Crossing the Finish Line: the Potential Impact on Business Rescue of Adoption of new Cross-Border Insolvency Provisions

Report to the Office of the Superintendent of Bankruptcy

Janis Sarra[1]

I. INTRODUCTION

The purpose of this paper is to undertake a preliminary analysis of the potential impact on business rescue of the adoption of the proposed new cross-border insolvency provisions. It also examines the Chapter 15 U.S. *Bankruptcy Code* proceedings with Canadian debtor corporations commenced in the first year of Chapter 15's existence, including some of the practical and policy differences between amendments proposed in Canada and those enacted under Chapter 15. The paper explores whether different treatment of concepts of centre of main interest and main and non-main proceedings may impact cross-border proceedings, using lessons learned from the treatment of centre of main interests under the EC Regulation on Insolvency.

In November 2005, Parliament voted for adoption of Bill C-55, now Chapter 47 of the Statutes of Canada, 2005, amending the *Bankruptcy and Insolvency Act (BIA)* and the *Companies' Creditors Arrangement Act (CCAA)* and creating new wage earner protection legislation.[2] Chapter 47 is the first comprehensive amendment to the *BIA* and the *CCAA* in a decade. The proposed amendments to the cross-border provisions adopt much of the UNCITRAL Model Law on Cross-Border Insolvency,[3] and, when proclaimed in force, will replace the current cross-border provisions, Part XIII of the *BIA* and section 18.6 of the *CCAA*, in their entirety. A number of States have now adopted the UNCITRAL Model Law on Cross-Border Insolvency.[4]

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[1] Dr. Janis Sarra, Associate Dean and Professor, University of British Columbia Faculty of Law; Director, National Centre for Business Law. The author appreciates the financial support of the OSB in undertaking this research.

[2] *An Act to Establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, Chapter 47, Royal Assent November 25, 2005, not yet proclaimed in force as of January 1, 2007 ("Chapter 47").

[3] UNCITRAL Model Law on Cross-Border Insolvency, U.N. Doc. A/RES/52/158 (1997) (Model Law).

[4] Adopted in Northern Ireland (2005), Eritrea, Great Britain (2006), Japan (2000), Mexico (2000),

Canada's existing cross-border provisions indicate a relatively early recognition of the need to facilitate cross-border proceedings for financially distressed companies, and recognition of the principles of comity, particularly in proceedings involving its largest trading partner, the U.S. Adoption of elements of the Model Law may provide greater certainty in insolvency proceedings, particularly in cross-border proceedings with nations other than the U.S. It may assist in reducing information asymmetries for creditors and advancing fairness, certainty and timeliness of proceedings.[5] Whereas the Chapter 47 amendments do not mirror exactly the Model Law provisions, the U.S. has largely adopted the Model Law. Since the U.S. is the jurisdiction that engages by far the greatest number of Canadian cross-border insolvency proceedings, this divergence of legislative approach warrants consideration.

Part II will address how the Chapter 47 provisions compare with Chapter 15 of the U.S. *Bankruptcy Code* (Chapter 15) and the Model Law, and address some of the issues that are likely to arise in future cross-border proceedings, including powers of foreign representatives, the need for evidence in determining the centre of main interests, the definition of COMI for corporate groups, the relationship between the public policy exception and deference to international obligations, time frames for recognizing a foreign proceeding, the scope of the stay following recognition, factors affecting the court's discretion to grant relief, obligations following recognition, and the potential for concurrent proceedings. These issues are likely to arise either as a consequence of differences between the Model Law, Chapter 15 and Chapter 47 or from the lack of specific provisions addressing the issues in the legislation. Part III then discusses some of the initial caselaw under Chapter 15 in respect of recognition of Canadian foreign proceedings. Part IV analyses the experience with centre of main interests under the European Union regulation on insolvency, and examines whether there are lessons to be drawn for Canada.

II. CHAPTER 47 PROVISIONS AS COMPARED WITH THE MODEL LAW AND CHAPTER 15 OF THE U.S. *BANKRUPTCY CODE*

The express purpose of the cross-border insolvency amendments under Chapter 47 is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies; greater legal certainty for trade and investment; the fair and

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Montenegro (2002), Poland (2003), Romania (2003), Serbia (2004), South Africa (2000), British Virgin Islands and United States of America (2005).

[5] Janis Sarra, "Northern Lights, Canada's Version of the UNCITRAL Model Law on Cross-Border Insolvency", (2007) 16 International Insolvency Review 1-43 ("Northern Lights").

efficient administration of cross-border insolvencies that protects the interests of creditors, debtors and other interested persons; the protection and the maximization of the value of debtors' property; and the rescue of financially troubled businesses to protect investment and preserve employment.[6] These purposes mirror those of the Model Law and Chapter 15, aimed at promoting certainty and predictability in insolvency proceedings.[7]

For purposes of the cross-border provisions, if an insolvency, reorganization or similar order has been made in respect of a debtor company in a foreign proceeding, a certified copy of the order is, in the absence of evidence to the contrary, proof that the debtor company is insolvent and proof of the appointment of the foreign representative made by the order.[8] This presumption exists currently in the *BIA*, but Chapter 47 will bring the *CCAA* in line with both the *BIA* and the Model Law and Chapter 15 provisions.[9] Given that access to Canadian insolvency legislation, including restructuring mechanisms, is based on a requirement of insolvency, this presumption of insolvency assists in providing recognition where the foreign jurisdiction does not require insolvency to access the statutes, most notably for Canada, access to Chapter 11 of the U.S. *Bankruptcy Code.* The recognition of a foreign proceeding does not prevent Canadian creditors from initiating or maintaining collection proceedings, although it does stay the proceedings in certain circumstances. Chapter 47 seeks to align relief resulting from recognition of a foreign proceeding with relief available under the *BIA* or the *CCAA*.[10]

1. Foreign Representative

A key objective of the Canadian provisions is to provide timely and direct access for foreign representatives to Canadian courts, to facilitate both communication and co-operation. Chapter 47, if proclaimed, will permit a foreign representative to apply to the court for recognition of a foreign proceeding.[11] The Chapter 47 amendment to the *BIA* provisions defines foreign representative as a person or body authorized in a foreign proceeding to administer the debtor's property or affairs for the purpose of reorganization or liquidation.[12] Foreign court is defined in

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[6] Sections 44, 267, as amended by Chapter 47.
[7] Preamble, Model Law; section 1501 of Chapter 15, U.S. *Bankruptcy Code*.
[8] Sections 59, 269, as amended by Chapter 47.
[9] Article 31, Model Law.
[10] Northern Lights, *supra*, note 5
[11] Section 269, *BIA*, Section 46(1), as amended by Chapter 47.
[12] Sections 45(1), 268(1)(b), as amended by Chapter 47.

Chapter 47, the Model Law and Chapter 15 as a judicial or other authority competent to control or supervise a foreign proceeding.[13]

The provisions under the *CCAA* include authorizing the representative to monitor the debtor company's business and financial affairs for the purpose of reorganization, a provision not expressly included in the Model Law. The difference may be due to the existence of the monitor as a court-appointed officer under the *CCAA*, with a range of monitoring and facilitating roles. The Model Law provision specifies that the foreign representative is authorized to administer the reorganization or liquidation of the debtor's assets or affairs.[14] Since the *CCAA* is not a liquidation statute (although there have been a number of recent liquidating *CCAA* proceedings), it does not contain this language. One interesting question is whether foreign representatives will move for recognition more often under the *BIA* in order to avail themselves of powers that are broader than the *CCAA*.[15] Aside from the liquidation issue, it appears as if the foreign representative could not administer under the *CCAA* for purposes of reorganization.

Both the Model Law and the Canadian provisions limit the jurisdiction of the court over the foreign representative to the purposes of the application.[16] An application by a foreign representative for an order does not submit the foreign representative to the jurisdiction of the court for any other purpose except with regard to the costs of the proceedings, but the court may make any order conditional on the compliance by the foreign representative with any other order of the court.[17] As with the Model Law, it constitutes a "safe conduct" rule aimed at ensuring that the court will not assume jurisdiction over all the assets of the debtor corporation solely of the basis of a foreign recognition order, and ensuring that the court does not assume jurisdiction over the foreign representative for matters unrelated to the insolvency.[18]

One notable difference between the U.S. and Canadian versions of the Model Law is that Chapter 15 specifies that on granting of recognition, the foreign representative may sue or be sued in U.S. courts, subject to any limitations that the court may impose consistent with the policy of Chapter 15.[19] The Canadian provisions do not contain such a provision, and under the *BIA*, insolvency officers are well protected from such suits in most circumstances. Hence there is

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[13] Sections 45(1), 268, as amended by Chapter 47; Article 2, Model Law.
[14] Article 2, Model Law. See also Section 1502, Chapter 15, U.S. *Bankruptcy Code.*
[15] Northern Lights, *supra*, note 5.
[16] Article 10 of the Model Law specifies that "the sole fact that an application pursuant to this Law is made to a court in this State by a foreign representative does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the courts of this State for any purpose other than the application". See also Section 1510, Chapter 15, U.S. *Bankruptcy Code.*
[17] Sections 57, 280, Chapter 47.
[18] *Guide to Enactment of UNCITRAL Model Law on Cross Border Insolvency,* http://www.iiiglobal.org/organizations/uncitral/model_law.pdf at para. 94.
[19] 1509(b)(1) of Chapter 15, U.S. *Bankruptcy Code.*

likely to be litigation regarding the scope of potential liability when filing and receiving a recognition order in the U.S., a matter that may give rise to forum shopping away from the United States, depending on the circumstances of the debtor's financial distress.

2. Centre of Main Interests (COMI)

As with the Model Law and Chapter 15, Chapter 47 adopts the concept of centre of main interests (COMI) as the mechanism for determining main and non-main proceedings. However, COMI is not defined in Chapter 47, Chapter 15, the Model law or the EC regulation.[20] In many proceedings, the issue of COMI does not arise, because the debtor corporation operates in the jurisdiction in which it is registered. However, the issue of COMI does arise where there is a question of the debtor's connection with a jurisdiction. In such cases, insolvency laws adopt different tests for taking jurisdiction, including a COMI test, or consideration of whether the debtor has an establishment or assets in the jurisdiction in which insolvency proceedings are being sought.

The Canadian provisions specify that in the absence of proof to the contrary, a debtor company's registered office is deemed to be the centre of its main interests, mirroring the Model Law and Chapter 15.[21] A "foreign proceeding" under the Canadian provisions is defined as a judicial or an administrative proceeding, including an interim proceeding, in a jurisdiction outside Canada dealing with creditors' collective interests generally under any law relating to bankruptcy or insolvency in which a debtor company's business and financial affairs are subject to control or supervision by a foreign court for the purpose of reorganization.[22] Hence the definition tracks the Model Law and Chapter 15.[23] Foreign main proceeding means a foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests, mirroring the Model Law.[24] The amended *BIA* and *CCAA* will create a presumption that the debtor's place of residence or registered office is deemed to be the centre of main interests.[25]

However, foreign non-main proceeding is defined differently than the Model Law and Chapter 15. The Canadian provisions define foreign non-main proceeding as a foreign proceeding, other than

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[20] The EC Regulation is discussed in part IV of this paper.
[21] Sections 45, 268, as amended by Chapter 47.
[22] Sections 45(1), 268, as amended by Chapter 47.
[23] Article 2, Model Law.
[24] Sections 45(1), 268, as amended by Chapter 47. Article 17(2)(a) and Article 2(b), Model Law. See also Section 1502(4), Chapter 15, U.S. *Bankruptcy Code.*
[25] Sections 45, 268, as amended by Chapter 47.

a foreign main proceeding.[26] In contrast, the Model Law requires that the debtor have an establishment within the jurisdiction of a foreign non-main proceeding, defined as any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.[27] Chapter 15 of the U.S. *Bankruptcy Code* also requires an establishment in order to come within the definition of foreign non-main proceedings.[28] In Canada, there will be no requirement to have an establishment in the foreign jurisdiction as a condition of recognition of a foreign non-main proceeding.[29] Hence, arguably, one could have different kinds of foreign non-main proceedings than anticipated by the Model Law or U.S. Chapter 15.

Where the COMI is challenged under the Model Law, Chapter 15 or Chapter 47, the court will determine the matter based on the evidence; however, there is no legislative guidance on what proof to contrary might be in terms of rebutting the statutory presumption that the COMI is the jurisdiction where the debtor's registered office is located. The UNCITRAL Legislative Guide on Insolvency Law, which is aimed at establishing an effective insolvency framework, defines centre of main interest as "the place where the debtor conducts the administration of its interests on a regular basis and that is therefore ascertainable by third parties".[30] The UNCITRAL Legislative Guide observes that a debtor must have a sufficient connection to a State to be subject to its insolvency laws.[31] The Model Law uses the concept of COMI to discern those proceedings that could be recognized as constituting foreign "main" proceedings for the purposes of recognition in another state and ultimately assistance in the administration of the insolvency. The UNCITRAL Working Group has observed that the Model Law recognizes that the status of those proceedings as main proceedings may change and accordingly that the order for recognition may need to be modified or terminated.[32] The Guide to Enactment of the Model Law notes that it was not advisable to include more than one criterion, COMI, for qualifying a proceeding as a foreign main proceeding because multiple criteria would increase the risk of competing claims from foreign

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[26] Sections 45(1), 268, as amended by Chapter 47.
[27] Article 2(c) and (f), and 17(2)(b), Model Law. Article 17(4) of the Model Law specifies that the recognition provisions do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.
[28] Section 1502(5), Chapter 15, U.S. *Bankruptcy Code*. See, however, the discussion above in *re SPinX Ltd.*, where the court found a foreign non-main proceeding without addressing the fact that there was no establishment.
[29] Sections 45(1), 268, as amended by Chapter 47.
[30] *UNCITRAL Legislative Guide on Insolvency Law*, United Nations, New York, 2005, at 4, 41, citing the European Council Regulation No. 1346/2000 of May 2000 on Insolvency Proceedings; http://www.iiiglobal.org/organizations/uncitral/2003_Vienna_Report.PDF.
[31] UNCITRAL Working Group V, "*0657458* Treatment of corporate groups in insolvency Note by the Secretariat", working discussion document, December 2006.
[32] *Ibid.* at 3.

jurisdictions for recognition as the main proceeding.[33] Yet, there will inevitably be contests for control through litigation regarding centre of main interest.

The distinction between the requirement for an establishment makes it unclear whether the concept of foreign non-main proceeding is exhaustive of all types of foreign proceedings, and a proceeding commenced in a state in which the debtor has assets, but not an establishment, might arguably constitute a foreign proceeding that is neither a foreign main proceeding nor a foreign non-main proceeding.[34] While the Model Law does not accord recognition to proceedings commenced on the basis of presence of assets, Article 28 acknowledges that there might be a need in some cases to commence local proceedings to deal with such assets, provided the debtor is already involved in main proceedings elsewhere.[35] While the focus of the Model Law is on who has authority to deal with assets, Kent *et al* suggest that it remains unclear who has the authority to restructure the liabilities and that it is uncertain as to what extent courts will consider factors such as where business is conducted, where administration or control of the debtor's interests takes place, third-party perceptions and expectations, and other factors that may identify a debtor's centre of main interests.[36]

A critical question once Chapter 47 is proclaimed in force will be what evidence is required to rebut the presumption. Another key issue is the extent to which the court has an obligation to inquire into the COMI where an application is uncontested.

Where the debtor is a single corporate entity with assets and operations cross-borders, the filing strategy depends on the location and type of assets, the nature of creditors' claims, the jurisdiction in which assets are situated, and where the head office or centre of main interest is located.[37] The specific objectives of the workout may influence filing choices. For example, if a sale of all or substantially all of the business is anticipated, Canadian *CCAA* proceedings may be more expeditious and less rigid than filing in the U.S. and conducting the sale process there. Similarly, treatment of executory contracts can differ considerably in different jurisdictions and this may affect choice of laws. In the Canadian / U.S. cross-border context, DIP financing is more rule driven in the U.S. and may influence choice of regime.[38] Directors and officers tend to have

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[33] Guide to Enactment, *supra*, note 18, at para, 127.
[34] Andrew J.F. Kent, Stephanie Donaher and Adam Maerov. "UNCITRAL, eh? The Model Law and its Implications for Canadian Stakeholders" in Janis Sarra, ed., *Annual Review of Insolvency Law 2005* (Toronto: Carswell, 2006) at 187.
[35] UNCITRAL, *supra*, note 31 at 5.
[36] *Ibid.*
[37] Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, (Toronto: Carswell, 2007).
[38] The granting of DIP financing is not currently codified in Canada, but will be when Chapter 47 is proclaimed in force. Even after the implementation of Chapter 47, the granting of DIP financing

broader indemnification in Canada than in U.S. restructuring proceedings, and depending on the nature of claims against the debtor and its officers, this may influence where the debtor files. The two countries differ in the nature and extent of priorities and provisions on avoidable transactions, fraudulent conveyance and preferences. Moreover, Chapter 47 will strengthen the priority given to employee claims and provide a different approach than the U.S. for treatment of collective agreements. If a debtor does not file as a single entity and meet the specified tests, the debtor will be dependent on the discretion of the court to address recognition in the context of a corporate group. There is likely to be considerable uncertainty regarding recognition of proceedings for corporate groups in the early years of both U.S. and Canadian versions of the Model Law as the result of failure to seriously address this issue. Moreover, the main/non-main distinction does not address potential access problems for smaller or less well-resourced creditors. [39]

Treatment of COMI may also impact the ability to raise interim financing during workout proceedings. The UNCITRAL Legislative Guide notes that many jurisdictions restrict the provision of new money in insolvency or do not specifically address the issue of new financing or the priority for its repayment in insolvency. Structural impediments to providing new money include lack of statutory authority; different priority accorded to interim financing during the workout; personal liability of directors and officers of the debtor or an insolvency representative for incurring the debts that such financing entails; application of avoidance provisions to financing transactions; problems associated with providing priority to DIP facilities; and a preference for liquidation over reorganization that makes the issue of such finance difficult to address.[40] To date, issues that have arisen in DIP financing have been addressed in cross-border protocols in a number of cases.[41]

3. The COMI of Corporate Groups

Increasingly, Canadian capital structures are organized in corporate groups, frequently in a pyramidal structure, with separate corporate entities both within Canada and across borders. These multinational corporate groups may operate as separate entities, but also frequently operate as highly integrated corporate structures, even though the legal entities are separate and registered in multiple states, subject to multiple insolvency law regimes.

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will be more rule-driven in proceedings under the U.S. *Bankruptcy Code* than under the *BIA* or *CCAA*.

[39] Northern Lights, *supra*, note 5.

[40] *Digest of Financing Provisions from Cross-Border Insolvency Protocols*, International Insolvency Institute (http://www.iiiglobal.org); *Financing in Insolvency Proceedings*, INSOL 2006.

