*Unravelling The Mystery Of* *The COMI: A Legislative Attempt To Solve The Unique Challenges Presented to Finding the COMI of Business Enterprise Groups.*

***By Andrew Kamuteera Munanura***

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**Author Statement**

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**DECLARATION OF HONOUR**

I declare that the paper, titled “***Unravelling the mystery of the COMI: A Legislative Attempt to Solve the Unique Challenges Presented to Finding the COMI of Business Enterprise Groups.***” is my own work, that it has been prepared independently and that all references to, or quotations from the work of others are fully and correctly cited.



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**Signed**

**Date**: 7th February 2022

**Place**: Kampala

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## Chapter 1- INTRODUCTION

The development of the concept of the Centre of Main Interests (COMI) was mainly to determine the jurisdiction, law applicable and reliefs available to insolvent entities. This term was introduced by Working Group V in the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law) and subsequently included in the EU directive 1346/2000. It was maintained in the Regulation (EU) 2015/484 of the European Parliament and the Council of 20 May 2015 on insolvency proceedings (EIR recast).

Both legislative texts of the Model Law and EIR recast are aimed at addressing cross border insolvencies of business enterprises[[1]](#footnote-1)(a term used in the Model Law) or group of companies[[2]](#footnote-2) (a term used in the EIR Recast). At the heart of the EIR Recast and Model Law is the desire to impose a uniform set of rules pertaining to jurisdictional aspects of all cases within their ambit. The EIR Recast and Model Law will apply to entities in jurisdictions that are in a participating Member State in the European Union and such states that have codified the Model law respectively. The United States of America has codified the Model Law[[3]](#footnote-3).

As markets have evolved and the manner of doing business has taken on a new characteristic, businesses have quickly followed suit. Business enterprises have evolved into business dynasties or multinational businesses and like the kingdoms of old have trekked the earth in search of new consumers and markets. In their scramble to “colonise” new markets, enterprises have been forced to comply with local laws to authenticate their business status to enable them to legally operate in those markets. In so doing, “new” businesses though under the same name or management have been “birthed” in several nations around the world operating under different legal regimes.

Over the last century, business enterprises have increasingly organized themselves as multinational groups of companies[[4]](#footnote-4). The globalization of business means that multinational enterprises operate in a number of countries through companies incorporated under local laws. These companies might be tightly tethered to a parent company or loosely related to other entities spread across countries and continents without significant centralized control[[5]](#footnote-5).

Whereas the character of a business enterprise may not cause much difficulty when each member of the enterprise is solvent, the same cannot be said when one or several of the members are insolvent. It has therefore become increasingly important that insolvency laws are able to deal with the challenges specific to cross-border insolvencies involving groups of companies[[6]](#footnote-6) so as to address the detrimental effect on the overall value of a group arising from the uncoordinated method of resolving group insolvencies as separate individual proceedings.

While groups of companies comprise legally separate entities, they will often economically operate as an integrated enterprise. If that is the case, the value of that business enterprise in case of financial difficulties may very well be higher if a solution is found for the group as a whole, compared to a piecemeal liquidation. The interdependency between the group companies will often also result in a “domino effect”: if one or several group companies become(s) insolvent, the financial difficulty will often push other group companies into insolvency proceedings as well. Within national contexts, insolvency practices have regularly developed methods of dealing with these challenges. When multiple national insolvency laws come into play, however, these difficulties increase exponentially[[7]](#footnote-7).

The global insolvency system however suffers from a critical mismatch. An effective restructuring aims to preserve the value of the business, but the national and cross-border legal tools available to achieve that result instead focus on the separate legal entities that make up the business. Since virtually every significant business enterprise is divided up into multiple different legal entities, the business cannot be restructured unless all critical enterprise group members adopt consistent rescue plans. This is a problem under most national financial restructuring regimes even if all members of the enterprise group are located in the same jurisdiction. The challenge of developing a group-wide solution to financial distress is exacerbated if the restructuring proceedings of different critical group members must take place in different jurisdictions under differing legal regimes[[8]](#footnote-8). This mismatch justifies the development of concepts such as the COMI.

The Model Law and the EIR Recast reflect the largely unsuccessful attempt to come up with a coherent theory that can honor the separate legal entity status of each group member while achieving an enterprise-level group restructuring. Like all legal innovations, the COMI concept is not devoid of challenges. Whereas the Model Law and the EIR Recast try to deal with enterprise group insolvencies, they seem to not specifically address most of the challenges that were there before these legislative texts and continue to affect cross border insolvencies that relate to business enterprises.

