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The Model Law in the United States: COMI and Groups

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Law professors really do care about reality—or at least some do. This paper addresses the reality of the operation of the Model Law on Cross-Border Insolvency as reflected in cases commenced under the United States version of the Model Law, Chapter 15 of the United States Bankruptcy Code. It reports the results of an empirical study of all the cases filed under Chapter 15, along with a selective review of some important Chapter 15 decisions relating to recognition and relief. It also considers the exaggerated role of the “COMI” dispute and the problem of corporate groups. Its findings are consistent with the picture painted by Look Chan Ho in a recent article describing the smooth working of the Model Law, through which a Korean reorganization proceeding was recognized and supported in Australia, the United Kingdom, and the United States. We have a long way to go in managing multinational insolvencies, but we are well on our way.

Empirical Study

Nowadays, the overwhelming majority of United States bankruptcy cases are filed electronically, so that the entire record in the case is available through PACER. With some help from Mike Bickford of AACER, to whom I am deeply grateful, we have looked at the electronic

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211 U.S.C. §1501 et seq. The United States effort to enact the Model Law more or less exactly as written is illustrated by the fact that the Chapter 15 section numbers conform to the article numbers in the Model Law.
4“Public Access to Court Electronic Records.”
files for every Chapter 15 case filed through 2/18/2010. We asked a number of questions of the files. We found 383 cases filed since October, 2005, the effective date for Chapter 15. Thus, unlike most empirical studies, we report not a sample but the data from the entire universe of relevant cases. One general point of interest is the distribution of countries from which representatives applied for Chapter 15 recognition and relief. On the one hand, nearly half of the cases come from Canada and nearly 60% from Canada and the United Kingdom combined; on the other hand, 143 cases came from 26 other countries all over the world. Africa was the only unrepresented continent.

II. Recognition and COMI

A. Recognition

After the United States courts refused under Chapter 15 to recognize proceedings in haven jurisdictions with no economic connection to the debtor company, a number of commentators announced that the United States had regressed by adopting Chapter 15 and was now less willing to recognize foreign insolvency proceedings. Nothing could be farther from the truth, as the reported cases and my empirical study of Chapter 15 reveals.

Although the data remain preliminary, they show that the United States courts are very strongly inclined to defer to foreign main proceedings within the intent of the Model Law and Chapter 15. Of the 303 cases that we found had reached a clear result, 243 resulted in recognition and only 6 in a flat denial of recognition. The 4 cases that granted only provisional relief up to the time we looked at them, along with the 41 voluntary dismissals and 5 dismissals

5 There are always some ambiguities and glitches in the data, but I am confident these data are overall complete and accurate. They remain preliminary, because I am still reviewing some ambiguities and gaps in the files and because some cases have not been updated since we surveyed them last.

6 Attachment A. "We" means me, my research assistant Jamie France, Texas ’11, for whose legal and data research I am most appreciative and Sarah Reed, our UT sociology graduate student and STATA expert, who did an excellent job of running and analyzing the numbers.

7 We did not review any cases under section 304 of the Code, which governed international recognition matters until its repeal as part of the adoption of Chapter 15 in 2005.

8 See, e.g., In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 374 B.R. 122 (Bankr. 2007), aff’d 389 B.R. 325 (S.D.N.Y. 2008).

9 A total of 383 cases were in our study, of which 80 were pending a ruling or had to be treated as “missing” for this purpose. Four cases were recognized as nonmain, but may have been denied “main” recognition.
of ambiguous origins (a total of 54) may or may not have been denials. It seems quite likely that
many, if not most, of them followed some agreement among the parties or some development in
the case that made further court proceedings unnecessary. Thus about 20% of the applications
were potentially deniable, but it seems likely that only a small percentage of cases voluntarily
dismissed would reach the point of a Chapter 15 petition and then be dismissed because the
petitioners thought they would lose them on the merits. Regardless, it is clear on any assumption
that most Chapter 15 petitions for recognition are granted.\textsuperscript{10}

\textit{In re Atlas Shipping A/S}\textsuperscript{11} is illustrative of the hundreds of cases in which recognition has
been granted by the United States courts. The debtors were Danish shipping corporations that
were subject to an insolvency proceeding in Denmark. Foreign creditors had obtained marine
attachments against the debtors' finds in New York. The administrator of the Danish
proceedings sought recognition of her proceeding as the main proceeding and release of the
attachments. The court granted recognition, turning over the funds for administration in the
Danish cases.\textsuperscript{12} In the process, the United States court explicitly left to the Danish court any
questions concerning the effect of the attachments in giving an advantage to the attaching
creditors. That aspect of the case is important because it narrows the reach of an older case,
\textit{Koreag},\textsuperscript{13} in which the rule was announced that property issues would be resolved by the United
States courts prior to any turnover.

