JCOERE
Judicial Co-operation Supporting Economic Recovery in Europe

Report 2

Report on Judicial Co-operation in Preventive Restructuring and Insolvency in the EU

Substantive and procedural harmonisation, judicial practice and guidelines.

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VII. Chapter 7: Comparative Analysis of Co-operation in Other Federalised Systems: The United States

7.1 Introduction

The purpose of this Chapter is to compare the approach of the EU in matters of cross-border insolvency with the approach in the United States as a comparator federal jurisdiction. Given the uncertainty as to how individual Member States will implement of the PRD, coupled with issues surrounding co-operation and coordination under the EIR Recast, considering how another federalised jurisdiction deals with multi-state cases is a useful exercise to benchmark actions related to the JCOERE Project going forward. Accordingly, this enquiry extends to both forum determination and the coordination of multiple proceedings.

While there are arguments that will challenge the validity of comparing the EU with the United States – for example, whether the EU is truly federal in nature – we would hypothesise that there are enough practical parallels and connections to the problems of forum shopping and the coordination of cross-border cases to draw helpful comparisons as to how the same issues are handled in the United States.[1] Although other federal jurisdictions were considered as additional possible comparators, such as Australia and Canada, the case law and literature are far more developed in the United States, which will therefore be the focus of the following discussion.

The following discussion will also refer to how the US courts have developed protocols and addressed instances of co-ordination of cross-border insolvency proceedings to draw examples of how this might occur within the EU in relation to cross-border restructuring procedures.

This Chapter will proceed as follows: Section 7.2 addresses forum determination and forum shopping. Section 7.3 addresses coordination, which includes not only recognition and

[1] For a discussion on federalism generally and in the EU in particular, see for example Andrew Glencross, 'Federalism, Confederalism, and Sovereignty Claims: Understanding the Democracy Game in the EU' (2007) SGIR Conference Turin, 12-14 September 2007 European University Institute 5; Armin Cuyvers, 'The Confederal Comeback: Rediscovering the Confederal Form for a Transnational World' (2013) 19(6) Eur L J 711; Jose Gomes Andre, 'American Lessons: Legitimacy, Federalism, and the Construction of a European Compound Polity' (2017) 18(3) European Politics and Society 333; John Kincaid, 'Confederal Federalism and Citizen Representation in the European Union' (1999) 22(2) West European Politics 34; and John Erik Fossum, 'European Federalism: Pitfalls and Possibilities' (2017) 23 Eur L J 361.

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enforcement mechanisms, but also for cross-border restructuring and insolvency, the coordination of assets, parties, and the implementation of plans. Section 7.4 will explore the concept of forum competition as compared to interstate competition in the USA and the potential for similar competition among EU Member States. Section 7.5 will then offer a comparative reflection upon the EU's co-operation mechanisms and the other cooperative frameworks or mechanisms discussed below.

7.2 Forum Shopping and Court Cooperation in the United States

7.2.1 The idiosyncrasies of the United States bankruptcy regime

Bankruptcy is set within the competence of the federal government by the US Constitution under the Bankruptcy Clause,[2] which confers the federal government with the power to enact 'uniform laws on the subject of bankruptcies throughout the United States.'[3] Interestingly, prior to the introduction of a federal bankruptcy procedure, the American states mirrored, to some extent, the current picture of EU Member States, with each state having its own perspective on how to deal with financially distressed companies, sometimes with different objectives and outcomes. This caused a number of constitutional challenges with little clarification from the Supreme Court[4] until a Bankruptcy Act was passed in 1898.[5] In that sense the period before 1898 represents a movement from states operating their own bankruptcy/ insolvency codes to a more federalised structure. Even after the 1898 Bankruptcy Act further steps were taken towards a fully federalised bankruptcy code including the enactment of the Chandler Act during the New Deal in 1938.[6] In terms of timing, the much shorter period of European integration from the 1950s to the present allows us to perhaps view the current European situation in an historical frame.

The connection between bankruptcy cases and other areas of law, where many of these areas of law are matters for regulation by state rather than federal law, presents interesting questions. This includes laws relating to tort, contract, property, and trusts and estates.[7] It also includes company law or the law relating to corporations as matters of state law. Contract

[2] US Constitution, art 1, s 8, cl4. See MH Redish, 'Doing it with Mirrors: *New York v United States* and Constitutional Limitations of Federal Power to Require State Legislation' (1993-1994) 21 Hastings Const LQ 593, 594-596.

[3] United States Constitution, article 1 paragraph 8 clause 4; For a detailed history on the evolution of the federal bankruptcy competence under the Constitutions Bankruptcy Clause, see SJ Lubben, 'A New Understanding of the Bankruptcy Clause' (2013) 64(2) Case Western Reserve Law Review 319, 341-342; Charles Jordan Tabb, 'The History of the Bankruptcy Laws in the United States' (1995) 3(1) Am Bankr Inst L Rev 5, 12-15; and R Sylla, RE Wright and DJ Cowen, 'Alexander Hamilton, Central Banker: Crisis Management during the US Financial Panic of 1792' (2009) 83 *Business History Review* 61, 62-63..

[4] See *Sturges v Crownshield* 17 US (4 Wheat) 122 (1819); see also SJ Lubben, 'A New Understanding of the Bankruptcy Clause' (2013) 64(2) Case Western Reserve Law Review *319*, 352-353.

[5] Act of July 1, 1898, Ch 541 30 Stat 544 (repealed 1978); see also SJ Lubben, 'A New Understanding of the Bankruptcy Clause' (2013) 64(2) Case Western Reserve Law Review 319, 388-389.

[6] The full development of a federal bankruptcy framework is described in SJ Lubben, 'A New Understanding of the Bankruptcy Clause' (2013) 64(2) Case Western Reserve Law Review 319, 341-342.

[7] G Marcus Cole and Todd J Zywicki, 'Anna Nicole Smith Goes Shopping: A New Forum-Shopping Problem in Bankruptcy' (2010) Utah L Rev 511, 515.

law was originally particularly problematic in multi-state (cross-border) bankruptcies and bankruptcy discharges as such procedures by their nature impair the obligations arising under contract.[8] State bankruptcy laws were therefore challenged as being unconstitutional in interstate bankruptcies because of their potential impairment of contracts in another state. To some extent, this mirrors the difficulties in aligning insolvency procedures among the Member States of the EU due to different legal principles on how to deal with issues such as secured debt, the order of priorities, and rights *in rem*.

Today, bankruptcy and restructuring laws are contained in the US Federal Civil Code[9] within the Bankruptcy Statute under Title 11. It is a hybrid system that relies on both federal and state law.[10] The Federal Bankruptcy Code establishes the substantive entitlements of debtors and creditors that then intersects with state competences in areas of corporate law, tort, contract, property, and trusts and estates.[11] Arguments begin in state District courts and it must be shown that the jurisdiction of bankruptcy has been earned before a case will be transferred into the bankruptcy court system, and then only if some bankruptcy policy is being furthered.[12]

The dividing line between bankruptcy and other related areas of law is also reflected in how the judiciary bankruptcy judges are appointed in the US. US bankruptcy judges derive their authority under Article I section 8 of the US Constitution, which details the powers of Congress including the power to enact a bankruptcy statute.[13] By contrast, other judges derive their authority under article III, which creates the judicial branch of the United States Government. The individual rights and effective administration of justice protecting judicial independence and competence is embedded within article III; whereas, it has been argued that article I judges lack the same level of constitutional protections.[14] Bankruptcy judges also differ from article III judges because they are not appointed by the President, but by the United State Court of Appeal for the Circuit in which they sit and for a term of only fourteen years.[15] For this reason, their position is not as secure as article III judges, and there is the perceived

[8] See *Ogden vs Saunders* 25 US (12 Wheat) 213 (1827); see also SJ Lubben, 'A New Understanding of the Bankruptcy Clause ' (2013) 64(2) Case Western Reserve Law Review 319, 349-350 and Charles Jordan Tabb, 'The History of the Bankruptcy Laws in the United States' (1995) 3(1) *Am Bankr Inst L Rev* 5, 16-18.

[9] The US Civil Code codifies general and permanent statutory law at the federal level of the United States legal system. Federal law pre-empts state and territorial law if there is a conflict so long as the federal law is also in accordance with the United States Constitution.

