

*Centre for Business Law and Practice*  
*School of Law*  
*University of Leeds*

**ANNUAL REPORT**  
**2009 – 2010**

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# **1. ABOUT THE CENTRE FOR BUSINESS LAW AND PRACTICE, THE UNIVERSITY AND THE CITY OF LEEDS**

## **1.1 THE CENTRE**

The Centre for Business Law and Practice is located in the School of Law at the University of Leeds (which is part of the Faculty of Social Sciences, Education and Law) and its aim is to promote the study of all areas of Business Law and Practice, understood as the legal rules which regulate any form of business activity. It seeks to promote all forms of research, including doctrinal, theoretical (including socio-legal) and empirical research and to develop contacts with other parts of the academic world, as well as the worlds of business and legal practice in order to enhance mutual understanding and awareness. The results of its work are disseminated as widely as possible by publishing monographs, articles, reports and pamphlets as well as by holding seminars and conferences with both in-house and outside speakers.

Staff members have acted as consultants to law firms, accounting bodies and international bodies such as the International Monetary Fund. Research has been undertaken in many areas of business law including banking and financial services, business confidentiality, corporate (general core company law as well as corporate governance and corporate finance), credit and security, contract, consumer, employment, financial institutions, foreign investment, insolvency, intellectual property, international trade, the regulation of corporate lawyers, and corporate and economic crime (including money laundering and the financing of terrorism).

One of the primary functions of the Centre is to oversee the research undertaken at postgraduate level and to manage postgraduate taught several International Business Law programmes.

The number of postgraduate students recruited, for both doctoral research and taught Masters programmes, indicates the popularity and strength of the Centre's programmes and is testimony to the standing of the Centre's staff.

## **1.2 TAUGHT POSTGRADUATE PROGRAMMES**

These include:

**LLM International Business Law**  
**LLM International Corporate Law**  
**LLM International Banking and Finance Law**  
**LLM International Trade Law**  
**LLM European and International Business Law**

All postgraduate programmes are available on a full-time and part-time basis.

Postgraduate Diplomas are also available. These do not require the completion of a dissertation.

In all the programmes, the modules are taught by seminars, and there are two 11 week semesters in each academic year. Assessments are by written work.

We have a large postgraduate student cohort with a high proportion coming from outside the United Kingdom. One of the strengths of our programmes is that students come to study at Leeds from a wide range of countries and bring a broad range of experience and diverse perspectives.

The LL.M. programmes involve the completion of taught modules totalling 120 credits that are taken in Semesters 1 and 2. Some modules are compulsory (this varies between programmes) and the others are optional modules chosen from a long list of available subjects. The final stage of the programme is a dissertation (worth 60 credits) being completed in the Summer, following Semester 2. The programme consists of 180 credits in total.

The compulsory modules consist of modules which are believed to form a critical base for the study of business law, nationally and internationally. Students have a broad choice when it comes to the optional modules, and this reflects the breadth of expertise in the Centre.

The dissertation, constituting 60 credits, is compulsory and forms a major part of the programmes, and reflects one of the aims of the programme, namely to foster research capabilities. The dissertation requirement permits students to engage in some detailed research of a particular issue that warrants investigation. Research for, and the writing of, the dissertation is undertaken in conjunction with a supervisor, who is a member of the law staff. The members of the law staff have a wide range of research interests and are able to supervise a broad spectrum of topics in different areas of the law.

The overall objective of this programme is to provide students with a firm grounding in many of the basic principles and rules regulating business activity in the UK, Europe and around the world. The programme also aims to enable students to develop the following: analytical legal skills, ability to work independently, writing skills, and ability to undertake research.

### **1.3 UNDERGRADUATE TEACHING**

While the Centre does not directly run any undergraduate programmes, it makes a very important contribution to teaching of the Bachelor of Laws (LLB) degree, in particular. The Centre has developed modules that are taught to both law and non-law undergraduates. These modules have been very popular with students, and have attracted good enrolments. The modules that are taught in the Bachelor of Laws programme (although students from other programmes with the necessary prerequisites can enrol for them) are Commercial Law, Company Law, Banking and Financial Services Law, Intellectual Property Law, Corporate Finance and Insolvency. Members of the Centre also either act as leaders, or contribute to the teaching, of the following modules: Law of Contract, International Law, Equity and Trusts, and Constitutional Law, Medical Law. Offerings to non-law students include Introduction to Company Law and Introduction to Obligations.

## 1.4 RESEARCH POSTGRADUATES

The Centre for Business Law and Practice has been expanding the number of students enrolled for research degrees, and we have a diverse range of students engaging in research in a number of areas, including corporate law, banking and finance, insolvency, the legal profession and trade law. Each postgraduate student receives high quality supervision from two academics who are trained and experienced supervisors as well as being experts in the particular field of research. In addition students are provided with formal research methods training.

The Centre for Business Law and Practice welcomes applications from students wishing to pursue research into any aspect of business and commercial law. The Centre has particular expertise in the following areas: contract law; corporate law – especially corporate governance, the role and duties of company directors, corporate insolvency law, corporate rescue, corporate finance; all aspects of insolvency law; insider dealing; banking and financial services law; economic crime including anti money-laundering and terrorist financing; Islamic banking law; credit; law relating to security; intellectual property; international economic law; consumer law including consumer credit; the role and duties of corporate lawyers and environmental law.

All relevant proposals within the broad remit of business law will be considered and even if the proposed research topic is not listed above it may be worth contacting the Director to discuss whether research supervision would be available.

The degree schemes on offer by research and thesis only are as follows:

- Master of Laws (LL.M) – one year full-time or two years part-time
- Master of Philosophy (M.Phil) – two years full-time or four years part-time
- Doctor of Philosophy (Ph.D) – three years full-time or five years part-time
- Integrated Ph.D – four years full-time (not available part-time). This new degree combines taught classes and the traditional research thesis, with an exit award of LLM Legal Research the students complete the first two years.

The entrance requirements for all schemes are that applicants must normally possess an upper second class honours degree or equivalent. Applicants with professional qualifications or substantial professional experience are also encouraged to apply. In addition, MPhil and Ph.D applicants are usually required to hold a Masters level qualification.

Informal enquiries from applicants are welcome. Please contact Karin Houkes, Postgraduate Admissions Tutor, [lawpgadm@leeds.ac.uk](mailto:lawpgadm@leeds.ac.uk) or Tel: 0113 3435009.

## **1.5 THE UNIVERSITY**

The University of Leeds is among the United Kingdom's top universities, located close to the centre of one of the most progressive, cosmopolitan and student-friendly cities in the United Kingdom. One of the largest single site universities, Leeds is a hugely popular choice for students. With over 30,000 students living in the city, it regularly tops the national polls as a favourite destination for students.

Established in 1904, the University is a member of the Russell Group, which was formed by nineteen of the country's most prestigious universities. With a world class reputation for quality in research and teaching, a degree from the University of Leeds, both undergraduate and postgraduate, is highly regarded by employers and universities worldwide.

The University has over many years invested heavily in its infrastructure to provide students with first-class learning, development, support and leisure facilities, including modern well-equipped lecture theatres and seminar rooms, an internationally acclaimed University library, an enterprising careers service, a wide range of sporting amenities and one of the biggest and most active Students' Unions in the country.

The University is one of the main centres for postgraduate teaching in the country, with around 5,000 postgraduate students drawn from all over the UK and another 100 countries world-wide. The new Law School Building (opening January 2011) is a state of the art building situated next to the University of Leeds Business School has dedicated postgraduate facilities and, as a University of Leeds postgraduate research student, you will have access to the full range of university services including our major academic research library and excellent computing facilities.

## **1.6 THE CITY OF LEEDS**

Only a short walk from the bustling shops, boutiques, art galleries, cinemas, bars, restaurants and cafes of the city centre, the University campus is a vibrant place in which to live and study. Leeds is one of the fastest growing cities in the United Kingdom. As a law, finance, business and media centre, the city offers great employment potential. This is complemented by an exciting mix of culture, commerce and style, making Leeds the primary social hub of the North of England. Rich in history with a growing economy and cosmopolitan atmosphere, Leeds remains an affordable student-friendly city and the centre of a region of great cultural diversity. It is very well connected transport wise to the rest of the UK being 2 ½ hours from London (train) and around an hour from Manchester.

Leeds is a '24 hour city' that is famous for the diversity and popularity of its nightlife. The city prides itself on the vitality of its 'independent' bar scene, whilst its nightclubs offer a sophisticated and relaxed clubbing experience with a wide range of music and ambiances to suit all tastes. It is home to a wide variety of theatre, music, film and music venues including the legendary University Refectory. The annual Leeds Film Festival is also one of the leading cinema events in the country.

## 2. INTRODUCTION

This report covers the activities of the Centre for Business Law and Practice (“the Centre”) during the period from 1<sup>st</sup> October 2009 to 30<sup>th</sup> September 2010. The past year has been another very productive year for the Centre in terms of activity of staff, research, research outcomes and growth of its postgraduate student community.

This year we were delighted to welcome a new member of the Centre, Dr Michael Galanis who joined us as the RCUK Academic Fellow in Corporate Governance.

The Centre continues to expand the scope of its activities, and this has been very much in evidence during the past year. In particular the Centre has continued to develop its research profile particularly in those areas where it already has considerable expertise:

- Corporate law - with special emphasis on corporate governance, corporate finance and corporate insolvency law.
- International financial law – banking and financial services and anti-money laundering.
- Credit and security law
- Contract law – including consumer law.
- The regulation of corporate lawyers and law firms

The Centre enjoys links with the Leeds University Business School and has developed links with the Institute for Applied Ethics in the University with two Centre members giving invited papers to the Institute in the course of the year. We continue to build the relationship with the School of Economic Law, Brussels.

### CONFERENCE ACTIVITIES

#### **Directors Duties and Shareholder Litigation in the Wake of the Financial Crisis-September 2010**

In September 2010 the Centre hosted a highly successful and well attended conference, *Directors Duties and Shareholder Litigation in the Wake of the Financial Crisis* attended by leading academics, practitioners, and PhD students from across the UK and Ireland. There was a lively Panel discussion and the exchange of ideas between academics and practitioners was particularly fruitful.

The Honourable Mr Justice David Richards, Vice Chancellor of the County Palatine, opened the conference and the speakers included Professor John Armour (University of Oxford), Mr Andrew Campbell (Ashridge Strategic Management Centre) Professor Janet Dine (Queen Mary), Mr Louis Doyle (Kings Chambers), Mr Robin Hollington QC (New Square Chambers), Professor Roman Tomasic (Durham), as well as two members of the Centre Professor Andrew Keay and Dr Michael Galanis.

The papers from this conference are to be published in an edited collection by Edward Elgar and are also available on the Centre’s home page.

### **Research Student Conference, May 2010**

This year we hosted a PhD conference on 19 and 20 May 2010 in the Law School. Thanks go to Mrs Judith Dahlgreen and Badr Aljaafari, one of our research students, for organising this. It was well attended by students and staff with papers grouped into common areas of interest such as Islamic banking law, international arbitration and insider trading. The presentations were around 20 minutes in length and were followed by questioning and an exchange of views. The students valued the opportunity to present and defend an academic paper in an informal setting and welcomed the chance to strengthen the academic community with staff and fellow students. It is intended to repeat the conference next year.

### **PUBLIC SEMINAR PROGRAMME**

The Centre continued its evening seminar series, inviting internationally acclaimed speakers to speak on business related topics. The talks are designed to appeal to the legal profession, business professionals (including bankers and directors), academics and students. The seminars attract large audiences and they enrich our research culture and the learning experience of our own postgraduate and undergraduate students.