[41] *Digest of Financing Provisions, ibid.*

Cross-border insolvency protocols have been approved by courts as a mechanism to facilitate cross-border proceedings involving multiple related corporate entities, creating a legal framework for the conduct of insolvency proceedings and coordination of administration of an insolvent estate in one state with administration in another.[42] The courts in Canada and the U.S. have approved protocols on cross-border co-operation. These orders have dealt with coordination and co-operation in the administration of proceedings, coordination in ongoing operations, asset sales and distribution, claims filing procedures and choice of law issues, and coordination of development of plans in both countries.[43] This has reduced the cost of litigation and placed the focus on restructuring issues instead of conflict of laws disputes. These cases involved Canadian debtor corporations with significant operations and asset holdings in the United States, or *vice versa*, and thus the debtor corporations required recourse to protection of insolvency laws in both jurisdictions. A protocol sets out the ground rules by which concurrent insolvency proceedings can be coordinated; honours the sovereignty of the respective courts; harmonizes activities in multi-jurisdictional insolvency proceedings; promotes the orderly and efficient administration of proceedings; promotes international co-operation and respect for comity among the courts; facilitates fair and open processes for insolvency proceedings for the benefit of all parties; and implements a framework of general principles to address basic administration issues arising out of cross-border insolvencies.[44]

The greatest unresolved question is whether there should be a definition of COMI that recognizes COMI for corporate groups. The question of jurisdiction of filing is complicated when there are multiple related corporate entities that are registered in different jurisdictions. In addition to the factors that a single entity considers, there are multiple additional considerations regarding the most appropriate forum. The parent and/or some affiliated companies may be insolvent and others are not. The capital structures may be highly integrated across borders. Where management or financing control is centralized, the corporate group may need to file concurrently in multiple jurisdictions in order to continue operating, because a stay in one jurisdiction is not sufficient to allow such a centralized structure to continue during the workout negotiation process.[45] Operations may be quite distinct or highly integrated, particularly where various companies in the corporate group are the critical suppliers for other entities in the group, whatever jurisdiction the corporate group members are located in. This issue arises in many sectors. In such a case, there may be inter-company flow of assets, which could give rise to claims on a solvent member of the corporate group or reviewable transaction claims where

[42] For examples of cross-border protocols, see UNCITRAL document A/CN.9/580, paragraphs 18-48
[43] Northern Lights, *supra*, note 5.
[44] *Ibid.*
[45] Sarra, *supra*, note 37.

payments have been made in the period leading up to filing.[46] The debt structure may be highly integrated, with inter-company loans that cross borders. There may be guarantees by one entity for another or by the officers of the company for debts of a member of the corporate group. There are many cases in which the corporate group should be reorganized as one proceeding, but definitions of COMI may not easily facilitate such a proceeding. There are also cases where the COMI of the Canadian subsidiary may be in Canada, even if the parent's COMI is elsewhere.

The notion of COMI appears grounded for the most part in a single legal entity, and the language reflects the policy intent not to have competing applications for a main proceeding. Yet the reality is that many cross-border insolvencies involve corporate groups, including divisions, subsidiaries, affiliates, and co-venture arrangements. One or more of the parent or subsidiaries may be insolvent. The failure of the Model Law, Chapter 47 and Chapter 15 to deal with the issue of corporate groups and the resultant challenge for determining COMI is significant in Canada, as there are many insolvency proceedings that involve groups of companies carrying on business in more than one jurisdiction.

A key question is whether COMI can be defined in particular circumstances to allow members of a corporate group to all have their COMI in one state, even where their registered offices are in different states. This would require a corporate group definition of COMI that may assist in global workouts but may prove problematic for the rights of creditors in various jurisdictions where they were dealing with corporations registered in those jurisdiction and may want a remedy in respect of the particular corporate entity in that jurisdiction. Alternatively, there could be a recognition that the COMI may lie in multiple states, but then protocols used to facilitate cases where it is more efficient to administer the proceeding on a consolidated basis in the home state of the parent corporation. Both strategies would recognize corporate groups. However, conceptualizing a definition of corporate group COMI that can be appropriately applied to multiple jurisdictions will be a challenge. The objective is enhanced coordination, expedition of the process, efficiency in the time and use of insolvency professionals, and fairness to local creditors.

In recognition of a corporate group COMI, it is important that there not be an inappropriate extension of domestic law. At the same time, there is a need to recognize that operationally, the entities in the corporate group may be highly integrated and highly regulated in each of the jurisdictions in which the entities are registered. For example, if a parent corporation is located in Canada, but is operating subsidiaries in five other jurisdictions, would Canadian insolvency and bankruptcy law extend to other jurisdictions? Absent agreement by parties to have Canadian law apply to an integrated corporate organization, this could be an inappropriate extension of

[46] *Ibid.*

Canadian law and could prejudice creditors located in those jurisdictions where priorities or preferences differ, or where there are statutory protections such as "adequate protection" under the insolvency laws of the jurisdictions in which the subsidiaries are located. Equally, however, it is important that the domestic law in the jurisdiction in which the subsidiaries are located does not inappropriately extend the reach of its law to the parent corporation located outside of the jurisdiction. The centre of main interest test does not really account for corporate groups, unless they are so highly integrated that a court can pull aside the corporate veil. Yet jurisprudence under corporate law in Canada and many other jurisdictions indicates that the occasions in which the corporate veil is lifted are rare.[47] Where there is a multinational enterprise (MNE), with a controlling parent corporation, one issue is whether the parent corporation would ever attract liability for the debts of its insolvent subsidiaries located in other jurisdictions.

Concurrent proceedings in respect of related companies frequently are commenced in multiple jurisdictions, although such proceedings may or may not advance a global resolution of the debtor companies' insolvency, particularly where regimes differ as to their liquidation or rehabilitation goals or where procedures for resolving the firm's financial distress vary considerably. Most of Canada's cross-border experience is with the United States, where there is a degree of compatibility in procedural protections and a fair degree (although far from complete) alignment of insolvency laws. However, where systems do not converge, the issue of centre of main interests and how that might align with corporate groups that cross borders is yet to be determined.

In a cross-border proceeding where there is a corporate group operating in a number of jurisdictions, the facility with which the debtor will be able to restructure will depend to a large measure on the court's willingness to grant relief that facilitates the restructuring but is not inconsistent with domestic legislation.[48] Given that different regimes internationally have different normative conceptions of insolvency, with particular focus on rehabilitation or liquidation or a mix of both, the ability to restructure as a corporate group may be hampered if the courts narrowly interpret the COMI entity-based test for recognition or are unwilling to grant specific orders because they are not consistent with domestic law.[49] Until there is some interpretation of the meaning of the words "evidence to the contrary" in the test for COMI, there will be considerable transaction costs in litigating such recognition and/or in multiple filings across jurisdictions to prevent prejudice due to unwillingness of courts to recognize corporate group proceedings. One

[47] Even in such a case, there are likely to be conflicts of law issues.
[48] *Ibid.*
[49] *Ibid.*

issue is whether a parent's extensive control over the subsidiary will be sufficient to rebut the presumption that the location of the subsidiary's registered office constitutes its COMI.[50]

The use of cross-border protocols or other mechanisms to address procedural and administrative issues between the different jurisdictions may avoid requiring courts to determine a single corporate group COMI, however, a workout proceeding that is advanced through multiple proceedings internationally can raise the transaction costs of a global workout considerably and may create some pressure for premature liquidation in some of the jurisdictions.

One current debate is whether there should be a concept of centre of main interests of a corporate group developed, or whether international rules of comity and cooperation will be sufficient to address highly integrated multinational enterprises. The UNCITRAL Working group on Corporate Groups is in the early stages of considering whether to establish a concept of "centre of main interests of a corporate group" where there is a high degree of integration between members of a corporate group and the group was run essentially as a single entity.[51] The concept could be defined by reference to how and where policy, management and financial decisions of the group were made or carried out and creditor perceptions of that location.[52] The COMI would determine the jurisdiction in which main insolvency proceedings against a corporate group or one or more of its members should be commenced and the law that would apply to commencement and administration of the proceedings.

The Working Group has observed that where the adoption of such an approach depended on close integration of the group, the requisite level of integration would need to be defined.[53] This would place some onus on creditors to investigate or ascertain whether or not the corporation that they were dealing with was part of a corporate group. While this may not pose a challenge for senior lenders who can require such disclosures as part of the due diligence in making credit decisions, such an approach would be very difficult for trade suppliers, employees and other creditors that face bargaining and information asymmetries.

The Working Group observes that recognition of a corporate group COMI may lead to main insolvency proceedings at the location of the group COMI, irrespective of whether the parent or other subsidiaries registered at that location were also subject to insolvency; and local

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[50] Kent *et al*, *supra*, note 34 at 187.
[51] UNCITRAL, *supra*, note 31 at 6.
[52] *Ibid*., citing Gabriel Moss and Christoph Paulus, "The Urgent Need for Reform—What and When? Current Trends in European Rescue and the Impact of the European Insolvency Regulation", (15 July 2005).
[53] *Ibid*. at 6.

proceedings might still be required at the place of incorporation of the insolvent subsidiary to deal with its business and assets. Alternatively, it suggests that a different approach could be to deem the COMI of the group to be that of the parent corporation, so that all subsidiaries would also have that COMI; and jurisdiction for commencement of proceedings would not be related to place of incorporation or registered office.[54] A concept of corporate group centre of main interests could facilitate group commencement and administration of insolvency proceedings.[55]

In Canada, consolidation has been one strategy to deal with corporate groups, and its experience is being assessed by the UNCITRL Working Group, including how such a strategy can approach treatment of inter-company loans. Where there is a substantive consolidation of cross-border proceedings, it also raises the question of whether there should be creditors' committees, which would have representation from creditors of both the parent debtor, as well as subsidiaries in the corporate group. Even such a structure may create barriers to the participation of unsecured creditors where they are located jurisdictions other than the main proceeding. It may also raise a question is respect of the ability of employees and pensioners to participate in workout proceedings, where the corporate group proceeding is not in their domestic jurisdiction. This may include both informational and cost barriers to participation, resulting in the court not having all the interests at stake before it in the courtroom when making substantive decisions in respect of the proceeding. This implicates notions of creditors' reasonable expectations, as well as public interest and public policy in respect of the fairness and efficacy of the Canadian insolvency regime. In applying the provisions of Chapter 47, Canadian courts will have to pay careful attention to how substantive and procedural rights of stakeholders in Canada will be affected by the recognition of a foreign main proceeding of a corporate group.

4. Public Policy Exception and Deference to International Obligations

The Canadian Chapter 47 provisions do not contain the public policy exception set out in Article 6 of the Model Law and §1506 of Chapter 15, specifically, that nothing in the law prevents the court from refusing to take an action governed by the law if the action would be manifestly contrary to the public policy of the state.[56] The Guide to Enactment of the Model Law suggests that the use of the word "manifestly" was to emphasize that public policy exceptions should be interpreted

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[54] *Ibid.*
[55] *Ibid.*
[56] Section 1506 of Chapter 15, U.S. *Bankruptcy Code* mirrors the language, specifying that "Nothing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States."

restrictively and used only in exceptional circumstances concerning matters of fundamental importance to the domestic state or involving fundamental principles of law.[57]

However, despite the omission of the public policy exception in Chapter 47, arguably, Canadian courts already possess broad discretion to consider public policy objectives. The case law has numerous references to the court's concerns regarding the public policy goals of the legislation. There is also a provision that specifies that the Canadian court is not required to make any order that is not in compliance with the laws of Canada or to enforce any order made by a foreign court.[58] This wording has been carried over from the existing provisions. Arguably, this provision provides the Canadian court with jurisdiction to decline to make an order or enforce an order that is contrary to public policy. Equally, courts could apply the rule of interpretation that suggests that where legislators expressly adopt some provisions of the Model Law and not others, there was a legislative intent not to include those provisions and they should not be read into the legislation. However, given the long history of public policy consideration by Canadian courts, it is likely that they will continue with a purposive approach to interpreting insolvency legislation, even where the public policy exception of the Model Law and Chapter 15 is not expressly adopted.[59]

The Canadian provisions enable a foreign representative to apply under the *BIA* or *CCAA* despite an appeal or review in the foreign jurisdiction, retaining this language from the current cross-border provisions.[60] There is no parallel article in the Model Law or Chapter 15. A foreign representative or other interested person is also free to invoke any legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives, provided no inconsistency arises between such rules and the amended *BIA* or *CCAA*.[61]

There may be a further issue that is a tension between domestic and international priorities. Canadian courts have recognized the public interest aspects of restructuring; in particular, the flexibility of the *CCAA* has allowed the court to engage in a balancing of interests and prejudice based on public interest.[62]

The Canadian provisions also do not adopt the interpretation article of the Model Law, specifically, that "in the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith".[63] The provision was modeled on provisions under the UNCITRAL Model Law on Electronic Commerce,

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[57] Guide to Enactment, *supra,* note 18, at paras. 20(e), 87 and 89.
[58] Sections 61(2), 284(2), as amended by Chapter 47.
[59] Northern Lights, *supra*, note 5.
[60] Sections 58, 281, as amended by Chapter 47.
[61] Sections 61(1), 284(1), as amended by Chapter 47.
[62] For a full discussion, see Sarra, *supra*, note 37.
[63] Article 8, Model Law.

aimed at harmonizing interpretation.[64] The concept of good faith in commercial dealings has not been settled under Canadian caselaw.[65] Interestingly, while the U.S. Chapter 15 largely adopts the Model Law, it declined to adopt the good faith requirement, section 1508 of the U.S. *Bankruptcy Code* specifying only that the court shall consider the international origin of Chapter 15 and the need to promote an application of the chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions. Hence, as between Canada and the U.S., good faith is unlikely to be an issue.

5. Application for Recognition

Under the proposed Chapter 47 amendments, a foreign representative may apply to the court for recognition of the foreign proceeding in respect of which it is a foreign representative.[66] This right of direct access mirrors the language and objectives of the Model Law and Chapter 15.[67] The provisions create a streamlined recognition procedure. The party seeking recognition must file a certified copy of the instrument that commenced the foreign proceeding or a certificate from the foreign court affirming the existence of the foreign proceeding; a certified copy of the instrument or court order authorizing the foreign representative to act in that capacity; and a statement identifying all foreign proceedings in respect of the debtor company that are known to the foreign representative.[68] The court may, without further proof, accept these documents as evidence that the proceeding to which they relate is a foreign proceeding and that the applicant is a foreign representative in respect of the foreign proceeding.[69] In the absence of these documents, the court may accept any other evidence of the existence of the foreign proceeding and of the foreign representative's authority that it considers appropriate.[70] These provisions closely follow the Model law and Chapter 15 language.[71]

If the court is satisfied that the application for the recognition of a foreign proceeding relates to a foreign proceeding and that the applicant is a foreign representative in respect of that proceeding, the court shall make an order recognizing the foreign proceeding, specifying whether the foreign

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[64] Guide to Enactment, *supra,* note 18, at para. 91.
[65] See, for example, *Re Stelco Inc. supra,* note 21.
[66] Sections 46(1), 269(1), as amended by Chapter 47.
[67] Article 9 of the Model Law specifies that "a foreign representative is entitled to apply directly to a court in this State".
[68] Sections 46(2), 269(2), as amended by Chapter 47.
[69] Sections 46(3), 269(3), as amended by Chapter 47.
[70] Sections 46(4), 269(4), as amended by Chapter 47. The court may require a translation of any document accompanying the application, s. 46(5).
[71] Articles 15 and 16, Model Law. See also sections 1515 and 1516, Chapter 15, U.S. *Bankruptcy Code.*

proceeding is a foreign main proceeding or a foreign non-main proceeding.[72] Hence, once the requisite filings are made, the recognition order is automatic. Since the provisions mirror both the Model Law and Chapter 15 of the U.S. *Bankruptcy Code*, this will create consistency in respect of recognition of foreign proceedings.[73] In the context of Canada / U.S. cross border proceedings, this should considerably reduce the uncertainty associated with the U.S. court's discretion under former §304 to decline to grant orders in a recognition proceeding. While there has been less uncertainty in Canada as to the exercise of discretion in granting foreign recognition, the mandatory nature of the provision will nevertheless provide greater certainty to debtors in terms of the scope of orders that will be granted on recognition of a foreign main proceeding.

While the Model Law specifies that an application for recognition of a foreign proceeding is to be decided at the earliest possible time, the Canadian provisions are silent.[74] However, applications under both the *BIA* and the *CCAA* are currently frequently made on a "real time" basis, particularly as Canada has established commercial divisions of their superior courts in Ontario, Québec and British Columbia, and specialized members of the judiciary hear and decide insolvency proceedings in other larger provinces such as Alberta. Since these four provinces account for approximately 85% of all Canadian *CCAA* proceedings and most *BIA* commercial proceedings, there is an expectation that cross-border relief will be dealt with on an expeditious basis, even absent language similar to the Model Law.[75]

Under the Canadian provisions, the foreign representative must inform the court, without delay, of any substantial change in the status of the recognized foreign proceeding, any substantial change in the status of the foreign representative's authority to act in that capacity, and any other foreign proceeding in respect of the same debtor company that becomes known to the foreign representative, again mirroring the Model Law and Chapter 15.[76] The foreign representative must also publish, without delay after the order is made, once a week for two consecutive weeks, or as otherwise directed by the court, in one or more newspapers in Canada specified by the court, a notice containing the prescribed information.[77] This provision provides more specificity in notice of change requirements than set out in either the Model Law or U.S. Chapter 15, although the court rules and other provisions of the U.S. *Bankruptcy Code* do impose notice and filing requirements.

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[72] Sections 47(1),(2), 270(1)(2), as amended by Chapter 47.
[73] Section 1517, Chapter 15, U.S. *Bankruptcy Code.*
[74] Article 17(3), Model Law. See also section 1515, Chapter 15, U.S. *Bankruptcy Code.*
[75] Sarra, *supra*, note 37.
[76] Sections 53, 276, as amended by Chapter 47. Article 18, Model Law. See also section 1518, Chapter 15, U.S. *Bankruptcy Code.*
[77] Sections 53, 276, as amended by Chapter 47.

6. Stay of Proceedings

Once the foreign representative and foreign proceeding are recognized, the stay is mandatory, subject to any conditions the court imposes. However, the mechanism for receiving the stay differs under the *BIA* and the *CCAA.* There is an automatic stay under the *BIA*, whereas under the *CCAA*, this stay must be ordered by the court with carriage of the proceeding.[78] This distinction reflects current treatment of stays under the two statutes with respect to commencing domestic proceedings.

Where the court recognizes a foreign main proceeding, the *CCAA* provisions of Chapter 47 specify that the court shall make an order, subject to any terms and conditions it considers appropriate, staying for any period that the court considers necessary, all proceedings taken or that might be taken against the debtor company under the *BIA* or the *WURA;* restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the debtor company; prohibiting, until otherwise ordered by the court, the commencement or further pursuit of any action, suit or proceeding against the debtor company; and prohibiting the debtor company from selling or otherwise disposing of, outside the ordinary course of its business, any of the debtor company's property or business in Canada.[79]

The *BIA* provisions of Chapter 47 are similar, but reflect both the automatic nature of *BIA* initial stays and the fact that the *BIA* provisions also cover individuals. Hence, section 271(1) specifies that if a debtor carries on a business, the effect of recognition of a foreign main proceeding is that the debtor is not to sell or otherwise dispose of assets outside of the ordinary course of business.

The stay relief under the Canadian provisions is subject to three conditions. First, the order must be consistent with any order that may be made under the legislation.[80] Second, these provisions do not apply if any proceedings under the *CCAA* or the *BIA* have been commenced in respect of the debtor company at the time the order recognizing the foreign proceeding is made.[81] Third, nothing in the recognition order precludes the debtor company from commencing or continuing proceedings under the *CCAA*, the *BIA* or the *WURA* in respect of the debtor company.[82]

The stay provisions are aimed at an orderly, fair and expeditious conduct of the cross-border proceedings. The mandatory nature of the stay once the court is satisfied that it is appropriate to make a recognition order, facilitates the debtor obtaining operating capital during the work out period by increasing the certainty and predictability of the proceeding. At the same time, the

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[78] Sections 48, 271, as amended by Chapter 47.
[79] Section 48(1), as amended by Chapter 47. This mirrors Article 20 of the Model Law.
[80] Sections 48(2), 271(2), as amended by Chapter 47.
[81] Sections 48(3), 271(3), as amended by Chapter 47.
[82] Sections 48(4), 271(4), as amended by Chapter 47.

court retains discretion to impose terms and conditions on the order, hence protecting the ability of the court to supervise its own proceedings and advance the public policy objectives of Canadian insolvency law.[83]

The scope of the stay under Chapter 47 is as broad as that under Chapter 15. Upon recognition of a foreign main proceeding, an automatic stay of individual creditor actions and proceedings concerning the assets, rights, obligations, or liabilities of the debtor takes effect, and the right to execute against, transfer, encumber, or otherwise dispose of assets of the debtor is stayed or suspended.[84] The stay provides the debtor corporation with "breathing space", in terms of preventing creditors from moving to realize on their claims to assets until proper procedures are put into place for reorganization or liquidation or some combination of these strategies. In turn, this is aimed at promoting an orderly and fair cross-border proceeding.