[10] See for example, 11 USC §362(a) which enjoins all entities from taking almost any action outside of the bankruptcy process that would affect a debtor's property; §541, which designates all legal and equitable interests as property of the estate; and §544 which creates rights in the bankruptcy trustee based on the powers allowed to certain lien creditors under relevant state law.

[11] G Marcus Cole and Todd J Zywicki, 'Anna Nicole Smith Goes Shopping: A New Forum-Shopping Problem in Bankruptcy' (2010) Utah L Rev 511, 515.

[12] G Marcus Cole and Todd J Zywicki, 'Anna Nicole Smith Goes Shopping: A New Forum-Shopping Problem in Bankruptcy' (2010) Utah L Rev 511, 529-530.

[13] Article 1 details the powers of Congress, while clause 8 lists those powers, including the power to establish 'uniform laws on the subject of bankruptcies throughout the United States.' US Constitution art 1 §8 cl 4.

[14] G Marcus Cole and Todd J Zywicki, 'Anna Nicole Smith Goes Shopping: A New Forum-Shopping Problem in Bankruptcy' (2010) Utah L Rev 511, 533.

[15] 28 USC §152(a)(1) (2006); for a discussion about judicial appointment see David A Skeel, 'Bankruptcy Judges and Bankruptcy Venue' (1998) 1(1) Delaware L Rev 1, 32-33.

danger of being subject to external influence.[16] Because Article III judges benefit from express constitutional protections over their independence due to the nature of their role and method of appointment, they are better protected from being influenced by external factors that could influence their decision-making. In order to ensure that judicial independence is maintained, a norm was adopted in the *Marathon*[17] case and later incorporated into the Bankruptcy Code requiring that all bankruptcy cases be filed in an article III District Court,[18] which could then choose to refer the matter to a bankruptcy judge 'operating as a type of special master to the District Court.'[19]

The key difference between article I and article III judges in relation to bankruptcy revolve around whether a matter is considered 'core' or 'non-core'. Core proceedings are essentially those actions that arise from public rights created by the enactment of the Bankruptcy Code.[20] Whereas, non-core proceedings are predicated on rights that are usually decided outside of bankruptcy, whether under state or federal law, such as contractual or tortious matters.[21] Bankruptcy judges can hear both types of proceedings, but are only empowered to exercise their full competence over core proceedings, with only limited competence over the non-core matters[22] in which they can only submit 'proposed findings of fact and conclusions of law to the district court, subject to de novo review.'[23] There have been arguments justifying this approach[24] but what is interesting is the overall recognition of the difference between insolvency or bankruptcy law and proceedings and other actions in contract or tort or other related areas. These distinctions are also reflected in the EU approach to enforcement of insolvency processes and determinations under the specialised European Insolvency Regulation (original and Recast) as distinct from the more generally applied Brussels Judgement Regulation.

These distinctions have further implications regarding co-operation in insolvency matters as adumbrated in the discussion of cases on assistance of foreign courts in insolvency at common law in Chapter 5.

[16] G Marcus Cole and Todd J Zywicki, 'Anna Nicole Smith Goes Shopping: A New Forum-Shopping Problem in Bankruptcy' (2010) Utah L Rev 511, 538.
[17] *N Pipeline Construction Co v Marathon Pipe Line Co* 458 US 50, 87 (1982).
[18] 28 USC §157 (2006).
[19] Model Emergency Bankruptcy Rule (a) (1982) reprinted in Bankruptcy Code, Rules and Forms, xv (West 1983); see also G Marcus Cole and Todd J Zywicki, 'Anna Nicole Smith Goes Shopping: A New Forum-Shopping Problem in Bankruptcy' (2010) Utah L Rev 511, 530.
[20] See *N Pipeline Construction Co v Marathon Pipe Line Co* 458 US 50, 71 (1982).
[21] See *Broyles v US Gypsum Co* 266 BR 788, 783 (ED Tex 2001).
[22] G Marcus Cole and Todd J Zywicki, 'Anna Nicole Smith Goes Shopping: A New Forum-Shopping Problem in Bankruptcy' (2010) Utah L Rev 511, 518-519.
[23] *Wood v Wood (In re Wood)* 825 F2d 90, 95 (5th Cir 1987).
[24] G Marcus Cole and Todd J Zywicki, 'Anna Nicole Smith Goes Shopping: A New Forum-Shopping Problem in Bankruptcy' (2010) Utah L Rev 511, 539.

7.2.2 Forum determination in the USA

Forum shopping between states in the United States is common for a variety of matters and most importantly, in the current context for corporate law matters. While it is allowed and facilitated by the legal system, Congress and the courts have often disparaged the practice.[25] In corporate law cases, forum shopping also implies choice of law issues whereas because the substantive law of bankruptcy in the United States is federal in nature, it would seem to follow that this should exclude forum shopping driven by choice of law. However, there remain a number of 'jurisdictional hooks' to shop among the bankruptcy courts.[26]

Chapter 11 proceedings are the most similar type of proceeding to that envisaged by the new EU PRD so the discussion in this Chapter will focus on this issue. Forum shopping occurs frequently in Chapter 11 reorganisation cases[27] by filing a petition in a court other than in the location of the company's head office.[28] In the Chapter 11 petition, the debtor or its representative simply states its preferred venue and if it satisfies the requirements for forum determination as set out in the Bankruptcy Venue Statute,[29] it tends to be accepted without question. The Statute ostensibly provides two methods of determining venue: domicile or residence[30] and affiliation.[31] These two criteria have been interpreted as giving rise to 5 different options to establish forum:

1. place of incorporation;
2. location of the debtors' principle assets;
3. the debtor's principle place of business;
4. a case concerning an affiliate of the debtor is pending in the jurisdiction; or
5. objections to the venue have been waived expressly or through conduct.[32]

The Bankruptcy Venue Statute therefore provides for a virtually unlimited choice for large debtors with extensive operations.[33] The presumption that favours the debtor's first choice of venue that must be rebutted should another party wish to transfer the venue elsewhere. To rebut the presumption of the debtor's choice, it must be demonstrated by a preponderance of evidence that a different venue is better. This allows debtors to file, with

[25] Mary Garvey Alegro, 'In Defense of Forum Shopping: A Realistic Look at Selecting a Venue' (1999) 78 *Neb L Rev* 79, 87.
[26] Gerard M McCormack, 'Jurisdictional Competition and Forum Shopping in Insolvency Proceedings' (2009) 68(1) Cambridge L J 169, 169; see also Samir D Parikh, 'Modern Forum Shopping in Bankruptcy' (2013) 46(1) *Connecticut L Rev* 159 for an empirical analysis and discussion of instances of forum shopping in the United States.
[27] Gerard M McCormack, 'Jurisdictional Competition and Forum Shopping in Insolvency Proceedings' (2009) 68(1) Cambridge L J 169.
[28] T Eisenberg and L LoPucki, 'Shopping for Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganisations' (1999) 84 *Cornell L Rev* 967, 975.
[29] 28 U.S. Code § 1408 - Venue of cases under title 11.
[30] 28 USC §1408 (1).
[31] 28 USC §1408 (2).
[32] Lynn M LoPucki and William C Whitford, 'Venue Choice and Forum Shopping in the Bankruptcy Reorganisation of Large Publicly Held Companies' (1991) 1991 Wis L Rev 11, 16.
[33] Lynn M LoPucki and William C Whitford, 'Venue Choice and Forum Shopping in the Bankruptcy Reorganisation of Large Publicly Held Companies' (1991) 1991 Wis L Rev 11, 23.

little or no interference, in a jurisdiction where they believe they will receive the most favourable judgement.[34]

This has led to a focus on two main courts for bankruptcy filing: the District of Delaware and the Southern District of New York (SDNY). The 'jurisdictional hooks' mentioned above do not derive from differences in state laws but derive from a number of less obvious factors. Both jurisdictions are considered debtor friendly and have judges with extensive expertise and experience. Both states provide rules that make it fairly easy to file, including Delaware's rule on incorporation; this allows any of the many companies incorporated in Delaware with little or no business activities in the state to file for insolvency in Delaware. In the case of New York, its affiliate rule, which allows companies to file if they have some affiliate in the state already filing for bankruptcy there, offers a jurisdiction with flexible rules for parties to claim a connection with that jurisdiction.[35]

