BANKRUPTCY FORUM SHOPPING: THE UK AND US AS VENUES OF CHOICE FOR FOREIGN COMPANIES

GERARD MCCORMACK*

Abstract This paper critically evaluates 'forum shopping' possibilities offered by the UK and US in bankruptcy/insolvency cases. While recognizing that in some quarters forum shopping has a bad name, the paper makes the point that strategic manoeuvring and transaction planning is what litigation and case management is all about. Certain countries are popular as forum shopping venues because of substantive law or the procedural advantages brought about by litigating in that country. The paper concludes that while the UK may have shut its doors too firmly against foreign forum shoppers, the US is too much a safe haven. The paper calls for a measure of jurisdictional restraint through raising entry barriers. While a bit of jurisdictional competition in insolvency law-making may be no bad thing, the US approach runs the risk of undermining important policies considered important by other countries such as the protection of employees and the public purse. It is also asymmetrical in that US bankruptcy jurisdiction is assumed in situations where, if foreign countries had acted on a similar basis, US recognition of the foreign proceedings would be denied.

Keywords: comparative law, forum shopping, international insolvency, United Kingdom, United States.

In some quarters, forum shopping in general and insolvency forum shopping in particular has a bad name. For present purposes, insolvency forum shopping may be defined as the movement of assets from one country to another so as to take advantage of a more favourable legal position.[1] But strategic manoeuvring and transaction planning is what litigation and case management is all about. Parties to a case can hardly be expected to rest content with an unfavourable legal position. Certain countries are popular as forum shopping venues for insolvency cases. This may because of the substantive law in a particular country or else the procedural advantages brought about by litigating a case in that country. Despite the quality of the substantive goods or service supplied in a particular country, the country may be off limits to foreign litigants, however.[2]

* Director of the Centre for Business Law and Practice, University of Leeds, g.mccormack@leeds.ac.uk.

[1] See the European Insolvency Regulation: Reg 1346/2000 recital 4 of the preamble.

[2] See generally AC Bell, *Forum Shopping and Venue in Transnational Litigation* (OUP 2003) which argues that so long as different forums provide for the possibility of different outcomes in the

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The barriers to entry may be too difficult to surmount. This paper critically evaluates the forum shopping possibilities offered by both the UK and US in corporate bankruptcy cases.[3] It looks at both the demand side of the equation—why the UK and US are attractive to foreign forum shoppers—and also the supply side—the extent to which the insolvency jurisdiction of the UK and US is open to foreign companies. The paper has very much a US/UK focus and does not address directly forum shopping possibilities offered in an EU context by the Regulation on Insolvency Proceedings. This matter has been extensively covered elsewhere.[4]

The paper consists of six sections. The first section considers the goals of insolvency law; where insolvency jurisdiction should be exercised, and forum shopping in general. The second section addresses why the UK and US may prove attractive as forum shopping venues in insolvency cases. The third section considers jurisdictional thresholds for foreign companies making insolvency filings in the UK. In this connection a distinction is drawn between liquidation and restructuring proceedings. The fourth section addresses the situation in the US. The fifth section considers the impact of the UNCITRAL Model Law on Cross-Border Insolvency on this area and the final section concludes. The message is that while the UK may have shut its doors too firmly against foreign forum shoppers, the US is too much a safe haven. The paper calls for a measure of jurisdictional restraint through raising entry barriers. While some jurisdictional competition in insolvency law-making may be no bad thing, the US approach runs the risk of undermining important policies held dear by other countries. It is also asymmetrical in that US bankruptcy jurisdiction is assumed in situations where, if foreign countries had acted on a similar basis, US recognition of the foreign proceedings would be denied.

I. THE GOALS OF INSOLVENCY LAW, EXERCISING INSOLVENCY JURISDICTION AND FORUM SHOPPING

A. Insolvency Law Goals

Insolvency law is intended to provide for the orderly winding up of person's affairs—a means for the more efficient collection of the debtor's assets and their distribution to creditors. Lord Hoffmann in the *Cambridge Gas* case described it as a form of collective execution against the property of the debtor

resolution of any given dispute, litigation about where to litigate is inevitable. This book 'examines the fascinating competition to win the battle for venue in transnational litigation'.

[3] In this paper the expressions 'bankruptcy' and 'insolvency' and their affiliates are used interchangeably.

[4] See generally M Szydlo, 'Prevention of Forum Shopping in European Insolvency Law' (2010) 11 EBOR 253; W-G Ringe, 'Forum Shopping under the EU Insolvency Regulation' (2008) 9 EBOR 579; G McCormack, 'Jurisdictional Competition and Forum Shopping in Insolvency Proceedings' (2009) 68 CLJ 213.

by creditors whose rights are admitted or established.[5] The formal insolvency process minimizes collection costs and also helps to maximize the overall pool of assets by stopping a series of individual executions of creditors against debtor assets that may deplete general asset values. In this respect, insolvency law helps creditors as a collective class.[6] But insolvency law also furthers other goals.[7] In its rescue and restructuring provisions, insolvency law may help a debtor get back on its feet through a moratorium on collection efforts by creditors. This gives the debtor or its insolvency representatives the opportunity of putting into operation a business rescue plan. Successful implementation of a rescue plan should bring direct and indirect benefits to so-called stakeholders in the debtor's business through increased goodwill and revenue-generating capacity. Those benefited include employees, consumers of the debtor's products and the local community where the debtor's operations are based.[8]

Different countries may put different emphases on different aspects of insolvency law.[9] For example, some countries may place the emphasis entirely on liquidation and have no mechanism in place for formal business restructuring. But the recent emphasis is the other way and proposals by the European Commission for reform of the European Insolvency Regulation recognize a shift within Europe from liquidation proceedings to restructuring proceedings.[10] There are different views on whether the optimum use of assets can be achieved by selling off a business to the highest bidder as distinct from trying to negotiate a restructuring within the existing corporate framework.[11]

[5] *Cambridge Gas Transport Corporation v Official Committee of Unsecured Creditors (of Navigator Holdings Plc* [2006] UKPC 26; [2007] 1 AC 508 at paras 14–15.

[6] For 'creditors' bargain' and 'procedural' approaches towards bankruptcy law see TH Jackson, *The Logic and Limits of Bankruptcy Law* (Harvard University Press 1986) and CW Mooney, 'A Normative Theory of Bankruptcy Law: Bankruptcy As (Is) Civil Procedure' (2004) 61 Wash&LeeLRev 931.

[7] See generally V Finch, 'The Measures of Insolvency Law' (1997) 17 OJLS 227; A Keay, 'Insolvency Law: A Matter of Public Interest?' (2000) 51 NILQ 509 and for a rights-oriented perspective see RJ Mokal, 'The Authentic Consent Model: Contractarianism, Creditors' Bargain and Corporate Liquidation' (2001) 21 LS 400. See also D Korobkin, 'Rehabilitating Values: A Jurisprudence of Bankruptcy' (1991) 91 ColumLRev 717; L Lopucki, 'A Team Production Theory of Bankruptcy Reorganization' (2004) 57 VandLRev 741.

[8] See generally E Warren, 'Bankruptcy Policymaking in an Imperfect World' (1993) 92 MichLRev 336.

[9] See C Paulus, 'Global Insolvency Law and the Role of Multinational Institutions' (2007) 32 BrooklynJIntlL 755; S Block-Lieb and T Halliday, 'Harmonization and Modernization in UNCITRAL's Legislative Guide on Insolvency Law' (2007) 42 TexIntlLJ 481 and also T Halliday 'Legitimacy, Technology, and Leverage: The Building Blocks of Insolvency Architecture in the Decade Past and the Decade Ahead' (2006) 32 BrooklynJIntlL 1081.

[10] See 'Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings' COM(2012) 744 final at 3. For a critical overview see H Eidenmuller, 'A New Framework for Business Restructuring in Europe: The EU Commission's Proposals for a Reform of the European Insolvency Regulation and Beyond' (2013) 20 MJ 133.

[11] On different conceptions of corporate rescue see V Finch, 'Corporate Rescue: A Game of Three Halves' (2012) 32 LS 302; 'Corporate Rescue in a World of Debt' (2008) JBL 756.

Opinions differ on the extent to which a company should be allowed to ignore or set aside existing contractual commitments during the insolvency process. For instance, the US Bankruptcy Code allows a bankrupt debtor to assume or reject executory contacts; in effect to cherry-pick the most profitable contracts and to disregard the others.[12] There is no general equivalent in the UK though section 233 of the Insolvency Act prevents certain utility suppliers from insisting upon payment of arrears as a condition of further supplies to insolvent debtors. There is nothing, however, to prevent suppliers from altering the terms of supply and increasing tariff payments and this has led to provisions, as yet unimplemented, for reform of the section.[13]

The priority given to secured credit, whether secured creditors are subject to a bankruptcy or restructuring moratorium and whether secured creditors can be forced to 'buy in' to a restructuring plan against their wishes, are also areas where national differences in insolvency law remain pronounced. For instance, Recital 11 of the preamble to the EU Insolvency Regulation[14] acknowledges that as a result of widely differing substantive laws it was not practical to introduce insolvency proceedings with universal scope throughout the entire EU. While Recital 25 concedes that security rights are of considerable importance for the granting of credit, Article 5 of the Regulation largely immunizes secured creditors from the consequences of the opening of insolvency proceedings.[15]

Insolvency laws differ on the extent to which there is an investigation of the causes of the company's financial difficulties and whether company management can he held personally responsible for these failings. Moreover, there are different ideas about whether and under what circumstances pre-insolvency transactions may be set aside at the instigation of an insolvency administrator and the respect given to the policy of ensuring the security of transactions.[16] The treatment of employees in insolvency, whether it is in the context of continuation of employment or pensions, is another important area of difference.[17] For instance, in the UK the Pensions Act sets out a particular

[12] Section 365 US Bankruptcy Code and see generally J Fried, 'Executory Contracts and Performance Decisions in Bankruptcy' (1997) 46 DukeLJ 517; G Triantis, 'The Effects of Insolvency and Bankruptcy on Contract Performance and Adjustment' (1993) 43 UTLJ 679; JL Westbrook, 'A Functional Analysis of Executory Contracts' (1989) 74 MinnLRev 227.