This year we were fortunate enough to have:

**‘Euro Area Deposit Compensation Schemes in Uncharted Waters’**

Mr. Ray Labrosse,  
Former Secretary General, International Association of Deposit Insurers

**‘Behind the Judicial Curtain: Insights of a Chancery Court Judge in the North East’**

Judge Roger Kaye QC

**‘Understanding the Financial Crisis: Pay, Risk and Responsibility in the 21st Century.’**

Professor Alan Dignam,  
Professor in Corporate Law, Queen Mary, University of London

**‘A Practitioner’s View of Financial Services Law and Market Changes in 2010’**

Mr. Paul Anderson,  
Partner, Financial Services Group (CF)Hammonds LLP

**‘Legal Capital in the UK Following the Companies Act 2006’**

Jennifer Payne,  
Reader in Corporate Finance Law, University of Oxford

Full details of the Centre’s activities can be found at [www.law.leeds.ac.uk/leedslaw](http://www.law.leeds.ac.uk/leedslaw)

**Joan Loughrey**

**Director of the Centre for Business Law and Practice**



### 3. GENERAL CENTRE ACTIVITY AND NEWS

There have been some notable achievements by members of the Centre in the past year, and not always reflected in a published piece, that are worthy of mention. What follows is a selection of some of the activities of the Centre and its members and it is not intended to be exhaustive.

**Andrew Campbell** (Andy) acted as Consulting Counsel to the Legal Department of the International Monetary Fund, Washington, DC and was a member of the Academic Board for the International Association of Deposit Insurers.

**Michael Cardwell** was a Visiting Scholar at the University of Illinois in October 2010.

**Roger Halson** continued as Head of School until 1<sup>st</sup> Sept 2009 and in that capacity visited the Department of Law at Nanjiang University and also on two occasions the School of Law at East China University of Politics and Law (ECUPL), Shanghai where he delivered a lecture to contract and business law students. The School of Law at Leeds has signed a memorandum of understanding with ECUPL which is Shanghai's leading Law School and as an institution is rated very highly as a research led Chinese University. In 2010 we were pleased to receive the first students from ECUPL in Leeds inter alia to study for a business law LLM. Also as Head of School Halson attended the International Business and Law Exhibition in Amman, Jordan in May and explored possible collaboration with the University of Aleppo in Syria. This visit was facilitated by a former successful PhD student from the Centre for Business Law and Practice (now a lecturer at the University of Newcastle upon Tyne). When visiting Kenya and Uganda in January Halson met former Leeds business law LLM students who were completing their professional qualifications there.

**Andrew Keay** continued as a member of the Peer Review College of the Arts and Humanities Research Council. His work has been cited in the past year in *Vertex Trading SARL v Infinity Holdings* [2009] EWHC 461 (Ch) at para 8 (High Court of England and Wales); *Rawnsley v Weatherall Green and Smith North Ltd* [2009] EWHC 2482 (Ch); [2010] BPIR 449 at paras 71-72 (High Court of England and Wales); *Hall v Poolman* [2009] NSWCA 64 at paras 144, 145 (New South Wales Court of Appeal); *Condon v Watson* [2009] FCA 11 at para 68 (Federal Court of Australia); *Gould v Companies Auditors and Liquidators Disciplinary Board* [2009] FCA 475 at para 209 (Federal Court of Australia); McLellan, in the matter of *The Stake Man Pty Ltd v Carroll* [2009] FCA 1415 at para 106 (Federal Court of Australia); *Cussen v Sultan* [2009] NSWSC 1114 at para 19 (New South Wales Court of Appeal); *Ting-Foong Fang v Amazing International Co Ltd* [2009] WSSC 118 (Supreme Court of Samoa); *Orion International Limited (in liq) v Horne* [2009] NZHC 2458 at paras 16 and 24 (New Zealand High Court); *Bell Group Ltd v Westpac Banking Corp (No 9)* [2009] WASC 239 at paras 1061 and 1069 (Supreme Court of Western Australia); *Professional Services of Australia v Computing and Tax Pty Ltd* [2010] WASC 38 at [81] (Supreme Court of Western Australia); *In the Matter of Enviro Energy Australia Pty Ltd (in liquidation)* [2010] NSWSC 1222 at [57] (New South Wales Supreme Court); *McGrath & Anor re HIH Insurance Ltd & Ors* [2010] NSWSC 404 at [31], [48] (New South Wales Supreme Court) *Mana Property Trustee*

*Ltd v James Development Ltd* [2010] NZSC 124 at [10] (New Zealand Supreme Court); *McKern & Ors v The Minister administering the Mining Act 1978* (WA) [2010] VSCA 140 at [105] (Victorian Court of Appeal); *Orion International Limited (in liq) v Horne and Crichton* [2009] NZHC 2458 at [24] (New Zealand High Court); *Cussen & Ors v Sultan & Ors* [2009] NSWSC 1114 at [19] (New South Wales Supreme Court).

**Joan Loughrey** obtained a grant from the British Academy Overseas Conference Fund to attend the Fourth International Legal Ethics conference at the University of Stanford in July 2010.

**Gerard McCormack's** Leverhulme Research Fellowship commenced in September 2010 for a project that addresses international harmonisation efforts in the sphere of secured credit law and in particular examines the role of globalisation and international finance capital in shaping such efforts. This area is highly important and contentious in that an efficient secured transactions law is seen to increase the availability and lower the cost of credit, thereby contributing to international development. The project in particular asks whether the most comprehensive international standard – the United Nations Commission on International Trade Law (UNCITRAL) Legislative Guide on Secured Transactions (2008) – is suitable for adoption at the national level. The hypothesis however, is that American law and American lawyers have shaped the content of the Legislative Guide to an undue extent; so much so that it is not suitable for direct and immediate translation into the laws of other countries.

The project will ask the following specific questions:

1. Why is there pressure for greater international convergence, and is “spontaneous” convergence a viable possibility?
2. What is the relative importance of the different actors and how does their work interact? Why, for instance, is the European Bank for Reconstruction and Development (EBRD) Model Law on Secured Transactions much less prescriptive in tone and American in content than the UNCITRAL Legislative Guide?
3. Why has UNCITRAL assumed such a leading role in this field and why has it gone for the approach of maximum harmonisation? UNCITRAL has stressed the importance of secured credit and its intimate association with international trade. A degree of caution is appropriate however, for different States may wish to experiment with different degrees of freedom when it comes to sanctioning the creation and enforcement of security. The case for national autonomy is particularly strong in the area of consumer oriented transactions. But even in the commercial context, different States may have different views on the extent to which secured creditors should prevail over unsecured creditors and whether particular types of creditor e.g. trade creditors should prevail over other creditors e.g. finance creditors.
4. Why, on its face, is there such a large American imprint on the UNCITRAL Legislative Guide? For example, the Legislative Guide validates “all-assets security” i.e. security over the entire business operations of an enterprise. This reflects an approach found in Article 9 of the American Uniform Commercial Code and, like Article 9, the Guide rejects the idea of carving out a proportion of the value of such

security for the benefit of unsecured creditors. Similarly the Guide embodies a general principle of publicizing the existence of security through filing or registration although registrationless regimes of personal property security prevail in many economically significant jurisdictions like Germany. Moreover the Guide goes for US style “notice filing” rather than UK “transaction filing”. The notice on the register is a bare bones statement merely alerting one to the possible existence of a security interest. Further inquiries from the parties are necessary to ascertain the exact state of affairs.

In addition, mirroring the US approach, but at variance with the position in most jurisdictions worldwide, the Guide extends registration requirements to “quasi-security” i.e. functionally equivalent legal devices such as reservation of title clauses in sale of goods contracts.

5. How significant has been the influence of American lobby groups such as the Commercial Finance Association (CFA) on the Legislative Guide given their participation in the drafting work?

6. How successful is the Legislative Guide likely to be in influencing other initiatives such as the European Common Frame of Reference (CFR) and the Eurohypotheq, or is its American orientation likely to limit its usefulness?

McCormack also participated in discussions arising out of his research into secured credit and legal harmonisation at UNCITRAL Vienna in March 2010. He pursued potential research collaborations in Singapore and Hong Kong in August 2010, visiting Singapore Management University, Chinese University of Hong Kong, City University Hong Kong and Hong Kong University.

**Surya Subedi** was appointed to the UN Special Rapporteur for Human Rights in Cambodia.

## 4. PUBLICATIONS

### (a) Books

**Cardwell M:** Bodiguel, L. and Cardwell, M.N. (eds.), *The Regulation of Genetically Modified Organisms: Comparative Approaches* (Oxford University Press, Oxford, 2010), 285pp.

**Halson DR:** *Jowitt's Dictionary of English Law* (co-author) (2010, ISBN 9781847036261). The first edition of this iconic work was edited by the Lord Chancellor, Earl Jowitt. The last revision was over 30 years ago and the massive project to rewrite a new edition was led from the Cabinet Office. Halson was a senior contributing editor covering topics in contract, tort and remedies.

**Keay A:** *McPherson's Law of Company Liquidations* 2<sup>nd</sup> ed, Sweet and Maxwell, 2009 (1125pp).

**(b) Chapters in Books and Other Contributions to Books**

**Campbell A:** 'Revisiting the Lender of Last Resort - The Role of the Bank of England' in MacNeil, I. (Ed) *The Future of Financial Regulation* pp. 161 – 178, Hart, 2010. (With Lastra, R.)

**Campbell A:** 'Large Scale Bank Insolvencies - the Challenge' in Omar, P. (Ed) *Insolvency Law in the United Kingdom: The Cork Report at 30 Years* pp. 85 – 96, Insol Europe, 2010.

**Campbell A:** 'Protecting Creditors of Insolvent Banks: How Should the Rights of Different Types of Creditors be Best Managed?' in LaBrosse, J.R., Olivares-Caminal, R. & Singh, D. (Eds) *Financial Crisis Management and Bank Resolution* 203 – 216, Informa, 2009.

**Cardwell M:** "Agriculture and fisheries", in Bacon, K. (ed.), *European Community Law of State Aid* (Oxford University Press, Oxford, 2009), at pp.281-315

**Cardwell M:** "The polluter pays principle, European Community law and United Kingdom farmers: the reduction of nitrate pollution and the promotion of cross compliance", in Grossman, M.R. (ed.), *Agriculture and the Polluter Pays Principle* (British Institute of International and Comparative Law, London, 2009), at pp.261-286

**Keay A.:** "What is Wrongful Trading?" and "Implications for Directors" in *Wrongful Trading* (London, Institute of Chartered Accountants, 2009).

**McCormack G:** "Pressured by the paradigm: the Law Commission and company security interests" in J De Lacy ed *The Reform of UK Personal Property Security Law* (London, Routledge-Cavendish, 2010) at pp 83-116.

**Subedi S:** 'Reassessing and Redefining the Principle of Economic Sovereignty of States', in Duncan French (ed.), *Global Justice and Sustainable Development* (Koninklijke Brill NV, The Netherlands, 2010), pp.403-410.

**Subedi S:** 'WTO Dispute Settlement Mechanism as a New Technique for Settling Disputes in International Law', in Duncan French, Matthew Saul and Nigel D. White (eds.), *International Law and Dispute Settlement: New Problems and Techniques* (Hart Publishing, Oxford, 2010), pp.173-190.

**Subedi S:** 'The UN Commission on Sustainable Development', in *Max Planck Encyclopaedia of Public International Law* (Oxford University Press, Oxford, 2009), p.1-6.

**Subedi S:** 'Ganges River', in *Max Planck Encyclopaedia of Public International Law* (Oxford University Press, Oxford, 2009), p.1-6

**Subedi S:** 'Foreword' for a book entitled, *Protection of Himalayan Biodiversity* (International Environmental Law and Regional Legal Framework), written by Dr Ananda M. Bhattarai and published by Sage Publications, London, New Delhi, 2010.

**Subedi S:** ‘Foreword’ for a book entitled, *A Substantive Environmental Right* (An Examination of the Legal Obligations of Decision-Makers towards the Environment), written by Stephen J. Turner and published by Kluwer Law International, the Netherlands, 2009.

**(c)Journal Articles**

**Campbell A:** ‘UK Depositor Protection in the Aftermath of the Banking Crisis’ in *Journal of International banking Law and Regulation* (August, 2010).(With Moffatt, P.)

