Coordination of Insolvency Cases for International Enterprise Groups: A Proposal

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I. Introduction

The effective coordination of insolvency or bankruptcy cases[2] involving multinational enterprise groups[3] consisting of legal entities registered and operating in multiple nations is the most important unsolved problem of international insolvency law.[4] Neither the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency[5] (the "UNCITRAL Model Law") nor the European Union Regulation on Insolvency[6] (the "EU Regulation") addresses this problem.

The purpose of this paper is to propose a solution to this problem. Generally, the proposal takes a substantial step toward universalism by permitting the commencement of main proceedings for all members of an enterprise group in the

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[2] There is ambiguity in the international community as to the terminology used to discuss the court (or administrative) insolvency procedure for a natural person or legal entity. Both the UNCITRAL Model Law and the EU Regulation use the term "proceedings" to refer to this procedure. At the same time, it is common to talk about "proceedings" taking place within the insolvency court procedure, such as adversary proceedings under U.S. law. The U.S. law shared this ambiguity until the present Bankruptcy Code was enacted in 1978, when the term for the procedure was changed to "case," on the analogy of cases on other subjects brought before the courts. Thus, under present U.S. terminology, a case is the insolvency (or bankruptcy) process for the individual or entity, while a proceeding involves a particular subject (such as an adversary proceeding or claims objection proceeding) within the insolvency case. It should be noted that, despite this clarification of terminology in the U.S. statute, the bankruptcy law community continues to use the term "proceedings" to mean either a case or a proceeding within a case. Because of the terminology in both the UNCITRAL Model Law and the EU Regulation, it is impossible to use the term "proceedings" consistently in this article.

[3] For the purpose of this paper, an enterprise is any entity, regardless of form, that engages in economic activity. For a discussion of what constitutes an enterprise group, see *infra* note 17.

[4] For a thoughtful, detailed analysis of the insolvency problems in the multinational enterprise group context, focusing principally on common law countries, see Irit Mevorach, *Towards a Consensus on the Treatment of Multinational Enterprise Groups in Insolvency,* 18 CARDOZO J. INT'L & COMP. L. 359 (2010).

[5] U.N. Comm'n on Int'l Trade Law (UNCITRAL), UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment (1997), *available at* http://www.uncitral.org/pdf/english/texts/insoven/insolvency-e.pdf.

[6] Council Regulation 1346/2000, 29 May 2000, on Insolvency Proceedings, 2000 O.J. (L 160) 1-18 (as amended).

home country of the enterprise group, referred to herein as the enterprise center of main interests ("ECOMI").[7]

A. Impending Revision of the European Union Regulation on Insolvency

This problem has been brought to a head by the European Union's (the "EU's") proposal to adopt a provision in the EU Regulation to cover the issue of the insolvency of multinational enterprise groups (or "groups of companies," as the issue is described in the EU documents). Deliberations are currently ongoing. It is eminently timely to make recommendations on how this issue should be resolved because there will likely be other proceedings before the proposal is finalized. The Commission is expected to act on this proposal and make substantial revisions to the EU Regulation in late 2013.

The EU Regulation is now under revision in many respects.[8] Pursuant to a mandate in article 46 of the EU Regulation,[9] the European Commission (the "Commission") submitted a report (the "EU Commission Report")[10] in February 2012 to the EU Parliament and other EU entities on the revision of the EU Regulation. One of the most important proposals for action in the report is the adoption of a legal regime to govern the international insolvencies of groups of companies or enterprise groups within the European Union. The EU Commission Report, also called a "Roadmap,"

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[7] For a definition and further discussion of ECOMI, see *infra* text at notes 168-178.

[8] The most ambitious proposal for revision of the EU Regulation is the proposal of INSOL Europe, which includes draft language for a revised Regulation. *See* Revision of the European Insolvency Regulation (2012), *available at* http://www.insol-europe.org/download/file_/6856 [hereinafter "INSOL Europe Report"].

[9] *See* EU Regulation, art. 46 (requiring a report on June 1, 2012 (and every five years thereafter) on the application of the EU Regulation, accompanied "if need be" by a proposal for the adaptation of the regulation); *see generally* Samuel L. Bufford, *Revision of the European Union Regulation on Insolvency Proceedings – Recommendations,* 3 INT'L INSOLVENCY L. REV. 341 (2012). One of the major proposals for revision is to expand the coordination and cooperation provisions to courts and other parties in interest. *See id.* at 353-55.

[10] *See* Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No. 1346/2000 on insolvency proceedings, 2012, *available at* http://ec.europa.eu/governance/impact/planned_ia/docs/2013_just_012_insolvency_proceedings_en.pdf [hereinafter "EU Commission Report"].

reports that the Commission is carrying out "an in-depth evaluation of the need to reform the Insolvency Regulation."[11]

As a first step, the Commission has launched an external study on the application of the EU Regulation.[12] After the report from the external study, the Commission plans to develop future options for more efficient cross-border insolvency rules.[13] In addition, the Commission Report notes that lawyers, banks, and academics have been regularly consulted in recent international conferences on this subject,[14] and a public consultation was also launched in the first quarter of 2012.[15]

The EU Commission Report specifies that one of its most important objectives is to develop a proposal for the effective coordination of insolvency or bankruptcy cases[16] for international enterprises or corporate groups (sometimes also called "groups of companies").[17]

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[11] *See id.* at 1.

[12] *See id.*

[13] *See id.*

[14] *See id.* at 3.

[15] *See id.*

[16] This paper uses the term "insolvency" rather than "bankruptcy" to refer to laws regulating the liquidation or restructuring of legal entities and natural persons because "insolvency" is the term generally used in the international community. In the United States, "bankruptcy" is the term referring to this kind of law. The U.S. terminology is tied to the use of the term "bankruptcy" by the U.S. Constitution, which gives exclusive power to the U.S. Congress to "establish uniform Laws on the subject of Bankruptcies throughout the United States . . . ." *See* U.S. CONST., art. 1, § 8, cl. 4. The international community uses the term "insolvency law" because "insolvency" has a consistent meaning throughout the world. In contrast, "bankruptcy" has various meanings in various countries. For example, in Australia "bankruptcy" means liquidation only, and restructuring is provided under other laws. *See* Bankruptcy Act, 1966 (Austl.). In contrast, in Hungary, "bankruptcy" refers to the portion of the corporations code providing for the restructuring of a corporation, and not to its liquidation. *See* Act XLIX of 1991 on Bankruptcy Proceedings, Liquidation Proceedings and Voluntary Dissolution (as amended) (Hung.).

[17] My proposal does not specifically define a "group of companies." UNCITRAL describes enterprise groups as follows:

> Enterprise group structures may be simple or highly complex, involving numbers of wholly or partly owned subsidiaries, operating subsidiaries, sub-subsidiaries, sub-holding companies, service companies, dormant companies, cross

B. Enterprise Groups

Every well-managed large international enterprise group consists of a number of related corporate entities,[18] and a large international business can have thousands of such entities.[19] In addition, it is common for layers of management entities to exist that coordinate the operations of group members in specific regions of countries.[20]

The number of legal entities held within a single enterprise group can be enormous. For example, the Lehman Brothers enterprise group had approximately

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> directorships, equity ownership and so forth. They may also involve other types of entity, such as special purpose entities . . . , joint ventures, offshore trusts, income trusts and partnerships.

U.N. Comm'n on Int'l Trade Law (UNCITRAL), UNCITRAL Legislative Guide on Insolvency Law, Pt. 3: Treatment of Enterprise Groups in Insolvency (2012), at 6-7 (citations omitted), *available at* http://www.uncitral.org/pdf/english/texts/insolven/Leg-Guide-insol-Part3-ebook-E.pdf [hereainafter "UNCITRAL – Enterprise Groups"]; *see generally id.* at 5-11. The International Insolvency Institute offers a simpler definition for the purposes of enterprise group insolvency coordination:

> "Multi-national enterprise group" or "enterprise group" means a group of companies or enterprises established or centered 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 centrally controlled or coordinated.

See Hon. Ralph R. Mabey et al., *Judicial Guidelines for Coordination of Multinational Enterprise Group Insolvencies,* (International Insolvency Institute, 2009), *available at* http://www.iiiglobal.org/component/jdownloads/finish/362/5362/html [hereinafter "III Judicial Guidelines – Enterprise Groups"]. INSOL Europe's proposed definition of "group of companies" is even simpler: "an amalgamation of companies consisting of parent and subsidiary companies." *See* INSOL Europe Report, *supra* note 8, at 9.

[18] For a discussion of the reasons for conducting an international business through enterprise groups, see UNCITRAL – Enterprise Groups, *supra* note 17, at 11-14.

[19] For a variety of legal and business reasons (including tax consequences), it is advisable to have at least one corporate entity for each country where the enterprise group engages in business or trade.

[20] *See* UNCITRAL – Enterprise Groups, *supra* note 17, at 7.

8,000 corporate entities in forty countries at the time of its bankruptcy filing.[21] Parmalat had several hundred legal entities in various countries in its enterprise group.[22] The group entity chart for the bankruptcy of Federal Mogul, when magnified sufficiently to make subsidiary names legible, fills the wall of a small office. In a recent study of chapter 15 cases filed in the United States, Professor Jay Westbrook found that 232 of the 383 chapter 15 cases filed in the United States (as of February 18, 2010) involved enterprise groups.[23]

The legal structure of the group does not necessarily indicate how the group is managed. In a large enterprise group, it is typical for one legal entity to exercise the management and control functions for all of the legal entities in the group. For example, the Lehman Brothers enterprise group had its international business headquarters located in New York City, and it had principal operations centers in London and Tokyo. Parmalat, which was doing business in some thirty countries, was managed principally from Parma, Italy. Cooperation and coordination among the relevant corporate entities is particularly important for such entities.

