (2008) 6(3/4) Oxford University Press and New York University School of Law 509, 512.

[113] Leah Barteld, Cross-Border Bankruptcy and the Cooperative Solution' (2012-2013) 9(1) International Law and Management Review 27, 30.

[114] Lech Garlicki, 'Cooperation of Courts: The Role of Supranational Jurisdictions in Europe' (2008) 6(3/4) Oxford University Press and New York University School of Law 509, 512.

The national courts are more likely to cooperate with the supranational court if left with competence in domestic matters and the role of the supranational court is based on a minimum standard of interpretation framework. The supranational court ought to confine itself mostly to the identification of the correct venue for insolvency proceedings under the framework and should avoid supervising all proceedings related to the insolvency. There might be included in the framework also provision for the court to intervene upon request when national courts do not adhere to the spirit of the insolvency legal framework in the interpretation.

According to the EU Cross-Border Insolvency Court-to-Court Cooperation Principles and Guidelines (the JudgeCo Principles and Guidelines), the cooperation among all courts involved in the multinational companies' insolvency matters would avoid potential conflicts with parties' procedural rights within the involved countries.[115] The JudgeCo principles and Guidelines aim to facilitate communication and cooperation among EU national courts dealing with insolvency matters.[116] Principle 16 of the JudgeCo Principles suggested that modern communication methods, such as electronic communication and relying on technology, will increase the level of cooperation among the courts.[117] Principle 16 states:

> **Principle 16 Communications between Courts**
>
> 16.1. Courts before which insolvency cases are pending should, if necessary, communicate with each other directly or through the insolvency practitioners to promote the orderly, effective, efficient and timely administration of the cases.

[115] EU Cross-Border Insolvency Court-to-Court Cooperation Principles and EU Cross-Border Insolvency Court-to-Court Communication Guidelines; and Chapter 6: 'Survey of Frameworks and Best-Practice Guidelines for Judicial Cooperation' in JCOERE Project Consortium, Judicial Co-operation Supporting Economic Recovery in Europe: Report 2 on Judicial Cooperation in Preventive Restructuring and Insolvency in the EU (UCC 2020), 113-132 <https://www.ucc.ie/en/jcoere/research/report2/report2chapter/report2chapter2/> accessed 19 March 2021,125.

[116] EU Cross-Border Insolvency Court-to-Court Cooperation Principles and EU Cross-Border Insolvency Court-to-Court Communication Guidelines.

[117] EU Cross-Border Insolvency Court-to-Court Cooperation Principles and EU Cross-Border Insolvency Court-to-Court Communication Guidelines.

16.2. Such communications should utilise modern methods of communication, including
electronic communications as well as written documents delivered in traditional ways.
16.3. For such communications the EU JudgeCo Cross-Border Insolvency Court-to-Court
Communications Guidelines should be employed.
16.4. Electronic communications should utilise technology which is commonly used and be reliable and secure.
16.5. If courts are to manage an international insolvency case, they should consider the use of one or more protocols to manage the proceedings with the agreement of the parties, and approval by the courts concerned.[118]

From Principle 16 above, it can be deduced that communication between the insolvency practitioners is important for efficient, effective and orderly dealings between insolvency practitioners, which can be extended as well to the proposed supranational court and national court.[119] The effective modern means of communication deals with problems that would arise with courts communicating through traditional means such as post and fax. There might be delays using posts or communications may be lost. The other courts may not have the communication for cooperation in time or at all. Therefore, the proposed insolvency legal framework can incorporate modern means of communication between the proposed supranational court and national courts.

In a similar vein, the ALI-III Global Principles for Cooperation in International Insolvency Cases 2012 (ALI-III Global Principles) also recognised that courts' faster and less formal

[118] EU Cross-Border Insolvency Court-to-Court Cooperation Principles and EU Cross-Border Insolvency Court-to-Court Communication Guidelines.
[119] EU Cross-Border Insolvency Court-to-Court Cooperation Principles and EU Cross-Border Insolvency Court-to-Court Communication Guidelines.

communication methods could encourage cooperation.[120] (ALI-III Global Principles 'address cooperation by highlighting the potential and increase role of protocols and agreements in enhancing effective cooperation between courts and insolvency practitioners').[121] The insolvency legal framework will potentially apply universally where courts related to multinational companies' insolvency may be located in different corners of the earth. The modern means of communication, if adopted, will facilitate easier cooperation among national courts as well as the supranational court.

As noted above, principles of cooperation are also needed to cover cases where multiple insolvency proceedings are opened in respect of the same company. An example is the ALI-III Global Principles, which deal with how IPs involved with the multinational companies' insolvency can cooperate, and which can be used as a model for the proposed insolvency legal framework.[122] In particular, principle 26 states[123]

> **Principle 26 Cooperation**
>
> 26.1. Insolvency administrators in parallel proceedings should cooperate in all aspects of the cases. The use of an agreement or "protocol" should be considered to promote the orderly, effective, efficient and timely administration of the cases.
>
> 26.2. A protocol for cooperation among insolvency administrators should address the coordination of requests for court approvals of related decisions and actions when required and communication with creditors and other parties. To the extent possible, it should also provide for timesaving procedures to avoid unnecessary and costly court hearings and other proceedings.

It is acknowledged that principle 26 of the ALI-III Global Principles deals with insolvency proceedings regarding the same company happening in more than one jurisdiction.[124]

---

[120] ALI-III Global Principles for Cooperation in International Insolvency Cases 2012, Principle 9.
[121] Chapter 6: 'Survey of Frameworks and Best-Practice Guidelines for Judicial Cooperation' in JCOERE Project Consortium, Judicial Co-operation Supporting Economic Recovery in Europe: Report 2 on Judicial Cooperation in Preventive Restructuring and Insolvency in the EU (UCC 2020) 113-132 <https://www.ucc.ie/en/jcoere/research/report2/report2chapter/report2chapter2/> accessed 19 March 2021, 126.
[122] ALI-III Global Principles for Cooperation in International Insolvency Cases 2012.
[123] ALI-III Global Principles for Cooperation in International Insolvency Cases 2012.
[124] ALI-III Global Principles for Cooperation in International Insolvency Cases 2012.

However, the insolvency legal framework can still adopt this approach in other contexts, such as in respect of groups of companies, so that the IPs should cooperate. Cooperation among the multinational companies' IPs would lead to effective and efficient ways of dealing with their insolvencies. The consequence might be to encourage countries to adopt the proposed framework.

Ilya Kokorin recognises that there might be a conflict of interest in companies' cross-border insolvencies, as the stakeholders would try and achieve their individual best position.[125] There is the perception that IPs appointed from different nations to deal with insolvency matters in those countries might be more inclined to achieve the best position for their domestic stakeholders.[126] As a result, there might be a conflict of interest with other IPs located elsewhere trying to achieve a similar outcome for their domestic stakeholders. Therefore, it is crucial for all IPs of multinational companies in insolvency, no matter the country of location, to cooperate to ensure maximisation of assets for all stakeholders to benefit as a whole to the optimal extent possible. The insolvency legal framework can achieve cooperation by encouraging the IPs to cooperate. Cooperation among the IPs of the multinational companies will ensure that the IPs do not adopt measures that are not compatible with the insolvency aim of the multinational companies as a whole.[127]

In practice, the method of communication can increase cooperation among the IPs and with both national and supranational courts.[128] The European Communication and

[125] Ilya Kokorin, 'Conflict of Interest, Intra-Group Financing and Procedural Coordination of Group Insolvencies' (2020) 29 International Insolvency Review 32, 33.
[126] Ilya Kokorin, 'Conflict of Interest, Intra-Group Financing and Procedural Coordination of Group Insolvencies' (2020) 29 International Insolvency Review 32, 33.
[127] Chapter 6: 'Survey of Frameworks and Best-Practice Guidelines for Judicial Cooperation' in JCOERE Project Consortium, Judicial Co-operation Supporting Economic Recovery in Europe: Report 2 on Judicial Cooperation in Preventive Restructuring and Insolvency in the EU (UCC 2020) 113-132 <https://www.ucc.ie/en/jcoere/research/report2/report2chapter/report2chapter2/> accessed 19 March 2021, 119.
[128] Bernard Santen, 'Communication and Co-operation in International Insolvency: On Best Practices for Insolvency Office Holders and Cross-Border Communication between Courts' (2015) 16 ERA Forum 229, 233.

Cooperative Guidelines for Cross-Border Insolvency (The CoCo Guidelines) suggested that the IPs' communication should occur as soon as it is practically possible.[129] Meaning that when dealing with the cross-border insolvency of multinational companies, IPs should consider and be highly persuaded to communicate with the other IPs and the courts. Technology and electronic means of communication can ease cooperation, as suggested by guideline 7 of the ALI-III Global Principles.[130] The insolvency legal framework should clearly state that IPs should communicate with the courts (national and supranational) and other IPs as soon as it is practically feasible to do so through technology or electronic communication.

Judicial cooperation among all those involved in the multinational companies' insolvency is vital in providing efficient and effective resolution. The insolvency framework should ensure that it has a provision to enable and encourage judicial cooperation among the supranational court, national courts, and IPs. The insolvency legal framework should provide practical mechanisms for ensuring cooperation among the courts and IPs, such as using technology in communication. Provision relating to judicial cooperation might encourage countries to sign up to the proposed framework and the supranational court.

6.2.6 The Market for International Restructuring

In the cross-border insolvency landscape in recent years, some countries, such as Singapore and Netherland, have established themselves as insolvency and restructuring hubs.[131] The "traditional" insolvency hubs, the US and UK, have

[129] The European Communication and Cooperative Guidelines for Cross-Border Insolvency, Guideline 6.
[130] ALI-III Global Principles for Cooperation in International Insolvency Cases 2012.
[131] Nandakumar Ponniya, Min-Tze Lean and Rian Matthews, 'Singapore: A New Hub for Insolvnecy and Restructuring' (2016) Baker McKenzie < Institutionalizing Creative Destruction: Predictable and Transparent Bankruptcy Law in the Wake of the East Asian Financial Crisis > accessed 9 November 2021; and Mark Molhuysen and Olmo Weeshoff, 'WHOA! New Dutch Scheme Set to Position the Netherlands As A Restructuring Hub' (2019) DLA Piper < WHOA! New Dutch Scheme set to position the Netherlands as a restructuring hub | | Insights | DLA Piper Global Law Firm > accessed 9 November 2021.

been discussed in chapters 2 and 3.[132] These insolvency hubs may prove a stumbling block for engaging with the proposed insolvency procedural legal framework and consequently the supranational court. Therefore, examining what makes a jurisdiction, an insolvency hub should be done to understand how they may possibly engage with the supranational court.

Some governments have openly expressed their desires to establish their jurisdictions as insolvency hubs.[133] A good example is the Singapore government which in 2015 set up a committee aptly called The Committee to Strengthen Singapore as an International Centre for Debt Restructuring (Committee).[134]The Committee's task was to make recommendations to overhaul Singapore's insolvency system to make it a centre for international debt restructuring.[135] Like the Singapore government, other governments may follow suit in various ways to make their jurisdictions attractive destinations for cross-border insolvency.

Various domestic courts have shown their willingness to deal with cross-border insolvency issues.[136]Aurelio Gurrea-Martinez, recognises that sophisticated judiciary is one element that makes a jurisdiction an insolvency hub.[137]As seen in chapters 2 and 3, the US and UK courts, particularly in Delaware, Southern

---

[132] Chapter 2: The US and Chapter 3: The UK.
[133] Norton Rose Fulbright, 'Singapore's Efforts to Become An International Hub for Debt Restructuring' (2019) Norton Rose Fulbright < Singapore's efforts to become an international hub for debt restructuring | Knowledge | Norton Rose Fulbright | Global law firm | Norton Rose Fulbright > accessed 9 November 2021.
[134] Ministry of Law Singapore, 'Recommendations Released on Strengthening Singapore as an International Centre for debt Restructuring' (2016) Ministry of Law Singapore <Recommendations Released on Strengthening Singapore as an International Centre for Debt Restructuring (mlaw.gov.sg)> accessed 9 November 2021.
[135] Ministry of Law Singapore, 'Recommendations Released on Strengthening Singapore as an International Centre for debt Restructuring' (2016) Ministry of Law Singapore <Recommendations Released on Strengthening Singapore as an International Centre for Debt Restructuring (mlaw.gov.sg)> accessed 9 November 2021.
[136] Amy Sandys, 'Freshfields and Novartis Secure Cross-Border Injunctions Against Mylan' (2020) Juve Patent < Freshfields and Novartis secure cross-border injunctions against Mylan - JUVE Patent (juve-patent.com)> accessed 9 November 2021.
[137] Aurelio Gurrea-Martinez, 'Developments in Singapore's Insolvency Restructuring Regime' (2021) Australian Restructuring Insolvency & Turnaround Association Journal < ARITA. Interview to Aurelio Gurrea Martinez.pdf (smu.edu.sg) > accessed 9 November 2021.

District of New York and London, have established themselves as popular destinations for insolvency tourism.[138] In the example of the US courts, US courts have shown their willingness to deal with cross-border matters to the extent of creating situations where companies with assets as little as a peppercorn in the US is seen as sufficient to utilise the US courts for insolvency purposes.[139] Therefore, the courts in popular destinations through their decisions have shown willingness to deal will with cross-border matters particularly in popular insolvency tourism destinations.

Legal professionals and insolvency practitioners in countries with sophisticated insolvency laws and judiciary have openly expressed the attractiveness of their jurisdiction.[140] Law firms have set up specialist insolvency departments whose speciality is highlighted via various media outlets such as law firm websites in order to attract clients seeking assistance in dealing with cross border insolvency matters. The law firms highlight examples of cross-border insolvency achievements prominently in their "highlight sections" or various publications where they can be seen by potential clients.[141]Additionally, law firms and insolvency practitioners have set up a system to coordinate with other law firms and insolvency practitioners in other jurisdictions with the aim of attracting

[138] Gerard McCormack, 'Jurisdictional Competition and Forum Shopping in Insolvency Proceedings' (2009) 68(1) The Cambridge Law Journal 169; and Amy Coburn, 'The Growth of Bankruptcy Tourism in the United Kingdom' (2012) 25(1) Insolv. Int. 8.
[139] *In re McTague,* (1996) 198 B.R. 428, 432.
[140] See for example Norton Rose Fulbright, 'Cross-Border Insolvency Representation' (2020) Norton Rose Fulbright < https://www.nortonrosefulbright.com/en-gb/knowledge/publications/9c8c3b4c/covid-19-german-legislative-measures-to-mitigate-the-impact > accessed 15 November 2021; and Healys, 'Insolvency' (2021) Healys < https://healys.com/services/insolvency/cross-border-insolvency/> accessed 15 November 2021.
[141] See for example Kirkland & Ellis, 'International & Cross-Border Insolvency' (2021) Kirkland & Ellis < https://www.kirkland.com/services/practices/restructuring/international-and-crossborder-insolvency > accessed 15 November 2021; and Denton, 'Cross-Border Restructuring Matters' (2021) Dentons < https://www.dentons.com/en/find-your-dentons-team/practices/restructuring-insolvency-and-bankruptcy/cross-border-restructuring-matters> accessed 15 November 2021.

clients to their services as a one-stop shop for dealing with cross-border insolvency matters.[142]

As highlighted above, governments, courts, law firms and insolvency practitioners may be reluctant to engage with the proposed insolvency framework and, consequently, may not engage with the supranational court. One reason for the reluctance may be the feeling that the efforts to make the insolvency hubs will be lost. However, it should be noted that the proposed insolvency framework and the supranational court are there to streamline the process of identifying the correct jurisdiction for opening insolvency proceedings. The essence that makes the countries insolvency hubs, that is, the presence of sophisticated insolvency laws, court and specialist legal advisers, will not be phased out. Additionally, the supranational court will save time by identifying the 'home' jurisdiction rather than having multiple insolvency proceedings opened in various countries whose decisions may not be enforceable in other jurisdictions.

6.3 CONCLUSION

In conclusion, it is essential to have a supranational court to adjudicate matters concerning the proposed insolvency legal framework's interpretation. The supranational court represents the best means for developing a uniform interpretation of the proposed insolvency procedural framework to advance the development of international approaches to cross-border insolvencies and reduce the potential for forum shopping. The supranational court ought to be a hybrid model of the existing supranational courts, drawing upon examples of best practices. The supranational court, therefore, should be

[142] See for example Sarah Paterson, 'INSOL Talks: Sarah Paterson' (2021) INSOL International < https://www.insol.org/Focus-Groups/Academic-Group/Events-and-Podcasts?utm_campaign=961754_Podcast2&utm_medium=email&utm_source=INSOL%20International&dm_i=4WAM,KM3E,19L9J8,2GSF8,1> accessed 15 November 2021; Peter Mankowski, 'The European World of Insolvency Tourism: Renewed, But Still Brave?' (2017) 64 Netherlands International Law Review 94.

able to give preliminary rulings after referrals from national courts. Also, conflicts related to the insolvency framework can be commenced and adjudicated directly in the supranational court by a limited range of parties with standing and with safeguards to prevent “time wasting” applications that could undermine the changes of reorganisation.

It is acknowledged that what is proposed in this chapter is ambitious and that potential signatory countries might be reluctant to implement the insolvency framework, in particular those that have healthy businesses as insolvency tourism (forum shopping) destinations. The insolvency legal framework should have provisions that enable the supranational court to be a source of efficiency and effectiveness in cross-border insolvency. Two areas identified are judicial cooperation and judges' appointment based on robust factors of expertise and impartiality. If the two areas are adequately covered, countries might more readily implement the proposed framework and accept the superiority of the supranational court over national courts in respect of the limited range of matters covered by the court.

It is recognised that insolvency law reforms at an international stage take a long time. For example, Canada took years to reform its domestic insolvency laws before the reforms were made into law.[143] The same is even more likely to happen at an international level where countries will take time to agree on reforms and finally in implementation. Hence the creation and adoption of the supranational court will not happen soon. However, in the meantime, steps can be taken to prepare for its creation and adoption. The first step is creating a provision for example, convention or treaty that adopts the concept of COMI as a unifying principle for the opening of insolvency proceedings. As a next step, countries can be encouraged to sign up to facilitate countries' adoption of the supranational court.[144]

[143] R Gordon Marantz, ‘Canadian Bankruptcy and Insolvency Law Reform Continues-The 1997/7 Amendments’ (1998) 14(1) Tolley’s Insolvency Law and Practice 22.
[144] Pierre-Hugues Verdier and Mila Versteeg, ‘International Law in National Legal Systems: An Empirical Investigation’ (2015) 109(3) The American Journal of International Law 514 [514].

The provision is what will enable the supranational court to be recognised legally by nations.

Part of this next step is having an already existing international body to champion the enacting provision of the supranational court. Examples of international organisations that can champion the creation of the supranational court are the World Bank and the International Monetary Fund (IMF). The World Bank and the IMF have advocated insolvency law reforms in countries.[145] As part of their campaign to reform national laws they can encourage potential signatory countries to recognise the supranational court in relation to deciding where multinational companies can open insolvency proceedings. In addition, UNCITRAL has long been a driving force for the creation and introduction of model laws that have been widely implemented globally, such as the Model Law on Cross-Border Insolvency. Their working groups are relatively efficient and take into account the perspectives of delegate countries, which may lead to an insolvency framework that caters more broadly to the different interests of as many individual countries as possible.

The supranational court will have the authority to decide where COMI lies, and countries in which COMI is established should be equipped to handle multinational companies' insolvencies. Admittedly many countries have yet to develop insolvency laws covering both reorganisation and liquidation in modern and sophisticated ways and there is progress to be made in the development of supporting institutions, as discussed in Chapter 4. It is therefore essential that national laws and institutions are in line with global standards. The IMF and the World Bank are encouraging countries to reform insolvency laws to strengthen national financial and economic systems, thus attracting businesses and credit.[146]

[145] The World Bank, 'Resolving Insolvency' (2019) The World Bank < https://www.doingbusiness.org/en/data/exploretopics/resolving-insolvency/reforms> accessed 22 April 2021; and Legal Department, 'Orderly and Effective Insolvency Procedures' (1999) International Monetary Fund < The World Bank, 'Resolving Insolvency' (2019) The World Bank < https://www.doingbusiness.org/en/data/exploretopics/resolving-insolvency/reforms> accessed 22 April 2021.> accessed 22 April 2021.

