International Corporate Rescue

ChaseCambria
SOUTH SQUARE
Centre for Commercial Law
UCL LAWS

Published by:
Chase Cambria Company (Publishing) Ltd
4 Winifred Close
Barnet, Arkley
Hertfordshire EN5 3LR
United Kingdom

www.chasecambria.com

Annual Subscriptions:
Subscription prices 2013 (6 issues)
Print or electronic access:
EUR 695.00 / USD 845.00 / GBP 495.00
VAT will be charged on online subscriptions.
For 'electronic and print' prices or prices for single issues, please contact our sales department at:
+ 44 (0) 207 014 3061 / +44 (0) 7977 003627 or sales@chasecambria.com

International Corporate Rescue is published bimonthly.

ISSN: 1572-4638

ARTICLE

Fighting the Challenge of Cross-Border Insolvency at 'Home': A Global Approach to the Failure of Multinational Enterprise Groups

Vincenzo Volpe, University of Sussex, Brighton, UK

Introduction[1]

Insolvency law has been defined as a form of 'meta-law'[2] in the light of the inextricable knot of legal disciplines and policy considerations,[3] which make their appearance when a company is on the verge of failing. The difficulties arising from the balancing exercise of multiple, often conflicting, interests are then exacerbated in cases of transnational insolvencies, where issues of jurisdiction, choice of law, recognition and enforcement are involved.[4] It is commonly accepted that, in the context of a globalized market economy, domestic bankruptcy laws often proved ineffective in handling certain issues of private international law autonomously.[5] It is more specifically in the scenario of a multinational enterprise group ('MEG') that the unsuitability of national laws is capable of revealing a proper 'jurisdictional nightmare',[6] particularly in the light of the current financial crisis.[7]

Following more than twenty years of debates surrounding the idea of a transnational insolvency regime, mainly characterized by an intellectual dispute between universalism[8] and territorialism[9] based theories, a small number of international tools have now been provided, each claiming to represent the best example of a 'modified universalism'[10] approach. In 1997, the United Nations Commission on International Trade Law[11] adopted the Model Law on Cross-Border Insolvency,[12] followed in 2000 by the European Union's European Insolvency Regulation.[13] While both texts 'acknowledge and expand on the ancient principle of comity',[14] they both fail in considering the procedural and jurisdictional issues arising from the insolvency of MEGs.[15]Ample literature is already available concerning the strengths and weaknesses of those regimes.[16]

Notes

1 The author would like to thank Paul J. Omar, Senior Lecturer at the University of Sussex, for casting a critical eye over the contents of this article. Nonetheless, all errors and omissions remain the author's own.

2 See M. Balz, 'The European Union Convention on Insolvency Proceedings' (1996) 70 *American Bankruptcy Law Journal* 485, at 486.

3 See A. Sexton, 'Current Problems and Trends in the Administration of Transnational Insolvencies Involving Enterprise Groups: The Mixed Record of Protocols, the UNCITRAL Model Insolvency Law and the EU Insolvency Regulation' (2012) 12(2) *Chicago Journal of International Law* 811, at 813.

4 See I. Mevorach, *Insolvency between Multinational Enterprise Groups* (2009, Oxford University Press, Oxford), in Ch. 3, at 62.

5 Sexton, above note 3, at 811. See also on the impact of e-commerce on cross-border insolvency: N. Desai, 'How Insolvent Multinational Businesses Should Adjust to Congress's Creation: Chapter 15' (2006) 7 *Houston Business and Tax Law Journal* 138, at 139-140.

6 See R. Lechner, 'Note, Waking from the Jurisdictional Nightmare of Multinational Default: The European Council Regulation on Insolvency Proceedings' (2002) 19(3) *Arizona Journal of International and Comparative Law* 975.

7 See K-H. Lehne (Rapporteur), *Report with Recommendations to the Commission on Insolvency proceedings in the context of EU Company Law* (Document A7-0355/2011) (17 October 2011) ('Lehne Report'), at 5, copy available at: <www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2011-0355&format=XML&language=EN> [last viewed on 30 July 2012].