In contrast, under both the present EU Regulation and the UNCITRAL Model Law, international judicial jurisdiction is based on the location of either the debtor's center of main interests ("COMI")[24] or an establishment in the country where an insolvency proceeding is commenced.[25] Each debtor that is a distinct legal entity must have its own basis for international jurisdiction.

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[21] *See* Harvey R. Miller & Maurice Horwitz, *A Better Solution is Needed for Failed Financial Giants*, New York Times DealBook, October 9, 2012, available at http://dealbook.nytimes.com/2012/10/09/a-better-solution-is-needed-for-failed-financial-giants/. More than a hundred cases were commenced for related entities in many countries. *Id*.

[22] *See* Annika Wolf, Success and Failure in Cross-Border Insolvency Proceedings of Multinational Corporations – Parmalat – A European and American Perspective 29 (unpublished manuscript, on file with author), *available at* www.iiiglobal.org/component/jdownloads/finish/337/4050.html.

[23] Jay Lawrence Westbrook, *The Model Law in the United States: COMI and Groups* 8-10 (unpublished manuscript, on file with the author), *available at* www.iiiglobal.org/component/jdownloads/finish/362/4114.html.

[24] *See* UNCITRAL Model Law, art. 2(b) (specifying that a "foreign main proceeding" is a foreign proceeding in the State where the debtor's center of main interests is located); EU Regulation, preamble (12) (stating that the EU Regulation enables the opening of main insolvency proceedings in the debtor has its center of main interests).

[25] UNCITRAL Model Law, art. 2(f) (defining "establishment"); EU Regulation, art. 2(h) (same).

Thus, there are three essential features of enterprise groups that make their international insolvencies different from those of individual entities. First, under national laws, the entities have separate legal status, with a separate body of shareholders, a separate body of creditors, and (presumably) separate assets. Second, their COMIs are in different countries, and there is no single State[26] where they are located. Third, there may be a large number of entities, which can make a coordination effort difficult or impossible, if their insolvency cases are commenced in the States of their respective COMIs.

A very different, but workable, solution to the problem of insolvencies of enterprise groups is needed. The kind of bold thinking that inspired the original UNCITRAL Model Law and EU Regulation is needed to solve this problem. This paper proposes such a bold solution.

C. Summary of My Proposal

I recommend the adoption of a new ECOMI system[27] for the recognition of insolvency cases for multinational enterprise groups. The best strategy for dealing with the insolvency cases of such enterprise groups is to build on the existing international regime for international insolvencies for individual legal entities.

Briefly, this system should have the following features:

1. The country where an enterprise group's ECOMI is located is the presumptively proper country for the commencement of main insolvency proceedings or cases for each member of the group.[28] All business entities that are members of an

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[26] The usage of the term "State" (capitalized) in this paper follows international usage to refer to a nation or country, in contrast with "state" (not capitalized), which refers to a political subdivision of a nation in such countries as the United States and Mexico.

[27] For a definition of ECOMI, see *infra* notes 168-178 and accompanying text.

[28] As for individual legal entities under the UNCITRAL Model Law and the EU Regulation, there can be only one main proceeding for an enterprise group. *See, e.g., In re* Chiang, 437 B.R. 397, 403 (Bankr. C.D. Cal. 2010) (stating that a debtor cannot have more than one COMI). Under both the UNCITRAL Model Law and the EU Regulation, each entity in an enterprise group has its own COMI. The ECOMI of an enterprise group is the location where the group's center of main interests is located, which is often a different State from that where the COMIs of its constituent entities are located.

enterprise group shall be permitted to commence their main insolvency cases in the ECOMI country. Any such case commenced in the ECOMI shall be assigned to the same judge for supervision and administration.[29] Once such a main proceeding is commenced in the ECOMI State, no main insolvency proceeding for such an entity may be commenced or proceed in any other State, unless the appropriate court in the ECOMI country gives authorization.[30]

2. Where insolvency cases for members of an enterprise group are commenced in the ECOMI State, the procedural rules of the ECOMI State will apply. The procedural rules will need augmentation to accommodate the rights of foreign creditors (including those in the COMI State of a member entity where it differs from the ECOMI State). Foreign creditors should be entitled to equal treatment with domestic creditors.

3. In addition, each such case will be governed for the most part by the substantive law of the ECOMI State (including applicable choice of law rules) for both insolvency and other issues.[31] For certain issues, such as avoidance of suspect transactions, determining the merits of claims, and the ranking of claims for the distribution of assets, the law of the COMI State (including its choice of law rules) should govern.

4. The regime should permit a common administrator (e.g., trustee or liquidator) for all of the cases commenced for members of the enterprise group in the ECOMI court. Similarly, there should be common office holders (e.g., legal counsel, accountants, restructuring officers, committees of creditors and their professionals, and other creditors' representatives) for each other category provided under the insolvency law of the ECOMI State.

5. A secondary or non-main[32] proceeding may be commenced for any member of the enterprise group in a non-ECOMI State, provided that the entity has either its

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[29] Local law should determine the assignment of the proper court within the ECOMI country.

[30] *See infra* discussion at notes 241-243.

[31] For a discussion of choice of law rules for insolvency cases for multinational enterprise groups, see *infra* text at notes 262-274.

[32] Throughout this article, I use the term "secondary proceeding" to encompass "secondary proceeding" and "non-main proceeding." The two terms are essentially identical. "Secondary proceeding" is a term introduced into the legal lexicon by the European Convention on Certain Int'l Aspects of Bankr., May 5, 1990, Doc. No. 10 ETS 136 [hereinafter "Istanbul Convention"].

individual COMI or an establishment in that country. The commencement of such a proceeding should be subject to approval of the home court in the ECOMI State.

6. Cooperation and communication should be authorized and encouraged "to the maximum extent possible"[33] between courts, judges, and office holders among all the related cases (including secondary cases) in all States were they are commenced.

D. Goals of International Enterprise Group Insolvency Law

Before discussing my proposal for the principal features of enterprise group insolvency law, it is important to describe briefly the goals that a legal regime should pursue that are distinctive to an international enterprise group insolvency regime.[34]

The salient goals distinctive to an international enterprise group insolvency regime are: the maximization of enterprise value; providing clarity and predictability in the application of the law; treating similarly situated creditors equally, insofar as is reasonable across national boundaries (the *pari passu* principle); providing procedural fairness to creditors and parties in interest across national boundaries so that all creditors from all relevant countries are given a full and fair opportunity to explain their views to the tribunal; the protection of employment; and giving due respect to the legal status of the separate legal entities in the enterprise group.[35]

See id. at ch. III. For a more detailed analysis of these two terms, see *infra* notes 221-222 and accompanying text.

[33] This language is taken from the UNCITRAL Model Law, art. 25.

[34] A detailed examination of these goals is beyond the scope of this paper.

[35] This list of goals for an international enterprise group insolvency regime is adapted from the UNCITRAL Legislative Guide on Insolvency, 9-16 (2005), *available at* www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf. The Legislative Guide states several additional goals that apply to international insolvency law generally, and perforce to the insolvencies of enterprise groups: striking a balance between liquidation and reorganization; providing timely, efficient and impartial resolution of insolvency; preserving the insolvency estate to permit equitable distribution to creditors; and recognizing existing the rights of existing creditors and establishing clear rules for the ranking of creditors. *See id.* at 14. *See also* Mevorach, *supra* note 4, at 370-73 (discussing insolvency goals in the enterprise group context).

1. Maximization of Enterprise Value

The most important goal of the reorganization of businesses, whether domestically or internationally, is the maximization of economic value.[36] While the maximization of value chiefly benefits unsecured creditors, owners or shareholders share in this benefit to the extent that the value of an international enterprise is what is necessary to pay creditors in full.

The economic rationale for the coordination of insolvency proceedings for enterprise groups is the same rationale underlying the coordination of proceedings for individual legal entity proceedings. The restructuring of the enterprise group is far more efficient in that it is likely to maximize the value of the enterprise for the benefit of the creditors and other parties in interest.[37] For large enterprise groups, the value captured by coordinating insolvency proceedings can be massive. This preservation of value directly benefits creditors, especially unsecured creditors, by permitting them to recover a larger portion of the debts owing to them.[38]

The value of such an enterprise is best realized where the parts can be liquidated together rather than separately in the countries where the parts, including legal entities, are located. Coordination is also valuable where the enterprise is to be liquidated, except where the parts operate independently.

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[36] *See, e.g.,* SAMUEL L. BUFFORD ET AL., UNITED STATES INTERNATIONAL INSOLVENCY LAW 2008-2009, 21-22 (2009). Pure universalism relies on an assumption, not realized in the world today, that there is a single insolvency regime in force in every relevant country. *See, e.g., id.* at 21. In light of the counterfactual character of this assumption, pure universalism is impractical in today's world.

[37] *See, e.g.,* Gabriel Moss, *Group Insolvency – Choice of Forum and Law: The European Experience Under the Influence of English Pragmatism*, 32 BROOK. J. INT'L L. 1005, 1008-09 (2007). If an enterprise group is not worth more as a group than its respective entities are worth, the entities should be restructured or liquidated separately. Such a decision should be made by the court upon application of one or more parties in interest. Procedurally, the economic rationale supporting such a conclusion should be brought to the judge in charge of the insolvency cases of the enterprise group, who, upon receiving sufficient proof, will authorize separate cases for the various entities in their respective COMI countries.

[38] If the creditors can be paid in full, the preservation of value benefits the shareholders, the beneficial owners of the enterprise, or its respective entities.