[13] Enterprise and Regulatory Reform Act 2013 sections 92 and 93. See generally the campaign by R3, the Association of Business Recovery Professionals, for reform of section 233 <http://www.r3.org.uk/media/documents/policy/policy_papers/corporate_insolvency/Holding_rescue_to_ransom.pdf>.

[14] Regulation 1346/2000.

[15] It provides that the 'opening of insolvency proceedings shall not affect the rights in rem of creditors' in respect of assets that are situated in a State other than the State of the opening of the insolvency proceedings. See generally P Smart, 'Rights In Rem, Article 5 and the EC' (2006) 15 IIR 18; L Clark and K Goldstein, 'Sacred Cows: How to Care for Secured Creditors' Rights in Cross-Border Bankruptcies' (2011) 46 TexIntlLJ 513.

[16] See generally G McCormack, 'Conflicts, Avoidance and International Insolvency 20 years On: A triple Cocktail' (2013) JBL 141.

[17] See *Powdrill v Watson* [1995] 2 AC 394 and generally S Deakin and A Koukiadaki, 'Capability Theory, Employee Voice, and Corporate Restructuring: Evidence from UK Case

regime that operates with respect to the underfunding of corporate pension schemes but it does not have anything specific to say on how the regime is to be applied when the company enters a formal insolvency process. In *Bloom v Pensions Regulator*[18] the Supreme Court decided that the unfunded pension liabilities were a provable debt in the insolvency process but did not enjoy any 'super-priority'. Similar issues have been litigated in Canada in *Sun Indalex Finance LLC v United Steelworkers*[19] and while the end results in the cases are broadly comparable, they do reveal some different emphases in national policies on the treatment of underfunded pension liabilities in a corporate insolvency.

The priority accorded unpaid tax and environmental clean-up claims are also fertile ground for national variations in insolvency law provision. For instance, the UK abolished the preferential status of tax claims in the Enterprise Act 2002 but other countries have not necessarily followed suit.[20] In the UK also it is clear from *Re Celtic Extraction Ltd*[21] that claims for the alleviation of past environmental damage are not generally to be treated as an 'expense' of the insolvency process and therefore entitled to super-priority. Again, the same issue has been hotly contested recently in Canada.[22] In general it is true to say that the shape of a country's law in general, and insolvency law in particular, owes a lot to the balance of political power and the form of social arrangements in that country.[23] In the insolvency context, local policy concerns often trump wider considerations of international comity. This is graphically illustrated by the Singapore Chief Justice loudly defending provisions of Singapore law that ring-fence 'local' assets for the benefit of local creditors.[24]

B. Exercising Insolvency Jurisdiction

In the modern business environment even the most superficially straightforward insolvency case may have an international element. Payments to creditors may, for instance, be routed through foreign bank accounts or clearing systems but in many cases the foreign or international link is more substantial with the debtor company having assets in different countries. If the debtor becomes unable to service its debts this gives rise to the possibility of a multiplicity of

Studies' (2012) 33 CompLabL&PolyJ 427; J Armour and S Deakin, 'Insolvency and Employment Protection: The Mixed Effects of the Acquired Rights Directive' (2003) 22 IntlRevL&Econ 443.

[18] 2013] UKSC 52.

[19] [2013] SCC 6.

[20] Enterprise Act 2002 section 251 and see generally A Keay and P Walton, 'Preferential Debts: An Empirical Study' (1999) 3 InsolvL 112; and 'The Preferential Debts Regime in Liquidation Law: In the Public Interest?' (1999) 3 CfiLR 84.

[21] [2001] Ch 475. But for a different view in Scotland see *Re Scottish Coal Co Ltd* [2013] CSIH 108.

[22] *Newfoundland and Labrador v AbitibiBowater Inc* [2012] SCC 67.

[23] See generally O Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 MLR 1.

[24] SK Chan, 'Cross-Border Insolvency issues affecting Singapore' (2011) 23 SAcLJ 413, 419.

separate insolvency proceedings in the countries where the debtor has a 'presence', however defined. The greater the range of foreign 'contacts', the greater the number of possible insolvency proceedings. The multiplication of insolvency proceedings compromises the goals of insolvency law to achieve a collective forum for the administration and resolution of the debtor's affairs. There is the practical problem, however, of enforcing orders that relate to foreign assets and in getting third parties based overseas to cooperate in the enforcement of such orders.

The universalist ideal calls for a single forum to administer the debtor's affairs on a worldwide basis.[25] A single forum should cut down on cost and inconvenience and achieve greater parity in the treatment of creditors.[26] One US court has remarked that the centralization of insolvency proceedings 'will frequently provide the optimal result for a debtor and its creditors alike by preventing certain creditors from gaining an advantage over others by virtue of differing judicial systems. A single primary proceeding also minimizes the time, expense and administrative burdens of managing full cases in multiple jurisdictions.'[27] It is a less easy task to decide where this single forum should be but perhaps the most obvious forum is the country where the debtor came into existence; in short, where the debtor is a company, the country of incorporation. If the company has formally changed domicile or registered office then the law of the new domicile or registered office should come centre stage. There are drawbacks, however, with this simple solution. The country of incorporation may be a so-called letterbox jurisdiction offering the facilities to incorporate but little more.[28] Even if a company has not been incorporated in a letterbox jurisdiction, the company may have minimal contacts with its country of incorporation and have its corporate headquarters and/or the bulk of its business operations located elsewhere. Practical and political reasons may preclude the possibility of restructuring or liquidation proceedings in the country of incorporation even though such proceedings on an objective basis would best serve creditor and other interests. Having insolvency proceedings in a country other than the country of incorporation may produce a greater alignment of debtor and creditor interests.

The European Insolvency Regulation confers jurisdiction to open main insolvency proceedings on the EU State where a debtor has its 'centre of main

[25] *Cambridge Gas Transport Corporation v Official Committee of Unsecured Creditors (of Navigator Holdings Plc)* [2007] 1 AC 508 at 516. See also *Re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852 and generally G McCormack, 'Universalism in Insolvency Proceedings and the Common Law' (2012) OJLS 1.

[26] But a single forum does not necessarily resolve issues about choice of law; on which see H Buxbaum, 'Rethinking International Insolvency: The Neglected Role of Choice-of-Law Rules and Theory' (2000) 36 StanJIntl 23; JL Westbrook, 'Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum' (1991) 65 AmBankrLJ 457.

[27] See *In re Board of Directors of Multicanal SA* (2004) 314 BR 486 at 521; *In re Treco* (2001) 240 F 3d at 154.

[28] See the comments of Lord Hoffmann in *Re HIH Insurance* [2008] 1 WLR 852 at para 31.

interests' (COMI).[29] There is a nod, however, in the direction of the country of incorporation by the statement of a presumption that the COMI is the same as the place of the registered office. The Regulation is a set of compromises and it makes some concessions to 'territorial' rather than 'universalist' notions of insolvency jurisdiction by allowing for the possibility of secondary insolvency proceedings in countries where the debtor has an 'establishment'.[30] The 'establishment' concept signifies a place where the debtor carries out a non-transitory economic activity through human means and with goods. It clearly connotes something more than the mere presence of assets but obviously less than a 'centre of main interests'.[31]

One of the professed objectives of the EU Regulation is to stop forum shopping[32] but its detailed provisions are not very successful in this regard. There is nothing to stop a debtor from making an eve of bankruptcy move of COMI to another jurisdiction so as to take advantage of a more favourable legal regime and to open insolvency proceedings there. On an operational company, rather than a holding company, level this may be difficult to accomplish.

The UNCITRAL Model Law on Cross-Border Insolvency is a less ambitious instrument than the EU Insolvency Regulation containing a more modest set of measures.[33] It does not directly allocate jurisdiction to open insolvency proceedings and national implementing legislation makes it clear that existing jurisdictional rules remain in place.[34] Nor does the Model Law contain mandatory uniform rules on conflict of laws. Rather it provides for the recognition of insolvency proceedings—whether main or secondary proceedings—but unlike under the Regulation, recognition of such proceedings is not automatic. It depends on application to the court. Moreover, the consequences of recognition depend in part at least on the law of the recognizing State, whereas under the Regulation insolvency, proceedings have the same effects throughout the EU as they have in the State that opens the proceedings. Supporters of the Model Law argue that it impliedly restricts forum shopping in that foreign insolvency proceedings will only be 'fully' recognized if they have been opened in a State where the debtor has its COMI.[35] Critics, however,

[29] Regulation 1346/2000 art 3(1). For guidance from the European court on 'COMI' see Case C-341/04 *Re Eurofood IFSC Ltd* [2006] ECR 1-03813 and the more recent *Interedil* Case C-396/09 [2011] BPIR 1639 and *Mediasucre* Case C-191/10; OJ 2012 C39/3 cases.