Other cases show that the United States courts have been willing to grant recognition
even where there were plausible excuses to refuse. For example, the United Kingdom Court of
Appeal in the \textit{Harms} case\textsuperscript{14} affirmed issuance of an anti-suit injunction against further
proceedings by the United States District Court in New York with regard to pending attachment

\textsuperscript{12} The court suggested that in making the turnover decision under section 1522(a) it need consider only the
circumstances of United States creditors and there were no United States creditors in the case. With respect, the
language of the section ("...interests of the creditors and other interested entities") and the legislative history make it
clear that the interests of all creditors are to be considered. But I think that should have made no difference in the
outcome.
\textsuperscript{13}Koreag, Controle et Revision S.A. v. Refco F/X Assocs., Inc. (In re Koreag), 961 F.2d 341, 358 (2d Cir.1992).
\textit{Atlas} found that the \textit{Koreag} rule was limited to issues of title, not mere disputes over rights in the property.
\textsuperscript{14}Harms Offshore AHT v. Bloom, [2009] EWCA Civ 632.
proceedings. It would have been easy for the New York court to react negatively and to refuse recognition to the United Kingdom administration proceeding. Instead, the United States court dismissed the attachment case\textsuperscript{15} and thereafter recognized the proceeding in London.\textsuperscript{16}

Another exemplary case is \textit{Avanzit}.\textsuperscript{17} There the reorganization-type case in Spain had been completed to the point of adoption of a plan and establishment of a control commission to supervise the execution of the plan. In American terms, the company had “come out of bankruptcy.” On that basis, the objectant sought to defeat the application for recognition on the ground that the “foreign proceeding” had ended and that the control commission was not a foreign representative. The court rejected those arguments and granted recognition.\textsuperscript{18}

A greater legal stretch was recently required in the \textit{Metcalfe} case.\textsuperscript{19} The Canadian debtors had been central parties to the settlement of the great commercial paper paralysis in Canada through a reorganization proceeding. They sought, in effect, a United States discharge of obligations by way of injunctions against suits in the United States on the basis of debts barred by the approved Canadian reorganization plans.\textsuperscript{20} Such discharges have often been granted in the United States, but this time the releases included parties who were not debtors in the Canadian proceedings. There are rather strict rules in the United States against releasing third parties through a reorganization plan, with only limited exceptions. The court found, probably correctly, that these releases would not have been enforceable if entered in a United States proceeding. However, it held that under Chapter 15 and general principles of comity, it could grant not only recognition but also enforcement of the Canadian orders—in effect, discharge of obligations that could not have been similarly discharged in the United States.

Both \textit{Metcalfe}, which in the end granted both recognition and injunctive relief, and \textit{Avanzit}, which recognized but reserved any ruling on relief, reveal the important difference

\textsuperscript{15}Id., Order dated 6/1/09 (copy on file with author)  
\textsuperscript{16}Sub nom. In re Premier Oil Limited, Bankr. S.D.N.Y. No. 09-12641 (RDD), 9/17/09 (copy on file with author).  
\textsuperscript{17}In Re Oversight And Control Commission Of Avanzit, S.A., 385 B.R. 525 (Bankr. S.D.N.Y. 2008). The author was involved in the case on the side of the Commission.  
\textsuperscript{18}See also CSL Australia Pty. Ltd., V. Britannia Bulkiers Plc, 2009 WL 2914334 (S.D.N.Y. 2009).  
\textsuperscript{19}In re Metcalfe & Mansfield Alternative Investments, 421 B.R. 685 (Bankr. S.D.N.Y. 2010).  
under the Model Law between recognition (fast and easy) and relief (highly dependent on circumstances).

Another example of the distinction between recognition and relief is found in the case of *In re Loy.*\(^2\) The debtor there was a natural person who was a citizen of the United Kingdom but a current resident in the United States. The court recognized the foreign trustee, but declined to issue injunctive relief protecting the trustee from any personal lawsuit the debtor might file, holding that no danger as yet presented itself. The distinction between recognition and relief is further illustrated by the *RHTC Liquidating* case, discussed below in the section on groups.

