Contents

Acknowledgements xv
Abbreviations xvii
Table of Cases xix
Table of Statutes and Other Instruments xxv

Introduction 1

PART I THE CONTEXT OF INSOLVENCY WITHIN MULTINATIONAL ENTERPRISE GROUPS—THE PHENOMENON AND KEY PROBLEMS

1. The Phenomenon of the Multinational Enterprise Group 9
1.1 Introduction 9
1.2 The MEG as a Key Player in World Business 10
1.2.1 Introduction 10
1.2.2 The emergence of corporate groups 10
1.2.3 The phenomenon of the multinational enterprise 11
1.2.4 The use of affiliates by multinational enterprises 13
1.2.5 Flexibility in organizational structures of multinational enterprises 14
1.2.6 MEGs—a widespread phenomenon 14
1.3 What Constitutes a MEG 15
1.3.1 Introduction 15
1.3.2 Equity-based hierarchical multinational corporate groups 16
1.3.3 Decentralized and heterarchical patterns 19
1.3.4 Multinational businesses comprised of entities linked by contract 20
1.3.5 Supranational entities 21
1.3.6 In favour of a wide meaning of a multinational enterprise group 22
1.3.6.1 Considering the different types of groups and the range of different levels of connections among the entities 22
1.3.6.2 The international element 25
1.3.7 Legal systems' approaches to the definition of groups and multinational enterprises 26
1.3.8 Addressing the problem of definition in future reforms 29
1.4 Conclusion 30

2. 'To Link or not to Link?' The Problem of the Multinational Enterprise Group Business Structure 32

http://www.pbookshop.com

2.1 Introduction 32
2.2 One Enterprise or Several Entities? 33
2.2.1 A gap between commercial realities and legal infrastructure 33
2.2.2 The enterprise group problem arising in different areas of the law with further complexities in the international group case 34
2.2.3 Summary 37
2.3 The Theoretical Debate 38
2.3.1 Entity law versus enterprise principles 38
2.3.2 The economic essence of the separate entity (and its limitations) 41
2.3.2.1 The merits of corporate separateness in the single company scenario—reducing transaction costs 41
2.3.2.2 The weaknesses of the economic rationales of corporate separateness in the group context 42
2.3.2.3 Segregation of groups of assets between the entities comprising the group 44
2.3.2.4 The risk associated with limited liability 44
2.3.3 Distinguishing between 'levels of breaches' of the separateness between MEG entities and the role of enterprise law 47
2.3.4 The entity–enterprise law dichotomy and state sovereignty 49
2.4 Legal Systems' Treatment of Enterprise Groups—Application of Entity or Enterprise Principles? 51
2.4.1 Introduction 51
2.4.2 Inclination towards allowing recognition of the group where limited liability is not at stake 52
2.4.3 The approach to limited liability in the group context 54
2.4.4 Legal regimes with more explicit 'laws of groups' 56
2.4.5 Developments on EC level 57
2.4.6 An entity approach in regard to directors' duties, and the possibility of dealing with group liability from the insolvency angle 57
2.4.7 Further ambiguity as to legal regimes' approach to groups in the context of insolvency 58
2.4.8 Inroads into entity law with respect to jurisdiction 59
2.4.9 Summary 60
2.5 'To Link or not to Link' Between MEG Members in the Context of Insolvency—That is the Question! 60

3. Global Frameworks or State-based Insolvencies—the Problem of Cross-border Insolvency 62
3.1 Introduction 62
3.2 The Essence and Significance of the Cross-border Insolvency Problem 63
3.3 The Theoretical Debate 65
3.3.1 Introduction 65
3.3.2 The main schools of thought—pros and cons 65
3.3.2.1 Universalism 65

http://www.pbookshop.com

3.3.2.2 Modified universalism 68
3.3.2.3 Territorialism (and cooperative territorialism) 71
3.3.2.4 Other universal-based approaches 74
3.3.2.5 Contractualism 76
3.3.3 Summary: universality–territoriality: a balanced scale 80
3.4 Universalism–Territorialism in Practice: Legal Systems' Treatment of Cross-border Insolvency 81
3.4.1 Harmonization of insolvency systems—the development of global insolvency norms with flexibility in the lawmaking process 81
3.4.2 Unifying private international law aspects of insolvency and cooperating in international insolvencies—approaches in practice 85
3.4.2.1 National approaches, courts, and party-led initiatives 85
3.4.2.2 The EC Regulation on Insolvency Proceedings 89
3.4.2.3 The UNCITRAL Model Law on Cross-Border Insolvency 94
3.4.2.4 The ALI Principles of Cooperation 97
3.5 Universality–Territoriality and the MEG 100

PART II GUIDING OBJECTIVES AND TYPICAL SCENARIOS

4. Insolvency Goals in Legal Systems 105
4.1 Introduction 105
4.2 Key Objectives and Tasks of Insolvency Law 105
4.2.1 Can shared objectives and tasks be identified? 105
4.2.2 Fair and efficient insolvency regimes—the key values and possible ways to achieve them 107
4.2.2.1 Wealth maximization and costs reduction 107
4.2.2.2 Respecting pre-insolvency entitlements and providing adequate incentives and measures to enhance *ex ante* efficiency 110
4.2.2.3 Widening the goals of insolvency (beyond wealth maximization and preserving relative entitlements) 113
4.2.2.4 Balancing between goals 117
4.2.2.5 Fairness in distribution 117
4.2.2.6 Summary 119
4.2.3 A broad agreement on the key values and tasks for effective insolvency regimes 119
4.2.3.1 An eclectic approach 119
4.2.3.2 Wealth maximization and respect for pre-insolvency entitlements as key goals 120
4.2.3.3 Acknowledging the wider goals of insolvency law 121

http://www.pbookshop.com

4.2.3.4 Additional tasks of insolvency law which support equitable distribution 123
4.2.3.5 Creditors' participation, impartiality, and expertise of insolvency representatives 124
4.2.3.6 Summary 124
4.2.4 The consideration of the objectives in subsequent chapters 125

5. Prototypical Scenarios of Insolvency within Multinational Enterprise Groups 127
5.1 Introduction 127
5.2 Key Factors Regarding the Structure, Operation, and Default of MEGs with Relevance to Insolvency within such Enterprises 128
5.3 Classifying each Factor into Main Representative Scenarios 129
5.3.1 The insolvency scenarios 130
5.3.2 Degree of integration/interdependence 130
5.3.3 Central control, location, and function 133
5.3.4 Portraying a concise picture of insolvency within multinational enterprise groups 135
5.4 Defining 'Prototypes' 136
5.5 Summary 146

PART III THE QUEST FOR APPROPRIATE SOLUTIONS FOR INSOLVENCY WITHIN MULTINATIONAL ENTERPRISE GROUPS

6. Preservation of the Estate, Maximization of Value, and Facilitation of Rescues 151
6.1 Introduction 151
6.2 A Global Unified Approach to 'Business Integrated' MEGs in Distress 153
6.2.1 Benefiting from package sales and going concern surpluses 153
6.2.1.1 Why and when 'linking' between the group entities across borders is beneficial 153
6.2.1.2 Mechanisms for group-wide insolvencies 159
6.2.1.3 Procedural consolidation and entity law 165
6.2.1.4 The need for global measures for 'business integrated' MEGs in distress 166
6.2.1.5 Coordination and cooperation, access, recognition, and relief in regard to entities of the business integrated MEG in distress 169
6.2.1.6 Stronger measures = greater prospects 175
6.2.1.6.1 The concept of centralization of insolvency proceedings against MEG members 175
6.2.1.6.2 Current measures for centralization of proceedings against single debtors 176

http://www.pbookshop.com

6.2.1.6.3 Enabling centralization in the case of the MEG insolvency 177
6.2.1.6.4 Centralization of MEG insolvency proceedings in practice 179
6.2.1.6.5 Adopting universalist–enterprise law principles to enhance centralizations 184
6.2.1.7 Centralization, entity law, and territoriality 187
6.2.1.8 Alternative methods of global consolidation—full or partial centralization 189
6.2.1.9 A single jurisdiction to which the MEG as a whole has connection—identifying the MEG home country 194
6.2.1.10 Problems in identifying a home country 202
6.2.2 Promoting timely and efficient resolution of the insolvency process 205
6.2.2.1 Reducing excessive and complex litigation 205
6.2.2.2 Reducing expenses and time waste on obtaining information 208
6.2.2.3 Reducing costs related to conducting multiple insolvency proceedings, transnational communication and relocation of proceedings 209
6.2.2.4 Reducing the inefficiency resulting from successive filings 211
6.2.3 Global procedural consolidation for 'business integrated' insolvent MEGs—a summary 212
6.3 Additional Linking Tools for 'Asset Integrated' MEGs 215
6.3.1 Maximizing returns and facilitating rescues in 'asset integrated' MEGs 215
6.3.2 Pooling 'the substance' of entities in the course of insolvency—available mechanisms 219
6.3.3 Substantive consolidation and entity law 224
6.3.3.1 Allowing substantive consolidation in cases of a façade of 'asset partitioning' 224
6.3.3.2 The merits of entity law are less pronounced in closely linked MEGs 227
6.3.3.3 Substantive consolidation and SPVs 228
6.3.3.4 Different levels of substantive consolidation (partial substantive consolidation) 228
6.3.3.5 Substantive consolidation by consent 229
6.3.3.6 Summary 229
6.3.4 Global measures and the universality–territoriality dilemma 230
6.3.4.1 Greater need for international coordination in cases of 'asset integrated MEGs' 230
6.3.4.2 Global substantive consolidation and centralization 232
6.3.4.3 Various means for achieving global substantive consolidation 232
6.3.5 Global substantive consolidation for 'asset integrated' insolvent MEGs—summary 235
6.4 Conclusion 235

http://www.pbookshop.com

7. Equitable Distribution and Accountability 237
7.1 Introduction 237
7.2 Joint Solutions (for MEG Insolvencies) and Redistribution 240
7.2.1 The basic rule: maintaining the separateness among the MEG entities under procedural consolidation 240
7.2.2 Maintaining equitable distribution: a case for stronger enterprise law-based solutions 241
7.2.2.1 Voting on reorganization plans 241
7.2.2.2 Global group-wide sales 243
7.2.3 Summary 245
7.3 The Global Measures (Supporting Consolidation) and Issues of Distribution 245
7.3.1 Protecting creditors in applying universalism-based solutions in MEG cases 245
7.3.2 The standard test for the group central proceedings and fairness considerations 249
7.4 Global Substantive Consolidation and Redistribution 254
7.4.1 Asset integration 255
7.4.2 Reliance 256
7.5 Creditors' Participation and Adequate Representation in the Proceedings 259
7.5.1 Accountability on a global group-wide basis 259
7.5.2 Adequate notifications and consideration of relevant information as measures to enhance global group-wide creditors' participation 262
7.5.3 Handling the case in the proper venue 265
7.5.4 Dealing with conflicts of interest 265
7.5.5 Expertise of insolvency representatives handling MEG insolvency cases 267
7.6 Conclusion 268