8 See J. Westbrook, 'A Global Solution to Multinational Default' (2000) 98 *Michigan Law Review* 2276, at 2277.

9 See L. LoPucki, 'Cooperation in International Bankruptcy: A Post-Universalist Approach' (1999) 84 *Cornell Law Review* 696, at 702-704.

10 Sexton, above note 3, at 815 describes 'modified universalism' as a theory capable of 'allowing for recognition of foreign insolvency proceedings while still respecting the role of domestic law'.

11 'UNCITRAL'.

12 General Assembly Res. No. 52/158, UN Doc. A/RES/52/158 (1998) ('Model Law'), copy available at: <www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html> [last viewed on 30 July 2012].

13 Council Regulation 1346/2000, 2000 OJ (L 160), copy available at: <eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:160:0001:0018:EN:PDF> [last viewed on 30 July 2012].

14 See S. Mund, 'Note, 11 USC 1506: US Courts Keep a Tight Rein on the Public Policy Exception, But the Potential to Undermine International Cooperation in Insolvency Proceedings Remains' (2010) 28 *Wisconsin International Law Journal* 325, at 325.

15 See S. Bufford, 'International Insolvency Case Venue in the European Union: The Parmalat and Daisytek Controversies' (2009) 12 *Columbia Journal of European Law* 429. See also S. Johnston and J. Han, 'A Proposal for Party Determined COMI in Cross-Border Insolvencies of Multinational Corporate Groups' (2007) 16 *Norton Journal of Bankruptcy Law and Practice* 811, at 812.

16 In favour and against the Model Law, see respectively I. Fletcher, *Insolvency in Private International Law: National and International Approaches* (2nd edn) (2005, Oxford University Press, Oxford), at 443-51 and I. Mevorach, 'Towards a Consensus on the Treatment of Multinational

Therefore, a detailed critique of them falls outside the scope of this article. The analysis here will be focused on the development of a global approach based on the 'Home Country' concept,[17] as developed by Irit Mevorach. The first part of the paper will consider the necessity of a global approach and its capacity to fully embrace the 'poly-corporative character'[18] of groups of companies. The second, main part, will be dedicated to the analysis of the concept of 'Home Country' and its limitations in relation to specific enterprise group structures. Conclusions will then follow.

I. Why do we need a global approach for multinational enterprise groups?

Embryonic examples of Multinational Enterprises ('MEs') can be traced back to the sixteenth century colonial trading companies in Europe.[19] In that historical context, managing the insolvency of an ME would be relatively straightforward as a 'genuine international division of production by firms'[20] used to be in place. This would thus result in an appropriate 'entity-law'[21] approach to bankruptcy. However, starting in the nineteenth century, the increasing replacement of independent agents with controlled affiliates[22] led to the emergence of multinational corporate groups.[23] The main characteristic of MEGs lies in the increased transnationality of their horizontal and vertical operations. While the latter are capable of boosting business efficacy, they also render MEGs 'legal shadows'[24] in the eyes of essentially every legal system. Because of the highly complicated net of intercompany obligations arising in both equity and contract,[25] it is not difficult to imagine the disastrous impact that the insolvency of a single entity would have on the rest of the group.[26] The likelihood of 'knock-on' insolvencies is inherent in MEGs and calls for the rejection of an 'entity-law' approach in favour of an 'enterprise-law' or global perspective.[27] The main problem with the latter perspective is that, by requiring extra-territorial practices, it potentially leads to jurisdictional controversies.[28]

The opening of numerous insolvency proceedings in different jurisdictions, in relation to the same MEG, inevitably leads to a 'parochial rush to assets' [29] in each individual legal system, reducing the value of the entire enterprise to a vanishing point. A territoriality-based approach allows host countries to act like 'every man for themselves',[30] entirely disregarding the modern shift in the culture of insolvency towards rescue.[31] The opening of one proceeding in a single jurisdiction, on the contrary, would allow for a more comprehensive assessment of the group's financial position, while guaranteeing a minimum waste of time and money in the interest of the equal treatment of creditors (*pars conditio creditorum*). It is fundamental to emphasise that the possibility of coordinating the insolvency of an MEG in a 'single common geographical locus',[32] does not automatically require *substantive consolidation* of the estate of the enterprise. The untraceability of mobile assets crossing borders (or even *every* border),[33] constitutes one of the main critiques advanced against

Notes

Enterprise Groups in Insolvency' (2010) 18 *Cardozo Journal of International and Comparative Law* 359, at 363-364. In favour and against the EC Regulation, see respectively Lechner, above note 6) and Johnston and Han, above note 15.