As Delaware grew in popularity, the bankruptcy industry grew up around it. Delaware's popularity in the bankruptcy arena is of course linked to the underlying popularity of Delaware as a state of incorporation and as a forum of choice for corporate litigation generally. Because of the experience and significant body of specialised jurisprudence in the state system, Delaware judges are viewed as more predictable with certainty of outcomes. While certainty may be beneficial, John Coffee notes that it can sometimes be 'manipulated by management in those areas where its interests conflict with those of the shareholders.' [36] While there are arguments that challenge the morality and appropriateness of shopping for what is sometimes perceived as judicial favour, few real efforts have been made to change this status quo.[37] In addition, it has been suggested by Coffee and others that the role of markets will actually provide an incentive for states to ensure efficient legal systems, which will be of benefit to any party involved in a corporate law or bankruptcy case. The argument goes that if a company were to choose a jurisdiction with inefficient laws, it would suffer in the product and capital markets and its stock price would also fall, making the firm an attractive takeover target. Thus, the availability of forum shopping may actually facilitate a race to the top for states providing efficient laws.[38] Nevertheless and despite arguments regarding the merits or

[34] Mary Garvey Alegro, 'In Defense of Forum Shopping: A Realistic Look at Selecting a Venue' (1999) 78 Neb L Rev 79, 99.
[35] Laura Napoli Coordes, 'The Geography of Bankruptcy' (2015) 68 Vand L Rev 382, 388-389; see also Samir D Parikh, 'Modern Forum Shopping in Bankrupcty' (2013) 46(1) Connecticut L Rev 159, 181-192.
[36] John C Coffee, 'The Future of Corporate Federalism: State Competition and the New Trend toward De Facto Federal Minimum Standards' (1987) 8 Cardozo L Rev 759, 766; see also Leslie R Masterton, 'Forum Shopping in Business Bankrupcty: An Examination of Chapter 11 Cases' (1999) 16(1) Bankr Dev J 65, 67 .
[37] For a discussion of competing arguments about the pros and cons of Delaware's popularity, see L LoPucki, 'Shopping for Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganisations' (1999) 84 Cornell L Rev 967, 1002; T Eisenberg and L LoPucki, 'Shopping for Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganisations' (1999) 84 Cornell L Rev 967, 971; and see also Lynn M LoPucki, *Courting Failure: How Competition for Big Cases is Corrupting the Bankruptcy Courts* (Ann Arbor 2005), which offers an in-depth critique of forum shopping in the United States.
[38] John C Coffee, 'The Future of Corporate Federalism: State Competition and the New Trend toward De Facto Federal Minimum Standards' (1987) 8 Cardozo L Rev 759, 766; see also Leslie R Masterton, 'Forum Shopping in Business Bankrupcty: An Examination of Chapter 11 Cases' (1999) 16(1) Bankr Dev J 65, 67; David A Skeel, 'Bankruptcy Judges and Bankruptcy Venue' (1998) 1(1) Delaware L Rev 1, 22; for a discussion around the relevance of either racing to the top or to the bottom in the United States federal system, see Anne Anderson, Jill Brown, and

demerits of forum shopping and a lack of consensus about the correct interpretation of the Bankruptcy Venue Statute on forum determination, most Chapter 11 cases are heard in one of these two jurisdictions.[39]

Objecting to a venue selection in the United States after it has already been filed is also difficult. In fact, most cases proceed with little discussion over the choice of venue at all, as the alternative is costly, timely, and challenging. Courts view debtors as being in the best position to better know their operations and the extent of their problems than any other party, so tend to defer to the better information that the debtor is perceived to have to make this choice. There is also a concentration of professionals and experts in New York and Delaware, so there is a strong 'club atmosphere' that tends to influence the maintenance of the status quo.[40] As noted by LoPucki and Whitford:

> Although the benefits of venue transfer may well exceed the costs for all claimants as a group, the benefits to any one claimant are likely to be far less than the costs of a successful challenge to the initial venue choice. These costs are high, in part because much of the information needed to assess what venues are possible…tend to be under the exclusive control of the debtor during the crucial period from the filing of the case until momentum renders the case unmoveable.[41]

Finally, judges, while empowered to transfer venue themselves, will rarely do so.[42]

Despite the fact that bankruptcy law is a federal competence in the US, there still exist significant variances on case-defining issues from circuit to circuit, such as the treatment of key non-assignable contracts[43] and third party releases under reorganisation plans.[44] Thus, while the bankruptcy law remains the same, decisions that relate to a plan and which have an element of judicial interpretation may find different results under different circuits.[45] The exercise of discretion makes debtors and decision-makers quite sensitive to the perceived experience, knowledge, and personality of judges in a given district.[46] It is not surprising then that debtors and decision-makers in a Chapter 11 case will take time to examine the

Parveen P Gupta, 'Jurisdictional Competition for Corporate Charters and Firm Value: a Re-examination of the Delaware Effect' (2017) 14 Int J Discl Gov 341.

[39] See Marcel Kahan and Ehud Kamar, 'The Myth of State Competition in Corporate Law' (2002) 55(3) Stanford L Rev 679, 725-726, 730-731.

[40] Laura Napoli Coordes, 'The Geography of Bankruptcy' (2015) 68 Vand L Rev 382, 394-396.

[41] Lynn M LoPucki and William C Whitford, 'Venue Choice and Forum Shopping in the Bankruptcy Reorganisation of Large Publicly Held Companies' (1991) 1991 Wis L Rev 11, 42.

[42] Lynn M LoPucki and William C Whitford, 'Venue Choice and Forum Shopping in the Bankruptcy Reorganisation of Large Publicly Held Companies' (1991) 1991 Wis L Rev 11, 42 and Laura Napoli Coordes, 'The Geography of Bankruptcy' (2015) 68 Vand L Rev 382, 394-396.

[43] 11 USC §365(c); See *In re Catapult Entm't* 165 F3d 747, 754-755 (9th Cir 1999) and *In re W Elecs Inc* 852 F2d 79 (3d Cir 1988).

[44] See *In re Lowenschuss* 67 F3d 1394, 1401-02 (9th Cir 1995); *In re Zale Corp* 62 F3d 746, 760-01 (5th Cir 1995); and *In re W Real Estate Fund Inc* 922 F2d 592, 601-02 (10th Cir 1990); Samir d Parikh, 'Modern Forum Shopping in Bankruptcy' (2013) 46(1) Connecticut Law Review 159, 193.

[45] Samir d Parikh, 'Modern Forum Shopping in Bankruptcy' (2013) 46(1) Connecticut Law Review 159, 193.

[46] Samir d Parikh, 'Modern Forum Shopping in Bankruptcy' (2013) 46(1) Connecticut Law Review 159, 194.

characteristics of available potential venues and judges for a bankruptcy case to determine the greatest chance of success.[47]

7.2.3 European parallels

The first point to make is that the development of an integrated market is of much more recent vintage in the EU; consequently, the development of a European insolvency legal framework is in a comparatively early phase. At this point in its development, the application of the COMI test in cross-border insolvencies and restructurings in the European Union under the original Insolvency Regulation 1346/2000 and the EIR Recast 848/2015 renders the idea of forum shopping less possible. However, over time, the idea of orchestrating a 'COMI shift'[48] prior to a proceeding has gained more familiarity and become more common. The emergence of case law and litigation on COMI[49] is related to the operation of more traditional insolvency processes, rather than more recent developments in restructuring law. The development of a newer European approach to business failure represented in the PRD raises a number of possibilities that have been considered in Chapters 2, 3 and 5 of this Report. Essentially, where some restructuring processes do not come within the EIR Recast, the impediment to forum shopping created by decades of COMI case law quite simply does not exist.

The second point then comes into play, which is that unlike the US, restructuring laws are quite different across the EU and given our analysis in both the first JCOERE Report and the summary of different approaches in Chapter 3 of this Report, forum shopping driven by choice of law is a real possibility. We have already seen this in relation to English Schemes of Arrangement.[50] However, given the range of choices built into the PRD, it will now be possible to have a process that both implements the PRD but that is more dynamic and 'robust' than other processes that may be implemented elsewhere in the EU.

7.2.4 American cases on forum determination or transfer

The following sample of cases demonstrate a habitual tendency for states such as Delaware or New York to accept jurisdiction or refuse to transfer it, despite the thin association a venue has to the actual operations of the company and evidence that participation by the more vulnerable stakeholders would be stymied due to the costs of attendance. There are further interesting points raised in the discussion below.

