***Challenges in finding the COMI of business enterprise groups. Position of EU Insolvency Regulations and UNCITRAL Working Group V - Model Law on the insolvency of enterprise groups.***

**Arvind Kumar**

**Global Insolvency Practice Course**

**2021-22**

**Table of Contents**

1. The Centre of Main Interest "COMI" Concept**2**
2. Business group enterprise in the insolvency context.**4**
3. The need to find the centre of main interest, COMI, of business enterprise group…. **5**
4. Challenges in finding the centre of main interest "COMI" of a Business Group Enterprise (BGE).**5**
5. Is the challenge worth taking? **11**
6. The European Union Insolvency Regulations and group COMI.**11**
7. UNCITRAL Model Law on the Insolvency of Enterprise Groups and COMI issues of business enterprise groups.**14**
8. Conclusions.**16**
9. End Notes.**17**
10. Bibliography.**17**

***Challenges in finding the COMI of business enterprise groups. Position of EU Insolvency Regulations and UNCITRAL Working Group V - Model Law on the Insolvency of Enterprise Groups.***

*For business group enterprises facing insolvency, identifying COMI is essential for ensuring a feasible group-wide insolvency solution. However, finding a venue to serve the role of group COMI is challenging. The challenges spring due to the diversity of group structures, business models, interconnectedness and interdependencies of group members, and group COMI's expected role. Identifying these challenges and understanding their origins can help design alternatives to address business group enterprises' insolvencies in domestic and cross border scenarios. The paper highlights how the quest for a true group of COMI exposes its inefficiencies as it ruffles many settled principles in corporate law. It also describes how lowering the expectations from a group COMI venue in its full glory can lead to efficient and effective alternatives and how EIR Recast and UNCITRAL Model Law on enterprise group insolvencies attempts to mitigate the challenges of finding group COMI after rationalising the expectation from its role.*

1. **The Centre of Main Interest "COMI" Concept.**
   1. **Origin** **Centre of Main Interest "COMI" Concept.**
2. COMI is a concept unique to cross border insolvency laws. The Virgos Schmit report to Istanbul/ Brussels Convention first coined this term. UNCITRAL model law on cross border insolvency 1997 used the term COMI after that. In 2000, the European Union adopted it in European Union Insolvency Regulations.
3. Historically the insolvency laws were confined to the boundaries of national jurisdictions. With the increased globalisation, the enterprises expanded their operations beyond the national boundaries. The business failures, a local phenomenon, no longer remained the same and affected many jurisdictions. The absence of any unifying law relating to insolvencies of multinational groups usually led to the initiation of fragmented proceedings in various jurisdictions, which rarely achieved revival of the businesses. Efforts to address the issue required a change in mindset and involved a paradigm shift from territoriality to the universality of insolvency laws.
4. States used conventions and treaties to harmonise cross border insolvency law in the absence of a universal law applicable to all sovereign jurisdictions. However, the route of treaties and conventions is not always possible. The alternative to these was the concept of soft law, which aims at developing model laws for adoption by states into their domestic laws. It aims to enact similar laws across states and thus promotes harmony among those laws, though less intense than achievable by treaties and conventions. UNCITRAL Model Law on cross border insolvency (MLCBI) is one such global attempt in this direction.
   1. **Cross border insolvency law - needs and purpose.**
5. The purpose of the cross-border insolvency laws is to address the insolvency of a debtor where the debtor has assets in more than one State or where some of the debtor's creditorsare from other States*.* For such debtors, there is a possibility of initiating multiple insolvency proceedings in different states. The cross-border insolvency laws provide for the cooperation and coordination between the states and courts in different States to achieve the objective of efficiency, fairness of proceedings and maximisation of the values of assets.
6. Explaining the origin of cross border insolvency law, the MLCBI states that "*The increasing incidence of cross-border insolvencies reflects the continuing global expansion of trade and investment. However, national insolvency laws by and large have not kept pace with the trend, and they are often ill-equipped to deal with cases of a cross-border nature. "* ***1****.*
7. The need for Cross border insolvency laws arose as the national laws lacked effective mechanisms to ensure *the rescue of financially troubled businesses, protection of the insolvent debtor's assets against dissipation, and maximisation of the value of those assets. The national laws were found to be leading to uncertainties of the outcome of insolvency proceedings resulting in impediment in capital flows across borders****2****.*
8. The cross-border insolvency laws attempt to promote cooperation and coordination among the courts of various jurisdictions and strives to reduce the multiplicity of the proceedings to the bare minimum.
   1. **Centre of main interest COMI under UNCITRAL Model law on cross border insolvencies (MLCBI) and European Union Insolvency Regulations (EIR).**
9. The premise of cross border insolvency law as contained in the MLCBI is that debtor having assets/establishments/ creditors in more than one jurisdiction can face multiple proceedings in the event of its insolvency. These proceedings are characterised as main and non-main proceedings. The main proceedings enjoy universal impact, whereas the non-main proceedings have local impact limited to the assets in that jurisdiction. Characterisation of the proceedings as main and non-main depends on the location of the proceedings. The proceedings opened in the State of COMI are characterised as main proceedings and the rest as non-main proceedings.