17 Mevorach, above note 4.

18 See A. Daehnert, 'Groups of Companies and the Insolvency Threat, Chapter 1', in B. Wessels and P. Omar (eds), *Insolvency and Groups of Companies* (2011, INSOL Europe, Nottingham), at 8.

19 See V. Bornschier and H. Stamm, 'Transnational Corporations', in S. Wheeler (ed.), *The Law of the Business Enterprise* (1992, Oxford University Press, Oxford), at 340.

20 See P. Muchlinski, *Multinational Enterprises and the Law* (2nd ed) (2007, Oxford University Press, Oxford), 8-9.

21 See I. Mevorach, 'The "Home Country" of a Multinational Enterprise Group Facing Insolvency' (2008) 57 *International and Comparative Law Quarterly* 428.

22 Bornschier and Stamm, above note 19.

23 In relation to the development of MEs in the United States, see M. Wilkins, *The Emergence of Multinational Enterprise: American Business Abroad from the Colonial Era to 1914* (1970, Harvard University Press, Cambridge MA), in Part Two. For an account of the same developments in the United Kingdom, see T. Hadden, 'Inside Corporate Groups' (1984) 12 *International Journal of Sociology of Law* 271.

24 Daehnert, above note 18, at 17.

25 Mevorach, above note 4, at 15.

26 See E. Flaschen, A. Smith and L. Plank, 'Foreign Representatives in US Chapter 11 Cases: Filling the Void in the Law of Multinational Insolvencies' (2001) 17 *Connecticut Journal of International Law* 3, at 3-4.

27 Mevorach, above note 21.

28 Mevorach, above note 4, at 49.

29 Sexton, above note 3, at 814.

30 See T. Tkachenko, 'Legal Status of Bank Holding Companies (BHCs): US and European Bankruptcy Issues' (2010) 19 *Journal of Bankruptcy Law and Practice* 573, at 573, quoting Bryan Marsal, Lehman's chief restructuring officer.

31 For a comparative analysis of rescue in corporate law, see G. McCormack, *Corporate Rescue Law: An Anglo-American Perspective* (2008, Edward Elgar Publishing, Cheltenham).

32 Mevorach, above note 21, at 428.

33 See the example provided by LoPucki of a lease in a satellite orbiting the earth:, above note 9, at 716.

a global insolvency regime. In turn, a global regime does not necessarily argue for such a consolidation,[34] which would *de facto* be both 'impossible and undesirable'.[35] Rather, it promotes a consolidation of the procedural aspects of the cross-border insolvency, under which, even in circumstances of a joint administration of the group, each entity would 'remain crucially separate' in the course of the proceedings.[36] Such 'procedural consolidations', as termed by Mevorach,[37] are 'almost de rigueur'[38] in both the American and the Canadian domestic insolvency regimes[39] and have recently found support in Spanish law.[40]

The amendment of the Spanish Insolvency Act,[41] resulting from reforms taking place in March 2009, does not simply provide for a new set of rescue provisions, but supports the idea that joined declarations of insolvency do not automatically lead to substantive consolidation regardless of the level of interdependence within the corporate group.[42] According to the Spanish Supreme Court,[43] insolvency proceedings involving groups of companies should be processed in a 'coordinated manner',[44] while remaining independent at the same time. Contrary to what has often been asserted,[45] procedural consolidation only 'follows from'[46] substantive consolidation when the insolvency procedure concentrates on the ownership of the assets rather than on the true economic value behind the group's corporate activity.[47] Alternatively, as suggested by INSOL-Europe in their proposals for the revision of the European Insolvency Regulation issued recently, substantive consolidation should be restricted to those circumstances where disentanglement is particularly expensive, so that the application of a single procedure would be entirely arbitrary, or capable of blurring the possibility of rescue.[48]

