**Short Paper – Thorben Langhinrichs – GIPC 2023/2024**

**Discuss the challenges for finding the COMI of business enterprise groups, assessing the EU Insolvency Regulation and the work of UNCITRAL Working Group V on this issue, in particular the Model Law on Enterprise Group Insolvency.**

**Table of contents**

1. Introduction
2. Challenges in determining the COMI
3. Assessments of the EU Insolvency Regulation with regard to business enterprise groups
4. Work of UNCITRAL Working Group V, in particular the Model Law on the Insolvency of Groups of Companies
5. Conclusion
6. Bibliography
7. **Introduction**

The COMI ("centre of main interest") describes the centre of the debtor's main interests. The centre of the debtor's main interests is defined in the first sentence of the second subparagraph of Article 3(1) of the EU Insolvency Regulation as the place where the debtor habitually carries out the administration of its interests and which is ascertainable by third parties. In the case of companies or legal entities, however, it is presumed that the centre of their main interests is the place where they have their registered office, unless there is proof to the contrary. However, this only applies if the registered office has not been transferred to another Member State within a period of three months prior to the application for the opening of insolvency proceedings (Art. 3 para. 1 subpara. 2 sentence 2 EU Insolvency Regulation).[[1]](#footnote-1)

Since the ECJ's Eurofood ruling on COMI (ECJ, Judgement of 2 May 2006 - C-341/04), the presumption of a company having the centre of its main interests at its registered office has applied. In order to deviate from this, "objective and ascertainable elements for third parties" are required that prove a centre of main interests at a location other than the registered office. This is particularly conceivable in the case of a pure letterbox company that does not carry out any activities at its registered office. If, on the other hand, the company is also active at its registered office, the fact that the company's decisions are controlled or can be controlled at the parent company's different registered office is not sufficient to establish a different centre of main interests.[[2]](#footnote-2)

In the subsequent Interedil decision (ECJ, Judgement of 20 October 2011 - C-396/09), the ECJ expressly considered the place where the administrative decisions of the company that directly shape the externally recognisable operational business are taken to be relevant. If the administrative and controlling bodies of a company are located at its registered office and the administrative decisions are also taken there and this can be ascertained by third parties, the presumption that the centre of main interests is also located there cannot be rebutted. However, the presumption set out in Art. 3 para. 1 sentence 2 can be rebutted if, from the perspective of third parties, the location of a company's head office is not at the location of the registered office.

In this respect, the challenge arises as to how COMI is to be determined for internationally active Enterprise Groups and, in this context, which insolvency law procedural regulations apply. For example, the head office may be in New York, the registered office in Hongkong and operating units in Germany and Spain.

**II. Challenges in determining the COMI**

The head office (place where the management is located, from where it directs the company's fortunes and is recognisable to the outside world) must be determined:

* Not the location of the debtor's assets;
* Not the location(s) of strategic management;
* Not business premises;
* Decisive: location of the operational management of day-to-day business;
* Not the place of initiation, but the place of implementation of operational actions.

In this respect, the debtor's integration into a group of companies can also be of significance if this leads to the debtor's day-to-day business being conducted at the location of a group company.[[3]](#footnote-3)

According to the ECJ, the presumption of domicile can be rebutted if objective circumstances recognisable to third parties prove that the centre of main interests is not actually located at the place of the registered office. This may be the case, for example, with mere letterbox companies that do not carry out any activities in the Member State in which they have their registered office, but merely feign this.

According to Art. 2 No. 13 EU Insolvency Regulation, a group of companies is the totality of parent companies and all of their subsidiaries. The parent company (Art. 2 no. 14 sentence 1) is the company that either directly or indirectly controls one or more subsidiaries.

The determination of COMI can therefore present some challenges and controversies.

Firstly, the interpretation of the COMI concept itself can pose a challenge. Although the definition appears clear at first glance, its application varies depending on the jurisdiction and the specific circumstances of the individual case. In some cases, there have been very different interpretations of the COMI concept by the courts of the member states in the past. Determining the true centre can be complex if a company is active in several jurisdictions or has recently relocated its headquarters.

The different interpretations sometimes lead to abusive influence on the jurisdiction of the court by the debtor. The aim of this so-called "forum shopping" is to find a jurisdiction with favourable insolvency laws and procedures in order to maximise the outcome for the debtor or other interested parties. The problem with this is that forum shopping runs counter to the creation of a functioning internal market and also results in a lack of recognisability of the applicable insolvency regime, making it more difficult to assess the insolvency risk of business partners (in particular borrowers).[[4]](#footnote-4)

This regularly leads to disputes between different jurisdictions, as each can claim to be the debtor's COMI. For example, a company may establish a subsidiary in a country with more lenient insolvency laws, which raises the question of the true COMI and the rationale behind the decision.

In addition, another challenge arises when a company's COMI changes over time. A debtor may move its principal business activity or headquarters to another jurisdiction, potentially triggering a shift in COMI. In such cases, the determination of the COMI date is crucial as it impacts the jurisdiction's authority to open insolvency proceedings.