The MLCBI does not prohibit multiple proceedings; however, it provides that instead of opening separate proceedings, recognition of proceedings opened in one State may be sought in another state. Upon recognition, the recognising state grants right to seek relief in that State. The nature of these reliefs depends upon whether the proceedings recognised are main or non-main. The ultimate purpose of determining COMI under MLCBI is thus to determine what reliefs are to be accorded to the proceedings in the recognising State when seeking recognition for such proceedings.

1. EU EIR also uses the concept of COMI though it serves a different purpose in those regulations. In EIR, the COMI decides the jurisdiction of the court to open insolvency proceedings and which member state's laws take precedence if there are more than one insolvency proceedings in different member states.
2. The concept of centre of main interest "COMI" is a nucleus around which the proceedings of cross border insolvency laws revolve. Stressing the importance of the COMI, UNCITRAL Model Law on Cross Border Insolvency: Guide to enactment and interpretation, states that "*The concept of a debtor's centre of main interest "COMI" is fundamental to the operation of the model law* ***3*."**
3. Despite the importance of the concept of COMI, neither MLCBI nor the EU EIR defines it. Both the enactments use COMI's concept in relation to a unitary business enterprise with assets/establishments or creditors in more than one international jurisdiction; neither MLCBI nor the EU Regulations provide anything about group COMI.
4. **Business group enterprise in the insolvency context.**
5. A business group enterprise (BGE) is a group of interrelated and interconnected entities engaged in economic activities. A corporate form is a predominant form of organisations conducting business in groups. These days, most businesses are owned and conducted through corporate entities primarily because of the benefits of the principle of limited liability of the members and separation of the corporate entity from its owners (Shareholders).
6. Innovations in corporate laws made it possible for a corporate entity to create another entity and acquire its ownership, leading to corporate ownership of corporate entities in the form of parents and subsidiaries. Members of such multinational groups may be few and situated in one State or thousands spread across other states. Relationships among these may be straightforward or complex, flowing from one to one or each one to everyone.
7. Under insolvency law, group enterprises become an important entity due to the peculiar nature of group insolvency. In a group of interrelated entities, there is a risk of spreading financial stress from one member to another that requires looking for a group-wide cure to its insolvency. In a group setting, solutions at the individual level of the group member usually yield sub-optimal results. A group's members facing insolvency, that although have separate identities, are so interlinked that the insolvency of one member may cause the insolvency of the entire group. Defining a group in insolvency must consider this aspect of links between the members. The groups structured on insolvency remoteness principles may not be candidates for group designation in insolvency proceedings. Each member of such group will bear the consequences of its insolvency without affecting other members. If this is the case, there is no requirement to develop group insolvency solutions, and any forced unification of such members in a group will be unhelpful in achieving the goals of cross border insolvency laws.
8. **The need to find the centre of main interest "COMI" of business group enterprise in insolvency.**
9. COMI is a concept unique to cross border insolvency laws. Finding COMI of a group enterprise implies applying a centralised/global approach to solving the situation of group insolvency. The term group insolvency does not imply the insolvency of the entire group; it means that some of the group members are insolvent or on the verge of insolvency, and their insolvency can cause the insolvency of other members. This further enforces the view that a group in the context of insolvency means a group of interconnected, interdependent entities.
10. The need to find a group COMI arises from the assumption that for a group consisting of interconnected and interdependent entities, a group-wide insolvency solution can be devised only at the level of group COMI. As the members are interconnected, they can benefit from a centralised/global approach. The interdependencies among the group members may be financial, technological, legal or administrative. Fragmented groups with no mutual interdependencies among the members are not groups envisaged under insolvency laws; they gain nothing from group insolvency proceedings and do not require centralised solutions envisaged by group COMI.
11. The purpose of a global approach to the insolvency of BGE is to *develop a group insolvency solution for the whole or part of an enterprise group and cross-border recognition and implementation of that solution in multiple States"* ***4***. The purpose of finding COMI in respect of BGE is thus to find a venue for preparing an all-encompassing plan of reorganisation of the group that may be capable of implementation in multiple jurisdictions where different members of a group are situated. One should remain cautious that the structure, model, interconnectedness, and interdependencies among members may change with time and COMI at one point of time may not be the COMI next time.
12. **Challenges in finding the centre of main interest "COMI" of a**

**Business Group Enterprise (BGE).**

*Finding the COMI of a group is an enduring endeavour. The process involves the risk of violating certain long-established legal principles related to corporate entities, contracts, and the choice of jurisdictions. All these violations are weighed against the perceived benefits of group-wide insolvency solutions in centralised proceedings viz. cost efficiencies, process fairness, certainty and predictability and reduced instances of forum shopping. True COMI of a business enterprise group should objectively demonstrate the outweighing of these sins of violation by the benefits of centralised proceedings. Finding such a group COMI venue is not an easy task and require addressing many challenges in the path leading to its discovery*

