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The Model Law After Five Years: The U.S. Experience with COMI

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THE MODEL LAW AFTER FIVE YEARS:
THE U.S. EXPERIENCE WITH COMI

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On April 20, 2005, the President signed into law the so-called Bankruptcy Abuse Prevention and Consumer Protection Act, effective October 17, 2005.¹ The Act contained extensive amendments to the Bankruptcy Code, including a new chapter 15, entitled “Ancillary and Other Cross-Border Cases,” which largely adopted the UNCITRAL Model Law on Cross-Border Insolvency.² We now have almost five years of experience under the Model Law, and a growing body of cases. This paper is intended to provide some very preliminary views on how one of the new concepts in the law—the concept of COMI—has fared.

Chapter 15 provides relief previously available in ancillary cases under § 304 of the U.S. Bankruptcy Code, which was repealed. Section 304 had created a special proceeding, called an “ancillary proceeding,” in which a foreign administrator or liquidator could seek an order from the U.S. bankruptcy court that would recognize and provide assistance to the foreign proceeding. Section 304 was based on the proposition that there was a principal insolvency proceeding in the foreign jurisdiction, that the U.S. case would be “ancillary” to the foreign case, and that the function of the U.S. court was to provide appropriate support to the foreign case. Chapter 15 expanded and clarified the

¹ Pub. L. 109-8, 119 Stat. 23.

² United Nations Pub. Sales No. E.99.V.3, “Model Law on Cross-Border Insolvency with Guide to Enactment.”

relief available in these types of ancillary cases, and also contained a statutory requirement of coordination and cooperation in plenary (full) cases filed in more than one jurisdiction. This is not to say that the principle of coordination and cooperation was a novel idea. Although it was not always respected in practice, in the United States the basic principle was well established as a matter of common law and common sense.³

COMI

One of the most important new developments in chapter 15 was the introduction of the concept of COMI, or “center of main interests.” The term COMI is not defined but Article 16(3) of the Model Law provides that, “In the absence of proof to the contrary, the debtor’s registered office, or habitual residence in the case of an individual, is presumed to be the center of the debtor’s main interests.” The U.S. adopted the principle in 11 U.S.C. § 1516(c), which uses the phrase “In the absence of evidence to the contrary.”⁴ An insolvency case filed in the debtor’s COMI is designated the main proceeding, and any other cases filed in a location where the debtor has an establishment are designated as nonmain proceedings.⁵

The concept and the word appear to have been imported into the Model Law from the European Insolvency Regulation, which binds all of the members of the European

³ See, e.g., *In re Lernout & Hauspie Speech Prods. N.V.*, 310 F.3d 118 (3d Cir. 2004). It was also well established that a court should ordinarily give effect to a foreign insolvency based on the common law principle of comity. See, e.g., *Cunard S.S. Co. Ltd. v. Salen Reefer Servs. AB*, 773 F.2d 452 (2d Cir. 1985); *Royal and Sun Alliance Ins. Co. of Can. v. Century Int’l. Arms, Inc.*, 466 F.3d 88, 92-93 (2d Cir. 2006).

⁴ See *In re Tri-Continental Exch. Ltd.*, 349 B.R. 627, 634-35 (Bankr. E.D. Cal. 2006).

⁵ Under chapter 15, certain protections go into effect automatically upon entry of an order of recognition in a “main” proceeding, including a stay of proceedings similar to the automatic stay of § 362 of the Bankruptcy Code. For a nonmain proceeding, the court has to enter an order to put a stay in effect, as it did under § 304. Compare § 1520 with § 1521. If a main proceeding is recognized, and a U.S. plenary case is pending or commenced, the U.S. court is enjoined to take jurisdiction over only the debtor’s domestic U.S. assets and certain very limited foreign assets. Compare § 1528 with § 1529(3).