2. Clarity and Predictability

Clarity of rules and predictability in their application is important to minimizing the transaction costs of an insolvency proceeding. If the parties know what law will govern their rights, and how it will be applied, they can plan their business activities in advance to take advantage of mutually advantageous legal regimes. Predictability allows parties to price their credit adequately when they are deciding whether to extend credit to an entity that is part of an international enterprise.[39] In addition, once an insolvency case commences, or if the shadow of an impending insolvency case looms, the parties can more easily resolve their differences and settle their disputes. Furthermore, predictability reduces the opportunities for improper forum shopping.[40]

Such coordination is especially important where the purpose of the insolvency is to restructure or reorganize the enterprise and its business. Some enterprise groups are worth more if they continue in business (i.e., they have "going concern value")[41] than if they are liquidated. For large enterprises, there are almost always parts of the enterprise that have "going concern value" and should be reorganized rather than liquidated.[42]

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[39] *See, e.g.,* Mevorach, *supra* note 4, at 371-72; Douglas G. Baird, *Bankruptcy's Uncontested Axioms*, 108 Yale L.J. 573, 595 (1998).

[40] *See* John A. E. Pottow, *The Myth (and Realities) of Forum Shopping in Transnational Insolvency,* 32 BROOK. J. INT'L L. 785 (2007) (arguing that the territorialist charge that universalism leads to inappropriate forum shopping depends on two assumptions, neither of which can be reliably realized). On forum shopping for enterprise group insolvencies generally, see *infra* text at notes 210-214.

[41] "Going concern value" for a firm is defined by BLACK'S LAW DICTIONARY as "the value of a commercial enterprise's assets or of the enterprise itself as an active business with future earning power, as opposed to the liquidation value of the business or its assets." BLACK'S LAW DICTIONARY 1691 (9th ed. 2009). This value is usually more than its value if it is liquidated ("liquidation value"). The going concern value of an enterprise group is the value of the entire group if it continues in operation. Its liquidation value is the value of its parts if they are liquidated. This determination can be more difficult for an insolvency case for an enterprise group, for two reasons: first, some of its constituent entities may have their own going concern value, while others may not; second, some of its constituent parts may be liquidated, while others may continue in active business.

[42] In the context of an enterprise group, whether an individual entity has going concern value may be less important than other considerations, such as the role of the entity in the group, and whether this continues to be a valuable function upon reorganization of the group.

Thus, enterprise rescue serves the purpose of preserving value for the parties in interest. A corollary is that, if the preservation of the enterprise does not preserve more value for the parties in interest, the business should not be rescued and it should be liquidated.

3. *Pari Passu* – Equality of Distribution

The *pari passu* principle (equality of distribution) is also a fundamental feature of insolvency law: creditors of the same rank should be treated equally. This principle, however, has a diminished role in the insolvency of an enterprise group (apart from the insolvencies of particular members thereof). Where a creditor has done business with a particular legal entity, the creditor's expectation to be treated equally with the other creditors of all of the entities in the enterprise group is much more attenuated than with respect to the individual entity with which the creditor did business.

4. Procedural Fairness

Another important policy for international enterprise group insolvency law is procedural fairness in the course of the insolvency process.[43] Procedural fairness has a particularly important role to play for the insolvencies of enterprise groups where the enterprise center of main interests ("ECOMI")[44] is located in a different State from that where the creditor is located. For a creditor doing business with an entity (domestic or multinational) whose center of main interests ("COMI") is in the creditor's country, participation in the insolvency process is usually much easier than where the enterprise group commences its insolvency case in another country and the entire group's insolvency case is located there.

[43] Professor Mevorach takes the position that substantive overall fairness of results should also be a goal of an international insolvency regime for enterprise groups. *See* Mevorach, *supra* note 4, at 386-87. I do not include this as a goal of this regime because the concept is vague, at best. Especially in this context, "fairness" is difficult to define, and provides little guidance to a judge responsible for the multiple insolvency cases of an enterprise group.

[44] For a discussion of ECOMI, see *infra* text at notes 168-178.

The right to participate in an insolvency case is normally limited to creditors of a particular insolvent entity and other "parties in interest."[45] For the insolvency proceeding of an international enterprise group, every creditor and party in interest of every entity involved in the insolvency must have the right to be heard and participate.

Another important right is that the forum must not be permitted to discriminate against foreign creditors: a foreign creditor must be permitted to participate in distributions *pari passu* with domestic creditors in the State where the enterprise group insolvency case is located. The UNCITRAL Model Law now permits such participation in an international case for an individual entity.[46] This rule must be applied to all entities involved in an international insolvency case for an enterprise group.

The procedural rights for creditors and parties in interest to participate in an insolvency case are called "equality of arms"[47] in the European Union, or "due process" rights in the United States[48] (and other common law countries). First, all creditors and parties in interest for all members of the enterprise group must be given adequate notice of insolvency proceedings for members of the enterprise group. This notice must not only allow for timely participation, but should permit access to copies of relevant documents filed in the court. Second, a party in interest must have a full and fair opportunity to express that party's own views to the court. Third, a party in interest

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[45] "Party in interest" is a broad concept frequently used in the insolvency context to refer to any person or entity whose interests may be affected by the insolvency case. *See, e.g., In re* Rice, 462 B.R. 651, 655-57 (B.A.P. 6th Cir. 2011). In addition, any governmental regulator with responsibility for insolvency cases or for entities that become the subject of insolvency cases qualifies as a party in interest.

[46] *See* UNCITRAL Model Law, art. 13.

[47] *See* American Law Institute,*Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases*, 2012, Principle 5, 2 [hereinafter "Transnational Insolvency"]; Case 341/04, Eurofood IFSC Ltd., 2006 E.C.R. I-3813, ¶ 66 (stating, "In the context of insolvency proceedings, the right of creditors or their representatives to participate in accordance with the equality of arms principle is of particular importance"). For a discussion of the meaning of "equality of arms," as imported into European international insolvency law in the *Eurofood* case, see Samuel L. Bufford, *Center of Main Interests and International Insolvency Case Venue: The* Eurofood *Decision of the European Court of Justice,* 27 NW. J. INT'L L. & BUS. 351 (2007), at 392-404.

[48] *See, e.g.,* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (finding that creditors have due process requirements in a bankruptcy case).

must have an opportunity to respond to the evidence and legal arguments of others participating in the resolution of the dispute.[49]

The right to be heard requires more attention in the context of the insolvency of an international enterprise group than in domestic insolvency cases, or even in international cases for single entities. The law of international enterprise group insolvencies should require that notice of important decisions[50] in the enterprise insolvency case be given to all creditors of each of the entities whose insolvency cases are concentrated in the consolidated forum. Such notice should be given with sufficient time[51] and by suitable manner[52] to provide an opportunity for all creditors of the relevant entities to be heard. In addition, such notice is only effective if provided in the creditor's language.[53]

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[49] *See* Transnational Insolvency, *supra* note 47, at 2 (Principle 5); Bufford, *supra* note 47, at 392-404.

[50] Important decisions in an enterprise insolvency case would typically include at least the following: opening the case (if required by the law of the forum), debtor financing, sale of an entity or a substantial asset (not in the ordinary course of business), substantive (but not procedural) consolidation, voting (or other creditor input) into a plan of reorganization, approval of a reorganization plan, dismissal of the case, and conversion of a reorganization case into a liquidation case.

[51] The length of advance notice of an important hearing in international insolvency law should be substantially longer than that given in a domestic insolvency case. The time should be calculated to include the time to deliver the notice internationally, and time for a party in interest to notify the court of its position and file papers in opposition. For an examination of the notice issues in the Parmalat case, see Bufford, *supra* note 47, at 392-404.

[52] Publication in the national gazette is the international standard for giving notice of the commencement of an insolvency case, and for taking important decisions in the case. Domestic creditors know that this is the vehicle for giving such notice, and they monitor the national gazette to make sure that they are informed of pending decisions. In an international case, publication in the national gazette is generally not sufficient to give notice to foreign creditors, particularly those located in States where notice is traditionally given by other means. In the United States, for example, notice must be given by mail or personal service, not by publication, to all known creditors. *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 318-19 (1950).

[53] If the creditor is in a State where multiple languages are spoken, notice given in an official language of that State should suffice. The EU Regulation has a more limited language provision: it permits a creditor to lodge a claim in an official language of the creditor's home State, but a creditor may be required to provide a translation into an official language of the State where the insolvency case is commenced. *See* EU Regulation, art. 42.

The right to participate may require relaxation of some of the traditional rules with respect to appearance in court, at least in some countries. If entity X, which is involved in enterprise group Y, conducts its business primarily, or exclusively, in State A, but the group's ECOMI (and thus its main insolvency case) is located in State B, the opportunity for X's creditors to participate in the insolvency case can be substantially diminished if traditional notions of international insolvency law and appearance were strictly followed. Special arrangements may be necessary, such as participation by telephone or videoconference, to permit X's creditors to have meaningful input into the insolvency case.[54]

5. Protection of Employment

The protection of employment plays an important role in the insolvency law of a number of countries.[55] However, in my proposal the protection of employment has a secondary role.[56]

Employment can be protected in two ways in the context of an enterprise group insolvency. First, if the enterprise group has "going concern" value,[57] the entity should continue in operation. However, if the enterprise group continues in operation, redundancies should be eliminated to protect the economic value of the enterprise.

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[54] If the rights of entity X's local creditors under due process or equality of arms are not respected in the enterprise group insolvency case in State B, the courts in State A may not respect the decisions of State B with respect to the enterprise group's insolvency case. *See, e.g., In re* Eurofood IFSC Ltd., [2004] IESC 45 (Ir.) (holding that, because of lack of sufficient notice to participate, the decision to open an insolvency case for Eurofood in Parma, Italy violated the public policy of Ireland), *sustained on other grounds,* Case 341/04, Eurofood IFSC Ltd., 2006 E.C.R. I-3813, ¶ 66.

[55] *See, e.g.,* C. Comm., arts. L. 620-1 (*sauvegarde*), 631-1 (*redressement judiciaire*) (Fr.), making the protection of employment the second most important goal in the reorganization of businesses under French law, second only to the preservation of the enterprise and ahead of the protection of creditors.

[56] In the international enterprise insolvency context, it is particularly inappropriate for governments to impose undue employment protection. Reasonable unemployment measures, in contrast, may be appropriate, such as social security payments, reasonable severance payments, and notice before a plant is closed.