[30] Art 3(2).

[31] See the definition in art 2(h) and also *Interedil* Case C-396/09 [2011] BPIR 1639.

[32] Recital 4 of the preamble.

[33] The Model Law (1997) is available at the United Nations Commission on International Trade Law (UNCITRAL) website <www.uncitral.org/>. See also A Berends, 'UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview' (1998) 6 TulJIntl&CompL 309; J Clift, 'The UNCITRAL Model Law on Cross-Border Insolvency: A Legislative Framework to Facilitate Coordination and Cooperation' (2004) 12 TulJIntl&CompL 307.

[34] Cross-Border Insolvency Regulations 2006, SI 2006/1030 sch 1, art 20(5) in the UK and section 1520(c) Bankruptcy Code in the US.

[35] See JL Westbrook, 'Chapter 15 at Last' (2005) 79 AmBankrLJ 713.

point out that the concept of COMI is 'fuzzy' and subject to manipulation and there is nothing to prevent local courts from opening insolvency proceedings on a wide jurisdictional basis.[36]

C. Forum Shopping in General

Forum shopping is often viewed in a pejorative light.[37] It is seen as undermining the principle of equal application of the law and involving unjustifiable advantage gaining by one party over another.[38] Nevertheless, if forum shopping is defined as the search by a plaintiff for the international jurisdiction most favourable to his claims, then the phenomenon must be accepted as a natural consequence which is not open to criticism.[39] For instance, in the *Atlantic Star* case Lord Wilberforce commented that it was natural and inevitable that a plaintiff would choose the place where he considers that his legitimate interests would be best advanced. He suggested that if the law of one country was more favourable than the law of another country, a plaintiff was not to be criticized for choosing the former.[40] Lord Simon said that this should be a matter neither for surprise nor for indignation.[41]

In the US, Rehnquist CJ has remarked, without any criticism, on the litigation strategy of countless plaintiffs who seek a forum with favourable substantive or procedural rules or sympathetic populations.[42] Forum shopping has been described by one Federal appeals judge as a national legal pastime.[43] In the US context there has been a lively debate on domestic bankruptcy forum shopping and various, as yet unsuccessful attempts, to reform the 'venue' provisions of the US Code which currently allows bankruptcy proceedings to be filed where a debtor is incorporated; where it has its principal place of business or where an affiliate has already filed for bankruptcy.[44]

[36] See LM LoPucki, 'Global and Out of Control?' (2005) 79 AmBankrLJ 79; LM LoPucki, 'Universalism Unravels' (2005) 79 AmBankrLJ 143 and generally J Pottow, 'The Myths (and Realities) of Forum Shopping in Transnational Insolvency' (2007) 32 BrooklynJIntlL 785.

[37] See the comments of Lord Simon in the *The Atlantic Star* [1974] AC 436 at 471 that "'Forum-shopping" is a dirty word'.

[38] For references to inappropriate forum shopping see the comments of Andrew Smith J *in Citigroup Global Markets Ltd v Amatra* [2012] EWHC 1331 at para 38 and see also the decision of the US Supreme Court in *Morrison v National Australia Bank* rejecting the use of US securities laws by foreign plaintiffs.

[39] See the opinion of Advocate General Colomer in *Staubitz-Schreiber* Case C-1/04 [2006] ECR I-701 at paras 71, 72.

[40] *Owners of the Atlantic Star v Owners of the Bona Spes* (The Atlantic Star and The Bona Spes) [1974] AC 436 at 461.

[41] ibid at 471. For the more controversial comments of Lord Denning in the Court of Appeal see [1973] QB 364 at 381–382.

[42] *Keeton v Hustler Magazine* (1984) 465 US 770 at 779.

[43] JS Wright, 'The Federal Courts and the Nature and Quality of State Law' (1967) 13 WayneLR 317, 333. See generally F Jeunger, 'What's Wrong with Forum Shopping' (1994) 16 SydLR 5.

[44] 28 USC 1408.

While US bankruptcy law is federal law,[45] different bankruptcy courts in fact differ in their interpretation of particular Bankruptcy Code provisions; different courts adopt different procedural rules and some judges are more experienced in bankruptcy matters than others.[46] Since the so-called 'great recession' in 2007, empirical evidence suggests that about 70 per cent of large corporate bankruptcies are 'forum shopped' to a district other than where the debtor has its principal place of business.[47] The Southern District of New York and Delaware are the prime forum shopping venues. Critics argue that 'rampant forum shopping undermines the perception and integrity of the bankruptcy system … The perception is that there are courts willing to give corporate debtors and other key decision makers the outcomes they seek' and a debtor can simply choose the court that is most flexible. 'This perception erodes public confidence in the bankruptcy courts and affects creditors, employees, unions and other constituents excluded from the perceived backroom dealings.'[48] There have been efforts in the US Congress to promote a Bankruptcy Venue Reform bill[49] that would restrict venue choice in bankruptcy cases but these efforts have stalled in part it seems because of the of the strength of the Delaware lobby which has an influential advocate in the person of US Vice President and former Delaware Senator, Joe Biden. Mr Biden has argued that some bankruptcy courts develop specialized knowledge and experience and it is understandable for parties to want cases to be adjudicated in fora where they feel most comfortable.[50]

Mr Biden's arguments can be translated into the international level and there is also the argument that creative competition among jurisdictions for the optimum set of insolvency law provisions will promote aggregate social welfare.[51] The existence of jurisdictional diversity creates the opportunity for competition among national legal orders and, on this analysis, the general welfare is maximized through the adoption of innovative rules at the national level and then giving parties a relatively free hand in selecting such rules to

[45] Art 1, section 8, cl 4 of the US Constitution.

[46] For a full-blooded critique of bankruptcy forum shopping in the US see LM LoPucki, *Courting Failure: How Competition for Big Cases Is Corrupting the Bankruptcy Courts* (University of Michigan Press 2005) but for rebuttals of the LoPucki thesis see MB Jakoby, 'Fast, Cheap, and Creditor-Controlled: Is Corporate Reorganization Failing?' (2006) 54 BuffLRev 401 and also K Ayotte and D Skeel, 'An Efficiency-Based Explanation for Current Corporate Reorganization Practice' (2006) 73 UChiLRev 425.

[47] See UCLA-LoPucki Bankruptcy Research Database <http://lopucki.law.ucla.edu/tables_and_graphs/Forum_shopping_rate.pdf>.

[48] See S Parikh, 'Modern Forum Shopping in Bankruptcy' (2013) 46 ConnLRev 28.

[49] HR 2533. For a copy of the bill and US Congressional testimony see <http://judiciary.house.gov/hearings/printers/112th/112-88_68185.PDF>.

[50] See J Biden, 'Give Credit to Good Courts' *Legal Times* 20 June 2005: 'One of the states … singled out for criticism is my state of Delaware, a jurisdiction widely respected for the quality, efficiency, expertise, and fairness of its bankruptcy courts.'

[51] For the basic argument about forum shopping in a municipal context see C Tiebout, 'A Pure Theory of Local Expenditures' (1956) 64 JPolEcon 416.

govern their relationships.[52] According to Lord Hobhouse, in a slightly different context, international commerce is best served 'by encouraging the development of the best schemes in a climate of free competition and choice'.[53]

There are, however, powerful counter-arguments centred around the proposition that national insolvency law contains a set of normative provisions that parties, or one party, should not be allowed to bypass by the exercise of contractual or jurisdictional choice. Insolvency law normally contains a mandatory set of provisions on, *inter alia*, operation of the debtor's business; treatment of existing contracts, avoidance of pre-insolvency transactions and priority among creditors. National insolvency laws differ on the emphasis placed on rehabilitation of the debtor over liquidation; on the ranking accorded particular creditors and on the conditions whether, and to what extent, creditors can be pressed into accepting a restructuring plan. The values that are, and ought to be, served by insolvency law, have excited a lot of debate and discussion among commentators.[54] In our fragmented world these values will bear different weights in different countries. If foreign parties are allowed to flock to the safe haven of US or even UK insolvency jurisdiction then there is a risk of undermining national policies that foreign countries consider important such as special protection for employees and/or the public purse. The *Yukos* case[55] provides a good example of this where a Russian oil company was held entitled to file for bankruptcy protection in the US to stave off Russian tax demands—demands that would not be recognized in the US.

II. THE ATTRACTIVENESS OF THE UK AND US AS BANKRUPTCY FORUM SHOPPING VENUES

Both the UK and US may be attractive as bankruptcy and restructuring venues because of certain legal possibilities that are denied to companies in their home jurisdiction.

A. The UK

In the UK, there are two main insolvency procedures—liquidation and administration—and both of these procedures may be attractive to foreign companies for various reasons. Corporate restructuring may also be achieved

[52] See generally A Ogus, 'Competition between National Legal Systems: A Contribution of Economic Analysis to Comparative Law' (1999) 48 ICLQ 405; F Easterbrook, 'Federalism and European Business Law' (1994) 14 IntlRevL&Econ 125.

[53] J Hobhouse, 'International Conventions and Commercial Law: In Pursuit of Uniformity' (1990) 106 LQR 530, 535.

[54] See generally V Finch, 'The Measures of Insolvency Law' (1997) 17 OJLS 227.