* 1. ***Changing the rules of the game!***

1. The quest to find COMI of a BGE starts on the ashes of principles of the separate legal entity of corporates. One legal factor that mainly takes credit for the business growth in corporate form is the separate legal entity status of the corporates and associated limited liabilities of members. Regardless of their shareholders, two corporate entities are separate entities with separate legal identities, perpetual succession, and rights to own and enjoy properties and separate liabilities. They can transact with each other as separate persons, sue each other and exist separately and independently. The separation of the corporate entities is not just between them but also with respect to their members (shareholders). The concept of group COMI violates this very basic principle. The group COMI implies that the entities are controlled from one place and are so interrelated that it is difficult to separate them.
2. COMI is stated to be analogous to *heads and limbs****5****,* the control centre being the head and other members of the group limbs, implying that limbs cannot survive without head and head without limbs is useless. This is a clear violation of the basic principles of the corporate form of entities, i.e. separate legal entity and perpetual succession. The very concept of COMI of the group is against the ethos of corporate laws and takes away the benefits which led to the birth of the corporate form of business. With this concept, the members of corporate groups surrender their separate identities and lose the limited liability shield.
   1. ***Finding an imaginary power centre****.*
3. The concept of group COMI implies that a power centre must exist within the group from where the fate of all members can be decided. Such a power centre may exist in some highly integrated, vertically interdependent organisations engaged in sequential activities where the outputs from one member are the inputs to another for final products, but that is not a norm. Compulsorily finding COMI in all group insolvency matters would require altering the relationship among the members or imagining it. The controlling power centre is an imaginary all-powerful organisational centre that must be found. It ignores the heterogeneity of the group structures, business model, and relationships between the members.
4. The group structure presents a major challenge in the determination of its COMI. *Enterprise group structures may be simple or highly complex, involving numbers of wholly or partly owned subsidiaries, operating subsidiaries, sub subsidiaries, sub-holding companies, service companies, dormant companies, cross-directorships, equity ownership and so forth. They may also involve other entities, such as special purpose entities (SPE) joint ventures, offshore trusts, income trusts and partnerships. Enterprise groups may have a hierarchical or vertical structure, with succeeding layers of parent and controlled group members, which may be subsidiaries or other types of affiliated or related entities, operating at different points in a production or distribution process. Enterprise groups may also have a horizontal structure, with many sibling group members, often with a high degree of cross-ownership, operating at the same level in a particular process. Group entities may have been formed on principles of bankruptcy remoteness* ***6****".*
5. Finding an all-powerful power centre of the group, as the group COMI concept envisages, may not always be possible. However, if the entire process of group insolvency sees the COMI as a launchpad, proponents of group insolvency will create an imaginary power centre and name it as group COMI, whether or not it exists.

* 1. ***Meeting (destroying) the expectations of the proper venue?***

1. Corporate business enterprises are much more than their business and shareholders. Workers/ employees, creditors, regulatory authorities are significant stakeholders in such organisations. All join or serve an organisation having faith in assurances and guarantees available under the corporate form. The corporate form provides certainty about the place of incorporation, the applicability of the law relating to the transactions with the organisation and certainty about the proper venue to resolve any differences. The group COMI concept is the antithesis of all assurances and guarantees available under the corporate form of the organisation. It is very much possible to determine Group COMI at a place completely different from the place of incorporation of a corporate. The group COMI concept cannot honour the legitimate expectations of the employees, workers, creditors, and regulators. It can lead to legal challenges and undermine the objectives cross border insolvency laws.
   1. ***Encouraging forum shopping.***
2. Finding group COMI is a purposive exercise. While beginning the journey to find COMI of a group facing financial stress, the objective in mind is to find a venue to develop a group insolvency solution for the whole or part of an enterprise group and cross-border recognition and implementation of that solution in multiple States. With this objective in mind, management/courts determine group COMI.
3. There are many perspectives to view and analyse a group to determine its control centre. The group's structure may be analysed from an ownership perspective, control perspective, interdependencies (financial or operational) perspective. Each perspective can suggest a different choice of venue eligible for the role of group COMI. The cost of the process and the efficiency of the legal system can also dictate the choice of group COMI venue. The jurisdiction's international importance is another factor that can dictate the choice of venue for group COMI. A less effective group, COMI in an influential jurisdiction that has clout to enforce its judgments, is usually a choice over a true group COMI in less influential jurisdiction.
4. In practice, the management decides the choice of venue of group COMI. The venues which offer maximum protection against past acts (misdeeds) of the management will be the preferred choice of the management, other benefits offered by alternative venues may weigh less in the face of such considerations. The COMI is thus not the actual COMI, but which suits those who choose it. It may be justified and shifted to any venue that suits the suiters. The group COMI finding exercise is essentially a voyage for venue shopping. It is paradoxical as one of the objectives of finding group COMI is to minimise instances of forum shopping.
   1. ***COMI for substantiative Consolidation or procedural Consolidation or just for coordination.***
5. The objective of determining COMI in group insolvency is to find a venue to develop a group-wide insolvency solution for the whole or part of an enterprise group. The nature of the proposed resolution plan will play an important role in determining the COMI venue. The plan may propose substantive consolidation or a procedural consolidation. If the plan proposes a substantive consolidation, actual or deemed, to device a group-wide rescue plan, the choice of group COMI venue must consider the fact that the concept (substantive consolidation) is known to the legal system of the venue. Only a very few jurisdictions recognise the substantiative consolidation, and thus the COMI of the group cannot be outside these jurisdictions. The group will be forced to "find" its COMI in any such jurisdiction whether or not it exists there.
6. On the other hand, there can be many suiters' venues for the COMI job if the plan is for procedural consolidation. The group COMI chosen may not be the true group COMI; however, it is chosen as it fits into the plan's objective or helps in the execution of the plan. Whether group COMI venue dictates the nature of the plan or the nature of the plan dictates the choice of COMI venue? Any arguments, for or against, expose the fragile nature of the group COMI.
7. Another aspect of the group COMI is that given the group's structure, interconnectedness & interdependencies among the members of the group, there may not be any group COMI in its true sense. In such scenarios, the group COMI venue only coordinates the otherwise individual fragmented proceedings. The term COMI in such a case may be entirely misleading for its true meaning and purpose.