[57] See *supra* note 41 for a description of "going concern value".

A second way that employment can be protected is if the entity or employment unit is sold to a third party that is able to retain the employees. This alternative may be available even if the insolvent enterprise group is liquidated: liquidation typically involves the sale of an operating and intact entity with a viable market position.

Fundamentally, the protection of employment and provision of benefits to the unemployed is a governmental function that should not be the responsibility of insolvency law. Every business should be required to pay its share of taxes so that the government can provide such measures. Insolvency law should serve as a method to deal with financial distress and insolvency, and market solutions should be applied to resolve this issue. A business that cannot compete effectively in the marketplace should be liquidated. However, a business in financial difficulty should not be required to bear the additional cost of retaining employees that it does not need and that it cannot afford.

6. Respecting the Separateness of Individual Legal Entities

A sixth policy of multinational insolvency law is to respect the separateness of each legal entity.[58] The recognition of the independence of each corporate legal entity is a foundational pillar of modern company law.[59] A legal regime for multinational enterprise group insolvencies must also tread this path, except where substantive consolidation is appropriate.[60] The insolvency of an enterprise group is not an occasion for neglecting corporate forms, which create legitimate expectations for creditors, shareholders, and managers.

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[58] Professor Mevorach takes the view that the policy goals of an insolvency system for multinational enterprise insolvencies are different from those for a single international enterprise. *See* Mevorach, *supra* note 4, at 387-88. In my view, respect for the separateness of the individual legal entities is the principle policy goal that does not apply to individual international insolvencies.

[59] Nonetheless, it is common in many countries to treat an enterprise group as a single entity for certain purposes, such as tax law and public accounting.

[60] For a discussion of the appropriate application of substantive consolidation to enterprise group insolvencies, see *infra* text at notes 278-294.

Admittedly, this goal may be more difficult to achieve where the insolvency cases of the members of the enterprise group are collected in a single national forum[61] and where a shared administrator and shared office holders are appointed.[62]

Respect for the separate legal entities in the insolvency of a multinational enterprise group is important both to creditors and to shareholders. Creditors do business with specific legal entities, and their rights in case of default depend on the realization of the separate assets (and the respective liabilities) of the individual entities with which they do business. If the assets are commingled, it becomes increasingly difficult to assure that the rights of the creditors of a particular entity are respected.

Shareholders also have a stake in the separateness of the individual entities in an enterprise group. To the extent that the assets of a particular entity exceed its individual debts, shareholders have rights in the excess.[63]

There are, however, occasions in which legal entities should be combined for the purpose of insolvency administration. This principle applies equally to multinational enterprise groups. This combined treatment should be limited to those situations in which substantive consolidation is applied,[64] and the rights of individual creditors and shareholders are accommodated. In addition, the substantive and procedural requirements for substantive consolidation should be approved by the relevant court before any such combination takes place.[65]

II. Present International Legal Regime for Enterprise Group Insolvencies

The international insolvency regime existing today began in 1997.[66] Today's regime consists mainly in the UNCITRAL Model Law[67] and the EU Regulation.[68] Since

[61] *See infra* text at notes 151-167.

[62] *See infra* text at notes 215-218.

[63] Under generally accepted principles of company law, the net value of a legal entity after paying its debt belongs to the shareholders.

[64] *See infra* text at notes 278-294.

[65] *See id.*

[66] Before 1996, there was a very limited regime for international insolvency cases. The U.S. Bankruptcy Code had 11 U.S.C. § 304 (repealed 2005), and there were a smattering of cases in other countries, but very little statutory law existed.

the promulgation of the UNCITRAL Model Law in 1997 and its subsequent adoption in a number of countries,[69] and the issuance of the EU Regulation in 2000 (effective in 2002), a number of increasingly large international insolvency cases have arisen, including Lehman Brothers,[70] Enron,[71] General Motors,[72] Chrysler Corp.,[73] and

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[67] *See* André Berends, *The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview,* 6 TUL. J. INT'L & COMP. L. 309 (1998).

[68] Apart from the UNCITRAL Model Law and the EU Regulation, there are several other international instruments for coordinating transnational insolvency cases. The Nordic Bankruptcy Convention of 1933 applies between the Nordic countries of Denmark, Finland, Iceland, Norway and Sweden. *See* Convention Regarding Bankruptcy, Nov. 7, 1933, 155 L.N.T.S. 115, (amended 1977); *see generally* IAN F. FLETCHER, INSOLVENCY IN PRIVATE INTERNATIONAL LAW, 290-300 (2d ed. 2005). At least two treaties currently in force between various countries of Latin America include provisions on the subject of insolvencies. First, Chapter X of the Montevideo Treaty of 1889 governs insolvency issues between Argentina, Bolivia, Colombia, Paraguay, Peru and Uruguay. *See* 2 INT.'L AM. CONF., Reports of Committees and Discussions Thereon 884 (1890); *see generally* FLETCHER, *supra,* at 275-76. The Montevideo Treaty was revised in 1940, but only Argentina, Paraguay, and Uruguay ratified the revision. *See* FLETCHER, *supra,* at 276-77.

Second, the "Bustamante Code" (Convention on Private International Law of 1928) covers fifteen Latin American countries: Bolivia, Brazil, Chile, Costa Rica, Cuba, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru and Venezuela. *See* Havana Convention on Private International Law, Feb. 20, 1928, 86 L.N.T.S. 254; FLETCHER, at 285-90. *See generally* FLETCHER, at 285-90.

In addition, in 1998 the Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA) adopted a Standard Act Relating to Organization of Collateral, Collection and Enforcement Procedures and Bankruptcy Proceedings, *available at* http://www.ohada.com/actes-uniformes/588/acte-uniforme-portant-organisation-des-procedures-collectives-d-apurement-du-passif.html [hereinafter the "OHADA Act"]. Part VI of the OHADA act consists of ten articles and is based on the EU Regulation. *See generally id.;* BOB WESSELS, INTERNATIONAL INSOLVENCY LAW 60-64 (3d ed. 2012). These treaties are rarely used to deal with international insolvency cases. *See, e.g.,* FLETCHER, *supra,* at 285 (observing that there are no known cases using the Montevideo treaties).

[69] For a current list of the countries adopting the UNCITRAL Model Law, see www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html.

[70] The U.S. chapter 11 bankruptcy case of Lehman Brothers and its affiliates, filed on September 15, 2008, involving liabilities exceeding $600 billion, is the largest insolvency case in history to date. *See, e.g., In re* Lehman Bros., Inc., 458 B.R. 134 (Bankr. S.D.N.Y. 2011).

[71] *See, e.g.,* Official Comm. of Unsecured Creditors v. Enron Corp. (*In re* Enron Corp.), 335 B.R. 22 (S.D.N.Y. 2005).

Adelphia.[74] The coordination of the international insolvency proceedings these cases spawned has proved immensely challenging, given the present international insolvency regime.

The chief challenge to the effective administration of these large international insolvency cases (as well as a large number of smaller international cases) is the complete lack of an international regime for groups of companies or enterprise groups. The lack of such a regime leads to uncertainty in predicting the judicial treatment of the insolvency of enterprise group members.[75] This gap in the international law leads to uncertainty on the part of judges to whom such cases are assigned. Judges lack direction on achieving the goals of international insolvency, which include the maximization of value of the enterprise group, the protection of creditors of the various entities, the proper calculations for distributions to the various creditors of the entities,[76] and the fair treatment of all the parties in interest.[77] Indeed, judges lack direction as to whether such goals should even be pursued under present insolvency laws.

The enterprise group context raises special problems for coordination of insolvency proceedings. The most important difficulty arises from the fact that the existing regime is conceived to deal with a single legal entity. In contrast, virtually every

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[72] *See, e.g., In re* Gen. Motors Corp., 407 B.R. 463, 520 (Bankr. S.D.N.Y. 2009) *aff'd sub nom. In re* Motors Liquidation Co., 428 B.R. 43 (S.D.N.Y. 2010) *and aff'd sub nom*. *In re* Motors Liquidation Co., 430 B.R. 65 (S.D.N.Y. 2010).

[73] *See, e.g., In re* Chrysler LLC, 405 B.R. 84 (Bankr. S.D.N.Y. 2009), *aff'd*, 576 F.3d 108 (2d Cir. 2009) *vacated sub nom.* Ind. State Police Pension Trust v. Chrysler LLC, 130 S. Ct. 1015 (U.S. 2009) *and vacated sub nom*. *In re* Chrysler, LLC, 592 F.3d 370 (2d Cir. 2010).

[74] *See, e.g., In re* Adelphia Commc'ns Corp., 368 B.R. 140, 169 (Bankr. S.D.N.Y. 2007).

[75] *See, e.g.,* Mevorach, *supra* note 4, at 366.

[76] The EU Regulation lacks a formula for the division of assets among general unsecured creditors (apart from respecting the rights of secured creditors and the priority of certain specified creditors). *Compare* UNCITRAL Model Law, art. 32 (providing that, where a creditor in a particular country has received a distribution from an insolvency proceeding in another country for the same entity, that creditor is not eligible to receive further distributions until the other members of the same class have received an equal distribution). In practice, the application of this formula can be extremely complex. *See, e.g.,* José M. Garrido, *No Two Snowflakes the Same: The Distributional Question in International Bankruptcies,* 46 TEX. INT'L L.J. 459 (2011).