Courts must carefully analyse the timing and intentions behind the relocation to ensure fairness and prevent abuse of the system.[[5]](#footnote-5)

**III. Assessments of the EU Insolvency Regulation with regard to Enterprise Groups**

The European legislator addressed the issue of group insolvency for the first time in the 2017 EU Insolvency Regulation. These provisions are intended to make the handling of insolvency proceedings relating to the assets of companies belonging to a group of companies more efficient and to utilise synergies within a group of companies. The European group insolvency law also retains the principle of separation (= no procedural or substantive consolidation of the individual insolvency proceedings / only coordination and mutual information: between liquidators (Art. 56), between courts (Art. 57), between liquidators and courts (Art. 58)). In addition, the so-called coordination procedure (Art. 61) was introduced for the purpose of implementing group-wide reorganisation solutions. Contrary to the recommendations of UNCRITRAL, the European legislator has not standardised any cooperation obligations between creditors or the appointment of a single creditor body. Likewise, unlike German Group Insolvency Law, the European Insolvency Regulation does not provide for a European Group Court.[[6]](#footnote-6)

**IV. Work of UNCITRAL Working Group V, in particular the Model Law on the Insolvency of Enterprise Groups**

As a sub-organisation of the UN, the UN Commission on Trade Law draws up recommendations for the drafting of laws and corresponding model laws in the field of trade and economic law. The aim of UNCITRAL is to harmonise national legislation, which in turn should facilitate world trade and enable poorer countries to create modern and efficient laws. Within UNCITRAL, insolvency law is discussed by Working Group V. UNCITRAL's most important project in the field of insolvency law to date is the Model Law on Cross-Border Insolvency. 30 May 2022 marks the 25th anniversary of the adoption by the United Nations Commission on International Trade Law (UNCITRAL) of the Model Law on Cross-Border Insolvency (MLCBI).

Since its adoption in 1997, a large number of countries have incorporated the Model Law into their own legislation. In doing so, the MLCBI has played a direct role in increasing the likelihood of corporate and business rescue – by centralising the rescue process and avoiding the piecemeal breakup of debtors’ assets in numerous locations – and enhanced creditor returns. This has also had important ‘macro’ implications, supporting broader investment and financial stability and economic growth.[[7]](#footnote-7)

The Model Law has played a crucial role in facilitating international co-operation and providing a framework for dealing with cross-border insolvency cases. However, as the global business landscape continues to evolve, the Model Law must constantly adapt to meet emerging challenges and ensure its continued effectiveness.

The rise of multinational corporations and complex corporate structures has brought with it the need for a comprehensive framework for dealing with group insolvencies. While the Model Law recognises the concept of "foreign proceedings" and provides for the recognition of foreign insolvency proceedings, it does not explicitly address group insolvencies.[[8]](#footnote-8)

The purpose of the Model Law on Enterprise Group Insolvency is to develop effective mechanisms for the resolution of group insolvency proceedings, focussing in particular on the cooperation of courts and other public authorities as well as insolvency practitioners.[[9]](#footnote-9)

The aim is to develop a solution for a part or the entire group of companies that is also recognised in a cross-border context. The group members should be administered in a fair and efficient manner, whereby the value of the entire group should be protected and, if possible, increased. Furthermore, the interests of creditors and investors should be protected.[[10]](#footnote-10)

The particular focus ought to be on adoption and implementation of complementary cross-border protocols under the UNCITRAL Model Law on the Recognition and Enforcement of Insolvency-Related Judgments (MLIRJ) and the UNCITRAL Model Law on Enterprise Group Insolvency (MLEGI), as well as substantive court cooperation and communication protocols developed by the International Insolvency Institute (III), the American Law Institute (ALI), the European Union (EU) and the Judicial Insolvency Network (JIN). Clarifying the applicable law in an insolvency proceeding will also be an important priority focus area.[[11]](#footnote-11)

These pursuits are all the more important now in a truly global economy shaped by digital transformation and the proliferation of complex corporate structures permeating multiple jurisdictions and facilitating the conduct of business not so much across borders, but more aptly without any borders at all. Indeed, the reality is that larger insolvencies will almost invariably now have at least some cross-border elements. A global cross-border restructuring and insolvency framework that continues to evolve and adapt to rapidly changing economic, financial and social circumstances is rightly regarded as a foundational and essential part of future economic growth and prosperity.[[12]](#footnote-12)

Cross-border insolvency proceedings involving one or more debtors with businesses and creditors in a number of different locations across the world has traditionally given rise to two competing policy approaches to how those proceedings should be managed by local courts.[[13]](#footnote-13)

On one side of the ledger is the universalist approach, which favours the operation of a single insolvency proceeding extending on a worldwide basis. This avoids the need to conduct multiple processes simultaneously, and therefore leads to greater efficiency and cost savings while minimising the risk of conflicting laws and legal approaches. As Lord Hoffman noted in *Cambridge Gas Transport Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc*, universalism allows ‘the foreign office holder or the creditors to avoid having to start parallel insolvency proceedings and to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum’.[[14]](#footnote-14)

On the other end of the spectrum is territorialism, an approach whereby local courts separately administer and distribute assets and determine creditors’ rights in every jurisdiction in which those assets and creditors are located according to the priorities provided for under local laws.