Another delicate issue arising in relation to a global insolvency regime concerns the objects of its scope. In other words, does it (and can it) apply to all forms of MEGs? Broadly speaking, it is possible to subdivide MEGs into two main categories: 'equity-based' and 'contractual-based'.[49] Those groups belonging to the former category tend to have a pyramid-shaped structure formed by a main parent company at the top and a certain number of dislocated subsidiaries.[50] The structure of groups belonging to the latter category tends to be more complex and can take the form of, *inter alia*, distribution franchise alliances or production rights in franchise packages.[51] While the application of a global approach is possible in relation to both types of MEGs, its success ratio will vary on a case-by-case basis.[52] The transnational nature of all corporate groups, alongside their common relationship of 'coordination and control', represents the key to such universal applicability.[53]

Notes

34 Working Group V – UNCITRAL does not discuss the issue either. Documents are available in full text at: <www.uncitral.org/uncitral/en/commission/working_groups/5Insolvency.html> [last viewed on 30 July 2012].
35 Sexton, above note 3, at 839.
36 Mevorach, above note 21, at 437.
37 *Idem*.
38 See J. Ziegel, 'Corporate Groups and Cross-Border Insolvencies: A Canada-United States Perspective' (2002) 7 *Fordham Journal of Corporate and Financial Law* 367, at 376.
39 See, as examples, *Unsecured Creditors Comm. v. Leavitt Structural Tubing*, 55 B.R. 710, 711-12 (N.D. Ill. 1985), affd, 796 F.2d 477, stating the convenience and cost-saving aspects of procedural consolidation; *In re Coles*, 14 B.R. 5, 5-6 (Bankr. E.D. Pa. 1981), defining procedural consolidation as 'handling cases together for administrative purposes'.
40 For a detailed analysis of the Spanish Insolvency Act, see A. Núñez-Lagos and Á. Alonso Hernández, 'Insolvency Proceedings of Group Companies under the Spanish Insolvency Act' (2012) 9(3) *Corporate Rescue and Insolvency* 94.
41 Law 38/2011.
42 Núñez-Lagos and Alonso Hernández, above note 40, at 95.
43 See case number 229/2011 (22 December 2011).
44 Núñez-Lagos and Alonso Hernández, above note 40.
45 See H. Benjamin, 'Federalism in Bankruptcy: Relocating the Doctrine of Substantive Consolidation' (2011) 96 *Minnesota Law Review* 711.
46 *Ibid.*, at 718.
47 That is to say when the *lex situs* prevails over the *lex loci contractus*. For more details see section II.A of this article.
48 Revision of the European Insolvency Regulation, Proposal by INSOL Europe (May 2012), at 99.
49 Mevorach, above note 21, at 429-430.
50 For a general discussion on this form of capital structure, see J. Sarra, 'Maidum's Challenge, Legal and Governance Issues in Dealing with Cross-Border Business Enterprise Group Insolvencies' (2008) 17 *International Insolvency Review* 73, at 78.
51 Mevorach, above note 21, at 429-430.
52 This issue will be further discussed in section III.
53 Mevorach, above note 21, at 430; Muchlinsky, above note 20, at 152-153. The idea of 'coordination' and 'control' as the basis of every MEG can also be found in the OECD Guidelines for Multinational Enterprises (27 June 2000), 'Concept and Principles' no. 3, at 12, copy available at: <www.oecd.org/dataoecd/56/36/1922428.pdf> [last viewed on 30 July 2012]. See also Núñez-Lagos and Alonso Hernández, above note 40, at 94.