[47] Samir d Parikh, 'Modern Forum Shopping in Bankruptcy' (2013) 46(1) Connecticut Law Review 159, 195.
[48] Gerard M McCormack, 'Jurisdictional Competition and Forum Shopping in Insolvency Proceedings' (2009) 68(1) Cambridge L J 169, 180 and (n 41).
[49] See generally Chapters 2 and 5 of this Report.
[50] Jennifer Payne, 'Cross-border Schemes of Arrangement and Forum Shopping' (2013) 14 European Business Organization Law Review 563-589.

Polaroid 2001[51]

The Polaroid case is demonstrative of some of the issues around objecting to the filing of a case in a venue distant from a company's main activities.

In 2001, after years of financial difficulty, Polaroid filed for protection under Chapter 11 of the US Bankruptcy code. A sale of substantially all of its assets under section 363(b) of the US Bankruptcy Code was approved by the Bankruptcy Court of Delaware,[52] although the company's nerve-centre was in Massachusetts where it had thousands of employees.[53] There was considerable controversy around the section 363 sale, which the financial press criticised for being undervalued by around a third of the actual value.[54] Judge Walsh of the Bankruptcy Court of the District of Delaware declined to take into account the creditor committee's evidence that the company would be worth more in a reorganisation, relying instead on a market approach in which a transaction appropriately conducted is viewed as the best test of value.[55]

During a hearing on the Chapter 11 Bankruptcy Venue Reform Act of 2011, the Chief Bankruptcy Judge of the United States Bankruptcy Court for the District of Massachusetts, the Honourable Frank J Bailey, noted in his testimony that filing in certain magnet courts, such as Delaware, has an adverse effect on 'the rights of small creditors, vendors, employees and pensioners' because 'efforts to overrule the filer's choice have proven to be much too expensive for all but the most well-heeled creditors.'[56] Polaroid's filing of Chapter 11 in Delaware far from its assets and investments, meant that anyone interested in pursuing their rights would have to either travel to Delaware or hire a lawyer to appear in court on their behalf.[57] As noted by Judge Bailey in his testimony to Congress on reforming the Bankruptcy Venue Statute:

> […]the stakeholders, large and small, would have had an opportunity to participate in the proceeding. At a minimum, stakeholders would have received notices that told them that they could participate in the proceeding at courthouses near where they live and work before a judge that lives in the same community as they do. This is to

[51] *In re Polaroid Corp*, No 01-10864 (Bankr D Del July 3, 2002).
[52] *In re Polaroid Corp*, No 01-10864 (Bankr D Del July 3, 2002).
[53] Chapter 11 Bankruptcy Venue Reform Act of 2011: Hearing on H.R. 2533 Before the H Subcomm on Courts, Commercial, and Administrative Law of the H. Comm. on the Judiciary, 112th Congress (testimony of Honorable Frank J Bailey, Us Bankr Ct, D Mass).
[54] Kris Frieswick, 'What's Wrong with this Picture?' (CFO 2003) <https://www.cfo.com/banking-capital-markets/2003/01/whats-wrong-with-this-picture/> accessed 22 June 2020; see also Tom Becker and Lingling Wei, 'Questions Mount in Chapter 11 Case of Former Polaroid' (WSJ Online 2003) as cited in Lynn M LoPucki and Joseph Doherty, 'Bankruptcy Fire Sales' (2007) 106 Mich L Rev 1, 13.
[55] *In re Polaroid Corp*, No 01-10864 (Bankr D Del July 3, 2002), Transcript of Sale Hearing before Honourable Peter J Walsk United States Chief Bankrupcty Judge, 172-173, 177 as cited by Lynn M LoPucki and Joseph Doherty, 'Bankruptcy Fire Sales' (2007) 106 Mich L Rev 1, 14.
[56] Chapter 11 Bankruptcy Venue Reform Act of 2011: Hearing on H.R. 2533 Before the H Subcomm on Courts, Commercial, and Administrative Law of the H Comm on the Judiciary, 112th Congress (testimony of Honorable Frank J Bailey, Us Bankr Ct, D Mass) 35-36.
[57] Chapter 11 Bankruptcy Venue Reform Act of 2011: Hearing on H.R. 2533 Before the H Subcomm on Courts, Commercial, and Administrative Law of the H Comm on the Judiciary, 112th Congress (testimony of Honorable Frank J Bailey, Us Bankr Ct, D Mass) 39.

say there would have been the perception that their opportunity was real and accessible. And perception is often paramount.[58]

It is suggested by Coordes that the Polaroid case 'demonstrates the difficulties that can arise when a company files far from its primary operating region'.[59] While there are ways to challenge the venue filing under section 1412 of the Bankruptcy Venue Statute, Judge Bailey notes that litigating a motion to change venue is very expensive and often out of the reach of small vendors and former employees. The strong presumption in favour of the debtor's chosen forum also makes it difficult to persuade a Court to change the venue of the case.[60] In a European context these issues are aggravated by legal and cultural differences.

Enron (2002)[61]

The *Enron* case is well-known for many reasons. According to C William Thomas, it is an example of failure due to 'individual and collective greed born in an atmosphere of market euphoria and corporate arrogance'.[62] Unusually, there was actually a request to transfer its venue to the Southern District of Texas instead of being heard in the Southern District of New York. There were multiple litigant companies and groups involved in the *Enron* case, along with a class-action lawsuit on behalf of pension beneficiaries. In short it was a complex, multi-faceted case that garnered much media attention at the time due to the scandals associated with it.

Enron's business activities took place mainly in Portland, Oregon and Houston, Texas, with no real property owned in New York. The debtor companies were organised under the laws of Oregon, California, and Delaware with only one organised under the law of Texas and one under Pennsylvania law. None of the debtor companies were organised under the law of New York and the principle place of business was almost unanimously identified as Houston.[63] Around 25,000 employees worked for Enron worldwide, with 7500 employees in Houston Texas and only 63 employees in New York, where it decided to file for bankruptcy. At the time of filing the motion to change venue, almost all of the dismissed employees in the United States were employed in Houston.[64] In addition, much of the debtor's real property was also located in Houston.[65] The only connection Enron had to New York was Enron Metals & Commodity Corp, a Delaware corporation with its principle place of business in New York with

[58] Chapter 11 Bankruptcy Venue Reform Act of 2011: Hearing on H.R. 2533 Before the H Subcomm on Courts, Commercial, and Administrative Law of the H Comm on the Judiciary, 112th Congress (testimony of Honorable Frank J Bailey, Us Bankr Ct, D Mass) 42.
[59] Laura Napoli Coordes, 'The Geography of Bankruptcy' (2015) 68 Vand L Rev 381, 401.
[60] Chapter 11 Bankruptcy Venue Reform Act of 2011: Hearing on H.R. 2533 Before the H Subcomm on Courts, Commercial, and Administrative Law of the H Comm on the Judiciary, 112th Congress (testimony of Honorable Frank J Bailey, Us Bankr Ct, D Mass) 50.
[61] *In re Enron Corp* 274 BR 327 (Bankr. S.D.N.Y. 2002).
[62] C William Thomas, 'The Rise and Fall of Enron' (2002) Journal of Accountancy <https://www.journalofaccountancy.com/issues/2002/apr/theriseandfallofenron.html> accessed 22 June 2020.
[63] *In re Enron Corp* 274 BR 327 (Bankr. S.D.N.Y. 2002) [334].
[64] *In re Enron Corp* 274 BR 327 (Bankr. S.D.N.Y. 2002) [337].
[65] *In re Enron Corp* 274 BR 327 (Bankr. S.D.N.Y. 2002) [338].

assets consisting of furniture and fixtures at a rental office; deposit accounts at Citibank; contracts, accounts receivable, prepaid transactions, and trades in progress, comprising less than 0.5% of the assets of the debtor as a whole.[66]

A group of creditors and state officials moved to transfer the venue to the Southern District of Texas to make it easier for small stakeholders to participate. Because the venue was found to be properly filed, it was the burden of the movant to 'show by a preponderance of the evidence that the transfer of venue is warranted.'[67] The judgment in the motion to transfer also noted accessibility of both potential venues, observing that while New York is one of the most accessible locations in the world, it is 1,600 miles from Enron's headquarters, which is blocks from the Texas District Bankruptcy Courts. It also noted the challenges of plane ticket costs and the limitations of arrival times in terms of travel from Texas to New York,[68] which indicates that the Court was considering the convenience of the most affected stakeholders in their decision-making.