The Guide to Enactment of the Model Law observes that the automatic stay is justified even if the state where the debtor has its centre of main interests poses different conditions for the commencement of proceedings or if the automatic effects of the originating proceeding differ from the automatic relief afforded by the enacting state. [85] The Model Law provides that the scope of this automatic relief may be limited by statutory exceptions under domestic laws and preserves the possibility of excluding or limiting actions in favour of the foreign proceeding.[86]

Notably absent from the Canadian provisions is Article 22 of the Model Law and § 1522 of Chapter 15, which specify that in granting or denying relief, the court must be satisfied that the interests of creditors and other interested persons, including the debtor, are adequately protected, allowing the court to impose conditions, modify orders or terminate relief as it considers appropriate.[87] The omission is likely due to the fact that Canadian insolvency law does not currently enshrine a notion of adequate protection, as currently exists in the U.S. and some other jurisdictions. The court may also, at the request of the foreign representative or a person affected by relief granted, or at its own motion, modify or terminate such relief. Similarly, the Canadian

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[83] Northern Lights, *supra*, note 5.
[84] Article 20(1)(a), (b), and (c), Model Law.
[85] Guide to Enactment, s*upra*, note 18 at para. 143.
[86] Article 6, Model Law. Article 7 of the Model Law specifies that nothing in the law limits the power of a court or a person or body administering a reorganization or liquidation under the law of the enacting state to provide additional assistance to a foreign representative under other laws of this state.
[87] Article 22, Model Law. See also section 1522, Chapter 15, U.S. *Bankruptcy Code*, which specifies that (a) the court may grant relief under section 1519 or 1521, or may modify or terminate relief under subsection (c), only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected; (b) the court may subject relief granted under section 1519 or 1521, or the operation of the debtor's business under section 1520(a)(3), to conditions it considers appropriate, including the giving of security or the filing of a bond; (c) the court may, at the request of the foreign representative or an entity affected by relief granted under section 1519 or 1521, or at its own motion, modify or terminate such relief; (d) section 1104(d) shall apply to the appointment of an examiner under this chapter. Any examiner shall comply with the qualification requirements imposed on a trustee by section 322.

provisions do not contain an express provision similar to Article 23 of the Model Law and § 1523 of Chapter 15, which is titled "actions to avoid acts detrimental to creditors", but which specifies that where the foreign representative has standing to initiate actions, the court must be satisfied that the action relates to assets that, under the law of the state, should be administered in the foreign non-main proceeding. Article 23 of the Model Law is not included in Chapter 47 amendments to the *CCAA*, as the *CCAA* does not expressly enable the monitor to institute avoidance actions.[88] However, under Chapter 47, once an order recognizing a foreign proceeding is made, the court may appoint a trustee as receiver to take any action the court considers appropriate, which would appear to allow the trustee to pursue preferences and other transactions at undervalue pursuant to the *BIA.*

The premise of the adequate protection provisions is that there is a balance between the relief granted to the foreign representative and the interests of creditors and other interested persons that may be affected by the relief granted.[89] However, notwithstanding that there are no such specific provisions in Chapter 47, Canadian courts, in granting relief, engage in a balancing of interests and prejudice in considering the interests of the debtor, creditors, employees and other stakeholders. While this has not been undertaken in the context of strict codification of "adequate protection", it has allowed the court to consider multiple interests in granting relief. Moreover, it merits note that the U.S. *Bankruptcy Code* has long had the concept of adequate protection and Canadian insolvency statutes have not; and this has not acted as a bar to successful cross-border proceedings.[90] Hence this distinction in language should not be a barrier to enhanced cross-border co-operation and coordination.

Article 20(4) of the Model Law and § 1520 of Chapter 15 specify that the stay provision does not affect the right to commerce individual actions or proceedings to the extent necessary to preserve a claim against the debtor. This provision is not in Chapter 47. Currently, on application, the Canadian court will lift the stay for a limited period or limited purpose to allow parties to file proceedings to preserve claims where there is a prejudice to the party seeking a lift of the stay. The proposed amendments to the *BIA* and the *CCAA* do not change that, essentially aligning what foreign parties need to do with how such requests are treated in domestic proceedings.

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[88] *Ibid*.
[89] Guide to Enactment, *supra,* note 18, at para. 161.
[90] Northern Lights, *supra,* note 5.

7. The Court's Discretionary Power to Grant Relief

The Canadian provisions also grant the court discretion to make a number of other orders, similar to the provisions of Chapter 15 and the Model Law.[91] If a recognition order is granted, the Canadian court may make any order that it considers appropriate, if it is satisfied that it is necessary for the protection of the debtor company's property or the interests of creditors. If the proceeding is a foreign non-main proceeding, the court has discretion to make orders similar to those available for a main proceeding, such as staying domestic insolvency proceedings or the commencement or pursuit of actions against the debtor company, or disposing of property outside of the ordinary course of business. The court can also order the examination of witnesses; the taking of evidence or the delivery of information concerning the debtor company's property, business and financial affairs, debts, liabilities and obligations; and can authorize the foreign representative to monitor the debtor company's business and financial affairs in Canada for the purpose of reorganization.[92]

This relief can include execution against the debtor's assets, suspending transfers or disposal of the debtor's assets, and, in the case of the amendments to the *BIA*, granting to the foreign representative the ability to administer the assets of the debtor located in Canada and appointing a trustee or receiver with authority to take possession of the debtor's property in Canada and take any action that court considers appropriate in the circumstances. This mirrors the Model Law and Chapter 15 of the U.S. *Bankruptcy Code*.[93]

Under the Model Law, the court can grant interim relief pending determination of a recognition application.[94] Article 19 of the Model Law is aimed at urgently needed relief that can be granted at the court's discretion on making the application for recognition, where such relief is needed pending the decision on recognition in order to protect the assets of the debtor and the interests of creditors.[95] The U.S. Chapter 15 also provides for urgently needed relief.[96] While this power is not expressly set out in Chapter 47, Canadian courts already have a broad discretion to grant interim relief, including the authority to grant interim relief pending a recognition decision.

Under the Canadian provisions, the restriction on the court's discretion is that if any proceedings under the *Act* have been commenced in respect of the debtor company at the time an order

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[91] Article 21, Model Law.
[92] Sections 49(1), 272, as amended by Chapter 47.
[93] Section 1520(a)(3), U.S. *Bankruptcy Code*, empowers the foreign representative, unless the court orders otherwise, to operate the debtor's business and to exercise the rights and powers of a trustee in respect of the sale or use of property and liens on after-acquired property. These powers are confined to the debtor's property within the United States' territorial jurisdiction.
[94] Article 19, Model Law; Guide to Enactment, *supra*, note 18, at para. 30.
[95] Guide to Enactment, *supra*, note 18, at paras. 135, 137.
[96] Section 1519, Chapter 15, U.S. *Bankruptcy Code.*

recognizing the foreign proceeding is made, an order made under these provisions must be consistent with any order that may be made in any proceedings under the domestic insolvency statute.[97] As with mandatory orders, the making of a discretionary order does not preclude the commencement or the continuation of proceedings under the *CCAA*, the *BIA* or the *WURA* in respect of the debtor company.[98] The foreign representative may commence and continue proceedings under the *BIA* and *CCAA* in respect of a debtor company as if the foreign representative were a creditor of the debtor company, or the debtor company, mirroring Chapter 15 and the Model Law.[99]

8. Obligations

Chapter 47 sets out a series of obligations, including co-operation by the court, other Canadian authorities and the foreign representative. It specifies that if an order recognizing a foreign proceeding is made, the court shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.[100] If any proceedings under the *CCAA* or *BIA* have been commenced in respect of a debtor company, every person who exercises powers or performs duties and functions under Canadian proceedings is required to cooperate, to the maximum extent possible, with the foreign representative and the foreign court.[101] This language largely mirrors Articles 25 and 26 of the Model Law and the respective Chapter 15 provisions.[102] The Guide to Enactment suggests that this provision makes it clear that an insolvency administrator is acting under the supervision of the court, and that the Model Law does not modify the rules already existing in the domestic insolvency law.[103]

However, the Canadian provisions do not go on to provide, as the Model Law does, that the court and the person administering the liquidation or reorganization are entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.[104] It is unclear what the significance of this might be, in that Canadian courts, through their orders, do directly request information and assistance, and in a number of cases, protocols have allowed direct communication. In the current proceeding of *Muscletech Research*

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[97] Sections 49(2), 272(2), as amended by Chapter 47.
[98] Section 49(3), 273(3), as amended by Chapter 47.
[99] Section 51, as amended by Chapter 47, Articles 11, 12 and 24, Model Law.
[100] Sections 52(1), 275(1), as amended by Chapter 47.
[101] Sections 52(2), 275(2), as amended by Chapter 47.
[102] Article 26(1), Model Law.
[103] Guide to Enactment, *supra*, note 18, at para. 180.
[104] Articles 25(2) and 26(2), Model Law.

and Development Inc., the *CCAA* judge and the Chapter 15 U.S. judge are in direct communication in respect of coordination and co-operation.[105]

Article 13 of the Model Law and § 1513 of Chapter 15 specify that foreign creditors enjoy the same rights as domestic creditors to initiate and participate in a domestic insolvency proceeding, although this does not affect the ranking of claims in a proceeding, except that foreign creditors are not to be ranked lower than particular classes of claims.[106] The Model Law proposes alternative wording to this provision suggesting that it could be phrased as not affecting the ranking of claims or the exclusion of foreign tax and social security claims from such a proceeding.[107] Although the Model Law does not interfere with the enacting state's determination of priority of claims, it prescribes a minimum standard of treatment. The enacting state must treat a foreign creditor "at least as well as a general unsecured creditor, provided that the equivalent local claim would receive at least that treatment."[108]

9. Concurrent Main Proceedings

Chapter 47 expressly recognizes multiple proceedings, and facilitates coordination between a local proceeding and one or more foreign proceedings. The provisions are aimed at fostering coordination of decision-making, with the ultimate objective of a successful restructuring or maximizing the value of creditors' claims.

Chapter 47 provides for concurrent proceedings, and specifies that if any proceedings under the *CCAA* in respect of a debtor company are commenced at any time after an order recognizing the foreign proceeding is made, the court shall review any order it has made and, if it determines that the order is inconsistent with any orders made in the Canadian proceeding, the court shall amend or revoke the order.[109]

The Model Law specifies that after recognition of a foreign main proceeding, a proceeding under the law of the domestic state may be commenced only if the debtor has assets in the state; and the effects of that proceeding shall be restricted to the assets of the debtor that are located there

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[105] *Re Muscletech Research and Development Inc.*, [2006] O.J. No. 462 (Ont. S.C.J.) at para. 5.

[106] The Model Law specifies to "identify the class of general non-preference claims, while providing that a foreign claim is to be ranked lower that the general non-preference claims if an equivalent local claim (e.g. claim for a penalty or deferred payment claim) has a rank lower than the general non-preference claims", Article 13, Model Law.

[107] Footnote to Article 13, Model Law.

[108] J. Clift, "The UNCITRAL Model Law on Cross-Border Insolvency: A Legislative Framework to Facilitate Coordination and Co-operation in Cross-Border Insolvency", (2004) 12 Tulane J. Int'l & Comp. L. 307, at 322.

[109] Section 54, *CCAA*, as amended by Chapter 47.

and, to the extent necessary to implement co-operation and coordination, to other assets of the debtor that, under the domestic law, should be administered in that proceeding.[110] The Guide to Enactment specifies that these provisions ensure that the recognition of foreign main proceeding will not prevent commencement of a local insolvency proceeding as long as there are assets in the domestic jurisdiction.[111] Under the Model Law, "the effects of an insolvency proceeding commenced on the basis of the presence of assets only are normally restricted to the assets located in that state".[112] Hence, the Model Law does not prohibit commencement of a local proceeding after recognition of a foreign main proceeding, but it limits the scope of the proceeding. The Guide to Enactment notes that the Model Law adopted the less restrictive asset test, rather than requiring the debtor to have an establishment to commence a proceeding, leaving "a broad ground for commencing a local proceeding after recognition of a foreign man proceeding".[113]

The Guide to Enactment also specifies that while ordinarily, the local proceeding would be limited to the assets located in the state, in some situations, a meaningful administration of the local insolvency proceeding may have to include certain assets abroad, especially where there is no foreign proceeding necessary or available in the state where the assets are located.[114] It notes that in order to allow such limited cross-border reach, Article 28 of the Model Law includes the words "and…to other assets of the debtor that…should be administered in that proceeding", qualified by the words that this reach is permissible to the extent necessary to implement co-operation and coordination and the foreign assets must be subject to administration in the enacting state.[115] The Guide to Enactment observes that this qualification should avoid creating an open-ended faculty to extend the effects of a local proceeding to assets located abroad, which could reduce certainty and lead to conflicts of jurisdiction disputes.[116] The Chapter 15 provisions adopt the same approach as the Model Law.

In contrast, Chapter 47 does not have a provision similar to Article 28 of the Model Law, which appears to preclude commencement of concurrent main proceedings. The Canadian provisions appear to expressly contemplate concurrent main proceedings, as currently exist in Canadian cross-border proceedings. The language of the Model Law raises several questions. First, if a main proceeding has been recognized in another jurisdiction but not yet granted a recognition order in the domestic state, can the domestic state commence a main proceeding? There is

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[110] Article 28, Model Law; see also Chapter 15.
[111] *Ibid.* at para. 184.
[112] Guide to Enactment, *supra*, note 18, at para. 73.
[113] *Ibid.* The Guide to Enactment also specifies that states may wish to enact the more restrictive establishment test and that this would still align with the Model Law.
[114] *Ibid.* at para. 186-7.
[115] *Ibid.* at para. 187.
[116] *Ibid.*

nothing in the language that appears to preclude this. If so, there is likely to be a "race to recognition" and considerable forum shopping. There is no analogous provision that prevents commencement of a domestic proceeding if it precedes recognition of a foreign main proceeding.[117] If a recognition order for a foreign main proceeding has been granted, can the domestic court nevertheless approve domestic main proceedings? The Model Law would appear to allow for domestic proceedings, but not main proceedings, as it for the most part restricts the court's jurisdiction to the debtor's assets in the jurisdiction. Yet even such a restriction may not resolve conflicts, given that the domestic jurisdiction may have considerable assets and few creditors' claims. The Model Law is unclear as to how claims are to be realized in such an instance, and which court has jurisdiction over the claims realization process. The impact on a workout strategy is therefore to add an element of uncertainty about the results of liquidation that may impede negotiation for such a strategy.

The Model Law also specifies that when a proceeding in the State is taking place at the time the application for recognition of the foreign proceeding is filed, any relief granted must be consistent with the domestic proceeding; and if the foreign proceeding is recognized in the domestic state as a foreign main proceeding, the Article 20 automatic stay provisions do not apply.[118] When the proceeding in the state commences after filing of an application or recognition of the foreign proceeding, any relief in effect shall be reviewed by the court and is to be modified or terminated if inconsistent with the domestic proceeding.[119] If the foreign proceeding is a foreign main proceeding, the stay and suspension are to be modified or terminated if inconsistent with the domestic proceeding.[120] This language appears broad enough to contemplate a domestic proceeding that could be a main proceeding and a foreign main proceeding, although this would likely be highly contested. Even if it were to be interpreted this way, the language of the Model Law raises the question of whether a third jurisdiction implicated in the debtor's insolvency could recognize two foreign main proceedings.

Under the Canadian provisions, a domestic proceeding may be commenced after recognition of a foreign main proceeding even if the debtor has no assets in Canada, something that does not appear to be possible under the Model Law. The Model Law requires that in granting relief to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of the state, should be administered in the foreign non-main

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[117] Marvin Baer, "The Impact of Part XIII of the *BIA* and the UNCITRAL Model Law on Cross-Border Insolvency" (February 1998), online: Government of Canada, http://www.strategis.ic.gc.ca/pics/cl/uncitr_1-2.pdf at 9.
[118] Article 29((a), Model Law.
[119] Article 29(b)(i), Model Law.
[120] Article 29(b)(ii), Model Law.

proceeding or concerns information required in that proceeding.[121] Hence, domestic law tempers the scope of relief available under the recognition order, regardless of when the order is sought. The timing of the various recognition orders and commencement of proceedings is likely to place limits on the court's decision to grant particular relief. If proceedings under the *BIA* or *CCAA* have already been commenced, the automatic relief prescribed upon recognition of a foreign main proceeding does not apply.

The Legislative briefing notes on Chapter 47 are illustrative of the Government's view of the interplay between domestic and foreign proceedings:

> Section 277 gives the court guidance to deal with cases where the same debtor is subject to a foreign proceeding followed by a local proceeding. The most important principle in this section is that the commencement of a local proceeding does not terminate the recognition of a foreign proceeding. This principle allows Canadian courts to provide relief in favour of the foreign proceeding in all circumstances. However, section 277 maintains a pre-eminence of the local proceeding over the foreign proceeding (i.e., any relief that has already been granted to the foreign proceeding must be reviewed to ensure consistency with the local proceeding and if the foreign proceeding is a main proceeding, the automatic effects pursuant to section 271 are to be terminated if inconsistent with the local proceeding).
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> Section 278 deals with cases where the debtor is subject to insolvency proceedings in more than one foreign state and foreign representatives of more than one foreign proceeding seek recognition or relief in Canada. The objective of section 278 is similar to that of section 277 in that the key issue when there are concurrent proceedings is to promote cooperation, coordination and consistency of relief granted to different proceedings. Such consistency is achieved by appropriately tailoring relief to be granted or by modifying or terminating relief already granted. The only priority in this section is given to the foreign main proceeding. That priority is reflected in the requirement that any relief in favour of a foreign non-main proceeding must be consistent with the foreign main proceeding (subsection 278(1)).[122]

Where there are numerous corporate entities, with highly interwoven corporate operations, it appears that there is still the opportunity for concurrent main proceedings after enactment of Chapter 15 in the U.S. and Chapter 47 in Canada. Calpine Corporation is the first Canadian-U.S. company to file such proceedings after Chapter 15 came into force. Calpine Corporation owned, leased or managed 92 natural gas-fired and geothermal plants in the U.S. and Canada. It suffered financial distress due to the high price of natural gas, an oversupply of electricity during 2005, market competition from less costly but environmentally less friendly coal production, and a damages award from litigation in the amount of US$313 million when its bondholders successfully won a suit alleging that use of certain asset proceeds had violated terms of their debentures.[123] Calpine and almost 300 subsidiaries filed under Chapter 11 of the U.S. *Bankruptcy Code* and 12

[121] Article 21(3) and Article 29(3), Model Law.
[122] Legislative Briefing Note on Chapter 47, Library of Parliament.
[123] Northern Lights, *supra*, note 5.

Canadian Calpine entities applied for protection under the *CCAA*. At the time of filing, Calpine owed US$18 billion in debt. Concurrent main proceedings were approved through grouping of different corporate entities in different jurisdictions. The Canadian subsidiaries had few remaining assets and operations at the time of filing, holding numerous gas supply contracts, and having a large amount of highly complex inter-company debt through two special purpose financing vehicles, with billions of dollars of public bond debt held by New York-based distressed debt investors, and the bond debt guaranteed by Calpine Corporation, the U.S. parent.