The term COMI thus does not stand unless its purpose clutches it, i.e., COMI for substantiative consolidation or procedural consolidation or coordination. For a group in insolvency, these may be different venues simultaneously.

* 1. ***COMI is in the eyes of creditors: violating the jurisdictional rules.***

1. The fairness of the insolvency process (especially in international insolvency matters) demands that there should be a certainty of the jurisdiction of the proceedings to the creditors. The insolvency forum should correspond to the legitimate expectations of the creditors. Certainty of the law that governs plays an important role in the relations of debtors and creditors. When deciding to deal with a debtor, the creditors assume the law's certainty that would govern payment and security issues.
2. In deciding the cost of credit, creditors consider the insolvency risk of the debtor. Creditors factors in their rights and security position in the debtor's insolvency while determining the cost of credit. Different jurisdictions provide different rules for priority in payment and enforcement of securities in insolvency. Change in these rules exposes the creditors to the uncertainty's new legal regime. The concept of establishing a group COMI implies making all the member entities of the group subject to one jurisdiction, which violates the rules of respecting the legitimate and reasonable expectations of the creditors in issues of international insolvencies.
3. COMI of an enterprise is the venue that is ascertainable by third parties. The group COMI concept does not respect this condition of ascertainable by third parties. Third parties of an international group may not be aware of its presence or members. They may be dealing with the local entities in their jurisdiction, and for them, COMI lies in that jurisdiction. Suppose the group COMI comes to be established in other jurisdictions for any reason. In that case, the foundation of ascertainably by third parties is gone. It will impede creditors' ability to calculate credit costs and participate in foreign jurisdictions group proceedings. Such disruption in the creditors' rights may make them resist any revival plan. It may lead to denial of fresh cooperation, or it may come at a higher cost. Meeting creditors expectations while determining COMI of a business group enterprise is a challenge that the insolvency managers must tackle with caution, considering its implications in the near times and on a long streak of relationships with creditors.
   1. ***Conferring too much discretion on courts.***
4. The quest for finding group COMI is purposive. The purpose is to devise group level plan of rescuing the debtor group in the insolvency or facing the prospect of insolvency. With the purpose in mind, all rules (if any exist) for the determination of group COMI can be ignored by the courts while dealing with group insolvency cases on the pretext of producing value-preserving enterprise-level solutions. In many nations (notably in the USA and UK), courts have approved restructuring enterprise group debt even though several group members had foreign COMIs. Courts have started designing their own rules to determine the group COMI and assuming jurisdiction over multinational group insolvency proceedings because it helps them produce value-preserving enterprise-level solutions.
5. The original concept of the group COMI has somewhat been lost in the race for achieving these value-preserving enterprise-level solutions. Lo Pucki Lynn M., in their book *Courting Failure: How Competition for Big Cases Is Corrupting the Bankruptcy Courts,* states that a competitive race is taking place between the courts*.* They state that it has corrupted the entire system. Authors explained the process of competition leading to corruption as *"court competition is an active, deliberate response by the court to forum shopping. When courts compete, they change what they are doing to make themselves more attractive to forum shoppers. If more than one court competes, the process becomes reiterative. Court A offers to do X for shoppers; court B offers to do X plus Y. Court C—or court A—can then offer to do even more. The court that offers forum shoppers the most may be the only one that gets cases in the end, but all of the judges who compete are corrupted along the way. Their actions are "corrupt" in that they are dictated not by an attempt to apply the law to the facts of the case but by the need to remain competitive* **7***".*
6. The purposive definition of group COMI has given the courts and practitioners a tool to manipulate it to suit any jurisdiction*.* The court in jurisdictions claiming to have extraterritorial jurisdiction (*Extraterritoriality by Intimidation)* and means to enforce compliance of their judgments have determined COMI of group enterprise on trivial considerations. In the case of Global Ocean Carriers, the Delaware court, while holding that to prove a connection to the jurisdiction the debtor should have a property in the USA, stated that *"having "property" in the United States qualified a foreign corporation to file bankruptcy in the United States. That property, the court said, could be "a dollar, a dime, or a peppercorn***8***."* The threshold to find group COMI has been brought to a so lower standard that one may find COMI anywhere.
7. Regarding the extraterritoriality of US laws and enforceability of the judgments in other states, the authors' Lo Pucki Lynn M. states that courts have adopted *Extraterritoriality by Intimidation* ***9*** *doctrine.* Judges simply assume jurisdiction as they feel they can enforce compliance with such judgments because of the creditors' dependence on the US financial system.