Judge Arthur Gonzalez of the Bankruptcy Court of the Southern District of New York refused to move the venue, despite the overwhelming amount of business operations conducted in Texas. Key considerations included the number of creditors and the relative amount of their claims, placing an importance on the value of the debt owed, which placed the banks and financing creditors in a high position of preference. It was also noted that given the worldwide nature of the Enron bankruptcy, New York was more accessible overall than Texas.[69] Further, both the creditors' committee and the banks, Enron's largest creditor, opposed the transfer. Primarily, support of the venue transfer came mainly from Texas state and local authorities with an economic interest in the case. While clearly employees may not have been able to attend in person, the Judge considered that the issues most pertinent to employees would not likely be heard by the bankruptcy court in the first place.[70] That said, the issue of greatest concern to those employees in Texas was the fate of their 401k pension plans, which were heavily affected by the failure of the company due to the high percentage of Enron stocks in which the plan had invested.[71]

Fundamentally, Judge Gonzalez deemed that there was not really a necessity for those arguing for the venue change to attend court, and that court management protocols would make it possible for interested parties to follow the case from a distance.[72]

[66] *In re Enron Corp* 274 BR 327 (Bankr. S.D.N.Y. 2002) [338].
[67] *In re Enron Corp* 274 BR 327 (Bankr. S.D.N.Y. 2002) [342].
[68] *In re Enron Corp* 274 BR 327 (Bankr. S.D.N.Y. 2002) [339].
[69] *In re Enron Corp* 274 BR 327 (Bankr. S.D.N.Y. 2002) [345].
[70] *In re Enron Corp* 274 BR 327 (Bankr. S.D.N.Y. 2002) [346].
[71] Patrick J Purcell, 'The Enron Bankruptcy and Employer Stock in Retirement Plans' (CRS Report for Congress 2002) <https://www.everycrsreport.com/files/20020122_RS21115_077711a5e71ecdbbbb7715846f05d7e498f691c0.pdf> accessed 23 June 2020.
[72] *In re Enron Corp* 274 BR 327 (Bankr. S.D.N.Y. 2002) [347].

The court found that:

> New York is the more economic and convenient forum for those whose participation will be required to administer the cases. Accordingly, New York is the location which would best serve the Debtors' reorganization efforts – the creation and preservation of value.[73]

Jurisdiction was retained in the Southern District of New York, which was arguably exactly the correct decision based on wealth maximisation principles. That said, little consideration was given to what Judge Bailey considered important in relation to *Polaroid* in his testimony to Congress: the perception of an opportunity to participate, which employees and smaller local stakeholders will not have had due to the costs of travel and their lack of income due to lay-offs. Again, in a European context the issue of what has been termed 'jurisdictional reach' will be even more pertinent and it is one to which European judges may be more sensitive.

General Motors (GM) Case (2009)[74]

The General Motors' bankruptcy is another example of a company filing in a place that is clearly not its headquarters and highlights the relative ease with which this can be done in the United States. A Chevrolet-Saturn dealership in Harlem filed under Chapter 11, making it possible for GM to utilise the affiliate rule under the Bankruptcy Venue Statute, which allows a filing to be made in a place 'in which there is pending a case under Title 11 concerning such person's affiliate, general partner, or partnership.'[75] GM was headquartered in Detroit, Michigan and incorporated in Delaware with its only affiliation in New York a single subsidiary dealership in Harlem. GM lawyers centred on the Harlem affiliate so that it could find a way to bring the whole case to the Southern District of New York, which as noted by Reuters, is 'known for its expertise and speed in handling huge bankruptcies such as Enron and WorldCom.'[76]

Out of the 26 representative groups appearing in the case, 18 were at least partially based in New York, including GM's representatives, the representatives of the creditors' committee, and the various Unions representing the workers. These are clearly some of the largest groups of stakeholders in the case, while those based elsewhere comprise individual tort victims, other US States, single creditors, a retirees' association, and a public citizen litigation group,[77] in other words, groups that on the face of it have relatively minor financial interests when

[73] *In re Enron Corp* 274 BR 327 (Bankr. S.D.N.Y. 2002) [349].
[74] *In Re General Motors Corp* 407 BR 463 (Bankr SDNY 2009).
[75] 28 US Code § 1408(2).
[76] Tom Hals and Martha Graybow, 'GM Bankruptcy Forever Linked to Harlem Dealership' (Reuters 2009) <https://www.reuters.com/article/us-gm-harlemdealership/gm-bankruptcy-forever-linked-to-harlem-dealership-idUSTRE55050V20090601#:~:text=NEW%20YORK%20(Reuters)%20%2D%20General,quirks%20of%20U.S.%20bankruptcy%20law.&text=Before%20GM%20filed%20its%20historic,its%20own%20Chapter%2011%20filing.> accessed 23 June 2020.
[77] *In Re General Motors Corp* 407 BR 463 (Bankr SDNY 2009) [471] list of Appearances.

compared with those represented by New York legal professionals. In 2011, after the GM Bankruptcy, reforms were being mooted for the Bankruptcy Venue Statute to reduce forum shopping. It was noted by a congressman of the House Judiciary Committee sponsoring the Bill that venue shopping for sympathetic courts '…significantly disadvantages displaced employees, creditors and shareholders who should be able to participate in the reorganisation negotiations.'[78]

In line with this statement by Congressman Lamar Smith (Republican-Texas), it has been observed by Coordes that 'running the bankruptcy from New York could make it more difficult for GM's Detroit-based employees, trade creditors, and other stakeholders to interfere in the case' noting further that 'filing close to home might have fuelled local tensions, invited more voices into the courtroom, and slowed down the case – all risks GM probably preferred to avoid'.[79] While no written evidence of this intention has been unearthed, filing in New York will certainly have been easier for the many party representatives and professionals in the case based there. There was no objection or request for change of venue filed in the GM bankruptcy, which proceeded on the basis of a s363 sale[80] to the US Treasury and the governments of Canada and Ontario through Export Development Canada (EDC), as a Chapter 11 reorganisation would have been too lengthy to ensure that the company would not end up in liquidation.[81] The only objections listed in the case relate to the fairness of the sale to the various parties and it was approved by SDNY Bankruptcy Judge Robert E Gerber.

While the filing in New York was legal, the media,[82] interest groups,[83] and even Congress[84] questioned the appropriateness of choosing New York over Delaware (incorporation) or Michigan (headquarters), not only in relation to GM, but generally in similar cases. As noted by the Honourable John Conyers Jr:

> By choosing to file for Chapter 11 in a distant venue such as New York, a business—with its principal assets and most of its creditors and employees located in Michigan or California for example—makes it much more difficult for these creditors,

[78] Jacob Barron, 'Bill Introduced to Combat Bankruptcy "Venue Shopping"' (NCAM 2011) <http://www.nacm-e.com/credittrends/articles/Aug_11/Bill%20Introduced%20to%20Combat%20Bankruptcy%20Venue%20Shopping.htm> accessed 23 June 2020.
[79] Laura Napoli Coordes, 'The Geography of Bankruptcy' (2015) 68 Vand L Rev 382, 382-384.
[80] 11 US Code § 363 Use, sale, or lease of property.
[81] *In Re General Motors Corp* 407 BR 463 (Bankr SDNY 2009) [479-480] & [484].
[82] Barbara Kiviat, 'GM's Potential Bankruptcy: Shopping for Venue '(Time 2009) < http://content.time.com/time/business/article/0,8599,1890171,00.html> accessed 23 June 2020.
[83] See for example a statement from the National Association of Credit Management: Jacob Barron, 'Bill Introduced to Combat Bankruptcy "Venue Shopping"' (NCAM 2011) <http://www.nacm-e.com/credittrends/articles/Aug_11/Bill%20Introduced%20to%20Combat%20Bankruptcy%20Venue%20Shopping.htm> accessed 23 June 2020
[84] Chapter 11 Bankruptcy Venue Reform Act of 2011: Hearing on H.R. 2533 Before the H Subcomm on Courts, Commercial, and Administrative Law of the H. Comm. on the Judiciary, 112th Congress (prepared statement of Honorable John Conyers, Jr, Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary) 76.

particularly smaller creditors and workers, to participate in the case and defend their claims.

These creditors are forced to retain counsel in the distant venue and, if they want to physically appear, incur travel costs. In effect, they have to pay more to collect on their claims.