[146] The World Bank, 'Resolving Insolvency' (2019) The World Bank < https://www.doingbusiness.org/en/data/exploretopics/resolving-insolvency/reforms> accessed 22

Therefore, the IMF or the World Bank can encourage countries to recognise the supranational court's authority during its efforts to encourage them to reform their laws to increase financial and economic system standing. There can therefore be a principled approach of opening insolvency proceedings based on COMI, rather than forum shopping in a way that bypasses the domestic laws of the COMI to the detriment of local stakeholders.

April 2021; and Legal Department, 'Orderly and Effective Insolvency Procedures' (1999) International Monetary Fund < The World Bank, 'Resolving Insolvency' (2019) The World Bank < https://www.doingbusiness.org/en/data/exploretopics/resolving-insolvency/reforms> accessed 22 April 2021.> accessed 22 April 2021.

CHAPTER 7: CONCLUSION

> Insolvency laws... play a far more important role. If effectively designed and implemented, they can boost confidence in an economy, thereby fostering growth and helping to prevent or resolve financial and economic crises.[1]

7.1 AN INTRODUCTORY RESTATEMENT OF THE RESEARCH PROBLEM, AIMS AND RESEARCH QUESTION

7.1.1 Background

Developing countries have lagged behind much of the developed world in the modernisation of their insolvency legal frameworks due in part to the lack of practical incentives to do. This is not helped by the lack of interest that multinational companies seem to have in utilising the procedures available in the jurisdictions where they, their branches or subsidiaries may be located. Although international organisations such as the World Bank, the IMF and UNCITRAL have encouraged modern reforms in order to attract foreign investment and improve economic and financial activities, without internal incentives that have largely been superseded by the availability of efficient procedures in the UK and the US as a result of their long-arm jurisdiction, there is little justification to put significant work into the development of modern reformed insolvency legal frameworks in developing countries. Developing countries may attract multinational companies due to various reasons, such as low costs of labour and readily available raw material.[2] Doing business carries the risk of business failure. Multinational companies based in developing countries during insolvency may opt not to commence insolvency in those jurisdictions,

[1] Sean Hagan, 'Promoting Orderly and Effective Insolvency Procedures' (2000) 37(1) Finance and development 1, 1.
[2] See for example Joseph LaPalombara and Stephen Blank, 'Multinational Corporations and Developing Countries' (1980) 34(1) Journal of International Affairs 119; and Lynn M LoPucki and William C Whitford, 'Venue Choice and Forum Shopping in the Bankruptcy Reorganisations of Large Publicly Held Companies' (1991) 1991 Wis L Rev 11.

through forum shopping.[3] 'Forum shopping' and 'long-arm jurisdiction' dominate the international insolvency landscape.[4] 'Forum shopping' is the process where litigating parties actively seek the most advantageous venue in which to litigate.[5] A key aspect of 'long-arm jurisdiction' is the ability of national courts to preside over the insolvency proceedings commenced by foreign companies with little connection to the jurisdiction in which those proceedings are opened.[6] The United States of America (US) and the United Kingdom (UK), in particular, are popular destinations for forum shopping.[7] The insolvency laws in the US and UK enable 'foreign'[8] companies to open insolvency proceedings with few requirements to establishing a close connection (a peppercorn has been enough), thus providing long-arm jurisdiction that are easily accessible by companies that are technically foreign to those jurisdictions.[9] Forum shopping and long-arm jurisdiction may be detrimental to the multinational companies' stakeholders[10] based in developing countries due to the differences in legal system, language, and the physical distance from the location where proceedings are taking place. Additionally, insolvency law reforms in developing countries may be affected by forum shopping and long-arm jurisdiction as there are fewer incentives to reform or modernise such systems if there is a low likelihood of them being needed or used.

[3] See for example Samir D Parikh, 'Modern Forum Shopping in Bankruptcy' (2013) 46(1) Connecticut L Rev 159.
[4] See for example John A. E. Pottow, 'The Myth (and Realities) of Forum Shopping in Transnational Insolvency' (2007) 32(2) Brook. J. int'l l. 785; Pamela K. Bookman, 'The Unsung Virtues of Global Forum Shopping' (2017) 92(2) Notre Dame Law Review 579; and C. Granger, 'The Conflict of Laws and Forum Shopping: Some Recent Decisions on Jurisdiction and Free Enterprise in Litigation' (1974) 6 Ottawa law Review 416.
[5] Gerard McCormack, 'Universalism in Insolvency Proceedings and the Common Law' (2012) 32(2) Oxford Journal of Legal Studies 325; and Gerard McCormack, 'Jurisdictional Competition and Forum Shopping in Insolvency Proceedings' (2009) 68(1) Cambridge Law Journal 169, 169.
[6] Emil Petrossian, 'In Pursuit of the Perfect Forum: Transnational Forum Shopping in the United States and England' (2007) 40 Loy. L. A. L. Rev. 1257.
[7]See for example Gerard McCormack, 'Bankruptcy Forum Shopping: The UK and US as Venues of Choice for Foreign Companies' (2014) 63 ICLQ 815, 816 – 817.
[8] The term foreign can equate to companies that have not been incorporated or registered in the country.
[9] Title 11 United States Code Annotated, § 109 (a) (The US); and *Re Eloc Electro-Optieck and Communicatie BV* [1981] 2 All ER 1111 [226] sufficient connection test for the UK.
[10] See for example Andre J. Berends, 'The UNICTRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview' (1998) 6 Tul. J. Int'l & Comp. L. 309 Stakeholders are individuals and entities that with an interest in a company financially or otherwise, such as employees, creditors, customers, society among others.

By reducing the likelihood of forum shopping to such long-arm insolvency jurisdictions by applying COMI instead of looser tests that more easily allow for the opening of main insolvency proceedings in respect of multinational companies in alternative jurisdictions with little real connection, inappropriate or abusive forum shopping that may be to the detriment of domestic creditors and stakeholders would be more difficult to achieve. The reduction of opportunities to forum shop may also increase the internal incentives for developing countries to develop their own insolvency law frameworks. This thesis, therefore, examined insolvency laws in the US and UK that enable forum shopping and long-arm jurisdiction with a focus on multinational companies. The thesis also examined forum shopping from the perspective of developing countries by examining potential issues encountered by multinational companies in developing countries and whether those issues result in forum shopping. The thesis suggested, as a long term objective for the advancement of cross-border insolvency approaches, that countries adopt a global insolvency procedural framework utilising the centre of main interest (COMI) to decide the forum for insolvency proceedings of multinational companies to ensure that there is only one global test to determine the forum in which insolvency proceedings may be opened. It was not suggested that forum shopping could wholly be eliminated and it was acknowledged that there is still some scope for 'good' forum shopping, in particular while improvements are to be made to insolvency laws and supporting institutions in developing countries. Finally, to ensure that the uniform application of the insolvency legal framework, there should be the creation of a supranational court.

The engagement of multinational companies with the insolvency laws of developing countries may encourage insolvency law reform, a driving force that might be missed if multinational companies choose to use the procedures available in other jurisdictions. It is essential to understand how developing countries are affected by the choices made by

multinational companies in opening insolvency proceedings in the US and UK rather than in the developing countries where they are also located.

7.1.2 The Research Objectives and Questions

The research focused on the following to provide a developing country's perspective on forum shopping and how it is facilitated by the US and UK insolvency laws, it:

1. Examined US and UK insolvency laws that enable multinational companies to open insolvency proceedings in those jurisdictions under long-arm jurisdiction;
2. Identified and analysed potential issues encountered by multinational companies in developing countries during insolvency and whether these issues lead to multinational companies' forum shopping to the US or UK;
3. Examined the drivers and principles for insolvency law reform in developing countries and how stakeholders' interests might be prioritised locally in developing countries but bypassed by forum shopping;
4. Recommended an advanced cross border insolvency procedural framework that utilised the centre of main interest (COMI) test in identifying the choice of forum for opening insolvency proceedings for multinational companies; and
5. Recommended the creation of a supranational court that would aid in interpreting the insolvency procedural framework.

In fulfilling the research objectives mentioned above, the research focused on the following questions:

1. What are the US and UK insolvency laws that allow 'forum shopping' and 'long-arm jurisdiction'?
2. What are the potential negative impacts on efforts to develop insolvency laws in developing countries by 'forum shopping' and 'long-arm jurisdiction'?
3. How are stakeholders' interests prioritised locally in developing countries?

4. How can progress be made towards international insolvency law reforms that provide a straightforward means and uniform application of a test by which multinational companies can identify the choice of forum for opening insolvency proceedings?

7.1.3 Methodology

The methodologies used were doctrinal and comparative legal methodologies. The doctrinal methodology was used to analyse current insolvency laws in the UK, US and developing countries.[11] The method aimed to determine which insolvency laws in the UK and US allow forum shopping and long-arm jurisdiction and how the global system may develop and improve in the future with a possible consequence of multinational companies using developing countries' insolvency laws. A secondary result from the improvement may be that developing countries might enhance their insolvency laws and supporting institutions. The improvement may enable developing countries' insolvency laws to be utilised more by multinational companies, rather than using laws in another jurisdiction by forum shopping.

The doctrinal methodology was used to examine the concept of COMI, a central aspect of the recommended insolvency framework. This concept was examined by reference to the development of COMI in the EU. The aim was to establish whether the same approach can be used in the insolvency legal framework to create a test for determining where multinational companies' insolvency proceedings can be commenced. In relation to the development of the insolvency legal framework, the doctrinal methodology was used to assess whether a supranational court should be created. The aim of the supranational court was to provide a standard application of the insolvency legal framework.

[11] Vijay M. Gawas, 'Doctrinal Legal Research method a Guiding Principle in Reforming the Law and Legal Systems Towards the Research Development.' (2017) 3(5) International Journal of Law 128.

The comparative legal methodology was used to compare the provisions that govern the opening of insolvency proceedings regarding foreign companies in the UK and US. The comparison was to determine how both jurisdictions allow multinational companies to forum shop.[12] This comparative methodology was also used to compare the key drivers and principles that influence insolvency law reform in developing countries with a view to determining whether there was a lack of internal incentive to reform because there has been little demand to use their insolvency laws due to the ease of forum shopping elsewhere, typically the US or UK. A comparative method was also used to contrast how several international courts function and what mechanisms they use to fulfil their particular roles and overcome the challenges they face in the applicability and enforceability of their decisions, providing certain benchmarks and potential solutions for the proposed supranational insolvency court, which might share similar challenges.

7.2 A SUMMARY OF THE FINDINGS

7.2.1 The US Insolvency Laws that Enable Forum Shopping

Forum shopping in the US has been described both by a federal appeals judge and an academic as a 'national legal pastime' and 'popular pastime'.[13] The US is a popular destination for forum shopping by corporations seeking effective and efficient insolvency outcomes, especially in Delaware and the Southern District of New York.[14] The low threshold for opening insolvency proceedings under Federal bankruptcy laws facilitates

[12] Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (3rd edn, Oxford University Press 2011) 34; and Konrad Zweigert and Hans-Jürgen Puttfarken, 'Critical Evaluation in Comparative Law' (1973-76) 5 Adelaide Law Review, 343.
[13] *Keeton v Hustler Magazine* (1984) 465 US 770, 779; and Gerard McCormack, 'Jurisdictional Competition and Forum Shopping in Insolvency Proceedings' (2009) 68(1) Cambridge Law Journal 169, 169.
[14] Gerard McCormack, 'Bankruptcy Forum Shopping: The UK and US as Venues of Choice for Foreign Companies' (2014) 63 ICLQ 815, 816.

forum shopping.[15] Multinational companies have taken advantage of the readiness of US courts to assert jurisdiction over insolvency matters of companies that are based not only in the US but in other jurisdictions as well.[16]

The Title 11 Bankruptcy Code (Bankruptcy Code) is the primary source of insolvency laws in the US.[17] Foreign companies, including multinational companies, are attracted to commencing insolvency proceedings due to the popularity of the Chapter 11 restructuring provisions, with which the US has historically significant experience and institutional expertise.[18] There are other insolvency proceedings in the Bankruptcy Code, such as liquidation in Chapter 7 which can possibly be used by foreign companies.[19] The attractiveness of the restructuring provision enables the company to enjoy the benefit of an automatic stay and to propose a plan of reorganisation, although in recent years s 303 business sales have often been used in place of trading reorganisations.[20] Foreign companies are also attracted to reorganising in the US because it is debtor-friendly.[21] The 'debtor-friendly' reputation of US law arises in part from the approach that enables the management of the companies to remain in charge during the insolvency process,[22] although it is acknowledged that in many instances creditors will have significant control as a result of conditions attached to post-commencement financing.

[15] Elizabeth Warren, 'Why have a Federal Bankruptcy System' (1992) 77(5) Cornell Law Review 1093, 1095.
[16] Oscar Couwenberg and Stephen J Lubben, 'Corporate Bankruptcy Tourists' (2015) 70 Bus. Law. 719.
[17] Title 11 United States Code Annotated.
[18] Title 11 United States Code Annotated, Chapter 11; Gerard McCormack, 'Bankruptcy Forum Shopping: The UK and US as Venues of Choice for Foreign Companies' (2014) 63 ICLQ 815, 826; Ian Drake, 'Use of US Chapter 11 Filings by Non-US Corporations: Realistic Option or Non-Starter' (2011) 8(3) International Corporate Rescue 206, 207.
[19] Title 11 United States Code Annotated, chapter 7.
[20] Title 11 United States Code Annotated, section 303.
[21] Fancy Chepkemoi Too, 'A Comparative Analysis of Corporate Insolvency Laws: Which if the Best Option for Kenya?' (2015) Nottingham Trent University < http://irep.ntu.ac.uk/id/eprint/27951/1/Thesis%20post%20viva%20FINAL.pdf > accessed 24 September 2018.
[22] Gabriel Moss, 'Chapter 11: An English Lawyers Critique' (1998) 11 Insolvency Intelligence 17.

The US courts can exercise long-arm jurisdiction over insolvency matters of foreign companies through the gateway provision.[23] Section 109 (a) of the Bankruptcy Code is the gateway provision, which describes who is eligible to be a debtor and can therefore make use of the provisions of the US Bankruptcy Code.[24] Any company or individual that can prove that they fulfil the requirement to be a 'debtor' under the Bankruptcy Code can file for the opening of proceedings under the Bankruptcy Code.[25] Fulfilling the requirements means that multinational companies not incorporated or registered in the US but which can show that they are debtors under section 109 (a) can open their insolvency proceedings in the US.

It was noted in Chapter 2 that the bar for claiming jurisdiction by US courts is low under section 109 (a).[26] Section 109 (a) states that a debtor needs to fulfil two requirements, being a person [27] which is easy for most multinationals to establish, and having a connection to the US. [28] All that is needed for a multinational company to meet the connection criteria of eligibility to open proceedings in the US, at the lowest threshold, is to identify the existence of property in the jurisdiction.[29] In *In re McTague* the evidence for showing property can be as little as a dollar, a dime or a peppercorn.[30] Consequently, the value of the property is immaterial in proving the property requirement.[31] It is enough for a foreign company to show that they have a bank account in the US, even if the bank

[23] Philip A. Trautman, 'Long-Arm and Quasi in Rem Jurisdiction in Washington' (1975-1976) 51 Wash. L. Rev.1.
[24] Title 11 United States Code Annotated, § 109 (a).
[25] Title 11 United States Code Annotated, § 109 (a).
[26] See for example Gerard McCormack, 'Bankruptcy Forum Shopping: The UK and US as Venues of Choice for Foreign Companies' (2014) 63 ICLQ 815 [834]; Sandy Shandro and Bennett Jones, 'Bankruptcy Jurisdiction in the US and Europe: Reconsideration Needed!' (2005) 18 Insolv. Int. 129, 131.
[27] Title 11 United States Code Annotated, § 109 (a); and Title 11 United States Code Annotated, § 101 (41) states who a legal person is under the Bankruptcy Code.
[28] Title 11 United States Code Annotated, § 101(9).
[29] Title 11 United States Code Annotated, § 109 (a).
[30] *In re McTague,* (1996) 198 B.R. 428, 432.
[31] *In re McTague,* (1996) 198 B.R. 428, 432; Erin K. 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] AmBankrInstLRev 535.

account has nothing or an insignificant amount of money such as penny.[32] Therefore, it is easy for multinational companies to show that they have property in the US for the purposes of commencing insolvency proceedings there.

It should be acknowledged that although there is a low threshold for eligibility, the US courts are still able to refuse jurisdiction even though a link to the US has been established. The refusal can be based on the principle that bankruptcy proceedings cannot be 'used as a sword' to gain an unfair advantage over the other party.[33] This means that if US courts suspect that the multinational companies are applying to gain an unfair advantage over the other stakeholders of the multinational companies. Still, US courts can exert long-arm jurisdiction over insolvency proceedings of multinational companies.

7.2.2 The UK Insolvency Laws that Enable Forum Shopping

UK insolvency law offers several insolvency procedures such as liquidation, administration including the expedited pre-pack administration,[34] plus the new restructuring plan and moratorium.[35] The restructuring plan builds upon the schemes of arrangement, which is not technically an insolvency procedure, though it has often been used by foreign companies to restructure debt obligations and to resolve financial distress.[36] Each of the above procedures has certain requirements that must be met in order for foreign multinational companies to effectively forum shop to use the UK insolvency framework.[37] The thesis concentrated on the core procedures that have been utilised over time and thus been tried and tested: liquidation, administration and schemes of arrangements, although

[32] *In re Globo Comunicacoes*, 2004 WL 2624866 [9]; *In re Global Ocean Carriers Ltd.,* 251 B.R. 31 (Bankr. D. Del. 2000), 38 - 39; *In re McTague,* (1996) 198 B.R. 428, 431 - 432.
[33] *In re Head*, (1998) 223 B.R. 648, 654.
[34] Insolvency Act 1986, section 220, section 221 and schedule B1; and Companies Act 2006, Part 26.
[35] The Corporate Insolvency and Governance Act 2020, schedule 1 to 7 and section 4.
[36] Companies Act 2006, Part 26.
[37] Insolvency Act 1986, section 220, section 221 and schedule B1; and Companies Act 2006, Part 26.

it was noted that there has already been one example of forum shopping to make use of the UK's new restructuring plan.

Foreign companies forum shopping in the UK must pass two hurdles before a UK court can accept jurisdiction to open insolvency proceedings, though schemes of arrangements provide different criteria. The first hurdle is statutory, and the other is judge-made.[38] The thesis considered the various procedures and statutory requirements for opening proceedings in Chapter 3. It noted that not only must statutory requirements for the opening of proceedings be fulfilled, but foreign companies must show that they have a link to the UK.[39] The test for establishing a link is the 'sufficient connection' test.

The sufficient connection test has three elements.[40] The first element requires foreign companies to show that they have sufficient connection to the UK.[41] The UK courts have shown that they are flexible in accepting proof for the first element of the sufficient connection test.[42] The easiest means by which foreign multinational companies can show that the first element is through the presence of assets and places of business in the UK.[43] The foreign multinational companies do not have to have a physical presence in the UK, as trading through agents is still sufficient.[44] The next requirement is that there must be

[38] Insolvency Act 1986, section 220, section 221 and schedule B1; Companies Act 2006, Part 26; *Stocznia Gdanska SA v Latreefers Inc and Others Appeals* [2002] All ER (D) 148; *Re Real Estate Development Co* [1991] BCLC 210.
[39] Stocznia Gdanska SA v Latreefers Inc and Others Appeals [2002] All ER (D) 148; Re Real Estate Development Co [1991] BCLC 210.
[40] Stocznia Gdanska SA v Latreefers Inc and Others Appeals [2002] All ER (D) 148; Re Real Estate Development Co [1991] BCLC 210.
[41] See for example International Westminister Bank Plc v Okeanos Maritime Corp [1987] 3 All ER 137, 145; Re Real Estate Development Co [1991] BCLC 210, 214; Siskina (Cargo Owners) v Distos Cia Naviera SA, The Siskina [1977] 3 All ER 803, 825; Stocznia Gdanska SA v Latreefers Inc and Others Appeals [2002] All ER (D) 148 among others.
[42] See for example International Westminister Bank Plc v Okeanos Maritime Corp [1987] 3 All ER 137, 145; Re Real Estate Development Co [1991] BCLC 210, 214; Siskina (Cargo Owners) v Distos Cia Naviera SA, The Siskina [1977] 3 All ER 803, 825; Stocznia Gdanska SA v Latreefers Inc and Others Appeals [2002] All ER (D) 148 among others.
[43] Stocznia Gdanska SA v Latreefers Inc and Others Appeals [2002] All ER (D) 148; Re Real Estate Development Co [1991] BCLC 210; and International Westminister Bank Plc v Okeanos Maritime Corp [1987] 3 All ER 137, 145.
[44] See Re Mid East Trading Ltd [1998] 1 All ER 577 (The Lehman Brothers were acting as agents for a Lebanese company in the UK); Banque des Marchands de Moscou (Koupetschesky)(in liq) v Kindersley [1950] 2 All ER 549 (Employees acting on behalf of Dutch company in the UK.)

a reasonable possibility that any of the insolvency procedures will benefit the petitioner.[45] The benefit can simply be presented as using any of the insolvency proceedings, insolvency practitioner or a future judgement order.[46] It is important to note that the benefit need not be in existence at the time that the insolvency proceedings are commenced.[47] The final requirement is that one or more beneficiary to the insolvency proceedings are in the UK.[48] The final element is not a necessity in establishing a sufficient connection to the UK, once the first two elements have been fulfilled.[49] Therefore, the judge-made requirement for foreign companies to forum shop in the UK requires a link to the UK and a benefit to be realised from using the insolvency procedures.