In the end, a best practice insolvency regime has typically favoured the principle of ‘modified universalism’, under which a main proceeding opened in the debtor’s home country is mutually recognised in other jurisdictions where the debtor has assets and creditors unless doing so would be manifestly contrary to the local laws and policies of those other jurisdictions. Modified universalism also recognises a role for ancillary proceedings to be opened in those other jurisdictions, but only to the extent they help to facilitate the administration of the main proceeding – for example, in enabling the recovery or realisation of assets to maximise value as part of coordinated overarching restructuring or insolvency process.[[15]](#footnote-15)

**V. Conclusion**

The correct preparation and selection of the COMI therefore has a significant impact on the reorganisation process or the liquidation of individual company components.

Prior to the enactment of the MLCBI, recognition and cooperation in cross-border insolvency matters was dealt with primarily under general law concepts developed by courts. In common law jurisdictions, resort could be had to the doctrine of comity, while in civil law jurisdictions, the exequatur procedure enabled the recognition and enforcement of orders between different jurisdictions.[[16]](#footnote-16)

Some jurisdictions also had in place legislation (which continues to apply even in those jurisdictions where the MLCBI has been implemented, such as Australia) setting out what are known as ‘aid and auxiliary provisions’, under these provisions, upon receipt of a letter of request from a foreign court in a list of statutorily prescribed jurisdictions (the letter having been issued upon the application of a foreign insolvency practitioner), the local court is required to act in aid of and be auxiliary to the foreign court in all external administration matters.[[17]](#footnote-17)

The difficulty with provisions of this kind is that they leave a very broad discretion for courts to decide whether to so act, and they lack predictable outcomes and the use of common, well-understood concepts and elements required to establish a clear basis for recognition and the granting of ancillary relief to support insolvency practitioners involved in the administration of complex cross-border restructuring and insolvency proceedings. Even in cases where the legislation casts the provision of aid as a mandatory obligation, it does not prescribe the form of relief or the range of orders that may be made.[[18]](#footnote-18)

MLCBI sets out an approach to recognition and cooperation based on clearly defined and familiar concepts. It adopts a modified universalist system, seeking to achieve the key elements of access, recognition, assistance (or relief) and cooperation.[[19]](#footnote-19) This essentially provides for:

* the ability of a local insolvency practitioner to apply to courts of foreign jurisdictions to obtain recognition of an insolvency process being undertaken in the local jurisdiction;[[20]](#footnote-20)
* the grant of recognition if that insolvency process is either a ‘foreign main proceeding’ (in cases where an insolvency process is taking place in a State where the debtor has its ‘centre of main interests’) or a ‘foreign non-main proceeding’ (in cases where the insolvency process is taking place in a State where the debtor has an ‘establishment’);[[21]](#footnote-21)
* different consequences and entitlements to ancillary relief depending on the type of proceeding recognised (with a mandatory automatic stay on enforcement and execution and a suspension on the right to transfer, encumber or dispose of assets of the debtor only upon recognition as a foreign main proceeding);[[22]](#footnote-22)
* discretionary interim relief, including by way of an interim enforcement moratorium and a stay of execution orders pending the determination of an application for recognition;[[23]](#footnote-23) and
* a framework for cooperation and communication between courts.[[24]](#footnote-24)

As noted, this framework leads to greater efficiency and cost-savings that can increase the return for creditors through greater coordination in the collection and distribution of assets, the concentration of proceedings and the avoidance of duplicate insolvency proceedings and multiple court applications, as well as potentially inconsistent court orders.

The challenges for finding the COMI are diverse and complex. Nonetheless, the existing jurisdictions provide a resilient opportunity to reorganise enterprise groups in a sustainable and long-term financial and performance-related manner.

**VI. Bibliographie**

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18. For example, under section 581(2)(a) of the Australian *Corporations Act 2001* (Cth), in all external administration matters, the court must act in aid of, and be auxiliary to, the courts of prescribed countries that have jurisdiction in external administration matters.  Courts also have the discretion under section 581(2)(b) to act in aid of, and be auxiliary to, the courts of other countries that have jurisdiction in external administration matters (i.e. in countries that are not prescribed). [↑](#footnote-ref-18)
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20. MLCBI, article 15 [↑](#footnote-ref-20)
21. MLCBI, articles 2 and 17 [↑](#footnote-ref-21)
22. MLCBI, article 20 [↑](#footnote-ref-22)
23. MLCBI, article 19 [↑](#footnote-ref-23)
24. MLCBI, articles 25 to 27 [↑](#footnote-ref-24)