As a result, the ability of these small creditors and workers to influence the bankruptcy proceedings is greatly diminished. And, by choosing a distant forum, a company can reduce local press coverage of the case.[85]

While the reform of the Bankruptcy Venue Statute failed to change the venue determination rules around Chapter 11 filings, in part due to resistance from a powerful Delaware Congressman at the time, Joe Biden, the discussions within Congress, the media, and interest groups illuminated how easy it is to file in a state with little connection to the business of the company and how difficult it is to challenge that filing once made in practical and financial terms. Those who benefit from filing in New York, for example, often tend to have the greatest financial strength while those who are most adversely affected by a distant filing tend to have far less financial stake in the case, in terms of the proportion of debt owed to them.

Conclusion

The forgoing cases show a range of forum issues. The common thread between all of these cases is that a forum, which might not have been the most appropriate under the Bankruptcy Venue Statute or convenient to a large number of creditors (even if those creditors did not command a commensurate value of the debt owed), has been confirmed or accepted by the courts. The tendency of courts, as well as the strong presence of insolvency professionals in New York and Delaware and the powerful lobby they also control, make changing venue that much more difficult. This is particularly true as the larger creditors usually command more of the value of the debt and there is a for bankruptcy judges to look at convenience of creditors from a proportion of value perspective. Finally, the presumption that appears to follow forum selection by the debtor that it will know best where it should file, adds a further burden onto stakeholders who may be left out-of-court. As surmised by Coordes, these 'judicial considerations suggest that small creditors must fight an uphill battle when they object to venue in large cases'.[86] Other commentators have described the 'harm' of forum shopping[87] but there are yet others who do not regard the fact that specialist courts and jurisdictions have emerged in the US to be a problem. This debate is expected to resonate in the EU.

[85] Chapter 11 Bankruptcy Venue Reform Act of 2011: Hearing on H.R. 2533 Before the H Subcomm on Courts, Commercial, and Administrative Law of the H. Comm. on the Judiciary, 112th Congress (prepared statement of Honorable John Conyers, Jr, Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary) 76.
[86] Laura Napoli Coordes, 'The Geography of Bankruptcy' (2015) 68 Vand L Rev 382, 397.
[87] Samir D Parikh, 'Modern Forum Shopping in Bankruptcy' (2013) 46(1) Connecticut L Rev 159, 193 *ff*

In an emerging European context, the key difference is the strength of the jurisdictional tie created by COMI jurisprudence in the EIR Recast, coupled with normative resistance to forum shopping (possibly derived from elements of legal culture described in Chapter 4). However, the phenomenon of emerging patterns in recent significant European corporate insolvency cases, particularly relating to corporate restructuring that are run out of the courts in London under the Scheme of Arrangement framework,[88] raises questions regarding the alleged difference between Europe and the US. It is possible that as the European Union becomes more integrated that patterns of forum shopping may begin to reflect patterns that have emerged in the United States over a long period of more than 100 years. More integration implies a greater knowledge of the characteristics of a particular jurisdiction, reflected in the taxonomic characterisation presented in Chapter 3 of this Report. Thus, certain jurisdictions appear more attractive as forums.

However, there is another consideration. It has always been assumed that one of the key differences between the US and the EU is that unlike the US, there is very little by way of harmonisation of insolvency law as between state frameworks in the EU compared with the federalised approach of the US. As we progress incrementally towards harmonisation in Europe and as we discover through our work in preventive restructuring and cross-border practise generally, there is in fact there is a commonality of concepts (eg. *actio pauliana* and variants thereof) across European jurisdictions. It is therefore likely that greater convergence will occur. Against that background, deliberate forum shopping driven by a search for issues like efficient and expert courts; a concentration of legal and financial expertise in a particular jurisdiction; and a willingness or openness to accept jurisdiction over cases may be a feature of future European practice.

7.3 Coordinating Proceedings in other Cooperative Paradigms

This Chapter has illustrated that the issue of interstate court-to-court recognition and co-ordination is not a hotly contested legal issue in bankruptcy proceedings in the United States, although it is controversial in other respects. Comparisons with the EU system are therefore not entirely fluid because even though harmonisation is acknowledged as a goal and an important element in court co-operation (see Chapters 3, 4, 6 and 8 of this Report), this is not near the EU reality.

There is the separate but related issue of co-ordination in the US cases that typically involve jurisdictions outside the US. And indeed, in terms of the EU there are Member States such as the UK that have been identified as possessing similarly attractive forums for international restructuring particularly, as distinct from more traditional insolvency processes.[89] In this

[88] Jennifer Payne, Schemes of Arrangement: Theory Structure and Operation (CUP 2014).
[89] Post-Brexit the interesting question is whether one of the remaining states will take up this role and it is generally acknowledged that Ireland and the Netherlands are the main contenders.

context US courts are considered exemplars of the conduct of co-ordination proceedings in an international context. New York in particular is considered to be a centre point for restructuring and therefore this Report would not be complete without a consideration of how the co-ordination of proceedings is actually achieved. This Report has considered what the EIR Recast itself describes as co-ordination in Chapters 2 and 3, and in Chapter 5 has considered some case law within European jurisdictions, mostly from England and Wales, on co-ordination in international insolvency and restructuring proceedings. Hence a consideration of how US courts co-ordinate proceedings is pertinent to the extent that it might provide some useful examples for cross-border insolvency co-ordination either within the EU or in cases involving one European jurisdiction operating externally to the EU. Comparisons are therefore not entirely straightforward; nevertheless, European insolvency practitioners, lawyers and policy-makers may assess the likelihood of successful co-ordination within Europe against this comparative context. Alternatively, with the new interest in preventive restructuring, the real focus might be on external cases even in a European construct where Ireland, the Netherlands, and Luxembourg already look to attract legal and financial services business into their jurisdictions and the EU.[90] This discussion is continued in 7.4 below.

There are a number of examples of how the US has coordinated complex multinational bankruptcies in the US courts under Chapter 15, which demonstrate that co-ordination is often achieved through the use of bespoke protocols,[91] in addition to or instead of following guidelines such as those discussed in Chapter 6 of this Report, though some of those also refer to the use of protocols in aid of co-ordination. The following examples of protocols used in international cases may indicate what could be expected in future cross-border restructuring cases within and external to the EU.

7.3.1 Maxwell[92]

The *Maxwell* case is one of the first recorded uses of a coordinating protocol in a cross-border insolvency case. The parties created a bespoke protocol to coordinate what were effectively two primary insolvency proceedings in the UK and the USA. An examiner was appointed under the Chapter 11 proceedings to work towards harmonising the two proceedings. The protocol's two primary goals were to maximise the value of the estate and to harmonise the proceedings

[90] Reinout Vriesendorp, Ferdinand Hengst, Wies van Kesteren, Irene Lynch Fannon, Michel Nichels and Benoit Nerriec, INSOL International Special Report on Restructuring Cross Border Groups: Key Considerations Around Foreign Tax and Finance Driven SPVs (INSOL International, June 2020).

[91] Protocols are case-specific, private international contracts between the parties of an insolvency case that strive to promote efficiency in the coordination of cross-border cases and their resolution, including worldwide asset identification, collection, and distribution for the benefit of all creditors: Anthony V 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' (2011-2012) 12 Chi J Int'l L 811; Evan D Flaschen and Ronald J Silverman, 'Cross-border Insolvency Co-operation Protocols' (1998) 33(3) Texas International Law Journal 587

[92] *In re Maxwell Communications Corp* Case No 91-B-15741 (TLB) (Bankr SDNY Jan 15 1992).

to minimize expense, waste, and jurisdictional conflict.[93] Under the protocol framework, UK administrators were tasked with the corporate governance of the Maxwell estate, while major decisions concerning the estate would require the approval of the US examiner or approval by the US Court. While much of the decision making in the case was left open, the protocol provided direction regarding the conduct of certain matters to be determined in the case, in particular that the parties should develop a coordinated plan of reorganisation and scheme of arrangement. The UK administrators and US examiner were able to consensually accomplish all matters of coordination and co-operation, with only one material conflict regarding US preference law.[94]