[77] For a brief discussion of the goals of international enterprise group insolvency, see *supra text* at notes 35-65.

international business is organized as a group of companies or enterprise group, often with complex relationships between the entities in the group. As UNCITRAL states:

> There is often a clear tension between the traditional separate legal entity approach to cooperate regulation and its implications for insolvency and the facilitation of insolvency proceedings concerning a group or part of a group in a cross-border situation in a manner that would enable the goal of maximizing value for the benefit of all creditors to be achieved.[78]

The INSOL Europe Report[79] equally points out that separate insolvency proceedings for the individual companies and the appointment of separate liquidators may result in substantial loss of value and the disintegration of the business.[80]

Notwithstanding these difficulties, it must be recognized that such coordination would have been far more difficult, indeed virtually impossible, without the UNCITRAL regime and the EU Regulation that we have today.[81] In practice, however, both the EU Regulation and the UNCITRAL Model Law have been largely limited to the international recognition and coordination of insolvency proceedings for a single legal entity.[82]

Part II of this paper takes up six background issues. First, it summarizes the history of the present legal regime for dealing with international insolvencies. Second, it describes the UNCITRAL Model Law in greater detail. Third, it elaborates the present EU Regulation. Fourth, it explores the weaknesses of the existing regime, particularly in regard to the coordination of multinational insolvency cases for enterprise groups. Fifth, it briefly discusses the underlying tension between an effective international regime for insolvencies and national sovereignty issues. Finally, by way of background, the paper describes the internal experience of the United States in dealing with insolvency cases for related entities.

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[78] *See* UNCITRAL – Enterprise Groups, *supra* note 17*,* at 85.

[79] *See* INSOL Europe Report, *supra* note 8, at 46.

[80] *See id*.

[81] One could anticipate that, if the European Union makes substantial improvements in the EU Regulation, UNCITRAL will follow with parallel improvements in the UNCITRAL Model Law.

[82] *See, e.g.,* Case C-191/10, Rastelli Davide C. Snc v. Hidoux, 2011 E.C.R. ___ (Dec. 15, 2011) (holding that the EU Regulation is limited to single legal entities).

A. History of the Present Legal Regime

International commercial law had no effective regulation for the treatment of the insolvency or bankruptcy of natural persons or legal entities doing business internationally before 1996.[83] Before that time, the assets of an international entity, upon the commencement of an insolvency case, were largely divided up by the various countries where the assets were located, and were used to pay creditors in those countries. Assets belonging to related entities were not treated at all, unless the related entities commenced[84] their own insolvency cases. Under this territorial regime, creditors in some countries were paid in full while those in other countries remained unpaid. This violated the *pari passu* insolvency law principle that creditors of the same rank should be treated equally. The dismemberment of large international business entities frequently resulted in major loss of value to the entity and their creditors (especially major banking entities) suffered substantial losses.

Although frequent efforts were mounted to formulate a legal regime for multinational coordination of insolvency cases or proceedings before 1995, those efforts were largely unsuccessful.[85] The prospects of bringing to fruition a legal structure to govern international business insolvencies seemed remote, at best.

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[83] Prior to 1996, there were a few national laws that authorized a measure of assistance in international insolvency cases. In the United States, for example, 11 U.S.C. § 304 (repealed 2005) authorized a U.S. court to provide assistance with respect to a foreign insolvency proceeding and there was a substantial body of case law applying this provision. In the United Kingdom and in Canada, there was a smattering of case law regarding international insolvency cases. Occasional bilateral treaties also covered the issue. However, there was no generally accepted legal regime covering such cases.

[84] This article uses the term "commenced" for the beginning of an insolvency case, including a case for an enterprise group. This term is used because, in many countries, the commencement of an insolvency case requires a court order, which may be given a few days after an application is received by the court, or a few months later. In contrast, in the United States, and in many common law countries, a case is commenced upon the filing of a voluntary application for insolvency relief. *See, e.g.,* 11 U.S.C. § 301 (2012) ("A voluntary case under a chapter of this tile is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter.").

[85] For a summary of the multilateral insolvency treaties in place as of 1995, see *supra* note 68.

In the early 1990's, two huge international insolvency cases prompted the international community to undertake renewed efforts to formulate a legal regime for international insolvencies. The first was BCCI, an international banking empire specializing in third world banking that did business in more than seventy countries. Its spectacular failure resulted in a Luxembourg receivership followed by litigation among creditors who suffered immense losses in many countries.[86] The second giant to fall was Maxwell Communications,[87] a publishing empire with business centers in London and New York managed by a single person who mysteriously disappeared in a boating accident on the Mediterranean Sea. Because nobody else knew enough to run the business, Maxwell produced major insolvency cases in both London and New York with no orderly procedure to coordinate the two cases.

Because of these and other large insolvency cases, a major change in the international insolvency law arena began in 1995, when two major legal structures were launched for the coordination of international insolvency cases. The first was the European Union Convention on Insolvency Proceedings (hereinafter, "the EU Convention"), which was signed on November 28, 1995[88] and became the EU Regulation in 2002. The second was the 1997 UNCITRAL Model Law. Thereafter, the EU Convention was converted into the EU Regulation (chiefly by adding a lengthy preamble), and issued in 2000 (effective in 2002).[89] Thus, the UNCITRAL Model Law

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[86] *See*, *e.g.,* Maxwell Communication Corp. v. Société Générale (*In re* Maxwell Communications Corp.), 93 F.3d 1036 (2d Cir. 1996).

[87] *See, e.g.,* United States v. BCCI Holdings (Luxembourg), S.A., 48 F.3d 551 (D.C. Cir. 1995).

[88] *See* European Union Convention on Insolvency Proceedings, 17 ZIP 976, 35 I.L.M. 1223 (1996). For a brief history of the EU Convention, *see* Manfred Balz, *The European Union Convention on Insolvency Proceedings,* 70 AM. BANKR. L.J. 485 (1996). For a definitive commentary on the EU Convention, which perforce applies also to the EU Regulation, see Miguel Virgós & Etiénne Schmit, Report on the Convention on Insolvency Proceedings, EU Council of the EU Document (1996), *available at* http://aei.pitt.edu/952/. *See also* Ian Fletcher, *The European Union Convention on Insolvency Proceedings: An Overview and Comment with U.S. Interest in Mind,* 23 BROOK. J. INT'L L. 25 (1997); Eberhard Schollmeyer, *The New European Convention on International Insolvency,* 13 BANKR. DEV. J. 421 (1997).

[89] The language of the EU Regulation is taken exactly from the prior failed EU treaty, with two exceptions. First, several treaty-specific provisions at the end were deleted as unnecessary. Second, an extensive preamble was added. For a set of guidelines for the application of the EU Regulation, see Bob Wessels & Miguel Virgós, *European Communication and Cooperation*

was the first multinational instrument to offer a reasonably effective international regime for the insolvency of international entities.

B. UNCITRAL Model Law

The UNCITRAL Model Law resulted from a proposal[90] by the UNCITRAL secretariat to the 1993 annual Commission meeting, which grew out of a congress on international trade law in May 1992.[91] The report noted, "[t]he current lack of harmony among national rules governing cross-border insolvencies has often been noted as an obstacle to international trade."[92] In consequence, the report stated, the efforts to reorganize or to liquidate businesses were "subject to obstacles, uncertainties and inequalities."[93] In addition, courts "may be inclined to restrict recognition of foreign insolvency proceedings, may take measures favouring local creditors, and may be reserved in providing court assistance to foreign creditors."[94] In consequence, the report states, the results are "wasteful, further increase the possibility of unequal treatment of creditors and may give rise to conflicts between actions of the various bankruptcy administrators."[95]

The UNCITRAL drafters focused on two subjects: access and recognition in the cross-border insolvency context, and judicial cooperation.[96] The form of the work product, recommended by a colloquium of 60 judges from 36 countries, was a model

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Guidelines for Cross-border Insolvency Proceedings, in WESSELS, *supra* note 68, Appendix XIV (generally known as the "CoCo Guidelines").

[90] *See* UNCITRAL, Note by the Secretariat, July 5-23, 1993, U.N. Doc. A/CN.9/378/Add.4 (June 23, 1993).

[91] *See id.* at 2.

[92] *See id.* at 10.

[93] *See id.* at 11.

[94] *See id.*

[95] *See id.*

[96] *See* UNCITRAL, Report of the UNCITRAL of the Work of its Twenty-Eighth Session, May 20-26, 1995, U.N. Doc. A/50/17, ¶¶ 382-393.

law to provide a legislative framework as a part of national law. After four two-week meetings of a drafting committee, UNCITRAL adopted the Model Law in 1997, which was designed for internal adoption in countries around the world, rather than as a treaty.[97] After a slow start, the UNCITRAL Model Law has now been adopted by more than twenty countries, including many major trading countries such as the United States, United Kingdom, Japan, Canada, Mexico, and Australia.

C. European Union Regulation on Insolvency

Drafting of the EU Insolvency regime began in 1960,[98] much earlier than the UNCITRAL Model Law. The most ambitious European effort before 1996 was the Istanbul Convention,[99] finalized in 1990, which proposed a regime for the coordination of international insolvency cases in Europe. Although this treaty was designed for the forty-six members of the Council of Europe (or those of its members that would ratify the treaty),[100] the only State to ratify it was Cyprus.[101]

With lowered ambitions, the European Union drafted the EU Treaty, which was signed in 1995 and proposed for ratification by the EU member states. Again, ratification failed when the United Kingdom refused to ratify the treaty.

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[97] Because of the lack of success in putting treaties on international insolvency law in place, in 1997 UNCITRAL chose the vehicle of a model law, rather than a treaty, to formulate a legal regime for international insolvency cases. A model law is much more flexible than a treaty for several reasons: any violation does not invoke international sanctions; it can be tailored to the internal law of the adopting country; additions can be made to accommodate specific national needs and concerns; and unacceptable provisions can be deleted.

[98] *See* WESSELS, *supra* note 68, at 349.

[99] *See* Istanbul Convention, *supra* note 32.

[100] *See* WESSELS, *supra* note 68, at 350-51.

[101] *See id.,* at 350-51. Unlike the EU Regulation, which applies throughout the European Union (with the exception of Denmark), the Istanbul Convention was designed for the members of the Council of Europe (which now consists of forty-seven member countries, see http://www.coe.int/lportal/web/coe-portal), or as many members thereof who were willing to become parties to the convention.