This short paper sets out to examine the challenges faced by courts, insolvency practitioners and scholars when identifying the COMI of a business enterprise and review of the effectiveness of the Model Law and EIR Recast in dealing with these challenges. This short paper is therefore organized as follows: Chapter 1 above is a brief introduction to this paper. Chapter 2 deals with the concept of COMI. Chapter 3 will identify the challenges that business enterprises present to finding the COMI and assess the effectiveness of the Model Law and EIR Recast in addressing these challenges. Chapter IV is the conclusion.

## Chapter 2- THE CENTRE OF MAIN INTERESTS

The work of the European Union and the United Nations Commission on International Trade Law is part of the global effort to find solutions for the unique problems presented by business enterprises that are faced with insolvency. The evolution of cross-border businesses guaranteed that such a business would have assets and liabilities across borders.

Insolvency law has always had to deal with the debtor’s instinct to hide assets and the scrabble and partition of the debtor’s estate by creditors seeking to collect through attachment. Such actions which are purely driven by human instinct and greed rarely provide for an orderly manner of dealing with the affairs of an insolvent entity.

To regulating the cross-border insolvency issues of multinational groups of companies, the choice is generally between either taking a worldwide perspective so that global solutions may be applied (a universalist approach), or to have proceedings against group members handled within each relevant territory (a territorialist approach)[[9]](#footnote-9).

The term "centre of main interest" is a legal term introduced in the UNCITRAL Model Law on Cross-Border Insolvency and thus included in the EU directive 1346/2000 ("Directive"), which deals with cross-border insolvency proceedings within the member states of the European Union and, in particular, which member state is responsible for the main insolvency proceeding[[10]](#footnote-10).

The development of the concept of COMI was and is intended to curb the debtor’s desire to forum shop and enable an orderly distribution of the debtor’s estate. It addresses the debtor’s instinct of hiding assets by determining which court should have jurisdiction over the debtor’s assets while providing an automatic stay against creditor action. The key role of the COMI is therefore to determine which court has jurisdiction to open a main insolvency proceeding and what reliefs can be obtained by the debtor. The COMI is of great importance in cross-border matters as it determines both jurisdictional and governing law matters.

The COMI of a debtor is, in legal terminology, a connecting factor. Connecting factors come into play when a conflict of laws occurs and must be resolved as to which law or legal order applies. A connecting factor serves to dictate governing law in cross-border cases[[11]](#footnote-11).

Unlike the Model Law, Article 3 (1)[[12]](#footnote-12) of the EIR Recast has now formally defined the COMI as the place where the debtor conducts the administration of his interests on a regular basis, and which is ascertainable by third parties. Article 3 of the EIR Recast goes on to provide that the presumption that the place of the registered office is the centre of its main interests in the absence of proof to the contrary shall apply if in the case of a company or legal person the registered office has not moved to another Member State within the 3-month period prior to the request for the opening of insolvency proceedings. This period is 6 months for individuals whose COMI is presumed to be the individual’s habitual residence.

Whereas the registered place of business still has a role to play, the courts will give special consideration to creditors and their perception as to where a debtor conducts the administration of its affairs when determining the location of the COMI.

It is evident that both legislative texts are based upon the approach that each entity has its own COMI. The approach that each entity has its own COMI raises the pertinent question of how many COMIs a business enterprise may have. The legislative texts of both the Model Law and EIR Recast provide little help on how to deal with this quandary. With little clarity as to what is the COMI of a business enterprise is, the attempt by the Model Law and EIR Recast to legislate for group insolvencies has presented more challenges than answers.

## Chapter 3. THE CHALLENGES OF FINDING THE COMI IN INSOLVENCIES OF BUSINESS GROUP ENTERPRISES

Despite the great work of the Model Law and EIR Recast in dealing with enterprise group insolvencies, finding the COMI for business enterprise group insolvencies faces many challenges.

### 3.1 Definition

Whereas the EIR Recast has attempted to define the COMI in Article 3(1) as the place where the debtor conducts the administration of its interests on a regular basis, and which is ascertainable by third parties[[13]](#footnote-13) this definition seems to provide more of a criterion than a definition to enable a court to ascertain whether the COMI is within its jurisdiction.

The EIR Recast does not elaborate what constitutes the process of the administration of an enterprise’s interests on a regular basis and what it means to be ascertainable by a third party though these aspects are given special consideration. This presents its own challenges in determining where the COMI is situated for business enterprises as creditors may have different views as to where the administration of a business is. It is sad to note that the Model Law neither defines the COMI nor provides a criterion in finding the COMI of a business enterprise.