Calpine had operated as a global company when it was viable; however, the Chapter 11 and *CCAA* proceedings have been conducted relatively independently of one another, in part because it became evident that the contemplated $2 billion DIP financing was not to be made available to the Canadian debtor companies. Yet this separation of the global operations into two proceedings is challenging, as there is an ongoing need to supply gas from the Canadian entities to the U.S. power plants. Moreover, the Canadian Calpine affiliates are one of the U.S. Calpine companies' largest creditors. The proceedings have been proceeding in tandem, rather than through a protocol, and there have been memoranda of understanding on specific issues.[124] For example, there is a memorandum of understanding on the nature of claims by the Canadian Calpine companies against the U.S. parent and affiliates and as a result, the parties agreed to a master proof of claim by the Canadian entities as against the U.S. entities. This addressed the fact that one of the unlimited liability companies of Calpine located in Nova Scotia Canada had raised billions of dollars in public bond debt, most of which had gone to the U.S. entities, but had been lent further to other Calpine U.S. debtors, and hence the Canadian debtor might not have a direct claim against the entity that ended up with the assets.[125]

Similarly, given that the assets raised through one of the Canadian Calpine debtors were lent on throughout the parent and affiliates in the U.S., the creditors of the U.S. entities were the Canadian debtors.[126] While the bondholders as creditors of the Canadian debtors would be the beneficiaries of any assets eventually realized, they had no direct claim against the U.S. debtors. Recovery of their claims depended on the Canadian debtors recovering their inter-company loans, most of which were to the U.S. Chapter 11 debtors. The debtors permitted the indenture trustees for the public bondholders to file certain claims they deemed necessary into the U.S. on behalf of the Canadian Calpine entities that were the issuers of the public bond debt, after making the underlying transaction documents available to their counsel under confidentiality agreements.[127] Hence, while the public bondholders were not granted any right to prosecute

[124] *Ibid.*
[125] *Ibid.*
[126] *Ibid.*
[127] *Ibid.*

claims, they were, under an issue specific agreement, able to move to protect their claims by filing in a timely manner under the U.S. claims process against the U.S. Calpine debtors. The Alberta Court of Queen's Bench, which has carriage of the Canadian *CCAA* proceedings, issued an order confirming this arrangement. Thus while the issue of corporate groups is not easily resolved, in Calpine, to date, the parties have found a workable process of concurrent main proceedings.[128]

There continues to be debate in both Canada and the U.S. regarding the scope of concurrent proceedings that may be recognized under § 1528 of Chapter 15. A liberal interpretation suggests that the courts could recognize a domestic main proceeding and a foreign main proceeding. As with the Model Law, under § 1528 of Chapter 15, the domestic proceeding can extend to assets that are not within the state but are within the jurisdiction of the court and have not been brought under the jurisdiction and control of a foreign proceeding.[129] However, if one considers the Calpine case, discussed above, a globally operated corporation with more than 300 affiliated companies in Canada and the U.S. have concurrent main proceedings, splitting the corporate group into two sets of entities. It seems that as long as there are separate corporate entities that can locate their COMI in the jurisdiction, the courts can recognize concurrent main proceedings, even if the corporate group has operated as a global enterprise.

The Chapter 47 provisions are codification of many current practices of Canadian courts. Hence while some discretion is removed in the sense of mandatory stay orders once recognition is granted, the reality is that under the current provisions of the *CCAA*, once a court does grant recognition in Canada, these types of orders are more often than not granted. While codification will provide greater certainty and predictability for foreign representatives in considering recognition and other applications, in Canada, in practice, the difference may not be significant. This will be clearer after some initial Court decisions following proclamation of Chapter 47.

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[128] *Ibid.*

[129] Section 1529 specifies: If a foreign proceeding and a case under another chapter of this title are pending concurrently regarding the same debtor, the court shall seek co-operation and coordination under sections 1525, 1526, and 1527, and the following shall apply: (1) If the case in the United States pending at the time the petition for recognition of such foreign proceeding is filed-- (A) any relief granted under section 1519 or 1521 must be consistent with the relief granted in the case in the United States; and (B) section 1520 does not apply even if such foreign proceeding is recognized as a foreign main proceeding. (2) If a case in the United States under this title commences after recognition, or after the date of the filing of the petition for recognition, of such foreign proceeding-- (A) any relief in effect under section 1519 or 1521 shall be reviewed by the court and shall be modified or terminated if inconsistent with the case in the United States; and (B) if such foreign proceeding is a foreign main proceeding, the stay and suspension referred to in section 1520(a) shall be modified or terminated if inconsistent with the relief granted in the case in the United States. (3) In granting, extending, or modifying relief granted to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the laws of the United States, should be administered in the foreign non-main proceeding or concerns information required in that proceeding. (4) In achieving co-operation and coordination under sections 1528 and 1529, the court may grant any of the relief authorized under section 305.

Codification may bring cost efficiencies, but this is unlikely in the initial period after enactment, as parties litigate to set the parameters of requirements and deal with issues such as potential forum shopping.[130] There may be efficiencies once there is some certainty in how the legislation is interpreted.

III. INITIAL CANADIAN EXPERIENCE WITH CHAPTER 15 U.S. *BANKRUPTCY CODE*

In the year since Chapter 15 came into force, there have been more than thirty cases seeking recognition of foreign main and non-main proceedings in the United States. Nine of those proceedings involve Canadian foreign representatives and Canadian proceedings. It is important to note at the outset that the OSB data base is not collecting data that allows the tracking of concurrent Chapter 15 and Canadian insolvency proceedings, which will make data collection and policy analysis very difficult. The OSB should consider revising its data collection tool to try to capture this information. Of the nine proceedings found, information was available on eight of the proceedings. Six of these cases were commercial insolvencies and two cases involve individual debtors with considerable business liabilities. All cases appear to be ongoing as of January 2007.

One case, *Muscletech,* is a *CCAA* proceeding involving a company and a number of related entities with a Chapter 15 foreign main proceeding recognition order, as discussed below. Two files involve interim receiverships for related companies in Ontario and Delaware.[131] Another case also involves recognition of a foreign main proceeding for a Canadian receivership involving eight corporate entities, and also involves recognition orders from the High Court of Justice in Barbados and the Bahamas Supreme Court.[132] Two cases involve recognition of a Canadian

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[130] Northern Lights, *supra*, note 5.

[131] *Creative Building Maintenance Inc (Ontario)* and *Creative Building Maintenance Inc.(Delaware),* U.S. Bankruptcy Court Western District of New York, Case 06-03587, Chapter 15, Order directing joint administration of related cases, recognizing the interim receiver in a proceeding before the Ontario Superior Court of Justice under the *BIA* ,(21 November 2006).

[132] In *re: Norshield Asset Management (Canada), Ltd., a/k/a Norshield Financial Group; Norshield Investment Partners Holdings Ltd.; Olympus United Fund Holdings Corporation, a/k/a First Horizon Holdings Ltd.;* Order recognizing court-appointed receivership as a Foreign Main Proceeding with certain Canadian insolvency proceedings pending in the Ontario Superior Court of Justice (Commercial List) and the Québec Superior Court (Commercial Division) , U.S. Bankruptcy Court District of Minnesota, BKY 06-40997 (28 June 2006) pursuant to 11 U.S.C. § 1515. See also Order of the High Court of Justice Civil Division Barbados, order winding up of Olympus United Bank and Trust SCC and appointing RSM Richter as joint custodians, (25 September 2005); Order of the Bahamas Supreme Court appointing joint provisional liquidators of Mosaic Composite Limited, now Mosaic Composite Limited (US) Inc., a Minnesota Corporation (22 March 2006), 2005/com/bnk/no. 00047. Québec Superior Court Recognition

bankruptcy proceeding as a foreign main proceeding and recognition of the trustee in bankruptcy as the foreign representative.[133] In Mount Real Corporation, recognition was granted for proceedings against four related companies. The two consumer insolvencies involve trustees and liquidators, and issues where the debtor is alleged to be hiding assets that should be available to meet claims arising from commercial dealings, as discussed below. The cases for the most part involve the foreign representative seeking to protect assets located in the U.S.

1. Recognition Orders and Interpretation of COMI under Chapter 15

The U.S. *Bankruptcy Code* provides that a foreign proceeding for which Chapter 15 recognition is sought must be recognized as a "foreign main proceeding" if it is pending in the country where the debtor has the centre of its main interests.[134] For the most part, the COMI of the Canada-U.S. cross-border proceedings has been uncontested.[135] For example, in *re: Norshield Asset Management (Canada), Ltd.,* the U.S. Bankruptcy Court held that "the Canadian insolvency proceeding is a foreign proceeding as such term is defined in 11 U.S.C. § 101(23) and, because

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Order dated February 2006, recognizing the Ontario Superior Court Order appointing RSM Richter Inc. as Receiver, to take possession and control of assets of the debtor corporations (29 June 2005).

[133] In *re: Mount Real Corporation;* Order recognizing MRACS Management Ltd., Foreign Main Proceeding, a/k/a Mount Real Acceptance Corporation; Real Vest Investment Ltd.; BKY 06-41636 Real Assurance Acceptance Corporation, (Chapter 15 Case) a/k/a Mount Real Assurance Acceptance Corporation, U.S. Bankruptcy Court District of Minnesota, BKY 06-41636, (6 September 2006), recognizing Raymond Chabot Inc. as bankruptcy trustee in proceedings before the Québec Superior Court.

[134] 11 U.S.C. § 1517(b)(1). For the purpose of Chapter 15, "debtor" "means an entity that is the subject of a foreign proceeding." 11 U.S.C. § 1502(1). "Entity" "includes person, estate, trust, governmental unit, and United States trustee." 11 U.S.C. § 101(15). The rules of construction for Title 11, contained in 11 U.S.C. § 102 and made applicable in Chapter 15 cases by 11 U.S.C. § 103(a), instruct that the word "includes" is not limiting. 11 U.S.C. § 102(3); *9165-7999 Québec Inc., aka les Productions Sky High Vikings Inc.*, U.S. Bankruptcy Court Northern District of Illinois Chapter 15 Recognition Order (22 August 2006), 06B-07875 recognizing a trustee and proceeding before the Québec Superior Court.

[135] *Creative Building Maintenance Inc.*, U.S. Bankruptcy Court Western District of New York, Case 06-03587, Chapter 15, Order directing joint administration of related cases, recognizing the interim receiver in a proceeding before the Ontario Superior Court of Justice under the *BIA* ,(21 November 2006); *9165-7999 Québec Inc., aka les Productions Sky High Vikings Inc.,* U.S. Bankruptcy Court Northern District of Illinois Chapter 15 Recognition Order (22 August 2006), 06B-07875 recognizing a trustee and proceeding before the Québec Superior Court, where the court held that the COMI was Canada and that it was a foreign main proceeding pursuant to §1502(4) and entitled to recognition pursuant to §1517(b)(1) and relief under §1520; In *re Trade and Commerce Bank (in Liquidation),* Chapter 15 recognition order, U.S. Bankruptcy Court Southern District of New York, Chapter 15, Case No. 05-60279 (SMB), Order granting recognition of Foreign Main proceeding pursuant to Chapter 15, §§ 1515 AND 1517, recognizing joint liquidators in main proceedings before the Grand Court of the Cayman Islands, http://www.tcbliquidation.ky, finding that the Foreign Proceeding is pending in the country where the center of main interests of TCB is located and accordingly the TCB Liquidation is a foreign main proceeding pursuant to 11 U.S.C. § 1502(4) entitled to recognition as a foreign main proceeding pursuant to 11 U.S.C. § 1517(b)(1), (8 February 2006); Re *Vekoma*, U.S. Bankruptcy Court, Western District of Texas, Case no. 06-50151 (LMC), recognizing as foreign main proceeding Dutch insolvency proceedings by the District Court of Roermond (Liq. No. 01-119 F).

the Canadian insolvency proceeding is pending in the country where the debtors have the center of their main interests, constitutes a foreign main proceeding under 11 U.S.C. § 1502(4)."[136]

In *Muscletech Research and Development Inc.*, the first Canadian case involving a *CCAA* main proceeding and U.S. Chapter 15 proceeding, Canadian debtor companies had sold products in the U.S. that gave rise to U.S. product liability class action suits and U.S. consumer class actions.[137] The Canadian Court found that Ontario was the COMI on the basis that: all the applicant companies were incorporated and registered in Canada; the principals, directors and officers were Ontario residents; all decision-making and control in respect of the applicants takes place at the debtor's premises in Ontario; the debtor's principal banking arrangements are conducted in Ontario with a Canadian Bank; and all administrative functions and employees performing those functions, including general accounting, financial reporting, budgeting and cash management, are conducted in Ontario. [138]

Hence the indicia of COMI was found to include place of registration, place of control and decision making, as well as the court considering administrative and operational factors. In granting the Chapter 15 petition in *Muscletech,* Judge Rakoff of the U.S. District Court made the finding that the applicants' COMI was located in Ontario, based on the factors that were identified by the Canadian Court in its initial decision on COMI.[139] The fact that most of the debtor's products were sold in the U.S. and that it had been subject to product liability litigation did not alter where the COMI was located. The proceeding in *Muscletech Research and Development Inc.* is still in progress.

The Chapter 15 cases involving foreign proceedings other than Canadian proceedings to date have also been largely uncontested in terms of determination of the COMI of the debtor. For example, in *re Gordian Runoff (UK) Limited*, the U.S. Bankruptcy Court Southern District of New York approved recognition of a foreign main proceeding under Chapter 15 and related relief in aid of a debtor's scheme of arrangement pursuant to section 425 of the *Companies Act 1985 of*

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[136] In *re: Norshield Asset Management (Canada), Ltd., a/k/a Norshield Financial Group; Norshield Investment Partners Holdings Ltd.; Olympus United Fund Holdings Corporation, a/k/a First Horizon Holdings Ltd.;* Order recognizing court-appointed receivership as a Foreign Main Proceeding with certain Canadian insolvency proceedings pending in the Ontario Superior Court of Justice (Commercial List) and the Québec Superior Court (Commercial Division) , U.S. Bankruptcy Court District of Minnesota, BKY 06-40997 (28 June 2006) pursuant to 11 U.S.C. § 1515. The Court held that the Canadian Insolvency Proceeding was recognized as a foreign main proceeding pursuant to 11 U.S.C. § 1517(a) and (b)(1).
[137] *Re Muscletech Research and Development Inc.*, [2006] O.J. No. 167 (Ont. S.C.J) and *Re Muscletech Research and Development Inc.*, [2006] O.J. No. 462 (Ont. S.C.J.).
[138] *Re Muscletech Research and Development Inc.*, [2006] O.J. No. 167 (Ont. S.C.J) at para. 4.
[139] There was no issue in respect of the recognition of the foreign main proceeding by the New York U.S. Bankruptcy Court, and while there was considerable debate as to the scope of the order, the U.S. court ultimately did not have to rule on that issue.

England and Wales (Companies Act) sanctioned by the High Court of Justice of England and Wales.[140] The application was uncontested; England was the place of incorporation, location of the debtor's registered office, and the only place of business of the debtor and hence was clearly the country in which the centre of main interests of the debtor was located. The Chapter 15 case was found properly commenced pursuant to 11 U.S.C. §§ 101(24) and 11 U.S.C. §§ 1504 and 1515. The Court held that the foreign proceeding was entitled to recognition pursuant to 11 U.S.C. § 1517(a), as it was pending in the country where the centre of main interests of the debtor is located and, as such, is a foreign main proceeding pursuant to 11 U.S.C. § 1502(4); entitled to recognition as a foreign main proceeding pursuant to 11 U.S.C. § 1517(b)(1); and the foreign representative was entitled to all relief provided pursuant to 11 U.S.C. § 1520.[141] The Court held that the relief granted, including permanent injunctive relief, was necessary and appropriate, in the interests of the public and international comity, consistent with the public policy of the United States, and would not cause any hardship to Scheme creditors or other parties in interest that is not outweighed by the benefits of granting the relief.[142]

The first comprehensive reasons given by a U.S. court under Chapter 15 in respect of the definition of COMI was in *re SPinX Ltd.* In a judgment dated September 6, 2006, the U.S. Bankruptcy Court Southern District of New York considered the issue of recognition of foreign main versus non-main proceedings. In *re SPinX Ltd*., joint official liquidators of a number of debtors, called collectively the SPinX Funds, were engaged in voluntary wind-up proceedings under supervision of the Grand Court of the Cayman Islands, and sought recognition in the U.S.

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[140] In *re Gordian Runoff (UK) Limited*, Case No.06- 11563(rdd), (28 August 2006), Robert Drain, U.S. Bankruptcy Judge, the U.S. Bankruptcy Court, Southern District of New York in August 2006, approved a proceeding under Chapter 15, Order and Final Decree Granting Recognition of Foreign Main Proceeding, Permanent Injunction and Related Relief pursuant to 11 U.S.C. §§ 1517, 1520 and 1521. The Scheme was proposed pursuant to Section 425 of the C*ompanies Act 1985* of Great Britain and the English High Court approved the convening of a meeting of Scheme Creditors that subsequently was held and at which the Scheme was approved by the requisite majorities of Scheme Creditors. On April 26, 2006, the English High Court issued an Order sanctioning the Scheme.

[141] It found its jurisdiction pursuant to 28 U.S.C. §§ 157 and 1334, 11 U.S.C. §§ 109 and 1501, and the Standing Order of Referral of Cases to Bankruptcy Judges of the United States District Court for the Southern District of New York (Ward, Acting C.J.), dated July 10, 1984. Recognition of foreign proceedings and other matters under Chapter 15 of the *Bankruptcy Code* expressly have been designated as core proceedings pursuant to 28 U.S.C. § 157(b)(2)(P). The Debtor does not have a place of business within the territorial jurisdiction of the United States and there are no known proceedings pending against the Debtor or its assets within the United States. While the Debtor has assets located within the territorial jurisdiction of the United States, including within the Southern District of New York, there is no principal place where the Debtor's assets are located. Edwards Angell Palmer & Dodge LLP, Attorneys for the Chapter 15 Petitioner, Memorandum of Points and Authorities in support of Chapter 15 Petition for Order and Final Decree granting recognition of foreign main proceeding and permanent injunctive and other relief, *re Gordian Runoff (UK) Limited*, Case No.06- 11563(rdd) (11 July 2006), www.gordianuk.co.uk. See also *La Mutuelle du Mans Assurance IARD (UK Branch)*, Case No. 06-60100(BRL) and *Lion City*.

[142] *Ibid.* at para. 12.

for the Cayman proceedings as a foreign main proceeding.[143] Each of the SPinX Funds was either a limited liability company or a segregated portfolio company incorporated and registered in the Cayman Islands. The SPinX Funds are hedge funds buying and selling securities and commodities, established off-shore because of favourable tax treatment for investors. The U.S. Bankruptcy Court recognized the foreign proceeding and granted the foreign representative status, but declined to recognize the Cayman Islands proceeding as a foreign main proceeding. The Court observed that the presumption that the debtor's registered office is the COMI was rebuttable. While the U.S. *Bankruptcy Code* does not specify the type of evidence required to rebut the presumption, various factors could be relevant to the determination, and the court held that it should not apply such factors mechanically.

The Court in *re SPinX Ltd.* held that because it is ultimately creditors' money at stake, courts should generally defer to any creditor acquiescence in support of a proposed COMI. Here, however, the Court found that the SPinX Funds did not conduct any trades or business in the Cayman Islands; the only business in the Caymans was the minimum steps to remain in good standing under Cayman law; the debtors had no employees or managers located there, no directors resident there and no meetings of the corporate board had taken place there; no assets were located there except minute books and other minimum statutory requirements under Cayman law. At least 90% of the SPinX Funds approximately $500 million in assets are located in accounts in the U.S., and investors are located throughout the world.