Union (except Denmark).⁶ The European Regulation provides that a main proceeding is an insolvency case opened in an entity's "center of main interests," and it requires that all states subject to the regulation recognize and give effect to that proceeding unless a secondary proceeding (which must be a liquidation) is opened in another member state where the entity has an "establishment," defined as a place of operations where the debtor carries out the non-transitory economic activity.⁷

Since there is no mechanism in the Model Law (and chapter 15) for enforcing the requirement of cooperation with a main proceeding, it is not clear that there was the same need as in the European Regulation for the recognizing court to determine whether a foreign proceeding is "main" or "nonmain." On the other hand, a long-term goal of the drafters of the Model Law and of chapter 15 in the United States was to centralize all insolvency proceedings relating to an enterprise in one forum.⁸ Determination of the COMI is thought to assist in this goal, and this is presumably the principal reason why the Model Law provides that there be such a determination in connection with the motion for recognition.

The COMI Decisions in the United States

It appears that in Europe the COMI principle has become a hindrance rather than a help in the effort to centralize and coordinate the insolvency proceeding of groups of

⁶ (EC) No. 1346/2000 of 29 May 2000.

⁷ Id. at Article 2(h); see Case C-444/07, *MG Probud Gdynia sp.zo.o.*, 2010 ECJ EUR-Lex LEXIS 15 (Jan. 21, 2010).

⁸ Jay Lawrence Westbrook, *A Global Solution to Multinational Default*, 98 Mich. L. Rev. 2276, 2279 (2000); Jay Lawrence Westbrook, *Locating the Eye of the Financial Storm*, 32 Brook. J. Int'l L. 1019 (2007). Control is centralized to provide for reorganization or sale of the enterprise as a whole, with its worldwide assets intact, rather than piecemeal dismemberment and the likelihood of liquidation at a significantly reduced value.

companies.⁹ Experience with the application of the COMI principle in U.S. chapter 15 cases during the first five years does not, in the eyes of this observer, provide much evidence that it will simplify cross-border insolvency or provide a structure that facilitates the goal of centralized control of the insolvency proceedings of a multinational enterprise, even where the debtor is a single entity.

Although there has not been an issue as to the location of the COMI in most cases, in an inordinate number of situations, it has opened a fertile new field for litigation. Parties have litigated the question of the COMI of an enterprise that moved to the United States,¹⁰ that did business in Australia, Canada and the United States via the internet;¹¹ of a fraudulent enterprise;¹² as well as the COMI of a businessman who moved to the United States after insolvency proceedings had been brought against him in the country of his former residence.¹³ The last decisions, and there have been three of them so far, involve an Israeli businessman, Yuval Ran, who moved to the United States and whose businesses in Israel were later taken over by a receiver. Frankly, they appear particularly counter-intuitive, albeit understandable from the perspective of statutory construction. In brief, the U.S. courts refused to recognize the Israeli receiver because Ran's "center of main interests" was in the United States at the time the chapter 15 proceedings were commenced,¹⁴ and Israel was no longer his "center of main interests." Moreover, since he no longer had an establishment (or any presence) in Israel, the proceedings could not

⁹ The principal culprit identified is the *Eurofoods* decision of the European Court of Justice, Case C-341/04, *In re Eurofoods IFSC Ltd.*, 2006 ECR I-3813, 2006 ECJ CELEX LEXIS 777 (May 2, 2006).

¹⁰ *In re Gold & Honey, Ltd.*, 410 B.R. 357 (Bankr. E.D.N.Y. 2009).

¹¹ *In re Betcorp Ltd.*, 400 B.R. 266 (Bankr. D. Nev. 2009).

¹² *In re Tri-Continental Exch. Ltd.*, 349 B.R. 627 (Bankr. E.D. Cal. 2006).

¹³ So far there have been three opinions in *Lavie v. Ran*, 384 B.R. 469 (S.D. Tex. 2008), *on remand*, *In re Ran*, 390 B.R. 257 (Bankr. S.D. Tex. 2008), *aff'd*, 406 B.R. 277 (S.D. Tex. 2009).