**Cardwell M:** “Public participation in the regulation of genetically modified organisms: a matter of substance or form?”, (2010) 12 *Environmental Law Review* 12-25

**Halson DR:** ‘Unused Economic Capacity and the Case of the Under-Occupied Artist’ (2009) 25 *Journal of Professional Negligence* 107

**Keay A:** “Getting to Grips With the Shareholder Value Theory in Corporate Law” (2010) 39 *Common Law World Review* 358-378.

**Keay A:** “Shareholder Primacy in Corporate Law: Can It Survive? Should It Survive?” [2010] 7 *European Company and Financial Law Review* 369-413.

**Keay A:** “The Ultimate Objective of the Public Company and the Enforcement of the Entity Maximisation and Sustainability Model” (2010) 10 *Journal of Corporate Law Studies* 35-71.

**Keay A:** “Derivative Proceedings in a Brave New World for Company Management and Shareholders” [2010] *Journal of Business Law* 151-178 (co-author – Ms J. Loughrey).

**Keay A:** “Stakeholder Theory in Corporate Law : Has It Got What It Takes?” (2010) 9 *Richmond Journal of Global Law & Business* 249-300 (USA).

**Keay A:** “Office-holders and the Duty to Promote the Success of the Company” (2010) 23 *Insolvency Intelligence* 133-138 (double column pages).

**Keay A:** Analytical Review of *Canadian Bankruptcy and Insolvency Law: Bill C-55, Statute c.47 and Beyond*, by Stephanie Ben-Ishai & Anthony Duggan, eds. (Markham, LexisNexis, 2007, xxxviii and 418 pp. (2009) 48 *Canadian Business Law Journal* 154-163.

**Keay A:** “Litigation Expenses in Liquidations” (2009) 22 *Insolvency Intelligence* 113-116 (double column pages).

**Loughrey J:** ‘Derivative Proceedings in a Brave New World for Company Management and Shareholders’ forthcoming (2010) *Journal of Business Law* with Professor Andrew Keay.

**McCormack G:** "Reconstructing European Insolvency Law: Putting in Place a New Paradigm" [2010] Legal Studies 126-146.

#### **d) Reports**

**Subedi S:** 'The situation of human rights in Cambodia', **second report** to the UN Human Rights Council in September 2010 (U.N. Doc. A/HRC/15/46) as the UN Special Rapporteur for Human Rights in Cambodia.

**Subedi S:** 'The situation of human rights in Cambodia', **first report** submitted to the UN Human Rights Council in August 2009 (U.N. Doc. A/HRC/12/40) as the UN Special Rapporteur for Human Rights in Cambodia.

### **5. CONFERENCE PRESENTATIONS AND PUBLIC LECTURES**

**Brown S:** "European regulation of consumer credit: enhancing consumer confidence and protection from a UK perspective?" European Consumer Protection Theory and Practice 16th-17th December 2009, Leeds (to be published in an edited collection in 2011)

**Brown S:** "Protection of the small business as a credit consumer: paying lip service to protection of the vulnerable or a providing a real service to the struggling entrepreneur?" SLS conference September 2010

**Campbell A:** 'Bank Insolvency Law in the Caribbean: Law and Best Practice' Jamaica Deposit Insurance Corporation, Montego Bay, Jamaica, March, 2010.

**Campbell A:** 'Managing Systemic Risk', Warwick Symposium on Banking Law, University of Warwick, March, 2010.

**Campbell A:** Presented several papers on bank insolvency and related topics at a seminar on 'Designing Effective Legal Frameworks for Problem Banks and resolving Banking Crises', International Monetary Fund Regional Training Institute, Singapore, September 2009.

**Cardwell M:** 'European Union agricultural policy and practice: the new issue of climate change', American Agricultural Law Association Conference in Omaha, Nebraska?)

**Galanis M:** 'The Dynamics of Corporate Bargaining and the Law vs. Contract Debate: Chocolate, Cars and Other Systemic Issues' (Invited paper) Directors Duties and Shareholder Litigation in the Wake of the Financial Crisis, 20 September 2010, University of Leeds.

**Galanis M:** "Vicious Spirals in Corporate Governance: Mandatory Rules for Systemic (Re)Balancing?" (Invited paper) Standing Group on Regulatory Governance

of the European Consortium for Political Research Third Biennial Conference 'Regulation in the Age of Crisis', June 17-19, 2010 at University College, Dublin.

**Keay A:** "The Duty to Promote the Success of the Company : Is it Fit for Purpose?" presented at the Directors' Duties and Shareholder Litigation in the Wake of the Financial Crisis Conference organised by Centre for Business Law and Practice at the University of Leeds on 20 September 2010.

**Keay A:** "The Duty to Promote the Success of the Company : Section 172" presented at the Guildhall Chambers Insolvency Conference in Bristol on 13 May 2010.

**Keay A:** "Moving Towards Stakeholderism? Enlightened Shareholder Value, Constituency Statutes and All That" a paper presented at the Conference on Stakeholder and Gatekeeper Roles in Corporate Governance : Comparative Perspectives held at the University of Durham, 16 January 2010.

**Keay A:** "The Objective of the Public Corporation" a paper presented at the Research Seminar Series on Applied Ethics at the Centre for Inter-Disciplinary Ethics at the University of Leeds on 7 December 2009.

**Loughrey J:** 'The Future of the Legal Profession and the English Corporate Lawyer', SLS Conference, Southampton, September 2010  
'Client Identity and the English Corporate Lawyer', Panel on Conflicts of Interest, Fourth International Legal Ethics Conference, Stanford University USA, July 2011

**Loughrey J:** 'Directors' Duties and Shareholder Remedies in the UK', Invited Paper, Nanyang Technological University, Singapore, April 2010

**Loughrey J:** 'Analysing the Regulation of UK Corporate Lawyers as Gatekeepers.' Invited contribution, British Academy funded Co-Reach Project Workshop involving The United Kingdom, Germany and the People's Republic of China, Durham University, 16-17 January 2010 on Stakeholders and Gatekeepers in Corporate Governance: Comparative Perspectives, January 2010

**Loughrey J:** 'The Role of the Corporate Lawyer', Centre for Applied Ethics, University of Leeds, November 2009, Invited Lecture

**McCormack G:** Paper arising out of European and Insolvency Law Research, Stockholm, October 2009

**McCormack G:** Paper arising out of European and Insolvency Law Research, Nottingham, September 2010

**McCormack G:** "Football Creditors and Insolvency Law", International Sports and Business Law conference, Istanbul September 2010.

**McCormack G:** Paper on Secured Credit and Legal Harmonisation, MLR seminar and conference series Newcastle University May 2010.

**McCormack G:** Paper on Secured Credit and Legal Harmonisation, Centre for Socio-Legal Studies Oxford April 2010

**Pearce D:** 'Reflections on Williams v Roffey Bros: a Case of Storms and Teacups?' at the July 2010 meeting of the North East Regional Obligations Group, Hull, July 2010.

**Subedi S:** Chaired a seminar on "The First Verdict of the ECCC (the Khmer Rouge Tribunal) – the Duch Case" organised by the British Institute of International and Comparative Law, London, on 30 September 2010.

**Subedi S:** 'The Human Rights Situation in Cambodia', a statement delivered to the plenary session of the UN Human Rights Council in Geneva on 28 September 2010.

**Subedi S:** Chaired a session at a conference on "Directors Duties and Shareholder Litigation in the Wake of the Financial Crisis" organised by the Centre for Business Law and Practice, University of Leeds on 20 September 2010.

**Subedi S:** 'The Impact of International Legal Standards on International Commercial Arbitration', presented at the 74<sup>th</sup> Biennial Conference of the International Law Association (ILA) held in The Hague, the Netherlands, on 16 August 2010.

**Subedi S:** 'The experience of the UN Special Rapporteur in a country in transition: A case study of Cambodia', presented at an international research workshop on the Role of Special Rapporteurs of the Human Rights Council in the Development and Promotion of International Human Rights Norms at the University of Leeds on 25 June 2010.

**Subedi S:** 'What role does international law and protection of the rule of law play in promoting stability and development?', presented at a workshop organised by the Cambridge International Development Studies Programme at the Faculty of Law, University of Cambridge on 1<sup>st</sup> of May 2010.

**Subedi S:** 'What Should be the Future Form of Governance in the New Republican Constitution of Nepal: Parliamentary or Presidential?', presented at an International Conference on Dynamics of Constitution Making in Post-Conflict Scenario organized by the Nepal Constitution Foundation in Kathmandu, Nepal, 16 January 2010.  
2009

**Subedi S:** 'The Challenges of Conservation in a Politically Fragile Nepal', presented at an international conference on "Nepal Conservation in Crisis", organised jointly by the Zoological Society of London and the National Trust for Nature Conservation (Nepal) at the Zoological Society of London on 24 November 2009.

**Subedi S:** 'Comments on the Challenges of Realising the Millennium Development Goals of the UN through Public-Private Partnerships', remarks made as the Chair of Workshop IV to the Plenary Session of the international conference on 'Globalisation, the Nation-State and Private Actors' organised by The Hague Institute for Internationalisation of Law (HiIL), the Peace Palace, The Hague, the Netherlands, 9 October 2009.

**Subedi S:** 'The Human Rights Situation in Cambodia', a statement delivered to the plenary session of the UN Human Rights Council in Geneva on 1<sup>st</sup> October 2009.

**Subedi S:** 'Interstate Arbitration', a talk delivered at a seminar on "Natural Resource International Arbitration and Advocacy Skill", organised by the Centre for Energy, Petroleum and Mineral Law and Policy of the University of Dundee at Middle Temple, London, 9 September 2010.



**Subedi S:** ‘Human Rights in a Country in Transition: A Case Study of Cambodia’, a public lecture delivered at the School of Social Sciences, University of Hull, 3 March 2010.

**Subedi S:** ‘The Challenges of the UN Special Rapporteur for Human Rights in Cambodia’ a lecture delivered to Chevening Fellows of the Centre for Human Rights, School of Law, University of Nottingham, on 11 February 2010.

**Subedi S:** ‘The UN Human Rights Mandate in Cambodia: The Challenges of a Country in Transition’, a lecture delivered at the Lauterpacht Centre for International Law, Faculty of Laws, University of Cambridge, Cambridge, on 27 November 2009.

**Subedi S:** ‘Human Rights in Cambodia and the Challenges for the Judiciary’, a speech made at a hearing at the European Parliament organised jointly by the Group of Liberal Democrat MEPs and Human Rights without Frontiers International in Brussels on 17 November 2009.

**Subedi S:** ‘The Role of UN Special Rapporteurs in Promoting and Protecting Human Rights’, at a seminar organised jointly by the International Law Association, Belgian Branch and the Royal Flemish Belgian Academy of Social Sciences in Brussels on 5 November 2009.

**Subedi S:** ‘The Challenges for the Mechanism of UN Special Procedures in Promoting and Protecting Human Rights’, at the International Institute of Social Studies, Erasmus University, the Netherlands, 9 October 2009.

## 7. EDITORIAL WORK

Many members of the Centre are actively involved as members of editorial boards and editorial activity includes:

**Campbell A:** Member of editorial boards of the Journal of Banking Regulation, the Journal of Money Laundering Control and the Journal of Financial Regulation and Compliance.

**Halson DR:** Member of the Editorial Board of the Journal of Professional Negligence.

**Keay A:** Commonwealth Editor of *Gore Browne on Companies*

**McCormack G:** edits chapters for Gore Browne on Company Law and also for Gore Browne on EU Company Law.

**Subedi S:** Editor, *Asian Journal of International Law* (Cambridge University Press) since 2010).

**Subedi S:** Consulting Editor, *Peace and Conflict Studies* (George Mason University, USA) since 1998.

**Subedi S:** Member, Advisory Board, *Human Rights and International Legal Discourse*, Intersentia (Antwerp/Oxford) since 2006.