Perhaps the emergence of these scenarios was farsighted by those who coined the term COMI but chose not to define it.

* 1. ***COMI is not once for all.***

1. Finding group COMI is not a one-time event. The fluidic nature of the COMI concept and the factors upon which it rest can cause it to change even in a short time. The group COMI could shift even due to adopting a group reorganisation plan, which alters the group's structure or the relationship among its members. The group's structure, the level of integration between the group members, the interdependencies among the group members, and the group members' ownership can change over time, hence the group COMI.
2. Finding group COMI is a purposive quest in a given time, place and situation. Its choice depends upon when, where, and what situation it is being determined. A venue, group COMI in one situation, may not be in another. Once found to be group COMI, a venue may lose all its characteristics and no longer hold that position.
   1. ***Bringing home the aliens*.**
3. Devising a group-wide plan based on group COMI has its share of unintended consequences. One such consequence is making all the group members liable to all the liabilities of the group members.
4. Solutions derived using the group COMI concept imply that irrespective of the group members' form, structure, and interrelationship, they are so interrelated that they are regarded as one. In the case of substantive consolidation, the courts even confirm this fact. This may open the group members to the liabilities of other members. On the same reasoning as "oneness of group", a creditor can claim against any group member for his debt. The claim may be brought before the same jurisdiction that declared the group as one entity and approved group solution. It would not be easy to repudiate that claim by claiming separate legal personalities of group members, for the exact very separate legal personality, was abandoned at first while devising group insolvency solution using group COMI concept.
5. The group and its members post the implementation of a group insolvency solution based on group COMI cannot turn to creditors and claim separateness for their liabilities as per their convenience. Once the wall of separate legal identities, choice of law and forum is demolished, it becomes a path to walk for all.
6. Innovations and creative solutions are not a proprietary domain of bankruptcy courts, lawyers and practitioners. It would be too naïve to assume that the world outside bankruptcy cocoon is oblivious to the addition of new dimensions in bankruptcy laws. So-called newly found strengths of the new regime can be brought upon the regime itself; the regime, still in its infancy, may find these hard to bear.
   1. ***Expecting too much from other jurisdictions.***
7. *The objective of using group COMI in group insolvency matters is to find a venue to develop a group insolvency solution for the whole or part of an enterprise group and cross-border recognition and implementation of that solution in multiple States****10***. The solution found in group insolvency cases should get cross border recognition and be implemented in other states. This is too much expectation from other states. The benefits of group solutions found using group COMI can be negated entirely where one or more members critical to the group's success are domiciled in jurisdictions either not having an effective insolvency regime or shares not so good political relations with others. The search for group COMI ignores the geopolitical tensions among nations, their cultures, risk tolerance, and economic development. Finding an all-acceptable group COMI amidst such constraints is an uphill task.
8. **Is the challenge worth taking?**
   * 1. The challenges in finding COMI of business group enterprises are authentic and intimidating; however, so valid are the reasons to find it and its importance in furtherance of global trade, promoting fairness and certainty of legal processes in cross border insolvencies; cross border insolvencies now being every day encountered reality.
     2. The challenges in finding group COMI may be attributed to adopting a particular approach to finding it, the purpose of finding it and ascribing a particular meaning to it. Alternative approaches, purpose and meaning may make the group COMI easy to identify and serve a greater purpose.
     3. Conscious collective efforts have been made to face & overcome the challenges of finding COMI and ensure the success of the cross-border insolvency solutions. These initiatives are the UNCITRAL Model Law on Enterprise Group Insolvency and European Union Regulations (Recast). These two enactments have propagated alternatives to the concept of group COMI.

1. **The European Union Insolvency Regulations and Group COMI.**

**6.1 Earlier EU work on group companies and development of concept COMI.**

1. The original European Union Insolvency RegulationsEIR 2000 did not contain any specific provisions relating to insolvency proceedings concerning groups of companies. The regulations used COMI regarding individual entities having assets, establishment, or creditors in more than one member state.
2. EIR guides to ascertain COMI in the case of a company or legal person. COMI is presumed to be the place of the registered office in the absence of proof to the contrary. The presumption is rebuttable by demonstrating that the COMI is other than the registered office. There is no group COMI concept in EIR

**6.2 European Union Regulations (Recast) – Addressing the elephant in the room.**

1. EIR (Recast), introduces a new chapter (chapter V) relating to insolvency proceedings of members of a group of companies. The EIR's do not talk about group COMI and adopts a different mechanism to address the group insolvency proceedings. In the mechanism, the EIR's provides for a group coordination proceeding. A group coordinator is appointed to conduct these group proceedings. The group members can voluntarily participate in these proceedings and choose a court venue to preside over these proceedings. The group coordinator coordinates the insolvency proceedings of different members and prepares a group coordination plan that aims to address group members' insolvencies in an integrated manner. The group members are free to accept or reject the group coordination plan.
2. The EIR Recast defines 'group of companies as "*group of companies means a parent undertaking and all its subsidiary undertakings.****11****"*

The 'parent undertaking' is defined as to "*means an undertaking which controls, either directly or indirectly, one or more subsidiary undertakings****11****"*.