In conclusion, foreign companies wishing to forum shop first need to decide which type of UK insolvency procedure to use and then they need to meet the statutory criteria for opening proceedings as well as establsihign a sufficient connection. The "sufficient connection" test sets a lower threshold for jurisdiction than COMI.

7.2.3 The Impact of Forum Shopping on Developing Countries

Doing business in developing countries carries the risk of business failure, the same as doing business anywhere. Multinational companies based in developing countries during insolvency may opt not to commence insolvency proceedings in those jurisdictions and may prefer forum shopping to utilised proceedings elsewhere that they perceive as being more suited or beneficial to their interests.[50] Therefore, if the insolvency procedural

[45] Re Real Estate Development Co [1991] BCLC 210 and Stocznia Gdanska SA v Latreefers Inc and Others Appeals [2002] All ER (D) 148.
[46] Re Eloc Electro-Optieck and Communicatie BV [1981] 2 All ER 1111 [226].
[47] See for example Stocznia Gdanska SA v Latreefers Inc and Others Appeals [2002] All ER (D) 148.
[48] Re Real Estate Development Co [1991] BCLC 210 and Stocznia Gdanska SA v Latreefers Inc and Others Appeals [2002] All ER (D) 148.
[49] See for example *In re Rodenstock GmbH* [2011] EWHC 1104 (Ch), [2011] Bus LR 1245 (The creditors who were the beneficiaries were not in the UK.)
[50] See for example Samir D Parikh, 'Modern Forum Shopping in Bankruptcy' (2013) 46(1) Connecticut L Rev 159.

framework and its connected supranational court that is recommended in Chapters 5 and 6 is to be effective, there will be improvements needed to the insolvency laws and institutions in many developing countries.

Forum shopping may impact developing countries' efforts to advance their insolvency laws due to a lack of internal incentives based on the limited demand to use local procedures.[51] Chapter 4 identified that international organisations, such as the World Bank, the IMF, and UNCITRAL, in the recent past have exerted external pressure on developing countries to reform their insolvency laws. There have also been notable triggers by major events, examples of which are the Asian financial crisis, the 2008 US financial crisis and other reforms have been prompted by financial growth in developing countries, which has required the modernisation of corporate law frameworks including insolvency law to meet the needs of such financial growth.[52] Some of the areas that local insolvency law reforms have targeted in developing countries are: recouping of companies assets in India for the benefit of all stakeholders;[53] protection of vulnerable stakeholders in Sub-Sahara Africa; efforts to create an insolvency profession that reflects better the diversity of the population.[54] It was noted that there are various reasons given by multinational companies for choosing to open proceedings in the US or UK rather than locally. These

[51] Irit Mevorach, 'European Insolvency Law in a Global Context' (2011) 7 JBL 666.
[52] Elena Cirmizi, Leora Klapper and Mahesh Uttamchandani, 'The Challenges of Bankruptcy Reform' (2012) 27(2) The World Bank Research Observer 185; and Morris Goldstein, *The Asian Financial Crisis: Causes, Cures, and Systemic Implications* (Peterson Institute for International Economics 1998) 1; Steven Radelet, Jeffrey D. Sachs, Richard N. Cooper and Barry P. Bosworth, 'The East Asian Financial Crisis: Diagnosis, Remedies, Prospects' (1998) 1998(1) Brookings Papers on Economics Activity 1; and Randall D. Guynn and Davis Polk, 'The Financial Panic of 2008 and Financial Regulatory Reform' (2010) Harvard Law School Forum on Corporate Governance < https://corpgov.law.harvard.edu/2010/11/20/the-financial-panic-of-2008-and-financial-regulatory-reform/> accessed 4 May 2020.
[53] See for example Anonymous, 'Opinion: An Exam to Test the Watchdog on the Board' (2019) Mint < https://ntu.idm.oclc.org/login?url=https://www-proquest-com.ntu.idm.oclc.org/newspapers/opinion-exam-test-watchdog-on-board/docview/2238827512/se-2?accountid=14693 > accessed 22 May 2021; and Justin Bharucha, 'Insolvency Law, Policy and Procedure' (2019) The Insolvency Review < https://thelawreviews.co.uk/edition/the-insolvency-review-edition-7/1211488/india> accessed 26 May 2020.
[54] See for example Anneli Loubser, 'An International Perspective on the Regulation of Insolvency Practitioners' (2007) 19 S. Afr. Mercantile L.J. 123; J.C. Calitz and D. A. Burdette, 'The Appointment of Insolvency Practitioners in South Africa: Time for Change?' (2006) 4 TSAR 721.

included reluctance to commence insolvency proceedings in jurisdictions with new insolvency laws and inexperienced institutions of courts and practitioners; and scepticism that the reformed insolvency laws may be good on paper but complex in application.[55] The complexity may arise from reformed insolvency laws being legal transplants from other jurisdictions.[56] The transplanted insolvency laws may not be fully incorporated into the developing countries' laws in line with their broader policies or legal culture.[57] The lack of proper integration may create a complex application that might dissuade multinational companies from engaging with the new insolvency laws and opt to forum shop to other jurisdictions such as the US or the UK where insolvency procedure outcomes are more certain and foreseeable.

The chapter considered how developing countries might ensure that their insolvency laws are effective to increase the chances of use by multinational companies.[58] The World Bank, the IMF and UNCITRAL have identified key features of effective legal insolvency frameworks for adoption by developing countries and these were considered in Chapter 5.[59] It was noted that each country must devise the most suitable insolvency laws in line with broader legal and commercial systems.[60] Insolvency laws tend to link with more than

[55] Benny S Tabalujan, 'Indonesia: Issues in Insolvency Law — I International Briefings' (1998) 5 JIBFL 199.
[56] Charles W Mooney Jr., 'Lost in Transplantation: Modern Principles of Secured Transactions Law as Legal Transplants' (2020) Faculty Scholarship at Penn Law 2174.
[57] Wai Yee Wan and Gerald McCormack, 'Transplanting chapter 11 of the US Bankruptcy Code into Singapore's Restructuring and Insolvency Laws: Opportunities and Challenges' (2018) Journal of Corporate Law studies < https://ink.library.smu.edu.sg/sol_research/277> accessed 5 July 2020.
[58] The World Bank, 'Principles for Effective Insolvency and Creditor/Debtor Regimes' (2016) The World Bank < http://pubdocs.worldbank.org/en/919511468425523509/ICR-Principles-Insolvency-Creditor-Debtor-Regimes-2016.pdf> accessed 27 December 2019.
[59] The World Bank, 'Principles for Effective Insolvency and Creditor/Debtor Regimes' (2016) The World Bank < http://pubdocs.worldbank.org/en/919511468425523509/ICR-Principles-Insolvency-Creditor-Debtor-Regimes-2016.pdf> accessed 27 December 2019; United Nations Commission on International Trade Law , 'Legislative Guide on Insolvency Law' (2005) United Nations Commission on International Trade Law < https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf > accessed 4 January 2020.
[60] The World Bank, 'Principles for Effective Insolvency and Creditor/Debtor Regimes' (2016) The World Bank < http://pubdocs.worldbank.org/en/919511468425523509/ICR-Principles-Insolvency-Creditor-Debtor-Regimes-2016.pdf> accessed 27 December 2019.

one area of law in any jurisdiction,[61] such as employment law and contract law.[62] These other areas of law linked with insolvency laws often provide for the rights and responsibilities of the local stakeholders of insolvent companies.[63] Given the potential impairment of the rights of multinational companies' local creditors and other stakeholders, contract law issues are often implicated in insolvency situations. There needs to be a balance on how much of a link should be given between the other areas of law.[64] The local policies should determine the balance to ensure that the insolvency laws are applicable in the developing countries instead of being there for show.

UNCITRAL identifies another key feature of an effective legal insolvency framework as a provision protecting and maximising the insolvent companies' assets and value.[65] Multinational companies are likely to use developing countries' insolvency laws if they ensure that the best value for their assets can be achieved.[66] Ensuring the maximisation of assets and value ensures that the creditors are paid more in proportion to what is owed or that the part of business that survives the insolvency can be sold at the best price. Developing countries may model aspects of their insolvency provisions for the

[61] See for example The Policy Development and Review and Legal Departments, 'Involving the Private Sector in the Resolution of Financial Crises-Restructuring International Sovereign Bonds' (2001) The International Monetary Fund < https://www.imf.org/external/pubs/ft/series/03/IPS.pdf> accessed 27 December 2019; and Donald R. Korobkin,'Employee Interests in Bankruptcy' (1996) 4 Am. Bankr. Inst. L. Rev. 5.
[62] Donald R. Korobkin,'Employee Interests in Bankruptcy' (1996) 4 Am. Bankr. Inst. L. Rev. 5.
[63] Timothy M. Lupinacci and Bill D. Bensinger, 'Adequately Protect Your Interest in an Economic Crisis' (2008) 17(5) 51; Dr Kyriaki Noussia and Dr Katarina Durdenic, 'The Financial Crisis 10 Years on: Creditors' Protection in Insolvency Law' (2019) 34(9) JIBLR 325.
[64] United Nations Commission on International Trade Law, 'Legislative Guide on Insolvency Law' (2005) United Nations Commission on International Trade Law < https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf > accessed 4 January 2020; and Benhajj Shaaban Masoud, 'The Context for Cross-Border Insolvency Law Reform in Sub-Saharan Africa' (2014) 23(3) International Insolvency Review 181.
[65] United Nations Commission on International Trade Law, 'Legislative Guide on Insolvency Law' (2005) United Nations Commission on International Trade Law < https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf > accessed 4 January 2020; and The World Bank, 'Principles for Effective Insolvency and Creditor/Debtor Regimes' (2016) The World Bank < http://pubdocs.worldbank.org/en/919511468425523509/ICR-Principles-Insolvency-Creditor-Debtor-Regimes-2016.pdf> accessed 27 December 2019.
[66] See for example A. M. Callejón, A. M. Casado, M. A. Fernández and J. I. Peláez, 'A System of Insolvency Prediction for Industrial Companies using a Financial Alternative Model with Neural Networks' (2013) 6(1) international Journal of Computational Intelligence Systems 29.

maximisation of assets and value after the US and UK provisions, in particular the US reorganisation provision, and the UK provision of retrieving assets sold at an undervalue.[67] The US and the UK systems may be emulated because of the tried and tested nature of their insolvency provisions, however suitable adaptation for the local context is needed to avoid problems of legal transplants. Suitable law reforms may encourage multinational companies to use the insolvency law of developing countries if it shows that they will benefit by the maximisation of value and assets and potentially cheaper costs of proceedings.

Another significant feature of an effective insolvency framework identified by the IMF is who controls the multinational companies during an insolvency proceeding.[68] Insolvency procedures tend to either allow directors or company management to remain in control of the business, or they place an insolvency practitioner in charge with varying degrees of control over the day to day decision-making of the business.[69] The person(s) in charge can direct which insolvency proceeding the multinational companies should commence to some extent. In debtor-in-possession insolvency, the directors are in charge of the multinational companies during insolvency,[70] while an insolvency practitioner (IP) is placed in charge of the company in a practitioner-in-possession style of insolvency

[67] See for example Kermit Roosevelt III, 'Understanding Lockups: Effects in Bankruptcy and the Market for Corporate Control' (2000) 17 Yale J. on Reg. 93; Kyriaki Noussia and Katarina Durdenic, ' The Financial Crisis 10 Years on: Creditors' Protection in Insolvency Law' (2019) 34(9) JIBLR 325; Gerard McCormack, 'COMI and Comity in UK and US Insolvency Law' (2012) 128(Jan) LQR 14.

[68] International Monetary Fund, *Orderly and Effective Insolvency Procedures* (International Monetary Fund 1999) 9

[69] Thomas G. Kelch, 'The Phantom Fiduciary: The Debtor In Possession in Chapter 11' (1991-1992) 38 Wayne L. Rev. 1323; and Dr. Klaus Pannen, 'Debtor-in-Possession Proceedings in Germany' (2005) International Insolvency Institute < https://www.iiiglobal.org/sites/default/files/klauspannen.pdf> accessed 18 May 2020; Lijie Qi, 'Managerial Models During the Corporate Reorganisation Period and their Governance Effects: The UK and US Perspective' (2008) 29(5) Comp. Law. 131.

[70] Dr. Klaus Pannen, 'Debtor-in-Possession Proceedings in Germany' (2005) International Insolvency Institute < https://www.iiiglobal.org/sites/default/files/klauspannen.pdf> accessed 18 May 2020; Lijie Qi, 'Managerial Models During the Corporate Reorganisation Period and their Governance Effects: The UK and US Perspective' (2008) 29(5) Comp. Law. 131.

procedure.[71] There are advantages for having either the directors or the IPs in charge. In the case of directors, they are aware of the multinational companies' day-to-day activities, unlike the IPs who come in and have to navigate potentially unfamiliar territories. The advantage of IP control is that they are knowledgeable of insolvency laws and which processes are most suitable for particular situations.[72] It is advisable that a regulatory body be created and given powers to regulate conduct of insolvency practitioners where they are in charge during insolvency proceedings.[73] In relation to directors being in charge, the courts can oversee their conduct to ensure that they conduct themselves within their remit.[74] Clear guidelines for those in charge need to be included in the insolvency procedural framework to ensure their conduct is in the best interest of the multinational companies and their stakeholders as a whole.

According to the World Bank and UNCITRAL, the duration of insolvency resolution is an essential factor for an effective insolvency legal framework.[75] The duration of insolvency procedure may lead to forum shopping as multinational companies may opt for jurisdictions with the quickest resolution time. According to the World Bank, the average number of years to resolve insolvency in the least developed countries is 3.063 years compared to one year in the UK and the US.[76] This is one reason why multinational

[71] Wai Yee Wan and Gerald McCormack, 'Transplanting chapter 11 of the US Bankruptcy Code into Singapore's Restructuring and Insolvency Laws: Opportunities and Challenges' (2018) Journal of Corporate Law studies < https://ink.library.smu.edu.sg/sol_research/277> accessed 5 July 2020.
[72] David Milman, *Governance of Distressed Firms* (Edward Elgar 2013), 78.
[73] Anirudh Burman and Shubho Roy, 'Building an Institution of Insolvency Practitioners in India' (2019) 5 Bus & Bankr LJ 118.
[74] Maria Koumenta, Amy Humphris, Morris Kleiner and Mario Pagliero, 'Occupational Regulation in the EU and UK: Prevalence and Labour Market Impacts' (2014) The Department for Business, Innovation and Skills <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/343554/bis-14-999-occupational-regulation-in-the-EU-and-UK.pdf> accessed 18 July 2020.
[75] The World Bank, 'Principles for Effective Insolvency and Creditor/Debtor Regimes' (2016) The World Bank < http://pubdocs.worldbank.org/en/919511468425523509/ICR-Principles-Insolvency-Creditor-Debtor-Regimes-2016.pdf> accessed 27 December 2019; United Nations Commission on International Trade Law , 'Legislative Guide on Insolvency Law' (2005) United Nations Commission on International Trade Law < https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf > accessed 4 January 2020.
[76] The World Bank, 'Time to Resolve Insolvency (Years) – Least Developed Countries UN Classification' (2019) The World Bank <https://data.worldbank.org/indicator/IC.ISV.DURS?end=2019&locations=XL&start=2019&view=bar> accessed 4 June 2020.

companies may opt to commence insolvency proceedings in the US or the UK rather than in developing countries that will take a longer time. The insolvency resolution duration may correlate to the speed of decisions and costs of resolving the insolvency.[77] The costs of insolvency can include fees such as court fees, IPs fees, among others. Therefore, developing countries need to ensure that a clear guideline of the insolvency timeline is stated, and the amount of time should be reasonable to an international standard.

Finally, the World Bank and the IMF recognise that for insolvency law reforms to be effective, there must be an effective and independent judiciary.[78] The role of the judiciary is to ensure that the insolvency laws are implemented correctly.[79] Lack of insolvency courts and judges may encourage multinational companies to forum shop in the US or the UK due to a perceived lack of institutional expertise in the developing country which may have the most obvious jurisdictional claim.[80] Both the US and UK have specialist insolvency judges who are skilled in insolvency law and procedure.[81] Multinational companies may feel confident in a jurisdiction where the insolvency is dealt with by judges with specific competence in insolvency law in a time specific manner. However, it takes time to establish institutional mechanisms such as a specialist insolvency court.[82] Developing countries may not have the resources to create specialist courts, but multinational companies are more

[77] See for example Shashi Rajani, 'Cost-Effectiveness of Corporate Rescue and Insolvency Procedures in the UK' (1993) 1 Am Bankr Inst L Rev 441.
[78] The World Bank, 'Principles and Guidelines for Effective Insolvency and Creditor Rights Systems' (2001) The World Bank < https://edisciplinas.usp.br/pluginfile.php/35888/mod_resource/content/1/CHY%20Principles_and_Guidelines_for_Effective_Insolvency_and_Creditors_Rights_Systems.pdf> accessed 22 May 2021 [56]; and International Monetary Fund, 'Orderly & Effective Insolvency Procedures' (1999) International Monetary Fund <https://www.imf.org/external/pubs/ft/orderly/#institu> accessed 22 May 2021.
[79] International Monetary Fund, 'Orderly & Effective Insolvency Procedures' (1999) International Monetary Fund <https://www.imf.org/external/pubs/ft/orderly/#institu> accessed 22 May 2021.
[80] See for example Gijs van Dijck, Ruben Hollemans among others, 'Insolvency Judges Meet Strategic Behaviour: A Comparative Empirical Study' (2020) 27(2) Maastricht Journal of European and Comparative Law 158.
[81] See for example Gerard McCormack, 'Bankruptcy Forum Shopping: The UK and US as Venues of Choice for Foreign Companies' (2014) 63 ICLQ 815.
[82] Dr. Heike Gramckow and Barry Walsh, 'Developing Specialist Court Services: International Experiences and Lessons Learned' (2013) The International Bank for Reconstruction and Development/The World Bank < https://openknowledge.worldbank.org/bitstream/handle/10986/16677/819460WP0Devel00Box379851B00PUBLIC0.pdf?sequence=1&isAllowed=y> accessed 22 May 2021, 25.

inclined to use courts that can deal with complex insolvency issues that relate to them.[83] Developing countries can endeavour to provide training for judges to deal with these complex issues. Judges' training and the introduction of clear institutional expertise will give multinational companies more confidence in the judiciary of a developing country and may convince them to open main insolvency proceedings there rather than forum shopping to other jurisdictions.[84]Therefore, developing countries should provide for specialist judges and expedited court proceedings to give more confidence in the developing countries' judicial system to resolve insolvencies expeditiously.

In conclusion, forum shopping may affect the efforts of developing countries to reform their insolvency laws. The impact of forum shopping in developing countries is that local insolvency policies to resolve local issues will be circumvented when multinational companies' forum shop to other jurisdictions. On the other hand, multinational companies are likely to forum shop if they are not confident in the developing countries' insolvency laws and judicial system. To increase the chances of multinational companies using developing countries' reformed laws, the reformed laws should ensure that they are effective by following some of the key features identified by the World Bank, IMF and UNCITRAL, adapted as necessary to suit local circumstances.