[55] *Re Yukos Oil Co* (2005) 321 BR 396. See the discussion of the case in notes 117–120 below. For some consideration of the merits of the tax demands see the judgment of the European Court of Human Rights in *Yukos v Russia* (2012) 54 EHRR 19.

by means of a scheme of arrangement under the Companies Act though the scheme of arrangement procedure may also be used by solvent companies particularly in a takeover context.[56]

The UK liquidation procedure offers at least three attractions. First, the professionally qualified insolvency practitioner (liquidator) who takes charge of a company's affairs as part of the process is invested with special information gathering powers that facilitate the collection of company assets.[57] Second, the liquidator has power to bring 'claw-back' proceedings seeking the recovery of company assets that have been transferred away.[58] Third, the liquidator may also bring 'wrongful trading' proceedings seeking a contribution to company debts from directors who have failed to take every step with a view to minimizing loss to company creditors once they had realized that there was no reasonable prospect that the company would avoid going into insolvent liquidation.[59]

Administration brings with it most of the same advantages[60] but the procedure was designed with a different objective in mind.[61] An administrator is obliged to perform his functions with the objective of (a) rescuing the company as a going concern, or (b) achieving a better result for company creditors as a whole than is likely in liquidation.[62] In most cases administration leads to a sale of company assets to a purchaser who may carry on the original business in whole or in part through the vehicle of a new corporate entity, or it is used as a form of quasi-liquidation.[63] The 'rescue' objective is achieved in very few cases, in the sense that the original corporate entity continues to carry on business in a restructured form. For this to be a viable proposition the company may need to shed all or part of its debt burden whether through debt forgiveness; extending loan maturities or debt/equity swaps. Administration per se does not allow these results to be accomplished. Administration, however, may lead to a voluntary arrangement under the Insolvency Act or a scheme of arrangement under the Companies Act and these procedures permit

[56] For details on schemes see Pt 26 of the UK Companies Act 2006 and see generally on schemes G O'Dea, J Long and A Smyth, *Schemes of Arrangement Law and Practice* (OUP 2012).

[57] Sections 234–236 Insolvency Act.

[58] Section 238, 239, 244, 245 and 423 Insolvency Act.

[59] Section 214 Insolvency Act.

[60] An administrator, however, is not entitled to bring wrongful trading proceedings.

[61] For the distinction between the procedures see generally *Re MF Global UK Ltd* [2012] EWHC 3068; [2013] 1 WLR 903 where David Richards J said at para 52 that the 'sole purpose of a liquidation is the realisation of assets and the distribution of assets amongst creditors. Save in limited circumstances and then only for a limited time, the business of the company will cease upon the appointment of a liquidator. This distinguishes liquidation from the numerous other insolvency proceedings … including in particular administration. An administration and other insolvency proceedings may result in the realisation of a company's assets and a distribution of the proceeds among creditors, but the alternative of a rescue of the company as a going concern is at least one of the purposes or objectives of those proceedings.'

[62] Sch B1 Insolvency Act 1986 para 3(1).

[63] For statistical information on the use of insolvency procedures see the UK Insolvency Service website <www.insolvency.gov.uk>.

the modification of creditor rights if a prescribed percentage of the relevant group of creditors agrees.[64]

The liquidation and administration procedures also benefit from a statutory stay in that legal proceedings against the company, and executions against company assets, are subject to a moratorium.[65] The administration stay is wider in that it also bars actions for the enforcement of security. In neither case does the stay have extraterritorial effect for it does not extend to proceedings brought in foreign courts.[66] The UK courts, however, may restrain a party properly served in the UK from proceeding with an action brought in a foreign court.[67]

Schemes of arrangement under the Companies Act do not necessarily involve an administration filing. Nor do they benefit from a statutory stay under the Insolvency Act though recently the court has fashioned a limited stay from the Civil Procedure Rules.[68] The scheme of arrangement procedure has proved its popularity as the restructuring vehicle of choice for large companies, and large corporate debt.[69] In effect it serves as a form of 'debtor-in-possession' restructuring. The procedure enables a company, irrespective of solvency, to enter into a compromise or arrangement with any class of creditors. The statute requires that a majority in number representing 75 per cent in value of the class of creditors affected must accept the scheme. Court sanction is also required and once these conditions are fulfilled, the arrangement binds abstainers or dissenters.

B. The US

While the US Bankruptcy Code contains a liquidation chapter in Chapter 7, its main attractiveness to foreign companies lies in the restructuring provisions of Chapter 11[70] where the statutory goal is the preparation and confirmation of a

[64] A CVA proposal may not, however, affect the right of a secured creditor of the company to enforce his security, except with the concurrence of the creditor concerned—see section 4(3) Insolvency Act 1986 and para 73(1) sch B1 for a similar provision in respect of proposals by an administrator.

[65] See Insolvency Act section 130(2) and sch B1, paras 43, 44.

[66] *See Mazur Media Ltd v Mazur Media GmbH* [2004] 1 WLR 2966 and *Bloom v Harms Offshore AHT* [2010] Ch 187.

[67] *Re Vocalion (Foreign) Ltd* [1932] 2 Ch 196—but where an injunction was refused see *Kemsley v Barclays Bank* [2013] EWHC 1274.

[68] *BlueCrest Mercantile BV v Vietnam Shipbuilding Industry Group* [2013] EWHC 1146.

[69] See *Primacom Holdings GmbH v Credit Agricole* [2011] EWHC 3746; *Re Rodenstock GmbH* [2011] EWHC 1104; [2011] WLR (D) 150. See also *Re Drax Holdings Ltd* [2004] 1 WLR 1049 for the use of schemes of arrangement in the restructuring of insurance companies. See generally J Payne, 'Cross-Border Schemes of Arrangement and Forum Shopping' (2013) 14 EBOR 563.

[70] See generally I Darke, 'Use of US Chapter 11 Filings by Non-US Corporations; Realistic Option of Non-Starter' [2011] International Corporate Rescue 206. The merits of Chapter 11 are considered in E Warren and JL Westbrook, 'The Success of Chapter 11: A Challenge to the Critics' (2009) 107 MichLRev 603. The American Bankruptcy Institute has established a commission to review Chapter 11 with a view to advancing proposals for legislative reform—see <www.commission.abi.org>.

reorganization plan.[71] The US Supreme Court has described the objectives of Chapter 11 in the following terms:[72]

> In proceedings under the reorganization provisions of the Bankruptcy Code, a troubled enterprise may be restructured to enable it to operate successfully in the future … By permitting reorganisation, Congress anticipated that the business would continue to provide jobs, to satisfy creditors' claims, and to produce a return for its owners … Congress presumed that the assets of the debtor would be more valuable if used in a rehabilitated business than if 'sold for scrap'.

Professors Warren and Westbrook[73] suggest that Chapter 11 deserves a prominent place in 'the pantheon of extraordinary laws that have shaped the American economy and society and then echoed throughout the world … Based on the idea that a failing business can be reshaped into a successful operation, Chapter 11 was perhaps a predictable creation from a people whose majority religion embraces the idea of life from death and whose central myth is the pioneer making a fresh start on the boundless prairie.'

US bankruptcy law in general and especially Chapter 11 is particularly attractive to foreign forum shoppers for at least five reasons; (a) the worldwide automatic stay; (2) the debtor in possession norm; (3) the provisions for super-priority new finance; (4) the statutory 'cramdown' possibilities; and finally (5) the procedural consolidation possibilities.

First, a bankruptcy filing brings about an automatic stay, on enforcement proceedings against the debtor or its property and this stay has worldwide effect.[74] The US courts have inferred extraterritorial effect from the language of the Bankruptcy Code provisions[75] and they have also held that the bankruptcy estate comprises property of the debtor wherever situated throughout the world.[76] Second, under Chapter 11 there is no automatic displacement of company management in favour of an outside trustee or administrator. Chapter 11 proceedings are normally begun by a voluntary petition filed by the corporate debtor. Chapter 11 is based on debtor in possession which means that the existing corporate governance structure remains in place notwithstanding the formal commencement of the restructuring process.[77] There is the possibility of management displacement in favour of an outside trustee but,

[71] *Bank of America v 203 North LaSalle Street Partnership* (1999) 526 US 434.

[72] *US v Whiting Pools Inc* (1983) 462 US 198 at 203. See also HR Rep No 595, 95th Congress, 1st Sess 220 (1977).

[73] See E Warren and JL Westbrook, 'The Success of Chapter 11: A Challenge to the Critics' (2009) 107 MichLRev 603, 604.

[74] For a recent example see *In re Nortel Networks Inc* (2011) 669 F 3d 128.

[75] See *Nakash v Zur (In re Nakash)* (1996) 190 BR 763 where the automatic stay was enforced against a foreign receiver in respect of the foreign assets of a foreign debtor.

[76] See *Hong Kong & Shanghai Banking Corp v Simon (In re Simon)* (1998) 153 F 3d 991 at 996: 'Congress intended extraterritorial application of the Bankruptcy Code as it applies to property of the estate.'