II. Jurisdictional and procedural issues of a global approach

A. Identifying the 'home country'

The distinctive aspect of a global insolvency regime lies in the conduct of a single, universally recognized proceeding, starting within a single jurisdiction. Establishing the criteria underlying the choice of forum is thus a key element to such an approach. According to Professor Ian Fletcher, there are three main sources of jurisdiction to consider: the law of the country of residence of the creditor and/or the debtor (*lex domicilii*), the law of the country where the transactions occurred (*lex loci contractus*) and the law of the country with jurisdiction over the assets (*lex situs*).[54] None of those sources is applicable to an MEG for a simple reason: there are often too many creditors, debtors, transactions and assets involved, including both domestic and cross-border ones. However, a procedural consolidation approach does not require the creation of a new source of jurisdiction; rather, it re-interprets the existing ones in a relative (instead of an absolute) fashion. Bearing in mind 'the *economic reality* of the relationship between the parent and subsidiaries',[55] a global approach will identify the 'home country'[56] of an MEG with the locus hosting the *core* creditors, debtors, transactions and assets making up the 'brain and nerve centre'[57] of the enterprise group. In an ideal context, this 'operational headquarters'[58] interpretation of the European notion of centre of main interests ('COMI') should also match all creditors' expectations.[59] This seems practically impossible, as different creditors are likely to have different forum-related opinions, whether held *bona* or *mala fide*. However, while the third party test to assess creditors' expectations is easily manipulated,[60] leaving plenty of room for forum shopping, it is submitted that an objective test would lead to a fairer outcome.[61] Such an objective test would have to lend major weight to the *lex loci contractus* and a minor consideration to the *lex situs*. The reason behind this is that an asset-related test bears two main flaws: in the extremely dynamic context of an MEG, it is only applicable at the onset of insolvency, 'therefore its outcome cannot be predicted *ex ante* by definition'.[62] Secondly, the degree of shareholding 'does not tell very much about the degree of integration'[63] between the entities of the group, nor does it reveal the dynamics of their coordination and control.

Contrary to what Mevorach affirms,[64] even in circumstances where the operational headquarters of an MEG are located in one country, while the entirety of the assets is in another, it is not necessary to open parallel proceedings in different jurisdictions.[65] Rather, on the basis of the above-mentioned considerations, the *lex situs* should be subordinated to the *lex loci contractus* even in those circumstances. Such an approach would not be problematic in the light of the transnational validity of the rights of secured creditors, as already recognized in Article 5 of the European Insolvency Regulation.[66] By requiring that 'the opening of insolvency proceedings shall not affect the rights *in rem* of creditors in respects of assets belonging to the debtor which are situated in another Member State',[67] Article 5 highlights the tension between security rights and international insolvency proceedings with the aim of avoiding any encroachment upon the former in the context of the latter. The idea that security rights 'are furnished to deal with the possibility of insolvency'[68] is mirrored in English law by the inclusion of security rights in

Notes

54 See I. Fletcher and H. Anderson, 'The Insolvency Issues', in M. Bridge and R. Stevens (eds), *Cross Border Security and Insolvency* (2001, Oxford University Press, Oxford), at 258-259.
55 Mevorach, above note 21, at 434 (emphasis added).
56 *Idem*.
57 *Ibid.*, at 440.
58 *Idem*.
59 *Idem*.
60 The test forms an integral part of the COMI concept under Article 13, European Insolvency Regulation.
61 Mevorach, above note 21, at 436. While advocating in favour of an objective standard, Mevorach does not provide a clarification as to what criteria should weight more in such objective assessment.
62 *Ibid.*, at 438.
63 Daehnert, above note 18, at 9.
64 Mevorach, above note 21, at 445.
65 See *Maxwell Communication Corp* 170 BR 800 (Bankr SDNY 1994); (1993) 1 WLR 1402 (Ch 1993), where the operational headquarters were in the United Kingdom while the majority of assets were in the United States. Double proceedings started in both countries leading to a consistent waste of time which could have been avoided by coordinating one main insolvency from the United Kingdom where the majority of contracts were stipulated.
66 See also on the impact of a common insolvency strategy on security rights: B. Wessels, 'European Cross-Border Insolvency and Secured Rights', Chapter 6 in Wessels and Omar (eds), above note 18, at 62 *et seq.*.
67 Article 5, European Insolvency Regulation. 'Rights in rem' are here considered very broadly so as to include 'floating charges' and reservations of title.
68 See O. Liersch, *The Inclusion of Security Rights in Insolvency Proceedings under European Law*, paper given at the INSOL Europe Annual Congress (Cork, Ireland), 17-18 October 2003, copy available at: <www.insol-europe.org/download/file/573> [last viewed on 30 July 2012].