7.2.4 The use of COMI in the Proposed Insolvency Procedural Legal Framework

The last two chapters sought to identify a progressive approach to cross border insolvency laws using the concept of COMI as the basis for opening of proceedings. The establishment of the centre of main interests is set out in Article 3(1) of the Recast Regulation and is essentially reliant upon being able to identify the place where the multinational company

[83] International Monetary Fund, 'Orderly & Effective Insolvency Procedures' (1999) International Monetary Fund <https://www.imf.org/external/pubs/ft/orderly/#institu> accessed 22 May 2021.
[84] International Monetary Fund, 'Orderly & Effective Insolvency Procedures' (1999) International Monetary Fund <https://www.imf.org/external/pubs/ft/orderly/#institu> accessed 22 May 2021.

(in this case) conducts the administration of its interests on a regular basis, which is presumed to be the place of registered office. Cases heard by the CJEU between the passing of the original insolvency regulation, which also relied upon the registered office to establish COMI, and the Recast Regulation, such as *Eurofood* and *Interedil*, helped to clarify certain ambiguities relating to how COMI could be identified where there were competing registered offices, for example. These cases led to the addition of wording in the Recast Regulation that allowed for the rebuttal of the presumption of registered office and the reliance instead on the ascertainability by third parties of place where a company administers its interests regularly. By using COMI, the courts will be able to clearly and consistently identify which jurisdiction to commence primary insolvency proceedings.

The thesis recommended that the test for jurisdiction to open main insolvency proceedings should be modelled after COMI under art 3(1) of the Recast Insolvency Regulation (Regulation (EU) 2015/848) (The Recast Regulation).[85] The Recast Regulation provides a means for the orderly coordination of cross-border proceedings.[86] Orderly coordination of insolvency proceedings should also be the aim of the insolvency procedural framework. COMI under art 3(1) of the Recast Regulation has been tried and tested by the European Union (EU) member state courts and the Court of Justice of the European Union (CJEU).[87] The application of the COMI concept in the EU has provided a benchmark applicable in the global insolvency framework recommended in this thesis, although it was noted that this suggested framework would be more difficult to achieve than the EU's approach, which enjoyed the benefit of economic and political institution to drive it forward.

In conclusion, an insolvency procedural framework is essential to assist national courts and multinational companies in identifying the jurisdiction for commencing insolvency

[85] Recast Insolvency Regulation (EU) 2015/848, article 3(1).
[86] Recast Insolvency Regulation (EU) 2015/848.
[87] Recast Insolvency Regulation (EU) 2015/848, article 3(1); *In re Eurofood IFSC* Ltd Case C-341/04; *Interedil Sri v Fallimento Interedil Sri and Intesa Gestione Crediti SpA* Case C-396/09 [43].

proceedings. The insolvency legal framework should be based on modified universalism to ensure a universal insolvency proceeding can be used, while also providing for exceptions in specific circumstances. For the insolvency legal framework to be effective in dealing with abusive forum shopping, it should be above national laws, thus not subject to national laws. The effect is creating an insolvency framework that assists in identifying the correct forum from a procedural perspective through the application of COMI without changing substantive domestic insolvency laws. The thesis considered this central aspect of the proposed framework, alongside the creation of a court, and further research would determine the other provisions, such as those relating to cooperation, that would be included in the framework.

7.2.5 The Creation of a Supranational Court to Deal with Interpretation of the Insolvency Procedural Legal Framework

Given that the proposed insolvency procedural framework should be applied supranationally, it was identified that it would be advisable to create an institution that could independently interpret issues arising in connection with the insolvency procedural framework. Since there are no universal insolvency laws, the interpretation and application of the insolvency legal framework will likely be different in different adopting states. Consequently, confusion may arise as to the correct forum for opening insolvency proceedings which the insolvency framework aims to simplify. A supranational court was therefore considered necessary to ensure that the insolvency legal framework is applied uniformly.

It was proposed that national courts would refer matters regarding the insolvency procedural framework to the supranational court for assistance through a preliminary

ruling, following the example of the CJEU.[88] A preliminary ruling would enable the supranational court to adjudicate on matters arising from the insolvency procedural framework.[89] The identification of the correct venue for the opening of proceedings would be based primarily on COMI with some scope, by way of exception, for positive forum shopping. After providing a preliminary ruling, the supranational court would leave the national courts to judge the correct venue for the multinational companies' insolvency in line with the preliminary ruling.[90]

The proposed supranational court will achieve the aim of uniformly interpreting the insolvency legal framework if countries recognise its authority.[91] By recognising the supranational court, there can be efficient ways of dealing with multinational companies' insolvencies.[92] The reason is that the court can decide on the choice of forum for the multinational insolvencies rather than having more than one country claiming jurisdiction through their national courts. Multinational companies may save costs of multiple adjudications.

Countries are likely adhere to the rulings of the proposed supranational court if they believe it will be efficient and that the proposed insolvency framework will benefit domestic

[88] Emmanuel Ugirashebuja, ' Preliminary References under EAC Law' in Emmanuel Ugirashebuja, John Eudes Ruhangisa, Tom Ottervanger and Armin Cuyvers (eds), *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (1st, Brill, Leiden Boston 2017), 267.
[89] The UK Parliament, 'The Role of the Court of Justice of the European Union (CJEU)' (Unknown) The UK Parliament < https://publications.parliament.uk/pa/ld201719/ldselect/ldeucom/130/13005.htm#:~:text=13.,of%20Member%20States'%20national%20courts.> accessed 20 April 2021, 13.
[90] Diana Mocanu, 'Short Insight into the Problem of the Preliminary Ruling System in the European Union' (2015) lawyr.It < https://www.lawyr.it/index.php/articles/international-focus/401-short-insight-into-the-problems-of-the-preliminary-ruling-system-in-the-european-union> accessed 5 April 2021.
[91] See for example Antoine Vauchez, 'Keeping the Dream Alive: The European Court of Justice and the Transnational Fabric of Integrationist Jurisprudence' (2012) 4(1) European Political Science Review 51, 52; Mark Elliot, 'Is the Harmonisation of Laws a Practical Solution to the Problems of Cross-Border Insolvency?' (2000) 16(6) I. L. & P. 224.
[92] Shuai Guo, 'Cross-Border Resolution of Financial Institutions: Perspectives from International Insolvency Law' (2018) III Prize in International Insolvency Studies < https://www.iiiglobal.org/sites/default/files/media/Submission%20for%20the%20III%20Prize%20in%20International%20Insolvency%20Studies%202018_Shuai%20Guo.pdf> accessed 6 April 2021 [27].

interests.[93] The insolvency legal framework should provide for qualified insolvency judges to be appointed to the supranational court.[94] For the supranational court to operate efficiently, it will rely on the relationship between itself and national courts together with IPs.[95] The insolvency legal framework should prudently cater to guidelines for the supranational court's conduct with national courts and IPs,[96] Which should include methods and means of jurisdictional cooperation.[97] Effective and accessible guidelines for conduct and cooperation in cross-border insolvency activities within the supranational court will provides further certainty and enhance the confidence that countries may have in the capability and usefulness of such a supranational court, which may incentivise the endorsement of such an institution.

7.3 CONTRIBUTION TO KNOWLEDGE

The thesis makes three contributions to knowledge. The first contribution to knowledge is a developing countries' perspective on forum shopping. The majority of the academics have assessed forum shopping from the perspective of the US, the UK and the EU.[98] Little is written on the impact of forum shopping on developing countries, specifically forum shopping by multinational companies.[99] The stakeholder protections that may be included

[93] Laurence R. Helfer and Anne-Marie Slaughter, 'Towards a Theory of Effective Supranational Adjudication' (1997) 107(2) The Yale Law Journal 273, 278.
[94] Lech Garlicki, 'Cooperation of Courts: The Role of Supranational Jurisdictions in Europe' (2008) 6(3/4) Oxford University Press and New York University School of Law 509, 512.
[95] Hermann Mosler, 'Supra-National Judicial Decisions and National Courts' (1981) 4(3) Hastings International and Comparative Law Review 425, 426.
[96] See for example Ernest A. Young, 'Toward a Framework Statute for Supranational Adjudication' (2008) 57 Young Galleys Final 56, 101; Laurence R. Helfer and Anne-Marie Slaughter, 'Towards a Theory of Effective Supranational Adjudication' (1997) 107(2) The Yale Law Journal 273, 300.
[97] Clifford J. Carrubba and Lacey Murrah, 'Legal Integration and use of the Preliminary Ruling Process in the European Union' (2005) 59(2) International Organization 399, 399.
[98] See for example Gerard McCormack, 'Bankruptcy Forum Shopping: The UK and US as Venues of Choice for Foreign Companies' (2014) 63 ICLQ 815, 816 – 817; Irit Mevorach, 'European Insolvency Law in a Global Context' (2011) 7 JBL 666; Wolf-Georg Ringe, 'Forum Shopping under the EU Insolvency Regulation' (2008) 9 European Business Organization Law Review 579; and Jay Lawrence Westbrook, 'Choice of Avoidance Law in Global Insolvencies' (1991) 17 Brook. J. Int'L L. 499; Jay Lawrence Westbrook, 'Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum' (1991) 65 Am. Bankr. L.J. 457.
[99] See for example Damilola Odetola, 'Corporate Insolvency Reforms in Emerging Africa: The Need, Challenges and Prospects' (2017) 28(10) I.C.C.L.R. 362.

in the insolvency laws of developing countries may be circumvented due to forum shopping.[100] The thesis examined the impact of forum shopping of multinational companies to the US and the UK on local stakeholders and the insolvency law reforms in developing countries. As discussed above, local multinational companies' stakeholders and insolvency law reforms can be impacted by forum shopping. Where this is done, protections of local stakeholders in the developing countries, for example protecting pension funds, can be bypassed.

The second contribution to knowledge by this thesis involves creating an insolvency procedural framework the aim of which is to identify the jurisdiction for opening main insolvency proceedings. This proposed framework is regarded as a natural progression of modified universality approaches, although it is acknowledged also that it is a significant advancement which is unlikely to be achieved in the near future. The framework builds on the EU approach but it is notable that that the EU Regulation could only be enacted after a protracted process even though the member states had a common interest in developing the single market that the Regulation would support. In contrast, the insolvency framework will not be limited to any geographical area and will initially lack any unifying will towards reform. It is however objectively desirable for cross border insolvency law to move beyond long-arm jurisdiction by the US and UK and to move to a system where countries will be able to sign up for the insolvency framework, which will offer common principles for identifying which jurisdiction is appropriate to open main insolvency proceedings.

The final contribution to knowledge involves the creation of a supranational court aimed at dealing with issues arising from the insolvency legal framework. There are presently no specialist international insolvency courts that deal with cross-border insolvency

[100] Antonia Menezes, Andres Martinez, Fernando Dancausa and Nina Mocheva, 'Insolvency and Debt Resolution' (2017) The World Bank Group

exclusively. The CJEU and the East African Court of Justice (EACJ) deal with cross-border insolvency as part of their areas of concern.[101] However, both courts are limited to adjudicating cross-border insolvency within their respective geographical regions. Thus, the area of adjudication for the CJEU and EACJ is only limited to insolvency matters involving either the EU or EAC.[102] The supranational court will adjudicate over issues involving allocation of insolvency jurisdiction occurring worldwide, specifically to countries that have signed on to it.

7.4 CONCLUSION

Cross-border insolvency law needs to move on from long-arm jurisdiction by the US and UK, even if this approach is presently a matter of pragmatic necessity. Developing countries can be affected negatively by forum shopping and long-arm jurisdiction involving other insolvency jurisdictions, such as the UK and the US. It is hoped that creating an insolvency procedural framework that identifies the appropriate insolvency jurisdiction fairly and consistently will provide an incentive chance for developing countries to modernise and reform their insolvency laws do to the potential demand for their use by multinational companies. However, the creation of an insolvency framework may take a long time.[103] In the meantime, developing countries should continue with their effort to

[101] The 1999 Treaty for the Establishment of the East African Community; Victor Lando, 'The Domestic Impact of the Decision of the East African Court of Justice' (2018) 18 African Human Rights Law Journal 463, 463; and The UK Parliament, 'The Role of the Court of Justice of the European Union (CJEU)' (Unknown) The UK Parliament < https://publications.parliament.uk/pa/ld201719/ldselect/ldeucom/130/13005.htm#:~:text=13.,of%20Member%20States'%20national%20courts.> accessed 20 April 2021, 13.
[102] The 1999 Treaty for the Establishment of the East African Community; Victor Lando, 'The Domestic Impact of the Decision of the East African Court of Justice' (2018) 18 African Human Rights Law Journal 463, 463; and The UK Parliament, 'The Role of the Court of Justice of the European Union (CJEU)' (Unknown) The UK Parliament < https://publications.parliament.uk/pa/ld201719/ldselect/ldeucom/130/13005.htm#:~:text=13.,of%20Member%20States'%20national%20courts.> accessed 20 April 2021, 13.
[103] R Gordon Marantz, 'Canadian Bankruptcy and Insolvency Law Reform Continues-The 1997/7 Amendments' (1998) 14(1) Tolley's Insolvency Law and Practice 22.

reform their insolvency laws and institutions.[104] Hopefully, the reforms will enable developing countries' laws to reach the same standard as US and UK insolvency laws and a need for forum shopping will be reduced. These reforms will then set the scene for an improved and progressive framework as set out in this thesis.

[104] The World Bank, 'Resolving Insolvency' (2019) The World Bank < https://www.doingbusiness.org/en/data/exploretopics/resolving-insolvency/reforms> accessed 22 April 2021; and Legal Department, 'Orderly and Effective Insolvency Procedures' (1999) International Monetary Fund < The World Bank, 'Resolving Insolvency' (2019) The World Bank < https://www.doingbusiness.org/en/data/exploretopics/resolving-insolvency/reforms> accessed 22 April 2021.> accessed 22 April 2021.

BIBLIOGRAPHY

TABLE OF STATUTES

UK Statutes

Companies Act 1948.

Companies Act 2006.

Corporate Insolvency and Governance Act 2020.

Corporate Restructuring and Insolvency Act 2020.

Data Protection Act 2018.

Employment Protection (Consolidation) Act 1978.

Employment Rights Act 1996.

Financial Services and Markets Act 2000.

Insolvency Act 1986.

Small Business Enterprise and Employment Act 2015.

European Statutes

Council Regulation (EC) 1346/2000.

Council Regulation (EC) 44/2001.

European Insolvency Regulation 2015/848.

General Data Protection Regulation (EU) 2016/679.

The Recast Insolvency Regulation (Regulation (EU) 2015/848).

Treaty on the Functioning of the European Union.

Other Statutes

1998, 1999, and 2000 Amendments to the Bankruptcy Act, Bankruptcy Court Act 1999.

1999 Treaty for the Establishment of the East African Community.

Amendment to Bankruptcy Act 2004.

Bankruptcy Act 1998.

Companies Act (Cap 486 Laws of Kenya).

Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.

German Insolvency Code.

Insolvency Act 2015 (Acts No. 18).

Insolvency Act 24 of 1936.

Insolvency and Bankruptcy Code 2016 No. 31.

Insolvency and Bankruptcy Code 2016.

Interest Act 2002 No. 54.

Law 550.

Pengurusan Danaharta National Berhad Act 1998.

Rome Statute of the International Criminal Court.

Securitisation and Reconstruction of Financial and Enforcement of Securities Interest Act 2002 No.54.

Title 11 United States Code Annotated.

United Convention for the Law of the Sea.

United States Constitution.

TABLE OF STATUTORY INSTRUMENTS

UK Statutory Instruments

Insolvency (England and Wales) Rules 2016 (SI 2016/1024).

Insolvency Practitioners Regulations 2005 (SI 2005 No. 524).

Insolvency Rules 2016.

Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009/1917.

Overseas Companies (Execution of Documents and Registration of Charge) (Amendment) Regulations 2011.

Soft Law Instruments

ALI-III Global Principles for Cooperation in International Insolvency Cases 2012.

EU Cross-Border Insolvency Court-to-Court Cooperation Principles and EU Cross-Border Insolvency Court-to-Court Communication Guidelines.

European Communication and Cooperative Guidelines for Cross-Border Insolvency.

JudgeCo Principles and Guidelines.

UNCITRAL Model Law on Cross-Border Insolvency.

TABLE OF CASES

UK Cases

A Company, Re (No 003102 of 1991), ex p Nyckeln Finance Co Ltd.

APCOA (In the Matter of APCOA Parking (UK) Ltd & Ors [2014] EWHC 997 (Ch), [2014] 4 All ER 150.

ARM Assets Backed Securities SA, Re [2013] EWHC 3351, [2013] All ER (D) 107.

Azoff-Don Commercial Bank, Re [1954] Ch. 315.

Banco Nacional de Cuba v Cosmos Trading Corp [2000] B.C.C. 910.

Bank of Credit and Commerce International SA, Re (No. 2) [1992] B.C.L.C. 570.

Banque des Marchands de Moscou (Koupetschesky)(in liq) v Kindersley [1950] 2 All ER 549.

Bloom v Harms Offshore AHT [2009] EWCA Civ 632, [2010] Ch 187.

BRAC Rent-A-Car International Inc, Re [2003] EWCA (Ch) 128, [2003] 2 All ER 201.

Cia Merabello San Nicholas, Re [1972] 3 All ER 448.

Compania Merabello San Nicholas S.A., In re [1973] Ch. 75.

Daisytek-ISA Ltd & Ors, Re [2003] 5 WLUK 491, [2003] B.C.C. 562.

Drax Holdings Ltd, Re [2003] EWHC 2743 (Ch).

Eloc Electro-Optieck and Communicatie BV, Re [1981] 2 All ER 1111.

European Directories, Re [2010] EWHC 3472 (Ch), [2011] BPIR 408.

Hellenic & General Trust, Re [1976] 1 W.L.R. 123.

International Westminister Bank Plc v Okeanos Maritime Corp [1987] 3 All ER 137.

Kailis Groote Eylandt Fisheries Pty Ltd, Re (1977) 2 ACLR 574.

Kaupthing Capital Partners II Masters LP Inc, Re [2010] EWHC 836, [2011] BCC 338.

Mazur Media Ltd v Mazur Media GmbH [2004] EWHC 1566, [2004] 1 WLR 2966.

Mid East Trading Ltd, Re [1998] 1 All ER 577.

Primacom Holding GmbH v A Group of the Senior Lenders & Credit Agricole [2012] EWHC 164 (Ch).

Real Estate Development Co, Re [1991] BCLC 210.

Real Estate Development Co, Re [1991] BCLC 210.

Rodenstock GmbH, In re [2011] EWCA 1104 (Ch), [2011] Bus LR 1245.

Salomon v A Salomon and Co Ltd [1897] AC 22.

Siskina (Cargo Owners) v Distos Cia Naviera SA, The Siskina [1977] 3 All ER 80.

Stanford International Bank Ltd, Re [2009] BPIR 1157.

Stocznia Gdanska SA v Latreefers Inc [1999] 1 BCLC 271, [2002] All ER (D) 148.

T&N Ltd (No 3), Re [2006] EWHC 1447, [2007] 1 B.C.L.C 563.

European Cases

Davide Gullotta, Farmacia di Gullotta Davide & C. Sas v Ministero della Salute, Azienda Sanitaria Provinciale di Catania Case C-497/12.

Eurofood IFSC Ltd, In re Case C-341/04.

Interedil Sri v Fallimento Interedil Sri and Intesa Gestione Crediti SpA Case C-396/09.

Van Gend en Loos v Nederlandse Administratie der Belastingen (1963) Case 26/62.

US Cases

Aerovias Nacionales de Colombia SA Avianca, In re (2003) 303 BR 1.tners, L.P., In re (2002) 283 B.R. 661.

Aerovias Nacionales de Colombia SA Avianca, Re (2004) 303 BR 1

AIU Ins. Co. v TIG Ins. Co. (2013) 934 F.Supp.2d 594.

American Employers' Ins. Co. v. Elf Atochem North America, Inc., (1999) 725 A.2d 1093.

Berau Capital Resources Pte Ltd, In re (2015) 580 B.R. 80.

Brooke Corporation, Bkrtcy.D.Kan., In re (2014) 506 B.R. 560.

Camera, In re (1933) 6 F Supp 267.

Carmichael Enterprises, Inc., In re (1971) 334 F. Supp. 94.

Carmichael Enterprises, Inc., In re (1972) 460 F2d 1405.