The Court further held that the key to harmonizing the flexibility offered under Chapter 15 with its objective of greater legal certainty is protecting the interests of parties pursuant to fair and efficient procedures that maximize value.[144] Here, it was appropriate to recognize a foreign non-main proceeding, even though there was no foreign main proceeding yet recognized in another jurisdiction, and the Court held that this was a better approach than declining or deferring any recognition, as there were competent joint official liquidators under the supervision of the Cayman court ready to perform the winding-up function. The Court also observed that the primary basis for the recognition petition before it was improper; specifically, the Court concluded that the debtors were seeking recognition of a foreign main proceeding in part to gain access to the automatic stay and thereby frustrate a settlement that one of the debtor's largest creditors had received in another U.S. proceeding. The Court held that this litigation strategy was not appropriate. The judgment indicates that the court will adopt a purposive approach to interpretation of COMI. Interestingly, however, the Court did not address the requirement under

[143] *Re SPinX Ltd*., S.D. N.Y. Case No. 06-11760.
[144] *Ibid.*

section 1502(5) of Chapter 15, which requires an "establishment" in the foreign jurisdiction in order to come within the definition of foreign non-main proceeding.

2. Product Liability Claims and the Public Policy Exception

The *CCAA* and Chapter 15 proceedings in Re *Muscletech* and related companies is one of the first cases in which both Canadian and U.S. courts have had to consider how tort claims are to be dealt with in a cross-border restructuring proceeding. In *Re Muscletech*, the Ontario Superior Court of Justice recently considered the question of whether U.S. plaintiffs in an uncertified class action could file claims in the *CCAA* proceeding on behalf of themselves and all other similarly situated plaintiffs.[145] In the ephedra products liability litigation, consumers of products containing ephedra allege that they have suffered physical damage as a result of using the products; and in the prohormone litigation, consumers of products containing prohormone allege either that the product failed to produce the promised increased muscle mass, or alternatively, produced the promised increased muscle mass, but in doing so, allegedly contained anabolic steroids. The latter actions claim damages from misleading advertising and being illegally sold a controlled substance. All of the U.S. litigation has been moved to the United States District Court for the Southern District of New York to be managed together.

The products liability actions had been stayed under both the *CCAA* and U.S. Chapter 15 proceedings. There was a claims process set up under the *CCAA* proceeding, which involved a first assessment of claims by the Canadian monitor; a process for resolving disputed claims; and a claims bar date. In considering the issue of representative claims, the Canadian Court held that while it is possible to have a representation order in *CCAA* proceedings, to date, there had not been a Canadian judgment that extended such orders to permit a "representative proof of claim" to be filed. The Court held that while a representative claim may be possible, the question was whether the case before it was a proper one to permit this kind of representative claim without the necessity of the individual members of the class filing claims.

The Canadian Court in *Re MuscleTech* held that the *CCAA* claims process would have adequately protected the interests of the potential claimants, had they availed themselves of the process. It noted that other individuals had filed claims within the prescribed period, but the potential claimants had chosen not to utilize the process. The Court declined to exercise its discretion to allow the representative claims or lift the stay to permit certification motions to proceed in the U.S. The Court held that changing and increasing the landscape of claimants after

[145] *Re MuscleTech Research and Development Inc.*, [2006] O.J. No. 3300 Ont. S.C.J..

the claims bar date and after the settlement of 30 of the ephedra claims could prejudice the eventual success of the *CCAA* process. The Court held that the arguments by the representative plaintiffs should have been made when the Call for Claims Order was made. The process gave adequate opportunity for anyone with a claim to file a proof of claim; the forms were accessible and in plain language; and the products liability claimants all managed to make individual claims, even where they were involved in class actions. Hence the Court concluded that to allow representative or class claims at this date would be prejudicial to the entire claims process and would impair the integrity of the *CCAA* process.

In the Chapter 15 proceeding of the same debtor, the U.S. District Court Southern District of New York granted the Ontario monitor's request to recognize and enforce the Canadian order setting out the claims procedure.[146] The U.S. Court held that pursuant to § 105(a) and § 1521(a) of the U.S. *Bankruptcy Code,* the court is permitted in a Chapter 15 proceeding to grant any appropriate relief necessary to effectuate the purpose of the chapter and to protect the assets of the debtor or the interests of creditors. The allegation by the objecting parties was that the Canadian *CCAA* claims procedure violated their constitutional right to a jury trial and that the court had the power under §1506 to refuse to take an action if the action would be manifestly contrary to the public policy of the United States.

This was the first case in which the court considered the meaning the "manifestly contrary to public policy" exception in Chapter 15 of the U.S. *Bankruptcy Code*. The U.S. Bankruptcy Court noted that the *CCAA* Claims Procedure provides for mandatory mediation, and if the mediation results in a plan approved by specified majorities of creditors, for estimation and liquidation of the remaining claims by a court-appointed claims officer. The Court held that the amended claims process, which affords the claimants the opportunity to be heard, met any due process concerns. Most significantly, the Court held that § 1506 does not prevent a U.S. court from giving recognition and enforcement to a foreign insolvency proceeding for liquidating claims simply because the procedure does not include a right to a jury.

The Court held that in adopting Chapter 15, Congress made clear that "manifestly contrary to the public policy of the United States" was to be interpreted narrowly, restricting the public policy exception to the most fundamental policies of the U.S. The Court also cited the Guide to Enactment of the Model Law on Cross-Border Insolvency, which the U.S. House Judiciary Committee had directed be consulted for guidance on the meaning of Chapter 15 provisions. Judge Rakoff concluded that the public policy exception should be interpreted restrictively, and is

[146] *In re Ephedra Products Liability Litigation, In re Muscletech Research and Development,* Order of Judge Rakoff, 04 MD 1598, 06 Civ. 538 (S.D.N.Y.).

only intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the state. The Court drew on early U.S. caselaw in respect of foreign proceedings, to find that the court should generally accord comity if the foreign proceedings are fair and impartial and provide the same substantive and procedural due process protections as are available in the United States. The Court held that while the constitutional right to a jury is an important component of the U.S. legal system, "the notion that a fair and impartial verdict cannot be rendered in the absence of a jury trial defies the experience of most of the civilized world" and that it was difficult to detect what unfairness a plaintiff would suffer from having a civil case decided by a judge rather than a jury. The Court held that in the circumstances, the claims procedure was fair and impartial and that nothing more is required by § 1506 or any other law.

The judgment is significant in that it indicates that the court will defer to judicial decisions made in a foreign main proceeding as long as it is satisfied that due process protections are in place and in such cases, the objective of comity will trump some procedural avenues, such as trial by jury, that are available in the U.S. but not other jurisdictions.

3. Consumer Bankruptcy under Chapter 15

There appear to have been only two reported consumer insolvency proceedings recognized under Chapter 15 in respect of Canadian proceedings, both involving business interests.

In *Ian Gregory Thow*, the Canadian consumer bankruptcy case commenced in summer of July 2005 in response to actions by the B.C. Securities Commission, which froze the debtor's assets, including his B.C. $8 million residence. The debtor, an investment counsellor in British Columbia, was accused by former clients of defrauding them of millions of dollars to facilitate his lifestyle. There were a number of lawsuits pending by former client investors against the debtor and his related companies, with claims amounting to approximately $28 million. Thow operated a company known as Berkshire Investment Group. A trustee in bankruptcy was appointed in July 2005 as the interim receiver of Thow's assets and as Receiver of the assets of the various companies in which Thow held 100% interest. The companies were found to own considerable assets, including aircraft and boats. The trustee subsequently was granted an order authorizing it to file bankruptcy petitions against the related companies. The debtor then filed a notice of intention to make a proposal under the *BIA* in July 2005; however, a meeting of creditors refused

to accept the proposal and the debtor was thus deemed to have made an assignment in bankruptcy.[147]

Thow removed and secreted his assets from the trustee and creditors after filing the proposal and prior to the creditors voting against it, rendering him an involuntary bankrupt. He then crossed the border to the U.S. and the following day filed a Chapter 7 bankruptcy petition in the U.S. An arrest warrant was issued in Canada against the debtor by the British Columbia Supreme Court.[148] All of the secured creditors and 98% of the unsecured creditors were located in Canada. The trustee sought a recognition order under Chapter 15 in the U.S. In *re Ian Gregory Thow*, the U.S. Bankruptcy Court Western District of Washington granted a recognition order to the trustee in bankruptcy appointed pursuant to the *BIA*.[149] The U.S. Court held that virtually all of the debtor's assets and creditors were located in British Columbia, and that the COMI was British Columbia, and hence the Canadian proceeding was recognized as a foreign main proceeding. The Court stayed the debtor's previously filed application for liquidation pursuant to chapter 7 of the U.S. *Code*, and entrusted the administration and realization of the debtor's assets within the U.S. to the Canadian trustee.[150] Litigation on the outcome is still pending at the time this paper is written.

In *Mackenzie E. Bowell*, the only other reported Canadian consumer bankruptcy case under Chapter 15, allegedly involving less than $50,000 in assets and about $6 million in debts, the court granted a Chapter 15 order for recognition of a foreign non-main proceeding.[151] The debtor resided in Canada at the time of filing and then moved to the U.S. The Canadian trustee filed a Chapter 15 bankruptcy petition in June 2006, seeking to examine the debtor in connection with multimillion dollar real estate deals that he was involved in the U.S.[152] There is considerable litigation pending in respect of discovery and the extent and location of assets.

Most noteworthy in these initial cases is the early acceptance of the narrow, restrictive interpretation of the public policy exception in Chapter 15 and the uncontested nature of the determination of centre of main interests. While it may be that the facts that might motivate creditors or foreign representatives to dispute the centre of main interest have not yet arisen in

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[147] Certificate of Assignment, Official Receiver, Office of Superintendent of Bankruptcy, (14 September 2005).
[148] *Re Thow* [2005] B.C.J. No. 1986 (B.C.S.C.).
[149] *Re Ian Gregory Thow*, Order recognizing foreign proceeding pursuant to Chapter 15, U.S. Bankruptcy Court Western District of Washington, (10 November 2005), Case No. 05-30432.
[150] *Ibid.* at 3.
[151] *In re MacKenzie E. Bowell, Order Granting Application for Recognition of a Foreign Proceeding under Chapter 15,* Case No. 06-01710-SSC, U.S. Bankruptcy Court for the District of Arizona (20 July 2006) at 1.
[152] *In re MacKenzie E. Bowell, Application for Recognition of a Foreign Non-Main Proceeding under 11 U.S.C. SS. 1517* (14 June 2006) at 2.

the cases to date. Perhaps disputes will only arise in cases involving corporate groups. The same cannot be said of cases in the European Union.

IV. EXPERIENCE WITH COMI UNDER THE EC REGULATION

This part examines how the issue of COMI has been addressed under the EC Regulation on Insolvency Proceedings, which came into force in May 2002.[153] The EC Regulation is subordinate legislation under the *Treaty Establishing the European Community* (the EC Treaty) and is binding in its entirety on, and has general and direct applicability in, all Member States except Denmark, a total of 24 countries.[154] The EC Regulation applies without the need for Member States to adopt amendments to their national laws.[155] Under the doctrine of supremacy of EC law over national law, the EC Regulation on Insolvency Proceedings is binding on Member States of the EU, and the regulation's provisions take precedence over any conflicting provisions of national insolvency law in any of the Member States.[156] The European Court of Justice (ECJ) has jurisdiction to interpret the EC Regulation, serving as the final appellate court for the Member States of the EU for the purpose of determining questions of the validity of the EC Regulation and its interpretation.[157] The Regulation specifies that "the proper functioning of the internal market requires that cross-border insolvency proceedings should operate efficiently and effectively and this Regulation needs to be adopted in order to achieve this objective which comes within the scope of judicial cooperation in civil matters within the meaning of Article 65 of the Treaty".[158]

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[153] Council Regulation (EC) 1346/2000, of 29 May 2000, [2000] O.J. L.160/1 (EC Regulation).

[154] EC *Treaty Establishing the European Community* (Consolidated Version 2002), [2002] O.J. C 325/33 [EC Treaty], Recital (1); Ian F. Fletcher, *Insolvency in Private International Law*, 2d Ed., (Oxford: Oxford University Press, 2005), at para. 7.24 ("Fletcher"); Article 249 of the EC Treaty states, "A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States." The "Member States" are those member countries that comprise what has become the European Union (EU), as a result of the coming into force in 1992 of the *Treaty on European Union*, [1992] O.J. C 224/1 [Maastricht Treaty]. Under the Maastricht Treaty and the EC Treaty's predecessor, the *Treaty Establishing the European Community* (Consolidated Version 1997), [1997] O.J. C 340/03, Denmark is exempt from participating in the EU Regulation. Recital 33 of the EC Regulation, *supra* note 153; Fletcher, *ibid*., at para. 7.27. The other Member States of the EU are Austria, Belgium, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, The Netherlands, United Kingdom. Bulgaria and Romania are expected to join the EU in 2007.

[155] Fletcher, *ibid.*, at para. 7.24.

[156] The Regulation will enjoy a consistent interpretative approach over the longer term as the European Court of Justice has the authority to determine conflicts arising out of different interpretive approaches among the Member States, pursuant to Article 220, 234, *Consolidated EC Treaty of 1999, supra*, note 154. The EC Regulation does not apply to Denmark. For a discussion of the historical reasons for this exemption, see Fletcher, *ibid.* at 7.27.

[157] EC Treaty, *supra*, note 154, Arts. 220, 234. See also Fletcher, *ibid*., at paras. 7.24, 7.142.

[158] EU Regulation, *supra*, note 153, Preamble and Recitals (3)-(5).

Article 1 of the EC Regulation restricts its application to collective insolvency proceedings that involve partial or total divestment of a debtor and the appointment of a liquidator. Liquidator is defined in the Regulation as any person or body whose function is to administer or liquidate assets of which the debtor has been divested or to supervise the administration of its affairs.[159] Hence the Regulation excludes insolvency proceedings that although of a collective nature, leave the debtor in full control of its estate and business; and although partial divestment allows the debtor to come within the ambit of the Regulation, there must be some degree of loss of the debtor's powers of administration and control over the business and assets.[160]

1. Provisions of the Regulation in Respect of COMI

The EC Regulation utilizes "centre of main interests" (COMI) to determine where main proceedings should be commenced within the EU. It does not define COMI; however, Article 3 creates a rebuttable presumption that the registered office of a debtor company is presumed to be the centre of its main interests in the absence of proof to the contrary. If a proceeding is qualified as a main proceeding pursuant to the Regulation, the proceeding benefits from full extra-territorial effects, binding all Member States under the Regulation, and encompassing the debtor's assets globally, binding creditors.

The extensive recitals at the beginning of the EC Regulation are aimed at providing interpretive guidance to Member States in their interpretation of the Regulation's requirements. Professor Ian Fletcher has observed that the recitals will be used in a process of purposive interpretation of the Regulation that the ECJ employs.[161] Recital 13 of the EC Regulation specifies that the term COMI should correspond to "the place where the debtor conducts the administration of its interests on a regular basis and is therefore ascertainable by third parties".[162]

The Virgos-Schmit Report, which is considered an unofficial interpretive aid to the EC Regulation, explains the rationale of the COMI test:

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[159] *Ibid*., Article 2(b). For greater certainty, the Regulation lists in its Annex C a list of what insolvency professionals are called in the various Member States.
[160] Fletcher, *supra*, note 154 at 7.36; Virgos-Schmit Report, *supra*, contained as appendix to Fletcher, *ibid.* at 154 at para. 49(c).
[161] Fletcher, *supra*, note 154 at 7.26.
[162] Council Regulation (EC) 1346/2000, of 29 May 2000, [2000] O.J. L.160/1. Proceedings (Official Journal L 160 of 30 June 2000), consolidated text, as it stands after the accession of 10 States to the EU, based on Article 20 Act of Accession (Official Journal L 236 of 23 September 2003, Annex II, paragraph 18, A(1), and after the accession of Bulgaria and Romania as per January 1, 2007 (Official Journal L 363 of 20 December 2006).

> The rationale of this rule is not difficult to explain. Insolvency is a foreseeable risk. It is therefore important that international jurisdiction (which, as we will see, entails the application of the insolvency laws of that Contracting State) be based on a place known to the debtor's potential creditors. This enables the legal risks which would have to be assumed in the case of insolvency to be calculated.… Where companies and legal persons are concerned, the Convention presumes, unless proved to the contrary, that the debtor's centre of main interests is the place of his registered office. This place normally corresponds to the debtor's head office. [163]

Recital 14 specifies that the Regulation applies only to proceedings where the centre of the debtor's main interests is located in the European Community. The Regulation establishes international jurisdiction, designating the Member State the courts of which may open insolvency proceedings; however, territorial jurisdiction within that Member State must be established by the national law of the Member State concerned.[164] Professor Fletcher has commented on the problems associated with the limitation imposed by the Regulation where the centre of main interest of the debtor is located outside of the European Community, but there are entities within the community that are highly related:

> Recital 14 states that: This Regulation applies only to proceedings where the centre of the debtor's main interests is located in the Community. This vital limitation on the Regulation's scope of application is of immense importance, because it excludes many cross-border insolvency cases from the ambit of its provisions even though interested parties and assets may be located within the frontiers of the European Union. The decisive criterion employed in this context- the location of the debtor's centre of main interests- is particularly significant because its effect can be that insolvency proceedings concerning a debtor with quite substantial connections with one or more Member States will nevertheless be outside the scope of the Regulation, if it happens to be the case that the debtor's centre of main interests is outside the territory of any of the participating States at the time the proceedings are to be opened. In such cases, as already noted, the consequence of the Regulation's non-applicability is that the Member States are free to act individually, and in accordance with their existing law and practice, with regard to such matters as the exercise of jurisdiction, the conduct of proceedings so opened, and in respect of the recognition and enforcement of any proceedings similarly opened in other Member States.[165]

Hence COMI is used under the Regulation to limit the applicability of the Regulation and hence serves a different purpose than that under the Model Law, Chapter 15 or Chapter 47. If the COMI is located outside of the EU, the Regulation does not apply and there are no mandatory

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[163] *The Report on the Convention on Insolvency Proceedings* dated 8 July 1996, at para. 75. The Virgos Schmit Report was, when prepared, intended to serve as an interpretative guide to the EC Regulation's predecessor, the 1995 Convention. However, it has been recognized and relied upon to interpret the EU Regulation: *BRAC Rent-A-Car International Inc.*, [2003] EWHC (Ch. U.K.) 128; Fletcher, *supra*, note 154; http://www.iiiglobal.org/country/european_union.html#articles.

[164] *Ibid.*, Recital 15.

[165] Fletcher, *supra*, note 154 at 7.40.

obligations that flow from recognition of the proceeding in a particular Member State.[166] This situation can be contrasted with the situation where the COMI is found to be within a Member State such that the decisions of the court with carriage of the main proceeding apply to all assets located within all Member States, except where assets are being dealt with in a recognized secondary proceeding.

Recital 16 specifies that the court having jurisdiction to open the main insolvency proceeding should be enabled to order provisional and protective measures from the time of the request to open proceedings.[167]

The Regulation further specifies that prior to the opening of the main insolvency proceedings, the right to request the opening of insolvency proceedings in the Member State where the debtor has an establishment should be limited to local creditors and creditors of the local establishment or to cases where main proceedings cannot be opened under the law of the Member State where the debtor has the centre of its main interests.[168] Recital 17 suggests that the reason for this restriction is that cases where territorial insolvency proceedings are requested before the main insolvency proceedings, are intended to be limited to what is absolutely necessary, and that if main insolvency proceedings are opened, the territorial proceedings become secondary proceedings. Secondary proceedings can also be requested to be commenced in a Member State once a main proceeding is recognized.[169]

Recital 19 of the Regulation specifies that secondary insolvency proceedings may serve different purposes, besides the protection of local interests, and that there may be situation in which the

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[166] Excluding applicability of the Regulation on the basis that the COMI is located outside of the EU does not necessarily mean that if the debtor's registered office is outside the EU that the Regulation does not apply. In *Re BRAC Rent-a-Car International Inc.* [2003] E.W.H.C. (Ch.) 128, [2003] All E.R. 201, the U.K. court held that although the registered office of the company was in the U.S., the COMI was in the U.K., based on where its management, employees, operations and credit relations were located.