More surprisingly none of the legislative tests define an enterprise group COMI. Developing a definition that would be globally accepted, voluntarily adopted, and enforced by the courts is in no doubt an uphill task. This however isn’t an excuse for the omission.

The possibility of having two locations for the COMI is not envisaged by both legislative texts especially in a business enterprise situation neither do they address the unique character of business enterprises in administering their businesses. Some administration functions can be and are being conducted by business enterprises from different locations on a daily basis. It is not uncommon to find the finance and human resource functions of an entity governed from different locations. Neither do the two legislative texts envisage the possibility of having two COMIs. It is not uncommon for business owners to have several offices around the world from which they conduct the administration of their business affairs during the year on a daily basis. Not only does this make it difficult to determine the “administration of its affairs on a daily basis”, but it also makes it difficult for third parties to ascertain this fact.

Thus, one can deduce that the place where the main activity is carried out does not indelibly determine the COMI, but the administration of the interests of the debtor on a day-to-day basis coupled with the ascertainment of third parties (particularly creditors) should be considered. However, it has been argued that creditors (third parties) may have differing views in relation to such ascertainment and may create a challenging scenario. Nevertheless, it is suggested that creditors with the highest worth claims should be considered in such concerned cases[[14]](#footnote-14). This invariably puts creditors with lesser values at a disadvantage even in instances where their view with regards to the location of the COMI is the right one.

What is even more interesting with the definition or criterion is that it leaves out the role of the location of assets in determination of the COMI yet preserving value is at the heart of insolvency law. It is noted that secondary or non-main proceedings can only be opened where an entity has an establishment[[15]](#footnote-15) not assets yet the debtor’s assets are of critical importance when an entity is faced with insolvency.

The limited scope of the definition and lack of clarity on what the administration of the interests of the debtor on a day-to-day basis”’ and “ascertained by third parties” means, presents a unique challenge in finding the COMI of a business enterprise.

### 3.2 COVID - 19 and Artificial Intelligence

The current global health pandemic and enormous work on artificial intelligence and their impact on the way businesses conduct their affairs presents a unique challenge in locating the COMI of a business enterprise. The EIR Recast and the Model law do not legislate for this and such challenges. The pandemic has shown that the concept of the COMI of a business let alone a business enterprise will and can become affected by external forces that will make it increasingly difficult to find.

Without defining the parameters for “administration of its affairs on a daily basis and ascertainable by third parties” it can and will be difficult to ascertain the COMI of a business enterprise facing insolvency in such times. This is because for the last three years people have had to work from home. Home would therefore be determined by where the lockdown found the owners or directors of these entities. With the internet and artificial intelligence, business entities continued to operate remotely. How to determine the COMI of an entity that is operating remotely presents a unique challenge for the courts which are tasked with the duty to find the COMI.

### 3.3 Forum shopping.

An insolvency system should aim at enabling creditors to foresee where the insolvency of a company is going to take place and calculate their risk accordingly[[16]](#footnote-16). Unfortunately, both the EIR Recast, and the Model law do not provide such clarity. Whereas the EIR Recast gives some direction, the likelihood of the COMI changing during the lifetime of the enterprise cannot be barred by legislation. Enterprises will, like human beings, change location. Whether this is done purely for strategic advantage or otherwise should not be the basis of discouraging such movement. Owing to the unpredictable nature in which these entities operate, the risk accessed at the point of contract may fundamentally change at the point of insolvency. Unfortunately, courts do not determine the COMI at the point of incorporation or entering into transactions but rather at the point of filing insolvency proceedings. This presents a window of opportunity for enterprise groups to withdraw from one jurisdiction to another which presents a major challenge not necessary for the courts but for third parties dealing with enterprise groups.

Worse still a mere agreement establishing the COMI of the enterprise at the point of dealing with an enterprise group is not sufficient to determine the COMI. While a contract may select the choice of law, the court determining the COMI is not obligated to use that law. Because of this challenge, an enterprise group may obtain an advantage at the expense of third parties by resorting to “evasive or confusing techniques of organising his business or personal affairs, in a way calculated to conceal the true location from which interests are systematically administered”[[17]](#footnote-17).

The challenge of forum shopping seems to persist despite the work of the Model Law and EIR Recast. This is inevitable due to the increase in human creativity and evolution of business strategies. The issue of forum shopping is further facilitated by the fact that the Model Law and the EIR Recast do not address the issue of a group COMI and they apply different standards.