Even in cases where recognition has been denied, the United States courts are often willing to defer to foreign courts on questions of foreign law. *In re Gold & Honey*\(^2\) involved two Chapter 11 cases filed in the United States, followed by a secured creditor’s receivership in Israel. Recognition was denied. One important holding is that a receivership under a floating charge may not be a “foreign proceeding” recognizable under Chapter 15 because it is primarily for the benefit of the secured creditor only. But the court also considered as a factor in the denial that the creditor had obtained the receivership in violation of the United States automatic stay, for which the United States claims global effect. Even more notable, however, for present purposes is that notwithstanding denial of recognition the court limited the effects of the Chapter 11 cases to United States assets and left the issues concerning the property in Israel to be resolved by the Israeli courts. The statute grants such a limitation on the global reach of United States bankruptcy law solely where a foreign main proceeding has been recognized,\(^2\) but the court here chose to so limit the Chapter 11 cases despite denying recognition. The reason was that the Israeli courts were better equipped to resolve questions of Israeli law.\(^2\)

Finally, another very recent case should be mentioned to indicate the flexibility and openness to foreign law found in the United States courts. *In re Condor*\(^2\) was another case in

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\(^{22}\) In re Gold & Honey, Ltd., 410 B.R. 357 (Bankr. E.D. N.Y. 2009).


\(^{24}\) The court was also influenced by the fact that the Chapter 11 cases were headed for liquidation. If the property in Israel had been needed for a successful reorganization, the result might have been different.

\(^{25}\) In re Condor Insurance Ltd., 601 F.3d 319 (5th Cir. 2010).
which recognition was not a problem, but rather the argument concerned the relief to be granted. The foreign representative sought to avoid an allegedly fraudulent transfer of more than $300 million from the Nevis debtor to an affiliate. The trustee sought avoidance under Nevis law, not United States law. The reason, no doubt, was that United States law explicitly forbids use of Chapter 15 to employ United States avoidance law. A trustee that wants to use United States avoidance provisions must file a full-fledged bankruptcy proceeding, probably under chapters 7 or 11. The defendant/transferee claimed that use of foreign law should likewise require the filing of a full bankruptcy case. The Fifth Circuit Court of Appeals held that the bankruptcy court could apply foreign avoidance law in a Chapter 15 case. There are a number of interesting points about this important case, but for present purposes it suffices to illustrate the willingness of United States courts to not only recognize but make effective the efforts of foreign administrators to collect assets in the United States.

B. COMI

The Model Law grants far broader relief to a main proceeding than to a nonmain one and grants no relief, except some level of cooperation, to a foreign proceeding that is neither main nor nonmain. A main proceeding is one pending in that jurisdiction that is the “center of [the debtor’s] main interests” (“COMI”). A nonmain proceeding can be found in a jurisdiction more peripheral to the debtor’s affairs, but that jurisdiction must nonetheless be one in which the debtor has a significant economic presence. Chapter 15 has adopted similar definitions.

A vast amount of ink has been spilled, in Europe and the United States, on the proper understanding of COMI. It is just the sort of problem that lawyers, and especially legal academics, love to chew upon. There has been wailing and gnashing of teeth over the prospect of forum shopping and inconsistent judgments. So far, at least in the United States, those concerns have been greatly exaggerated. COMI is a very interesting issue but is not a major problem in the American courts.

Of the 303 Chapter 15 cases in our study that had granted or denied relief, a serious argument with regard to COMI was made in less than 20 and accepted in less than 10.27 Even allowing for ambiguities and confusion in the records, the argument was even raised in only a handful of cases and was rejected in most of them. Many issues have arisen in these hundreds of Chapter 15 cases in the United States, but arguments about COMI have been minimal. COMI denials are a large percentage of recognition denials, but only because the total of denials is so small.

The best-known COMI case is *In re Bear, Stearns.*28 There two United States based investment funds sought Chapter 15 recognition for an insolvency proceeding filed in the Cayman Islands, where the funds were incorporated. The application was not opposed.29 However, the petition on its face strongly suggested that all of the important operations of the funds were in the United States, while there was no significant economic activity of the funds in the Cayman Islands. On that basis, Judge Lifland ruled that the COMI of the funds was obviously in the United States and that the lack of economic activity in the state of incorporation meant the foreign proceeding could not be recognized even as a nonmain proceeding.30 The ruling was affirmed on appeal. The key points are that the presumption that the state of incorporation is the COMI is not a strong one and that the court must ascertain the facts in that regard on its own, if necessary. Although there is some authority that is less rigorous in determining what sort of proceeding can be recognized,31 it is generally agreed that the *Bear* tests are the law in the United States.