[77] On this general issue of the relative merits of debtor-in-possession restructuring regimes see D Hahn, 'Concentrated Ownership and Control of Corporate Reorganisations' (2004) 4 JCLS 117;

in practice, this is confined to exceptional cases such as fraud.[78] The halfway house appointment of an examiner is also possible, but equally rare. The identities of individual managers or executives may change, however, in response to creditor pressure.[79] Third, Chapter 11 contains provisions for super-priority new finance that may allow an ailing business to survive and prosper. These provisions have proved something of a two-edged sword for existing management and shareholders. In practice a financier may be able to exert substantial control over the Chapter 11 process by means of provisions in agreements that provide for new finance and commentators have spoken of a new 'Chapter 11' with a greater emphasis on sales of the debtor's business as a going concern rather than on reorganizations in the traditional sense.[80] Ailing debtors need new finance to survive and the lender providing such finance can control the terms of the restructuring. This was done in the cases of the car manufacturers, Chrysler and GM, where the debtors' businesses were sold off to new operating companies, 'new' Chrysler and 'new' GM. In the Chrysler and GM cases the new lender was the US government and it was able to dictate the outcome of the Chapter 11 case by virtue of its new credit provider status.[81]

Fourth, Chapter 11 contains a facility for 'cramming down' creditors, including secured creditors, into accepting a reorganization plan. If certain statutory conditions are fulfilled then the majoritarian principle prevails and holdouts among creditors can be overcome.[82] Finally, Chapter 11 allows for the procedural consolidation of insolvency proceedings involving several related companies and this offers the possibility of a coordinated group rescue for multinational enterprises whose activities are dispersed across several jurisdictions.

III. JURISDICTIONAL THRESHOLDS FOR INSOLVENCY FILINGS IN THE UK

The European Insolvency Regulation is directly applicable law and constrains the jurisdiction of the English courts to open insolvency proceedings. The Regulation only applies to debtors whose centre of main interests is in the EU.[83] If the debtor's COMI is outside the EU then the authority of the UK

G McCormack, 'Control and Corporate Rescue: An Anglo-American Evaluation' (2007) 56 ICLQ 515.

[78] Section 1104 of the US Bankruptcy Code.

[79] See K Ayotte and E Morrison, 'Creditor Control and Conflict in Chapter 11' (2009) 1 JLegalAnal 511 who find 'pervasive creditor control'.

[80] See eg K Ayotte and DA Skeel, 'Bankruptcy or Bailouts' (2010) 35 JCorpL 469, 477: 'roughly two-thirds of all large bankruptcy outcomes involve a sale of the firm, rather than a traditional negotiated reorganization in which debt is converted to equity through the reorganization plan'.

[81] For different perspectives on these cases see D Baird, 'Lessons from The Automobile Reorganizations' (2012) 4 JLegalAnal 271; S Lubben, 'No Big Deal: The GM and Chrysler Cases in Context' (2009) 82 AmBankrLJ 531; M Roe and D Skeel, 'Assessing the Chrysler Bankruptcy' (2010) 108 MichLRev 727.

[82] See section 1129 of the Bankruptcy Code on the conditions for getting a restructuring plan approved.

[83] See Regulation 1346/2000 recital 14 of the preamble.

courts is unconstrained by European jurisdictional rules. As far as liquidation proceedings are concerned, the main jurisdictional pivot is then Part V of the Insolvency Act. This Part invests the court with jurisdiction to wind up companies incorporated outside the UK. Section 221(5) grants the court the authority to make a winding up order on various grounds including inability to pay debts. Once a UK winding up order is made it purports to have worldwide effect but it is possible for UK courts to assist foreign courts by treating any liquidation as ancillary to one that was taking place in the country's place of incorporation. This has the consequence that the powers of the UK liquidator are limited to gathering the UK assets, paying off preferential and secured creditors and then remitting any remaining assets to the principal liquidation.[84]

Section 221 does not on its face fetter the discretion of the court to make a winding up order and a case could be advanced that there is no need to establish any UK connection before the discretion comes into play It has been held, however, that this view is too broad. In *Banque des Marchands de Moscou v Kindersley*,[85] Evershed MR observed:

> As a matter of general principle, our courts would not assume, and Parliament should not be taken to have intended to confer, jurisdiction over matters which naturally and properly lie within the competence of the courts of other countries.

There has been a judicial concern that section 221 may interfere with the disposition by foreign sovereign powers of matters within their own territories. Therefore, some means must be found of controlling and channelling the discretion embedded in the section. Briggs J in *Re Rodenstock GmbH*[86] referred to the jurisdiction as 'prima facie exorbitant' and, all other things being equal, the appropriate forum for the winding up of a company was in its place of incorporation.[87] He also spoke of the practical purpose of ensuring that the court only made orders where some useful purpose would be served.

Many of the provisions in the Insolvency Act appear to be of unlimited territorial scope and if a transaction satisfies the statutory requirements, then prima facie, the provisions apply, irrespective of the situation of the property, of the nationality or residence of the other party, and irrespective of the law governing the transaction. Nicholls VC commented in *Re Paramount Airways Ltd*:[88]

> Parliament may have intended that the English court could and should bring before it, and make orders against, a person who has no connection whatever with

[84] *Banco Nacional de Cuba v Cosmos Trading Corp* [2000] BCC 910.

[85] [1951] Ch 112 at 125–126.

[86] [2011] EWHC 1104.

[87] Briggs J referred at para 21 to Knox J in *Re Real Estate Development Co* [1991] BCLC 210 at 217, *Re Latreefers Inc* [2001] BCC 174 per Lloyd J at 180 and *Re Drax Holdings Ltd* [2004] 1 WLR 1049 at 1054 per Lawrence Collins J.

[88] *Re Paramount Airways Ltd (No 2)* [1993] Ch 223. For the extraterritorial application of the wrongful trading provision in section 213 Insolvency Act see *Bilta (UK) Ltd v Nazir* [2013] EWCA Civ 968.

> England save that he entered into a transaction, maybe abroad and in respect of foreign property and in the utmost good faith, with a person who is subject to the insolvency jurisdiction of the English court. . .. Such an intention by Parliament is possible. But self-evidently in some instances such a jurisdiction, or the exercise of such a jurisdiction, would be truly extraordinary.

In *Re Paramount Airways Ltd* the court held that it would need to be satisfied that the party was sufficiently connected with England for it to be just and proper to make the order against him despite the foreign element. The court had a discretion and a 'sufficient connection' test was used to tailor the exercise of that discretion.

A 'sufficient connection' test has also been used as the overriding criterion for determining whether the court should make a winding up order in respect of a foreign company. In *Re Drax Holdings Ltd*[89] it was suggested that the 'sufficient connection' test went to jurisdiction and not to discretion. On the other hand, the jurisdiction to wind up a foreign-registered company is given by statute. As in the case of a domestic company, the jurisdiction need not be exercised as a matter of discretion. In respect of domestic companies, the petitioner is said to have a prima facie right to a winding up order once the statutory grounds are made out[90] but the court may exercise its discretion against winding up if, for instance, a majority of creditors in the same class oppose the making of the order.[91] There is no absolute entitlement to a winding up order and a fortiori the same holds true in relation to foreign companies where the 'sufficient connection' test mitigates against the risk of conflict with foreign authorities. In *Re Real Estate Development Co*[92] Knox J referred to a sufficient connection that would justify the court in setting in motion its winding up procedures over a body that was prima facie beyond the limits of territoriality The test can be criticized for being somewhat circular but it does enable a wide range of factors to be brought into the reckoning, including benefit to the petitioner whether through the presence of corporate assets in the UK or otherwise. Knox J also talked about a person or persons interested in the distribution of the assets being persons over whom the court can exercise jurisdiction.[93]

Under the provisions of section 895 Companies Act 2006 dealing with schemes of arrangement between a company and its creditors the court has jurisdiction to sanction a scheme if the company is liable to be wound up under the Insolvency Act. The courts in cases like *Re Drax*

[89] [2004] 1 WLR 1049.

[90] See *Re Demaglass Holdings Ltd* [2001] 2 BCLC 633.

[91] *Re St Thomas's Dock Co* (1876) 2 Ch D 116; *Re Crigglestone Coal Co Ltd* [1906] 2 Ch 327. See section 195 which provides for the holding of meetings to ascertain the wishes of creditors on matters relating to the winding up of the company.

[92] [1991] BCLC 210 at 217.

[93] In *Re Latreefers Inc; Stocznia Gdanska SA v Latreefers Inc* [2001] BCC 174 at 182 Lloyd J spoke, however, of the last factor as 'puzzling' in practice: 'The petitioning creditor will always have invoked the jurisdiction and therefore be subject to it in some sense.'

Holdings Ltd[94] have applied the 'sufficient connection' test in respect of schemes of arrangement. In *Re Rodenstock GmbH*,[95] for instance, a sufficient connection with England was found to exist by virtue of the fact that the credit facilities extended to the company contained English choice of law clause and jurisdiction clauses and also by expert evidence to the effect that the relevant foreign courts would recognize the English court order.[96]

A. The Sufficient Connection Test in Operation: Availability of Assets

In practice, the easiest way to establish a sufficient connection with the UK is establishing the presence of UK assets which can then be conveniently distributed to creditors. In *Re Compania Merabello San Nicholas SA*[97] a link was explicitly drawn between the discretion to make a winding up order and the functional purpose of the winding up. Megarry J said that it would normally be futile for a court to make a winding up order if there were no assets within the jurisdiction. There would be nothing to administer and it would be equally useless for the court to make a winding up order if there were no persons who had any interest in the proper distribution of the assets.[98] While the case suggests that the presence of assets was a precondition to the making of a winding up order, in the particular case the 'assets' requirement was satisfied only in a very attenuated form. A creditor had a breach of contract claim against the company but the company had taken out insurance in respect of the claim. If a winding up order was made the creditor would acquire statutory rights to claim directly from the company's insurer. This claim was payable in England and was the only asset of the company.