¹⁴ Section 1517(b) directs the court to determine a debtor's COMI as of the time the petition is brought. See *In re Betcorp Ltd.*, 400 B.R. 266 (Bankr. D. Nev. 2009).

be given recognition as a nonmain proceeding.¹⁵ The result is seemingly that the receiver will be shut out of the U.S. courts altogether and cannot pursue Ran, no matter what his derelictions in Israel. Does this mean that the U.S. will be considered a haven for businessmen who move there and gain certain protection from lawsuits brought by the representatives of their failed businesses?

The introduction of the COMI concept in chapter 15 has engendered serious disputes of a different nature involving a different type of haven, the tax haven. An early and influential case under § 304 had recognized a Bahamian proceeding and remitted U.S. assets to the court there, on the ground that the proceedings would afford all parties a fair hearing.¹⁶ Under chapter 15, however, one must also consider the COMI. Although the first case under chapter 15 brought by the liquidator of a Cayman Islands offshore fund gained recognition as a nonmain proceeding, the next two cases took into account the fact that the fund did not have an establishment in the Caymans and could not be considered a nonmain case, and they denied recognition altogether.¹⁷ It was considered irrelevant that all of the creditors were apparently satisfied with the Cayman liquidation and consented to the jurisdiction of the court there. The decision has created a cry of protest in the United Kingdom and the Caribbean.¹⁸ It has produced the notion that despite the statute, we can still give some relief to a proceeding like *Bear Stearns* by

¹⁵ 11 U.S.C § 1517(b)(2). Establishment is defined at § 1502(2).

¹⁶ *In re Culmer*, 25 B.R. 621 (Bankr. S.D.N.Y. 1982), penning the phrase that § 304 permitted the court to fashion relief in “near blank-check fashion.”

¹⁷ See *In re SphinX, Ltd.*, 371 B.R. 10 (S.D.N.Y. 2006), *aff’d* 351 B.R. 103 (Bankr. S.D.N.Y. 2006) (Cayman proceeding recognized as a nonmain proceeding); *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. 325 (S.D.N.Y. 2008), *aff’d* 374 B.R. 122 (Bankr. S.D.N.Y. 2007) (no recognition); *In re Basis Yield Alpha Fund (Master)*, 381 B.R. 37 (Bankr. S.D.N.Y. 2008) (no recognition).

¹⁸ See, e.g., Gabriel Moss, *Death of the Sphinx—Chapter 15 Closes U.S. Door on Recognition of Offshore Hedge Fund Liquidations*, 20 *Insolvency Intelligence* 157, 159 (Sweet & Maxwell Dec. 2007).

calling it a “tertiary proceeding.”¹⁹ A court in the British Virgin Islands has concluded that it does not mean much anyway, because there is an exception to the requirement of recognition in § 1509(f), which provides that a foreign representative can bring a suit to “collect or recover a claim which is the property of the debtor” without going through the step of obtaining recognition.²⁰

The COMI of an enterprise should doubtless constitute an important factor in connection with certain types of relief. For example, it would seem that funds should ordinarily be remitted by an ancillary court for ultimate distribution by the court at the center of main interests. In connection with the issue of recognition, however, it would seem of little importance whether the proceeding is main or nonmain. Consider the U.S. chapter 15 proceedings of *Schefenacker plc*, Case No. 07-11482, U.S. Bankr. Ct. S.D.N.Y., involving a German company that had moved its headquarters to the U.K. After successful insolvency proceedings in the U.K., the debtor sought recognition in the United States of the English company voluntary arrangement (“CVA”) already approved in the U.K. Certain recalcitrant creditors asked the U.S. court to deny recognition to the English proceedings as a foreign “main proceeding” on the ground that England was not the COMI. The U.S. court refused to conduct what would have been a review of the COMI determinations of the English courts, finding that it was irrelevant to the relief

¹⁹ Samuel L. Bufford, *United States International Insolvency Law*, 45-47, 53-56 (2009).