[167] EC Regulation, *supra*, note 153. Recital 16 specifies that: "Preservation measures both prior to and after the commencement of the insolvency proceedings are very important to guarantee the effectiveness of the insolvency proceedings. In
that connection this Regulation should afford different possibilities. On the one hand, the court competent for the main insolvency proceedings should be able also to order provisional protective measures covering assets situated in the territory of other Member States. On the other hand, a liquidator temporarily appointed prior to the opening of the main insolvency proceedings should be able, in the Member States in which an establishment belonging to the debtor is to be found, to apply for the preservation measures which are possible under the law of those States."

[168] *Ibid.*, Recital 17.

[169] *Ibid.* Recital 18 specifies: "Following the opening of the main insolvency proceedings, the right to request the opening of insolvency proceedings in a Member State where the debtor has an establishment is not restricted by this Regulation. The liquidator in the main proceedings or any other person empowered under the national law of that Member State may request the opening of secondary insolvency proceedings."

estate of the debtor is too complex to administer as a unit or where differences in the legal systems concerned are so great that difficulties may arise from the extension of effects deriving from the law of the State of the opening to the other States where the assets are located. As a result, a liquidator in a main proceeding may request the opening of secondary proceedings to advance the efficient administration of the estate. The Regulation recognizes that main insolvency proceedings and secondary proceedings can only contribute to the effective realization of the total assets if all the concurrent proceedings pending are coordinated and various liquidators exchange information and cooperate closely.[170]

The Regulation is aimed at providing immediate recognition of judgments concerning the opening, conduct and closure of insolvency proceedings that come within its scope and of judgments handed down in direct connection with such insolvency proceedings.[171] The recitals specify that recognition of judgments delivered by the courts of the Member States should be based on the principle of mutual trust. To that end, grounds for non-recognition should be reduced to the minimum necessary and hence the decision of a first court to open proceedings should be recognized in the other Member States without those Member States having the power to scrutinize the court's decision.[172]

Recital 23 specifies that the "Regulation should set out, for the matters covered by it, uniform rules on conflict of laws which replace, within their scope of application, national rules of private international law. Unless otherwise stated, the law of the Member State of the opening of the proceedings should be applicable (*lex concursus*). This rule on conflict of laws should be valid both for the main proceedings and for local proceedings; the *lex concursus* determines all the effects of the insolvency proceedings, both procedural and substantive, on the persons and legal relations concerned. It governs all the conditions for the opening, conduct and closure of the insolvency proceedings."[173]

Article 2 defines where assets are situated:

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[170] *Ibid.*, Recital 20, which also specifies that "For example, he should be able to propose a restructuring plan or composition or apply for realization of the assets in the secondary insolvency proceedings to be suspended."

[171] *Ibid.*, Recital 22.

[172] *Ibid.*

[173] *Ibid.* Recital 24 specifies: "Automatic recognition of insolvency proceedings to which the law of the opening State normally applies may interfere with the rules under which transactions are carried out in other Member States. To protect legitimate expectations and the certainty of transactions in Member States other than that in which proceedings are opened, provisions should be made for a number of exceptions to the general rule."

2(g) ‘the Member State in which assets are situated’ shall mean, in the case of:

— tangible property, the Member State within the territory of which the property is situated,

— property and rights ownership of or entitlement to which must be entered in a public register, the Member State under the authority of which the register is kept,

— claims, the Member State within the territory of which the third party required to meet them has the centre of his main interests, as determined in Article 3(1);

Article 3 of the EC Regulation specifies that the debtor’s registered office, or habitual residence in the case of an individual, is presumed to be the centre of main interests, unless it can be shown that the centre of main interests is elsewhere.

Article 3 specifies:

Article 3 International jurisdiction

1. The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.

2. Where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.

3. Where insolvency proceedings have been opened under paragraph 1, any proceedings opened subsequently under paragraph 2 shall be secondary proceedings. These latter proceedings must be winding-up proceedings.

4. Territorial insolvency proceedings referred to in paragraph 2 may be opened prior to the opening of main insolvency proceedings in accordance with paragraph 1 only:

(a) where insolvency proceedings under paragraph 1 cannot be opened because of the conditions laid down by the law of the Member State within the territory of which the centre of the debtor’s main interests is situated; or

(b) where the opening of territorial insolvency proceedings is requested by a creditor who has his domicile, habitual residence or registered office in the Member State within the territory of which the establishment is situated, or whose claim arises from the operation of that establishment.

The EC Regulation specifies that proceedings commenced where a debtor has an establishment are secondary proceedings where there is already a main proceeding opened. However, the court of a Member State can open a proceeding prior to a proceeding commencing where the debtor has its COMI, called independent territorial proceedings.[174] If main proceedings are subsequently opened, Recital 17 specifies that the territorial proceedings then become secondary proceedings. The Regulation defines establishment as "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods."[175] Under the EC Regulation, secondary proceedings are restricted to liquidation of those assets of the debtor situated in the particular State.

The EU Regulation contains the presumption with respect to registered office. However, a number of courts have dealt with the issue of the factors to take into consideration in determining COMI.[176] The concept of centre of main interest under the EC Regulation means that there is only one main insolvency proceeding and one or more secondary proceedings in other Member States in respect of the debtor, with the proceedings to be coordinated. The duties of communication and cooperation as set out in Article 31 of the Regulation are therefore an important aspect of the fair and efficient administration of the insolvency and effective conduct of main and secondary proceedings. Article 31(2) of the Regulation is aimed at coordination between main and secondary insolvency proceedings, specifying that main liquidators are obliged to actively cooperate with secondary liquidators.[177] The liquidator in the secondary proceedings must give the liquidator in the main proceedings the opportunity to submit proposals on the realization of assets in the secondary proceedings.[178] The provisions necessitate a level of recognition, cooperation and information sharing in order to ensure the effective administration of proceedings where the COMI is located, as well as secondary proceedings, whether the objective is restructuring or liquidation and realization of assets. The liquidator in the main proceeding can intervene in any secondary insolvency proceeding, and is to be able to draw on the advice of the liquidator in secondary proceedings as to the most efficient resolution of the insolvency.[179] The disclosure regime also allows insolvency professionals to give appropriate advice to the particular

[174] Fletcher, *supra*, note 154 at 7.46.
[175] *Ibid.*, Article 2(h).
[176] See UNCITRAL documents (see A/CN.9/580, paras. 58-79 and A/CN.9/579, paras. 8-17).
[177] EC regulation, *supra*, note 153, Article 31 specifies: "1. Subject to the rules restricting the communication of information, the liquidator in the main proceedings and the liquidators in the secondary proceedings shall be duty bound to communicate information to each other. They shall immediately communicate any information which may be relevant to the other proceedings, in particular the progress made in lodging and verifying claims and all measures aimed at terminating the proceedings. 2. Subject to the rules applicable to each of the proceedings, the liquidator in the main proceedings and the liquidators in the secondary proceedings shall be duty bound to cooperate with each other."
[178] *Ibid.*, Article 31(3).
[179] *Ibid.*, Articles 32 to 38.

court and take appropriate actions to conserve or maximize the value of assets. It also allows creditors to make an informed assessment of their position in the particular proceeding.

Article 16(1) of the Regulation states that "'Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings." Article 16 specifies that recognition of the proceedings referred to in Article 3(1) shall not preclude the opening of the proceedings referred to in Article 3(2) by a court in another Member State. The latter proceedings shall be secondary insolvency proceedings. Article 17 specifies:

> *Article 17* Effects of recognition
>
> 1. The judgment opening the proceedings referred to in Article 3(1) shall, with no further formalities, produce the same effects in any other Member State asunder this law of the State of the opening of proceedings, unless this Regulation provides otherwise and as long as no proceedings referred to in Article 3(2) are opened in that other Member State.
>
> 2. The effects of the proceedings referred to in Article 3(2) may not be challenged in other Member States. Any restriction of the creditors' rights, in particular a stay or discharge, shall produce effects vis-à-vis assets situated within the territory of another Member State only in the case of those creditors who have given their consent.

The Regulation contains a narrow public policy exception, in that any Member State may refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual.[180]

Articles 27 to 29 set out the provisions in respect of secondary proceedings:

> *Article 27* Opening of proceedings
>
> The opening of the proceedings referred to in Article 3(1) by a court of a Member State and which is recognized in another Member State (main proceedings) shall permit the opening in that other Member State, a court of which has jurisdiction pursuant to Article 3(2), of secondary insolvency proceedings without the debtor's insolvency being examined in that other State. These latter proceedings must be among the proceedings listed in Annex B. Their effects shall be restricted to the assets of the debtor situated within the territory of that other Member State.
>
> *Article 28* Applicable law

[180] *Ibid.*, Article 26(1).

> Save as otherwise provided in this Regulation, the law applicable to secondary proceedings shall be that of the Member State within the territory of which the secondary proceedings are opened.
>
> *Article 29* Right to request the opening of proceedings
>
> The opening of secondary proceedings may be requested by:
> (a) the liquidator in the main proceedings;
> (b) any other person or authority empowered to request the opening of insolvency proceedings under the law of the Member State within the territory of which the opening of secondary proceedings is requested.

Hence a liquidator in a main proceeding may request the opening of secondary proceedings. Article 38 of the Regulation provides that, where the court of a Member State that has jurisdiction pursuant to Article 3(1) appoints a temporary administrator, that temporary administrator "shall be empowered to request any measures to secure and preserve any of the debtor's assets situated in another Member State, provided for under the law of that State, for the period between the request for the opening of insolvency proceedings and the judgment opening the proceedings".

Where secondary insolvency proceedings are opened, the law applicable to the secondary proceedings is that of the Member State within which the secondary proceedings are opened, except as otherwise provided in the EC Regulation.[181] The *lex concursus,* the law of the Member State of the opening of the main proceeding applies to all of the debtor's property, wherever situated, except to the extent that secondary proceedings have been opened in a Member State. The effects of the secondary proceedings are restricted to the assets of the debtor situated in that Member State.[182]

Article 4 (1) of the Regulation specifies that "save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened, hereafter referred to as the 'State of the opening of proceedings'.[183] Article 4(2) specifies that the law of the State of the opening of proceedings shall determine the conditions for the opening, conduct and closure of those proceedings, including, specified substantive and procedural matters.[184] This includes the effects of insolvency proceedings on current contracts with the debtor, the rules governing the distribution of proceeds from the realization of assets and the ranking of claims, and the rules

[181] *Ibid*., Article 28.
[182] *Ibid*., Articles 3(2) and 27.
[183] *Ibid*., Article 4(1).
[184] *Ibid*., Article 4(2)(a) – (m).

relating to the voidability or unenforceability of legal acts detrimental to all the creditors.[185] Rights of set-off, sellers' rights based on reservation of title and third party rights *in rem* are not affected by the insolvency proceedings.[186]

2. EU Caselaw in Respect of COMI

COMI is a question of fact that is determined at the time of opening of the insolvency proceedings. The U.K. Court in *Re Parkside Flexibles* held that the identification of a company's centre of main interests involves a fact-sensitive decision, and the court must weigh and balance all relevant material to determine COMI.[187]

While there is no express definition of COMI, Article 3(1), cited above, specifies that the place of the registered office is, in the absence of proof to the contrary, presumed to be the COMI and Recital 13 of the Regulation specifies that the 'centre of main interests' should correspond to the place where the debtor conducts the administration of its interests on a regular basis and is therefore ascertainable by third parties.[188] The principle underlying the definition is that creditors are entitled to certainty in their dealings with debtor companies, and that they should be able to make assessments of their risks of transacting with the debtor based on transparency in respect of which jurisdiction's laws would apply in the event of insolvency. One problem is that the Regulation does not indicate what aspects of administration are relevant to the determination. Another is that the Regulation does not appear to be able to address the situation where the debtor tactically shifts its COMI in the period leading up to insolvency, such that its COMI is no longer located within a Member State and hence the jurisdiction of the Regulation.[189]

The European Court of Justice (Grand Chamber) interpreted COMI in *Eurofood IFSC Ltd.* in a judgment rendered in May 2006, the first EC appellate decision on COMI.[190] In summary, the Court found the following:

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[185] *Ibid.*, Article 4.
[186] *Ibid.*, Articles 5, 6 and 7.
[187] *Re Parkside Flexibles S.A.*, [2005] EWHC (Ch. (U.K.)), at para. 9.
[188] EU Regulation, *supra*, note 153, Recital 13.
[189] Fletcher, *supra*, note 154 at 7.42. For a discussion of Member State and applicability of the Regulation, see *Re Arena Corporation* [2003] E.W.H.C. 3032 (Ch.); [2003] All .R. (d) 277.
[190] *Eurofood IFSC Ltd.*, Judgment of the European Court of Justice (Grand Chamber) (2 May 2006), Europe Case C-341/04; http://eur-lex.europa.eu. Eurofood was registered in Ireland in 1997, with its registered office in Dublin. It is a wholly owned subsidiary of Parmalat SpA, registered in Italy.
In the matter of Eurofood IFSC Ltd. and in the matter of the Companies Act 1963 to 2003, Enrico Bondi against Bank of America N.A., Pearse Farrell (the Official Liquidator), Director of Corporate Enforcement and the Certificate/Note holders, E.C.J. C-341/04, 2006 ECJ CELEX LEXIS 199 (Lexis).

The Court (Grand Chamber) hereby rules:

1. Where a debtor is a subsidiary company whose registered office and that of its parent company are situated in two different Member States, the presumption laid down in the second sentence of Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, whereby the centre of main interests of that subsidiary is situated in the Member State where its registered office is situated, can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which location at that registered office is deemed to reflect. That could be so in particular in the case of a company not carrying out any business in the territory of the Member State in which its registered office is situated. By contrast, where a company carries on its business in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by that Regulation.

2. On a proper interpretation of the first subparagraph of Article 16(1) of Regulation No 1346/2000, the main insolvency proceedings opened by a court of a Member State must be recognised by the courts of the other Member States, without the latter being able to review the jurisdiction of the court of the opening State.

3. On a proper interpretation of the first subparagraph of Article 16(1) of the Regulation, a decision to open insolvency proceedings for the purposes of that provision is a decision handed down by a court of a Member State to which application for such a decision has been made, based on the debtor's insolvency and seeking the opening of proceedings referred to in Annex A to the Regulation, where that decision involves the divestment of the debtor and the appointment of a liquidator referred to in Annex C to the Regulation. Such divestment implies that the debtor loses the powers of management that he has over his assets.

4. On a proper interpretation of Article 26 of the Regulation, a Member State may refuse to recognise insolvency proceedings opened in another Member State where the decision to open the proceedings was taken in flagrant breach of the fundamental right to be heard, which a person concerned by such proceedings enjoys.

Hence the ECJ judgment set out the principles for determination of COMI. It ruled that where a debtor is a subsidiary company whose registered office and that of its parent company are situated in two different Member States, the presumption laid down in Article 3(1) of the Regulation, that the centre of main interests of that subsidiary is situated in the Member State where its registered office is situated, can be rebutted only if factors that are both objective and ascertainable by third parties enable it to be established that an actual situation exists that is different from that which location at that registered office is deemed to reflect. The Court held that this could occur in the case of a company not carrying out any business in the territory of the Member State where its registered office is situated; however, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to

rebut the presumption laid down by that Regulation.[191] The Court further held that a main insolvency proceeding opened by a court of a Member State must be recognized by the courts of the other Member States, without the latter being able to review the jurisdiction of the court of the opening State. However, the court of a Member State may refuse to recognize insolvency proceedings opened in another Member State where the decision to open the proceedings was taken in flagrant breach of the fundamental right to be heard, which a person concerned by such proceedings enjoys.

The proceedings before the ECJ in *Eurofood IFSC Ltd.* were commenced by way of reference under Article 234 of the EC Treaty by the Supreme Court of Ireland for a preliminary interpretive ruling on the issue of COMI where the debtor is controlled by a parent in another Member State.[192] Eurofood was a company registered in Ireland and was a wholly-owned subsidiary of Parmalat SpA (Parmalat), a company incorporated in Italy, providing financing facilities for companies in the Parmalat group of companies in more than thirty countries. In 2003, Parmalat was put into extraordinary administration in Italy.[193] The reference to the ECJ arose because two courts of Member States opened main proceedings under Article 3 of the EC Regulation, the High Court of Ireland and the Tribunale Civile e Penale di Parma in Italy, each having found the COMI to be in their jurisdiction.[194] The Extraordinary Administrator appealed the Irish High Court Judgment unsuccessfully to the Irish Supreme Court. The Supreme Court of Ireland held that

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[191] *Eurofood IFSC Ltd.*, Judgment of the European Court of Justice (Grand Chamber) (2 May 2006), Europe Case C-341/04, [2004] O.J. C 251/7 at paras. 33-40.

[192] *Ibid.* The specific reference question was: " Where, (a) the registered offices of a parent company and its subsidiary are in two different Member States, (b) the subsidiary conducts the administration of its interests on a regular basis in a manner ascertainably by third parties and in complete and regular respect for its own corporate identity in the Member State where its registered office is situated and (c) the parent company is in a position, by virtue of its shareholding and power to appoint directors, to control and does in fact control the policy of the subsidiary, in determining the "centre of main interests", are the governing factors those referred to at (b) above or on the other hand those referred to at (c) above?

[193] "Extraordinary administration" is a restructuring procedure in Italy that applies only to large companies with more than 1,000 employees and debts of no less than €1 billion. Extraordinary administration permits the economic and financial restructuring of companies on the basis of a recovery programme up to a two year period.

[194] *In the Matter of Eurofood IFSC Limited*, [2004] IESC 45 (Supreme Court of Ireland), online: Courts Service of Ireland http://www.courts.ie. Eurofood was registered in Ireland in 1997 as a 'company limited by shares' with its registered office in the International Financial Services Centre in Dublin. It is a wholly owned subsidiary of Parmalat SpA, a company incorporated in Italy, *Eurofood IFSC Ltd., supra*, note 191 at para. 17. Parmalat SpA was admitted to extraordinary administration proceedings by the Italian Ministry of Production Activities, who appointed an extraordinary administrator of that undertaking, *ibid.* at para. 18, finding that this appointment was made in accordance with Decree-Law No 347 of 23 December 2003 concerning urgent measures for the industrial restructuring of large insolvent undertakings (GURI No 298 of 24 December 2003, p. 4). On 27 January 2004, the Bank of America NA applied to the High Court (Ireland) for compulsory winding up proceedings to be commenced against Eurofood and for the nomination of a provisional liquidator, based on a contention that that company was insolvent. On 20 February 2004, the District Court in Parma, taking the view that Eurofood's centre of main interests was in Italy, held that it had international jurisdiction to determine whether Eurofood was insolvent.

Eurofood's registered office was in Dublin, Ireland, at the IFSC, which had been established in 1987 to provide a location for internationally traded financial services; day-to-day administration of Eurofood was managed by Bank of America; Eurofood had four directors, two of whom were Irish until December 2003; Eurofood's audited financial statements were prepared by chartered accountants in Ireland and in accordance with Irish law and accounting standards; Eurofood had regularly conducted its business in Ireland, in accordance with Irish legal and regulatory regime; and that its creditors were of the understanding that they were dealing with an Irish entity. The Court observed that "the note holders have placed before the High Court very detailed evidence of the lengths to which they went to satisfy themselves of the legal and financial character of the Company and of the regulatory environment in which it operated. They clearly did not believe that they were transacting business with a company whose centre of main interests was in Italy. Insofar as this matter is relevant, it also tends to show that the centre of main interests was in Ireland".[195] The Irish Supreme Court held that COMI should respect the distinct and separate legal and corporate identity of a debtor, particularly where the principal creditors relied on such separate identity, and that ultimate financial control by a parent was not the test for determining COMI by a parent.