8. Certainty and Predictability 270
8.1 Introduction 270
8.2 Problems of Predictability in Regard to MEG Insolvencies under Current Regimes 272
8.3 Global Linking Tools Compatible with Typical Expectations of Voluntary Creditors 275
8.3.1 Universal or territorial process for the MEG and problems of predictability 275
8.3.2 Procedural or substantive consolidation for MEGs and certainty–predictability demands 279
8.3.3 Unequivocal and stable home country standard 280
8.4 Statutory Basis for the Linking Tools Invoked 283
8.5 Conclusion 284

http://www.pbookshop.com

9. Responsibility for Debts of MEG Members and Vulnerability of Intra-group Transactions 286

9.1 Introduction 286
9.2 'Group Considerations' in Avoiding (or Upholding) Intra-group Transactions 287
9.2.1 The typical avoidance provisions and their key elements 287
9.2.2 Applying avoidance provisions to intra-group transactions 288
9.2.3 Eliminating intra-group transactions in cases of 'asset integration' 290
9.2.4 Greater scrutiny in applying avoidance provisions to intra-group transactions 290
9.2.5 Upholding intra-group transactions based on 'group considerations' 291
9.2.6 Summary 293
9.3 Protecting Creditors of 'Vulnerable Entities'—Fraud, Wrongful Trading, and False Impression of Creditworthiness by Group Members 294
9.3.1 Introduction 294
9.3.2 Extending the notion of 'management' to the controlling entity 294
9.3.3 Considering circumstances of 'mismanagement' in the group context 296
9.3.4 Scenarios of mismanagement distinguished from circumstances of voidable transactions or 'asset integration' 299
9.4 Available 'Enterprise Law' Remedies for Adequate Assessment of Intra-group Transactions and Creditor Protection in Insolvency 301
9.4.1 'Group considerations' in avoidance provisions 301
9.4.2 Group liability via lifting the corporate veil or directors' duties doctrines 303
9.4.3 Group liability via fraudulent or wrongful trading regimes 304
9.4.4 Explicit consideration of group liability in insolvency 307
9.4.5 Deference of group members' claims in insolvency 309
9.5 Conflicts with Entity Law—Balanced Solutions 311
9.5.1 Avoidance of intra-group transactions and the entity–enterprise law dilemma 311
9.5.2 Balanced 'linking tools' for group liability 313
9.5.2.1 Caution in imposing liability or subordinating claims 313
9.5.2.2 The role of enterprise law 314
9.5.2.3 The available provisions for group liability considered in light of entity/enterprise law concerns 317
9.5.2.4 Summary 318
9.6 Global Measures and the Universality–Territoriality Dilemma 319
9.7 Conclusion 324

Summary and Conclusion 326

Bibliography 333
Index 353

http://www.pbookshop.com

1

The Phenomenon of the Multinational Enterprise Group

1.1 Introduction

This work focuses on multinational enterprise groups (MEGs) in insolvency. Hence, it is important at first to appreciate the phenomenon of MEGs in general: the economic significance of these business organizations and their considerable power in the modern world. Clearly, if the phenomenon is widespread, the need to address issues of law pertaining to its operations (and in our case—its default) is more crucial. This may be true either in case there is a multitude of MEGs operating worldwide, or if, regardless of their numbers, each MEG tends to be large and thus its operation or collapse may affect a large body of stakeholders and the community at large.

It is also fundamental to consider at the outset what exactly 'MEG' means for the purpose of addressing the problem of its default. In other words, which sort of enterprises will be the subject of this work? Different definitions are attributed to enterprise groups in different legal systems. There may even be differences of definition and meaning among different areas of the law within the same system. Sometimes the law does not provide any definition of a group at all. It will be crucial for the purposes of this study to address this question, and propose some guidance as to what should be the subject matter of an approach to insolvency within MEGs. For this purpose, it is necessary to consider various potential legal and organizational forms of what can be regarded as a MEG.

This chapter aims to address these issues. It starts by briefly reviewing the historical background of the multinational enterprise and the use of the group device in this regard. It describes the various reasons for the emergence of the MEG and its growth into what became a significant phenomenon in world business. It will point out the way in which such enterprises are expanding their businesses across borders using subsidiaries or other separate business units to achieve their economic goals. It then delineates the various forms such enterprises may use when they embark on a multinational venture, and finally suggests what should constitute a MEG for the purposes of addressing insolvencies within MEGs.

http://www.pbookshop.com

1.2 The MEG as a Key Player in World Business

1.2.1 Introduction

Multinational enterprises operating through group structures are essentially enterprises comprising two or more companies (or other forms of undertaking) which are linked in such a way that they may be regarded as 'related entities' and which operate in a transnational setting (i.e. a group consisting of entities from at least two different countries). The next section will elaborate on the various legal structures of MEGs and further discuss what will constitute a MEG—mainly, what is the sort of linkage needed in order to formulate the group for the purposes of this work, and what would constitute the international dimension of such groups. For now, however, it will suffice to suggest that the MEG is a combination of the group business form (i.e. a business comprising separate legal units which are together linked in some way), mainly the corporate group,[1] and the multinational enterprise (i.e. the enterprise operating in more than one country). Accordingly, the growth of the MEG phenomenon has been the result of developments at its two core axes: the rise of the multinational enterprise and the emergence of the corporate group business pattern. As will be shown here, at some point these two axes coincided in that the multinational enterprise adopted the group structure as a major form for its operation, thus coagulating the MEG as a major force in world business.

1.2.2 The emergence of corporate groups

In the evolutionary process corporate groups represent an advanced stage of development, building upon the now established concepts of the corporate separate personality and limited liability. Thus, corporate groups exploit the concept of a company's distinct personality which is detached from the identity of its shareholding members. Moreover, they normally rely on the limit of the holding company's liability for the subsidiaries' debts to the amount it has paid or have agreed to pay to the company for its shares.[2] It appears that corporate groups first surfaced in the US. It was not until 1889–93 that states within the US began enacting statutes granting powers to corporations to acquire and hold shares of other corporations.[3] Before that, the action of purchasing stock of another corporation was seen as an improper expansion of the restricted corporate purpose. There was also a general anti-corporate feeling in the US during the nineteenth

http://www.pbookshop.com

[1] This may also include groups linked by contract, as will be discussed herewith.

[2] See further on the application of the corporate personality and limited liability notions in the group context in chapter 2.

[3] See P.I. Blumberg, *The Multinational Challenge to Corporation Law: the Search for a New Corporate Personality* (Oxford University Press, Oxford 1993) [hereinafter: Blumberg, *The Multinational Challenge*] ch. 3.

century, stemming from the antagonism towards monopolies, particularly where the purchase represented not merely an investment, but an attempt to gain control of the other corporation and perhaps to achieve monopoly power over the market as well.[4] With the new rules that gradually dropped all restrictions on acquiring the shares of other companies, corporate groups soon grew to occupy a commanding role in American industry.[5]

It is more difficult to track the entry of corporate groups onto the English scene, since there was not an equivalent rule in English law regarding ownership by companies.[6] However, the period of the 1920s and the 1930s has been indicated as the point of entry of groups into the conscious jurisprudence of UK company law.[7] There is less information on the emergence of corporate groups in other European countries, though it is clear that the civil law systems' tendency was towards permitting and even encouraging various sorts of group relationships.[8] Corporate groups had significant dominating power in Japan in the pre-war period, though later on they have changed their typical structures to comply with the prohibition imposed by the US on the operation of pure holding companies (whose principal activity is to control the business of other Japanese companies).[9]

1.2.3 The phenomenon of the multinational enterprise

It can be argued that the multinational enterprise should be traced back to several hundred years earlier, however not in its modern form, when a genuine international division of production by firms was presented.[10] This phenomenon of control over the production of goods and services in foreign countries originated with the establishment in the sixteenth century of the great European colonial trading companies.[11] Initially, this worldwide business was achieved via trade relations. In time, big companies exerted a growing degree of control through independent foreign agencies. Finally, multinational enterprises in their modern sense began to appear in the nineteenth century with the growth of world trade and industrial production, and the simultaneous

http://www.pbookshop.com

[4] Ibid.

[5] Ibid.

[6] See D. Milman, 'Groups of Companies: The Path towards Discrete Regulation', in *Regulating Enterprise* D. Milman (ed.) (Hart Publishing, Oxford 1999) 218, 220.

[7] T Hadden, 'Inside Corporate Groups' (1984) 12 Int. J. of Soc. of Law 271.

[8] See T. Hadden, 'Regulating Corporate Groups: An International Perspective', in J. McCahery, S. Picciotto and C. Scott (eds.), *Corporate Control and Accountability* (Oxford University Press, Oxford 1993) 343, 350–51.

[9] Ibid*,* 352. See further on typical corporate group structures in Japan in section 1.3.3.