It seems clear, however, that the presence of assets is neither necessary nor sufficient for the making of a winding up order. An absolute requirement of the presence of assets would be arbitrary and could lead to the evasion of jurisdiction by the transfer of assets immediately prior to the institution of winding up proceedings. Moreover, as was remarked in *Re Yugraneft*[99] the fact that there is an asset in the UK to which the company lays claim was not automatically a reason for the court to exercise the winding up jurisdiction. The asset may be so small or too tenuous a connecting factor to justify UK winding up proceedings.

[94] [2004] 1 WLR 1049.

[95] [2011] EWHC 1104; [2012] BCC 459. See also on the jurisdiction to sanction schemes *Primacom Holdings GmbH v Credit Agricole* [2013] BCC 201 *and Re Seat Pagine Gialle SpA* [2012] EWHC 3686.

[96] See generally L Chan Ho, 'Making and Enforcing International Schemes of Arrangement" (2011) 26 JIBLR 434.

[97] [1973] Ch 75.

[98] For a statement of principles see [1973] Ch 75 at 91–92.

[99] [2008] EWHC 2614 at para 58.

B. Sufficient Connection: Indirect Benefit to Creditors

In a number of cases the courts have held that 'indirect benefits' to creditors rather than the presence of assets per se justifies English winding up proceedings in respect of foreign companies. 'Indirect benefits' have taken the form of the following:

(a) The fact that English proceedings might result in asset recoveries that would not otherwise be achieved.[100]
(b) The fact that the liquidator might succeed against the directors for fraudulent and/or wrongful trading under sections 213 and 214 Insolvency Act 1986: those directors being present in England and subject to the jurisdiction of the English court.[101]
(c) The fact that a winding up order might enable unpaid employees to claim redundancy payments from the UK Employment Service.[102]
(d) The fact that while the company was subject to insolvency proceedings in a foreign country, an English winding up meant that legal proceedings in England to which the company was a party were under the control of an insolvency practitioner who was familiar with English litigation as well as being an officer of the English Court and accountable to the court.[103]
(e) The fact that there was no more appropriate forum to conduct a winding up because there was little possibility of a winding up in the place of incorporation. This was a factor in the *Okeanos Maritime Corp* case where the company had been incorporated in Liberia but did not carry on business there.[104]

While the doctrine of *forum non conveniens* has been used in a positive way to assert jurisdiction on the part of the English courts, in other cases jurisdiction has been declined on the grounds that a winding up would be more appropriately conducted in another forum.[105] If there is a winding up in, for example, the company's place of incorporation where it carried on business, then the court may consider it more beneficial to creditors if there is no English winding up. This has the positive advantage of preserving the debtor's assets inasmuch as a proliferation of liquidations will deplete the company's necessarily limited resources. The *forum non conveniens* principle was applied

[100] This was a factor in *Re A Company (No 3102 of 1991), ex parte Nyckeln Finance Co Ltd* [1991] BCLC 539 and see also *Re Mid East Trading Ltd* [1998] 1 BCLC 240.
[101] See the *Okeanos Maritime Corp* case; *Re a Company No 00359 of 1987* [1988] Ch 210. A sufficiently close connection was also held to exist because the loan agreement on which the company had defaulted was governed by English law, was to be performed in England and the company had carried on business in England.
[102] *Re Eloc Electro-Optieck and Communicatie BV* [1982] Ch 43.
[103] *Re Yugraneft* [2008] EWHC 2614; [2008] All ER (D) 311.
[104] [1988] Ch 210.
[105] See the comments of Mann J in *Trillium (Nelson) Properties Ltd v Office Metro Ltd* [2012] BCC 829 at paras 34–36 and generally K Dawson, 'The Doctrine of Forum Non Conveniens and the Winding up of Insolvent Foreign Companies' (2005) JBL 28.

in *Re Harrods (Buenos Aires) Ltd*[106] which concerned a solvent company registered in England but which traded in Argentina and with its assets located in Argentina. Under Argentine law a company was classed as an Argentine company if its principal activities were carried on in Argentina and thus the court concluded that Argentina was a more appropriate forum for a winding up.

The *forum non conveniens* principle was also considered in *Banco Nacional de Cuba v Cosmos Trading*[107] where the company was a Cuban state bank that had neither traded nor had offices in England for 20 years. It had done nothing to acknowledge the jurisdiction of the English courts and its only assets in England were shares in an English registered company. Scott VC suggested that a winding up order made whilst a company continues to trade in its country of incorporation was thoroughly undesirable. The winding up would not be ancillary to any foreign liquidation and nobody would recognize it. The only benefit for creditors from a winding up would be the public relations benefit of obtaining an order for payment but there was no practicable means by which such an order could be enforced. This benefit was much too light to outweigh the substantial reasons why the courts should not order winding up.

C. Foreign Companies and Administration Orders

Before the coming into force of the EU Insolvency Regulation the general view was that only companies formed and registered under the Companies Act could be the subject of UK administration proceedings. There was a minority view that this limitation did not make sense and that foreign registered companies which could be wound up under the Insolvency Act 1986 were also covered. A statutory amendment takes away whatever vestige of interpretive legitimacy attached to the minority view. The provision limits jurisdiction to Companies Act companies as well as non-UK EEA companies and foreign companies whose COMI is within the EU, excluding Denmark.[108] The 'EU extension' is there because otherwise there might be claims of unjustifiable discrimination if the administration mechanisms were open to UK companies but not to their EU counterparts.

[106] [1992] Ch 72. See, however, the comments of Briggs J in *Re Rodenstock GmbH* [2011] EWHC 1104 at [24] on the effect of the European court decision in *Owusu v Jackson* (C-291/02) [2005] QB 801 on *Re Harrods (Buenos Aires) Ltd*: 'because the company was incorporated in the UK, the UK courts had jurisdiction to wind up the company under Art 22(2) of the Jurisdiction and Judgments regulation – regulation 44/2001 – and this jurisdiction could not be declined. According to *Owusu* at para 41: 'Application of the forum non conveniens doctrine, which allows the court seised a wide discretion as regards the question whether a foreign court would be a more appropriate forum for the trial of an action, is liable to undermine the predictability of the rules of jurisdiction . . . and consequently to undermine the principle of legal certainty'.

[107] [2000] BCC 910. See also *Re Latreefers Inc* [2001] BCC 174.

[108] Insolvency Act 1986 (Amendment) Regulations 2005 SI No 2005/879. See generally G Moss, 'Salvage Sunk' (2005) 18 InsolvInt 92. The jurisdiction in respect of CVAs is limited in the same way—see now section 1(4) Insolvency Act 1986 as amended.

The statutory amendment could be viewed as an illogical severing of the link with the liquidation jurisdiction. More seriously and practically, it can also be viewed as creating an obstacle to corporate restructuring and destroying both employment and businesses. The administration procedure is specifically designed to achieve the rescue of the business of a company as a going concern and to accomplish better returns for company creditors than could be achieved in liquidation. Administration is seen specifically as a rehabilitation tool and as producing more beneficial returns than liquidation. If liquidation is available on a certain basis to foreign registered companies, then administration should be available on a similar basis.

Essentially there are three interrelated arguments against exercising the winding up jurisdiction in relation to foreign registered companies. The first is practicality in that the winding up order may not be recognized abroad particularly where it continues to trade and carry on business in other countries. The second factor stems from incongruity of terminating the life of a company that owes its existence to the laws of another country. The third factor concerns the perceived interference with the sovereign authority of another State to deal with matters and legal persons within its own territory. These factors seem to militate less strongly against making administration orders since the process does not of itself involve bringing the existence of the foreign company to an end. The primary objective of the administration procedure is stated to be to give new business life to a company rather than terminating its existence[109] though in certain cases achievement of the rescue objective may require the co-operation of governmental authorities in the country of incorporation.

IV. JURISDICTIONAL THRESHOLDS FOR INSOLVENCY FILINGS IN THE US

Unlike the position in the UK, in the US there is no distinction drawn between liquidation proceedings under Chapter 7 of the Bankruptcy Code and restructuring proceedings under Chapter 11. The same (low) jurisdictional threshold applies in both scenarios. Commentators have spoken of the tissue thin connection that suffices to found US Bankruptcy Code competence.[110]

Section 109(a) of the US Bankruptcy Code provides that any person who 'resides or has a domicile, a place of business, or property in the United States' may be a debtor under the Code. This wide jurisdictional basis predates the 1978 Bankruptcy Code. For instance in a case from the 1930s that involved the well-known Italian boxer Primo Carnera[111] it was held that the boxer, who had

[109] See sch B1 Insolvency Act 1986 para 3(1).

[110] See S Shandro and B Jones, 'Bankruptcy jurisdiction in the US and Europe: reconsideration needed!' (2005) 18 InsolvInt 129, 131. Also generally E Healy, 'All's Fair in Love and Bankruptcy? Analysis of the Property Requirement for Section 109 Eligibility and Its Effect on Foreign Debtors Filing in US Bankruptcy Courts' (2004) 12 AmBankrInstLRev 535.