## 8. WORKING PAPERS

**\*The following represents work in progress, and is not completed; some references need to be finalised. Please contact the author before citing or quoting from it. The author can be contacted at [g.mccormack@leeds.ac.uk](mailto:g.mccormack@leeds.ac.uk)**

### COMI AND COMITY IN UK AND US INSOLVENCY LAW

#### **Professor Gerard McCormack, Professor in International Business Law**

This paper critically evaluates the Model Law on Cross-Border Insolvency and the manner of its implementation in the UK and US. The paper argues that despite professed intentions, uniform implementation has not been achieved in practice nor has uniformity of interpretation. It is submitted that the latter goal was always an unrealistic, or at least an exaggerated one, since the broad institutional and political dynamics in both the US and UK, including Britain's membership of the European Union and the appearance of the European Insolvency Regulation (EIR), were always likely to produce divergences of interpretation, even if these divergences were unintended at the outset. After an introductory section, the paper explores issues of convergence and divergence across three important fronts; "centre of main interests" (COMI) as the basis for recognising foreign main insolvency proceedings; protection of domestic creditors consequent upon recognition of foreign proceedings; and "additional assistance" that may be provided in relation to foreign proceedings. It then offers a general conclusion.

The Model Law on Cross-Border Insolvency emanates from the United Nations Commission on International Trade Law (UNCITRAL) whose business is legal harmonisation and modernisation.<sup>1</sup> The Model Law aims to improve the real world of cross-border insolvency law through fair and efficient administration of cases; protecting the interests of debtor, creditors and other interested parties; maximising asset values and facilitating the rescue of financially troubled businesses so protecting

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<sup>1</sup> See generally the UNCITRAL website – [www.uncitral.org](http://www.uncitral.org) and see also A Berends, 'UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview' (1998) 6 Tulane Journal of International and Comparative Law 309; J Clift, 'The UNCITRAL Model Law on Cross-Border Insolvency – A Legislative Framework to Facilitate Coordination and Cooperation in Cross-Border Insolvency' (2004) 12 Tulane Journal of International and Comparative Law 307

investment and preserving employment.<sup>2</sup> The Model Law has been described as an exercise in realism and the art of the possible.<sup>3</sup> Harmonisation efforts were concentrated in certain key areas such as providing foreign creditors or foreign insolvency representatives with access to local courts; recognising certain orders issued by foreign courts as well as trying to secure co-operation between courts in different countries.<sup>4</sup> An international Model Law is however, “soft law” and even States that choose to implement it may do so in different ways, which means that the desired level of harmonisation may not be achieved. On the other hand, experience with international conventions demonstrates that the process of signature and ratification may be very slow and cumbersome. States that sign a convention may never get around to ratification.<sup>5</sup> These points were noted in the deliberations leading up to the Model Law and there was a consensus that model legislative provisions represented the best prospects for genuine improvements in the administration of cross-border insolvencies.

The Model Law has been incorporated into domestic UK law by the Cross-Border Insolvency Regulations 2006 (CBIR) under enabling powers conferred by s 14 of the Insolvency Act 2000. In drafting the regulations, the Insolvency Service explained that it tried to stay “as close to the drafting in the Model Law as possible to try and ensure consistency, certainty and harmonisation with other States enacting the Model

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<sup>2</sup> The US Supreme Court has noted more than 100 years ago in Canada Southern Railway Co v Gebhard (1883) 109 US 527 at 537-39: “Unless all parties in interest, wherever they reside, can be bound by the [foreign reorganisation] arrangement which it is sought to have legalized, the scheme may fail ... Under these circumstances, the true spirit of international comity requires that schemes of this character, legalized at home, should be recognized in other countries”.

<sup>3</sup> See IF Fletcher Insolvency in Private International Law (Oxford, 2<sup>nd</sup> ed 2005) at p 453.

<sup>4</sup> According to one researcher of the 266 large public companies that filed for bankruptcy reorganization in the United States between 1980 and 1997 nearly one third reported owning property outside the US - see S Isham “UNCITRAL’s Model Law on Cross Border Insolvency: A Workable Protection for Transnational Investment At Last (2001) 26 Brooklyn Journal of International Law 1177 n 1 and see also M Gilreath “Overview and Analysis of How the United Nations Model Law on Insolvency Would Affect United States Corporations Doing Business Abroad (2000) 16 Bankruptcy Developments Journal 399.

<sup>5</sup> H Kronke “International uniform commercial law Conventions, advantages, disadvantages, criteria for choice” (2000) 5 Uniform Law Review 13. R Goode in “International Restatements of Contract and English Contract Law” (1997) 2 Uniform Law Review 231 at 232 comments that while “many States participate in the work leading to a convention, for fear of losing the opportunity to influence its terms, most of them are likely to drag their feet for many years before ratifying the convention, if indeed, they ever get around to ratifying it at all.”

Law” and that this “may result in the use of some terms, which may not be standard in British insolvency law.”<sup>6</sup> On the other hand, there are divergences from the Model Law in certain places, including changes in terminology. In the US the Model Law has been implemented by the introduction in 2005 of a new Chapter 15 of the US Bankruptcy Code. This new chapter supersedes the “old” s 304 under which a US bankruptcy court could exercise various powers in a “case ancillary to a foreign proceeding”.<sup>7</sup> In the US, the legislative intent was to stay loyal at least to the spirit of the Model Law. A Congressional report suggests that Chapter 15 “largely tracks the language of the Model Law with appropriate United States references”, talking about “alteration to tie into United States procedural terminology” and the expression of concepts “more clearly in United States vernacular”.<sup>8</sup> The US legislative history, like the British, also stresses the international origins of the Model Law and the need to promote consistent interpretation with that in other countries. The Congressional Report refers to the crucial goal of uniformity of interpretation and suggests that to the extent that US courts rely on foreign decisions, their own decisions will more likely be regarded as persuasive elsewhere.<sup>9</sup>

Whether the realities match up to the aspirations will now be addressed.

### Centre of main interests

“Centre of main interests” or COMI is at the core of the Model Law providing the basis for the recognition of foreign main proceedings. These are defined basically as proceedings pending in a country where the debtor has its COMI.<sup>10</sup> Recognition of foreign main proceedings provides a status with the implications set out in Article 20

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<sup>6</sup> See UK Insolvency Service “Implementation of UNCITRAL Model Law on Cross-Border Insolvency in Great Britain” (2005) at para 7.

<sup>7</sup> See generally on Chapter 15 JL Westbrook “Multinational Enterprises in General Default: Chapter 15, the ALI Principles, and the EU Insolvency Regulation” (2002) 76 American Bankruptcy Law Journal 1; “Chapter 15 at Last” (2005) 79 American Bankruptcy Law Journal 713 and for critical voices see L LoPucki “Global and Out of Control?” and “Universalism Unravels” (2005) 79 American Bankruptcy Law Journal 79 and 143; J Chung “The New Chapter 15 of the Bankruptcy Code: A Step Toward Erosion of National Sovereignty” (2006) 27 NorthWestern Journal of International Law and Business 89.

<sup>8</sup> See HR Rep No 31, 109th Congress 1st Session at paras 106, 107 and 109.

<sup>9</sup> *Ibid* at para 109.

<sup>10</sup> Article 2(b).

of the Model Law automatically following. First, upon recognition there is an automatic stay on individual proceedings against the debtor's assets though the apparent breadth of this prohibition is qualified in various respects. Legal proceedings may still be instituted to prevent an action from becoming statute-barred; the stay is subject to whatever exceptions are found in the domestic insolvency law and the right of a qualified party to request the opening of domestic insolvency proceedings is preserved. Secondly, there is a stay on execution against the debtor's assets. Thirdly, the right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended subject to whatever limitations found in domestic insolvency law.

Both Chapter 15 and the CBIR are faithful to the spirit of Article 20 though with differences in drafting that reflect local exigencies and the statutory structure in both countries. The US legislative history suggests s 1520 of the Bankruptcy Code contains provisions that are "broader and more complete than those contemplated by the Model Law, but include all the restraints the Model Law provisions would impose".<sup>11</sup> In the UK, it is specifically stated that the stay does not affect rights to enforce security, rights to repossess goods under hire-purchase and retention of title agreements, rights of set-off and rights pertaining to financial market transactions to the extent that all these rights would be exercisable in a domestic UK context.<sup>12</sup> Moreover, where the foreign proceedings are of a rescue or reorganisation rather than liquidation nature, the foreign representative, at the time of applying for UK recognition, may apply for the effects of the stay to be modified and for more appropriate relief to be granted.<sup>13</sup>

While relatively straightforward as a concept, the COMI notion may defy easy application in practice. This is particularly the case where a debtor has its business operations spread over several states and central control and management functions are performed in a State that is not the State of incorporation and this in turn may be different from the State where the bulk of economic activities are carried out. Also potentially controversial is the situation where a company's COMI may have shifted during the course of its corporate history especially if the change occurred just prior to the commencement of formal insolvency proceedings. In making use of the COMI concept and putting it centre stage, the Model Law borrows from the still-born EC

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<sup>11</sup> See fn 7 at para 114.

<sup>12</sup> CBIR Schedule 1 Article 20(3).

<sup>13</sup> See fn 5 at para 57.

Convention on Insolvency Proceedings which was later resurrected and came into force as the European Insolvency Regulation (EIR). The concept of COMI is the same as that to be found in Art 3(1) of the EIR. Article 16(3) of the Model Law introduces a presumption, subject to rebuttal by proof to the contrary, that the debtor's registered office, or habitual residence in the case of an individual, is the COMI. The language of this provision mirrors almost exactly Article 3(1) of the Model Law but there is nothing in the latter equivalent to Recital 13 of the preamble to the EIR stating that the centre of main interests "should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties". Lewison J in *Re Stanford International Bank Ltd*<sup>14</sup> however, suggested that the Model Law framers envisaged that the interpretation of COMI in the EIR, necessarily including the effect of recital 13, would be equally applicable to COMI in the Model Law.

US and UK courts appear to have diverged somewhat in their interpretation of COMI and the absence of any equivalent to recital 13 in the Model Law has been one of the interlinked factors in this divergence. Another more significant factor involves British membership of the European Union and the consequent supremacy of decisions of the Court of Justice of the European Union (CJEU) interpreting matters of EU law. But arguably the most significant factor has been differential implementation of the Model Law in the US and UK. The UK provision uses the language of the Model Law but when enacting the equivalent of Art 16(3), the US Congress changed the wording so that the presumption may be rebutted by "evidence" rather than "proof" to the contrary. It seems doubtful however whether the US Congress believed that it was making a substantive change. In the UNCITRAL guide to enactment of the Model Law, reference is made to Article 16 establishing presumptions that allow a court to expedite the evidentiary process. The Guide goes on to say that these presumptions "do not prevent, in accordance with the applicable procedural law, calling for or assessing other evidence if the conclusion suggested by the presumption is called into question by the court or an interested party".<sup>15</sup> The US Congressional Report talks of only "minor changes" to the language of the Model Law explaining that the word "proof" has been changed to "evidence" to "make it

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<sup>14</sup> [2009] BPIR 1157 at para 65.

<sup>15</sup> See UNCITRAL Guide at para 122.

clearer using United States terminology that the ultimate burden is on the foreign representative.” The Report explains that the presumption that the place of the registered office is also the COMI has been “included for speed and convenience of proof where there is no serious controversy”.<sup>16</sup>

In the US it has been held that the burden of proof lies on the party who is asserting that particular proceedings are “main proceedings” and the burden of proof is never on the party opposing that contention.<sup>17</sup> Furthermore, in Re Bear Stearns Ltd<sup>18</sup> Judge Lifkind said except in circumstances where there is no contrary evidence, the location of the registered office did not have any special evidentiary value. From the Bear Stearns case it appears that the COMI is determined by where the most material contacts are to be found, especially management direction and control of assets. These contacts “include the location of the debtor’s headquarters, the location of those who actually manage the debtor, the location of the debtor’s primary assets, the location of a majority of the debtor’s creditors or of a majority of creditors who would be affected by the case and the jurisdiction whose law would apply to most disputes”.