administration proceedings following the Enterprise Act 2002 reform and the restriction of administrative receivership. However, to be effective in a global context, a provision of mutual-recognition of security rights should extend to all transactions to which a European Union Member State is a party, even where the other party (or parties) are non-European Union countries. This would strongly increase the transparency of MEGs, considering the high degree of participation of European Union Member State companies in global corporate activities. On the assumption that increased transparency in European Union transactions would automatically result in an extension of transparency globally, it is also suggested that the greatest efforts be put into the development of an e-justice Insolvency Portal, as proposed by the Lehne Report.[69]

The idea that the place of incorporation of the MEG automatically represents the 'Home Country' is also to be disregarded. This presumption lies at the core of the COMI definition under the European Insolvency Regulation[70] and forms part of the test under the Model Law to identify the locus of main proceedings. Notwithstanding its rebuttable nature, the presumption fails by treating the COMI as a 'fact-intensive enquiry'[71] and has the potential to increase the levels of tax evasion by leading creditors to incorporate in financial havens.[72] For instance, in the case of *Re BCCI SA (No 10)*,[73] the insolvent company was incorporated in Luxembourg, but the operational headquarters were in London. The Chancery Division of the High Court of England and Wales held that the main proceedings were to be undertaken in Luxembourg, entirely disregarding the fact that the major economic activities of the company were coordinated from the City of London. Notwithstanding ebullient criticism in relation to the choice of forum in that case,[74] a very similar approach was subsequently taken in *Eurofood ISFC Ltd*,[75] in which the ECJ reinforced the presumption of the place of incorporation as the COMI, risking a 'lethal effect to any concept based on internal facts such as control'.[76] The Court confirmed its reasoning in a line of subsequent cases,[77] but eventually changed its route in *Planzer Luxemburg Sarl*.[78] In that case, the place of the company's central administration proved crucial in establishing the company's COMI. Particular attention was directed to 'the place where the company's financial, and particularly banking, transactions mainly took place'.[79] The latter, coupled with other statements in relation to the place were 'general meetings were held', and 'where administrative and accounting documents were kept',[80] illustrates a shift of the emphasis to the *lex loci contractus* and, more generally, to a 'control-coordination' test for the determination of the *lex concursus*.[81] Crucially, this focus on the investigation of the group's structure and its corporate behaviour, as opposed to the mere acknowledgement of the COMI at the place of incorporation, means that the insolvency of a subsidiary could immediately trigger the opening of main proceedings elsewhere: either in another closely connected subsidiary exercising control over the failing subsidiary or even in the parent company/companies coordinating the entire group.[82]

B. Particular group structures and the limits of a global approach

There are two further scenarios to analyse in order to properly test the functionality of a global insolvency regime. Those are provided by decentralized single-head MEGs and decentralized groups coordinated by more than one parent company. In a decentralized scenario, there is a weak (or absent) level of integration within an insolvent enterprise. In other words, the subsidiaries are likely to exercise their operations in a relatively independent way from the parent company, or even conduct entirely different businesses from each other.[83] The lack of a clear link between the parent company and the subsidiaries makes it difficult to individuate the dynamics of control shedding light on the *Home Country* of the MEG. The application of a global regime would prove problematic here as it would necessarily

Notes

69 Above note 7.
70 Article 3(1), European Insolvency Regulation.
71 Sexton, above note 3, at 827.
72 See J. Westbrook, 'Locating the Eye of the Financial Storm' (2006-2007) 32 *Brooklyn Journal of International Law* 1019, at 1032.
73 [1997] 2 WLR 172 (Ch) 1996.
74 See I. Fletcher, 'The European Union Regulation on Insolvency Proceedings' [2003] INSOL International, *Cross-Border Insolvency* 15, at 37.
75 Case 341/04, ECR I-3813 (2006).
76 Daehnert, above note 18, at 13.
77 *BenQ Mobile GmbH & Co OHG [a trading partnership] and BenQ Mobile Holding BV*, Docket No 1503 IE 4371/05 Munich, 5 February 2007.
78 C-73/06 [2007] ECJ I-5655.
79 *Ibid.*, at paragraph 2.
80 *Idem*.
81 See also *Energotech SARL* [2007] BCC 123, where jurisdiction was determined on the ground of dependency of the subsidiary on the parent company, thereby suggesting a control-determined approach.
82 INSOL-Europe Proposal, above note 48, at 92.
83 Mevorach, above note 4, at 143.