[10] See P.T. Muchlinski, *Multinational Enterprises and the Law,* 2nd edn (Oxford University Press, Oxford 2007) [hereinafter: Muchlinski, *Multinational Enterprises*] 8–9.

[11] See I. Wallerstein, *The Modern World-system* vol i and ii (Academic Press, New York 1974, 1980). See also V. Bornschier and H. Stamm, 'Transnational Corporations', in S. Wheeler (ed.) *The Law of the Business Enterprise* (Oxford University Press, Oxford 1994) 340.

growing importance of technological know-how.[12] The pressure to find affiliates increased, due to the need to open up new attractive markets and to secure access to raw materials. Independent agents still played a major role in this regard, but as they were often unreliable they were replaced more and more by directly controlled affiliates.[13]

In fact, various theoretical explanations regarding the establishment and continued growth of the multinational enterprise were suggested by economists over time. Initially it was suggested that ownership advantages were the driving force behind multinational enterprises. According to this view enterprises expanded beyond their national seat of operations primarily to be able to expand market power.[14] Later on, another explanation linked the expansion of firms abroad to the development sequence of their products, suggesting that enterprises use foreign markets to seek new opportunities for profit and to remain competitive.[15] Yet another view explained the motivation for expansion into foreign markets as derived from minimizing transaction costs. According to this theory, internalization of activities (that is, the vertical and horizontal integration of operations) increases efficiency.[16] Another approach concentrated on location advantages. Namely, that the choice of the enterprise to expand to foreign markets depends on the advantages that host countries may or may not offer, such as the market size or local protective measures (access to cheap labour may also be an incentive to expand into particular markets). This approach is closely related to the classical theory of trade.[17] Later, it was suggested that the development of the multinational enterprise should be explained as a combination of those different

http://www.pbookshop.com

[12] M. Wilkins, *The Emergence of Multinational Enterprises: American Business Abroad from the Colonial Era to 1914* (Harvard University Press, Cambridge MA 1970) Part Two.

[13] See ibid. See also V. Bornschier and H. Stamm, 'Transnational Corporations' in S. Wheeler (ed.) *The Law of the Business Enterprise* (Oxford University Press, Oxford 1994) 340.

[14] See the 'monopolistic' approach illustrated in the work of Hymer (see, for example, S. Hymer, *The International Operations of National Firms: Study of Foreign Direct Investment* (MIT Press, Cambridge MA 1976); S. Hymer and R. Rawthorn, 'Multinational Corporations and International Oligopoly: The Non American Challenge' in Kindleberger (ed.), *The International Corporation* (MIT Press, Cambridge MA 1970) 57). See also S. Wheeler 'The Business Enterprise: A Socio-Legal Introduction', in S. Wheeler (ed.), *The Law of the Business Enterprise* (Oxford University Press, Oxford 1994) 36–7; V. Bornschier and H. Stamm, 'Transnational Corporations', in S. Wheeler (ed.), *The Law of the Business Enterprise* (Oxford University Press, Oxford 1994) 334–5.

[15] Known as the 'product cycle' model developed by Professor Vernon (see R. Vernon, *Sovereignty at Bay: The Multinational Spread of U.S. Enterprises* (Longman, Harlow 1971); R. Vernon, *The Economic and Political Consequences of Multinational Enterprise,* 2nd edn (Harvard University Press, Cambridge MA 1973)). The model has lost its relevance since the mid-70s, in particular it was not thought to work as an explanation for the behaviour of established multinational enterprises or the expansion of non-US enterprises abroad (see in the writings of Professor Vernon himself (R. Vernon, 'The product cycle hypothesis in a new international environment' (1979) 41 Oxford Bull. Econ. & Stat. 255)).

[16] See, for example, P.I. Buckley and M. Casson, *The Future of Multinational Enterprise* (Holmes & Meier, New York 1991) 2.

[17] See, for example, J.H. Dunning, *Explaining International Production* (Allen & Unwin, London 1988) 22–3.

approaches into an 'eclectic paradigm', which combines ownership, location, and internalization factors.[18]

1.2.4 The use of affiliates by multinational enterprises

The corporate group legal structure helps to achieve some of the above goals.[19] Thus, ownership advantages (i.e. expansion of market power) can be achieved through the process of acquiring existing corporations, resulting in a corporate group structure.[20] Transaction costs can be minimized by operating an integrated corporate group,[21] in which for instance a subsidiary can serve as a supplier of required goods, rather than third party companies, ultimately internalizing the activities of the enterprise. The enterprise can exploit 'location advantages' by placing a local subsidiary in the foreign market that will be subject, as a legal person, to the foreign jurisdiction.[22] Sometimes it is a regulatory requirement of the foreign jurisdiction that local businesses be conducted through separate subsidiaries. In addition, the multinational group device may be used for various other reasons and purposes. For instance, though the integrated multinational enterprise structure helps businesses to achieve market power, companies may also be motivated to invest in foreign subsidiaries merely for the purpose of diversifying investment (and reducing risk).[23] Tax advantages are often cited as a main driving force for conducting businesses via groups.[24] The limited liability notion in particular (applied to groups) enables businesses to ring-fence risks and to isolate potential liabilities. This could be particularly opportune when the enterprise considers embarking on a new hazardous activity.[25]

http://www.pbookshop.com

[18] See J.H. Dunning, *Industrial Production and the Multinational Enterprise* (Allen & Unwin, London 1981); J. Black and J.H. Dunning (eds.), *International Capital Movements* (Macmillan, London 1982).

[19] Though, there are other legal factors that may influence the growth of multinational enterprises (for a thorough discussion of the role of legal factors in the growth of multinational enterprises, see Muchlinski, Multinational Enterprises (n 10 above) 33–43).

[20] See O.E. Williamson, 'Organization Form, Residual Claimants and Corporate Control' (1983) 26 J. L. & Econ. 351, 362; O.E. Williamson, 'The Modern Corporation: Origins, Evolution, and Attributes' (1981) 19 J. Econ. Lit. 1537. See also W. Bratton Jr 'The New Economic Theory of the Firm: Critical Perspectives from History', in S. Wheeler (ed.), *The Law of the Business Enterprise* (Oxford University Press, Oxford 1994) 153.

[21] See further on the concept of integration in chapter 5, section 5.3.2.

[22] It should be noted that legal factors also have a role to play in determining the location characteristics of the host state. The host state may use its political power to alter its location advantages through law and thereby influence the investment decisions of the enterprise (see Muchlinski, Multinational Enterprises (n 10) 38–40).

[23] See Kopits, 'Multinational conglomerate diversification' (1979) 32 Econ. Int. 99.

[24] See generally, A. Dewing, *Financial Policy of Corporations* (Ronald, New York 1953) 980–7. See also D. Milman, 'Groups of Companies: The Path towards Discrete Regulation', in D. Milman (ed), *Regulating Enterprise* (Hart Publishing, Oxford 1999) 221.

[25] See further on limited liability in the group context and more generally the legal problems associated with MEGs in chapter 2.

1.2.5 Flexibility in organizational structures of multinational enterprises

The combined model proposed by Dunning[26] has later been adapted to take account of the rise of multinational strategic alliances.[27] Such alliances may enhance each participating firm's ownership advantages and extend internalization advantages across the participants. Location advantages are considered in relation to their capacity to influence the extent and structure of localized centres of excellence into which strategic alliances may choose to locate and are also regarded as a parameter of the ownership advantages of the firm.[28] Accordingly, multinational enterprises' investment choices tend towards 'the creation of foreign direct investment "clusters" around locations offering the correct mix of location advantages for the enhancement of firm competitiveness'.[29] Such developments have led to changes, inter alia, in the business organization of multinational enterprises allowing for more flexible forms of organization.[30]

1.2.6 MEGs—a widespread phenomenon

Ultimately, multinational groups of various forms have come to be the modern reality.[31] These complex enterprises are based widely around the globe.[32] The impact of the MEG in world business is more significant considering operations taking place using various group structures, other than the conventional hierarchical structures and the full ownership of affiliates. The MEG may take

[26] N 18.

[27] See J.H. Dunning, *Alliance Capitalism and Global Business* (Routledge, New York 1997) ch. 3. See further on MEG structures in section 1.3.

[28] J.H. Dunning, 'Location and the Multinational Enterprise: A Neglected Factor?' (1998) 29 J. Int'l. Bus. Stud. 45.

[29] Muchlinski, *Multinational Enterprises* (n 10), 32.

[30] Ibid.

[31] P.I Blumberg et al, *Blumberg on Corporate Groups* (2005) [hereinafter, Blumberg et al, *Blumberg on Corporate Groups*] (5 Volumes) vol. 1, s. 1.04; Blumberg, *The Multinational Challenge* (n 3) 231. Professor Schmitthoff observed in 1989 that 'in modern business life, particularly on the transnational level, the single public limited company has virtually ceased to exist and one encounters only groups of companies' (C.M. Schmitthoff 'Introduction', in C. Schmitthoff and F. Wooldridge (eds.), *Groups of Companies* (Sweet & Maxwell, London 1991) xiv, ix). See also E. Ellis, 'Multinationals and the Antiquities of Company Law' (1984) 47 Mod. L. Rev 87, 92; K. Hofstetter, 'Multinational Enterprise Parent Liability: Efficient Legal Regimes in a World Market Environment' (1990) 15 N.C.J. Int'l L. & Com. Reg. 299, 301–02; D. Milman, 'Groups of Companies: The Path towards Discrete Regulation', in D. Milman (ed.), *Regulating Enterprise* (Hart Publishing, Oxford 1999) 235–6; P.L. Davies, *Gower and Davies' Principles of Modern Company Law* (Sweet & Maxwell, London 2008) [hereinafter: Davies, *Company Law*] 228–9.