Lewison J in Re Stanford International Bank Ltd<sup>19</sup> noted, however, that the approach of the CJEU under the EC Regulation was different and he suggested that the English courts should follow the ECJ approach. The US jurisprudence was of lesser significance given the difference in legislative wording. Lewison J said it was “a reasonable inference that the intention of the framers of the Model Law was that COMI in the Model Law would bear the same meaning as in the EC Regulation, since it ‘corresponds’ to the formulation in the EC Regulation; and one of the purposes of the Model Law is to provide EU member states with a ‘complementary regime’ to the EC Regulation.”<sup>20</sup>

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<sup>16</sup> See fn 6 at paras 112, 113.

<sup>17</sup> See Judge Klein in Re Tri-Continental Exchange Ltd (2006) 349 BR 629 at 635.

<sup>18</sup> (2007) 374 BR 122 and affirmed (2008) 389 BR 325. See also Re Basis Yield Alpha Fund (2008) 381 BR 37; Re Ernst & Young (2008) 383 BR 773.

<sup>19</sup> [2009] BPIR 1157.

<sup>20</sup> Ibid at para 45.

The approach adopted by Lewison J was upheld by the Court of Appeal where Chancellor Morritt commented:<sup>21</sup>

“Further as both UNCITRAL and the EC Regulation apply in England and Wales it is essential that each should be interpreted in a manner consistent with the other. It would be absurd if the COMI of a company with its registered office in, say, Spain which is being wound up both there and in the US should differ according to whether the court in England was applying UNCITRAL on an application by the US liquidators for recognition as a foreign main proceeding or the EC Regulation in deciding whether the court in England may entertain a petition to wind up the Spanish company here.”

In Stanford the Court of Appeal stressed the supremacy of CJEU rulings on matters of European law and if there was any difference in the COMI test promulgated by the CJEU in its leading judgment in Eurofood and that applied by the courts in the US then UK courts should apply the Eurofood test.

In Eurofood,<sup>22</sup> the CJEU considered COMI in the context of an Irish-incorporated wholly owned subsidiary, Eurofood, of a major Italian-incorporated global food company, Parmalat. Eurofood’s principal business activity was to provide financing facilities for companies in the Parmalat group and it enjoyed tax benefits conditional upon it being managed and operated in Ireland. Eurofood’s day-to-day administration was conducted in Ireland in accordance with the terms of an agreement governed by Irish law and which contained an Irish jurisdiction clause. One might say however, that the central management and direction of the group as a whole was conducted from Italy. Following financial troubles experienced by the Parmalat group, rival insolvency proceedings in respect of Eurofood were opened in both Ireland and Italy.

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<sup>21</sup> [2010] BPIR 679 at para 54 and see UK Insolvency Service “Implementation of UNCITRAL Model Law on Cross-Border Insolvency in Great Britain” ((2005) at para 54: “It is clear from the Guide to Enactment (paragraph 72) and UNCITRAL working papers (A/52/17, Para 153) that those drafting the Model Law thought that jurisprudence on the meaning of ...[COMI] as used in the context of EC Regulation ‘would be useful’ for its interpretation in the context of the Model Law.”

<sup>22</sup> Case C-341/04 Re Eurofood IFSC Ltd [2006] ECR I-03813; [2006] Ch 508.



In accordance with European law, the Irish Supreme Court<sup>23</sup> referred questions on COMI to the CJEU for a preliminary ruling. The CJEU responded by saying that the concept had an autonomous meaning for the purpose of the European Regulation and must be interpreted independently of national legislation. The presumption that the COMI of a company was in the State of the registered office applied even if the company had a parent company with a registered office in a different State. The court said that the presumption could only be rebutted:<sup>24</sup>

“if ... factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect. That could be so in particular in the case of a company not carrying out any business in the territory of the Member State in which its registered office is situated. By contrast, where a company carries on its business in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by the Regulation”.

While Eurofood has been cited in the US case law, including Bear Stearns, without apparent disapproval, the US cases attach much less weight to the presumption than does Eurofood. Perhaps without conscious intent, US courts seem to be trying to have it both ways – referring to foreign interpretations and the need for uniformity but at the same time maintaining an individual approach. In Re Tri-Continental Exchange Ltd<sup>25</sup>, for example Judge Klein refers to the comments of Professor Westbrook re COMI: “The drafters of Chapter 15 believed ... that such a crucial jurisdictional test should be uniform around the world and hope that its adoption by the United States would encourage other countries to use it as well.”<sup>26</sup>

Judge Klein cited the provenance of COMI in the EIR but went on to state:<sup>27</sup>

"In effect, the registered office (or place of incorporation) is evidence that is probative of, and that may in the absence of other evidence be accepted as a proxy for, 'center of

<sup>23</sup> Re Eurofood IFSC Ltd [2005] BCC 999.

<sup>24</sup> [2006] Ch 508 at 547.

<sup>25</sup> (2006) 349 BR 627

<sup>26</sup> JL Westbrook “Chapter 15 at Last” (2005) 79 American Bankruptcy Law Journal 713 at 719-720.

<sup>27</sup> (2006) 349 BR 627 at 635.

main interests'. The registered office, however, does not otherwise have special evidentiary value and does not shift the risk of non persuasion, i.e. the burden of proof, away from the foreign representatives seeking recognition as a main proceeding.”

For the US courts the registered office presumption is merely a factor to be considered but for the CJEU it may be the decisive factor in many cases and certainly something that is not easily rebutted unless objective and ascertainable factors pointed otherwise. This view was also strongly articulated in the English courts by Lewison J in Stanford and he strongly disapproved of the earlier English decision in Re Ci4net.com Inc<sup>28</sup> to the effect that the location of the registered office was no more than a factor to be considered. It followed from Eurofood that the location of a company’s registered office was a true presumption and the burden lay on the party seeking to rebut it.<sup>29</sup> In Stanford it was held that the COMI of an Antigua-registered corporation was in Antigua because quite simply there was insufficient evidence to rebut the presumption. But it is important to note that Stanford did not involve a “letter box” company in that the company clearly carried out economic activity in Antigua. Its physical headquarters and most of its employees were located there.

In Stanford there was also a discussion of recital 13 of the EIR and how it may produce EU/US divergence. Lewison J said that an important purpose of COMI was to provide certainty and foreseeability for company creditors. Recital 13 suggested that COMI had to be identified by reference to criteria that were objective and ascertainable by third parties. Information would only count as ascertainable if it was in the public domain. It was not enough that it would have been disclosed as an honest answer to a question asked by a third party. The judge suggested that there would be a quite unrealistic burden if every transaction had to be preceded by a set of inquiries to establish whether the underlying reality differed from the apparent facts.

So the evidence points to the conclusion that there is a difference of approach between US and UK courts on COMI.<sup>30</sup> This is despite the fact that US courts have been loyal

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<sup>28</sup> [[2005] BCC 277.

<sup>29</sup> [2009] BPIR 1157 at paras 61-63.

<sup>30</sup> See however I Mevorach “Jurisdiction in Insolvency: A Study of European Courts’ Decisions” (2010) 6 Journal of Private International Law 327at 351 who concludes on the basis of an empirical study that the registered office presumption is often rebutted by courts in Europe, including UK courts. She suggests

to the injunction expressed in Article 8 of the Model Law to bear in mind its international character and the desire to achieve uniform interpretation across nations. The US courts, despite the strictures uttered by Scalia J in the US Supreme Court in Roper v Simmons<sup>31</sup> about the use of foreign law and American exceptionalism, have made reference to the English case law on COMI as well as the CJEU pronouncements in Eurofood. But the question arises whether the difference in approach is likely to lead to different results in concrete cases or is more a matter of terminology than anything else. It has been suggested that in at least one set of circumstances; namely where the debtor's business was a fraud, Eurofood and the US Chapter 15 approach may produce starkly different outcomes.<sup>32</sup> The argument is that under "the EC Insolvency Regulation, the smoke and mirrors orchestrated by the fraudster to engineer a public perception that its business is run from the registered office will be almost determinative of the COMI location. A court applying the EC Insolvency Regulation will feel bound by the smoke and mirrors..." Under Chapter 15 however, a court would be free to determine the true location of the debtor's COMI unconstrained by the smoke and mirrors. In this, the debtor's head office functions become highly relevant and these would not be discounted simply on grounds of lack of third party ascertainability for privileging the latter risks the court being used as an instrument of fraud. Under Chapter 15 unlike the EC Regulation, the court would not be taken in by appearances instead searching out the true location of the debtor's COMI.

Re Ernst & Young Inc<sup>33</sup> is highlighted as a case where the difference in approach is likely to lead to a different outcome in practice. The case involved fraudsters resident in Canada who set up companies in Canada and in the US State of Colorado. The Colorado company was run by a Colorado resident but under the supervision and direction of the principal fraudsters in Canada. A Canadian court appointed a receiver

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that this trend was not confined to the pre-Eurofood era, was not geographically limited and even when applying the presumption, courts tended to avoid justifying the decision merely on the presence of the registered office. It may be important to note though that the survey was conducted pre-Stanford and also the strength of the registered office presumption may dissuade parties from litigating the COMI issue in marginal cases.

<sup>31</sup> (2005) 543 US 551.

<sup>32</sup> Look Chan Ho "Cross-border fraud and cross-border insolvency: Proving COMI and seeking recognition under the UK Model Law" (2009) 24 Journal of International Banking and Financial Law 537.

<sup>33</sup> (2008) 383 BR 773.

over both the Canadian and Colorado companies and the receiver then sought and was granted recognition in the US as a foreign insolvency representative under Chapter 15 on the basis that the COMI of the Colorado company was in Canada. In according recognition the US Bankruptcy Court essentially applied a head office functions test taking into account “the location of those who manage the debtor” and finding that the fraudsters had formed their fraudulent organisation and directed the operations of both companies from a Canada base. If however, one viewed the facts of Ernst & Young through a Eurofood prism then a different determination seems likely. The physical location of the Colorado company seems determinative of the COMI issue since this location was objective and ascertainable by third parties even though it was largely smoke and mirrors with no real business being conducted there.<sup>34</sup>

Apart however, from the rare instance of outright fraud it is difficult to say that that the different viewpoints articulated in Eurofood and Bear Stearns will necessarily lead to different results in concrete cases. Take the basic facts of Bear Stearns with an “offshore” hedge fund type entity incorporated as a Caymans Islands company. In Bear Stearns there were no employees or managers in the Caymans; the investment manager was located in New York, the back-office operations including books and records were also operated from the US and prior to the commencement of the Cayman proceeding all of the company’s liquid assets were located in the US. According to Lifland J, it seems that the only business done in the Caymans was limited to those steps necessary to maintain the status of the company as a registered Caymans company. In these circumstances, Lifland J is surely justified in concluding that the offshore entities closely approximate to the “letterbox” companies referred to in Eurofood and therefore, the COMI presumption, even if given substantive weight, would be rebutted. Re Kaupthing<sup>35</sup> is a somewhat analogous UK case where the Eurofood presumption was applied but held to have been rebutted in respect of a letter box company. This case concerned an offshore limited partnership that was established as a special purpose vehicle (SPV) for investment purposes within a larger group of companies (the Kaupthing group). The SPV maintained registered offices in the offshore jurisdiction (Guernsey) but day-to-day activities were managed by its operator in London – another legal entity within the Kaupthing group, and certain administrative functions were delegated to other companies within the group. The

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<sup>34</sup> Re Ernst & Young Inc (2008) 383 BR 773.

<sup>35</sup> [2010] EWHC 836.

judge said that the limited partnership was indeed a letterbox entity since all of its functions were carried out on its behalf in England. In weighing up the evidence to rebut the presumption, she looked to recital 13 and asked what was ascertainable by third parties. The SPV's creditors were "third parties" and it would have been apparent to creditors that the debtors' affairs were being conducted in London on its behalf.