7.3.2 Nortel[95]

Nortel was a multinational group of high-tech companies with the parent company in Canada and much of its business occurring in the United States. Insolvency proceedings were filed in Canada, the USA and the UK. The results of this case indicate both the best of co-operation, through bespoke protocols, and the worst. Although reorganisation failed, the parties were able to co-operate to sell the debtor's global assets in large pieces spanning many different countries. Co-operating with the disposition of the assets produced more value than would have happened if individual jurisdictions had dealt only with their domestic assets. However, the parties could not then agree on how to allocate the proceeds of sale without resolution through the courts, which heavily dissipated the benefits gained from the initial co-operative efforts.[96]

7.3.3 Blackwell

The Blackwell case[97] concerned Inverworld, which collapsed in a scandal after defrauding investors in the United States and several Latin American countries. Insolvency proceedings were brought in the United States, Cayman Islands, and England. A protocol was agreed that led to the dismissal of the English insolvency proceedings if certain conditions to protect claimants were met between the other two courts. The US Court was tasked with resolving the outstanding legal and factual issues, while the Cayman court oversaw the creation and operation of the mechanism formulated to distribute the claimants' proceeds, with full recognition and enforceability agreed between the courts. It is generally considered that this led to a successful worldwide settlement at a much lower cost that would have occurred if

[93] Final Supplemental Order Appointing Examiner and Approving Agreement Between Examiner and Joint Administrators, *In re Maxwell Communication Corp,* Case No 91-B-14741 (TLB) (Bankr SDNY Jan 15 1992).
[94] Evan D Flaschen and Ronald J Silverman, 'Cross-border Insolvency Co-operation Protocols' (1998) 33(3) Texas International Law Journal 587, 592.
[95] *In re Nortel Networks Inc* 669 F3d 128 (3d Cir 2011).
[96] Jay L Westbrook, 'Global Insolvency Proceedings for a Global Market: The Universalist System and the Choice of a Central Court' (2018) 96 Tex L Rev 1473, 1490-1491.
[97] San Antonio Express News v Blackwell (In re Blackwell) 263 BR 505.

the three courts struggled for power over the case.[98] The key factor that is attributable to the success of this case and its protocol is the substantial amount of communication aimed at resolving the global case. The judges involved:

> actively encouraged the professionals to engage in cross-border negotiations with an emphasis on non-litigious solutions despite plausible conflicting claims for several groups of claimants under each of the seven arguably applicable laws (...) Judicial activism combined with a first-rate performance by the professionals produced spectacularly fast, fair, and efficient results.[99]

7.3.4 Nakash[100]

The Nakash protocol is an example of a protocol agreed between the United States and a civil law country, Israel. The fact that it was agreed with a civil law country is significant because of the strict adherence to statutory law required of a civil law judiciary, which often inhibits effective co-operation in such cases due to a lack of legislative standing to do so. This potential obstacle arising from legal origin differences was noted in this Report in Chapter 4 section 4.3.2 and is discussed in some detail by Mangano.[101] Express statutory permission to enter into the protocol was required, which was perhaps surprisingly found by the Israeli court. It also focused on enhanced coordination of court proceedings between the civilian judiciary of Israel and the American court along with coordinating the actions of the parties. This enhanced coordination was needed because of the increased level of involvement in the civilian court setting required to harmonise the international proceedings.[102] Flaschen and Silverman's view is that the success of this protocol can largely be attributed to the willingness of the two courts to work together along with the extraordinary agreements made to harmonise and respect the actions of each other.[103] In this context, the particulars of the case are less important than the nature of the two systems and the fact that they were able to conduct proceedings in a coordinated fashion despite the fundamental differences between the legal systems, which might otherwise have inhibited effective co-operation to the extent reached between the parties and the court.

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[98] Jay L Westbrook. 'Global Insolvency Proceedings for a Global Market: The Universalist System and the Choice of A Central Court' (2018) 96 Tex L Rev 1473, 1493.

[99] Jay L Westbrook. 'Global Insolvency Proceedings for a Global Market: The Universalist System and the Choice of A Central Court' (2018) 96 Tex L Rev 1473, 1493.

[100] Order Approving Cross-Border Protocol, Granting Comity to Jerusalem District Court Letter of Request, Setting Damages for Initial Stay Violation and Granting *Nunc Pro Tunc* Stay Relief in Respect of Alleged Further Stay Violations, *In re Nakash* Ch 11 Case no 94-B-44840 (NRL) (Bankr SDNY May 23 1996)

[101] Renato Magnano 'From Prisoner's Dilemma to Reluctance to Use Judicial Discretion: The Enemies of Cooperation in European Cross-Border Cases' (2017) 26 IIR 314, 317.

[102] Evan D Flaschen and Ronald J Silverman, 'Cross-border Insolvency Co-operation Protocols' (1998) 33(3) Texas International Law Journal 587, 593.

[103] Evan D Flaschen and Ronald J Silverman, 'Cross-border Insolvency Co-operation Protocols' (1998) 33(3) Texas International Law Journal 587, 594.

7.3.5 Lehman

Finally, the Lehman bankruptcy is a particularly complicated example of an international cross-border insolvency case.[104] The Lehman Brothers insolvency resulted in 75 separate insolvency proceedings[105] subject to the laws of nine different countries all of which had competing and sometimes conflicting policy and social influences.[106] The Protocol[107] itself was agreed as a response to a lack of applicable law that would bind all of the parties in the Lehman bankruptcy and was broadly similar to the UNCITRAL Model Law containing references to the Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases by the American Law Institute, which was discussed in Chapter 6 of this Report.[108] We would consider it exceptional in this discussion.

7.3.5 Limitations of the United States' approach to cross-border co-ordination

Protocols have been powerful tools in cross-border insolvency cases heard in the United States but they are also flawed. In a protocol, it is still possible for a party to 'hold-out' for a better deal to the detriment of the collective and they do not resolve territorial disputes about substantive law.[109] There have been a variety of cross-border cases resolved through the use of protocols, but with a broad range of success and efficiency. That said, as will be shown in Chapter 8 in the responses to the Judicial Survey, many judges would still prefer to draft their own bespoke protocols on a case by case basis.

As with provisions in the Article 26 of the EIR Recast, the US courts have the discretion to refuse to recognise a plan that contains some action that would be manifestly contrary to public policy under the rules of Chapter 15 in cross-border insolvency cases.[110] This exception provides flexibility to avoid recognising foreign insolvency proceedings, as public policy is a decision based in national law, which was discussed in some detail in relation to the EIR Recast in this Report's Chapter 5 section 5.5.3.

Protocols also often contain a similar public policy exception. The exception can have a broad range of interpretations from differences in substantive law, to conflicts with fundamental

[104] For a detailed account of the Lehman Brothers bankruptcy, see Stephen J Lubben and Sarah Pei Woo, 'Reconceptualising Lehman' (2014) 49 Texas Int'l L Rev 297 and more recently, for a detailed discussion and analysis of the Lehman insolvency, see Paula Moffat, 'In a Digital Age and Where Significant Assets May Consist of Dematerialised Instruments, are our Existing Rules Sufficient to Provide a Fair and Effective Regime Governing the Location of Assets?' (PhD Thesis, Nottingham Trent University 2016).

[105] Sheryl Jackson and Rosalind Mason, 'Developments in Court-to-Court Communications in International Insolvency Cases' (2014) 37(2) UNSW L J 507, 507.

[106] Jamie Altman, 'A Test Case in International Bankruptcy Protocols: The Lehman Brothers Insolvency' (2011) 12 San Diego Int'l L J 463, 466-467.

[107] Lehman Bros Holdings Inc, Cross-border Insolvency Protocol for the Lehman Brothers Group of Companies (May 12, 2009).

[108] 'Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases' (The American Law Institute and the International Insolvency Institute 2001).

[109] Anthony V 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' (2011-2012) 12 Chi J Int'l L 811, 823.