[32] See Blumberg et al, *Blumberg on Corporate Groups* (n 31), vol. 1, s. 1.01. See, though, O. Sussman 'The economics of the EU's corporate-insolvency law and the quest for harmonization by market forces' [2005], *Oxford Financial Research Centre*, Working Paper 2005-FE-16, 18. Sussman found, in regard to five European countries (Germany, France, Spain, the UK, and Italy) in the period 2001–03 and in regard to 116,445 of Europe's top companies, that the phenomenon of foreign ownership (i.e. the degree of group operations across several jurisdicions) among sizable European companies is important though not overwhelming.

http://www.pbookshop.com

a multiplicity of forms including the more loosely connected networks of coordinated economic collaborations.[33] In particular, the phenomenon is intensified if those group enterprises linked by contract rather than equity are taken into account. Such undertakings include for example enterprises composed of franchisors and franchisees or licensors and licensees.[34]

All in all, the phenomenon is both significant in frequency and in complexity of its components. As observed by the authors of Blumberg on Corporate Groups:

> Multinational corporations of enormous size dominate the world's economy. These enterprises are corporate groups that typically conduct their operations throughout the world through numerous subsidiary corporations—domestic and foreign—incorporated under the laws of the country in which they conduct their business. The multinational groups are typically complex, multitiered corporate structures with first-tier, second-tier, third-tier, and even more junior-tier subsidiaries.[35]

In the context of insolvency, the intensity of the phenomenon is also reflected in the level of media coverage given to numerous large scale insolvency cases of multinational groups in recent decades, such as the collapse of the Maxwell Group, Worldcom, Global Crossing, Federal Mogul, MG Rover, Parmalat, to name just a few.[36]

1.3 What Constitutes a MEG

1.3.1 Introduction

A basic issue to establish before considering how the law should address insolvencies within MEGs is what may be regarded as a MEG in this respect. It was

[33] See Muchlinski, *Multinational Enterprises* (n 10) 33. See further section 1.3 (discussing MEG structures).

[34] It was observed that 'Franchising is the outstanding example of this development... In recent years, enterprises resting on franchise contracts have come to occupy an increasingly prominent position in certain industries, particularly hotels, fast-food and other restaurants, and motor vehicles sales and servicing.' (Blumberg et al, *Blumberg on Corporate Groups* (n 31) Vol. I, s. 6.04 [A]). Burns mentions in regard to UK based franchise systems that the phenomenon developed from a relatively small beginning to a big business which continues to grow in size and significance and to a large extent operates internationally (see T. Burns, 'Developing a Franchise: could securitization be a serious funding option for franchisors in the United Kingdom?' [2006] JBL 656).

[35] The authors note that the phenomenon has grown to surprisingly large dimensions and refers to UNCTAD 2005 World Investment Report, reporting of 69,727 multinational parent corporations conducting business through 690,391 foreign affiliates (UNCTAD, 2005 World Investment Report, 265 (Annex Table A.I.8). They also note that, in addition, there were many thousands of franchisees, licensees, dealers, and contractors for which statistics are unavailable (Blumberg et al, *Blumberg on Corporate Groups* (n 31) Vol 1, s. 1.01).

[36] These and other MEG insolvencies' cases will be discussed later on in this work. Indeed, an increase in number of collapses of enterprise groups is anticipated in the near future due to the current financial crises (with the collapse of the Lehman Brothers investment banking group as a major example). See further chapter 3 on the cross-border insolvency phenomenon.

http://www.pbookshop.com

already indicated (in the previous section) that foreign investment and operations via separate business units may take various forms. It is important now to consider what those possible forms are in more detail, and to substantiate whether these structures will be included under the term MEG for our purposes. Essentially, both the linkage between the separate units and the foreign element required for the 'group' and 'multinational' aspects of MEGs, respectively, should be identified.

1.3.2 Equity-based hierarchical multinational corporate groups

The typical multinational group enterprises are those operating across borders via subsidiary companies.[37] These are 'equity-based' forms of multinational enterprises and classically they are structured in the 'pyramid' hierarchical form of ownership, where a parent company wholly owns (or holds the majority of shares) and controls a subsidiary or a number of subsidiaries (domestic and foreign).[38] In fact, these patterns may appear in more complex forms of multi-tier group structures, with subsidiaries and sub-subsidiaries either wholly or partly owned.[39] Alternatively, a group may be created via the common ownership and control of individual shareholders (or a family).[40] In all these structures, the group is equity based, namely its components are linked by stock ownership, and the capacity to control the management and operations of the various entities is what constitutes the group. Control over a subsidiary (which includes membership in the subsidiary) cannot be easily defined. Yet, in general terms such a relationship exists whenever the controller holds a strategic position within the corporate decision-making facility of the subsidiary which gives it a power to directly or indirectly influence its business affairs. It may therefore derive from a variety of situations

http://www.pbookshop.com

[37] See Blumberg et al, *Blumberg on Corporate Groups* (n 31) Vol. 1, s. 1.01.

[38] This is a widely used form of corporate groups, but it is especially typical of US and UK enterprises of the 20th century (T. Hadden, 'Regulating Corporate Groups: An International Perspective', in J. McCahery, S. Picciotto and C. Scott (eds.), *Corporate Control and Accountability* (Oxford University Press, Oxford 1993) 343, 345–7; Muchlinski, *Multinational Enterprises* (n 10), 56–8 (Muchlinski mentions examples such as the Ford group (the US auto manufacturer) and Cape Asbestos)).

[39] Corporate groups may evolve into intricate networks of sub-holding companies (see A. Muscat *The Liability of the Holding Company for the Debts of its Insolvent Subsidiaries* (Dartmouth Publishing Group, Aldershot 1996) [hereinafter: Muscat, *The Liability*] 8. See also T. Hadden, 'Inside Corporate Groups' (1984) 12 Int. J. of Soc. of Law 271, 273; Blumberg et al, *Blumberg on Corporate Groups* (n 31), vol. 1, s. 1.01.

[40] See for example the relationship between Parmalat and Parmatour. The Italian Tanzi family held the Parmalat dairy group and also other family companies such as Parmatour (a tourism business) (see *New York Times*, 'The Rise and Fall of Parma's First Family', 11 January 2004). All those companies may be regarded as among themselves creating a group via the common control of the family (see further on the Parmalat insolvency proceedings in chapter 6 mainly sections 6.2.1.4, 6.2.1.6, 6.2.2.1 and 6.2.2.2; chapter 7, section 7.5.4; chapter 8, section 8.2; and chapter 9, section 9.2.4).

demonstrating ability to effectively control the subsidiary.[41] Control need not be actively exercised and a passive potential for control may suffice to form a group of linked entities.

When the entities comprising the group (be it the parent and a subsidiary, or different subsidiaries) are situated in more than one country the group is multinational.[42] The group components may all operate in the same line of business or there may be more diversity in the entities' operations.[43] A particular subsidiary may serve specific purposes, as with SPVs[44] used for example for securitization transactions.[45]

Equity-based linkages that may potentially form a multinational group could be a result of various forms of alliance between firms.[46] An example is the transnational merger in which two or more parent companies from different countries

[41] This may include situations where a person or a parent holds a small percentage of the shares yet with concentrated rights (in the general meeting or rights to nominate the members of the board of directors), either attached to the shares or as contemplated in the subsidiary's constitution, or as a result of agreements with other members. It can also happen where there is less than the majority of voting shares, but where ownership of the remaining shares is dispersed, or as a result of a control contract with the subsidairy (according to which the subsidiary renounces its autonomy and is subordinated to the directions of the parent) or where there are interlocking board directorates (See e.g. J.E. Antunes, *Liability of Corporate Groups—Autonomy and Control in Parent-Subsidiary Relationships in U.S., EU and German Law. An International and Compative Law (*Kluwer, Deventer 1994) 116–21; D.D. Prentice 'A survey of the law relating to corporate groups in the United Kingdom', in E. Wymeersch (ed.), *Groups of Companies in the EC* (De Gruyter, Berlin 1993). On control emerging in contractual networks see section 1.3.4 below.

[42] On the 'international aspect' see further section 1.3.6.2.

[43] See Blumberg, *The Multinational Challenge* (n 31), 142. See further chapter 5 on different levels of integration within MEGs.

[44] A special purpose vehicle (SPV; also referred to as special purpose entity (SPE) or special purpose company (SPC); this work uses the term SPV).

[45] Securitization has become one of the most important financing vehicles in the US, and its use is now rapidly expanding worldwide. It enables companies, inter alia, to obtain lower cost financing, increase liquidity and it better allocates risk and its distribution. The transaction involves transfer of revenue generating assets to a newly formed special purpose entity. The SPV then issues bonds or other securities (secured by assets sold). The funds that are raised by the bond issue will then be used to pay the originator company for the assets it transferred to the SPV. The main idea is to separate the receivables from risk associated with the originator company, and for this reason it is crucial that the SPV will remain insolvency remote. SPVs are usually corporate entities held by the originator company, but they may take other forms such as partnerships (on securitization transactions and the use of SPVs see S. Schwarcz, 'Structured Finance: The New Way to Securitize Assets' (1989) 11 Cardozo L. Rev. 607; S. Schwarcz, *Structured Finance: A Guide to the Principles of Asset Securitization,* 2nd edn (Practicing Law Institute, New York 1993); S. Schwarcz, 'The Alchemy of Asset Securitization' (1994) 1 Stan. J. L. Bus. & Fin. 133; S. Schwarcz, 'Securitization Post-Enron' (2004) 25 Cardozo L.Rev. 1539. See also C. Hill, 'Securitization: A Low Cost Sweetener for Lemons' (1996) 74 Wash U. L.Q. 1061; T. Burns, 'Developing a Franchise: could securitization be a serious funding option for franchisors in the United Kingdom?' [2006] JBL 656). On SPVs in the context of MEG insolvencies see chapter 6 section 6.2.1.1 and section 6.3.3.3 and chapter 9 section 9.5.1.