Five years later, the EU Treaty was converted into the EU Regulation and issued on May 30, 2000.[102] By its terms, the EU Regulation went into force on May 31, 2002.[103] The strategy of the EU Regulation is to coordinate insolvency proceedings involving the same entity[104] in two or more EU countries.[105] The EU Regulation provides for coordination by: (1) requiring the recognition of any insolvency case opened in any other EU State;[106] (2) determining the choice of law for insolvency issues;[107] (3) authorizing the opening of a secondary proceeding to protect local interests;[108] (4) providing for the coordination of claims,[109] (5) requiring information about related proceedings,[110] and (6) resolving the question of which language will be used.[111]

The EU Regulation applies only where there are two or more insolvency cases in EU member States. It also does not apply to an international insolvency case involving an EU country and a non-EU country. If an insolvency case involves two or more EU members and one or more non-EU countries, the EU Regulation applies only

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[102] For commentaries on the EU Regulation, see*, e.g.,* WESSELS, *supra* note 68, at 341-837; GABRIEL MOSS, IAN F. FLETCHER & STUART ISSACS, THE EC REGULATION ON INSOLVENCY PROCEEDINGS (2d ed. 2009).

[103] *See* EU Regulation*,* art. 47. The EU Regulation does not apply in Denmark. *See* EU Regulation, preamble (33).

[104] The EU Regulation applies to both legal entities and natural persons, provided that they are suitable subjects for bankruptcy under national insolvency law of the applicable Member State.

[105] While the EU Regulation does not specify that it applies only to insolvency cases arising in the European Union, it makes no provision for cases arising outside the European Union. This is another issue on the INSOL Europe agenda. *See* INSOL Europe Report, *supra* note 8, at 109-21.

[106] *See* EU Regulation, arts. 18-26.

[107] *See id.* at arts. 4-15.

[108] *See id*. at arts. 27-38.

[109] *See id.* at arts. 39, 41.

[110] *See id.* at art. 40.

[111] *See id.* at art. 42.

to those issues between the EU members, and not to any issue relating to a non-EU case.

D. Weaknesses of the Current International Insolvency Regime

The present international insolvency regime fails to provide to any substantial degree for coordination and cooperation with respect to international enterprise group insolvency cases.[112] Indeed, in some recent notable cases, there has been little to no cooperation with respect to certain related entities in the enterprise group. In many others, coordination has been arranged *ad hoc*, without a supporting legal structure. A better, more effective structure is needed to facilitate international insolvency proceedings for enterprise groups, and especially the reorganization of such international enterprises.

The present regime relies principally on two kinds of procedures.[113] First, both the UNCITRAL Model Law and the EU Regulation provide for the recognition of a foreign proceeding as either a main proceeding or a secondary (non-main)[114] proceeding. Under the UNCITRAL Model Law, recognition requires an application to a court in the recognizing country.[115] Under the EU Regulation, recognition is automatic upon the opening of a main or secondary insolvency proceeding in another EU country.[116]

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[112] The coordination and communication provision of the UNCITRAL Model Law may have application to the insolvencies of enterprise groups. *See* BUFFORD, *supra* note 36, at 145. This view has not been generally adopted.

[113] A third procedure for coordination of cases is also provided in both the UNCITRAL Model Law and the EU Regulation: the coordination of the distribution of assets to creditors from the insolvency estate. There is much less literature on this issue, because many international insolvency cases have not yet reached this stage in the process. There are substantial problems to be resolved at the stage of distribution of assets. *See, e.g.,* Garrido, *supra* note 76. However, this paper does not focus on these issues.

[114] There is a minor difference between the terminology in the UNCITRAL Model Law and U.S. Bankruptcy Code chapter 15: UNCITRAL uses the term “non-main” (hyphenated), while chapter 15 uses the term “nonmain” (hyphen deleted). This difference has legal no consequence.

[115] *See* UNCITRAL Model Law, art. 15.

[116] *See* EU Regulation, art. 16.

The second principal procedure is communication and cooperation between the courts and the parties in interest in the applicable cases in multiple countries. The UNCITRAL Model Law requires both communication and cooperation[117] between and among the relevant administrators and courts (including judges) "to the maximum extent possible."[118] The EU Regulation, in its present form, provides only for cooperation and communication between administrators in a main proceeding for a particular legal entity and the administrators in a secondary proceeding for the same entity.[119] Notably, cooperation among courts and judges is not mentioned in the EU Regulation.[120]

The major weakness of both the UNCITRAL Model Law and the EU Regulation is that they each apply only to distinct legal entities such as a single corporation, limited liability corporation, or limited partnership. Their recognition and cooperation provisions do not apply to other members of an enterprise group.[121]

There had been a good reason why the UNCITRAL Model Law and the EU Regulation did not extend to enterprise groups.[122] That reason is now obsolete. The drafting of the EU Regulation began in approximately 1960,[123] when it was far less common for business organizations to operate as enterprise groups, and expansion of the text that developed into the EU Regulation was never extended to enterprise

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[117] *See* UNCITRAL Model Law, arts. 25-26.

[118] *See id.*

[119] *See* EU Regulation, art. 31.

[120] This is also an issue on the reform agenda of the European Union. *See supra* text at notes 8-11.

[121] I have argued elsewhere that the cooperation and communication provisions may be interpreted to apply to the members of an enterprise group, as well as to individual legal entities. *See* BUFFORD, *supra* note 36, at 145. While I believe that these provisions may be given such an interpretation, the text in each instrument does not mandate this construction, and the dominant view is that the provisions do not reach this far.

[122] It is difficult to keep in mind the enormity of the task faced by the drafters of both the UNCITRAL Model Law and the EU Regulation. At that time, there was no generally accepted regime for the international coordination of insolvency cases. The magnitude of the accomplishments of those drafters is enormous and cannot be overstated.

[123] *See supra* text at note 98.

groups. The drafting of the UNCITRAL Model Law began much later, in 1994,[124] and its expansion to cover enterprise groups was thought to be too difficult a problem to address at that time.[125]

Under the EU Regulation, the UNCITRAL Model Law, and the UNCITRAL Model Law's domestic variations, recognition of a foreign main proceeding under the present legal regime does not solve the problem of the coordination of enterprise groups. Under the current regimes, recognition is limited to a foreign insolvency proceeding for the same legal entity. Thus, recognition is not a strong enough tool to facilitate the coordination needed to administer the multinational insolvency cases for a large enterprise group.

The only provision in the EU Regulation on the coordination of related cases is Article 31, which requires the coordination of main and secondary proceedings for the same legal entity.[126] While this provision has been applied to the coordination of cases for members of an enterprise group,[127] a clear provision in the text of the regulation itself would make coordination much easier. Such a provision would also help greatly in those countries where the legal tradition does not support such coordination without statutory support.

UNCITRAL has recognized the need for further international guidance on the insolvencies of enterprise groups.[128] However, after considering the possibility of a

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[124] *See supra* text at notes 90-97.

[125] It remains to be seen whether the insolvency of international enterprise groups is still too difficult a problem for UNCITRAL to solve. This was more true when the UNCITRAL Model Law was drafted in 1996: there was substantial uncertainty at that time that it would be adopted at all (or to any substantial extent) by the major trading countries. In fact, there were very few adoptions before 2001, when Mexico became the first country to adopt the UNCITRAL Model Law in its final form. (Canada adopted a preliminary version in 1997, and formally adopted the official version in 2005 (taking effect in 2009)).

[126] *See* EU Regulation, art. 31.

[127] Notwithstanding the narrow scope of EU Regulation, art. 31, it has been applied to the coordination of cases involving separate entities in an enterprise group. *See, e.g.,* Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Nanterre, Feb. 15, 2006 [2006] BCC 681, 687-88 (Fr.) (MPOTEC GmbH) (three entities); *In re* Daisytek-ISA Ltd., [2003] B.C.C. 562 (Ch.) (May 16, 2003) (U.K.) (sixteen entities).

[128] *See* UNCITRAL Working Group V (Insolvency Law), Report of Working Group V (Insolvency Law) on the Work of Its Thirty-Sixth Session, May 25, 2009, U.N. Doc. A/CN.9/671, 55.

model law on this subject, its Working Group V (which is responsible for addressing issues of insolvency law and proposing solutions on behalf of UNCITRAL), the working group decided to incorporate its recommendations into its previously published Legislative Guide on Insolvency Law.[129]

This decision was based on two premises: the need for urgent action in light of the global financial crisis, and the time, effort, and further negotiations that would be needed to put the recommendations into a model law.[130] These efforts resulted in the publication of Part III of the Legislative Guide on Insolvency Law.[131]

The recent proliferation of large international enterprise group insolvency cases has made it apparent that the international regime for the coordination of these cases calls for further development and revision of the EU Regulation and the UNCITRAL Model Law. Existing laws and regulations have failed to provide sufficient cooperation between courts and bankruptcy administrators[132] in various countries to facilitate their restructuring or liquidation without substantial loss of enterprise value. The current sources of law that are not up to task are the UNCITRAL Model Law (with its various national incarnations such as chapter 15 of the U.S. bankruptcy code) and the EU Regulation.

E. The European Union Agenda – Change is Necessary

The EU Commission Report indicates that the EU Regulation is insufficient for the new tide of multinational insolvency cases for enterprise groups. The EU

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[129] *See id.*

[130] *See id.* *See also* Mevorach, *supra* note 4, at 367-70 (describing history of Working Group V consideration of the problem of insolvency cases for enterprise groups).

[131] *See* UNCITRAL – Enterprise Groups, *supra* note 17. Unlike a model law, which commits itself to a particular legislative solution to a legal problem, a legislative guide (including this legislative guide) contains discussion of alternatives and, in certain instances, conceptual recommendations for legislative solutions. It is often less specific than a model law must be.