A certain degree of fuzziness is associated with a COMI type test, no matter whether one applies the multi-pronged inquiry of the US courts or a Eurofood style presumption. COMI has an elasticity of meaning and, despite the rhetoric of the Model Law, the reality is that if there is any dispute regarding COMI the determination and recognition process will not be speedy or efficient.<sup>36</sup> Moreover, particularly with alleged last minute changes in COMI immediately prior to an insolvency filing there is the possibility of abuse – of strategic game playing and advantage gaining by certain favoured parties compared with others. "It is a fact of judicial life that, when abuse rears its head, speed is the abuser's friend. Ferreting out abuse invariably slows the process down because it requires consideration of evidence."<sup>37</sup>

Eurofood states that while the COMI presumption may be rebutted in relation to "letter box" companies, the fact that the economic purse-strings of a subsidiary or associated company are pulled from group headquarters does not of itself alter its COMI. But between these two extremes lies a very large grey area where Eurofood does not help. Eurofood can also be criticised for failing to acknowledge the modern reality of multinational corporate groups; in short for narrowing the inquiry onto each individual company within a group of parent and subsidiary companies rather than looking at the affairs of the group of as a whole which should have the effect of improving coordination and administration of the global estate. An ability to file insolvency proceedings in respect of all group companies in the same jurisdiction can carry significant strategic advantages in that a coordinated sale or restructuring plan can be developed with improvements in net recoveries for creditors.

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<sup>36</sup> See the article by Judge Leif Clark "Centre of Main Interests" Finally Becomes the Center of Main Interest in the Case Law" (2008) 43 Texas International Law Journal 14 at 15.

<sup>37</sup> Ibid at 17.

On the other hand, a multi-pronged approach towards COMI determination may allow more pragmatic considerations to come into play facilitating the conclusion that a group of related companies share the same COMI. At the very least a multi-dimensional approach invites consideration of four factors (1) incorporation (registered office), (2) headquarters, (3) administrative employees and operations, and (4) assets. It also involves looking at how close cousins of COMI have been made sense of by the courts. Professor Jay Westbrook has drawn an analogy between COMI and the principal place of business standard that “in one formulation or another is commonplace throughout American law—state and federal—and is found elsewhere as well.” Westbrook recognises that this sort of standard has generated some litigation, but he is “unaware of any widely held view that it is so imprecise as to be impractical or to maim any important legal objective.”<sup>38</sup>

Judge Klein also made the equation between principal place of business and COMI in one of the first US Chapter 15 cases - Re Tri-Continental Exchange<sup>39</sup> asserting that an entity’s “principal place of business” in United States jurisprudence was that entity’s COMI. US case law generally holds that a company’s principal place of business is at its headquarters, as opposed to the place where it has the bulk of its assets or operations. In Phoenix Four v Strategic Resources Corp<sup>40</sup>, however, it was suggested that “two tests are commonly employed to determine a corporation’s principal place of business. The first is the ‘nerve center’ test which defines the principal place of business as the “nerve center from which a corporation radiates out to its constituent parts and from which its officers direct, control and coordinate all activities without regard to locale, in the furtherance of the corporate objective... Under this test, courts focus on those factors that identify the place where the corporation’s overall policy originates... The other test has been labeled the ‘place of operations’ or ‘locus of operations’ test. There, the effort is to identify the place in which a corporation conducts its principal operations...”

Courts were said to apply the “nerve center” test when a corporation’s operations were geographically widespread, and the “locus of operations” test when a corporation was centralised. At the same time however, it was stressed that judges

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<sup>38</sup> JL Westbrook “A Global Solution to Multinational Default” (2000) 98 Michigan Law Review 2276 at 2316.

<sup>39</sup> (2006) 349 BR 627 at 634.

<sup>40</sup> (2006) 446 F Supp 2d 205 at 214-215.

should apply the tests to the factual realities in each case and should not be straightjacketed by the formal requirements of the two tests. A flexible approach was particularly appropriate where the facts did not fall within the exact parameters of either paradigm.

In the European setting there have also been influential voices calling for a “head office functions” test<sup>41</sup>. While these voices have been stilled somewhat by Eurofood, Advocate General Jacobs in that case lent some support to “head office functions” as a test though recognising the ambiguities of the test. He said that the focus must be on the head office functions rather than simply on the location of the head office because a “head office” could be just as nominal as a registered office if head office functions were not carried out there. In transnational business the registered office was often chosen for tax or regulatory reasons and had no real connection with the place where head office functions were performed.<sup>42</sup>

Post Eurofood the “head office functions” test has come in for a bit of buffeting in the UK. In Stanford, Lewison J resiled from his earlier approach in Re Lennox Holdings Ltd<sup>43</sup> where he used such a test to decide that an English court had jurisdiction to enter main insolvency proceedings in respect of two companies whose registered offices were in Spain. He said in Stanford: “Simply to look at the place where head office functions are actually carried out, without considering whether the location of these functions is ascertainable by third parties, is the wrong test .... Pre-Eurofood decisions by English courts should no longer be followed in this respect ....” When

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<sup>41</sup> See generally G Moss, IF Fletcher and S Issacs (eds) The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide (OUP, 2nd ed 2009) at pp 255-256. A French court in Re MPOTEC GmbH [2006] BCC 681 suggested that the notion of head-office functions was founded on the following elements; the place of meetings of the board of directors; the law governing the main contracts; the location of business relations with clients; the place where the commercial policy of the group was defined; the existence of a prior authorisation from the parent company to enter into certain financial arrangements; the location of bank creditors; and the centralised management of purchasing policy, staff, accounts and computing systems.

<sup>42</sup> [2006] 1 Ch 508 at 529. See also M Virgós and F Garcimartín The European Insolvency Regulation: Law and Practice (Kluwer, The Hague, 2004) at p 40: “[T]he important factor when determining [COMI] is the place where the interests are administered, not the place where those concrete interests are located... Consequently, the ‘administrative connection’ (which is established in the place of management and control) must take precedence over both the ‘operational connection’ (which is established in the place of business or operations) and the ‘asset connection’ (which is established in the place where the property is located). In layman’s terms, what the definition tells us is that in order to establish international jurisdiction over a debtor what matters is where the ‘head’ (ie the directing power) is located, not the ‘muscles’ (ie the assets, the factors of production, the market, etc.)...”

<sup>43</sup> [2009] BCC 155.

Stanford went on appeal however, Arden LJ seemed more supportive though her analysis is not in line with the American case law. She stated:<sup>44</sup> ‘In determining the location of the COMI, the key question appears to be where the head office functions are based... The COMI must be determined on an objective basis and be ascertainable by third parties. It does not appear to be a question of where the principal place of business is conducted since this would give rise to uncertainty. There can in principle only be one place where head office functions are carried out, and that makes it easier to identify the COMI. The test is designed to achieve speed and ease of recognition. There are, however, difficulties in the test ...’

The difficulties are clear and these stem from the inherent ambiguity of COMI as a concept. Neither the approach of the CJEU or the US courts eliminates these difficulties. One leading practitioner has seen irony in the fact that US courts are attaching much less weight to the presumption than the CJEU in respect of the European Insolvency Regulation (EIR) even though the consequences of recognition under the EIR are far more significant.<sup>45</sup> These consequences extend not merely to jurisdiction but also to important matters of substance. The EIR contains mandatory uniform rules on jurisdiction and conflict of laws and, to that extent, represents an encroachment on the sovereignty of individual Member States. The EIR emanates from the EU whose Member States have agreed to pool their sovereignty and agreed to work towards an ever-closer Union<sup>46</sup> whereas UNCITRAL is a UN organ where the link between Member States is profoundly more diffuse. The Model Law is much looser in tone and does not purport to say which law should govern insolvency proceedings that are opened in a particular jurisdiction. Moreover, recognition of insolvency proceedings opened in another EU Member State under the EIR is automatic whereas under the Model Law it is dependent upon an application to the court. By virtue of the EIR, insolvency proceedings have the same effect in other EU

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<sup>44</sup> [2010] BPIR 679 at para 152. See now Re Kaupthing [2020] EWHC 836 and also G McCormack “Reconstructing European Insolvency Law” (2010) 30 *Legal Studies* 126 at 129–133 and the articles listed in the footnotes to those pages.

<sup>45</sup> See S Shandro “A plea for amendment of Chapter 15” (2009) 28 *American Bankruptcy Institute Journal* 48.

<sup>46</sup> See Article 1 of the Treaty on European Union as amended by the Treaty of Lisbon which entered into force on 1 December 2009 refers to the Treaty marking “a new stage in the process of creating an ever closer union among the peoples of Europe”.



states as they have in the law of the insolvency forum whereas under the Model Law the consequences of recognition depend partly on the law of the recognising State.

But one could argue that, given the more far-reaching consequences of recognition under the EIR, there is a case for a more “certain” test of COMI and attaching greater weight to the presumption provides at least the illusion of greater certainty. The fact that COMI under the EIR and under the Model Law share a common history does not necessarily signify that the meaning under the two instruments is identical.<sup>47</sup> COMI is certainly capable of a spectrum of interpretation and, to give greater flesh to the concept in a particular legislative context, one has to look to the purpose and setting of the legislation in question. It has been suggested that the COMI spectrum should be refracted and administered through the prism of legislative purpose but the court in Stanford in equating COMI under the two instruments paid insufficient regard to the different functions served by the EIR and the Model Law. If one is concerned with exclusive jurisdiction to open insolvency proceedings, then creditors need to be able to assess with reasonable certainty the insolvency risks associated with a particular debtor before extending credit, and the debtor’s directors need to be able to assess with reasonable certainty the location of COMI before giving a warranty to creditors that the debtor’s COMI will be maintained in a particular jurisdiction,

#### Protection of creditors and other interested parties

Under the Model Law, as well as under the CBIR and Chapter 15, certain consequences follow automatically from the recognition of foreign main proceedings. There are no such automatic consequences from the recognition of foreign non-main proceedings though similar relief is available on a discretionary basis. Whether the foreign proceedings are ‘main’ or ‘non-main’, Model Law Article 21 allows additional relief to be provided on a discretionary basis and this additional relief can take the form of –

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<sup>47</sup> See generally Look Chan Ho “Cross-border fraud and cross-border insolvency: Proving COMI and seeking recognition under the UK Model Law” (2009) 24 *Journal of International Banking and Financial Law* 537

- (1) extending the stay, or suspension of the right to transfer assets, beyond the extent envisaged by domestic insolvency law.
- (2) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;
- (3) entrusting the administration or realisation of all or part of the debtor's assets to the foreign representative or another person designated by the court;
- (4) extending interim relief;
- (5) granting any further relief that might be available to an insolvency office holder in domestic proceedings.

Insofar as the consequences of recognition of foreign insolvency proceedings are discretionary, the content of the insolvency law in the foreign state may be one of the factors that help to shape the exercise of the court's discretion. This discretion is left largely unfettered though Article 22 tries to fill in some of the blanks by stating that the interests of the creditors and other interests of persons are adequately protected. Furthermore, the court may subject the relief to appropriate conditions, or modify or terminate it in suitable cases.

A particularly strong form of relief is to entrust the distribution of "local" assets to the foreign representative though even this possibility is catered for in Article 21(2), which in turn opens up the possibility that a foreign representative might be able to distribute realisations of local assets on a basis different from that applying under local insolvency law though creditors should be "adequately protected".<sup>48</sup> Both the CBIR and Chapter 15 give effect to the provisions of the Model Law in this respect though with some adjustments to take account of local exigencies. For instance the US congressional report refers to changes to conform to US linguistic usage and to US law. But potentially the most significant change arises from the fact that the word "adequately" in the Model Law has been changed to "sufficiently" in sections 1521(b) and 1522(a). This has been explained as avoiding "confusion with a very

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<sup>48</sup> See generally K Yamauchi "The UNCITRAL Model Cross-Border Insolvency Law: The Stay of Proceedings and Adequate Protection" (2004) 13 International Insolvency Review 87.

specialized legal term in United States bankruptcy”.<sup>49</sup> The CBIR sticks with the usage of “adequate protection”.