The ECJ held that it would determine the fourth question referred to it first because it concerned the general system that the Regulation establishes for determining the competence of the courts of Member States, specifically, what should be the determining factor for identifying the centre of main interests of a subsidiary company, where the subsidiary and its parent have their registered offices in two different member states.[196] The Court held:

> 27 The referring court asks how much relative weight should be given as between, on the one hand, the fact that the subsidiary regularly administers its interests, in a manner ascertainable by third parties and in respect for its own corporate identity, in the Member State where its registered office is situated and, on the other hand, the fact that the parent company is in a position, by virtue of its shareholding and power to appoint directors, to control the policy of the subsidiary.
>
> 28 Article 3 of the Regulation makes provision for two types of proceedings. The insolvency proceedings opened, in accordance with Article 3(1), by the competent court of the Member State within whose territory the centre of a debtor's main interests is situated, described as the 'main proceedings', produce universal effects in that they apply to the assets of the debtor situated in all the Member States in which the regulation applies. Although, subsequently, proceedings under Article 3(2) may be opened by the competent court of the Member State where the debtor has an establishment, those proceedings, described as 'secondary proceedings', are restricted to the assets of the debtor situated in the territory of the latter State.
>
> 29 Article 3(1) of the Regulation provides that, in the case of a company, the place of

[195] *Ibid.*
[196] *Ibid.* at para. 26.

the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.

30 It follows that, in the system established by the Regulation for determining the competence of the courts of the Member States, each debtor constituting a distinct legal entity is subject to its own court jurisdiction.

31 The concept of the centre of main interests is peculiar to the Regulation. Therefore, it has an autonomous meaning and must therefore be interpreted in a uniform way, independently of national legislation.

32 The scope of that concept is highlighted by the 13th recital of the Regulation, which states that 'the 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties'.

33 That definition shows that the centre of main interests must be identified by reference to criteria that are both objective and ascertainable by third parties. That objectivity and that possibility of ascertainment by third parties are necessary in order to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open main insolvency proceedings. That legal certainty and that foreseeability are all the more important in that, in accordance with Article 4(1) of the Regulation, determination of the court with jurisdiction entails determination of the law which is to apply.

34 It follows that, in determining the centre of the main interests of a debtor company, the simple presumption laid down by the Community legislature in favour of the registered office of that company can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect.

35 That could be so in particular in the case of a 'letterbox' company not carrying out any business in the territory of the Member State in which its registered office is situated.

36 By contrast, where a company carries on its business in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by the Regulation.

37 In those circumstances, the answer to the fourth question must be that, where a debtor is a subsidiary company whose registered office and that of its parent company are situated in two different Member States, the presumption laid down in the second sentence of Article 3(1) of the Regulation, whereby the centre of main interests of that subsidiary is situated in the Member State where its registered office is situated, can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect. That could be so in particular in the case of a company not carrying out any business in the territory of the Member State in which its registered office is situated. By contrast, where a company carries on its business in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by the Regulation.

The judgment indicates that the Court will scrutinize evidence relating to COMI. Although the Court did not specify what factors might be applied, it observed that COMI could be in a location different to the registered office where, for example, the company was not carrying out business in the Member State in which its registered office was situated. In contrast, as noted above, where a company is carrying out its business in the territory of the Member State in which it has its registered office, the mere fact that its economic choices are or could be controlled by a parent company in another Member State is not sufficient to rebut the presumption in Article 3. The Court emphasized that in the system established by the Regulation for determining the competence of the courts of the Member States, each debtor constituting a distinct legal entity is subject to its own court jurisdiction.

Prior to the ECJ decision in *Eurofood IFSC Ltd.*, the courts had considered the following factors in rebutting the presumption that the COMI is located in the jurisdiction in which the debtor is registered: management and policy decision-making; financial arrangements between parent and subsidiary, including capitalization; the extent of a subsidiary's independence with respect to financial decisions; the location of bank accounts and accountancy services; the division of responsibility with respect to provision of technical and legal documentation and signature of contracts; where design, marketing, pricing and delivery of products was conducted; and conduct of office functions. These considerations are likely to alter now that the ECJ has rendered a judgment that sets a high threshold for rebutting the presumption.

In deciding whether the jurisdiction assumed by a court of a Member State to open main insolvency proceedings may be reviewed by a court of another Member State in which recognition has been applied for, the ECJ held that the decision of the court that first opened the insolvency proceedings is, under the principle of mutual trust, entitled to recognition by the other court, without that other court being permitted to review the jurisdiction of the first court:

> 39 As is shown by the 22nd recital of the Regulation, the rule of priority laid down in Article 16(1) of the Regulation, which provides that insolvency proceedings opened in one Member State are to be recognised in all the Member States from the time that they produce their effects in the State of the opening of proceedings, is based on the principle of mutual trust.
>
> 40 It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the Convention are required to respect, and as a corollary the waiver by those States of the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of decisions handed down in the context of insolvency proceedings [see by analogy, in relation to the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial matters (OJ 1978 L 304, p. 36; 'the Brussels Convention'), Case C-116/02

Gasser [2003] ECR I-14693, paragraph 72; Case C-159/02 *Turner* [2004] ECR I-3565, paragraph 24].

41 It is inherent in that principle of mutual trust that the court of a Member State hearing an application for the opening of main insolvency proceedings check that it has jurisdiction having regard to Article 3(1) of the Regulation, i.e. examine whether the centre of the debtor's main interests is situated in that Member State. In that regard, it should be emphasised that such an examination must take place in such a way as to comply with the essential procedural guarantees required for a fair legal process (see paragraph 66 of this judgment).

42 In return, as the 22nd recital of the Regulation makes clear, the principle of mutual trust requires that the courts of the other Member States recognise the decision opening main insolvency proceedings, without being able to review the assessment made by the first court as to its jurisdiction.

43 If an interested party, taking the view that the centre of the debtor's main interests is situated in a Member State other than that in which the main insolvency proceedings were opened, wishes to challenge the jurisdiction assumed by the court which opened those proceedings, it may use, before the courts of the Member State in which they were opened, the remedies prescribed by the national law of that Member State against the opening decision.

44 The answer to the third question must therefore be that, on a proper interpretation of the first subparagraph of Article 16(1) of the Regulation, the main insolvency proceedings opened by a court of a Member State must be recognised by the courts of the other Member States, without the latter being able to review the jurisdiction of the court of the opening State.

The ECJ also dealt with the question of timing of proceedings and whether the granting of interim relief constituted an opening of proceedings such that other Member States should defer to the first recognized proceeding. It held:

49 By requiring that any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings, the first subparagraph of Article 16(1) of the Regulation lays down a rule of priority, based on a chronological criterion, in favour of the opening decision which was handed down first. As the 22nd recital of the Regulation explains, '[t]he decision of the first court to open proceedings should be recognised in the other Member States without those Member States having the power to scrutinise the court's decision'.

50 However, the Regulation does not define sufficiently precisely what is meant by a 'decision to open insolvency proceedings'.

51 The conditions and formalities required for opening insolvency proceedings are a matter for national law, and vary considerably from one Member State to another. In some Member States, the proceedings are opened very shortly after the submission of the application, the necessary verifications being carried out later. In other Member States, certain essential findings, which may be quite time consuming, must be made before proceedings are opened. Under the national law of certain Member States, the proceedings may be opened 'provisionally' for several months.

> 52 As the Commission of the European Communities has argued, it is necessary, in order to ensure the effectiveness of the system established by the Regulation, that the recognition principle laid down in the first subparagraph of Article 16(1) of the Regulation, be capable of being applied as soon as possible in the course of the proceedings. The mechanism providing that only one main set of proceedings may be opened, producing its effects in all the Member States in which the Regulation applies, could be seriously disrupted if the courts of those States, hearing applications based on a debtor's insolvency at the same time, could claim concurrent jurisdiction over an extended period.
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> 53 It is in relation to that objective seeking to ensure the effectiveness of the system established by the Regulation that the concept of 'decision to open insolvency proceedings' must be interpreted.
>
> 54 In those circumstances, a 'decision to open insolvency proceedings' for the purposes of the Regulation must be regarded as including not only a decision which is formally described as an opening decision by the legislation of the Member State of the court that handed it down, but also a decision handed down following an application, based on the debtor's insolvency, seeking the opening of proceedings referred to in Annex A to the Regulation, where that decision involves divestment of the debtor and the appointment of a liquidator referred to in Annex C to the Regulation. Such divestment involves the debtor losing the powers of management which he has over his assets. In such a case, the two characteristic consequences of insolvency proceedings, namely the appointment of a liquidator referred to in Annex C and the divestment of the debtor, have taken effect, and thus all the elements constituting the definition of such proceedings, given in Article 1(1) of the Regulation, are present.

This finding creates some certainty in respect of how courts are to treat preliminary decisions regarding divestment and appointment of provisional liquidators in terms of considering whether proceedings have been opened. However, given that some decisions for interim or provisional relief are made in very short time frames, often without full notice to parties, this finding could create a race to recognition in particular jurisdictions.

The courts of Member States have a narrow exception that they can use to not recognize proceedings that have been opened. The only exception is a limited public policy exemption. Article 26 of the EC Regulation specifies:

> 26. Any Member State may refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual.[197]

[197] *Ibid.*, Art. 26.

Pursuant to Article 26, a Member State may refuse to recognize the opening of insolvency proceedings by another Member State or to enforce a judgment handed down in such proceedings if the effects of such recognition or enforcement would be contrary to its public policy. The ECJ in *Eurofood IFSC Ltd.* held that this can include a flagrant breach of the fundamental right to be heard:[198]

> 61 Whilst the 22nd recital of the Regulation infers from the principle of mutual trust that 'grounds for non-recognition should be reduced to the minimum necessary', Article 26 provides that a Member State may refuse to recognise insolvency proceedings opened in another Member State where the effects of such recognition would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual.
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> 62 In the context of the Brussels Convention, the Court of Justice has held that, since it constitutes an obstacle to the achievement of one of the fundamental aims of that Convention, namely to facilitate the free movement of judgments, recourse to the public policy clause contained in Article 27, point 1, of the Convention is reserved for exceptional cases (Case C-7/98 *Krombach* [2000] ECR I-1935, paragraphs 19 and 21).
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> 63 Considering itself competent to review the limits within which the courts of a Contracting State may have recourse to that concept for the purpose of refusing recognition to a judgment emanating from a court in another Contracting State, the Court of Justice had held, in the context of the Brussels Convention, that recourse to that clause can be envisaged only where recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. The infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order (*Krombach*, paragraphs 23 and 37).
>
> 64 That case-law is transposable to the interpretation of Article 26 of the Regulation.
>
> 65 In the procedural area, the Court of Justice has expressly recognised the general principle of Community law that everyone is entitled to a fair legal process (Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraphs 20 and 21; Joined Cases C-174/98 P and C-189/98 P *Netherlands and Van der Wal* v *Commission* [2000] ECR I-1, paragraph 17; and *Krombach*, paragraph 26). That principle is inspired by the fundamental rights which form an integral part of the general principles of Community law which the Court of Justice enforces, drawing inspiration from the constitutional traditions common to the Member States and
> from the guidelines supplied, in particular, by the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950.
>
> 66 Concerning more particularly the right to be notified of procedural documents and, more generally, the right to be heard, referred to in the referring court's fifth question, these rights occupy an eminent position in the organisation and conduct of a fair legal process. In the context of insolvency proceedings, the right of creditors or their representatives to participate in accordance with the equality of arms principle is of particular importance. Though the specific detailed rules concerning the right to be

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198 *Eurofood IFSC Ltd.*, *supra*, note 191, at paras. 66 and 67.

> heard may vary according to the urgency for a ruling to be given, any restriction on the exercise of that right must be duly justified and surrounded by procedural guarantees ensuring that persons concerned by such proceedings actually have the opportunity to challenge the measures adopted in urgency.
>
> 67 In the light of those considerations, the answer to the fifth question must be that, on a proper interpretation of Article 26 of the Regulation, a Member State may refuse to recognise insolvency proceedings opened in another Member State where the decision to open the proceedings was taken in flagrant breach of the fundamental right to be heard, which a person concerned by such proceedings enjoys.
>
> 68 Should occasion arise, it will be for the referring court to establish whether, in the main proceedings, that has been the case with the conduct of the proceedings before the Tribunale civile e penale di Parma. In that respect, it should be observed that the latter court cannot confine itself to transposing its own conception of the requirement for an oral hearing and of how fundamental that requirement is in its legal order, but must assess, having regard to the whole of the circumstances, whether or not the provisional liquidator appointed by the High Court was given sufficient opportunity to be heard.

In *Eurofood IFSC Ltd.*, for example, the Irish Supreme Court took a broad view of the public policy exception. The Court held that there had been a disregard for the principles of fair procedures where the Extraordinary Administrator had failed to put Eurofood's creditors on notice of the Italian Court hearing and to furnish the Provisional Liquidator with the petition materials until after the hearing had taken place.[199] The Irish Supreme Court concluded that this amounted to a lack of due process so as to warrant the Irish Court refusing to recognize the Italian Court Judgment.[200] Although the Irish Supreme Court held that, in light of its disposition of the remainder of the case, it was not necessary to decide this question, it commented on the importance of the principles of fair procedures:

> I regret to say that it is quite shocking that the appellant should have deliberately refused to provide the Provisional Liquidator with the documents necessary for his appearance before the Parma Court in February 2004. This Court has offered several opportunities to the appellant explain his behaviour. He has declined to do so. It can only be inferred that this was done deliberately in order to place the Provisional Liquidator at a disadvantage. It is also disappointing that the Italian court appears to have condoned this behaviour. This Court is fully conscious of the important role now accorded to the principle of mutual recognition of judicial decisions in many contexts of European Community and Union law. It is based on a principle of mutual trust. This Court respects those principles. They must, therefore, entail respect for principles of fairness that are common to the traditions of the Member States and which have been affirmed again and again by the European Court.[201]

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[199] *In the matter of Eurofoods IFSC Limited and in the matter of The Companies Act 1963 to 2001*, [2006] IESC 41 (Supreme Court of Ireland).
[200] *Ibid.*
[201] *Ibid.*

Overall, the ECJ judgment provides considerable direction in respect of treatment of cross-border cases under the EC Regulation. The ECJ judgment is a helpful first analysis of COMI. However, Professor Bob Wessels has observed that the general description of centre of main interest is not sufficient to encompass all types of debtors: natural persons as private persons or as professionals, smaller companies and groups of companies with segregated management, control and operations.[202] He is concerned that there are no guarantees that the information before the court is complete, particularly where the party with an interest in the matter is not contested at the hearing; and argues that to date, the courts continue to be unclear as to the requisite level of proof required to establish COMI.[203] He observes that courts follow different approaches with regard to the strength of the presumption that a debtors' registered office is the location of its COMI, specifically, a strong presumption versus treating the registered office as one of the factors to be taken into account. Wessels also argues that in several court cases, it appears that the COMI operates as a movable object, which may be manipulated by certain debtors in a manner that is equivalent to forum shopping.[204]

Prior to the ECJ judgment, the caselaw was not consistent across Member States in respect of the principles to be applied to determine COMI. One line of reasoning set a fairly low threshold for rebutting the presumption, finding that although a debtor company was registered in one jurisdiction, if there was evidence indicating that head office functions in respect of the debtor were exercised by a parent in another Member State, the presumption created in favour of the registered office was rebutted. In *Re Enron Directo Sociedad Limitada*, involving an indirect Spanish-incorporated subsidiary of the U.S. corporation, a U.K. court made an administration order in respect of the company on the basis of evidence that, notwithstanding that the debtor's registered office was in Spain, all of its principal executive, strategic and administrative decisions in relation to the financial and economic activity were conducted in London, as was the centralized direction and oversight administration of all the Enron group's European operations.[205] In contrast to the ECJ judgment in *Eurofood IFSC Ltd.*, the U.K. Court found that although certain lower level functions, such as sales of electricity were conducted the debtor's head office in Spain, the presumption had been rebutted because of the higher functions performed in the

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[202] Bob Wessels, *The place of the registered office of a company: a cornerstone in the application of the EC Insolvency Regulation*, in: 3 European Company Law, August 2006, 183ff.
[203] Bob Wessels, Twenty Suggestions for a Makeover of the EU Insolvency Regulation, on file with author.
[204] *Ibid.*
[205] *In the matter of Enron Directo Sociedad Limitada and in the matter of the Insolvency Act, 1986*, Order of the High Court, Ch. Div. (Companies Court), July 4, 2002, International Insolvency Institute http://www.iiiglobalorg; Gabriel Moss Q.C., Argument on Behalf of the Petitioner in *RE Enron Directo Sociedad Limitada*, online: International Insolvency Institute, http://www.iiiglobalorg. The petitioning creditor for the U.K. administration order was Enron Power Operations Limited (in administration) (EPOL).

U.K.[206] Similarly, in *Daisytek-ISA Ltd.*, a U.K. Court approved the commencement of insolvency proceedings in respect of French company with an English parent company.[207] Given the higher threshold set in *Eurofood IFSC Ltd.,* it is likely that this lower threshold will no longer be applied.

In *Re Collins & Aikman Corporation Group,* a U.K. court granted an administration order in respect of a German company Collins & Aikman Corporation Group and its affiliates.[208] The debtor was a global supplier of automotive component systems, with sales and operations in multiple jurisdictions. Collins & Aikman's European operations consisted of 24 companies, located in ten countries, four of those companies in Germany and six in England; however, its headquarters until mid-2005 was in the U.S. The European operations of the debtor had previously been managed from the U.S.; however, after a Chapter 11 filing of the debtor's U.S. operations, the European operations were managed from the U.K. Hence, the debtor sought an administration order that its COMI was the U.K. Although Ford Motor Company accounted for almost 60% of the debtor's sales, its effort to seek disclosure and an adjournment in order for it to lead evidence regarding COMI was denied, notwithstanding that insolvency proceedings had already been commenced in Germany against one of Collins & Aikman's German companies, on application by two other creditors.[209] Ford claimed an interest in the proceedings as a potential creditor, which it would become if any of the Collins & Aikman companies became unable to service their contracts with Ford. Given differences in the insolvency laws of Germany and the U.K. regarding subordination of claims, Ford was concerned about the treatment of inter-company debt claims in proceedings in respect of the German company.[210] The U.K. High Court denied the adjournment and made the administration order in respect of all the Collins & Aikman European companies, including the German company. Ford was granted access to redacted disclosure and one working day to bring a comeback order, the court rejecting Ford's submission that the time allowed was unfair and unreasonable.[211] Arguably, with the ECJ judgement in *Eurofood IFSC Ltd.*, the U.K. Court might well have required a higher threshold of evidence before determining COMI and may have granted an order that would ensure that parties with an interest in the proceeding had the appropriate time to prepare that evidence.[212]

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[206] *Ibid*., at paras. 20-24. See also *Parkside Flexibles*, *supra,* note 188, where a U.K. Court opened insolvency proceedings over Polish company with an English parent corporation.
[207] *Daisytek-ISA Ltd.*, [2003] B.C.C. 562.
[208] *In the matter of Collins & Aikman et al. and in the matter of The Insolvency Act 1986*, [2005] EWHC 1754 (Ch.).
[209] *Ibid.* Ford had advised the U.K. court of this proceeding and advised that the German Court was in the process of reviewing the applications to determine whether it should proceed to give due process to the Collins & Aikman German company by notifying it of the application.

[211] *Ibid.,* Transcript of Judgment.

The issue of COMI is significantly different in Canada than for Member States subject to EC Regulation, hence the caselaw is helpful but limited in its application. The EC COMI decision determines the applicable law in a proceeding for all Member States, extending the law of the Member State of the main proceeding and the powers of the liquidator throughout the European Union.[213]

3. Establishment and Recognition of Secondary Proceedings under the EC Regulation

In a judgment rendered after the ECJ decision in *Eurofood IFSC Ltd.*, in *BenQ Mobile GmbH & Co. OHG [a trading partnership]* and *BenQ Mobile Holding B.V.*, the proceedings involved an investment and management services firm in which there was an issue as to the initiation of secondary proceedings, what constitutes establishment, and whether related entities should be treated as a corporate group in a consolidated proceeding.[214] The case involved the timing of applications before courts in Munich and Amsterdam.