²⁰ In *Western Union Int’l. Ltd. v. Reserve Int’l Liquidity Fund Ltd.*, BVIHC 2009/322, Judgment, 2010 (filed as Dkt. No. 48, Ex. C in *Reserve Int’l Liquidity Fund Ltd. v. Caxton Int’l Ltd.*, Case No. 09-9021 (PGG), S.D.N.Y.), the Eastern Caribbean Supreme Court found that this exception rendered the *Bear Stearns* decisions not an impediment to the right of the liquidators in the British Virgin Islands “to sue in a court in the United States to collect or recover a claim which is the property of the debtor. It follows that liquidators appointed by this Court harbor title and status to collect the Company’s credit balance at the bank in Boston. If they do this, they will have disposed of any deficiency flowing from their inability to obtain the assistance of the U.S. Courts in enjoining a scramble for assets.” This construction of § 1509(f) conflicts with at least one U.S. case, which held that the § 1509 “exception is to be narrowly applied.” *In re Loy*, 380 B.R. 154, 165 (Bankr. E.D. Va. 2007) (citing the legislative history, H.R. Rep. 109-31(I) at 110-11 (2005), which refers to the collection of an account receivable as within this “limited exception”).

sought—simple enforcement of the CVA in the U.S.—whether the English proceedings were main or nonmain. Order dated June 14, 2007, Docket ECF 81, Case No. 07-11482, www.nysb.uscourts.gov. I believe this was wise, but it is contrary to the view that a court must determine, at the earliest possible date, whether the proceeding is main or nonmain.²¹

The *Bona Fides* of a Foreign Proceeding

In actuality the real issue in many cases ostensibly involving COMI has little to do with the location of the center of main interests and everything to do with the *bona fides* of the foreign proceeding. It might be argued that the U.S. made a policy decision that it will respect mailbox companies in offshore tax havens for tax purposes but will insist on liquidating or reorganizing them under our laws. However, this would represent a significant change in the law.²² It is not the obvious result of a statute that does not define the term COMI but states only that the COMI is presumed to be the entity's place of reorganization, pointing us in the direction of the tax haven. It does not appear to be a practical distinction. The very first COMI decision in the United States recognized a case from St. Vincent and the Grenadines as a foreign main proceeding because the company, although wholly fraudulent, perpetrated the fraud from a center of main interest in that island nation.²³ That's a sensible construction of the statute, but the critical finding in my view was not whether St. Vincent was the locus of the wrongdoing but whether it was the

²¹ See *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122, 127 n. 4 (Bankr. S.D.N.Y. 2007), *aff'd on other grounds*, 389 B.R. 325 (S.D.N.Y. 2008), discussing the conflict with *Schefenacker*. See also *In re Loy*, 380 B.R. 154, 162 (Bankr. E.D. Va. 2007).

²² Under § 304 the U.S. court frequently recognized proceedings from tax haven jurisdictions. See *In re Commodore Int'l Ltd.*, 262 F.3d 96 (2d Cir. 2001); *In re Bullmore*, 384 F.3d 959 (8th Cir. 2004); *In re Culmer*, 25 B.R. 621 (Bankr. S.D.N.Y. 1982). In *In re Treco*, 240 F.3d 148 (2d Cir. 2001), the Court held that it would not remit assets to a case in the Bahamas if the transfer would adversely affect the interests of a secured creditor, but it did not otherwise hold that a proceeding from a tax haven should not be accorded recognition.

²³ *In re Tri-Continental Exch. Ltd.*, 349 B.R. 627 (Bankr. E.D.Cal. 2006)

right jurisdiction to lead the effort to liquidate the assets and take appropriate measures to rectify the wrong.