Dissolution of Chris Cole Enterprises, In re (2001) 188 Misc.2d 207.

DiTondo v Meagher (2009) 24 Misc.3d 720.

Donald Verona & Bernard Green, In re (1994) 126 B.R. 113.

E.E.O.C. v Arabian Am. Oil Co. (Aramco), (1991) 499 U.S. 244, 248.

Eastman v Eastman (In re Eastman) 188 B.R. 621 (9th Cir. BAP 1995).

Enark Industries, Inc. v Bush (1976) 86 Misc 2d 985.

Erie R. R. v Tompkins 304 U.S. 64, 78-79 (1938).

Filártiga v Peña-Irala 630 F. 2d 876 (2d Cir. 1980)

Ford Motor Credit Co. v Weaver (1982) 680 F2d 451.

French v Liebman (In re French), (2006) 440 F.3d 145.

French v. Liebmann (In re French), 440 F.3d 145 (4th Cir. 2006), petition for cert. filed,

75 U.S.L.W. 3020 (U.S. 15 May 2006) (No. 05-1459).

Georgia Aquarium, Inc. v Pritzker, (2015) 135 F.Supp.3d 1280.

Global Ocean Carriers Ltd., In re 251 B.R. 31 (Bankr. D. Del. 2000).

Globo Comunicacoes, In re 2004 WL 2624866.

Gulf Oil Corp v Gilbert 330 U.S. 501 (1947).

Head, In re (1998) 223 B.R. 648.

Hert Corp. v Friend (2010) 559 U.S. 77.

Hong Kong & Shanghai Banking Corp. v Simon (In re Simon), (1998) 153 F.3d 991.

Hordis Bros., Inc. v Sentinel Holdings, Inc., (1990) 562 So.2d 715.

In re Central European Distribution Corporation, et al., Case No. 13-10738 (CSS).

Int'l Milling Co. v Columbia Transp. Co., (1934) 292 U.S. 511.

Interbulk Ltd, In re (1999) 240 B.R. 195.

Johnson v SmithKline Beecham Corp., (2012) 853 F.Supp.2D 487.

Keeton v Hustler Magazine (1984) 465 US 770

Kiobel v Royal Dutch Petroleum Co., (2013) 569 U.S. 108.

Lamie v United States tr., (2004) 124 S.Ct. 1023.

McCrary's Farm Supply, Inc., In re (1983) 705 F2d 330.

McQuaide, In re (1968) 5 U.C.C.Rep 802.

MiIntosh v Maricopa County, (1952) 73 Ariz. 366.

Mimshell Fabrics Company, Ltd, In re (1974) 491 F.2d 21.

Mississippi Band of Choctaw Indians v. Holyfield, (1989) 490 U.S. 30.

Missouri Pacific R. Co. v. Lawrence, 215 Ark. (1949) 718, 223 S.W.2d 823.

Morrison v National Australia Bank Ltd., (2010) 561 U.S. 247.

Octaviar Admin. Pty Ltd., In re (2014) 511 B.R. 361.

Paper I Par4 WHIP, LLC, In re 332 B.R. 670.

Petition of Brierley, In re (1992) 145 B.R. 151.

Pettit, In re (1995) 183 B.R. 6.

Pocono Airlines, Inc., In re (1988) 87 B.R. 325.

Rajapakse, In re 346 B.R. 233 (2005).

Reimers v Honeywell, Inc., (1990) 457 N.W.2d 336.

RJR Nabisco, Inc. v European Community, (2016) 136 S.Ct.2090.

Sherlock Homes of W.N.Y., In re (2000) 246 B.R. 19.

Simon, In re (1998) 153 F.3d 991.

Smith v. United States, 507 U.S. 197 (1993).

Snyder v. McLeod, (2007) 971 So. 2d 166.

State ex rel. Cartwright v. Hillcrest Investments, Ltd.,(1981) 630 P.2d1253.

Steele v. Bulova Watch Co., 344 U.S. 280 (1952).

Sugar Valley Gin Co.,N.D.Ga., In re (1923) 292 F. 508.

Suntech Power Holdings Co., Ltd., In re (2014) 520 B.R. 399.

Sylvan Beach v. Koch, C.C.A.8 (Mo.) (1944) 140 F.2d 852

Tomko, In re (1988) 87 B.R.372.

U.S. v Belfast, 611 f.3d 783 (2010).

Underwood v. Hilliard (In re Rimsat, Ltd.), 98 F.3d 956, (7th Cir. 1996).

United States v Ron Pair Enters., Inc., (1989) 489 U.S. 235.

Walter M. Marsico, In re (2002) 278 B.R. 1.

Wolinsky v Bradford Nat. Bank, (1983) 34 B.R. 702.

Woodfield Furniture Clearance Ctr. of Suffolk, Inc., In re (1989) 102 B.R. 327.

Yukos Oil Co, In re (2005) 321 B.R. 396.

Zais Inv. Grade Ltd. VII, In re (2011) 455 B.R. 839.

Other Cases

Lamtex Holdings Limited, Re [2021] HKCFI 622.

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America).

Opti-Medix Ltd (in liquidation), Re [2016] SGHC 108.

BIBLIOGRAPHY

Books

Arnold M, The Insolvency Regulation. in Richard Sheldon qc (ed), Cross Border insolvency (Bloomsbury Professional 2011).

Barak A, The Characteristics of Judicial Discretion. in (ed), Judicial Discretion (Yale University Press 1989).

Bell A, Forum Shopping and Venue in Transnational Litigation (Oxford 2003).

Bingham T, The Business of Judging: Selected Essays and Speeches (Oxford 2000).

Bufford S L, United States International Insolvency Law 2008-2009 (Oxford University Press 2009).

Carruthers B G and Halliday T C, 'Institutionalizing Creative Destruction: Predictable and Transparent Bankruptcy Law in the Wake of the East Asian Financial Crisis' in Woo M J-E

(eds) Neoliberalism and Institutional Reform in East Asia (American Bar Foundation 2003).

Claessens S, Djankov S and Mody A (eds), Resolution of Financial Distress An International Perspective on the Design of Bankruptcy Laws (The World Bank 2001).

Cork K, Insolvency Law and Practice: Report of the Review Committee (Her Majesty's Stationary Office 1982).

Cuyvers A, Preliminary References under EU Law. in, East African Community Law: Institutional, Substantive and Comparative EU Aspects (Brill 2017).

Dicey A V and Morris J H C, The Conflict of Laws Collins L (ed) (11th ed, Sweet and Maxwell 1987).

Dollar D, Devarajan S and Holmgren T, Aid and Reform in Africa (World Bank Publications 2001).

Feldstein M, Hines J R and Hubbard R G, Taxing Multinational Corporations (1st ed, The University of Chicago Press 1995).

Fletcher I F, The Law of Insolvency (4th ed, Sweet & Maxwell 2009).

Goldring J, 'Common Law Protection for An English Insolvency Proceedings' in Richard Sheldon QC (ed), Cross Border Insolvency (3rd ed, Bloomsbury Professional 2011).

Goldstein M, The Asian Financial Crisis: Causes, Cures, and Systemic Implications (Peterson Institute for International Economics 1998).

Goode R, Principles of Corporate Insolvency Law (4th ed, Sweet & Maxwell 2011).

Grierson C, 'Issues in Concurrent Insolvency Jurisdiction' in Ziegel J and Cantile (eds), Current Developments in International and Comparative Corporate Insolvency Law, (Clarendon Press 1994).

International Monetary Fund, Orderly and Effective Insolvency Procedures (International Monetary Fund 1999).

Keay A and Walton P, Insolvency Law Corporate and Personal (3rd ed, Jordan Publishing 2012).

Lopucki L M, Courting Failure: How Competition for Big Cases is Corrupting the Bankruptcy Courts (University of Michigan Press 2006).

Manning P and Henry R, 'United Kingdom Bankruptcy and Insolvency Law and Policy' in Silkenat J R and Schimerler C D (eds), The Law of Insolvencies and Debt Restructurings (Oceana Publications 2006).

Mevorach I, The Future of Cross-Border Insolvency Overcoming Biases and Closing Gaps (1st ed, Oxford University Press 2018).

Millet The Rt Hon the Lord, Alcock A, Todd M and Boyle A J(eds), Gore-Browne on Companies (45th ed, LexisNexis 2019).

Milman D, Governance of Distressed Firms (Edward Elgar 2013).

Mokal R J, Corporate Insolvency Law: Theory and Application (Oxford University Press 2005).

Noble G W and Ravenhill J, "Causes and Consequences of the Asian Financial Crisis" in Noble G W and Ravenhill J (eds), The Asian Financial Crisis and the Architecture of Global Finance (Cambridge University Press 2000).

OECD, Asian Insolvency Systems: Closing The Implementation Gap (OECD 2007).

Peter H and others, The Challenges of Insolvency Law Reforms in the 21st Century (Schulthess 2006).

Paterson S, Corporate Reorganization Law and Forces of Change (OUP 2020).

Pollard D, Corporate Insolvency: Employment Rights (6th ed, Bloomsbury Professional Ltd 2016).

Rajak H, Insolvency Law Theory & Practice (1st ed, Sweet & Maxwell 1999).

Ruhangisa J E, ' The Scope, Nature and Effect of EAC Law' in Ugirashebuja E, Ruhangisa J E, Ottervanger T and Cuyvers A (eds), East African Community Law: Institutional, Substantive and Comparative EU Aspects (1st, Brill 2017).

Sachs J (eds), The Transition in Eastern Europe (vol 2, Chicago University Press 2004).

Shetreet S, Judicial Independence: New Conception Dimensions and Contemporary Challenges. in Shetreet S and Deschenes J (eds), Judicial independence: The Contemporary Debate (Martinus Nijhoff Publishers 1985).

Smith T, 'Jurisdiction for Companies: Winding Up, Administration, CVAs and Schemes of Arrangement' in Sheldon R QC (ed), Cross Border Insolvency (3rd ed, Bloomsbury Professional 2011).

Stiglitz J E, 'Bankruptcy Laws: Basic Economic Principles' in Claesens S, Djankov S and Mody A (eds), Resolution of Financial Distress: An International Perspective on the Design of Bankruptcy Laws (World Bank Publications 2001).

Ugirashebuja E, ' Preliminary References under EAC Law' in Ugirashebuja E, Eudes J Ruhangisa, Ottervanger T and Cuyvers A (eds), East African Community Law: Institutional, Substantive and Comparative EU Aspects (1st, Brill 2017).

van Zwieten K, Goode on Principles of Corporate Insolvency Law (5th ed, Sweet & Maxwell 2019).

Virgós M and Garcimartín F, The European Insolvency Regulation: Law and Practice (Kluwer Law International 2004).

Watson A, Legal Transplants: An Approach to Comparative Law (2nd ed, University of Georgia Press 1993).

Wessels B and Virgos M, European Communication and Cooperation Guidelines for Cross-border Insolvency (INSOL Europe 2007).

Wessels B, Markell B A and Kilborn J J, International Cooperation in Bankruptcy and Insolvency Matters: A Joint Research Project of American College of Bankruptcy and International Insolvency Institute (Oxford University Press 2009).

Woo E, Neoliberalism and Institutional Reform in East Asia a Comparative Study (Palgrave Macmillan 2007).

Journals

Adams E S and Finche J K, 'Coordinating Cross-Border Bankruptcy: How Territorialism Saves Universalism' (2008) 15 Colum J Eur L 43.

Adriaanse J, 'The Uneasy Case for Bankruptcy Legislation and Business Rescue' (2016) 2 NIBLeJ 8.

Afaganis J L, 'Canada: Insolvency-Stay of Proceedings' (2002) 17(5) JIBL N34.

Afsharipour A, 'Corporate Governance Convergence: Lessons from the Indian Experience' (2009) 29 Nw J Int'l L & Bus 335.

Aghion P and Hart O and Moore J, 'Improving Bankruptcy Procedure' (1994) 72 Wash U L Q 849.

Akhtar Z, 'Jurisdictional Issues in EU Competition Law and Remedies in Anti-Trust Litigation' (2017) 10(4) Global Competition Litigation Review 200.

Algero M G, 'In Defence of Forum Shopping: A Realistic Look at Selecting a Venue' (1999) 78(1) Nebraska Review 79.

Allee V, 'Value Network Analysis and Value Conversion of Intangible Assets' (2008) 9(1) Journal of Intellectual Capital 5.

Alter K J, Gathii J T and Helfer L R, 'Backlash against International Courts in west, East and Southern Africa: Causes and Consequences' (2016) 27(2) The European Journal of International Law 293.

Altman E I, 'The Success of Business Failure Prediction Models: An International Survey' (1984) 8(2) Journal of Banking and Finance 171.

Arden DBE Lady Justice, 'Peaceful or Problematic? The Relationship between National Supreme Courts and Supranational Courts in Europe' (2010) 29(1) Yearbook of European Law 3.

Asian Development Bank, 'Insolvency Law Reforms in the Asian and Pacific Region: Report of the Office of the General-Counsel on TA 5795-REG: Insolvency Law Reforms' (2000) 1 Law and Policy Reform at the Asian Development Bank 11.

Asian Development Bank, 'Insolvency Law Reforms in the Asian and Pacific Region: Report of the Office of the General-Counsel on TA 5795-REG: Insolvency Law Reforms' (2000) 1 Law and Policy Reform at the Asian Development Bank 11.

Barr P G, 'Asian Turmoil Spawns Many Theories' (1997) 25(2) Pensions & Investments 32.

Barteld L, Cross-Border Bankruptcy and the Cooperative Solution' (2012-2013) 9(1) International Law and Management Review 27.

Baujet B, 'New Concept in The Recast European Insolvency Regulation: The Coordinating Insolvency Office Holder' (2016) Eurofenix 16.

Bêlohlávek A J, 'Centre of Main Interest (COMI) Principle in the New EU Regulation on Insolvency Proceedings' (2016) International Conference on European Integration 80.

Berends A J, 'The UNICTRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview' (1998) 6 Tul. J. Int'l & Comp. L. 309.

Berkowitz J and White M J, 'Bankruptcy and Small Firms' Access to Credit' (2004) 35 The Rand Journal of Economics 69.

Biermeyer T, 'Case C-396/09 Interedil Sri, Judgement of the Court of 20 October 2011, Not yet Reported Court Guidance as to the COMI Concept in Cross-Border Insolvency Proceedings' (2011) 18 Maastricht J Eur & Comp L 581.

Boldon R M, 'Long-Arm Statutes and Internet Jurisdiction' (2011) 67(1) The Business Lawyer 313.

Bookman P K, 'The Unsung Virtues of Global Forum Shopping' (2017) 92(2) Notre Dame Law Review 579.

Bork R, 'Principles of International Insolvency Law' (2018) 31(3) Insolv. Int. 83.

Bork R, 'The European Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency' (2017) 26 International Insolvency Review 256.

Bourbouloux H and Loste A, 'Towards the Improvement of The Treatment of the Insolvency of Groups of Companies' (2015) Collective Proceedings Review File 8.

Boyes S, 'Sports in Court: Assessing Judicial Scrutiny of Sports Governing Bodies.' (2017) Public Law 363.

Brekoulakis S, 'Systemic Bias and Institution of International Arbitration: A New Approach to Arbitral Decision-Making' (2013) Journal of International Dispute Settlement 553.

Broderick E E, 'Replacing the Presumption Against Extraterritoriality for Bankruptcy Avoidance Actions ' [2017] 2017(2017) Norton Annual Survey of Bankruptcy Law 27.

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

Burman A and Roy S, 'Building an Institution of Insolvency Practitioners in India' (2019) 5 Bus & Bankr LJ 118.

Buxbaum H L, 'Territory, Territoriality, and the Resolution of Jurisdictional Conflict' (2009) 57 The American Journal of Comparative Law 631.

Buxbaum H, 'Rethinking International Insolvency: The Neglected Choice-of-Law Rules and Theory' (2000) 36 Stanford J. Int'L L. 23.

Byrne J, 'The Model Law in Practice' (2011) 24(1) Insolv. Int. 14.

Calitz J C and Burdette D A, 'The Appointment of Insolvency Practitioners in South Africa: Time for Change?' (2006) 4 TSAR 721.

Callejón A M, Casado A M, Fernández A M and Peláez J I, 'A System of Insolvency Prediction for Industrial Companies using a Financial Alternative Model with Neural Networks' (2013) 6(1) international Journal of Computational Intelligence Systems 29.

Carrubba C J and Murrah L, 'Legal Integration and use of the Preliminary Ruling Process in the European Union' (2005) 59(2) International Organization 399.

Chen L and Zhou Z, 'The Analysis of Asset Correlation between Parent and Subsidiary Company' (2009) International Conference on New Trends in Information and Service Science 1021.

Cirmizi E, Klapper L and Uttamchandani M, 'The Challenges of Bankruptcy Reform' (2012) 27(2) The World Bank Research Observer 185.

Claessens S and Klapper L F, 'Bankruptcy around the World: Explanations of its Relative Use' (2005) 7(1) American Law and Economics Review 253.

Coburn A, 'The Growth of Bankruptcy Tourism in the United Kingdom' (2012) 25(1) Insolv. Int. 8.

Colangelo A J, 'The Foreign Commerce Clause' (2010) 96 Va. L. Rev. 949.

Colangelo A J, 'What is Extraterritorial Jurisdiction' (2014) 99(6) Cornell Law Review 1303.

Conway L, 'Regulation of Insolvency Practitioners (IPs)' (2019) House of Commons Library 5531.

Coordes L N, 'The Geography of Bankruptcy' (2015) 68 Vand L Rev 381.

Couwenberg O and Lubben S J, 'Corporate Bankruptcy Tourists' (2015) 70 Bus. Law. 719.

Curl J, 'Remote, Doubtful, Dubious, Probable, Likely: What are the Conclusions from BTI v Sequana' (2019) 16(6) Int. C.R. 333.

Dalhuisen J H, 'Legal Orders and Their Manifestation: The Operation of the International Commercial and Financial Legal Ordr and its Lex Mercatoria' (2006) 24(1) Berkeley Int'L Law. 129.

Das A, Agarwal A K, Jacob J, et al., 'Insolvency and Bankruptcy Reforms: The Way Forward' (2020) 45(2) Vikalpa 115.

Dawson K, 'The Doctrine of Forum Non Conveniens and the Winding Up of Insolvent Foreign Companies' [2005] J.B.L 28.

Dengler J, 'Coordination or Centralisation? Group Insolvencies and COMI-Shifting under the Recast EIR' (2017) 14(6) Int. C.R. 441.

Dodge W S, 'Understanding the Presumption Against Extraterritoriality' (1998) 16 Berkeley J. int'l L. 85.

Doshi H and Jain Y, 'The Insolvency and Bankruptcy Framework and Principle of Business Efficacy Across Different Jurisdictions in the COVID Era' (2021) 42(1) Business Law Review 45.

Dotevall R, 'EU Insolvency Regulation and Multiregulational Combines' (2015) Scandinavian Studies in Law 64.

Douglas-Hamilton M H, 'Creditor Liabilities Resulting from Improper Interference with the Management of a Financially Troubled Debtor' (1975) 31(1) The Business Lawyer 365.

Douglas-Hamilton M H, 'Creditor Liabilities Resulting from Improper Interference with the Management of a Financially Troubled Debtor' (1975) 31(1) The Business Lawyer 365.

Drake I, 'Use of US Chapter 11 Filings by Non-US Corporations: Realistic Option or Non-Starter' (2011) 8(3) International Corporate Rescue 206.

Ebke W F, 'The "Real Seat" Doctrine in the Conflict of Corporate Laws' (2002) 36(3) The International Lawyer 1015.

Edwards R, Ahmad A and Moss S, 'Subsidiary Autonomy: The Case of Multinational Subsidiaries in Malaysia' (2002) 33(1) Journal of International Busines studies 183.

Ehrenzweig A 'A Proper Law in a Proper Forum: A "Restatement" of the "Lex Fori Approach"' (1965) 18 Okla. L. Rev. 340.

Elliot M, 'Is the Harmonisation of Laws a Practical Solution to the Problems of Cross-Border Insolvency?' (2000) 16(6) I. L. & P. 224.

European Law Institute, 'Rescue of Business in Insolvency Law' (2017) European Law Institute 1.

Evan D. Flaschen and Timothy B. DeSieno, 'The Development of Insolvency Law as Part of the Transition from a Centrally Planned to Market Economy' (1992) 26 Int'l L. 667.