Usually, an entity gradually slides into insolvency. This means that entities can strategically shift their COMI to comply with the legislative requirements and evade the restrictions on forum shopping. What would probably be harder to shift namely assets is ignored in locating the COMI of an entity.

### 3.4 Character of a Business Enterprise.

The central difficulty is the tension between the legal theory of the corporate form and the reality of group conduct. The corporate form is not merely a legal concept to be safely ignored in the face of practical realities. It is economically important to defend that form to the extent of legitimate expectations it creates in various actors, notably shareholders, managers, and creditors. On the other hand, a corporate group may create group-oriented expectations and collective legal difficulties not associated with stand-alone companies. The whole problem is further complicated by the great variation in the relationships among affiliates in a corporate group. Some affiliates are virtually independent, with the group a passive investor, while others are mere shells under central direction, ignored in every practical decision and not noticed even by creditors and other stakeholders. Some groups operate generally closer to one end of that spectrum than the other, while other groups have affiliates scattered along various points on that line. The great problem for an international solution is that most countries have no good answers to the question of legal treatment of corporate groups in their domestic laws. Although we know that corporate groups are common in international commerce, it is always important to develop the specific facts[[18]](#footnote-18).

There is therefore no doubt that whereas the concept of COMI on its own may have little challenge, the problem seems to be the failure to tailor the COMI to fit enterprise groups. The Model law and the EIR Recast have not developed the concept of a group or business enterprises COMI. As seen from Article 3 of the EIR Recast and court decisions on this matter, each entity that is part of a business enterprise can have its own COMI.

### 3.5 Jurisdictional Conflicts and conflict in law

It is no doubt that it is “difficult to avoid parallel proceedings being commenced in several states with each seeking to be the main proceedings and determining the Enterprise Group COMI would not reduce the number of different laws that might be applicable[[19]](#footnote-19).

Insolvency law is not immune to the danger of conflicting court decisions on a matter. It therefore follows that under some circumstances, two different courts in two jurisdictions may come to the conclusion that the COMI is located in their territory. In dealing with this matter Judge Brozman held in *re Maxwell Communication Corporation plc, 170 BR 800 at 817 “in the age of multinational corporations, it may be the two (or more) countries have equal claim to be the “home country” of the debtor. Certainly, one could not simply employ the nation of incorporation alone as the determinant for identification of the home country. Rather, to arrive at a reasoned selection for choice-of-law purposes, one must look at this factor and more, factors such as where the debtor's "nerve center," assets, and creditors are located and where the debtor's business is primarily conducted. Other factors would include the reasonable expectations of parties, as the Supreme Court adverted to in Gebhard.*[[20]](#footnote-20).

Such safeguards are aimed at “minimizing the impact of any attempts to open proceedings in a jurisdictionally improper forum[[21]](#footnote-21)”. However, the greatest innovation of these laws to lighten this challenge is the promotion of communication, cooperation and coordination of proceedings between courts that are handling these matters. This approach has enabled courts and insolvency practitioners wade through the murky waters of enterprise group insolvencies.

## Chapter 4. CONCLUSION

Whereas both the Model Law and EIR Recast must be commended for the efforts to assist in resolving insolvencies which deal with business enterprises, it is in no doubt that there is still a long way to go before satisfactory answers to the unique challenges that are presented by insolvent business enterprises are obtained. While pursuing better answers is inevitable, the Model Law and EIR Recast are a great foundation to build on as the business and legal world continues to grapple with the challenges in finding the COMI in business enterprises.