entail the breaking down of the MEG into more closely connected local structures, in order to subsequently identify sub-COMIs. Such an exercise would inevitably require more than a single proceeding, thereby undermining the thrust of the global insolvency approach discussed so far. However, it can be argued that the lack of a clear relationship of dependency does not itself preclude the application of the 'operational headquarters' criterion.[84] Even in the absence of clear control, it is often more easy than not to identify a 'business coordinating function' in almost every enterprise structure.[85]

In the scenario of a non-integrated decentralized multiple-head insolvent MEG, the coordination-control test cannot be applied. Mevorach's suggestion in this case consists in opening multiple proceedings or, alternatively, a single one based on the 'second-best (assets) test'.[86] The limitations of the *lex situs* have already been discussed, and they are only likely to increase dramatically in the context of a multiple-head decentralised MEG. Rather than an asset-based approach, it is suggested that in the absence of any identifiable element of control and/or coordination, the *lex loci contractus* should apply, as it is the most likely to reflect the economic reality of the group's business activities. In other words, no more than two proceedings (representing the two main parent companies of the multi-head enterprise group) should be opened in the jurisdiction in which the core agreements of the group have been established.

III. Conclusions

This article has focused on the complex jurisdictional and procedural issues concerning the insolvency of MEGs. A territorialist approach to cross-border insolvency is inapplicable 'in a global arena that collapses commerce into one market place'.[87] Instead of separating what in fact 'belongs together',[88] insolvency law should be coordinated globally so as to provide the most predictable outcome for all those involved in the process. In the case of incorporated MEGs or even decentralised MEGs with a single parent company, the 'operational headquarters' test should apply on the basis of the relationship of corporate control and/or coordination between the parent company and the subsidiaries. Where, in the presence of multiple parent companies, control becomes 'invisible'[89] or coordination remains unidentifiable, the *lex loci contractus* should constitute the second best test, instead of the often suggested *lex situs* (assets test). Subordinating the *lex situs* to the *lex loci contractus* would allow for procedural rather than substantive consolidation and safeguard the mutual recognition of security rights in the context of cross-border failures. By 'subjecting the entire insolvency process to a single direction',[90] a global regime would bring certainty of procedure and predictability of fora in the majority of cases. Such predictability, in turn, would provide for a better respect of creditor's expectations, while reducing the opportunities for forum shopping.

Notes

84 See *Re Collins & Aikman SA and Others* [2005] EWCH 1754 (Ch D).
85 Mevorach, above note 21, at 446-447. This point is also supported by J. Dunning, *Multinational Enterprises and the Global Economy* (1993, Edward Elgar, Cheltenham), at 223.
86 Fletcher, above note 74, at 446-447.
87 Desai, above note 5, at 139-140.
88 Daehnert, above note 18, at 6.
89 *Ibid.*, at 17.
90 See I. Mevorach, 'Centralising Insolvencies of Pan-European Corporate Groups: A Creditor's Dream or Nightmare?' (2006) *Journal of Business Law* 468, at 480.

International Corporate Rescue

International Corporate Rescue addresses the most relevant issues in the topical area of insolvency and corporate rescue law and practice. The journal encompasses within its scope banking and financial services, company and insolvency law from an international perspective. It is broad enough to cover industry perspectives, yet specialized enough to provide in-depth analysis to practitioners facing these issues on a day-to-day basis. The coverage and analysis published in the journal is truly international and reaches the key jurisdictions where there is corporate rescue activity within core regions of North and South America, UK, Europe Austral Asia and Asia.

Alongside its regular features – Editorial, The US Corner, Economists' Outlook and Case Review section – each issue of *International Corporate Rescue* brings superbly authoritative articles on the most pertinent international business issues written by the leading experts in the field.

International Corporate Rescue has been relied on by practitioners and lawyers throughout the world and is designed to help:

- Better understanding of the practical implications of insolvency and business failure – and the risk of operating in certain markets.
- Keeping the reader up to date with relevant developments in international business and trade, legislation, regulation and litigation.
- Identify and assess potential problems and avoid costly mistakes.

For more information about *International Corporate Rescue*, please visit www.chasecambria.com