The group of companies is restricted to including the parent and its subsidiaries, whether they are controlled directly or indirectly.

1. The EIR Recast adopts the concept of "Group Coordination Proceedings", "Group Coordinator", and "Group Coordination Plan" to address the issue of insolvency of the group of companies, as against the concept of a group COMI.
2. **Group coordination proceedings** are opened at the request of any IP appointed in the insolvency of any member of the group. Any group member in respect of whom insolvency proceedings have been opened can voluntarily participate in these proceedings. The participation is limited to the members facing insolvency. Any group member not facing insolvency proceedings is left out of coordination proceedings. The members who opt to participate in these proceedings can (with a two-third majority in numbers) choose a court venue before which these proceedings will be conducted. A group coordinator is appointed to conduct the group coordination proceeding.
3. **Group Coordinator** is an insolvency practitioner who is not IP in the proceedings of any member of the group. The group coordinator is appointed by the unanimous choice of IPs of participating members. The group Coordinator *identifies and outlines recommendations for the insolvency proceedings; and propose a group coordination plan that identifies, describes, and recommends a comprehensive set of measures appropriate to an integrated approach to the resolution of the group members insolvencies****12****.* The coordinator can attend meetings of creditors of any participating member, mediate any dispute between IPs and prepare a group coordination plan setting out measures to an integrated approach to resolving the group members' insolvencies.
4. The EIR mechanism is an alternative manner of dealing with the insolvencies of a *group of companies. Rather than the abstract concept of finding a group COMI, it provides a* much more efficient way of handling the group insolvencies without violating the rules of separate legal entities and forcing a change of applicable law and jurisdiction.
5. The group coordination proceedings aim to coordinate the insolvencies of different group members. Permitting separate proceedings respects members separate legal entity status. Voluntary participation by the members and majority choice of venue of the proceedings respects the contracts for choice of law and forum. A member cannot be dragged to an unfamiliar forum without its consent.
6. Group coordinator appointed with a unanimous choice of the IPs of participating members rules out any possibility of dealing with a stranger. The authority of the group coordinator is sufficient to ensure effective coordination of the proceedings in respect of participating group members, thus ensuring effective coordination in proceedings.
7. Group coordination plan aims to address the group insolvency issues in an integrated manner and can involve even settlement of intragroup liabilities. The group coordination plan cannot be forced upon the participating group members, and they have an ultimate say in its acceptance. This further ensures their independence. The creditors cannot be forced to accept an outcome that is less optimal than the outcome they expect in local proceedings.
8. The EIR mechanism respects the separate legal entity concept and choice of jurisdiction. The EIR provides for the opening of separate proceedings in respect of the group entities at the place of their COMI in different States. The EIR comes into play only on the opening of proceedings against different members of the group in different member states. have been The members of the group then, through the opening of group coordination proceedings, come together and formulate a group-wide plan. This contrasts with the opening of centralised proceedings under the group COMI concept. The members voluntarily participate in the proceedings and accept a solution. The members can opt-out of the proceedings and cannot be forced to accept the plan in group coordination proceedings. The EIR Recast does not force participation, choice of plan, or the legal forum on the members. The entire process is consensual with the legal limits of applicable local laws and thus can generate effective outcomes.

**6.3** **EIR *on group companies insolvencies: too restrictive: too liberal: not a global player.***

1. The alternative approach to group COMI, adopted by the EIR Recast, is a comprehensive mechanism to deal with the insolvencies of group members in EU member states. It is procedurally clear but leaves scope for sub-optimal results in the context of the development of a comprehensive group solution.

Factors that contribute mainly to this sub-optimal performance are its applicability only to EU member states, the participation only by members facing insolvency proceedings, voluntary participation of a member and the capacity to reject the group coordination plan.

1. Eligibility to participate in the coordination proceeding only if the member is facing insolvency proceedings is too restrictive. The domestic law of the EU Member State governs the insolvency proceedings regarding members. A member critical to the success of a group coordination plan may be solvent in terms of applicable local law. Such group members thus will not be able to participate in the coordination proceedings. It may lead to a suboptimal group coordination plan. EIR's assumes simultaneous proceedings in respect of participating members. However, as the proceedings of group members are subject to local laws, which in different members states, such symmetry is not always possible. Different proceedings may be at different stages, and thus coordination of such proceedings is a huge challenge to the coordinator and limit the effectiveness of the coordination plan.
2. The voluntary participation of the group members' entities is in line with the separate entity principle and a reasonable compromise in transnational cooperation; however, the capacity to reject the group coordination plan after participating in the group coordination proceedings is too extreme a liberty and brings uncertainties to the entire process.
3. Another aspect that limits the effectiveness of the EIR is that these apply only to EU member states except Denmark. If a group member is outside the EU, it cannot participate in coordination proceedings. The issue becomes critical when (i) such outside member has provided or, (ii) has been provided guarantees to or by an EU domiciled member or (iii) owes debts to each other. A coordination plan cannot deal with these guarantees or debts. A creditor who has provided credit to two or more members of a group, some domiciled in EU and others outside, with guarantees from each other, also faces this dilemma regarding settlement under coordination plan as the plan can only deal with liabilities of an EU domiciled member. These factors limit the effectiveness of the EIR (recast) as a global tool to group insolvency resolution, though these overcome many of the challenges of finding a group COMI.