[111] *In re Carnera* (1933) 6 F Supp 267.

a place of business in a hotel room in New York, could file under the US Bankruptcy Act even though he did not have a residence or domicile in the US.[112]

In *Re McTague*[113] it has held that the court did not have a discretion to look beyond the language of section 109(a) and inquire into the quantity of property in the United States. Eligibility to be a debtor under the Bankruptcy Code was not determined by the amount of property in the US. Bankruptcy jurisdiction could be exercised on the basis of a single bank account in the US since the presence of a 'dollar, a dime or a peppercorn' provided a sufficient jurisdictional nexus. It has been that a shareholding in a US-incorporated subsidiary company constitutes property in the US and renders the company eligible for US bankruptcy protection. The US States courts may decline jurisdiction, however, if, for instance, a debtor is attempting to get around choice-of-forum clauses in his contracts with principal creditors.[114]

Upon the commencement of a US bankruptcy case, the bankruptcy court has jurisdiction over all the assets of the debtor wherever situated. Section 541 of the Bankruptcy Code, in designating the property of the debtor that comprises the bankruptcy estate, states that it includes property 'wherever located and by whomever held' and it has been judicially affirmed that 'Congress intended extraterritorial application of the Bankruptcy Code as it applies to property of the estate'.[115] By virtue of section 362, the automatic stay comes into effect barring any actions against the debtor and its property and again this applies on a worldwide basis. In *Re Nakash*[116] it was argued on behalf of a foreign receiver that sections 541 and 362 contained boilerplate and vague language that provided an insufficient basis upon which to infer extraterritorial application of the stay. The court concluded, however, on the basis of the

[112] Section 2(a)(1) of the Bankruptcy Act 1898 gave the courts of bankruptcy the authority to adjudge persons bankrupt who 'do not have their principal place of business, reside, or have their domicile within the United States, but have property within [the courts'] jurisdiction'. The district court in *In re Berthoud*, (1918) 231 F 529 at 532 noted that, 'residence or domicile or the locus of the principal place of business is immaterial if there is property within the United States'.

[113] (1996) 198 BR 428. See also the statement in *In re Globo Communicacoes E Participacoes SA* (2004) 317 BR 235 at 249 that 'courts have required only nominal amounts of property to be located in the United States, and have noted that there is ''virtually no formal barrier'' to having federal courts adjudicate foreign debtors' bankruptcy proceedings'.

[114] See *In re Head* (1998) 223 BR 648 where the links with the US were quite slight and the foreign debtors were attempting to circumvent contractual liability to a UK based creditor—Lloyds of London.

[115] See *Hong Kong & Shanghai Banking Corp Ltd v Simon* (1996) 153 F.3d 991 at 996.

[116] (1996) 190 BR 763. In this case, the automatic stay was enforced against the foreign receiver of foreign assets of a foreign debtor. The stay was described (at 768) as existing to protect the estate from 'a chaotic and uncontrolled scramble for the Debtor's assets in a variety of uncoordinated proceedings in different courts'. The stay also served to protect and preserve the estate for the benefit of all creditors and the jurisdiction of the bankruptcy court so that the court could administer the debtor's estate in an orderly fashion.

applicable Code provisions, other indications of congressional intent as well as case law that the automatic stay applied extraterritorially. Foreign creditors taking action against the property of the debtor overseas may feel it politic to comply with the stay especially if they have assets or operations in the US that are liable to seizure in US contempt proceedings. To reinforce the message to creditors and others, the stay is sometimes backed up by a judicial restraining order, whether temporary or permanent. This has been described 'as a prophylactic measure to apprise third parties of the existence and effect' of section 362 of the US Bankruptcy Code.[117]

On the other hand, if foreign creditors have little or no assets in the US they may find it convenient and appropriate to ignore the US stay and to institute insolvency proceedings in another State. This was the case in *Re Cenargo Ltd*[118] where a UK company filed for Chapter 11 bankruptcy protection in the US under the assumption that its principal secured creditor would be bound by the US stay. 'Cenargo's belief was based on its understanding that Lombard had assets in the United States that the New York bankruptcy court could go against to enforce that stay. That belief turned out to have been erroneous.'[119] In violation of the stay, the secured creditor sought a UK administration order in respect of the company and the English court granted the order notwithstanding the US stay.[120]

A. The Expansionist Scope of the US Bankruptcy Code

Re Cenargo Ltd involved a foreign shipping company and the long arm of the US bankruptcy jurisdiction is also illustrated by a recent series of Chapter 11 cases involving such companies. Such creditors have recognized the benefits and advantages served by Chapter 11 bankruptcy proceedings including the debtor in possession norm and the reach of the automatic stay. In some of these cases the US connections of the debtors have been rather tenuous. For instance, in the *Marco Polo Seatrade* case[121] it was held that a retainer paid in advance of the bankruptcy filing to US counsel constituted property in the US sufficient to satisfy the Bankruptcy Code eligibility requirements.[122]

The scope and power of US bankruptcy proceedings and the US automatic stay is also illustrated by the *Yukos* case.[123] The case involved Yukos, a

[117] See *Nakash v Zur (In re Nakash)* (1996) 190 BR 763 at 767.
[118] (2003) 294 BR 571.
[119] See LoPucki (n 46) 191.
[120] (2003) 294 BR 571 at 584.
[121] *In re Marco Polo Seatrade BV*, No 11-13634; ruling of Judge Peck US Bankruptcy Court SDNY, 21 October 2011 and for a discussion see J Canfield *et al.*, 'How Low Can You Go? Minimum Jurisdictional Threshold For US Bankruptcy Courts in Cross-Border Insolvency Cases' ABI Committee News, March 2012.
[122] Applying *In re Global Ocean Carriers Ltd* (2000) 251 BR 31.
[123] *Re Yukos Oil Co* (2005) 321 BR 396. See also *In re Board of Directors of Multicanal SA* (2004) 314 BR 486.

Russian oil company whose business operations, including exploration and refining, were based in Russia. The US bankruptcy filing was made essentially in an attempt to prevent a seizure of the company's assets in Russia to satisfy a Russian tax debt. US bankruptcy jurisdiction was held to be established on the basis of bank account in the US opened shortly before the bankruptcy filing and on the presence of the debtor's chief financial officer in the US. The proceedings were later dismissed, however, on the basis of section 1112(b) of the Bankruptcy Code which allows dismissal of a case for cause, including the absence of a reasonable likelihood of achieving corporate restructuring. While the background to the Russian tax claim and the consequent US bankruptcy filing was a political dispute between the company controller and the Russian government, the court abjured reliance on the 'act of state' doctrine in dismissing the US proceedings.[124] The court also abstained from reliance on the seemingly self-evident proposition that the US was not a convenient forum.[125] The 'totality of circumstances' line of reasoning used by the court involved reference to a number of factors such as a very limited ability to implement a restructuring plan in the absence of cooperation from the Russian government; the transfer of funds to the US shortly before the bankruptcy filing; the attempt to subordinate the Russian tax claim and to upset the Russian scheme of creditor priorities by the use of US law and judicial structures; and also the fact that there were court proceedings in other countries including the possibility of accessing bankruptcy procedures in Russia.[126]

The *Yukos* case involved the assertion of US bankruptcy jurisdiction over a company that another country might consider to be a national champion. The *Avianca* case[127] involving Colombia's national airline is to the same effect. In fact, it is even more far reaching in that the US Bankruptcy court rather than dismissing the case 'on the totality of the circumstances' went on to confirm a restructuring plan. The company was eligible to file under the US Bankruptcy Code because it had both property and a place of business in the US including aircraft parts and other equipment in Miami, and an office in New York City. The US court felt confident enough to confirm a restructuring plan because Avianca's largest creditors were participating in the case or were otherwise subject to US jurisdiction. In the court's view, the interests of creditors would not be best served by dismissal of the case.[128] In coming to this conclusion, it referred to the presence of creditors; the power of the court to exert judicial control over them, and the willingness of other creditors to submit to the jurisdiction of the court.[129] With one or two exceptions, Colombian creditors

[124] (2005) 321 BR 396 at 410. [125] ibid at 407–408. [126] ibid at 411.

[127] *Re Aerovias Nacionales de Colombia SA Avianca* (2004) 303 BR 1.

[128] The court (303 BR 1 at 12) noted that there was no foreign proceeding pending: 'Moreover, it would be unwarranted to impose an obligation on Avianca to file a proceeding in its ''home'' court, or to assume that if such a proceeding were filed it would justify suspension or dismissal of the U.S. case.'

[129] ibid at 12–13.

had generally respected the stay that came into effect upon the commencement of the US bankruptcy case even though they had no substantial contacts with the US and therefore were outside the effective de facto reach of the US bankruptcy court.

Somewhat more controversially, the court said that this was not a case where the foreign debtor had manipulated its place of filing or attempted to evade its creditors, either to take advantage of the fact that the US left management in possession of the debtor; to benefit from different priority principles or to obtain another perceived legal advantage. The court also considered, but rejected, the argument that it was unseemly for the US courts to take sole jurisdiction over the Avianca restructuring since the company had its centre of main activities or interests abroad. The court dismissed this proposition as largely theoretical stating that 'an ideal or even in an orderly world, governing law might require a filing in one jurisdiction, presumably the jurisdiction where an international enterprise had its principal place of business or "center of main interests"'. In short, the court said that the present world was not an ideal world.[130]

The assertion of jurisdiction by the US court in *Avianca* has been criticized.[131] Cases like *Avianca* and *Yukos* throw up practical problems for foreign creditors in that they are obliged at considerable personal cost and inconvenience to enter the US courtroom to challenge the jurisdictional choice made by the debtor. If the jurisdictional threshold was higher, this would reduce the risk of inappropriate proceedings being filed. While the court in *Avianca*[132] acknowledged that consent is often a critical factor in determining the proper scope of the US bankruptcy court's jurisdiction, foreign creditors may have little choice but to participate in the US proceedings due to the worldwide scope of the automatic stay and the risk of US sanction for failing to heed the stay. Consent may in practice be effectively coerced. Moreover, once a US bankruptcy case commences it develops a momentum of its own with so-called 'first day' orders that may require payment of certain creditors.[133] The effect of such orders is to create constituencies that favour the continuation of the Chapter 11 case. A creditors' committee may be appointed and the committee may engage lawyers and financial advisors who become active in the case. In the *Avianca* case it was remarked that the 'Committee (and perhaps its professionals as well), not wishing to see their role come to an end with the dismissal of the case, appeared in vigorous support' of the US Chapter 11 proceedings.