BenQ is a Taiwanese company that is the parent corporation of BenQ Mobile Holding B.V., holding 100% of the equity. The Holding company is itself the parent of multiple companies operating in multiple jurisdictions, including OHG and Wireless.[215] On December 29, 2006, the Munich Court (*Amtsgericht)* ordered appointment of a provisional receiver, and in separate orders on January 1, 2007, ordered the involuntary liquidation of OHG and Wireless, appointing the provisional receiver as receiver. Two days prior, on December 27, 2006, the debtor had filed its own application for institution of insolvency proceedings before the Rechtbank (the Arrondissement Court) of Amsterdam, Netherlands and by an order of the same date, the Amsterdam Rechtbank temporarily granted the debtor deferral of payments and likewise appointed a liquidator. In a judgment dated January 31, 2007, the Amsterdam court considered an application for involuntary liquidation of BenQ Mobile GMBH and Company OHG ("OHG") and BenQ Wireless GMBH ("Wireless"), which was opposed by the two receivers of OHG and

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[213] Samuel L. Bufford, "International Insolvency Case Venue in the European Union: The Parmalat and Daisytek Controversies", 12 Columbia Journal of European Law, Spring 2006, 429ff.

[214] *BenQ Mobile GmbH & Co. OHG [a trading partnership*] and *BenQ Mobile Holding B.V.,* Docket No.: 1503 IE 4371/06 Munich, February 5, 2007. The proceedings involved the petition of BenQ Mobile GmbH & Co. OHG [a trading partnership], Haidenauplatz 1, 81667 Munich, having as its legal representative the personally liable partner in the trading partnership: BenQ Mobile Management GmbH, having as its legal representative its managing director Wei-Yui Liou (Alex Liou) – Taoyuan City, Tayoyuan, Taiwan its managing director Deng-Rue Wang (David Wang) – Munich the personally liable partner in the trading partnership: BenQ Wireless GmbH, having as its legal representative its managing director Wei-Yui Liou (Alex Liou) – Taoyuan City, Tayoyuan, Taiwan, creditor, for the institution of insolvency proceedings against the assets of BenQ Mobile Holding B.V., Neptuunstraat 15-37, 2132JA Hoofddorp, Netherlands,

[215] District Court of Amsterdam, Civil law section, Suspension no. 06/34/8, FT RK 07-93, FT RK 07-122.

Wireless respectively, but supported by Holding and BenQ.[216] The receivers argued that Holding's COMI was in Germany, whereas Holding and BenQ argued that by granting the provisional suspension of payments, the Amsterdam Court had taken jurisdiction of the proceeding and had recognized that jurisdiction as the COMI of the debtors. Using the reasoning of the ECJ, the Amsterdam Court held that "only if no or hardly any activities are performed in the country of the registered office according to the articles of association, the assumption that the COMI is situated in that location can be negated". Here, the Court found that there was a permanent establishment, with nine employees and two directors operating out of it, notwithstanding the commercial activities in Germany. The Court held:

> What should be decisive is the fact that Holding performed activities knowable for third parties in the Netherlands from a permanent establishment with staff and that it was not simply knowable for these third parties that in addition activities were (perhaps mainly) performed in Munich. The District Court therefore concludes that the legal assumption that the COMI was situated in the Netherlands as a result of the fact that the registered office according to the Articles of Association was in the Netherlands, has not been negated.
>
> Therefore the District Court is competent on the basis of Article 3, paragraph 1 EIV, to order the involuntary liquidation.[217]

Thus the COMI, and as a consequence, the main proceeding, were recognized in the Netherlands, using the approach set out by the ECJ in *Eurofood IFSC Ltd.*

The German Court instituted insolvency proceedings in February 2007 pursuant to Arts. 2, 3 (2) and (3), 16 (2), and 27 ff. of the EC Regulation in conjunction with §§ 2, 3, 11, and 17 ff. of the German *Insolvency Code* [*InsO*], as secondary insolvency proceedings. The effect of the proceedings was limited to the debtor's assets located in Germany. The Court appointed a liquidator and set a deadline for submission claims.[218]

The German Court held that instituting main insolvency proceedings under Art. 3 (1) of the EC Regulation was out of the question because such proceedings had already been instituted by the Amsterdam Rechtbank on December 27, 2006, two days before the Munich Court had ordered that a temporary insolvency administration be instituted. The German Court held that a court decision constitutes the "opening of an insolvency proceeding" within the meaning of the EC Insolvency Regulation if it is handed down in response to a petition for the institution of a

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[216] The application was for an order under section 242 of the Dutch *Bankruptcy Act.*

[217] District Court of Amsterdam, Civil law section, Suspension no. 06/34-S, FT RK 07-93, FT RK 07-122 (31 January 2007) at 5.

[218] The reporting hearing and hearing for a decision on the choice of another liquidator, if any, on the establishment of a creditors' committee, hearing for examination of creditors' claims and on the matters indicated in §§ 66, 100, 149, 157, 160, 162, and 233 of the *Insolvency Code*, was set for April 2007.

proceeding listed in Annex A of the Regulation, and results in divestment of the debtor and the appointment of a liquidator pursuant to the Regulation.[219] The decision of the Amsterdam Rechtbank met these requirements; it ordered that the debtor's business to be managed in cooperation with the appointed administrator and hence the debtor was no longer empowered to dispose of its assets without the administrator's cooperation. The German court held that according to Article 16 of the EC Regulation, the decision of the Amsterdam Rechtbank must be recognized. In accordance with Article 16 of that Regulation, there is to be no further review of the decision, particularly in regard to the international jurisdiction of the Amsterdam Rechtbank under Article 3 (1) of the EC Regulation. The Court found no breach of Article 26 of the Regulation.

The debtor opposed commencement of a secondary proceeding and the insolvency administrator appointed in the Netherlands suggested suspending the proceedings in Germany in favour of the Dutch court, under Art. 102 §§ 3 and 4 of the *Introductory Act to the German Insolvency Code* [*EGInsO*]. The German Court granted the secondary proceedings pursuant to Articles 2, 3 (2) and (3), 16 (2), and 17 ff. of the EC Insolvency Regulation. It held that German courts have international jurisdiction under Article 3 (2) and (3) of the Regulation, and Munich Local Court has territorial jurisdiction under Art. 102 § 1 (2) of the *Introductory Act to the German Insolvency Code*, since at the time of filing of the petition for insolvency, the debtor had an establishment in the territory of the Munich Court within the meaning of Art. 2(h) of the Regulation. The Court held that the debtor conducted more than a transitory economic activity from its Munich business premises; business decisions were prepared and implemented; one of the debtor's managing partners worked primarily from the office; corporate law and contractual affairs of the debtor were handled by employees from the petitioner's legal department in Munich and Munich was the venue of choice for legal venue for some contracts; the major portion of the debtor's payment traffic was also managed from Munich; and the debtor's economic activity in Munich was set up for a certain permanence. The Court held that economic activity in Munich had an effect that was not merely internal to the corporate group, but was also directed outward, and to that extent was recognizable to third parties. The debtor engaged in legal transactions with non-group contracting partners while giving the business address in Munich. It maintained business relations with German and foreign banks, which corresponded with the debtor at the Munich address.[220]

The Court further held that the debtor conducted its economic activity in Munich using human means and goods. The employed goods were primarily credit balances in various bank accounts,

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[219] *Ibid.,* citing European Court of Justice, decision of May 2, 2006 – C – 341/04.

[220] The Court noted that Citibank N.A., London, Deutsche Bank AG, Amsterdam, Deutsche Bank Polska S.A., the Deutsche Bank AG branch in Munich, Deutsche Bank S.p.A., Milan, Deutsche Bank (Portugal) S.A., and Citibank International PLC Netherlands each sent account statements and letters to the Debtor at the address at Haidenauplatz 1, 81667 Munich.

especially with Deutsche Bank AG in Munich, which was the debtor's main account. The human means employed by the debtor were the debtor's managing director, the head of the Petitioner's legal department, the legal department employee, the petitioner's treasury head, and at least five of the plaintiff's other employees spent 30 to 70 percent of their work time for the debtor. The Court held that the fact that the debtor employed only nine of its own employees in the Netherlands and used the Plaintiff's employees for economic activities in Munich, with the exception of its managing director, does not contradict the presumption of the use of personnel within the meaning of Art. 2(h) of the Regulation. The Court held that the broad legal definition of the term "establishment" in Art. 2(h) contains no indication that the use of human means may take place only by way of a company's own employees, and cannot also extend to other persons, for example under business engagements or agency agreements. Moreover, as a general rule, the *inter partes* relationship between the debtor and the persons it engaged is not apparent to third parties. In the interest of creditor protection, therefore, the Court held that the use of a company's own employees is not necessary to having an establishment if the engaged persons act on the debtor's behalf in regard to outsiders.

The Court held that because of the institution of main insolvency proceedings in the Netherlands, there was no requirement to inquire into the existence of grounds for insolvency.[221] It was not necessary to suspend the previous preliminary proceedings or subsequently to institute a separate secondary insolvency proceeding, since no final instituting decision had been handed down.[222] The Court held that in the proceedings for institution, the insolvency court must also examine, in addition to the other prerequisites, which type of proceeding (main or secondary) is permitted under the EC Regulation. The Court held that if it finds that main insolvency proceedings cannot possibly be instituted, an insolvency petition filed to this end may be reinterpreted and secondary insolvency proceedings may be instituted instead.[223]

The judgment in *BenQ Mobile GmbH & Co. OHG [a trading partnership]* and *BenQ Mobile Holding B.V.*, indicates a high degree of deference to the first finding of main proceeding and COMI, as directed by the ECJ. It recognizes local creditor interests and the need for certainty in terms of creditors' reliance on the COMI of the debtor. However, the high level of deference may pose a problem for going concern solutions of a corporate group. Given that secondary proceedings are restricted to liquidation proceedings in a Member State, may mean that absent coordination and cooperation, value may not be maximized through the separate realization of assets in secondary proceedings. The Court did not show particular deference to the main

[221] *Ibid.* at para. 4, citing Article 27, EC Insolvency Regulation, *supra*, note 153.
[222] *Ibid.*, Under Art. 102 §§ 3 (1), 4 (1) *Introductory Act to the German Insolvency Code.*
[223] *Ibid.*, citing Frankfurt Commentary to the Insolvency Code, 4th ed., Appendix II to § 358, Marginal No. 4 to Art. 102 § 3 of the *Introductory Act to the Insolvency Code.*

liquidator in this proceeding, whereas in Canada, the courts tend to show a high level of deference to the opinion of the monitor, receiver or trustee. This raises the question of whether courts in the EC Member States should accord a higher level of deference to the opinions of their court appointed officers. It also raises the question of whether there should be special recognition of the role of the main liquidator, such that its powers include an oversight role in all related proceedings to ensure that value is maximized for creditors, whatever the outcome of the proceeding.

Now that the ECJ has given direction to the courts of Member States, there should be a greater uniformity in the principles applied to determine of establishment and COMI. However, in respect of determining establishment, Professor Wessels observes:

> Some courts have ruled that an 'establishment' can also function as the registered office of a subsidiary whose insolvency has been opened in another Member State (where 'head office functions' of the parent are centralised). Although the history of the Regulation does not seem to provide support for such decisions, the consequence is that uncertainty remains concerning how the decision, which includes the applicability of a foreign *lex concursus* and the powers of the liquidators appointed, relates to the domestic corporate or insolvency law duties of the management of the subsidiary…. It may be premature to assess whether the Regulation has been sufficiently successful in avoiding forum shopping. In practice doubts are expressed, in short: (1) in 'a race to the court' the first COMI wins, (2) the set of choice of law rules may promote financial engineering in the choice of jurisdiction (to limit risks) and optimize set-off, and, in general, (3) will the whole PIL insolvency framework be sufficiently coherent?[224]

While the decision in *Eurofood IFSC Ltd.* will likely temper forum shopping given the threshold established before the presumption that COMI is the registered office of the debtor is rebutted, it does raise an issue in respect of whether there will be a "race to recognition" with respect to corporate groups in that parties may seek to have the COMI found in one jurisdiction, such that further efforts to deal with entities of a corporate group cannot be consolidated in a secondary proceeding in another Member State.

4. Corporate Group under the EC Regulation

There are several judgments under the EC Regulation that deal with corporate groups; however, they deal with multiple entities that had their COMI in the same jurisdiction. Hence while the courts were able to coordinate proceedings as a corporate group, they did not face the challenge

[224] Wessels, *supra*, note 203.

of determining whether there could be a corporate group proceeding where the COMI was located in different Member States.

In *Daiseytek Group*, there were 16 companies that comprised the European subdivision of a wider corporate group controlled by an American corporation Daiseytek Inc.[225] The American parent had filed under Chapter11 of the U.S. *Bankruptcy Code*. The U.K. court made administration orders against 14 of the 16 European companies, including ten incorporated in England, three incorporated in Germany and one in France.[226] The Court held that the COMI for all the companies was England, based on where the companies conducted the administration of their business on a regular basis, drawing a distinction between the place at which the companies in Germany and France conducted dealings with customers and the place where administrative control of the debtor's main interests is systematically and transparently exercised.[227] Essentially, the court applied a command and control test to determine COMI. It is unclear whether the same finding would be made after the ECJ decision in *Eurofood IFSC Ltd.,* as discussed earlier, because of the ECJ's higher threshold placed on what is needed to rebut the presumption.

The French and German courts in Daiseytek Group refused to acknowledge the order of the U.K. court and proceeded to open main proceedings in respect of the entities in the corporate group located in those jurisdictions. The French order was quashed by the appellate court on application by the U.K. joint administrators, on the basis that once the U.K. court found jurisdiction, that decision was not open to be examined by the French court.[228] This reasoning, of course, aligns with the directions given by the ECJ in *Eurofood IFSC Ltd.* The issue in respect of the German proceedings was eventually partially resolved by converting the proceedings to secondary proceedings; however, in respect of the two other German entities, there was an issue as to whether the judgment of the U.K. court was made without appropriate notice to German creditors.[229] Ian Fletcher has observed that while the commencement of insolvency proceedings are often time sensitive, in the Daiseytek case, the appropriate recourse for German creditors would have been to come back before the U.K. court to deal with any issues of fundamental justice and due process.[230]

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[225] Fletcher, *supra*, note 154 at 7.69.
[226] *Re Daisytek-ISA Ltd., and others, claim nos. 861-876 of 2003* [2003] BCC 562; [2004] B.P.I.R. 30 (Chancery Division, Leeds District Registry).
[227] *Ibid.* at para. 14.
[228] Cour d'appel de Versailles, 24ième chamber, arrêt No. 12 du 4 septembre 2003 (R.G. No. 03/05038), JOR 2003/288.
[229] Fletcher, *supra*, note 154 at 7.73.
[230] *Ibid.*

Vallens has observed that the French cases decided before the ECJ decision indicated that courts were receptive to the notion that in a number of cases it was practical to bring together group insolvencies and to deal with them under one proceeding in the jurisdiction where the parent company commenced proceedings and the subsidiaries were located in other Member States of the EU.[231] Other jurisdictions have also interpreted COMI liberally, to take account of corporate groups, including EU Member States and non-Member States such as Switzerland.[232]

In *Crisscross Telecommunications Group*, the U.K. court found that the COMI of the entire corporate group was located in the U.K., including those entities that were registered in several EC Member States as well as Switzerland. The factors applied were that the corporate board decisions were primarily taken in London; management, administration and accounting were carried out almost exclusively in London; although local suppliers contracted in the local jurisdiction, the contracts were generally made following meetings with English employees and suppliers send their bills to London for payment. The court then appointed the same joint administrators in all the cases in order to allow the proceedings to be carried out in a coordinated manner.[233] Here again, it is not clear whether these factors would be sufficient to rebut the presumption, given the reasoning set out in *Eurofood IFSC Ltd.* The ECJ has opted less for the command and control principle to be applied and instead relies to a greater extent on the place of registration, as noted previously, setting the threshold high for rebutting the presumption. However, the U.K. courts have considered the issue of creditors' expectations and what is ascertainable in terms of their understanding of the debtors' centre of main interests. In cases of corporate groups going forward, this will become even more significant, given the ECJ judgment.

V. Conclusion

While the proclamation of Chapter 47 in Canada will codify a number of current judicial practices in cross-border insolvencies, it will also raise a number of issues that will require some time for the courts to resolve. The analysis of cases to date where the centre of main interests was in dispute raises the issue of whether COMI should ever be determined on an *ex parte* basis, given that a number of remedies automatically flow from the declaration that a debtor has its COMI either in the jurisdiction whether it seeks a main proceeding, or in the jurisdiction in which it is seeking recognition as a foreign main proceeding. The EU cases illustrate that Canadian courts

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[231] Jean-Luc Vallens, Eurofenix, Summer 2006, at 10-11.
[232] UNCITRAL Working Group V, *0657458* Treatment of corporate groups in insolvency Note by the Secretariat, working discussion document.
[233] *Ibid.* See also *Hettlage-Austria*, Munich District Court, 4 May 2004, AG Munchen, Beschl. V.4.5.2004-1501 IE 1276/04, www.eir-database.com.

should be attuned to the need to have fulsome evidence before them, before making a determination of COMI. While this may pose challenges for proceedings that have some urgency in terms of recognition and imposition of a stay, the courts could consider an interim stay pending consideration of the recognition application based on broad notice and the best evidence possible. In the U.S., the notice requirements appear to ensure that this will occur, assuming that parties have the resources to make an appearance and make submissions in respect of COMI.

The EC regulation and definition of COMI applies only where the debtor is no longer fully in control of assets and operations. Hence a definition of COMI aimed at streamlining the process being conducted by the liquidator is significantly different from many Canadian cross-border proceedings in which the debtor is still in control. Moreover, the impact of determination of COMI in Canada differs from the EC regulation as the latter has a broad extra-jurisdictional reach. Courts may need to be sensitive to the different implications of liquidation and restructuring proceedings when determining the COMI in a particular proceeding in Canada.

Canada differs in its cross-border relationships from the EU Member States. The European Community is an economic and legal community bound by treaty, and subject to the authority of a single appellate court. The EC Regulation protects domestic insolvency law, but only to the extent that it does not conflict with the EC Regulation, and where it does, the EC Regulation creates a uniform standard across multiple jurisdictions within the EU. Canada is a sovereign state, and its relationships with the U.S. or with Commonwealth countries in which it has a close trading or economic relationship is still not in the nature of an economic and legal community relationship. Thus lessons from EU caselaw may have limited application.

However, on a pragmatic basis, the high degree of integration of Canada and U.S. capital markets and the integrated nature of the capital structure of Canadian corporations means that there needs to be a workable definition of COMI that addresses the structural and operational realities of inter-company debt. While Canadian courts will not be bound to another jurisdiction's determination of COMI, it has a long tradition of comity. However, a commitment to international cooperation should not override concern for the rights of domestic stakeholders, particularly where their interests may be prejudiced. There may be some awkwardness as different courts develop early jurisprudence in recognition orders under Chapters 47 and 15. The limited cases to date, however, indicate that Canadian and U.S. courts will accord a measure of deference to each others' judgments.

In addition, courts will have to recognize the differences between Chapter 47, Chapter 15 and the Model Law, as outlined earlier in Part II, in their decisions concerning cross-border insolvency

proceedings. Canada will thus have to develop its own jurisprudence within the framework of the legislation in recognizing foreign proceedings and foreign representatives in proceedings concerning domestic creditors' rights in cross-border proceedings. This will necessitate a careful balancing of the principle of protection of the interests and reasonable expectations of creditors, including secured and unsecured creditors and employees, with the principle of comity and international cooperation.