[110] 11 US Code § 1506 - Public policy exception.

constitutional principles.[111] This is particularly acute when a protocol attempts to bring together both civil and common law jurisdictions.[112] As observed by Sexton:

> Courts in civil law jurisdictions meticulously scour their civil codes for authorisation to engage in any practice, but because protocols frequently interact with rules limiting ex parte communications and communications between courts, civil law courts have found their authority to endorse protocols lacking.[113]

It is not entirely clear to us in our research on the JCOERE Project that, despite the fact that some civil law jurisdictions such as France and Italy have standardised rules relation to co-ordination and co-operation as discussed in Chapters 2, 3 and 5 of this Report, all civil law countries have the same approach. Nor is it clear that all common law jurisdictions would approach the adoption of co-ordination protocols without significant and careful consideration of the constitutional and administrative law principles mentioned in Chapters 3 and 5 of this Report. Otherwise, the information on what co-ordination looks like or indeed might look like in the EU in reality is sparse, and this would be equally applicable both within the EU and in relation to any one jurisdiction within the EU co-operating externally. Although some of the guidelines referred to in the foregoing Chapter 6 (section 6.4.3 and 6.4.5), notably the European JudgeCo Principles and Guidelines[114] along with the ELI Report[115] as well as the well-known ALI-III Principles, [116] do refer to the usefulness of creating protocols to co-ordinate cross-border proceedings, evidence of their use by courts in EU countries in strictly EU cross-border cases is not prevalent. Nor is there significant evidence of use in external cases by courts in EU of such protocols, other than in relation to cases deliberated upon in England and Ireland, a sample of which are mentioned in Chapter 5 of this Report.

7.4 Competition in the International Restructuring Forum Context

The United States provides an interesting example of how competing for forum in international cross-border corporate insolvency cases may (or may not) arise. As the restructuring frameworks implemented as a result of the PRD may not be covered by either the EIR Recast or the Judgments Regulation, it has already been noted that there may be opportunities for competition between European jurisdictions for restructuring business. The Netherlands has already been clear that they would like to become the next restructuring

[111] Anthony V 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' (2011-2012) 12 Chi J Int'l L 811, 824.
[112] Evan D Flaschen and Ronald J Silverman, 'Cross-border Insolvency Co-operation Protocols' (1998) 33(3) Texas International Law Journal 587, 593-94
[113] Anthony V 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' (2011-2012) 12 Chi J Int'l L 811, 824.
[114] EU Cross-Border Insolvency Court-to-Court Cooperation Principles' (Tri Leiden, University of Leiden, and Nottingham Law School 2014) (hereinafter referred to as the 'JudgeCo Principles and Guidelines').
[115] Bob Wessels, Stephan Madaus, and Gert-Jan Boon, *Rescue of Business in Insolvency Law* (European Law Institute 2017) (hereinafter referred to as the 'ELI Report').
[116] 'ALI-III Global Principles for Cooperation in International Insolvency Cases' (International Insolvency Institute 2017) (hereinafter referred to as the ALI-III Global Principles)

destination post-Brexit, as was discussed in Chapter 3 section 3.5.4, and also currently have plans to create a non-EIR Recast procedure similar to the English Scheme of Arrangement. Ireland already has a Scheme of Arrangement process in place that was used effectively recently in *Re Ballantyne plc.*[117]

Competition for international (or European) forum also brings to mind the 'race to the bottom' debate.[118] McCormack has refuted the 'race to the bottom' argument in the realm of European cross-border insolvency, suggesting that in a European context, involuntary or poorly adjusting creditors can also be protected by secondary proceedings, 'which truncates the possibility for a 'race to the bottom' leaving only opportunities for a "race to the top."'[119] This protection is not available from state to state in the USA as all creditors who are party to a bankruptcy will be governed by the same federal bankruptcy regime. Co-ordination procedures and co-operation obligations contained in the EIR Recast add further assurance in this vein.[120]

7.5 Comparing Co-operation in the US with the EIR Recast

7.5.1 Comparing procedural co-ordination

Without a recognised procedural framework such as the EIR Recast, coordination tends to be either subject to soft law or at the discretion of the parties. This can lead to a delay in acting quickly to seek recognition and coordination, as happened in the *Nortel* case, which resulted in two or more independent insolvency proceedings with little or no co-operation and a subsequent loss of value. The *Lehman* case is also an example where a delay caused serious problems as recognition and coordination were not sought for months. Whereas early co-operation facilitated perhaps by a regulation such as the EIR Recast promotes earlier contact. As noted by Westbrook:

> Early co-operation permits the establishment of protocols and lines of authority in a cooperative direction from the start. It also has the benefit of being put in place before tactical considerations have become so apparent as to make it difficult for the parties to agree.[121]

[117] Ruairi Rynne, 'Landmark Scheme of Arrangement in Ireland' (2019) Autumn Eurofenix 30. See also Irene Lynch Fannon and Gerard Murphy, *Corporate Insolvency and Rescue* (Bloomsbury, 2012*). Ballantyne RE Plc & Companies Act 2014* [2019] IEHC 407. From the William Fry Solicitor's note: 'This case demonstrates the effectiveness of an Irish law scheme of arrangement (which has been on the statute books for over 50 years) as a tool to implement complex international debt restructurings. Together with the extensive use of the examinership process to restructure insolvent Irish businesses it highlights the effectiveness and robustness of Ireland as a jurisdiction in which to pursue such restructurings.'

[118] The 'race to the bottom' is a socio-economic phrase that describes circumstances in which governments deregulate the corporate environment in the interests of economic efficiency to attract external investment that may effectively remove protections and limit regulatory interference that might otherwise ensure a higher level of corporate responsibility.

[119] Gerard M McCormack, 'Jurisdictional Competition and Forum Shopping in Insolvency Proceedings' (2009) 68(1) Cambridge L J 169, 181.

[120] See further, Chapter 3 of JCOERE Report 1.

[121] Jay L Westbrook. 'Global Insolvency Proceedings for a Global Market: The Universalist System and the Choice of A Central Court' (2018) 96 Tex L Rev 1473, 1491.

The presence of an overarching regulation applicable to all jurisdictions helps to create certainty in the procedural aspects of a cross-border insolvency cases. Our engagement with the European judiciary gave a clear indication that judges bound by the EIR Recast would not argue with a request for recognition of foreign main proceedings because the wording of the provisions is obligatory. While co-operation and recognition between courts in the USA in relation to inter-state insolvency and restructuring proceedings is not a problem due to the federal nature of bankruptcy, it does arise in cross-border cases occurring within the US Bankruptcy Court when there are multiple international proceedings occurring within the same case. That said, the use of 'sufficient connection' rather than the COMI test seems to continue to be the rule, even when a case falls under Chapter 15, which provides for a COMI test. This flexibility of interpretation is in part due to the ability of common law courts such as the US, Ireland, and the UK to interpret the test of COMI in a way that is more likely to make jurisdiction possible in more spurious situations.

The examples of coordination of international cross-border procedures in the USA may also serve as useful instruments of reference for coordination efforts between EU Member States when having to deal with potentially competing restructuring procedures.[122] However, bespoke protocols can also be problematic for civil law jurisdictions due to the nature of the judicial role as the applier of statutory law, rather than the interpreter. As aforementioned, most of the time a judge would need some kind of legislative permission to involve him or herself in a protocol that dictated its role in a case. The *Nakash* protocol was a significant exception to this characteristic conflict but is likely due to the relationship between the two relevant jurisdictions (the USA and Israel). Protocols can be created to suit the particulars of a case and provide a flexible and party-specific resolution to cross-border conflicts. However, protocols are also potentially subject to holdouts and will also differ on a case by case basis, though there is also an argument that case specific protocols may be more beneficial than a one-size-fits-all approach.

7.6 Conclusion and Transition

This Chapter has focused on the methods and means used by the United States in both its cross-border interstate bankruptcies as well as in the international restructuring arena. Co-operation in this context has focused on how certain conflict of laws issues are resolved in a place not covered by the EIR Recast, namely forum determination and the coordination of procedures. These comparisons are useful as the EU is itself both a species of federal organisation somewhat similar to the United States but is also a confederation of states that exhibit international relationships, similar to the United States' relationships with other countries. Thus, looking at the US from an interstate and international bankruptcy perspective offers some insight into the mechanisms that exist for co-operation both within and outside

[122] Evan D Flaschen and Ronald J Silverman, 'Cross-border Insolvency Co-operation Protocols' (1998) 33(3) Texas International Law Journal 587, 599.

of the EU that may be instructive in both insolvency generally and restructuring particularly. Drawing parallels to the current paradigm of co-operation under the EIR Recast, the inevitable conclusion is that the EIR Recast provides certainty and a harmonised approach that will be lacking should there be a proliferation of restructuring procedures that Member States choose to keep out of the EIR Recast.

The next Chapter will present the results of the JCOERE Judicial Survey. It is organised along several key themes: experience with cross-border co-operation; awareness of co-operation guidelines; demand for resources among the judiciaries of the EU; and interpretative observations in relation to judicial training.