One of the most justly celebrated decisions of recent years in the insolvency area is Lord Hoffmann’s judgment for the Privy Council in *Cambridge Gas Transport Corp. v. Official Committee of Unsecured Creditors of Navigator Holdings PLC*.²⁴ There the English courts recognized, as a matter of common law, U.S. chapter 11 proceedings, stating, “The English common law has traditionally taken the view that fairness between creditors requires that ideally, bankruptcy proceedings should have universal application.” The principle is an important one but in that case might have been nullified if the Model Law had been applicable and the U.K. courts had been constrained to consider the issue of COMI.²⁵ The U.S. case had the support and participation of all affected or impaired parties, but it was clearly not brought in the debtor’s COMI.²⁶

The Model Law and chapter 15 make it difficult for a court considering recognition to deal effectively with a fundamental issue—whether the foreign court is well situated to deal with the issues and property involved in the insolvency proceeding. Too many issues that really relate to questions of fairness and due process and ability to effectuate a decree are forced into the prism of COMI or non-COMI and are distorted as a result.²⁷ This problem is compounded, in my view, by the requirement that the issue of

²⁴ [2006] UKPC 26, 2006 WL 1546603 (P.C. 2006).

²⁵ The case predated the adoption of the Model Law by either the U.K. or the U.S.

²⁶ In *Cambridge Gas (Navigator Gas* in the United States), the parties affected by the bankruptcy proceedings were holders of bonds issued under U.S. law and the owners, who filed in New York. The U.S. court was therefore in a position to enforce its decrees, and it was not unseemly for it to adjust the debt of U.S. bondholders. Nevertheless, the U.S. was not the COMI. The debtor’s registered office was in the Isle of Man and its principal place of business, according to its Chapter 11 petition, was Switzerland. *In re Navigator Gas Transport PLC*, Case No. 03-10471, Bankr. Ct. S.D.N.Y., Dkt. No. 1 (Jan. 27, 2003).

²⁷ Several U.S. courts have stated that equitable considerations may not play *any* role in the recognition of foreign proceedings. *In re Loy*, 380 B.R. 154, 168 (Bankr. E.D.V.A. 2007); *Lavie v. Ran*, 406 B.R. 277, 288 (S.D.Tex. 2009).

recognition be “decided upon at the earliest possible time.”²⁸ As the Bankruptcy Court found in the *Bear Stearns* decision cited above, chapter 15 imposes a fairly rigid procedural structure for recognition of a foreign proceeding but then affords the court “substantial discretion and flexibility” in fashioning relief.²⁹ While the goal of the drafters to simplify the procedures for obtaining recognition and to separate them from the question of the relief to be granted is commendable in theory, I am not sure that this procedural straightjacket makes sense in practice.

Competing Proceedings

It might be argued that the COMI of a debtor has to be determined because there may be competing proceedings involving the same entity, and a court asked for an order of recognition should consider the COMI question before deciding which proceeding to recognize. Unfortunately, the COMI concept does not preclude inconsistent decisions, and it may deflect consideration of more important issues that bear on reasons for recognizing one or the other of the competing proceedings. Thus, in cases involving the collapse of Stanford International Bank and other Stanford entities, an English court recognized receiver-managers appointed by a court in Antigua and Barbuda, on the premise that the COMI was there, whereas a court in Canada recognized a receiver appointed by a court in Texas.³⁰ The Canadian decision was motivated in part by what the Canadian court perceived as bad conduct on the part of the receivers appointed in Antigua-Barbuda, and it has been argued that this issue should be considered irrelevant to

²⁸ 11 U.S.C. § 1517(c).

²⁹ 374 B.R. at 126, citing Jay Lawrence Westbrook, *Locating the Edge of the Financial Storm*, 32 Brook. J. Int’l L. 1019, (2007).

³⁰ Compare *In re Stanford International Bank Ltd. (In Receivership)*, [2009] EWHC 1441 (Ch), 2009 WL 1949459, July 3, 2009, with *In re Stanford International Bank Ltd., Re Superior Court of Quebec*, 209 CarswellQue 9216, Sept. 11, 2009, and 2009 CarswellQue 9211.

the “real” question – where is the entity’s COMI.³¹ I do not believe that the issue of COMI should be the only issue. In any event, in the Stanford matter, the search for COMI did not result in the recognition of one worldwide proceeding to take charge of the assets of one enterprise, despite the fact that the U.S., the U.K. and Canada have all adopted the Model Law.