[46] See Michael Y. Yoshino and U. Srinivasa Rangan, *Strategic Alliances: An Entrepreneurial Approach to Globalization* (Harvard Business School Press, Cambridge MA 1995) 4–5 (an alliance can take a variety of forms, ranging from an arm's length contract to a joint venture). On contractual linkages between firms see section 1.3.4 below.

http://www.pbookshop.com

integrate their business operations and jointly hold a company.[47] A transnational merger may be achieved via the creation of a 'twin holding' company located in each home state, based on joint shareholding by the founding parent companies, and the transfer of operating activities to subsidiaries that may be jointly or separately owned and controlled by the holding companies.[48] As organizational structures may change over time, such enterprises may restructure the business to form a more unified operation for various commercial reasons, forming a new single parent company instead of two parents located in different countries.[49]

A transnational merger can also develop from an international joint venture. In fact, there is no precise legal meaning to the term 'international joint venture', but it is commonly associated with a scenario involving cooperation between two or more parent companies from different countries that share control over the venture, formed for the pursuit of a particular activity.[50] Initially, the joint venture is between independent parent undertakings, and is operating for a specific purpose, but this may develop into a more permanent undertaking and a more integrated form of business. Unlike parent–subsidiary relationship in which there is control by a single parent, the joint venture normally involves shared control, although one of the parent undertakings may exercise a dominant influence over the venture.[51]

http://www.rbookshop.com

[47] This is especially common in Europe (for a thorough review of this type of multinational organization see Muchlinski, *Multinational Enterprises* (n 10), 58–63).

[48] See the examples provided by Muchlinski (ibid), for instance the Eurotunnel group, which operated under two parent companies (jointly held French and English Holding companies)—Eurotunnel SA and Eurotunnel Plc, each owning respectively a French and English concessionary companies—France Manche SA and the Channel Tunnel Group Ltd. The group entered insolvency proceedings, and has been restructured (Eurotunnel SA and Eurotunnel Plc became subsidiaries of Groupe Eurotunnel SA and their names were changed to TNU SA and TNU Plc respectively; see further on the case in chapter 6, section 6.2.1.10). See also J. Keir, 'Legal Problems in the Management of a Group of Companies', in C.M. Schmitthoff and F. Wooldridge (eds.), *Groups of Companies* (Sweet & Maxwell, London 1991) (discussing the organization of the Unilever group, which took the dual holding company approach). See also T. Hadden, 'Regulating Corporate Groups: An International Perspective', in J. McCahery, S. Picciotto and C. Scott (eds.), *Corporate Control and Accountability* (Oxford University Press, Oxford 1993) 343, 347.

[49] See the unification of the Anglo-Dutch oil company Royal Dutch Shell. Until 20 July 2005 it took the twin holding form of enterprise, but then was unified by establishing a new parent company headquartered in the Netherlands and incorporated in the UK (Muchlinski, *Multinational Enterprises* (n 10), 59).

[50] This refers to joint ventures created by the formation of a separate undertaking (otherwise the joint venture may be created by contract). Muchlinski discusses, inter alia, the example of Renault-Nissan Alliance which is organized around a 50 per cent jointly owned strategic management company, Renault-Nissan BV, incorporated in the Netherlands. The structure has been adopted for the specific purpose of coordinating strategic cooperation while preserving the distinct corporate culture and brand identity of each partner (Muchlinski, *Multinational Enterprises* (n 10), 67). See also generally on the phenomenon of joint ventures in M. Lower, 'Joint Ventures', in D. Milman (ed.), *Regulating Enterprise* (Hart Publishing, Oxford 1999) 241.

[51] Muchlinski, *Multinational Enterprises* (n 10), 66–8.

1.3.3 Decentralized and heterarchical patterns

The elements of central control and strategic influence over the affairs of subordinated entities were emphasized above as 'glue' connecting bundles of entities (operating worldwide) to form a multinational group. This is mostly emphasized in vertically (rather closely) held enterprise groups. However, multinational enterprises (comprised of separate business units) may operate their business in more decentralized and even heterarchical patterns. In such decentralized or flatter structures of organizations the group may still achieve a degree of managerial control or otherwise may still coordinate the whole business.[52] Such forms of enterprise could also be regarded as multinational groups. The linkage then will not be limited to control or capacity to control, but will also include the capacity to coordinate the business.

In fact, it has been argued that with enterprise growth and maturity, more decentralized patterns may be chosen by firms, replacing the traditional hierarchical model as the primary leading form for multinational enterprises.[53] The group may thus spread certain functions geographically across the global enterprise and opt for more flexible and innovative driven structures. In such structures, the members of the group will tend to be more autonomous (less closely held or controlled). As a result, the group as a whole (or certain parts thereof) is decentralized.[54] This strategy in forming the enterprise group may also lead to the replacement of parent–subsidiary structures with free-standing companies linked to the 'parent' by contract. The next section will consider possible contractual forms of multinational groups.

[52] In Japan, special group structures have evolved as a result of statutory prohibition of monopolies. One form that emerged was the keiretsu, or families of firms. In this type of group of companies there is no principal holding company, but a complex network of small intra-group holdings operating in coordination by regular meetings of the managements and through interlocking directorships. It has been observed that there appears to be general acceptance in Japan of the value of informal cooperative structures (but the formal prohibition of holding companies is widely regarded as historical anachronism) (T. Hadden, 'Regulating Corporate Groups: An International Perspective', in J. McCahery S. Picciotto and C. Scott (eds.), *Corporate Control and Accountability* (Oxford University Press, Oxford 1993) 343, 352–3). The authors of *Blumberg on Corporate Groups* observe that while relatively minor amounts of securities in such cross-holdings are sufficiently significant to create some pressure for the corporate policies of the group entities to be conducted in some collaborative fashion it is normally a situation where there is a minor degree of common control (Blumberg, *Blumberg on Corporate Groups* (n 31), vol 5, s.180.03). Some systems limit to an extent such cross-holding structures by generally prohibiting extensive cross-ownership (e.g. in France and Germany cross-holding in excess of 10 per cent is prohibited (France: Law No. 66-537, July 24, 1966, Arts. 217, 217-1, 217-2; Ordinance No. 67-695, Aug. 17, 1967, Arts. 1, 6; Germany: Aktiengesetz, BGB III 4121-1, Sept. 6, 1965, s. 71(1)).

[53] See Muchlinski, *Multinational Enterprises* (n 10) 47–8.

[54] See J.H. Dunning, *Multinational Enterprises and the Global Economy* (Addison-Wesley Publishing Co, Wokingham 1993) [hereinafter: Dunning, *Multinational Enterprises*] 3; N. Hood and S. Young, *The Economics of Multinational Enterprise* (Longman, London 1979) 3; R. Caves, *Multinational Enterprises and Economic Analysis,* 2nd edn (Cambridge University Press, Cambridge 1996) 1; Muchlinski, *Multinational Enterprises* (n 10) 45–51.

http://www.pbookshop.com

1.3.4 Multinational businesses comprised of entities linked by contract

Multinational groups operating via parents and numerous subsidiaries are a major form of multinational organization.[55] But, such organizations will also typically vary their use of legal patterns for their operations and may conduct certain parts of the group's activities via affiliates other than subsidiaries by way of different types of agreement.[56] Alternatively, the entire group may be a bundle of contractually linked entities (termed by Teubner as 'network organizations' [57]).

In this type of structure, ownership does not feature (in those parts of the group not operating via conventional subsidiaries), and the entities are interconnected only via contractual relationship.[58] However, as with equity-based multinational groups, control may be the element constituting the group, or the ability to control or coordinate a unified business in the more heterarchical patterns.[59] In a way similar to a parent–subsidiary relationship, the contractually linked entity may be an integral part of the group and may be closely and commonly controlled.[60] Alternatively, the contractual based group may operate as a transnational network group with looser connections among the entities, yet still operating with a degree of coordination. Generally, it has been observed that there is a trend towards more open heterarchical organizations via contractual linkages, though this may depend on the particular industry and the degree of integrated control desired by the enterprise.[61]

As mentioned earlier the most common type of contractual group relationship is agreements between franchisors and franchisees.[62] Here, the franchisor and the franchisee are linked together by the franchise contract. The franchise

http://www.pbookshop.com

[55] Blumberg et al, *Blumberg on Corporate Groups* (n 31) vol. I, s. 6.04.

[56] Ibid, s. 1.01.

[57] See G. Teubner, 'The many-headed Hydra: networks as higher order collective actors', in J. McCahery, S. Picciotto and C. Scott (eds.), *Corporate Control and Accountability* (Clarendon Press, Oxford 1993) 41. See further G. Teubner, '"Unitas multiplex: corporate governance in group enterprises', in D. Sugarman and G. Teubner (eds.), *Regulating Corporate Groups in Europe* (Nomos, Baden-Baden 1990) 87–92; G. Teubner, 'Beyond Contract and Organisation? The External Liability of Franchising Systems in German Law', in C Joerges (ed.), *Franchising and the Law: Theoretical and comparative Approaches in Europe and the United States* (Nomos, Baden-Baden 1992) 105; G. Teubner, *Law as an Autopoietic System* (Blackwell Publishers, Oxford 1993) ch. 7.

[58] See J.E. Antunes, *Liability of Corporate Groups—Autonomy and Control in Parent-Subsidiary Relationships in U.S., EU and German Law. An International and Compative Law* (Kluwer, Deventer 1994) 120.

[59] See section 1.3.3.

[60] Blumberg et al, *Blumberg on Corporate Groups* (n 31) vol. 1, s. 6.04.

[61] Muchlinski, *Multinational Enterprises* (n 10) 66.