“Adequate protection” is used in s 361 of the US Bankruptcy Code with reference to the situation where a secured creditor seeks relief from the automatic stay that kicks in once bankruptcy proceedings have been commenced. The secured creditor may be concerned that the secured assets will lose value during the period of bankruptcy protection. “Adequate protection” is not defined and it appears that the concept was left deliberately vague so as to facilitate “case-by-case interpretation and development. It is expected that the courts will apply the concept in light of [the] facts of each case and general equitable principles”.<sup>50</sup> In s361 three examples of “adequate protection” are given – periodical payments to the creditor; a replacement security interest on substitute property or something that is the “indubitable equivalent” of these. Indubitable equivalent is also not defined<sup>51</sup> but it appears to equate to something that has the same economic value to the creditor; for example, a guarantee of repayment from somebody of unimpeachable financial standing such as Bill Gates or Warren Buffet.

In the UK, Article 21(2) of the Model Law was applied in Re SwissAir<sup>52</sup> which concerned a company incorporated in Switzerland that carried on business as Switzerland’s principal international airline. The company had also established a branch office in the UK where it had acquired assets and incurred liabilities. It went into liquidation in both Switzerland and the UK and the court held that it has power to

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<sup>49</sup> See fn 7 at para 115. It seems that American delegates to the Insolvency Working Group sought to exclude the term “adequate protection” because of the concept’s rich history and “conceptual baggage” see Yamauchi (2004) 13 International Insolvency Review 87 at 89 n 12.

<sup>50</sup> See HR Rep No 595, 95th Congress, 1st Session 339 (1977) and see also Re Alyucan Interstate Corp (1981) 12 BR 803 at 805: “Adequate protection is not defined in the Code. This omission was probably deliberate. Congress was aware of the turbulent rivalry of interests in reorganization. It needed a concept which would mediate polarities. But a carefully calibrated concept, subject to a brittle construction, could not accommodate the ‘infinite number of variations possible in dealings between debtors and creditors’ ....This problem required not a formula, but a calculus, open textured, pliant, and versatile, adaptable to new ideas which are ‘continually being implemented in this field and varying circumstances and changing modes of financing.’”

<sup>51</sup> But see Learned Hand J in Re Murel Holding Corp (1935) 75 F2d 941.

<sup>52</sup> [2009] BPIR 1505.

order the remittal of assets collected by the UK liquidator to Switzerland. Under Swiss law certain liabilities were given preferential status in liquidation but more than enough assets had been realised in Switzerland to pay such liabilities in full. Other claims would be satisfied on a pari passu basis and the assets remitted would be distributed on this basis. Consequently, the interests of creditors in the UK were adequately protected and the remittal order was fully consistent with the UK liquidation.

The judge in Re SwissAir referred to the decision of the House of Lords in Re HIH Casualty and General Insurance Ltd<sup>53</sup> and said there was nothing in that decision that prohibited remittal of assets to a foreign jurisdiction where the foreign law provided for pari passu distribution. HIH concerned transfer of assets to an Australian liquidator pursuant to a request from an Australian court for assistance under s 426 Insolvency Act 1986. This section allows a UK court in insolvency cases to respond to requests from assistance from designated countries and, in responding to requests, the court may apply either UK law or the law of the requesting foreign State. In an Australian liquidation the remitted assets would be distributed on a different basis from that in UK liquidation to the disadvantage of certain creditors. In particular, insurance creditors enjoyed a certain priority under Australian law that they lacked in the UK, though UK law had since been amended to bring it into line with the Australian position. The House of Lords took the view that there was nothing inherently contradictory to public policy in the Australian position and therefore ordered the transfer of assets pursuant to the statutory request. Lord Hoffmann went further and was prepared to order the remittal of assets on the basis of common law discretion. He suggested that the principle of universalism - that main insolvency proceedings should cover all the assets of the debtor worldwide - was deep rooted in the common law. In his view, the courts should give effect to the principle in this case since principal insolvency proceedings were taking place in Australia and the UK liquidation was only an ancillary one. The power to remit assets was not confined to cases where foreign law coincided with English law for this would serve no purpose except occasional administrative convenience.

But a majority of the House of Lords did not go along with this view. Lord Neuberger, for instance, said that the power to remit assets derived exclusively from

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<sup>53</sup> [2008] 1 WLR 852.

statute where the distribution would not be in accordance with the UK insolvency regime. While the Model Law and the CBIR was not directly addressed in the House of Lords, the overall tenor of the remarks from Lord Neuberger seems to require of the “adequate protection” proviso a scheme of insolvency distribution that conforms to the UK pattern. The Model Law was considered however by the Court of Appeal in the case<sup>54</sup> though the court did stress that this was not the occasion in which to determine what degree of protection would be “adequate”. In general however, the court seemed sympathetic to the view that absent specific statutory backing “... in an English liquidation of a foreign company, [it]... has no power to direct the liquidator to transfer funds for distribution in the principal liquidation, if the scheme for *pari passu* distribution in that liquidation is not substantially the same as under English law.”

It was prepared however to see some qualifications to this general statement of principle with Morritt VC stating:

“There may be circumstances in which it is for the benefit of the creditors that a transfer should be made, notwithstanding that their interests in the liquidation in England, when viewed in isolation would be adversely affected. For example, the savings in cost by avoiding duplication may offset any reduction in prospective dividend. Similarly a loss of priority may be sufficiently offset by an increase in the pool available for distribution to those whose priority was changed. The admission of further creditors may be offset by an increase in the pool available for distribution to that class of credit”.

It may be that the concept of “sufficient protection” under Chapter 15 allows greater leeway for the transfer of US based assets to a foreign liquidator to be distributed in accordance with the relevant foreign law. In fleshing out the notion of “sufficient protection” a US court might have regard to s 1507 which incorporates the old comity criteria set out in former s 304 and the case law under the old s 304.<sup>55</sup> Section 1507

<sup>54</sup> [2007] 1 All ER 177 at paras 18-22 and 53-54 and for discussion at first instance see [2006] 2 All ER 671 at paras 147-154.

<sup>55</sup> For the classic definition of comity in the US context see *Hilton v Guyot* (1895) 159 US 113 at 163-164 where the Supreme Court commented that the “laws of every nation are limited by their own sovereignty and cannot extend beyond its jurisdiction” and went on to state: “‘Comity,’ in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the *recognition* which one nation allows within its territory to the legislative, executive, or judicial act of another nation, having due regard both to international duty and

refers to additional assistance, consistent with the principles of comity, that will reasonably assure — 56

“(1) just treatment of all holders of claims against or interests in the debtor’s property;  
 (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;  
 (3) prevention of preferential or fraudulent dispositions of property of the debtor;  
 (4) distribution of proceeds of the debtor’s property substantially in accordance with the order prescribed by this title”.

It has been argued that, read literally, s 304 clearly limited the authority to surrender US assets to situations in which a foreign court would distribute them in substantially the same way that a US court would. Some bankruptcy judges however, interpreted s 304 in a broader way as authorising the turnover of assets to foreign courts so long as the foreign country had a bankruptcy law “of the same sort generally” as that in the US.<sup>57</sup> For instance in Re Blackwell<sup>58</sup> it was held that s 304 did not require effective congruence between the foreign distributional scheme and that obtaining under US law. It said that “[the] problem with such an approach is that every country has its own scheme of priorities, reflecting local public policy choices that may or may not be shared by other countries. One country may give priority to internal tax claims, priming even secured lenders. Yet a third may give special treatment to social claims enforced by governmental entities. Were one to insist on congruence, it is doubtful that any court would ever find it appropriate to grant relief under [s 304].... Congress can be fairly presumed to have been familiar with the wide variety of distributional schemes worldwide. Its provision should not therefore be construed to effectuate an

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convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws”.

<sup>56</sup> The US congressional report suggests (see fn 7 at para 109) that s 1507 is only concerned with additional assistance beyond that contemplated by Articles 19-21, rather than with the application of Article 21, but this limitation does not appear on the face of the provision and it is arguable that it should not be so limited.

<sup>57</sup> JL Westbrook “A Global Solution to Multinational Default” (2000) 98 Michigan Law Review 2276 at 2324–25 requiring only that “the foreign [bankruptcy] law be of the same sort generally as ours” and see also JL Westbrook “Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum” (1991) 65 American Bankruptcy Law Journal 457 at 484.

<sup>58</sup> (2001) 270 BR 814 and see also Re Culmer (1982) 25 BR 621 (ordering surrender of assets to a Bahamian bankruptcy court that would distribute them differently than the United States would have).

intent clearly at odds with structure and overall purpose of s 304 – to provide a mechanism for cooperation with foreign proceedings.”

In Re Treco<sup>59</sup> a US Appeals Court adopted a stricter interpretation however. The case concerned funds in a US bank account which Bahamian liquidators sought to have remitted to the Bahamas. If the funds remained in the US they would be used to pay secured creditors but if they were remitted to the Bahamas, the Bahamian court would use them to pay administrative expenses in the bankruptcy case—essentially, the fees of the liquidators. Under Bahamian law administrative expenses had priority over secured creditors and in this particular case the fee disbursements were particularly generous by US standards. According to the Appeals Court s 304 called for a fact-specific analysis - the issue was not whether the foreign law was sufficiently similar to the US law but whether the money surrendered in this case would be distributed in substantially the same way.<sup>60</sup> The facts of Treco are somewhat extreme however with almost the entire secured claim eaten away by general administrative expenses. This suggests that the pronouncements in the case should be read with these unusual facts in mind.

### **Additional assistance**

According to Article 7 the Model Law is intended to provide only threshold levels of assistance and States are free to supplement this by providing additional assistance to a foreign insolvency representative. Para 90 of UNCITRAL’s Guide to Enactment of the Model Law explains that the purpose of the Model Law is not to displace provisions in national legislation to the extent that they provide assistance that is additional to, or different from, the type of assistance dealt with in the Model Law. The UK has stayed faithful to this purpose. In implementing the Model Law through the CBIR it was decided to avoid making any changes to s 426 Insolvency Act 1986, which allows UK courts to respond to requests for assistance in insolvency matters

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<sup>59</sup> Re Treco (2001) 240 F 3d 148.

<sup>60</sup> See the later case Re Board of Directors of Multicanal SA (2004) 314 BR 486 at 506 stating that s 304 does not “require that a distribution in a foreign proceeding match the distribution that would be available in a hypothetical US case or that US creditors receive the precise recovery or treatment to which they would be entitled under chapter 11”.

from foreign courts in designated countries.<sup>61</sup> The UK Court, in responding to the request, can apply UK or the relevant foreign insolvency law. In practice only a relatively small number of countries have been designated for the purposes of s 426 and these appear to have been chosen because of their analogous common law background. Section 426 continues to operate and it would be open to a foreign insolvency representative in a designated country to ask his local court to make a ‘section 426’ request for assistance. As a result of the CBIR, the UK has essentially three statutory regimes for international co-operation in insolvency matters – the EC Regulation on Insolvency Proceedings, the UNCITRAL Model Law and s 426 of the Insolvency Act 1986 plus the common law to the extent that it has not been superseded in relation to particular matters.

In the US, however, it has been held that Chapter 15 is the sole gateway for a US court to provide assistance to a foreign court and there is no residual common law discretion. The leading case is Re Bear Stearns<sup>62</sup> where it was held that the Cayman liquidation of a structured investment vehicle was not entitled to recognition in the US as either “foreign main proceedings” or “foreign non-main proceedings”. On the facts it was held that the statutory presumption that the COMI was in the Caymans, being the place of incorporation, was rebutted by contrary evidence. It was also held that the Cayman liquidation did not qualify as a “foreign non-main proceeding”, owing to a failure to show that the investment vehicle had any place of operations in Cayman where it carried out “non-transitory economic activity”. More controversially, it was observed that Chapter 15 heralded a shift from a subjective comity-based process under earlier bankruptcy law to a more rigid recognition standard.