While there are few cases in which COMI has been challenged,32 some of the challenges have been successful. For example, *In Re British American Insurance Company Limited*33 is a

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27 As noted, I am still sorting out some gaps and ambiguities in dockets, so the numbers here are approximately correct, but not yet directly linkable to the recognition numbers.


29 However, one major creditor filed an odd document that was not acquiescence but also not an objection.

30 *See also* *In re Tri-Continental Exchange Ltd.*, 349 B.R. 627 (Bankr. E.D. Cal. 2006).

31 *In re SPhinX*, 351 B.R. 103, 116-20 (Bankr. S.D.N.Y. 2006), aff'd, 2007 WL 1965597 (S.D.N.Y. July 3, 2007). Although the same district judge, Judge Sweet, who affirmed *Bear* had previously affirmed *SPhinX*, he distinguished the latter case in a way that strongly suggested Judge Lifland's analysis represents the rule.

32 Our data suggest that one reason may be that very few petitions have been filed from haven jurisdictions since the decision in *Bear*. 
very recent case in which the court refused to recognize a Bahamas proceeding. The debtor was a company with business all over the Caribbean but virtually all its actual operations were carried out by an affiliated management company in Trinidad and it had essentially no operations in the Bahamas before or after the opening of the Bahamas proceeding. Thus, as in Bear, it failed to qualify as either a main or a nonmain proceeding. On the other hand, a proceeding in SaintVincent and the Grenadines involving the same debtor could be recognized as a nonmain proceeding because in that jurisdiction the debtor "... conducts business, retains employees ... who perform insurance business activity, maintains accounts in SVG relating to its insurance business in that country, and has existing policyholders in SVG." The court also suggested that operations following the appointment of an administrator could be considered for this purpose, opening the possibility that a liquidator could pull operations into the filing jurisdiction to make it the COMI for Chapter 15 purposes, although one may be permitted to doubt if that dictum is good law.

A second case finding no sufficient COMI was In Re Tradex Swiss Ag. The court found that the proceeding brought by the Swiss banking authorities was a foreign proceeding for Chapter 15 purposes but that the COMI of the company was in Massachusetts. The ruling was based on the simple factual findings that most of the company's actual trading and other operations were carried on in Massachusetts, rather than in Switzerland. There was economic activity in Switzerland, however, so that the Swiss action was recognized as a foreign nonmain proceeding. Both these cases would seem to be classic garden-variety denials as they are resolved in the United States courts in the rare instances where they arise.

III. Groups

All of us have long recognized the great difficulties presented by corporate groups. The Model Law does not deal with these problems and neither did the American Law Institute

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Transnational Insolvency Project. The United Nations Commission on International Trade Law (UNCITRAL) Legislative Guide, one of the most valuable projects in the field, provides only very limited help with group issues. UNCITRAL is close to finishing a new project on corporate groups but with only limited success.

The central difficulty is the tension between the legal theory of the corporate form and the reality of group conduct. The corporate form is not merely a legal concept to be safely ignored in the face of practical realities. It is economically important to defend that form to the extent of legitimate expectations it creates in various actors, notably shareholders, managers, and creditors. On the other hand, a corporate group may create group-oriented expectations and collective legal difficulties not associated with stand-alone companies. The whole problem is further complicated by the great variation in the relationships among affiliates in a corporate group. Some affiliates are virtually independent, with the group a passive investor, while others are mere shells under central direction, ignored in every practical decision and not noticed even by creditors and other stakeholders. Some groups operate generally closer to one end of that spectrum than the other, while other groups have affiliates scattered along various points on that line.

The great problem for an international solution is that most countries have no good answers to the question of legal treatment of corporate groups in their domestic laws. Unlike insolvency law as such, where UNCITRAL, the ALI, and others could begin with sound domestic solutions and extrapolate them to the international stage, most countries have a patchwork of solutions to particular corporate-group problems and no very persuasive overall theory. Of course, Philip Blumberg’s massive work on the subject is where scholarship should begin (at least in common law countries), but we all have very far to go.