[62] See n 34, and accompanying text. The group may also comprise both traditional subsidiaries and independently owned operational units of franchisees (the authors of *Blumberg on Corporate Groups* give the examples of Hilton, Holiday Inn and Hertz multinational enterprise and notes that the public eye cannot readily distinguish in regard to such enterprises whether the particular business conducted by the group is organized as a traditional subsidiary or a franchisee (Blumberg et al, *Blumberg on Corporate Groups* (n 31) vol. 1, s. 6.04[A]).

contract is typically of a standard form used throughout the chain, requiring operation by the franchisee in accordance with certain standards and procedures imposed by the franchisor and assuring the franchisor a dominant position over the franchisee in operational and related matters.[63] Hence, in such contractual forms of enterprises there may be a similar pattern of hierarchical close control as with the classic pyramid pattern of equity-based groups. A looser contractual network aimed at distribution (across borders) may take the form of simple distribution agreements with foreign distributors.[64] Other typical contractual linkages are those aimed at production, such as licensing networks.[65]

1.3.5 Supranational entities

As we are concerned with enterprises conducting business transnationally, it is worth mentioning particular forms of entity which are 'supranational' as such, in the sense that they are formed under laws adopted by regional organizations of states. Though, as this work is also concerned in particular with 'groups', it should be noted that any such supranational entity (although of a multinational nature) is in itself not a subject matter of this work (as it is a type of a single entity). Yet, obviously, such entities may be part of a multinational group. The 'European company' known as the 'Societas Europaea' (SE) is one example of such an entity. [66] It is a creation of the EC Statute for the European Company 2001,[67] and it applies to public companies. It is primarily aimed at facilitating cross-border mergers of companies on the basis of a single set of rules and a unified management and reporting system. The idea is to provide a community form of incorporation that will not be identified with any particular member state. Yet, the success of this concept is compromised mainly due to the absence of a Community registry and of comprehensive regulation for the SE.[68] The EU commission is currently proposing a new European Private Company Statute (*Societas*

[63] Blumberg et al, *Blumberg on Corporate Groups* (n 31) vol. 1, s. 6.04[A]. The degree of control exercised by franchisors tends to be significant as the purpose of the franchisor is to expand its products and brand image abroad in a uniform business format so as to develop its presence as an international business (Muchlisnki, *Multinational Enterprises* (n 10) 53.

[64] Here, the distributer, after purchasing the stock from the producer, is usually free to sell goods as it sees fit (Muchlinski, *Multinational Enterprises* (n 10) 53).

[65] For a description of license agreements in the contexts of groups and multinational enterprise see Muchlinksi, *Multinational Enterprises* (n 10) 45; Blumberg et al, *Blumberg on Corporate Groups* (n 31) vol. 1, s. 6.04[B].

[66] For a comprehensive account of supranational forms of international business see Muchlinski, *Multinational Enterprises* (n 10) 72–7.

[67] Council Regulation (EC) 2157/2001 of 8 October 2001 (European Company Statute) [2001] OJ L294/1.

[68] The SE is mainly governed by the law of member states where it is registered. See further Muchlinski, *Multinational Enterprises*, (n 10) 72–3 (noting the example of Allianz, the German insurer, as the largest European company to use the SE structure). Thus far there have been less than 200 SE registrations throughout the European community and only less than 70 have operations and employees (as opposed to being shelf companies) (see Company Law Newsletter, 'European

http://www.pbookshop.com

Privata Europaea (SPE)) designed for small and medium-sized enterprises. This will complement the statute for the European company as it will apply to private companies (and will require only a nominal minimum share capital). It will allow entrepreneurs to set up all subsidiaries in various member states in the same form, and thus (as the EU commission predicts) will save considerable costs.[69]

Another supranational form of business adopted by the European Community is the European Economic Interest Grouping (EEIG) established by EC Regulation.[70] The creation of such an entity is aimed at facilitation of cross-border cooperation between business entities operating within the EC. It is formed by the conclusion of a contract between the member companies (or individuals) and upon registration becomes a separate entity. However, according to the relevant regulation, the members shall have joint and unlimited liability, the effects of which are to be determined by national law.[71] The EEIG is of limited commercial scope, as it has to facilitate or develop the economic activities of its members and is therefore disqualified from certain commercial activities.[72]

http://www.pbookshop.com

1.3.6 In favour of a wide meaning of a multinational enterprise group

1.3.6.1 Considering the different types of groups and the range of different levels of connections among the entities

Evidently, enterprises conducting business on a worldwide basis via separate entities take different shapes. It can be a small business of parent and few subsidiaries, an intricate web of subsidiaries and sub-subsidiaries, a network of franchisor and franchisees, a joint venture, a parent operating its activities via subsidiaries as well as licensees, affiliates, and so forth (assuming that these enterprises operate on a worldwide basis). The question is whether all such types should be considered as possible subject matter in the treatment of insolvencies within MEGs.

In general, it seems that limiting a definition of a MEG to only certain patterns while excluding other possibilities used in practice will result in mismatch

Commission proposes European Private Company and Small Business Act', Sweet & Maxwell, August 7, 2008).

[69] The SPE statute will only provide a set of company law rules related to the company form and will not regulate other areas of law affecting companies (such as insolvency) (see Proposal for a Council Regulation on the Statute for a European Private Company (COM (2008) 396/3) (available at: http://ec.europa.eu/internal_market/company/docs/epc/proposal_en.pdf); see also *EU Focus* 2008, 237, 2–4, 'Small Business Act for Europe Unveiled'.

[70] Council Regulation (EC) 2137/85 of 25 July 1985 (Establishing the European Economic Interest Grouping) [1985] OJ L199/1.

[71] Ibid, Art 24(1).

[72] See further S. Israel, 'The EEIG—A Major Step Forward for Community Law' (1988) 9 Co. Law 14; M. Anderson, *European Economic Interest Groupings* (Butterworths, London 1990); Muchlinksi, *Multinational Enterprises* (n 10) 73–5; Davies, *Company Law* (n 31) 26–8.

between the law and the realities. More importantly, it seems that there is no real justification in 'discriminating' against certain patterns (excluding them from a potential definition) even though there is no real difference in substance between them and the patterns that are within a definition of an enterprise group. For example, as seen above, where an international business is carried out by means of contract, there may emerge a relationship of control and dominance by one party over the other in much the same way as in the traditional parent–subsidiary relationship. A counter argument is that limiting the definition to certain clearly defined patterns will enhance certainty, for instance if the definition only refers to majority holding of a subsidiary. Majority holding is a clear concept to apply and expanding the concept of a group to other types of linkages may result in vagueness, that is, lack of predictability and certainty.[73] But clearly, a definition that would not encompass what are in fact enterprise groups (operating in the same way as other types traditionally perceived as groups) would lose its significance. It may allow enterprises and their members to evade legal consequences or otherwise be deprived of benefits the law may provide to such commercial relationships (especially bearing in mind legal and economic creativeness and continuous changes in practice in terms of patterns used by enterprises for their global operations). The inevitable conclusion is that all potential forms of enterprises operating via separate entities which feature a relevant form of 'glue' connecting them should be within the term 'MEG', without discriminating against certain forms which are in fact no different in substance.

Another question is what should be the sufficient linkage between the entities. It is possible to apply a high or a low threshold in terms of the connections between the entities for the purpose of determining whether they result in an enterprise group relationship. This will not pose a problem in terms of emphasizing form over substance or distinguishing otherwise similar patterns from others, as, by limiting the degree of linkage, a particular legal pattern is not preferred over another. Rather, the same threshold can be applied for any legal pattern the enterprise may choose.

The question is thus whether to adopt a broad meaning of MEG in terms of the degree of linkage required, allowing for capacity to coordinate the entities comprising the group to suffice. Or, rather a narrower concept, that would require close control or at least capacity to control the affairs of the entities in the group. For our particular purposes, the question is whether this will imply a rigid application of remedies or procedures to be imposed or utilized by the group or its entities in the course of their insolvencies in all possible scenarios. If this were the case, then adopting a broad meaning of MEG could be problematic, especially when considering the possibility of making a parent liable for the debts of its

http://www.pbookshop.com

[73] In contrast, it is noted in Blumberg et al, *Blumberg on Corporate Groups* that in the public eye there is no way of differentiating between the majority holding and close contractual linkages (see n 62).

subsidiary. Even in a closely controlled traditional group, members of a group are normally not liable for the debts or omissions of the other members. Such an idea would contradict basic principles of legal responsibility.[74] Furthermore, this is especially inappropriate considering different areas of the law relating to groups. The group may be more readily recognized for certain purposes,[75] and less so in regard to other areas. But also within the confines of insolvency, there may be various rules and remedies that may be considered for a group (as will be discussed later on in this work), which are very different in nature, particularly in the extent to which they interfere with the concept of the separateness among the entities.

However, these problems subside if the approach taken to MEG insolvencies will adopt a flexible strategy. A broad term could capture all possible scenarios that may occur in practice, where legal rules (or a subset of legal rules) might be relevant. Thus, it will indicate the scope of relevant rules, albeit specific rules could be subject to additional conditions. Specific pre-requisites for imposing rules could be determined for the specific area in issue and in regard to specific devices. Critically here, consideration will need to be given to various degrees of control and unification of groups, which in turn may dictate the solutions (or rules) that may be applied.[76]

Considering insolvencies within multinational groups, it seems that narrowing the meaning of the term MEG *a priori* could be detrimental to a meaningful approach to this matter. In the various structures of multinational enterprises (comprised of separate entities) discussed above a degree of coordination or of mutual involvement may potentially occur. If insolvency within such enterprises occurs, the promotion of goals of insolvency may require having regard to the enterprise as the relevant body or giving effect to the inter-connections among its members. If a broad approach to what are the goals of insolvency is taken, exclusion of certain types of enterprises (comprised of separate entities) would be especially counter-productive.[77] Thus, for instance, a functioning bankruptcy system may, in the relevant circumstances, need to hold a group member which excessively dominated other group members in a way harmful to its creditors (be it as a result of equity holding or a contractual linkage) responsible for the insolvent members' debts. In other circumstances, such a system should allow for joint administrations of insolvency proceedings of multiple debtors that operated with a degree of coordination in their ordinary course of business as this would, for example, reduce costs in the handling of the proceedings. An insolvency

http://www.pbookshop.com

[74] See H. Collins, 'Ascription of Legal Responsibility to groups in Complex Patterns of Economic Integration' (1990) 53 Mod. L. Rev. 731, 734. See further on the issue of liability and corporate groups in chapter 2.

[75] See e.g recognition of groups for accounting purposes (chapter 2, section 2.4.2).