1. Article 2 a) of the UNCITRAL Model Law on Enterprise Group Insolvency defines an enterprise to mean any entity, regardless of its legal form, that is engaged in economic activities and may be governed by the insolvency law. Article 2b) defines an enterprise group to mean two or more enterprises that are interconnected by control or significant ownership he United Nations Commission on International Trade Law, UNCITRALModel Law on Enterprise Group Insolvency with Guide to Enactment at Page 2 at <https://uncitral.un.org/en/MLEGI> assessed on 31 January 2022 [↑](#footnote-ref-1)
2. Article 2(13) of Regulation (EU) 2015/848 of the European Parliament and the Council of 20 May 2015 on insolvency proceedings (recast) at <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32015R0848> accessed on 2 February 2022 defines group of companies to mean a parent undertaking and all its subsidiary undertakings [↑](#footnote-ref-2)
3. 11 US Code Chapter 15 at <https://www.law.cornell.edu/uscode/text/11/chapter-15> accessed on 31 January 2022 [↑](#footnote-ref-3)
4. Sid Pepels, Defining groups of companies under the European Insolvency Regulation (recast): On the scope of EU group insolvency law, International Insolvency Review published by INSOL International and John Wiley & Sons Ltd at Page 96-97 at<https://onlinelibrary.wiley.com/doi/full/10.1002/iir.1402> accessed on 31 January 2022 [↑](#footnote-ref-4)
5. Professor Sandeep Gopalan and Michael Guihot, “Cross Border Insolvency Law and Multinational Enterprise Groups: Judicial Innovation as an International Solution” at Page 551-552 at [https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2773346#](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2773346) accessed on 30 January 2022. [↑](#footnote-ref-5)
6. Organisation For Economic Co-operation and Development, “Glossary of Industrial Organisation Economics and Competition Law” at Page 42 at <https://www.oecd.org/regreform/sectors/2376087.pdf> accessed on 30 January 2022 [↑](#footnote-ref-6)
7. Sid Pepels supra [↑](#footnote-ref-7)
8. G. Ray Warner and Michael Veder, “Enterprise Group Restructuring: Dutch Options and United States Enforcement” at <https://eirjournal.com/content/EIRJ-2021-7> accessed on 30 January 2022 [↑](#footnote-ref-8)
9. Eva M. F de Vette Multinational enterprise groups in insolvency: how should the European Union act? at

   <https://www.utrechtlawreview.org/articles/10.18352/ulr.156/> accessed on 5 February 2022 [↑](#footnote-ref-9)
10. Oliver Sutter, The centre of main interest is in the eye of the beholder: The perspective from Europe

    at <https://www.nortonrosefulbright.com/en/knowledge/publications/8f6190bb/irnw-germany> accessed on 7 February 2022 [↑](#footnote-ref-10)
11. Střížová, Veronika, The Never-Ending Challenge of Defining COMI (This Time Due to Groups of Companies) (June 27, 2019). Charles University in Prague Faculty of Law Research Paper No. 2019/II/6 , Available at SSRN: <https://ssrn.com/abstract=3415584> or [http://dx.doi.org/10.2139/ssrn.3415584](https://dx.doi.org/10.2139/ssrn.3415584) accessed on 3 Februrary 2022. [↑](#footnote-ref-11)
12. Regulation (EU) 2015/848 of the European Parliament and the Council of 20 May 2015 on insolvency proceedings (recast) at <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32015R0848> accessed on 2 February 2022 [↑](#footnote-ref-12)
13. Regulation (EU) 2015/848 of the European Parliament and the Council of 20 May 2015 on insolvency proceedings (recast) at <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32015R0848> accessed on 2 February 2022 [↑](#footnote-ref-13)
14. All Answers ltd, 'Centre of Main Interests (COMI) Challenges in EU States' (Lawteacher.net, February 2022) <https://www.lawteacher.net/free-law-essays/european-law/centre-of-main-interests-eu-states-1375.php?vref=1> accessed 3 February 2022 [↑](#footnote-ref-14)
15. Article 2(10) defines an establishment to mean any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets. Regulation (EU) 2015/848 of the European Parliament and the Council of 20 May 2015 on insolvency proceedings (recast) at <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32015R0848> accessed on 2 February 2022 [↑](#footnote-ref-15)
16. Irit Mevorach, The ‘Home Country’ of a Multinational Enterprise Group Facing Insolvency” at Page 433-434 at <https://nottingham-repository.worktribe.com/preview/1015327/Mevorach_ICLQ_pdf.pdf> accessed on 2 February 2022 [↑](#footnote-ref-16)
17. Fletcher, Ian F, *Insolvency in Private International Law*, Second Edition, Oxford University Press, p 367 [↑](#footnote-ref-17)
18. Professor Jay Lawrence Westbrook, Supra at Page 9 [↑](#footnote-ref-18)
19. Eva M. F de Vette Multinational enterprise groups in insolvency: how should the European Union act? at

    <https://www.utrechtlawreview.org/articles/10.18352/ulr.156/> accessed on 5 February 2022 [↑](#footnote-ref-19)
20. At <https://casetext.com/case/in-re-maxwell-communication-corp-plc-1> accessed on 28 January 2022 [↑](#footnote-ref-20)
21. Fletcher, supra-Page 372 [↑](#footnote-ref-21)