Cooperation and Coordination

Nor can it be said that the issue of COMI has helped lead us to an era of cooperation and coordination. In a very recent case, Western Union and other investors in “an offshore money-market type fund,” organized under the laws of the British Virgin Islands, sued the fund in New York to get their money back. The suits were eventually consolidated into an interpleader action involving the fund’s remaining assets, located in the United States. Dissatisfied with the possibility that the U.S. court would not recognize its claimed priority to the remaining funds, Western Union started a separate insolvency proceeding in the British Virgin Islands. The court there acknowledged that its case would not be recognized in the U.S. under the *Bear Stearns* decision discussed above, and it acknowledged the opposition of the British Virgin Islands Financial Services Commission, which supported the interpleader action in the United States as a fair means of winding up the affairs of the Fund. Nevertheless, the BVI Court held that it was proper to open proceedings and appoint liquidators, based on its determination that the registered office and COMI was in the British Virgin Islands, and that if the BVI case would not be recognized on account of the *Bear Stearns* decision, the liquidators could

³¹ Fraser Hughes, *Are We Moving Further Away From Common Principles: The Stanford Bank Decision in England and Quebec*, American Bankruptcy Institute (2010), available at <http://www.google.com/search?q=are+we+moving+further+away+from+common+principles&ie=utf-8&oe=utf-8&aq=t&rls=org.mozilla:en-US:official&client=firefox-a>.

nonetheless sue to obtain the funds in the United States based on the § 1509(f) exception discussed above.³² It also, without giving any Fund investors an opportunity to be heard, determined that the Fund's distribution would follow the principles sought by Western Union. The U.S. court not surprisingly refused to grant recognition to the orders of the BVI court, relying in part (as anticipated) on the *Bear Stearns* decision.³³

Most of the above-cited cases involved relatively simple business organizations, usually consisting of one entity, not a multiplicity of separate corporate entities. However, the typical multinational enterprise is organized into separate legal units, with a unit separately incorporated or established in each jurisdiction. Even if wholly dependent on the parent, with its cash swept on a daily basis into one worldwide account and then disbursed again the next morning, each subsidiary has a separate board of directors or managers legally responsible for the management of the entity. It is a fundamental principle of insolvency law that each corporate entity, having distinct legal status and often with separate creditors and assets, is treated as a separate debtor and cannot be routinely consolidated with its affiliates.³⁴

³² *Western Union Int'l Ltd. v. Reserve Int'l Liquidity Fund Ltd.*, BVIHC 2009/322, Judgment, 2010, (*Reserve Int'l Liquidity Fund Ltd. v. Caxton Int'l Ltd.*, Case No. 09-9021 (PGG), S.D.N.Y., Dkt. No. 48, Ex. C).

³³ *Reserve Int'l Liquidity Fund Ltd v. Caxton Int'l Ltd.*, 2010 WL 1779282 (S.D.N.Y. April 29, 2010) N.Y.L.J. May 6, 2010, p.31, Col. 1. The court also rejected the Liquidators' reliance on an unreported decision in Delaware that gave chapter 15 recognition to a Cayman proceeding as a foreign main case. *In re Saad Investments Finance Co. (No. 5), Ltd.*, No. 09-13985 (KG) (Bankr. D. Del. Dec. 17, 2009). The court found that the Finance Company's operations were at the time of the petition conducted almost exclusively in the Caymans, that its management resided there, and that more of its assets were held there than in any other location.

³⁴ United States insolvency law permits the "substantive consolidation" of separate, related entities under narrow, limited circumstances. *In re Owens Corning*, 419 F.3d 195 (3d Cir. 2005); *In re Augie/Restivo Baking Co., Ltd.*, 860 F.2d 515 (2d Cir. 1988). Some other systems do not recognize the concept, even though there may be limited circumstances under which a corporate veil will be pierced. See Daniel Staehelin, *No Substantive Consolidation in the Insolvency of Groups of Companies*, in Henry Peter *et al.*, *The Challenges of Insolvency Reform in the 21st Century* 213-19 (Schulthess 2006).