[76] For the purpose of this work, certain prototypes of organizational patterns combined with insolvency scenarios will be construed to assist in considering relevant solutions (see chapter 5).

[77] See chapter 4 (discussing insolvency goals in legal systems).

system may aim to promote business rescues and this may require, in the relevant circumstances, encompassing all the group entities in a plan, as the exlusion of an entity which was part of a coordinated business may impede the achievment of a rescue and be detrimental to a wide set of stakeholders.[78] In other words, a broad meaning assigned to the term MEG could better serve the objectives of insolvency systems.

I therefore suggest that it will be fit to follow the economists' perception of transnational businesses, viewing such enterprises as comprised of entities that may be tied by contract or by equity and may be organized with a high degree of decentralization. The vital link can thus be control, (actual, or capacity to control) or coordination between (or over) equity or contractually based entities, even when it is exerted over autonomous action centres.[79] A broad flexible approach should be taken as to what initially can be regarded as an enterprise group, including within the meaning the various possible patterns, appreciating that those may change over time, and that not every type can be anticipated by the law. This does not refer though to situations where there is mere 'collective dominance' of oligopolies (also termed tacit coordination),[80] among independent enterprises not otherwise linked by contract or equity. It also does not refer to networks or strategic alliances between firms that are focused on one-off or incidental transactions where there is no possibility to control or to coordinate the overall business. The term 'group' also does not refer to a relationship between entities and their creditors (in their capacity as creditors). Although a creditor (especially a secured creditor with substantial security over the undertaking) may exert significant control over a company, it is nevertheless an outsider to the enterprise business. Its relationship with a group may raise legal issues,[81] but it will not be part of the group.

1.3.6.2 The international element

In terms of the international element, it was generally referred above to the entities of the group (at least two of them) being 'situated' in different countries. The question is what precisely this means. Normally, it refers to entities being incorporated in different countries.[82] Indeed, incorporation has been the traditional standard for corporate nationality under international law.[83] Common

[78] See the discussions of insolvency solutions for insolvencies within MEGs in chapters 6–9.

[79] See e.g., Dunning, *Multinational Enterprises* (n 54), 3.

[80] See S. Baxter and F. Dethmers, 'Collective dominance under EC merger control—after Airtours and the introduction of unilateral effects is there still a future for collective dominance?' (2006) 27(3) ECLR 148.

[81] If the creditor was significantly involved in the management of the enteprise he may be exposed to 'lender liability' of some sort under certain jurisdictions (for example, creditors may be regarded as 'shadow directors' under the wrongful trading provision in the English Insolvency Act 1986 (s. 214)).

[82] See the OECD description of multinational enterpises in n 93.

[83] Blumberg et al, *Blumberg on Corporate Groups* (n 31) vol. 1, s. 48.02[A].

http://www.pbookshop.com

law national legal systems have also been utilizing the incorporation standard as the primary linkage of a company to a jurisdiction.[84] Civil law systems have traditionally referred to the location of the corporation seat, a notion that has been developed to refer to the 'real seat' of the company.[85] To an extent, incorporation generally loses its predominance as the sole manifestation of linkage to the country, and alternative standards based on notions of principal place of management and control are being used.[86] Indeed, incorporation may not represent a genuine connection of the corporation to the forum, in terms of economic realities, as a company may be incorporated in one place but conduct its business entirely elsewhere.[87] Especially considering insolvency issues, it may well be that the principal insolvency against a company will be held in its centre of main interests rather than its place of incorporation.[88] This may raise, for example, issues of how to handle the insolvency proceedings against related companies apparently centred in different jurisdictions.[89] Therefore, in considering whether a group is multinational, I suggest to have regard both to the test of incorporation and to other potential manifestations of company nationality.

1.3.7 Legal systems' approaches to the definition of groups and multinational enterprises

As will be further discussed in the next chapter, legal regimes normally lack a coherent law of corporate or enterprise groups. This is also reflected in an absence of consistent definitions of groups in legal systems. Normally, no general definition is offered, not even for domestic groups. Sometimes the key players in a group are defined, and typically this is done for specific purposes within the law. 'Control' is normally regarded as the key connection between the group's members in these cases, yet various factors are used to establish a relationship of control. Sometimes control is expressed only in terms of holding voting rights; other definitions are more elaborative and elements of 'effective' control are emphasized

http://www.pbookshop.com

[84] Ibid, s. 48.02[B].

[85] Ibid, s. 48.02[C].

[86] Ibid, ch. 48. But, see developments in Europe which to an extent undermines developments under national law towards standards based on economic realities. In the context of the freedom of establishment concept under the Rome Treaty, the European Court of Justice (ECJ) upheld the concept that the legal status of an existing entity incorporated in the EU must be respected by every Member State, even if the incorporation in a particular member state took place for the purpose of avoiding stricter incorporation laws in the other member state (*Centros Ltd v Erhvervs- og Selskabsstyrelsen* (C-212/97) [1999] ECR I-1459); *Überseering* [2002] ECR I-9919; *Inspire Art* [2003] ECR I-10155). See further on the incorporation factor in regard to jurisdiction in insolvency in chapter 6, section 6.2.1.9; chapter 7, section 7.3.2; and chapter 8, section 8.3.3.

[87] See E.T. Bicker, 'Creditor Protection in the Corporate Group' (University of Freiburg—Faculty of Law, Working Papers Series, July 2006).

[88] On the concept of 'centre of main interests' in regard to cross-border insolvency see chapter 3, section 3.4.2.2.

[89] See chapters 6–9 *passim*.

(the actual ability to exert dominant influence).[90] Definitions may refer only to parent–subsidiary relationship (i.e., not referring, for instance, to natural persons who may control several companies) or they may include different types of enterprise. Such differences in definition sometimes appear within the same legal system.[91]

On the international level, the OECD Guidelines[92] describe multinational enterprises in broad terms while observing that they usually consist of separate entities established in a number of countries. They focus on coordination rather than control as the possible manifestation of linkage between separate entities, and suggest that the amount of influence and control over affiliates may differ between enterprises with different degrees of autonomy enjoyed by affiliates.[93] The crucial characteristic of the multinational enterprise is the ability to coordinate activities between enterprises in more than one country. Other factors are not decisive. This description is broad enough to include both equity and non-equity-based groups, regardless of the legal form or ownership of the entities.[94] This is a broad conceptual guideline, and therefore involves some arbitrariness,[95]

[90] See e.g. American standard of 'control' in various legislation and court decisions which provide functional standards that turn on power over the management and operations of the company (Blumberg et al, *Blumberg on Corporate Groups* (n 31) vol. II, s. 90.04[A]; see also the Australian Corporation Act 2001, s. 50AA(1) (defining control as the capacity to determine the outcome of decisions about financial and operating policies). Cf. Canadian Business Corporations Act 1974–75–76, s. 2(3) (control is defined by formal requirements, i.e. reference to ownership of more than 50 per cent of the voting power for election of directors); New Zealand Companies Act 1993, s. 7 (defining control as the power to appoint or remove all the directors or 'such number of directors as together hold a majority of the voting rights at meeting of the board.').

[91] See e.g. English Companies Act which offers no formal definition of a group, though it seeks to define the key players within a group. For accounting purposes the definition refers to a group of undertakings embracing an elaborated list of optional connecting factors that can establish a parent undertaking, including concepts of major voting control (formal control concept), but also concepts of effective control. That is, a company is a parent to another company also if it has the right to exercise dominant influence over the subsidiary by virtue of its memorandum or articles or by virtue of a control contract, or if it has a participating interest in the undertaking and actually exercises a dominant influence over it or it and the other company are managed on a unified basis (s. 1162 and Sch 7 of the English Companies Act 2006). For other purposes the definition is narrower, refers only to body corporate and to formal control over a subsidiary (s. 1159 of the English Companies Act 2006). The latter definition is however a considerable improvement on the previous definition which did not focus on control, rather on holding a majority of the shares (voting or non-voting) (see Davies, *Company Law* (n 31) 234).

[92] OECD Guidelines for Multinational Enterprises 27 June 2000 (available at: http://www.oecd.org/dataoecd/56/36/1922428.pdf) [hereinafter: OECD Guidelines].

[93] See OECD Guidelines (ibid), 'Concepts and Principles' p. 3. The guidelines do not provide a precise definition of multinational enterprises, yet it states that such enterprises: '. . . usually comprise companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary from one multinational enterprise to another. Ownership may be private, state or mixed'.

[94] See also Muchlinski, *Multinational Enterprises* (n 10) 6–7.

[95] Ibid.

http://www.pbookshop.com

but it avoids exclusion of types of groups that may in substance encompass the same characteristics as others.

UNCITRAL Working Group V, which is at present considering the issue of treatment of enterprise groups in insolvency,[96] is currently proposing that the term 'enterprise group'[97] should be explained as 'two or more enterprises, that are interconnected by ownership or control'. It also explains that 'control' should mean 'the capacity to determine, directly or indirectly, the operating and financial policies of an enterprise', and that 'enterprise' includes any entity regardless of its legal form (yet one which is subject to insolvency laws).[98] It therefore currently adopts a wide meaning of the components of the group, as these are not confined to corporations. Additionally, it does not seem to be confined to groups linked by equity. It adopts a functional test of control, not resting solely on formal standards (such as specified percentages of ownership),[99] though it refrains from expanding the meaning to include groups operating in a coordinated manner.

[96] UN Comm'n on Int'l Trade Law (UNCITRAL), Working Group V (Insolvency Law) [hereinafter: UNCITRAL Working Group V or Working Group interchangeably]. The author is an adviser to the UK delegation in the deliberation of the Working Group. The views expressed in this study in regard to the work of Working Group V, however, are those of the author and do not necessarily reflect those of the UK delegation or of the Working Group. The book refers to various draft recommendations and other relevant notes or draft commentary from the working papers, mainly those which were the bases of the discussions in the fourth meeting of the Working Group (New York, 3–7 March 2008) on which a report has already been published, and to subsequent working papers which were provided as material for the fifth meeting of the Working Group (Vienna, 17–21 November 2008). It should be noted that at the time the book went to print the work is still in progress (another meeting of the Working Group for discussion of the topic of enterprise groups is scheduled for 18–22 May 2009, New York) and thus recommendations and commentary may be altered (including their numbering).