Fagbayibo B, 'Towards the Harmonisation of Laws in Africa: Is OHADA the Way to Go?' (2009) 42(3) The Comparative and International Law Journal of Southern Africa 309.

Ferrari F, 'Forum shopping: A Plea for a Broad and Value-Neutral Definition' (2014) 1 NYU Lectures on Transnational Litigation, Arbitration and Commercial Law.

Finch V, 'The Measure of Insolvency Law' (1997) 17 OJLS 227.

Fitzsimmons A, 'Forum Shopping: A Practitioner's Perspective' (2006) 31 The Geneva Papers 314.

Fletcher I, 'The 'Home Country' of a Multinational Enterprise Group Facing Insolvency' (2008) 57 ICLQ 427.

Fletcher I, 'UK Corporate Rescue: Recent Developments — Changes to Administrative Receivership, Administration, and Company Voluntary Arrangements — The Insolvency Act 2000, The White Paper 2001, and the Enterprise Act 2002' (2004) 5(1) European Business Organization Law Review 119.

Foster Jr G W, 'Long-Arm Jurisdiction in Federal Courts' (1969) Wis. L. Rev. 9.

Foy III H M, 'On Judicial Discretion in Statutory Interpretation' (2010) 62(2) Administrative Law Review 291.

Franken S M, 'Cross-Border Insolvency Law: A Comparative Institutional Analysis' (2014) 34(1) Oxford Journal of Legal Studies 97.

Garlicki L, 'Cooperation of Courts: The Role of Supranational Jurisdictions in Europe' (2008) 6(3-4) International Journal of Constitutional Law 509.

Garzon P E, Vassallo A M and Carruth J, 'Cross-Border Insolvency and Structure Reform in a Global Economy' (2000) Int'L 533.

Gawas V M, 'Doctrinal Legal Research method a Guiding Principle in Reforming the Law and Legal Systems Towards the Research Development.' (2017) 3(5) International Journal of Law 128.

Gennaioli N and Rossi S, 'Judicial Discretion in Corporate Bankruptcy' (2010) 23(11) The Review of Financial Studies 4078.

George B C, 'The Dilemma of the European Union: Balancing the Power of the Supranational EU Entity against the Sovereignty of its Independent Member Nations' (1997) 9(3) Pace International Law Review 111.

Ghio E, 'Cross-Border Insolvency and Rescue Law Theory: Moving Away from the Traditional Debate on Universalism and Territorialism' (2018) I.C.C.L.R. 713.

Goodman H L, 'Use of the United States Bankruptcy Laws in Multinational Insolvencies: The Axona Litigation—Issues, Tactics, and Implications for the Future' (1992) 9 Bank.Dev.J. 19.

Granger C, 'The Conflict of Laws and Forum Shopping: Some Recent Decisions on Jurisdiction and Free Enterprise in Litigation' (1974) 6 Ottawa Law Review 416.

Grigorian D A and Raei F, 'Government Involvement in Corporate Debt Restructuring: Case Studies from the Great Recession' (2010) IMF Working Paper WP/10/260.

Guzman A T, 'International Bankruptcy: In Defense of Universalism' (2000) 98 Mich. L. Rev. 2177.

Haller A-P, 'Globalisation, Multinational Companies and Emerging Markets' (2016) 5(1)(8) Ecoforum 9.

Hanna J, 'The Role of Precedent in Judicial Decision' (1957) 2(3) Vill. L. Rev. 367.

Hay P, 'The Interrelation of Jurisdiction and Choice of Law in United States Conflict of Law' (1979) 28(2) The International and Comparative Law Quarterly 161.

Healy E K, 'All's Fair in Love and Bankruptcy - Analysis of the Property Requirement for Section 109 Eligibility and Its Effect on Foreign Debtors Filing in U.S. Bankruptcy Courts' (2004) 12 Am Bankr Inst L Rev 535.

Helfer L R and Slaughter A-M, 'Towards a Theory of Effective Supranational Adjudication' (1997) 107(2) The Yale Law Journal 273.

Henkins L, 'That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera' (1999) 1 68 Fordham L. Rev. 1.

Henry R, 'The EC Insolvency Proceedings Regulation Becomes "Centre of Main Interest"' (2003) 13 Co. L.N. 1.

Higgins R, 'The United Nations: Still a Force for Peace' (1989) 52 Modern Law Review 1.

Ho L C, 'Conflict of Laws in Insolvency Transaction Avoidance' (2008) 20 Singapore Academy Law Journal 343.

Ho S-J and Banerjee S K, 'Indian Bankruptcy Code-How Does it Compare' (2018-2019) 8 emerging Markets Restructuring Journal 1.

Hoellering M F, 'The UNICTRAL Model Law on International Commercial Arbitration' (1986) 20(1) The International Lawyer 327.

Hoffman L, 'Cross-Border Insolvency: A British Perspective' (1996) 64(6) Fordham Law Review 2507.

Humanicki M, Kelm R and Krzysztof Olszewski K, 'Foreign Direct Investment and Foreign Portfolio Investment in the Contemporary Globalization World: Should They be Still Treated Separately?' (2014) MPRA Paper No. 58410.

International Monetary Fund, 'Kenya, Uganda and United Republic of Tanzania: Selected Issues' (2008) IMF Country Report No. 08/353.

Isaacs N, 'The Limits of Judicial Discretion' (1923) 32(4) Yale Law Journal 339.

Jay Lawrence Westbrook J W, 'Choice of Avoidance Law in Global Insolvencies' (1991) 17 Brook. J. Int'L L. 499.

Juwana H, 'Law and Development under Globalisation: The Introduction and Implementation of Competition Law in Indonesia' (2004) Forum of International Development Studies 27.

Kaczor A, 'Moving a Company's COMI to achieve a Restructuring: Factors for Consideration' (2010) 83 Amicus Curiae 1.

Kastrinou A, 'Cross Border Insolvency and the EC Regulation on Insolvency Proceedings' (2012) 23(1) I.C.C.L.R. 1.

Kaufmann-Kohler G, 'Soft Law in International Arbitration: Codification and Normativity' (2010) Journal of International Dispute Settlement 1.

Keay A, 'Insolvency Law: A Matter of Public Interest?' [2000] 51 N. Ir. Legal Q. 509.

Kelly L C, 'In re French: Extraterritorial Application of the US Bankruptcy Code's Fraudulent Conveyance Provisions' (2006) 3(5) Kluwer Law International 294.

Kendirli S, Muhammet Cankaya M and Cagatay Altug C, 'The Effects of Global Economic Crisis of the 2008 to Finacial Statements and Liquidity Ratios which Companies are Settled in BIST Energy Sector (2005-2013 Term Review) 6(1) Journal of Economic Development, Environment and People 6.

Kenneth Einar Himmar K E, 'Judicial Discretion and the Concept of Law' (1999) 19 Oxford Journal of Legal Studies 71.

Kim E, 'Corporate Insolvency Law & Practice in South Korea in the Aftermath of the Asian Financial Crisis' (2005) 21 Conn J Int'l L 155.

Klein J, 'Pre-Pack Administration: A Comparison Between Germany and the United Kingdom: Part 1' (2012) 33(9) Comp. Law 261.

Koch H, 'International Forum Shopping and Transnational Lawsuits' (2006) 31 The Geneva Papers 293.

Kokorin I and Wessels B, 'Communication and Cooperation in Cross-Border Restructuring and Insolvency Matters in the EU' (2018) 37(12) American Bankruptcy Institute Journal 32.

Kokorin I, 'Conflict of Interest, Intra-Group Financing and Procedural Coordination of Group Insolvencies' (2020) 29 International Insolvency Review 32.

Kolcak H, 'The Sovereignty of the European Court of Justice and the EU's Supranational Legal System' (2014) 6(4) Inquiries Journal 1.

Korobkin D R, 'Employee Interests in Bankruptcy' (1996) 4 Am. Bankr. Inst. L. Rev. 5.

Krommendijk J, 'Wide Open and Unguarded Stand Our Gates: The CJEU and References for a Preliminary Ruling in Purely Internal Situations' (2017) 18 German Law Journal 1359.

Lagrand P, 'The Impossibility of 'Legal Transplant'' (1997) 4(2) Maastricht Journal of European and Comparative Law 111.

Lai K, 'NPLs: Fine-Tuning of India's Bankruptcy Code Still Needed' (2018) International Financial Law Review.

Lando V, 'The Domestic Impact of the Decision of the East African Court of Justice' (2018) 18 African Human Rights Law Journal 463.

LaPalombara J and Blank S, 'Multinational Corporations and Developing Countries' (1980) 34(1) Journal of International Affairs 119.

Larsson O, Squatrito T, Stiansen O and St John T, 'Selection and Appointment in International Adjudication: Insights from Political Science' (2019) Academic Forum on ISCS Concept Paper 2019/10.

Latham & Watkins Restructuring & Special Situation Practice, 'COVID-19 Managing Financial Difficulties in the United Arab Emirates' (2020) Client Alert Commentary 2644.

LeClaire J, 'Cross-Border Trade' (2005) 40(7) Area Development Site and Facility Planning 58.

Leonard E B, 'Professional Costs of Insolvency Proceedings: The Canadian Perspective' (1993) 1 Am Bankr Inst L Rev 429.

Li B and Ponticelli J, 'Going Bankrupt in China' (2020) National Bureau of Economic Research Working Paper 27501.

Llamzon A P, 'Jurisdiction and Compliance in Recent Decision of the International Court of Justice' (2007) 18(5) European Journal of International Law 815.

Lombard S and Joubert T, 'The Legislative Response to the Shareholders v Stakeholders Debate: A Comparative Overview' (2014) (14(1) Journal of Corporate Law Studies 211.

LoPucki L M and Whitford W C, 'Venue Choice and Forum Shopping in the Bankruptcy Reorganisations of Large Publicly Held Companies' (1991) 1991 Wis L Rev 11.

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

LoPucki L M, 'Universalism Unravels' (2006) 79 (1) The American Bankruptcy Law Journal 143.

LoPucki L, "The Case for Cooperative Territoriality in International Bankruptcy." (2000) 98 Michigan Law Review 2216.

Loubser A, 'An International Perspective on the Regulation of Insolvency Practitioners' (2007) 19 S. Afr. Mercantile L.J. 123.

Lubben S J, 'Railroad Receiverships and Modern Bankruptcy Theory' (2004) 89 Cornell L. Rev. 1420.

Lupinacci T M and Bensinger B D, 'Adequately Protect Your Interest in an Economic Crisis' (2008) 17(5) Bus. L. Today 51.

Mackenzie R and Sands P, 'International Courts and Tribunal and the Independence of International Judges' (2003) 44(1) Harvard international Law Journal 271.

MacLennan P H, 'Wish you were here? English Court becomes the Restructuring Destination for Foreign Companies' (2011) 7 JIBFL 405.

Maier H G, 'Extraterritorial Jurisdiction at a Crossroads: An Intersection between Public and Private International Law' (1982) 76(2) The American Journal of International Law 280.

Mankowski P, 'The European World of Insolvency Tourism: Renewed, But Still Brave?' (2017) 64 Netherlands International Law Review 94.

Mannan M, 'Are Bangladesh, India and Pakistan Ready to Adopt the UNICITRAL Model Law on Cross-Border Insolvency?' (2016) 25 Int. Insolv. Rev. 195.

Marantz R G, 'Canadian Bankruptcy and Insolvency Law Reform Continues-The 1997/7 Amendments' (1998) 14(1) Tolley's Insolvency Law and Practice 22.

Mark A, 'Truth or Illusion? COMI Migration and Forum Shopping under the EU Insolvency Regulation' (2013) 14(3) Business Law International 245.

Marshall S D and Ramsay I, 'Stakeholders and Directors' Duties: Law, Theory and Evidence' (2009) University of Melbourne Legal Studies Research Paper No.411.

Mason R, 'Cross-Border Insolvency and Legal Transnationalisation' (2012) 21 Int. Insolv. Rev. 105.

Mason R, 'Cross-Border Insolvency: Adoption of CLERP as an evolution of Australian Insolvency Law' (2003) 11 Insolvency Law Journal 62.

Masoud B S, 'The Context for Cross-Border Insolvency Law Reform in Sub-Saharan Africa' (2014) 23(3) International Insolvency Review 181.

McCormack G, 'Bankruptcy Forum Shopping: The UK and US as Venues of Choice for Foreign Companies' (2014) 63 ICLQ 815.

McCormack G, 'COMI and Comity in UK and US Insolvency Law' (2012) 128(Jan) LQR 140.

McCormack G, 'Jurisdictional Competition and Forum Shopping in Insolvency Proceedings' (2009) 68(1) Cambridge Law Journal 169.

McCormack G, 'Recasting the European Insolvency Regulation' (2016) 79(1) The Modern Law Review 102.

McCormack G, 'Something Old, Something New: Recasting the European Insolvency Regulation' (2016) M.L.R. 102.

McCormack G, 'Universalism in Insolvency Proceedings and the Common Law' (2012) 32(2) Oxford Journal of Legal Studies 325.

McCormack G, 'Why "Doing Business" with the World Bank May Be Bad for You' (2018) 19 Eur Bus Org Law Rev 649.

McGaughey E, 'Ideals of Corporate and the Nexus of Contracts' (2015) 768(6) MLR 1057.

McKenzie T A, 'Judicial Independence, Autonomy, and the Bankruptcy Courts' (2010) 62(3) Stanford Law Review 747.

McMillan R, 'Judicial Support for Pre-Pack Administrations' (2007) 23 Tolley's Insolvency Law and Practice 196.

McRae K D, 'The Principle of Territoriality and the Principle of Personality in Multilingual States' (2009) 1975(4) International Journal of the Sociology of Language 33.

Menon A and Weatherill S, 'Democratic Politics in a Globalising World: Supranationalism and Legitimacy' LSE Law, Society and Economics Working Papers 13/2007.

Mevorach I, 'A Fresh View on the Hard/Soft Law Divide: Implications for International Insolvency of Enterprise Groups' (2019) 40(3) Michigan Journal of International Law 505.

Mevorach I, 'European Insolvency Law in a Global Context' (2011) 7 JBL 666.

Mevorach I, 'Forum Shopping in Times of Crises: A Directors' Duties Perspective' (2013) 4 ECFR 524.

Mevorach I, 'Modified Universalism as Customary International Law' (2018) 96 Texas Law Review 1403.

Mevorach I, 'The 'Home Country' of a Multinational Enterprise Group Facing Insolvency' (2008) 57(2) The International Comparative Law 427.

Mevorach I, 'The Role of Enterprise Principles in Shaping Management Duties at Times of Crisis' (2013) 14(4) E.B.O.R. 471.

Meyer B H, Prescott B, and Xuguang S S, 'The Impact of the COVID-19 Pandemic on Business Expectations' (2020) Federal Reserve Bank of Atlanta Working Paper 2020-17a.

Miller R, 'Effects of Bankruptcy on Contracts for the Purchase or Sale of Realty' (1927) 6 Tex. L. Rev. 358.

Milman D, 'Liquidation Law: A Review of Recent UK Developments' (2017) 402 Co. L.N. 1.

Mooney Jr. C W, 'Lost in Transplantation: Modern Principles of Secured Transactions Law as Legal Transplants' (2020) Faculty Scholarship at Penn Law 2174.

Moravec T, Pastorcak J and Valenta P, 'Is Schemes of Arrangement in Cross-Border Insolvency in Europe Over?' (2016) 19(8A) International Information Institute (Tokyo) 3107.

Morrissey O, 'Politics and Economic Policy Reform: Trade Liberalization in Sub-Saharan Africa' (1995) 7(4) Journal of International Development 599.

Mosler H, 'Supra-National Judicial Decisions and National Courts' (1981) 4(3) Hastings International and Comparative Law Review 425.

Moss G, 'Chapter 11: An English Lawyers Critique' (1998) 11 Insolvency Intelligence 17.

Mota D, 'Resolving Bankruptcy' (2015) 117(5) Business Credit 18.

Noussia K and Durdenic K, 'The Financial Crisis 10 Years on: Creditors' Protection in Insolvency Law' (2019) 34(9) JIBLR 325.

Noussia K and Durdenic K, 'The Financial Crisis 10 Years on: Creditors' Protection in Insolvency Law' (2019) 34(9) JIBLR 325.

Nyombi C, 'The Objective of Corporate Insolvency Law: Lessons for Uganda' (2013) 60(1) International Journal of Law and Management 2.

O'Keeffe D, 'Is the Spirit of Article 177 Under Attack? Preliminary References and Admissibility' (1998) 23 Eur. L. Rev. 509.

Odetola D, 'Corporate Insolvency Reforms in Emerging Africa: The Need, Challenges and Prospects' (2017) 28(10) I.C.C.L.R. 362.

Omar P J, 'The Inevitability of 'Insolvency Tourism'' (2015) 62 Neth Int Law Rev 429.

Parikh S D, 'Modern Forum Shopping in Bankruptcy' (2013) 46(1) Connecticut L Rev 159.

Paterson S, 'Finding our way: secured transactions and corporate bankruptcy law and policy in America and England' (2018) 18 Journal of Corporate Law Studies 247.

Payne J, 'Cross-Border Schemes of Arrangement and Forum Shopping' (2013) 14(4) European Business Organization Law Review 563.

Payne J, 'Debt Restructuring in England Law: Lessons from the United States and the Need for Reform' (2014) 130(Apr) L.Q.R. 282.

Pepels S, 'Defining Groups of Companies under the European Insolvency Regulation (recast): On the Scope of EU Group Insolvency Law' (2020) International Insolvency Review 96.

Petrossian E, 'In Pursuit of the Perfect Forum: Transnational Forum Shopping in the United States and England' (2007) 40 Loy. L. A. L. Rev. 1257.

Pildes R H, 'Supranational Courts and The Law of Democracy: The European Court of Human Rights' (2018) 9 Journal of International Dispute Settlement 154.

Pistor K, Raiser M and Gelfer S, 'Law and Finance in Transition Economies' (2000) 8(2) Economies of Transition 325.

Pottow J A E, 'The Myth (and Realities) of Forum Shopping in Transnational Insolvency' (2007) 32(2) Brook. J. Int'l l. 785.

Pottow J, 'Greed and Pride in International Bankruptcy: The Problems and Proposed Solutions to 'Local Interests'' (2006) Michigan Law Review 1899.

Prentice D D, 'Creditor's Interests and Director's Duties' (1990) 10(2) Oxford Journal of Legal Studies 265.

Purdie J, 'Winding-Up of Foreign Companies' (2008) 158 NLJ 1597.

Qi L, 'Managerial Models During the Corporate Reorganisation Period and their Governance Effects: The UK and US Perspective' (2008) 29(5) Comp. Law. 131.

Radelet S, Sachs J D, Cooper R N and Bosworth B P, 'The East Asian Financial Crisis: Diagnosis, Remedies, Prospects' 1998(1) Brookings Papers on Economics Activity 1.

Ragan A C C, 'COMI Strikes a Discordant Note: Why U.S. courts are not in complete harmony despite Chapter 15 directives' (2010) 27 Emory Bankr. Dev. J. 117.

Rajani S, 'Cost-Effectiveness of Corporate Rescue and Insolvency Procedures in the UK' (1993) 1 Am. Bankr. Inst. L. Rev 441.

Rasmussen R K, 'A New Approach to Transnational Insolvencies' (1997) 19 Mich. J. Int'l L. 26.

Reilly L, 'Introduction to the Court of Arbitration for Sport (CAS) & the Role of National Courts in International Sports Disputes, An Symposium' (2012) 2012(5) Journal of Dispute Resolution 1.

Reinhart C and Guillermo C, 'Capital Flow Reversals, The Exchange Rate Debate, and Dollarization' (1999) 36(3) Finance and Development 1.

Reumers M, 'What is in a Name? Group Coordination or Consolidation Plan – What is Allowed under the EIR Recast?' (2016) 25 Int. Insolv. Rev. 225.

Richards R and Tribe J, 'Members Voluntary Liquidation: Part 1: A Declaration of Under Use?' (2005) 26(5) Company Lawyer 132.

Ringe W-G, 'Forum Shopping under the EU Insolvency Regulation' (2008) 9 European Business Organization Law Review 579.

Robinson T, 'Corporate Insolvency: The Office-Holder's Investigatory Powers' (2021) Thomsonas Reuters 1.

Rodov I and Leliaert P, 'FiMIAM: Financial Methods of Intangible Assets Measurement' (2002) 3(3) Journal of Intellectual Capital 323.