EIR work on addressing insolvencies of group companies is a pioneer work in this field. It effectively achieves the group insolvency outcomes in the EU context without the express requirement of finding group COMI. This alternative approach will inspire the development of many other future solutions to this issue, overcoming its present-day shortcomings.

1. **UNCITRAL Model Law on the Insolvency of Enterprise Groups and COMI issues of business enterprise groups.**
2. UNCITRAL Model Law on cross border insolvency (MLCBI) adopted in 1997 concerned itself only with the cross-border insolvencies of unitary enterprises. The MLCBI did not address the issues relating to insolvencies of group enterprises either in domestic or cross border situations.

1. The issues of group insolvencies were later addressed in 2020 by the enactment of Model Law on Enterprise Group Insolvency (MLG). The enactment considers various aspects of cross border insolvency of group enterprises and, among others, proposes to *"provide effective mechanisms to address cases of insolvency affecting the members of an enterprise group.* It aims to develop *"a group insolvency solution for the whole or part of an enterprise group and cross-border recognition and implementation of that solution in multiple States****13****".*
2. The MLG defines the term *Enterprise, Enterprise group, Enterprise group member, group insolvency solution, planning proceedings, main proceedings, solution, group representative* in the context of group insolvency proceedings of a business enterprise group.
3. UNCITRAL model law on Enterprise Group Insolvency (MLG) does not seek to determine the COMI of the group as a whole for addressing the group insolvency situation.

The model law's approach respects the different circumstances in which the group may be operating, the different structures of the groups and their business models, and the different levels of integration between the enterprise group members. Given these factors, it opens the main proceeding characterised as planning proceedings with respect to a member of the group in its (group member's) centre of main interest and a group insolvency solution is devised in these proceedings.

1. The planning proceedings are akin to the group insolvency proceedings at group COMI. Instead of making a finding of group COMI as a launchpad, MLG addresses the issues by opening planning proceedings in respect of *"group member that is a necessary and integral participant in that group insolvency solution".* It implies that the member where planning proceedings are opened has a role akin to "Control Centre" of the group though; however, the test here is not the actual control exerted by the group member over other group members but that without the participation of such member, group insolvency solution is not possible.
2. The MLG provides for the participation of other group members in the planning proceedings opened in respect of a group member, i.e., if planning proceedings are opened in respect of a member, other members of the group irrespective of whether they have their COMI in the same State or not can participate in these proceedings. The planning proceedings in respect of an individual member of the group thus take global shape because of the participation of other members of the group. The participation by other members is voluntary on the members' choice and subject to court approvals if required by the participating members.
3. Though the participation of other members is optional, in practice, such opt-out can only occur in exceedingly rare scenarios or where the applicable laws prohibit such participation. The MLG, in this respect, takes a very practical approach instead of finding an ever-elusive group COMI. In practice, planning proceedings are opened with ex-ante planning about the venue. It considers the level of participation of the members given the laws of their jurisdiction. Chosen venue will be such where the maximum number of required members can participate. The "required members" mean the members intended to be covered by the group insolvency solution, implying that all the group members may not be required to participate in planning proceedings. This respects the group structure and business model of the group. Once such a venue is decided ex-ante, the required members may be nudged (being part of the group connected through ownership or control) to participate in the proceedings. Thus, the planning proceedings venue under MLG achieves the same result as group COMI but albeit stealthily under the guise of obligations of cooperation and mechanism of coordination.
4. The MLG fortifies the planning proceeding venue's position as group COMI further by providing for the appointment of a group representative. The group representative performs various aspects of coordination, including sharing and disclosure of information; approval or implementation of agreements with respect to the division of the exercise of powers and allocation of responsibilities between insolvency representatives, cooperation on the use and disposal of assets, the proposal and negotiation of coordinated reorganisation plans, the use of avoidance powers, the obtaining of post-commencement finance, and the submission and admission of claims and distributions to creditors".

The group representative thus holds a position that the insolvency representative at group COMI would have held.

1. The scheme of UNCITRAL model law on Enterprise Group insolvency is practical and neutral to the group's structure & its business model. It is minimalistic in that only members required and permitted under law join the proceedings. It considers the possibilities of multiple proceedings though it makes provisions to keep them at an unavoidable minimum level and provides a coordination mechanism by appointment of a group representative. This approach addresses almost all the challenges faced in finding a true group COMI for preparing and implementing a group insolvency solution discussed before. However, the approach of MLG has its share of challenges.
2. The MLG working assumes ex-ante planning of the venue considering group members' participation possibilities. The insolvencies of the group may be triggered or caused by members who do not qualify to be the venue for planning proceedings. Further, the velocity of the contagion of financial stress may not give the management time to plan the venue for planning proceedings. Further, although the management may have the power to nudge the members to participate in the planning proceedings, the effective implementation of the group insolvency solution would remain at the mercy of the local laws of the group member's States.
3. The MLG offers a viable and less confrontationist option to group COMI, a global option better than EIR recast, but the option may take time to come to age. No country has yet adopted it. If the speed of adoption of the MLCBI is any indication (49 countries in 25 years), the MLG has a long way to go for its global acceptance. Another challenge to the MLG mechanism is the courts' creativity to determine the centre of main interest (venue of planning proceedings). The courts in USA and UK have virtually disregarded the concept of COMI while dealing with the insolvencies of multinational groups. If the approach of those courts become precedence, the MLG may never get any acceptance.
4. **Conclusion.**