[97] The term is 'generic' and not limited to domestic groups (see Report of Working Group V (Insolvency Law) on the work of its thirty-third session, 16 November 2007, A/CN.9/643, para. 123; available at http://www.uncitral.org/uncitral/en/commission/working_groups/5Insolvency.html). [hereinafter: Report, thirty-third session].

[98] See Note by the Secretariat, Working Group V (Insolvency Law), 31 December 2007, A/CN.9/WG.V/WP.80, available at: http://www.uncitral.org/uncitral/en/commission/working_groups/5Insolvency.html [hereinafter: WP.80], para. II A (a); UN Comm'n on Int'l Trade Law (UNCITRAL), UNCITRAL Report of Working Group V (Insolvency Law) on the work of its thirty-fourth session, 14 March 2008, A/CN.9/647, paras. 14–23 [hereinafter: Report, thirty-fourth session], and UN Comm'n on Int'l Trade Law (UNCITRAL), UNCITRAL Note by the Secretariat, Working Group V (Insolvency Law), 1 September 2008, A/CN.9/WG.V/WP.82 [hereinafter: WP.82], paras. 2(a)–(d), 28–32 (all documents available at: http://www.uncitral.org/uncitral/en/commission/working_groups/5Insolvency.html). It was noted that the function of the glossary in the Working Group proposals should not be to provide statutory definitions of the relevant terms, but rather to provide readers with a general idea of how the concepts were used (Report, thirty-fourth session, ibid, para. 13).

[99] As it currently stands the definition can be interpreted as suggesting that ownership alone can be a sufficient linkage creating a group, as it refers to either control or ownership as the connecting factors. Yet, in its last meeting, the Working Group considered that the 'ownership' element should be qualified by adding the word 'significant' (so that it has to be substantial) (see UNCITRAL, UNCITRAL Draft report of Working Group V (Insolvency Law) on the work of its thirty-fifth session (Vienna, 17–21 November 2008) 18 November 2008, A/CN.9/WG.V/XXXV/CRP.1/Add.2 (on file with author) [hereinafter: Draft Report CRP.1/Add.2], para. 13. It is the author's

http://www.pbookshop.com

A committee of the International Insolvency Institute which is currently working on devising principles for coordination of multinational enterprise group insolvencies,[100] currently suggests that 'multinational enterprise group' or 'enterprise group' will mean 'a group of companies or enterprises established or centred in more than one country which are linked together by some form of control, whether direct or indirect, or ownership, by which linkage their businesses are controlled or coordinated.'[101] This definition is to an extent broader than the definition currently suggested by UNCITRAL Working Group V as it explicitly adopts the concept of coordination (resulting from a degree of control or ownership) as a possible manifestation of linkage creating an enterprise group.

1.3.8 Addressing the problem of definition in future reforms

To enhance consistency and clarity in legal systems on the one hand, and be compatible with economic realities and business innovations on the other, a broad all-encompassing meaning to the term MEG, centred on actual or capacity to control or coordinate the business (in functional terms) would be advantageous. This could be done primarily by explaining the term 'enterprise group', with further explanation as to international aspects.[102] Further conditions could then be added with regard to specific issues pertaining to the group; for our purposes, conditions relevant to issues pertaining to groups in distress.[103] A wide meaning given to MEGs would imply that the law matches with economic realities and will be general enough to serve the various problems that may be associated with groups. It also takes into account the dynamic nature of enterprises and the fact that a particular group form may become more dominant in the future, which again implies that some level of flexibility in the definition is suitable. Providing such guidance in legislation will enhance clarity and predictability, especially where 'players' from different regimes need to assess foreign laws (as we are dealing with a multinational setting). Adopting a broad flexible definition across legal regimes could further enhance consistency and harmonization, which would generally assist in dealing with multinational enterprises.[104]

view that a better definition will refer to ownership as only one factor in determining control (or coordination—see section 1.4).

[100] At the time the book went to print the work of the committee is still in progress. International Insolvency Institute (III), Committee on International Jurisdiction and Cooperation, Judicial Guidelines for Coordination of Multi-National Enterprise Group Insolvencies, Co-Chairs Hon. R.R. Mabey and J.L. Garrity, Reporter S.P. Johnston, Advisor I. Mevorach (Working Draft, on file with author) [hereinafter: III Draft Guidelines] (the author is an advisor to the committee; the views expressed in this work are those of the author and do not necessarily reflect those of the committee).

[101] See III Draft Guidelines (ibid), Definitions.

[102] As may be done by UNCITRAL Working Group V (see n 97).

[103] Relevant conditions for the purposes of international insolvency will be discussed in subsequent chapters.

[104] See further the problems associated with groups operating worldwide in chapter 2.

http://www.pbookshop.com

Alternatively, definitions of MEGs can be advanced in specific legislation in different areas of the law. In our area of interest, in a similar way, a broad meaning to MEGs would be suitable. As explained above, a variety of different issues may arise in connection to the MEG in distress, thus generality in the initial definition is beneficial. The meaning of an enterprise group currently suggested by UNCITRAL Working Group V[105] is a step in the right direction, suggesting a rather wide description (though as aforementioned it does not include coordination as a possible linkage). As aforementioned, the work is in progress[106] and it remains to be seen what would finally be included in the term (and in any accompanying explanatory notes or further explanations). In any case, for it to become practically significant it should be adopted within national legislation in as many countries as possible.[107]

In the absence of a universal definition for MEGs, and in places where there is room for manoeuvre in legal systems (in the absence of clear constraints imposed in the relevant legal system), courts could still consider enterprises as MEGs if this is the reality of the matter (emphasizing substance rather than form). This would only be a starting point prior to considering the specific purpose for which a business is to be recognized as a group. Therefore this should not drive parties to attempt considering new legal innovative patterns only to evade legal implications. Referring to a business as a MEG will not automatically imply rules, and where it does it can be for the benefit of companies, as will be discussed later on in this work in regard to certain procedures in insolvency that will be beneficial to the group as a whole.

http://www.pbookshop.com

1.4 Conclusion

The phenomenon of multinational enterprises conducting their business via separate entities is significant and widespread, both in quantity and in the scale of operations each enterprise may undertake. This may be driven by various economic advantages as well as legal incentives. MEGs do not appear in a single version, though. Rather, there is a range of different forms of international groups' structures. The strength and significance of the linkage between the entities comprising the group may also differ among different enterprises. A trend towards more open heterarchical organization of multinational enterprises which may use free-standing units linked to the parent by contract has been observed.[108] At the same time, there are clear advantages in the vertical parent–subsidiaries relationship, at least in certain industries, where a high level of integrated control

[105] See section 1.3.7.
[106] As of November 2008.
[107] See chapter 3, section 3.4 on instruments used by UNCITRAL and their adoption in national legislation.
[108] Muchlinski, *Multinational Enterprises* (n 10), 48–9, 65–6.

is desired as well as a less complex structure of the business.[109] It is therefore predicted that these patterns will continue to be used. Even when restructuring is desired by the group, networking may take time.[110] In any case, 'discriminating' between the different patterns even though a linkage emerges in much the same way, could be counter-productive. Similarly, limiting the degree of linkage only to capacity to control or even actual control is disadvantageous. This will exclude enterprises operating in more heterarchical patterns that may legitimately benefit from rules a legal system may provide for groups, or otherwise evade legal consequences. Certainly, the variety of groups may be relevant 'subject matters' in regard to issues of insolvency. For these reasons I suggest taking a more inclusive approach to what should initially be the meaning of a MEG. This work will therefore discuss MEGs (in insolvency) and generally refer to a bundle of entities (two or more) mutually connected either by common or interlocking shareholding,[111] or via contract, so that they can be controlled or may coordinate their businesses, and which are established or centred in different countries so that they may be subjected to different jurisdictions if they were to be considered separately.

The work uses the term 'enterprise' as the group may not necessarily consist only of corporations[112] (though this is normally the case), and it can be contractually based. If it is a corporation it can be either limited or unlimited. However, the focus of this work will be on limited corporations (that is, groups comprised of companies which are separate legal persons with their own rights and obligations distinct from those of their shareholders). This is the common scenario.[113] Generally, our focus is on corporate insolvency (rather than insolvency of individuals). Therefore, in particular scenarios where for example the group is comprised of an individual (or a number of individuals) and several entities (controlled by him), this study will focus on the 'sister' corporations and will not deal with the position of the individuals in terms of their bankruptcy or responsibilities. The primary focus of the work will also be on the parent and subsidiary relationship (i.e. multinational groups of companies linked by equity). However, indications of similar concerns arising in regard to contractual links will also be made.

http://www.pbookshop.com

[109] Ibid. See also T. Hadden, 'Regulating Corporate Groups: An International Perspective', in J. McCahery, S. Picciotto and C. Scott (eds.) *Corporate Control and Accountability* (Oxford University Press, Oxford 1993) 343, 346.

[110] Muchlinski, *Multinational Enterprises* (n 10) 48–9, 65–6.

[111] If this is allowed to occur under the relevant legal system (see n 52).

[112] It can be various types of business forms such as partnerships or trusts.

[113] Incorporation of most forms of business undertakings as limited liability companies is today the rule (D. Goddard, 'Corporate Personality—Limited Recourse and its Limits', in R. Grantham and C. Rickett (eds.), *Corporate Personality in the 20th Century* (Hart Publishing, Oxford 1998) 20, 63. See also T. Rapakko, *Unlimited Shareholder Liability in Multinationals* (Kluwer, The Hague, 1997) ch. 6 (discussing the universal adoption of the liability limitation in corporate law) [hereinafter: Rapakko, *Unlimited Shareholder Liability*].