Rodrik D, 'The Positive Economics of Policy Reforms' (1993) 83(2) The American Economic Review 356.

Roosevelt III K, 'Understanding Lockups: Effects in Bankruptcy and the Market for Corporate Control' (2000) 17 Yale J. on Reg. 93.

Rt Hon Lady Justice Arden DBE, 'Peaceful or Problematic? The Relationship between National Supreme Courts and Supranational Courts in Europe' (2009) The Honourable Society of Lincoln's Inn, The Annual Sir Thomas More Lecture 1.

Rudbordeh A A, 'A Theory on Abusive Forum Shopping in Insolvency Law' (2016) 4(1) NIBLeJ 1.

Rusch L J, 'Bankruptcy as a Revolutionary Concept: Good Faith Filing and a Theory of Obligation' [1996] 57 Montana Law Review.

Sano S D, 'The Third Road to Deal with the Insolvency of Multinational Enterprise Groups' [2011] 26(1) Journal of International Banking Law and Regulation 15.

Santen B, 'Communication and Co-operation in International Insolvency: On Best Practices for Insolvency Office Holders and Cross-Border Communication between Courts' (2015) 16 ERA Forum 229.

Santen B, 'Opening Secondary Insolvency Proceedings in the EU' (2015/Autumn) Eurofix 20.

Schollhammer H, 'Organization Structures of Multinational Corporations' (pre-1986) 14(3) Academy of Management Journal 345.

Schuz R, 'Controlling Forum-Shopping: The Impact of MacShannon v. Rockerware Glass Ltd' (1986) 35(2) The International and Comparative Law Quarterly 374.

Sedler R A, 'Judicial Jurisdiction and Choice of Law: The Consequences of Schaffer v. Heitner' (1978) 63 Iowa L. Rev. 1031.

Shandro S and Jones B, 'Bankruptcy Jurisdiction in the US and Europe: Reconsideration Needed!' (2005) 18 Insolv. Int. 129.

Shearman & Sterling LLP, 'UK: Jurisdiction – Schemes of Arrangement' (2012) J.I.B.L.R. N110.

Sherwood B, 'Tread Carefully when on the Brink: Insolvency: When Disaster Looms, Directors Face Unfamiliar Responsibilities. But New Legislation may Ease the Burden, Says' (23 June 2003) Financial Times 16.

Shihata I G I, 'Legal Framework for Development: Role of the World Bank in Legal Technical Assistance' (1995) 23 Int'l bus Law 360.

Simon's Taxes, 'Insolvency and Coronavirus (COVID-19)' A8.105.

Singh R, 'Bankruptcy Tourisms' Exploit UK's Lenient Insolvency Laws' (2009) Accountancy Age 1.

Skeel Jr. D A 'Creditors' Ball: The New "New" Corporate Governance in Chapter 11' (2003) 152 U. Pa. L. Rev. 917.

Smit J van Z, 'The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice [Report of Research Undertaken

by Bingham Centre for the Rule of Law' (2015) British Institute of International and Comparative Law i.

Sterling M and Taylor M, 'Issues Arising in Cross-Border Schemes of Arrangements' (1994) International Insolvency Review 122.

Stone K, 'Recast Regulation on Insolvency: A Guide to the Key Provisions' (2017) 3 CRI 104.

Stones K, 'UK Schemes and Forum Shopping' (2014) 7(4) Corporate Rescue and Insolvency 161.

Tabalujan B S, 'Indonesia: Issues in Insolvency Law - I' (1998) 5 JIBFL 199.

te Velde D W and et. all., 'The Global Financial Crisis and Developing Countries' (2010) Overseas Development Institute Working Paper 316.

Tett R and Crinson K, 'The Recast EC Regulation on Insolvency Proceedings: A Welcome Revision' (2015) 2 CRI 64.

The World Bank and The International Finance Corporation, 'Doing Business in India 2009' (2009) The World Bank and The International Finance Corporation.

Thirlwell Z, 'Bankruptcy Tourism: Will the Proposed Restructuring Moratorium Entice More to These Shores?' (2010) 6 Corporate Rescue and Insolvency 237.

Thomas G. Kelch T G, 'The Phantom Fiduciary: The Debtor In Possession in Chapter 11' (1991-1992) 38 Wayne L. Rev. 1323.

Too F C, 'Drivers of Insolvency Reforms in Kenya' (2016) 4(1) NIBLeJ 5.

Trautman D T, Westbrook J and Gaillard E, 'Four Models for International Bankruptcy' (1993) 41 Am. J. Comp. L. 573.

Trautman P A, 'Long-Arm and Quasi in Rem Jurisdiction in Washington' (1975-1976) 51 Wash. L. Rev.1.

Triantis G G, 'The Effects of Insolvency and Bankruptcy on Contract Performance and Adjustment' (1993) 43(3) The University of Toronto Law Journal 679.

Tsimplis M, 'Modified universalism and Cross-Border insolvency of Shipping Companies' (2020) 5 J.B.L. 346.

Turley J, '"When in Rome": Multinational Misconduct and the Presumption against Extraterritoriality' (1990) 84(2) Northwestern University Law Review 807.

Uddin M and Boateng A, 'Explaining the Trends in the UK Cross-Border Mergers & Acquisitions: An Analysis of Macro-Economic Factors' (2011) 20(5) International Business Review 547.

Umfreville C and Walton P, 'Insolvency Practitioner Fees in the UK-All Alone in the World?' 2014 27(6) Insolvency Intelligence 86.

Unknown, 'Forum Shopping Reconsidered' (1990) 103(7) Harvard Law Review 1677.

Unknown, 'Russia' (2003) International Financial Law Review 1.

Vallens J-L, 'Reform of the European Insolvency Regulation on Cross-Border Insolvency Proceedings: A French Point of View' (2010) Revenue des Procedures Collective 25.

van Dijck G, Hollemans R et all, 'Insolvency Judges Meet Strategic Behaviour: A Comparative Empirical Study' (2020) 27(2) Maastricht Journal of European and Comparative Law 158.

van Zwieten K, 'Disciplining the Directors of Insolvent Companies' (2020) 33(1) Insolv. Int. 2.

Vauchez A, 'Keeping the Dream Alive: The European Court of Justice and the Transnational Fabric of Integrationist Jurisprudence' (2012) 4(1) European Political Science Review 51.

Verdier P-H and Versteeg M, 'International Law in National Legal Systems: An Empirical Investigation' (2015) 109(3) The American Journal of International Law 514.

Virgós M and Schmit E, 'Report on the Convention of Insolvency Proceedings' (1996) The Council of European Union 6500/96.

Walters A and Smith A, 'Bankruptcy Tourism under the EC Regulation on Insolvency Proceedings: A View from England and Wales' (2010) 19 INSOL International Law Review 181.

Walters A, 'Cooperation in International Insolvency: An Era of Retrenchment?' (2014) 35(8) Comp. Law. 225.

Walters A, 'Recovering Costs of Litigation Expense' (2003) 24(3) Company Lawyer 84.

Walters A, 'United States' Bankruptcy Jurisdiction over Foreign Entities: Exorbitant or Congruent?' (2017) 17(2) Journal of Corporate Law Studies 367.

Wan W Y and McCormack G, 'Transplanting chapter 11 of the US Bankruptcy Code into Singapore's Restructuring and Insolvency Laws: Opportunities and Challenges' (2018) Journal of Corporate Law studies 8.

Warren E, 'Bankruptcy Policymaking in an Imperfect World' (1993) 92(2) Michigan Law Review 336.

Warren E, 'Why have a Federal Bankruptcy System' (1992) 77(5) Cornell Law Review 1093.

Weiler J H H, 'Van Gend en Loos: The individual as subject and object and the dilemma of European legitimacy' (2014) 12(1) I.CON 94.

Wessels B, 'Current Developments Towards International Insolvency in Europe' (2004) 13(1) International Insolvency Review 43.

Westbrook J L, 'A Global Solution to Multinational Default' (2000) 98 Mich L Rev 2276.

Westbrook J L, 'Priority Conflicts as a Barrier to Cooperation in Multinational Insolvencies' (2009) Westbrook J L, 'Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum' (1991) 65 Am. Bankr. L.J. 457.

Westbrook J L, 'Universalism and Choice of Law' (2005)23 Penn St Int'l L Rev 625.

Whytock C A, 'The Evolving Forum Shopping System' (2011) 96(3) Cornell Law Review 481.

Wiener T M and Walters A J, 'All Along the Watchtower' (2017) 38(8) Comp. Law. 253.

Wild D, 'The UK: A Magnet to Bankrupts' (2011) The Estates Gazette 6.

Winker A, 'Corporation Law or the Law of Business? Stakeholders and Corporate Governance at the End of History.' (2004) 67(4) Law and Contemporary Problems 109.

Wright J S, 'The Federal Courts and the Nature and Quality of State Law' (1967) 13 Wayne L R 317.

Wyatt D, 'New Legal Order, or Old?' (1982) 7 Eur. L. R 147.

Xie B, 'Role of Insolvency Practitioners in the UK Pre-Pack Administrations: Challenges and Control' (2012) 21(2) International Insolvency Law 85.

Yeowart G, 'Encouraging Company Rescue: What Changes are Required to UK Insolvency Law' (2009) 3(6) Law and Financial Markets Review 517.

Young E A, 'Toward a Framework Statute for Supranational Adjudication' (2008) 57 Young Galleys Final 56.

Websites

Agimba C, 'Global Trends in the Four Doing Business Indicators-Closing a Business: Kenya's Reform Experiences' (Paper given at doing business 2011 in Africa: Sharing Reform Experiences 2011) <https://www.wbginvestmentclimate.org/loader.cfm?csModule=security/getfile&pageid=16716> accessed 5 July 2018.

Ahmed B and Dar R, 'The Restructuring Review: United Arab Emirates' (2020) The Law Review < Latham & Watkins Restructuring & Special Situation Practice, 'COVID-19 Managing Financial Difficulties in the United Arab Emirates' (2020) Client Alert Commentary 2644.> accessed 21 May 2021.

Bělohlávek A J, 'Centre of Main Interest (COMI) and Jurisdiction of National Courts in Insolvency Matters (Insolvency Status)' (2008) 50(2) International Journal of Law and Management < https://www.emerald.com/insight/content/doi/10.1108/17542430810862333/full/html#idm44900873688864> accessed 1 October 2020.

Anonymous, 'Opinion: An Exam to Test the Watchdog on the Board' (2019) Mint < https://ntu.idm.oclc.org/login?url=https://www-proquest-com.ntu.idm.oclc.org/newspapers/opinion-exam-test-watchdog-on-board/docview/2238827512/se-2?accountid=14693 > accessed 22 May 2021.

Arts R, 'Main and Secondary Proceedings in the Recast of the European Insolvency Regulation: The Only Good Secondary Proceeding is a Synthetic Secondary Proceeding' (unknown) International Insolvency Institution <

https://www.iiiglobal.org/sites/default/files/media/Arts%20-%20Main%20and%20Secondary%20Proceedings.pdf> accessed 21 April 2021.

Asli Orbay A, 'Bahrain's Bankruptcy Law One Year On: An Untested Revolution' (2019) Debtwire CEEMEA < https://events.debtwire.com/emerging-markets/bahrains-bankruptcy-law-one-year-on-an-untested-revolution> accessed 15 July 2020.

Associate for Financial Market in Europe, 'Potential Economic Gains from Reforming Insolvency law in Europe' [2016] AFME < https://www.afme.eu/globalassets/downloads/publications/afme-insolvency-reform-report-2016-english.pdf> accessed 10 April 2018.

Association of Business Recovery Professionals, 'Worth the Costs?' (Association of Business Recovery Professionals, unknown) < https://www.r3.org.uk/media/documents/get_advice/business/R3_IPs_Fees_Paper_D3.pdf > accessed 20 April 2019.

Banerjee A, 'Forum Shopping in Intellectual Property Rights Infringement Cases in India' (2015) ATRIP < http://atrip.org/wp-content/uploads/2016/12/2014-3.-Arpan-Banerjee-Forum-Shopping-in-IP-rights-infringements-in-India.pdf> accessed 21 June 2018.

BBC, 'General Election 2017: Where UK's Parties Stand on Brexit' (2017) < https://www.bbc.co.uk/news/uk-politics-39665835> accessed 10 February 2019.

Bharucha J, 'Insolvency Law, Policy and Procedure' (2019) The Insolvency Review < https://thelawreviews.co.uk/edition/the-insolvency-review-edition-7/1211488/india> accessed 26 May 2020.

Boone J W and Wozniak D N, 'Insolvency and Directors' Duties in the United States: Overview' (2017) < https://uk.practicallaw.thomsonreuters.com/1-605-6165?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1> accessed 1 August 2020.

Burman A and Roy S, 'Building An Institution of Insolvency Practitioners in India' (2015) Indira Gandhi Institute of Development Research <http://www.igidr.ac.in/pdf/publication/WP-2015-033.pdf> accessed 15 July 2020.

Calitz J C, 'A Reformatory Approach to State Regulation of Insolvency Law in South Africa' (2010) < https://repository.up.ac.za/bitstream/handle/2263/30839/04part6-7.pdf?sequence=5&isAllowed=y > accessed 20 May 2021.

Chapter 6: 'Survey of Frameworks and Best-Practice Guidelines for Judicial Cooperation' in JCOERE Project Consortium, Judicial Co-operation Supporting Economic Recovery in Europe: Report 2 on Judicial Cooperation in Preventive Restructuring and Insolvency in the EU (UCC 2020) 113-132 <https://www.ucc.ie/en/jcoere/research/report2/report2chapter/report2chapter2/> accessed 19 March 2021.

Companies House, 'Overseas Companies Registered in the UK' (2015) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/415663/GP01_Overseas_companies.pdf> accessed 15 January 2019.

Correa P and Lootty M, 'The Impact of the Corporate Sector in Europe and Central Asia: Evidence from a Firm-Level Survey' (2011) 1(1) The World Bank < http://documents.worldbank.org/curated/en/742641468022737863/The-impact-of-the-global-economic-crisis-on-the-corporate-sector-in-Europe-and-Central-Asia-evidence-from-a-firm-level-survey> accessed 3 May 2020.

Day J, 'The Year in Bankruptcy:2020' (2021) Jones Day https://www.jonesday.com/en/insights/2021/02/the-year-in-bankruptcy-2020 accessed 20 May 2021.

Debt Resolution & Business Exit Team of the World Bank Group Competitiveness Global Practice, 'Debt Resolution and Business Exit' (2014) The World Bank Group <http://documents1.worldbank.org/curated/en/912041468178733220/pdf/907590VIEWPOIN003430Debt0Resolution.pdf > accessed 4 July 2020.

Denton, 'Cross-Border Restructuring Matters' (2021) Dentons < https://www.dentons.com/en/find-your-dentons-team/practices/restructuring-insolvency-and-bankruptcy/cross-border-restructuring-matters> accessed 15 November 2021.

Department for International Trade and The Rt Hon Liam Fox MP, 'Britain is Open for Business: A Commitments to Open Trade' (2017) < https://www.gov.uk/government/speeches/britain-is-open-for-business-a-commitment-to-open-trade> accessed 15 January 2019.

Directorate General for Internal Policies of the Union, 'The Training of Judges and Legal Practitioners' (2017) Policy Department for Citizens' Rights and Constitutional Affairs < https://www.europarl.europa.eu/RegData/etudes/IDAN/2017/583134/IPOL_IDA%282017%29583134_EN.pdf> accessed 21 April 2021.

Doing Business, 'Doing Business in a More Transparent World' (2012) The World Bank < https://www.ihk-krefeld.de/de/media/pdf/international/doing-business/kamdodscha-doing-business-in-cambodia-2012.pdf> accessed 4 June 2020.

Doing Business, 'Resolving Insolvency' (2019) Doing Business < https://www.doingbusiness.org/en/data/exploretopics/resolving-insolvency/reforms>

Elberg S, 'Using the Bankruptcy Code for International Restructuring' [2016] New York Law Journal < https://files.skadden.com/sites%2Fdefault%2Ffiles%2Fpublications%2FUsing_the_Bankruptcy_Code_For_International_Restructuring.pdf > accessed 10 January 2018.

European Commission, 'EU Position in World Trade' (2019) < http://ec.europa.eu/trade/policy/eu-position-in-world-trade/index_en.htm> accessed 11 February 2019.

European Union, 'The EU in Brief' (unknown) European Union < https://europa.eu/european-union/about-eu/eu-in-brief_en> accessed 5 April 2021.

Felter C, 'The Role of the International Criminal Court' (2021) Council on Foreign Relations < https://www.cfr.org/backgrounder/role-international-criminal-court> accessed 1 March 2021.

Finlays, 'Heritage' (Finlays, 2019) < https://www.finlays.net/our-business/history/> accessed 20 April 2019.

Finlays, 'Our Locations' (Finlays, 2019) < https://www.finlays.net/our-locations/> accessed 20 April 2019.

Gramckow H and Walsh B, 'Developing Specialist Court Services: International Experiences and Lessons Learned' (2013) The International Bank for Reconstruction and Development/The World Bank < https://openknowledge.worldbank.org/bitstream/handle/10986/16677/819460WP0Devel00Box379851B00PUBLIC0.pdf?sequence=1&isAllowed=y> accessed 22 May 2021.

Guo S, 'Cross-Border Resolution of Financial Institutions: Perspectives from International Insolvency Law' (2018) III Prize in International Insolvency Studies < https://www.iiiglobal.org/sites/default/files/media/Submission%20for%20the%20III%20Prize%20in%20International%20Insolvency%20Studies%202018_Shuai%20Guo.pdf> accessed 6 April 2021.

Gurrea-Martinez A, 'Developments in Singapore's Insolvency Restructuring Regime' (2021) Australian Restructuring Insolvency & Turnaround Association Journal < ARITA. Interview to Aurelio Gurrea Martinez.pdf (smu.edu.sg) > accessed 9 November 2021.

Gurrea-Martinez A, 'Insolvency Law in Emerging Market' (2020) Harvard Law School < https://blogs.harvard.edu/bankruptcyroundtable/2020/09/15/insolvency-law-in-emerging-markets/)> accessed 21 May 2021.

Guynn R D and Polk D, 'The Financial Panic of 2008 and Financial Regulatory Reform' (2010) Harvard Law School Forum on Corporate Governance < https://corpgov.law.harvard.edu/2010/11/20/the-financial-panic-of-2008-and-financial-regulatory-reform/> accessed 4 May 2020.

Halimi R, 'An Analysis of the Three Major Cross-Border Insolvency Regimes' (2017) International Immersion Program Papers 47 http://chicagobound.uchicago.edu/international¬¬_immersion_program_papers/47 accessed 15 July 2019.

Healys, 'Insolvency' (2021) Healys < https://healys.com/services/insolvency/cross-border-insolvency/> accessed 15 November 2021.

Her Majesty's Revenue and Customs, 'VATREG03550-Registration-General: Principal Place of Business (PPOB)' (2016) GOV.UK < https://www.gov.uk/hmrc-internal-manuals/vat-registration-manual/vatreg03550> accessed 5 May 2021.

Hogan Lovells, 'Hogan Lovells Advises Senior Lenders on Smile Telecoms' Restructuring Implemented Through High Court Sanction of Restructuring Plan and Cross-Class Cram-Down' (2021) < https://www.hoganlovells.com/en/news/hogan-lovells-advises-senior-lenders-on-the-restructuring-of-smile-telecoms-restructuring-implemented-through-high-court-sanction-of-restructuring-plan-and-cross-class-cram-down > accessed 25 May 2021.

Idigbe A I, 'INSOL Africa Roundtable Tackles Key Market Issues' (2010) International Law Office <https://www.internationallawoffice.com/Newsletters/Insolvency-Restructuring/International/Punuka-Attorneys-Solicitors/INSOL-Africa-Roundtable-tackles-key-market-issues> accessed 4 July 2020.

Illanes F J and Balharry S, 'Assessing a New Evolution in Chile: In-Court Reorganization Proceedings' (2017-2018) 5 Emerging Market Restructuring Journal < https://www.clearygottlieb.com/-/media/files/emrj-materials/winter-2017-issue-no-5/assessing-a-new-evolution-in-chile--incourt-reorganization-proceedings.pdf> accessed 5 July 2020.