The issues of group COMI has eluded a perfect solution since it first appeared in Vergos Sachmit report. It is the most debated issue in cross-border insolvency law. The challenges in finding group COMI arise because of the unreasonable expectations attached to its role in group insolvency solutions. The group COMI in all its glory is a consensus venue, a venue on which all group members depend, a venue from where a group-wide plan can be prepared and implemented, a group that meets the expectations of creditors, owners and regulators, a venue which unifies the group and at the same time respect the separate corporate entity status of members. Many of these characteristics are inherently juxtaposed to each other. Tempering with these expected characteristic traits of group COMI can mitigate many challenges encountered in finding it. The EIR Recast and the UNCITRAL Model Law on group enterprises insolvencies lower these expectations and achieve viable alternatives.

*[[1]](#endnote-1)*

1. ***End Notes****.*

   1. *20, UNCITRAL Model Law on Cross-Border Insolvency Law with Guide to Enactment and Interpretation. B. Origin of the Model Law. Para 5.*
   2. *Ibid Note 1.*
   3. *70, UNCITRAL Model Law on Cross-Border Insolvency Law with Guide to Enactment and Interpretation, centre of main interest para 144*
   4. *61, Part two. Guide to Enactment of the UNCITRAL Model Law on Enterprise Group Insolvency, para 116*
   5. *Irit Mevorach The 'Home Country' of a multinational enterprise group facing insolvency, 440 International and Comparative Law Quarterly, V Group COMI.*
   6. *6, UNCITRAL Legislative Guide on Insolvency Law—Part three B, Nature of group enterprises para 6.*
   7. *Lo Pucki, Lynn M., in their book Courting Failure: How Competition for Big Cases Is Corrupting the Bankruptcy Courts, Chapter 6, Corruption page 137.*
   8. *Ibid note 7, Chapter 7 competition goes global, page 186.*
   9. *IBID NOTE 8, Extraterritoriality by Intimidation page 187.*
      * + 1. *Part one UNCITRAL Model Law on Enterprise Group Insolvency Part A. Core provisions Chapter 1. General provisions Preamble "c".*
          2. *Regulation (EU) 2015/848 OF The European Parliament and of the council of 20 May 2015 on insolvency proceedings (recast****)*** *Article 2 Definition, 13, 14.*
          3. *Regulation (EU) 2015/848 OF The European Parliament and of the council of 20 May 2015 on insolvency proceedings (recast****)*** *Article 72 Tasks and rights of the coordinator.*
          4. *Ibid note 10.*

   ***Bibliography.***

   1. *Suitable Jurisdiction for an Enterprise Group in Cross Border Insolvency by Mahima Chhabrani (*[*National University of Juridical Sciences*](https://nujs.edu/index.html)*)*
   2. *The 'Home Country' of a Multinational Enterprise Group Facing insolvency Irit Mevorach.*
   3. *Coordination of Insolvency Cases for International Enterprise Groups: A Proposal Hon. Samuel L. Bufford.*
   4. *European Insolvency and Restructuring Journal Academic Article EIRJ 2021-7 www.eirjournal.com Enterprise Group Restructuring: Dutch Options and United States Enforcement G. Ray Warner\* and Michael Veder.*
   5. *Directorate general for internal policies policy department C: citizens' rights and constitutional affairs legal affairs Insolvency proceedings in case of groups of companies: prospects of harmonisation at EU level.*
   6. *Pepels S. Defining groups of companies under the European Insolvency Regulation (recast): On the scope of EU group insolvency law. Int Insolv Rev. 2021;30:96–123* [*https://doi.org/10.1002/iir.1402*](https://doi.org/10.1002/iir.1402)
   7. *Twelfth Annual International Insolvency Conference Supreme Court of France Paris, France PROSPECTIVE PRINCIPLES FOR COORDINATION OF MULTINATIONAL CORPORATE GROUP INSOLVENCIES Draft: Multinational Corporate Group Guidelines By Hon. Ralph R. Mabey Stutman, Treister & Blatt, P.C. Salt Lake City June 21-22-2012*
   8. *Courting Failure How Competition for Big Cases Is Corrupting the Bankruptcy Courts Lynn M. LoPucki.*
   9. *Understanding "Centre of Main Interests": Where Are We? September/October 2007 Paul Bromfield.*
   10. *REGULATION (EU) 2015/848 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 May 2015 on insolvency proceedings (recast)*
   11. *UNCITRAL Legislative Guide on Insolvency Law Part three: Treatment of enterprise groups in insolvency.*
   12. *Legislative Guide on Insolvency Law.*
   13. *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation.*
   14. *UNCITRAL Model Law on Enterprise Group Insolvency with Guide to Enactment.*
   15. *REPORT on the Convention on Insolvency Proceedings by Miguel VIRGOS: Professor, Universidad Autonoma of Madrid*

   [↑](#endnote-ref-1)