As mentioned above, the Model Law and chapter 15 have no provisions that deal effectively with enterprises comprised of multiple entities. The ancillary provisions are designed for the benefit of a single legal unit that seeks limited relief in another jurisdiction – *e.g.*, an order staying litigation or recovering assets for administration in the “main” case located elsewhere. The only provisions that are arguably relevant to affiliated corporate groups are the very general provisions of chapter IV of the Model Law, incorporated in sub-chapter IV of chapter 15 entitled “Cooperation with Foreign Courts and Foreign Representatives.” Sections 1525 and 1526 of chapter 15 require that the court and trustee, respectively, “cooperate to the maximum extent possible with a foreign court or a foreign representative.” It has been argued that this provision requires cooperation among affiliates that are in separate insolvency proceedings, or at least that there be cooperation among their respective courts and estate administrators.³⁵

In principle, coordination and cooperation are hard to dispute as goals in the administration of insolvency proceedings involving affiliates. Moreover, progress has been made, especially in the area of the cross-border protocol, which is a formal agreement among the administrators of multiple proceedings to cooperate in order to preserve or enhance value.³⁶ Nevertheless, the general principle of “cooperation” has not overcome the real conflicts that exist among estates and estate representatives, and the issue of COMI has not contributed to a solution to the problem. For example, in the *Reserve Intl. Liquidity Fund* situation discussed above, both the United States and the British Virgin Islands had adopted the Model Law, but the principle of cooperation and coordination did not prevent the BVI Court from opening a liquidation whose very

³⁵ Leif Clark, *Ancillary and Other Cross-Border Insolvency Cases under Chapter 15 of the Bankruptcy Code* 107-08 (LexisNexis 2008).

³⁶ Samuel L. Bufford, *United States International Insolvency Law* 505-17 (2009).

purpose was to countermand proceedings already in place in the United States, where the debtor's property was located.

Moreover, in many cases, although the goal may be cooperation “to the maximum extent possible,” the predicate is that multiple courts and multiple estate administrators are involved. The existence of multiple administrators usually accentuates conflict, and the principle of COMI does not help. It took the insolvency administrators of 18 subsidiaries of Lehman Brothers seven months to work out a protocol that contained general principles of coordination and cooperation; however, even that document provides that the protocol is not a legally enforceable agreement and expressly reserves to the respective administrators the right to act independently.³⁷ Furthermore, even though the protocol was designated as non-binding, the administrators of the largest non-U.S. affiliate, Lehman UK, held out and refused to sign. Despite the fact that both the U.S. and the U.K. have adopted the Model Law, the goal of cooperation has not prevented the U.K. administrator from publicly planning a lawsuit seeking \$100 billion in damages from the U.S. parent.³⁸

Much effort is currently underway to determine the COMI of a corporate group so as to coordinate the insolvencies of different members of that group. The effort to find a way to coordinate the insolvency cases of the members of a corporate group is an important project. Experience with the COMI principle during the first five years of

³⁷ Cross-Border Insolvency Protocol for the Lehman Brothers Group of Companies attached to Motion dated May 26, 2009, *In re Lehman Bros. Holdings Inc. et al.*, Chapter 11 Case No 08-13555 (JMP), S.D.N.Y. In their only substantive agreement, the administrators agreed to cooperate in attempting to work out the inter-company claims among the group.

³⁸ Danny Fortson, *Lehman UK Arm to Sue for \$100bn*, The Sunday Times Online, Aug. 30 2009, http://business.timesonline.co.uk/tol/business/industry_sectors/banking_and_finance/article6814920.ece.

chapter 15 in the United States leads to the question whether it is necessary or advisable to base the effort of coordination exclusively on the principle of the COMI.