[132] Bankruptcy administrators have various titles in various countries, such as liquidator (United Kingdom) or trustee (United States). In addition, in the United States and a few other countries, a corporate reorganization is typically managed by a "debtor in possession," operating through the prefiling management. Whatever the title, the responsibility of such an official is to manage the restructuring or liquidation of the insolvent entity. For the purposes of this paper, all of these officials are collectively referred to as "administrators."

Commission Report outlines fourteen areas for possible reform the EU Regulation:[133] (1) the question of insolvency of groups of enterprises; (2) the inclusion of hybrid proceedings in the scope of the EU Regulation; (3) the definition of center of main interests for the determination of international insolvency jurisdiction; (4) the inclusion of conflict of law rules (a number of which exist in the present version of the EU Regulation);[134] (5) the protection of rights *in rem*; (6) setoff; (7) claims handling and distribution; (8) detrimental acts; (9) avoidance actions; (10) registration and publication of proceedings; (11) judicial cooperation for courts and liquidators;[135] (13) interconnection of insolvency registers among EU members; and (14) electronic multilanguage forms. At the same time, INSOL Europe has issued a report recommending changes in many of these same areas.[136]

This is clearly a highly ambitious program for revision and reform. It remains to be seen how much of it can be incorporated into a new text for the EU Regulation. But the report is a clear indication of EU recognition that a new regime is needed for the insolvencies of international enterprise groups.

F. Enterprise Groups at the Domestic Level – the U.S. Experience

The proposals in this paper draw upon the U.S. courts' substantial experience with the coordination of domestic and international bankruptcy cases for related entities.[137] This article draws in part on the U.S. experience in recommending an international regime for the administration of insolvency proceedings for enterprise groups.

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[133] *See* EU Commission Report, *supra* note 10, at 1.

[134] *See* EU Regulation, arts. 4-15.

[135] The present EU Regulation mandates only cooperation by administrators, and does not address cooperation among the courts involved in related proceedings. *See id.* at art. 31. *Compare* UNCITRAL Model Law, arts. 25-29 (mandating cooperation among courts, as well as among administrators).

[136] *See* INSOL – Enterprise Groups, *supra* note 17.

[137] This background comes in part from the author's twenty-five years of experience as a U.S. bankruptcy judge. *See supra* note 1.

In the United States, the typical procedure in place calls for all bankruptcy cases for an enterprise group to be commenced in a single court before a single judge. This procedure is facilitated by three procedural features. First, bankruptcy jurisdiction is granted to the federal courts on a nationwide basis, without consideration of the location of the registered offices[138] of the various entities.[139] In consequence, the usual procedure is to commence all of the cases for an enterprise group in the same court, where they are assigned to the same judge.[140]

Second, where an insolvency or bankruptcy case has been commenced in a U.S. court for one affiliate of an enterprise group, U.S. law authorizes the commencement of a case in the same bankruptcy court for any affiliated entity in the same court.[141] In addition, local rules or procedures generally provide for the assignment of all related cases in a district to the same bankruptcy judge.[142] If a case for a member of an enterprise group is commenced in a different district, the judge to whom the first-filed case is assigned has the authority to determine the district in which the case should proceed.[143] In addition, the single judge to whom all the cases are

[138] The corporate laws in the United States are generally provided by state law, not U.S. federal law. In connection therewith, the overwhelming majority of legal entities in the United States have their registered offices in a particular state or a legal subdivision thereof. The major exception is partnerships: most general partnerships (in contrast with limited partnerships) do not have registered offices at all.

[139] *See* 28 U.S.C. § 1334 (2012) (granting nationwide original and exclusive jurisdiction to the federal district courts for all cases commenced under title 11 of the U.S. Code).

[140] If a U.S. bankruptcy case for a member of an enterprise group is commenced in a separate court from that where the cases for the other members of the group are commenced, Rule 1014 permits the court to transfer the case to the common venue. *See* FED R. BANKR. P. 1014.

[141] *See* 28 U.S.C. § 1408(2) (2012) (authorizing the commencement of a bankruptcy case for any legal entity in the same district where any such case is pending for an affiliate, general partner or partnership of the entity).

[142] *See, e.g.*, Bankr. C.D. Cal. R. 1073-1(c).

[143] *See* FED. R. BANKR. P. 1014(b).

assigned has the power to coordinate them for the collective benefit of creditors and other parties in interest.[144]

The third relevant U.S. procedure is that the same administrator is generally appointed for all of the cases for the members of an enterprise group. This function is particularly useful in the typical context where chapter 11 business reorganization cases are administered by a debtor in possession.[145] This means that the existing management in control of the enterprise group continues to manage its activities while the case is pending for any of the group members. This procedure achieves centralization without the need for any specific procedure for appointment of the same administrator (whether the debtor in possession or a trustee) in related cases.

These three procedures have been enormously effective in eliminating most of the transaction costs and delays that would result from having cases for related entities proceed in different courts before different judges.

Despite the effectiveness of this model, no international legal regime exists that permits such coordination at the international level. The UNCITRAL Model Law and EU Regulation are not presently capable of performing this task on an international basis.

Articles 25-27 and 29 of the Model Law can be interpreted broadly to require cooperation and communication between courts and administrators, and other parties in interest, for related entities such as enterprise groups. However, this broader interpretation of these provisions is not uniformly recognized or applied. This inconsistent application and vague language thus lacks the muscle to make the UNCITRAL Model Law an effective tool to deal with multinational enterprise group insolvencies. A much stronger legal regime is needed to provide effective coordination of these large international bankruptcies.

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[144] *See, e.g., In re* Owens Corning, 419 F.3d 195, 204 (3d Cir. 2005) (amended 2007) (discussing procedural and substantive consolidation of insolvency cases for related entities in the United States).

[145] *See* 11 U.S.C. § 1107 (2012) (providing for the administration of a chapter 11 case by a debtor in possession). While the U.S. Bankruptcy Code provides for the appointment of a trustee in a chapter 11 case, *see id.* at § 1104, such appointments are quite uncommon.

III. My Proposed Legal Regime for Insolvencies of Multinational Enterprise Groups

This section elaborates the details of my proposed legal regime for administering the insolvencies of multinational enterprise groups.

A. Enterprise Group Insolvency Case

I propose the creation of an insolvency case for the enterprise group.[146] This is a new kind of insolvency case that is not provided under any existing law. The purpose of this new creation is to provide an umbrella proceeding for the insolvency cases of the various enterprise group entities that will be commenced in the ECOMI State.[147] Such a case will provide a vehicle for the coordination of the insolvency cases of the constituent entities in the enterprise group.[148] However, each entity should have its own insolvency case.

The enterprise group case will not be a full-fledged insolvency case. Absent a court order to the contrary, there will be no insolvency estate in this case, no claims should be lodged in the case, and no avoidance actions will be commenced in the case. These activities should take place in the individual insolvency cases of the constituent entities.

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[146] This proposal is somewhat similar to the INSOL Europe proposal for a European Rescue Plan. *See* INSOL Europe Report, *supra* note 8, at 101-08. This proposal goes further, in that it authorizes a separate case for the enterprise group as such. While INSOL Europe proposes that the European Rescue Plan be proposed in the insolvency case for the ultimate parent in the enterprise group, *see id.* at 102-03, this proposal provides a separate case (and presumably a separate file) for an enterprise group plan (if any) to be proposed. For a comparison of my proposal with the INSOL Europe Proposal, see *infra* text at notes 295-311.

[147] For a discussion of ECOMI, see *infra* text at notes 168-178.

[148] The INSOL Europe Report makes a parallel recommendation, but recommends that the insolvency case for the ultimate parent company be the enterprise group insolvency case. *See* INSOL Europe Report, *supra* note 8, at 96 (defining "ultimate parent company" as "a parent company which has its [COMI] in the European Union and which is subject to insolvency proceedings . . . and which itself does not have a parent company which has its [COMI] in the European Union."). Because the functions of coordination are so different from those for a standard insolvency case, and they are not covered by existing insolvency law in any State, I recommend a different separate insolvency case, with different kinds of functions, for this purpose.

As in the INSOL Europe proposal,[149] there may be an insolvency group plan lodged and considered in the enterprise group case. Such a plan would require intensive coordination and communication[150] among the parties in interest in the respective entity case in any event, and the group insolvency case may provide an appropriate vehicle for such coordination and communication.

B. Jurisdiction and Venue

The international insolvency regime should provide that the ECOMI country has jurisdiction to commence insolvency cases for each of the members of an enterprise group. This basic grant of jurisdiction gives the home court[151] the authority to administer the insolvency cases for each of the members of the enterprise group.

Without such a jurisdictional grant, the authority of the home court over all of the members of the enterprise group may be called into question, and may be subject to collateral attack in a court of another country. This grant of jurisdiction would forestall efforts to avoid the effects of procedures and court orders in the ECOMI country for members of the enterprise group whose COMIs are located elsewhere.

The purpose of centralizing all of the insolvency cases for an enterprise group in one venue is to facilitate centralized control of their insolvency cases. Such centralized control is essential to preserving the value of the group's assets, and to the prospects of a successful restructuring.[152] As Gabriel Moss, a leading English barrister specializing in international insolvency cases, says:

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[149] *See* INSOL Europe Report, *supra* note 8, at 101-08.

[150] For increased requirements of cooperation and communication for an enterprise group insolvency generally, see *infra* text at notes 248-260.

[151] As a procedural matter, the internal insolvency law of the common venue should provide for the assignment of the cases to the same court, and for the assignment of a single judge to oversee all of the cases of the members of the group of companies.