Although we know that corporate groups are common in international commerce, it is always important to develop the specific facts. In our study in the United States, we coded a

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37http://www.uncitral.org/uncitraven/commission/working_groups/5Insolvency.html.
Chapter 15 petition debtor as a stand-alone case, a lead case (generally, the parent in a group), or an affiliate (generally, a subsidiary). A lead case or an affiliate case was coded also as a group case. A case was coded as a group case only if two or more members of a group filed in the United States. In our data, 232 of 383 cases were companies that were members of a corporate group based on their filings in the United States. Of these, only 45 were lead cases, so the relationship between stand-alone and group filings was approximately 151 to 45, or a bit more than three to one.

Thus in American Chapter 15 practice corporate groups are common, but not dominant. Often they involve a foreign parent and an American subsidiary, as with *In re RHTC Liquidating Co.* In this case, the United States court had no hesitation in recognizing the Canadian proceedings involving the Canadian parent and the United States subsidiary. Unlike some other countries, the United States does not have a notion that a subsidiary with its incorporation or “real seat” in jurisdiction A cannot be put into an insolvency proceeding in jurisdiction B, especially if it has a parent there that is also in such a proceeding. Thus recognition was easy. The problem here arose as to the relief to be granted.

In *RHTC*, certain United States creditors had filed an involuntary Chapter 7 case against the United States subsidiary. The petition sought dismissal of the United States involuntary proceeding. The court refused. As noted earlier, the Model Law makes a distinct cleavage between recognition and its automatic effects (for a main proceeding) and any further relief that the recognizing court may choose to give if appropriate. The American court in *RHTC* was concerned about at least two things: a very substantial inter-company claim that could greatly reduce the value of the claims of the United States parties and certain insider transfers. Being unsure about the effects of these matters on the United States creditors, it declined to dismiss the Chapter 7 cases on the record developed to that point.

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38 That is, we did not try to ascertain if a company that filed in the United States might have affiliates that did not file in the United States. Instead, we assumed it was a stand-alone company. We have the sense that in most instances stand-alone cases were not part of corporate groups, but we do not have hard numbers.

39 To be clear, that means 45 groups filed two or more of their affiliates in the United State versus 131 filings that appear to have been stand-alone companies.

The overall point about group filings in the United States is that neither our empirical study nor the reported cases show any great problems with group cases. A case like RHTC reflects at most the usual back and forth as courts cooperate while obeying the Model Law requirement to be careful of the rights of creditors and other stakeholders. Thus, while pursuing better answers for corporate groups is important, we should not let it distract us from the effective functioning of the Model Law in many cases, including group cases.

C. Communication

I have long been committed to the idea that communication is central to the proper conduct of a multinational insolvency case. Those of us who worked on the Model Law were at pains to include authorization for direct communication among administrators and courts coupled with a mandate for cooperation. Pending further development of methods for dealing with corporate groups, I think that a high level communication among courts and professionals, beginning at the very start of a case, is essential to effective administration. While that is especially true in a reorganization effort, it is importantly true in liquidation as well.

A second empirical study is interesting in this context. I was given permission to survey the members of the Institute as to their knowledge and experience about communication and cooperation in cross-border cases. I got a response rate of about 25% which, believe it or not, in the survey business is quite a good return. My first question inquired if there had been direct communication between courts or administrators in the cases you know about. Seventy-one percent of respondents said yes which, in my view, is notable. Ninety-three percent of the lawyers reported this communication resulted in some cooperation. Obviously, this survey was a somewhat rough cut at the empirical reality, but the results are nonetheless striking.

IV. Conclusion

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41 Cite articles
42 Model Law, art. 25.
The Model Law in its United States manifestation—Chapter 15—has achieved a high level of success, in significant part because of the courts' understanding of its enactment as an acceptance by the United States of modified universalism, which is a pragmatic form of the universalist ideal of having each case managed by a single court or other authority. Recognition has been granted in the great majority of cases and in reality locating COMI is a question more intellectually interesting than practically important.

Similarly, the group problem has not proven to be a substantial obstacle to cooperation in most cases in the United States. Cases like Federal Mogul have proven difficult, but more because of substantive disputes than because of the technical difficulties associated with coordination of affiliate insolvencies.

As we move upwards toward solution of the next set of problems, we should occasionally look back to remember how far we have come since UNCITRAL first convened an insolvency group fifteen years ago. That backward glance will make the way forward look less daunting.