Critics have questioned how these observations are consistent with the goals of the Model Law. The Bear Stearns case effectively holds that Chapter 15 is narrower than its predecessor: s 304. One might also query the Janus-faced nature of US bankruptcy law as revealed by this decision. US bankruptcy proceedings may be commenced in respect of a foreign-registered company under s 109 of the Bankruptcy Code on a

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<sup>61</sup> See UK Insolvency Service “Implementation of UNCITRAL Model Law on Cross-Border Insolvency in Great Britain” ((2005) at paras 41, 42.

<sup>62</sup> (2007) 374 BR122: case confirmed on appeal. See G Moss ‘Bitter pill delivered by Judge Sweet’ (2008) *Insolvency Intelligence* 118–21.



broad jurisdictional base including the presence of assets within the US.<sup>63</sup> There is no need to show the existence of a US “centre of main interests” or even a US “establishment” but if foreign insolvency proceedings were instituted on this broad-reaching basis, then they would not be recognised in the US under Chapter 15. It may be that the Bear Stearns decision was motivated by concerns about the nature of the Cayman proceedings but arguably such concerns could have been dealt with by limiting the effect of recognition. Moreover, both the Model Law and Chapter 15 are subject to a public policy caveat. A US court is not precluded from refusing assistance where assistance would be manifestly contrary to US public policy though use of the adverb ‘manifestly’ indicates that the public policy exception should be interpreted restrictively and it should only be invoked in situations that are considered to be of fundamental importance.

Re SPhinX<sup>64</sup> in a sense tried to smuggle the old comity-based principles of recognition back into Chapter 15 suggesting that while the determination of COMI depended on a number of objective factors it should reflect the flexibility of the former s 304 in terms of the “principles of international comity and respect for the laws and judgments of other nations”.<sup>65</sup> Judge Drain referred to what he called the “flexibility inherent in chapter 15”. In the light of this, he said that the court should not apply “the objective factors mechanically” instead viewing them in the context of Chapter 15’s emphasis on protecting the reasonable interests of parties in interest pursuant to fair procedures and the maximization of the debtor’s value. Accordingly, he said that the court should generally defer to the creditors’ acquiescence in or support of a proposed COMI.<sup>66</sup>

This view was firmly disapproved of in Re Bear Stearns. It has also been criticised by some of those involved in the drafting of Chapter 15 as deviating from the Chapter’s structure. Under the Chapter foreign proceedings were eligible for recognition only if they met the definitional requirements of either a foreign main proceeding or a foreign

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<sup>63</sup> For cases involving the Colombian national airline Avianca and the leading Russian oil company Yukos see In re Aerovias Nacionales de Colombia SA (2003) 303 BR 1 and In re Yukos Oil Co (2005) 321 BR 396.

<sup>64</sup> (2006) 351 BR 103 and affirmed (2007) 371 BR 10.

<sup>65</sup> (2006) 351 BR 103 at 112.

<sup>66</sup> (2006) 351 BR 103 at 117-118.

nonmain proceeding and there can be no recognition without the concomitant determination that the proceedings qualified under either of these categories.<sup>67</sup>

Distinguished UK based practitioners have argued that there is a serious lacuna if Chapter 15 is construed as the only mode of seeking assistance in the US for foreign insolvency proceedings.<sup>68</sup> They argue that it would not do any violence to the language of the statute to hold that Chapter 15 is not exclusive since it does not expressly purport to be. Therefore there is room for a residual common law discretion to recognise foreign insolvency proceedings along the lines articulated by the Privy Council in the Cambridge Gas case.<sup>69</sup>

This argument however, while conforming to the Model Law objectives, is clearly out of line with Chapter 15's legislative history and its arrangement of provisions. In the UK, when the Model Law was enacted in the form of the CBIR, the possibility of repealing s 426 of the Insolvency Act was considered and rejected. Article 7 of the Model Law was translated verbatim into the CBIR. In the US, on the other hand, the new s 1507 clearly makes the provision of any additional assistance to a foreign insolvency representative contingent on the foreign proceedings satisfying the criteria for recognition under Chapter 15 in the first place. One judicial commentator has spoken of Chapter 15 as "a series of carefully crafted compromises".<sup>70</sup> These compromises were said to include "a specific definition of what constitutes a foreign proceeding, a definition of foreign representative sufficiently broad to accommodate proceedings similar to the U.S. Chapter 11 debtor-in-possession model, a simplified procedure for proving up a foreign representative's authority to act... and a mechanism for recognition designed to promote speed". If one acknowledged common law discretion to render assistance to foreign insolvency proceedings, notwithstanding the fact that the Chapter 15 recognition criteria had not been

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<sup>67</sup> D Glosband "SPhinX Chapter 15 Opinion Misses the Mark" (2006) 25 American Bankruptcy Institute Journal 44. See also JL Westbrook "Locating the Eye of the Financial Storm" (2007) 32 Brooklyn Journal of International Law 1019.

<sup>68</sup> See for example G Moss "Beyond the SphinX – Is Chapter 15 the Sole Gateway?" (2007) 20 Insolvency Intelligence 56;

<sup>69</sup> [Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors of Navigator Holdings Plc](#) [2007] 1 AC 508.

<sup>70</sup> Judge Leif Clark "'Centre of Main Interests' Finally Becomes the Center of Main Interest in the Case Law" (2008) 43 Texas International Law Journal Forum 14 at 17.

satisfied, then this would undermine the “carefully crafted compromises” at the heart of Chapter 15 and run counter spirit of the legislation.

## **Conclusion**

The UNCITRAL Law is designed to lead to greater efficiencies in the administration of cross-border insolvencies thereby maximising the value of the debtor’s estates with knock-on benefits for those interested in the estate including creditors and employees. Its architects have hailed it as a modest first step<sup>71</sup> but critics have complained that it may lead to more asset-grabbing by forum shopping multinationals.<sup>72</sup> This criticism is overstated. Insolvency is undoubtedly a controversial business because at its heart lies the distribution of assets. Different jurisdictions may assign different weights and values to different considerations in the asset distribution process dependent upon their view as to social and economic policies. But the Model Law is sensitive to national policy concerns in a number of respects. There is a public policy exception in Article 6, and under Article 21(2) before authorising the handover of assets to a foreign insolvency representative the court must be satisfied that the interests of local creditors are adequately protected

The Model Law however is unlikely to achieve much my way of international coordination of insolvency proceedings if the manner of implementation or mode of interpretation varies greatly across countries. In implementation, both the US and UK have stayed broadly speaking close to the contours of the Model Law but there have been some changes of language to accommodate national drafting styles as well as the local legislative landscape.<sup>73</sup> In the US these terminological alterations may also have substantive effects though it is as yet unclear what the reference to “sufficient protection” of creditors in Chapter 15, as distinct from “adequate protection” in the Model Law portends. The effect of one alteration is clear however. The drafting of the new s 1507 suggests that Chapter 15 is now the sole gateway in the US for

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<sup>71</sup> See, e.g., A Berends “UNCITRAL Law on Cross-Border Insolvency: A Comprehensive Overview” 1998) 6 *Tulane Journal of International and Comparative Law* 309; JL Westbrook “Chapter 15 at Last” (2005) 79 *American Bankruptcy Law Journal* 713.

<sup>72</sup> See, e.g., L LoPucki “Global and Out of Control?” (2005) 79 *American Bankruptcy Law Journal* 79.

<sup>73</sup> For greater variance in implementation in Canada see J Sarra “Northern Lights, Canada’s Version of the UNCITRAL Model Law on Cross-Border Insolvency” (2007) 16 *International Insolvency Review* 19.

providing assistance to a foreign insolvency representative but, contrary to the wishes of some commentators, this substantive change has come about as a result of conscious legislative choice.

The US courts also appear to have differed from their UK counterparts in the interpretation of the “centre of main interests” or COMI concept, but this is hardly surprising. Firstly, COMI is such a malleable notion that inter-jurisdictional or indeed intra-jurisdictional fluctuations or variations of interpretation are hardly surprising. Secondly, for understandable though controvertible reasons, the UK courts have chosen to apply the same interpretation of COMI under the Model Law as that under the European Insolvency Regulation (EIR). In respect of the latter, UK courts are obliged to follow CJEU rulings and, on the EIR, the European Court has handed down a judgment that owes much to the distinctive position of COMI within the European firmament as well as the particular questions it was asked to decide by the court of an EU member state. US courts, of course, face no such constraints. While US courts have been faithful to the injunction expressed in Article 8 of the Model Law to bear in mind its international character and the desirability of a uniform interpretation, it is hardly surprising that they should not follow a view of COMI that is dictated by specifically European concerns.

## **APPENDIX 1**

### **Constitution of the Centre for Business Law and Practice**

#### **1. Objectives**

The objectives of the Centre are the promotion of research and teaching in all aspects of business law and practice, including but not limited to the interaction between legal rules and business practice. These objectives may, where appropriate, be pursued through links with other constituent parts of Leeds University or departments or centres within other Higher Education Institutions, as well as through links with businesses and professions in Leeds and elsewhere.

#### **2. Membership**

2.1 Any member of the academic or research staff of the Department of Law or the Leeds University Business School may be a member of the Centre.

2.2. Other individuals, whether members of the University or not, may be appointed to membership of the Centre by the University Council on the nomination of the Executive Committee.

2.3 Institutions or firms may become associate members of the Centre if they fulfil the conditions established in by-laws made from time to time by the Executive Committee of the Centre.

#### **3. Administration**

3.1 The Centre shall be administered by a Director and an Executive Committee.

3.2 The Director shall be appointed by the University Council on the nomination of the Head of the Department of Law after consultation with the members of the Centre. S/he shall hold office normally for a period of three years and shall be eligible for immediate re-appointment.

3.3 The Director shall be responsible to the Executive Committee for the running of the Centre and the representation of its interests. The Director shall have regard to the views and recommendations of the Executive Committee and the Advisory Committee. The Director may be assisted by a Deputy Director or Directors appointed by the Executive Committee normally for a period of three years. Any Deputy Director so appointed shall be a member ex officio of the Executive Committee.

3.4 The Executive Committee shall consist of the Director and any Deputy Director together with the Head of the Department of Law, two representatives of the Leeds University Business School and up to three nominated members of whom not more than two may be members of the teaching staff of the Department of Law. The Executive Committee shall have power to co-opt up to two) additional members. Nominated and co-opted members shall be appointed normally for two years and shall be eligible for immediate re-appointment.

3.5 The Executive Committee shall meet as often as necessary to carry on the work of the Centre, but in any event at least twice a year, the Director acting as convenor. Any member of the Executive Committee shall have the right to require the holding of a meeting of the Committee.

3.6. Minutes of the meetings of the Executive Committee shall be presented to the following Staff Meeting of the Department of Law.

3.7 There shall be an advisory Committee appointed by the Executive Committee which shall formulate advice and recommendations concerning any aspect of the administration or activities of the Centre. The Advisory Committee shall consist of:

- (a) all members of the Executive Committee;
- (b) up to three members of the teaching staff of the University of Leeds in departments other than Law, being individuals whose activities or interests have relevance to the objectives and work of the Centre;
- (c) up to fifteen persons from outside the University of Leeds with experience in the fields of activity covered by the objectives and work of the Centre.

3.8 The Executive Committee may also nominate up to ten persons to act as Advisers to the Centre. Advisers shall be persons who agree to offer advice on the work of the Centre at the invitation of the Executive Committee

3.9 The Advisory Committee shall meet once a year with the Director acting as convenor. Special Meetings may be held at the request of the Executive Committee.

#### **4. Amendment to the Constitution**

This constitution may be amended by the University Council (or any committee acting with authority delegated by the Council) on the recommendation of the Department of Law and the Executive Committee of the Centre.

**APPENDIX 2****OFFICERS OF THE CENTRE****Director :**

Joan Loughrey

**Executive Committee:**

Sarah Brown

Andrew Campbell

Judith Dahlgreen

Michael Galanis

Oliver Gerstenberg

Professor Roger Halson

Professor Andrew Keay

Paul Lewis (Leeds University Business School)

Joan Loughrey

Professor Gerry McCormack

Professor Surya Subedi