[130] ibid at 18.

[131] See M Hoogland, 'Recent Trends in International Chapter 11 Cases: Pragmatic Reorganizations' (2006) 41 TexIntlLJ 145, 166: 'Avianca allowed a Colombian airline to circumvent Colombian policy completely … Avianca … is dangerously close to imperialism'.

[132] (2004) *In re Avianca* 303 BR at 14.

[133] See generally *Re Kmart* (2004) 359 F 3d 866.

The US in Chapter 15 of the Bankruptcy Code has implemented the UNCITRAL Model Law on Cross-Border Insolvency and the *Avianca* result appears to be particularly anomalous in this light. Under Chapter 15 foreign main proceedings, and a prima facie stay on actions against the debtor, will only be recognized if they originate in a jurisdiction where the debtor has its centre of main interests. US courts themselves, however, will open main insolvency proceedings in respect of a debtor on the basis of a substantially lesser connection. Is this not Janus-like? The effect of the UNCITRAL Model Law will now be considered.

V. EFFECT OF THE UNCITRAL MODEL LAW

Both the UK and US have implemented the Model Law—the former through the Cross-Border Insolvency Regulations 2006 and the latter through the new Chapter 15 of the US Bankruptcy Code introduced by the Bankruptcy Abuse Prevention and Consumer Protection Act 2005.[134] The Model Law was designed to improve the real world administration of the cross-border insolvency case. The Law provides *inter alia* for the recognition of foreign main insolvency proceedings defined as proceedings commenced in a jurisdiction where the debtor has its centre of main interests. There are consequences flowing from the recognition of foreign main proceedings— an automatic stay on individual proceedings against the debtor's assets; a stay on executions against the debtor's assets and thirdly, the right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.[135] The domestic court, however, upon recognition may modify these consequences and it may also grant further discretionary relief.[136]

Article 28 of the Model Law provides that once foreign main insolvency proceedings have been recognized, local insolvency proceedings may only be opened in respect of the debtor if the latter has assets within the particular jurisdiction and the effect of the local proceedings is confined to those assets. In the Cross-Border Insolvency Regulations 2006 (CBIR),[137] the UK has qualified the full force of the principle reflected in Article 28. Local insolvency proceedings opened after foreign main insolvency proceedings have been recognized under the CBIR are limited to assets in the UK but there is no restriction on the jurisdictional base for opening such proceedings.[138] Effectively, the position under existing law is preserved and this allows a foreign company to be wound up in the UK where there is 'sufficient nexus'

[134] See JL Westbrook, 'Multinational Enterprises in General Default: Chapter 15, The ALI Principles and The EU Insolvency Regulation' (2002) 76 AmBankrLJ 1; LM LoPucki, 'Cooperation in International Bankruptcy: A Post-Universalist Approach' (1999) 84 CornellLRev 696; I Mevorach, 'On the Road to Universalism' (2011) EBOR 517; G McCormack, 'COMI and comity in UK and US Insolvency Law' (2012) 128 LQR 140.

[135] Art 20.

[136] Arts 20(6) and 21.

[137] SI No 1030/2006.

[138] Cross-Border Insolvency Regulations 2006, sch 1, art 28.

with the UK. As the Insolvency Service points out the concept of nexus 'encompasses more than just the presence of assets and extends to (among other things) the presence of creditors: it also permits consideration of whether a liquidation in the jurisdiction would be of benefit to UK creditors'.[139] The US has actually been more faithful to the spirit of the Model Law in its implementation of Article 28. Section 1528 of the US Bankruptcy Code now provides that after recognition of a foreign main proceeding, a full plenary bankruptcy case under Chapters 7 or 11 of the Code may be commenced only if the debtor has assets in the US. Moreover, the effects of such a case are generally restricted to the assets of the debtor that are within US territorial jurisdiction.

It is submitted that the Model Law provisions provide at best only a partial palliative to a creditor who is dissatisfied with the decision to open full US bankruptcy proceedings in respect of a foreign debtor. Not much has changed in this respect from before. Before implementation of the Model Law the creditor could go to the bankruptcy court and try to have the US proceedings dismissed either on the basis that the Chapter 11 filing had been made in bad faith or that restructuring efforts were doomed to failure in the absence of a substantial measure of creditor consent. With the new Model Law regime, the creditor could try to institute foreign insolvency proceedings in respect of the debtor and then apply to have these proceedings recognized under Chapter 15. The creditor could then apply for dismissal or suspension of the US case under section 305 of the Bankruptcy Code. Section 305 permits this if the purposes of Chapter 15 'would be best served by such dismissal or suspension'. The creditor is faced with the time, cost and inconvenience of taking all these steps and then has to confront the hurdle presented by the fact that the passage of time will have generated momentum that supports continuation of the US case. First day orders may have been made; creditors' committees appointed; lawyers engaged; debtor-in-possession financing arrangements put in place; certain creditors paid off and perhaps steps taken in the formulation of a restructuring plan that is congruent with the requirements of Chapter 11. Some, or all, of these events may need to be unravelled if the US proceedings are to be dismissed or suspended. The unravelling process may not be easy especially since the very opening of the US proceedings has the effect of creating constituencies that support the US-centred solution to the company's financial difficulties. Some of the difficulties in the unravelling process are illustrated by *Re Cenargo Ltd*[140] where it took a groundbreaking judge-to-judge conference call between the

[139] See para 158 Insolvency Service, *Implementation of UNCITRAL Model Law on Cross-Border Insolvency in Great Britain: Response to Consultation* (2006) and also I Fletcher, *Insolvency in Private International Law* (2nd edn, OUP 2005) 153–210.

[140] (2003) 294 BR 571.

US and UK courts to resolve the impasse over different courts exercising insolvency jurisdiction over the same entity.

VI. CONCLUSION

Both the UK and US offer certain attractions as bankruptcy forum-shopping venues. The law in both countries provides restructuring as well as liquidation alternatives though the UK administration procedure is effectively closed to foreign forum shoppers who are neither registered in an EEA country nor have their centre of main interests in the EU except Denmark.[141] Foreign companies may, however, restructure their debt by means of schemes of arrangement under the UK Companies Act. Schemes in respect of foreign companies may be approved and implemented in the UK if the company is deemed to have a sufficient connection with the UK. The test is the same for the exercise of the winding up jurisdiction in respect of foreign companies under section 221 of the Insolvency Act though it may play out differently in the different contexts. The limited scope of administration is anomalous since the policy arguments against restructuring foreign companies seem less strong than the policy arguments against liquidating them. It is especially anomalous since one of the avowed objectives of the administration procedure is to serve as a more convenient alternative to liquidation. It also detracts from the appeal of the UK as the bankruptcy venue of choice for foreign companies and hits out at 'invisible imports' in this regard.

The US has no such compunctions about serving as a restructuring forum for foreign companies. The jurisdictional threshold under the US Bankruptcy Code for both liquidating and restructuring foreign companies is quite low and is satisfied by the presence of minimal assets in the US. A US place of business is also sufficient to invoke the Bankruptcy Code jurisdiction. The criticism of US law is rather different than the criticism of UK law. The main criticism is one of hypocrisy in that under Chapter 15 of the Bankruptcy Code US courts will only recognize foreign main insolvency proceedings if they emanate from a jurisdiction where the debtor has its centre of main interests. Nevertheless, the US courts themselves will open US main bankruptcy proceedings in respect of a foreign based debtor even though the debtor's contacts with the US are quite limited. This asymmetry is difficult to justify. Moreover, if foreign companies are allowed to file for bankruptcy in the US then this runs the risk of

[141] See *Re BRAC Rent-A-Car International Inc* [2003] 1 WLR 1421. For the exclusion of Denmark see para 33 of the preamble to the Insolvency Regulation Reg 1346/2000 and also *Re Arena Corporation Ltd* [2004] BPIR 375. *Re Tambrook Jersey Ltd* [2013] EWCA Civ 576; [2013] BCC 472 confirms that English courts may make an administration order in respect of a foreign-registered company under section 426 Insolvency Act 1986. This section enables English courts to give assistance to foreign courts in designated countries having jurisdiction in respect of insolvency matters. In practice only a small number of largely Commonwealth, countries have been designated under section 426.

undermining policies considered important by the relevant foreign country such as the priority given to tax or employee claims under local law. The worldwide effect of the automatic stay consequent on the opening of US bankruptcy proceedings coupled with the global economic reach of the US means than foreign creditors can ill afford to ignore the US proceedings. In a multipolar world the lodestar of US bankruptcy jurisdiction casts an anomalous light.