International Association of Insolvency Regulators, 'The Regulatory Regime for Insolvency Practitioners' (2018) International Association of Insolvency Regulators <https://www.insolvencyreg.org/sites/iair/files/uploads/IAIR%20Principles%20-%20version%201.2%20for%20uploading%20to%20web.pdf > accessed 19 July 2020.

International Court of Justice, 'How The Court Works' (unknown) International Court of Justice < https://www.icj-cij.org/en/how-the-court-works> accessed 13 November 2021.

International Criminal Court, 'The Judges of the Court' (unknown) International Criminal Court < JudgesENG.pdf (icc-cpi.int)> accessed 13 November 2021.

International Monetary Fund, 'General Objectives and Features of Insolvency Procedures' (1999) <https://www.elibrary.imf.org/view/IMF071/05062-9781557758200/05062-9781557758200/ch02.xml?lang=en&redirect=true> accessed 4 January 2020.

International Monetary Fund, 'Orderly & Effective Insolvency Procedures' (1999) International Monetary Fund < http://www.imf.org/external/pubs/ft/orderly/ > accessed 27 June 2018.

International Monetary Fund, 'Proposed New Grouping in WEO Country Classifications: Low-Income Developing Countries' (2014) IMF Policy paper <https://www.imf.org/external/np/pp/eng/2014/060314.pdf> accessed 4 July 2018.

Jackson A and Taylor S, 'UK vs US debt recovery cultures and collections strategies' (unknown) The Gazett < https://www.thegazette.co.uk/all-notices/content/100263/#:~:text=Traditionally%2C%20the%20UK%20has%20been%20'creditor%2Dfriendly'.&text=When%20debts%20were%20not%20repaid,to%20marry%20risk%20with%20responsibility.> accessed 1 July 2019.

Johnson G W, 'Insolvency and Social Protection: Employee Entitlements in the Event of Employer Insolvency' (2006) OECD < https://www.oecd.org/daf/ca/corporategovernanceprinciples/38184691.pdf> accessed 17 May 2021.

Johnson I and Bulmore R, 'Restructuring & Insolvency in the United Kingdom' (2017) Lexology < https://www.lexology.com/library/detail.aspx?g=e997df75-3f4e-4653-bbef-ce3cb16b2821> accessed 1 July 2019.

Joshua Pasanisi J, 'Nicaragua:New Secured Transactions Law' (2017) < https://www.iflr.com/article/b1lv05p7yvk8zb/nicaragua-new-secured-transactions-law> accessed 29 May 2021.

Kammel V, 'New EU Directive on Restructuring Frameworks' (2019) Reed Smith Client Alerts < https://www.reedsmith.com/en/perspectives/2019/08/new-eu-directive-on-restructuring-frameworks> accessed 20 December 2020.

Kelly D, 'As Obama Takes Victory Lap Over Auto Industry Rescue, Here are The Lessons of The Bailout' (2016) < https://www.forbes.com/sites/davidkiley5/2016/01/20/obamas-takes-victory-lap-over-auto-industry-rescue/> accessed 28 May 2021.

Kirkland & Ellis, 'International & Cross-Border Insolvency' (2021) Kirkland & Ellis < https://www.kirkland.com/services/practices/restructuring/international-and-crossborder-insolvency > accessed 15 November 2021.

Koumenta M, Humphris A, Kleiner M and Pagliero M, 'Occupational Regulation in the EU and UK: Prevalence and Labour Market Impacts' (2014) The Department for Business, Innovation and Skills <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/343554/bis-14-999-occupational-regulation-in-the-EU-and-UK.pdf> accessed 18 July 2020

Langer J, 'The Preliminary Ruling Procedure: Old Problems or New Challenges' (2015) Rijsuniversiteit Groningen < https://ssrn.com/abstract=2885256> accessed 31 May 2021.

Legal Department, 'Orderly and Effective Insolvency Procedures' (1999) International Monetary Fund < The World Bank, 'Resolving Insolvency' (2019) The World Bank < https://www.doingbusiness.org/en/data/exploretopics/resolving-insolvency/reforms> accessed 22 April 2021.> accessed 22 April 2021.

Neuberger Lord, 'Key Speech' (2017) International Insolvency Institute Annual Conference <https://www.supremecourt.uk/docs/speech-170619.pdf> accessed 19 September 2018.

Martinez A F, Brun J P and Lunetti C, 'Anticipating Financial Distress: Could Developing Countries Borrow from the French and the U.S. Toolbox?' The World Bank Blog < https://blogs.worldbank.org/psd/anticipating-financial-distress-could-developing-countries-borrow-french-and-us-toolbox> accessed 17 May 2021.

Martino P D, 'The Historical Evolution of Bankruptcy Law in England, the US and Italy up to 1939: Determinants of Institutional Change and Structural Differences' (2005) unknown

< http://sh.diva-portal.org/smash/get/diva2:213033/FULLTEXT01> accessed 21 May 2021.

Matignon L de G, 'The Difference between International and Supranational Organizations' (2019) Space Legal Issues < https://www.spacelegalissues.com/the-differences-between-international-and-supranational-organizations/> accessed 1 February 2021.

McKenzie B, 'Global Restructuring & Insolvency Guide' (2016) Baker McKenzie < https://www.bakermckenzie.com/-/media/files/expertise/banking-finance/bk_globalrestructuringinsolvencyguide_20170307.pdf?la=en> accessed 14 May 2021.

McKenzie B, 'The New UK Restructuring Plan: An Overview' (2020) Baker McKenzie < https://restructuring.bakermckenzie.com/wp-content/uploads/sites/23/2020/09/Restructuring_Plan_under_the_UK_Corporate_Insolvency_and_Governance_Act_2020.pdf > accessed 26 May 2021.

Menezes A, Martinez A, Dancausa F and Mocheva N, 'Insolvency and Debt Resolution' (2017) The World Bank Group <https://www.worldbank.org/en/topic/financialsector/brief/insolvency-and-debt-resolution> accessed 4 July 2020.

Mingst K, 'International Court of Justice' (2019) Encyclopedia Britannica < https://www.britannica.com/topic/International-Court-of-Justice> accessed 1 March 2021.

Ministry of Justice, 'Company Winding Up and Bankruptcy Petition Statistics (NS)' (2009) Ministry of Justice < https://webarchive.nationalarchives.gov.uk/+/http://www.justice.gov.uk/publications/companywindingupandbankruptcy.htm> accessed 2 July 2020.

Ministry of Law Singapore, 'Recommendations Released on Strengthening Singapore as an International Centre for debt Restructuring' (2016) Ministry of Law Singapore <Recommendations Released on Strengthening Singapore as an International Centre for Debt Restructuring (mlaw.gov.sg)> accessed 9 November 2021.

Mocanu D, 'Short Insight into the Problem of the Preliminary Ruling System in the European Union' (2015) lawyr.It < https://www.lawyr.it/index.php/articles/international-focus/401-short-insight-into-the-problems-of-the-preliminary-ruling-system-in-the-european-union> accessed 5 April 2021.

Molhuysen M and Weeshoff O, 'WHOA! New Dutch Scheme Set to Position the Netherlands As A Restructuring Hub' (2019) DLA Piper < WHOA! New Dutch Scheme set to position the Netherlands as a restructuring hub | | Insights | DLA Piper Global Law Firm > accessed 9 November 2021.

Møller C, McGovern E, Schaffer E and Venditto M, 'COMI and Get It: International Approaches to Cross-Border Insolvencies' (2015) Corporate Rescue and Insolvency <https://www.globalrestructuringwatch.com/wp-content/uploads/sites/23/2016/01/Corporate-Rescue-and-Insolvency-1-December-2015-COMI-and-get-it-2.pdf> accessed 30 July 2018.

McGowan M A and Andrews D, 'Design of Insolvency Regimes Across Countries' (2018) OECD < https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=ECO/WKP(2018)52&docLanguage=En> accessed 21 May 2021.

Mulligan S P, 'The United States and the "World Court"' (2018) Congressional Research Service < https://fas.org/sgp/crs/row/LSB10206.pdf> accessed 28 February 2021.

Murphy S D, 'The United States and the International Court of Justice: Coping with Antinomies' (2008) GW Law Faculty Publications & Other Works <https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1902&context=faculty_publications> accessed 28 February 2021.

Norton Rose Fulbright, 'Cross-Border Insolvency Representation' (2020) Norton Rose Fulbright < https://www.nortonrosefulbright.com/en-gb/knowledge/publications/9c8c3b4c/covid-19-german-legislative-measures-to-mitigate-the-impact > accessed 15 November 2021.

Norton Rose Fulbright, 'Singapore's Efforts to Become An International Hub for Debt Restructuring' (2019) Norton Rose Fulbright < Singapore's efforts to become an international hub for debt restructuring | Knowledge | Norton Rose Fulbright | Global law firm | Norton Rose Fulbright > accessed 9 November 2021.

O'Brien E, 'What Makes International Agreements Work: Defining Factors for Success' (2012) Centre on International Cooperation < https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/7839.pdf> accessed 31 January 2020.

OECD, 'Insolvency in Asia – Forum on Asian Insolvency Reform (FAIR)' (unknown) OECD < https://www.oecd.org/corporate/ca/corporategovernanceprinciples/insolvencyinasia-forumonasianinsolvencyreformfair.htm#:~:text=FAIR%20gathers%20key%20policy%20makers,meet%20on%20a%20regular%20basis.> accessed 29 May 2021.

Office of National Statistics, 'Who does the UK Trade with?' Office of National Statistics (2018) <https://www.ons.gov.uk/businessindustryandtrade/internationaltrade/articles/whodoestheuktradewith> accessed 24 April 2019.

Oh S, 'Comparative Overview of Asian Insolvency Reforms in the Last Decade' (2006) OECD < http://siteresources.worldbank.org/GILD/Resources/Oh5.pdf> accessed 10 November 2019.

Organisation for the Harmonisation of Business Law in Africa, 'Insolvency Law' (2015) Organisation for the Harmonisation of Business Law in Africa < https://www.ohada.org/en/insolvency-law/> accessed 13 November 2021.

Organisation for the Harmonisation of Business Law in Africa, 'State Members' (2021) Organisation for the Harmonisation of Business Law in Africa < https://www.ohada.org/en/state-members/> accessed 13 November 2021.

Pannen K, 'Debtor-in-Possession Proceedings in Germany' (2005) International Insolvency Institute < https://www.iiiglobal.org/sites/default/files/klauspannen.pdf> accessed 18 May 2020.

Pannen K, 'Short Statement on the Occasion of the panel Discussion "American College of Bankruptcy": Debtor-in-Possession Proceedings in Germany' (2005) 39 American College of Bankruptcy < https://www.iiiglobal.org/sites/default/files/klauspannen.pdf> accessed 22 May 2021.

Paterson S, 'INSOL Talks: Sarah Paterson' (2021) INSOL International < https://www.insol.org/Focus-Groups/Academic-Group/Events-and-Podcasts?utm_campaign=961754_Podcast2&utm_medium=email&utm_source=INSOL%20International&dm_i=4WAM,KM3E,19L9J8,2GSF8,1> accessed 15 November 2021.

Payne J, Schemes of Arrangement Theory, Structure and Operation (Cambridge University Press, 2014).

Perera A C, 'Presumed COMI and Registered Office pf Company subject to Insolvency Proceedings under the New EU Regulation on Insolvency Proceedings' (2015) Gómez-Acebo & Pombo < https://www.ga-p.com/wp-content/uploads/2018/03/presumed-comi-and-registered-office-of-company-subject-to-insolvency-proceedings-under-the-new-eu-regulation-on-insolvency-proceedings.pdf> accessed 23 August 2020.

Ponniya N, Lean M-N and Matthews R, 'Singapore: A New Hub for Insolvnecy and Restructuring' (2016) Baker McKenzie < Institutionalizing Creative Destruction: Predictable and Transparent Bankruptcy Law in the Wake of the East Asian Financial Crisis > accessed 9 November 2021.

Practical Law, 'Glossary: Subsidiary' (2021) Thomson Reuters < https://uk.practicallaw.thomsonreuters.com/7-562-5046?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 6 May 2021.

Practice Law, 'Glossary: Insolvency Practitioner' (Unknown) Thomson Reuters Practice Law < https://uk.practicallaw.thomsonreuters.com/5-107-6261?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 22 April 2021.

R3, 'A Light Touch Administration Protocol' (unknown) <https://www.r3.org.uk/press-policy-and-research/r3-blog/more/29357/page/1/light-touch-administration-a-new-protocol/> accessed 20 November 2018.

Radhi N, Janahi N and Alkoofi H, 'Insolvency 2020 Bahrain' (2020) Chambers and Partners <https://practiceguides.chambers.com/practice-guides/insolvency-2020/bahrain> accessed 21 May 2021.

Rescue Recovery Renewal, 'A Moratorium for Businesses: Improving Businesses and Job Rescue in the UK' (2016) <https://www.r3.org.uk/media/documents/policy/research_reports/bus_distress_index/R3_Moratorium_Proposal_April_2016.pdf> accessed 19 January 2019.

Ropes & Gray, 'Hong Kong/Mainland Mutual Recognition Framework for Insolvency and Restructuring: What does it mean for Hong Kong restructuring & insolvency?' (2020) < https://www.ropesgray.com/en/newsroom/alerts/2021/May/Hong-Kong-Mainland-Mutual-Recognition-Framework-for-Insolvency-and-Restructuring > accessed 26 May 2021.

Sandys A, 'Freshfields and Novartis Secure Cross-Border Injunctions Against Mylan' (2020) Juve Patent < juve-patent.com> accessed 9 November 2021.

Shaoul J, 'Britain: Asset Stripping following Government Bailout of MG Rover' (2009) World Socialist Web Site < https://www.wsws.org/en/articles/2009/09/rovr-s21.html> accessed 28 May 2021.

American Law Institute, 'Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases' (2012) The American Law Institute <https://www.iiiglobal.org/sites/default/files/alireportmarch_0.pdf> accessed 17 September 2020.

Insolvency Service, 'Claim Money Back from a Bankrupt Person or Company in Compulsory Liquidation: Detailed Guidance for Creditors' (2019) GOV.UK < https://www.gov.uk/government/publications/claim-money-back-from-a-bankrupt-person-or-company-in-compulsory-liquidation-guidance-for-creditors/claim-money-back-

from-a-bankrupt-person-or-company-in-compulsory-liquidation-guidance-for-creditors> accessed 5 May 2021.

Insolvency Service, 'Insolvency Practitioner Regulation – Regulatory Objectives and Oversight Powers legislative changes Introduced on 1 October 2015' (2015) The Insolvency Service < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/482904/Guidanceforpublication.pdf> accessed 30 May 2021.

International Court of Justice, 'About the Court' (unknown) The International Court of Justice < https://www.icc-cpi.int/about > accessed 28 May 2021.

Policy Development and Review and Legal Departments, 'Involving the Private Sector in the Resolution of Financial Crises-Restructuring International Sovereign Bonds' (2001) The International Monetary Fund < https://www.imf.org/external/pubs/ft/series/03/IPS.pdf> accessed 27 December 2019.

UK Government, 'Outward Foreign Affiliated Statistics' (2016) The UK Government < https://data.gov.uk/dataset/b8052950-787c-4258-b0f9-d069a99d485d/outward-foreign-affiliates-statistics> accessed 4 April 2021.

UK Parliament, 'The Role of the Court of Justice of the European Union (CJEU)' (Unknown) The UK Parliament < https://publications.parliament.uk/pa/ld201719/ldselect/ldeucom/130/13005.htm#:~:text=13.,of%20Member%20States'%20national%20courts.> accessed 20 April 2021.

World Bank, 'Forum for Asian Insolvency Reforms (FAIR)' (2016) < https://www.worldbank.org/en/topic/financialsector/brief/forum-for-asian-insolvency-reform-fair> accessed 1 May 2020.

World Bank, 'Principles and Guidelines for Effective Insolvency and Creditor Rights Systems' (2001) The World Bank < https://www.iiiglobal.org/sites/default/files/media/126_World_Bank.PDF> accessed 21 May 2021.

World Bank, 'Principles for Effective Insolvency and Creditor/Debtor Regimes' (2016) The World Bank <http://pubdocs.worldbank.org/en/919511468425523509/ICR-Principles-Insolvency-Creditor-Debtor-Regimes-2016.pdf > accessed 28 October 2019.

World Bank, 'Resolving Insolvency' (2017) The World Bank <http://www.doingbusiness.org/data/exploretopics/resolving-insolvency> accessed 15 July 2018.

World Bank, 'Resolving Insolvency' (2019) The World Bank < https://www.doingbusiness.org/en/data/exploretopics/resolving-insolvency/reforms> accessed 22 April 2021.

World Bank, 'Time to Resolve Insolvency (Years) – Least Developed Countries UN Classification' (2019) The World <https://data.worldbank.org/indicator/IC.ISV.DURS?end=2019&locations=XL&start=2019&view=bar> accessed 4 June 2020.

World Bank, 'Time to Resolve Insolvency' (unknown) <https://data.worldbank.org/indicator/IC.ISV.DURS?end=2017&start=2017&view=bar> accessed 3 January 2019.

World Bank, 'World Bank Country and Lending Groups' (2021) The World Bank < https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups> accessed 20 May 2021.

Too F C, 'A Comparative Analysis of Corporate Insolvency Laws: Which if the Best Option for Kenya?' (2015) Nottingham Trent University < http://irep.ntu.ac.uk/id/eprint/27951/1/Thesis%20post%20viva%20FINAL.pdf > accessed 24.

Turvey N and Dovaston T, 'Restructuring Plans: Who's In Control' (2021) Boies Schiller Flexner LLP <https://www.bsfllp.com/news-events/restructuring-plans-whos-in-control.html. > accessed 1 June 2021.

United Nations Commission on International Trade Law, 'Legislative Guide on Insolvency Law' (2005) United Nations Commission on International Trade Law <

https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf > accessed 4 January 2020.

United Nations Conference on Trade and Development, 'Foreign Direct Investment to Africa Defies Global Slump, Rises 11%' (2019) United Nations Conference on Trade and Development < https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=2109> accessed 1 July 2020.

United Nations Human Rights Office of the High Commissioner, 'Basic Principles on the Independence of the Judiciary' (1985) The United Nations < https://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx> accessed 23 May 2021.

United Nations, 'Country Classification. Data Sources, Country Classifications and Aggregation Methodology' (2012) United Nations <http://www.un.org/en/development/desa/policy/wesp/wesp_current/2012country_class.pdf> accessed 4 July 2018.

Unknown, 'Legal Framework Navigating the Web of Laws and Contracts Governing Extractive Industries' (2015) <https://resourcegovernance.org/sites/default/files/nrgi_Legal-Framework.pdf> accessed 27 October 2019.

CreditMan, 'Debt Recovery, Insolvency Laws Remain Untested In UAE' (2008) CreditMan < https://www.creditman.co.uk/news/debt-recovery-and-insolvency-laws-remain-untested-in-the-uae/ > accessed 28 October 2019.

Varottil U, 'Supreme Court Affirms Creditor-Friendly Nature of Insolvency Law' (2017) IndiaCorpLaw < https://indiacorplaw.in/2017/09/supreme-court-affirms-creditor-friendly-nature-insolvency-law.html> accessed 24 September 2018.

Wessels B, 'Modified Universalism in European Cross-Border Insolvency' (2019) Prof. Dr. Bob Wessels Blog < https://bobwessels.nl/blog/2019-01-doc3-modified-universalism-in-european-cross-border-insolvency/> accessed 3 June 2021.

Wiggins R Z, Piontek T and Metrick A, 'The Lehman Brothers Bankruptcy A: Overview' (2014) Yale Program on Financial Stability Case Study < https://som.yale.edu/sites/default/files/files/001-2014-3A-V1-LehmanBrothers-A-REVA.pdf> accessed 28 May 2021.

Willot MP J, 'Strengthening the Regulatory Regime and Fee Structure for Insolvency Practitioners Consultation' (2014) The Insolvency Service <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/280880/Strengthening_the_regulatory_regime_and_fee_structure_for_insolvency_practitioners.pdf> accessed 19 July 2020.

Wolf A, 'A Global Cross-Border Insolvency Framework for Financial Institutions' (2015) 1 < https://cadmus.eui.eu/bitstream/handle/1814/34519/MWP_2015_01.pdf?sequence%253D1> accessed 20 January 2021.

World Trade Organisation, 'Who are he Developing Countries in the WTO?' (unknown) World Trade Organisation < https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm > accessed 4 July 2018.