[152] *Accord* Mevorach, *supra* note 4, at 392. Professor Mevorach recommends that a centralized venue for the insolvency of a multinational enterprise group be limited to those cases where the group is integrated. Other scholars have taken the same view. *See, e.g.,* Robert W. Miller, *Economic Integration: An American Solution to the Multinational Enterprise Group Conundrum,* 11 RICH. J. GLOBAL L. & BUS. 185, 188, 208-10 (2012); Edward S. Adams & Jason Fincke, *Coordinating Cross-Border Bankruptcy: How Territorialism Saves Universalism,* 15 COLUM. J. EUR. L. 43, 84 (2009). In my view, the benefits of a centralized venue are realizable in most multinational insolvency cases, whether or not the enterprise is integrated. However, if the

> From the practical point of view, having separate main proceedings in each place where each subsidiary in a group is registered is wasteful, duplicative, expensive, and likely to impede a rescue, reconstruction, or beneficial realization of the business of the group. . . . It is difficult to see how any sensible rescue, reconstruction, or beneficial sale can take place in such a situation.[153]

The French high court expressed a parallel view in the *MPOTEC* case:

> [T]he centralisation of proceedings permits the avoidance of the partitioning effects linked to the opening of several main proceedings in different . . . States. It is indeed desirable that the management of different companies continues thanks to a centralisation of different main proceedings under the supervision of just one court in order to allow the implementation of a global administration plan.
>
> This pragmatic approach preserves the legal personality of the subsidiary which is not considered as a branch of the parent company within the meaning of Regulation 1346/2000.[154]

For example, such centralization promotes group-wide solutions to financial difficulties in a practical and economically efficient manner. Such group-wide solutions may include the formation of a group-wide plan for the restructuring of the enterprise, which should likewise be centrally controlled (unless the ECOMI court decides otherwise).

Centralization of the insolvency cases for the group members facilitates a substantial reduction in the transaction costs of the insolvency cases. The transaction costs for separate venues for constituent entities are extremely high, and reduce the opportunities for a successful recovery of the enterprise group.

The international insolvency legal regime for enterprise groups should provide for a common venue, in a court specified by local law, for the commencement of insolvency proceedings for each group member.[155] This venue should be available[156]

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entities are not integrated, there may be grounds for the ECOMI court to permit a non-integrated entity to have its own insolvency case in the State where its own COMI is located. *See infra* discussion at notes 198-200.

[153] Moss, *supra* note 37, at 1008-09.

[154] Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Nanterre, Feb. 15, 2006 [2006] BCC 681, 687-88 (Fr.) (MPOTEC GmbH).

[155] *Accord* Reinhard Dammann, *Mobility of Companies and Localization of Assets – Arguments in Favor of a Dynamic and Teleological Interpretation of EC Regulation No 1346/2000 on*

for all qualified group members,[157] including those whose registered office or principal place of business is located in a different country. Thus, the proposed regime would specify that the country with the common venue has jurisdiction over the insolvency cases of all of the members of the group of corporations.

A common jurisdiction and venue for the insolvency cases is particularly useful where urgent measures are needed with respect to the entire multinational group. For example, immediate post-commencement financing of the restructuring effort may be necessary on an enterprise basis to facilitate the preservation of the enterprise, and may not be feasible for separate members of the group individually.

Furthermore, only the controlling group member should be required to satisfy any insolvency requirement.[158] The other members of the group should be permitted to commence their cases in the home court of the enterprise group with no further

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Insolvency Proceedings, in CROSS-BORDER INSOLVENCY AND CONFLICTS OF JURISDICTION 105, 121 (Georges Affaki, ed. 2007).

[156] Assuming that the proposed regime is put in place for groups of companies permitting them all to commence insolvency cases in the same country, there will likely be circumstances where, for strategic reasons, some members of the group commence insolvency cases in other countries. For example, if a group of companies does not have vertical economic integration, it may be advisable for group members to commence insolvency cases in the countries where their respective COMIs are located. *See generally* Mevorach, *supra* note 4, at 126-47. Where this occurs, the obligations to coordinate and communicate should be applied.

[157] For my proposed qualifications for group members to commence their insolvency cases in the ECOMI State, see *infra* text at notes 194-200.

[158] A discussion of the proper test for insolvency is beyond the scope of this paper. However, It is noteworthy that some countries, such as the United States, do not have an insolvency requirement for the commencement of a voluntary bankruptcy case, whether a liquidation or a reorganization. *See, e.g., In re* Gen. Growth Props., Inc., 409 B.R. 43, 57 (Bankr. S.D. N.Y. 2009); *In re* Marshall, 300 Bankr. 507, 510 (Bankr. C.D. Cal. 2003) *aff'd,* 403 B.R. 668 (C.D. Cal. 2009). Indeed, U.S. law "does not require any particular degree of financial distress as a condition precedent to a petition seeking [bankruptcy] relief." United States v. Huebner, 48 F.3d 376, 379 (9th Cir. 1994). Instead, the U.S. case law requires that a debtor filing a voluntary insolvency case must act in good faith, and this requirement is only tested after the filing, and only if a party in interest challenges the validity of the filing. *See, e.g.,* Platinum Capital, Inc. v. Sylmar Plaza, L.P. (*In re* Sylmar Plaza, L.P.), 314 F.3d 1070, 1074-75 (9th Cir. 2002); *accord In re* James Wilson Assocs., 965 F.2d 160, 170 (7th Cir. 1992) (rejecting bad faith challenge to chapter 11 plan confirmation).

insolvency requirement.[159] Insolvency relief for particular members of an enterprise group may be needed even if the enterprise group is solvent. Applicable corporation laws often limit the ability of one entity in an enterprise group to provide sufficient financial assistance to other members of the group to avoid the need for insolvency relief. In addition, the financial health of an entire enterprise should not be at risk if one or a few of its constituents has a financial disaster.

A common venue for the various members of an enterprise group greatly facilitates obtaining financing for the reorganization of the group.[160] The dangers of different approaches to such financing (or its absence where national law does not accommodate such financing) are eliminated by bringing all the relevant entities before the same court and subjecting them to the same legal regime. A common venue for enterprise group insolvency also facilitates joint or coordinated rescue plans. It is much easier to propose and administer a reorganization plan if the cases are pending in the same venue. Nonetheless, absent substantive consolidation,[161] such a plan should be voted on separately by the creditors of each entity.[162]

This common venue proposal avoids a substantial problem in the INSOL Europe proposal for revision of the EU Regulation, which would require that each entity in the group of companies commence its insolvency case in the country where its own COMI is located.[163] The INSOL Europe approach raises the problem of how to propose a joint

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[159] Some degree of financial distress, either present or impending, should be required for an entity in the enterprise group to commence its own insolvency case. Such an entity that has no financial distress should be able to function without an insolvency case. However, its ownership interest (e.g., shares of stock) could be assets in the insolvency case of the controlling group member or some other enterprise group member.

[160] As a procedural matter, it should be permissible to commence an insolvency case for a number of such entities by simply listing them in a joint filing. Where separate case files are required under local procedures, copies of the joint filing should be sufficient. Because procedural consolidation of the various cases is likely, this burden is likely to be minimal. It is expected that, in any event, the records will be maintained electronically. Where a filing fee is imposed for each case, it would be appropriate to assess a filing fee for each entity that commences an insolvency proceeding under this process.

[161] For a discussion of the proper role of substantive consolidation in the insolvency regime for international enterprise groups, see *infra* text at notes 287-294.

[162] *See generally* BUFFORD, *supra* note 36, at 572-74.

[163] *See* INSOL Europe Report*, supra* note 8, at 92-93.

rescue plan involving more than one member of the group, where the insolvency cases are commenced in different countries. My proposal simplifies to a substantial extent the coordination and communication problems (although they continue to be substantial) with respect to a common enterprise group reorganization plan.

The authorization for the various members of a group of companies does not eliminate possible conflicts of interest between the members of such a group.[164] For example, there are frequently inter-entity transfers of funds and other property that, under the applicable insolvency law, should be returned or credited to the account of the transferring entity. For the resolution of such a conflict of interest, it may be necessary to appoint conflicts counsel or a separate insolvency representative to address the issues on which the conflict has arisen. The appointment of such a representative may be especially important where the insolvency representative is a debtor in possession, and management is not accustomed to the strict segregation of accounts and activities of each separate legal entity.

The proposal's concept of creating a common venue for insolvency cases aligns with present practice in some countries. For example, in the European *Daisytek* cases,[165] all sixteen European subsidiary cases[166] were commenced on the same day in the same high court in Leeds, England. While the filings included twelve cases for United Kingdom entities, these cases included three German entities and one French

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[164] Such conflicts disappear where the relevant members of the group of companies are substantively consolidated. *See* discussion of substantive consolidation, *infra* notes 278-294; *see also In re* Parkway Calabasas, Ltd., 89 B.R. 832 (Bankr. C.D. Cal. 1988), *aff'd sub nom* Sierra Pacific Constructors, Inc. v. Gill (*In re* Parkway Calabasas Ltd.), 949 F.2d 1058 (9th Cir. 1991).

[165] *See In re* Daisytek-ISA Ltd., [2003] B.C.C. 562, [2004] B.P.I.R. 30, 2003 WL 21353254, Ch. Leeds. (May 16, 2003) (UK) (opening cases for fourteen European Daisytek subsidiaries, including three German subsidiaries and one French subsidiary, after finding that the COMI for all fourteen entities was in the United Kingdom). *See also* Klempka v. ISA Daisytek SA, [2003] B.C.C. 984 (French court of appeals case finding that U.K. court had opened a case for the French Daisytek corporation that required recognition under the EU Insolvency Regulation).

[166] In fact, Daisytek was a group of companies centered in Texas, where six U.S. insolvency cases were commenced for the principal operating and holding companies. *See* Sony Elecs., Inc. v. Daisytek, Inc. (*In re* Daisytek, Inc.), No. 03-34762-HDH-11, 2004 WL 1698284, ¶ 1 (N.D. Tex. July 29, 2004). The U.K. Daisytek cases included only the European subsidiaries. Presumably these cases were filed in an EU country in part to take advantage of the more powerful recognition provisions of the EU Regulation, especially in view of the fact that no relevant countries (not even the United States) had yet adopted the UNCITRAL Model Law.

entity. Similarly, most of the Parmalat cases, including cases for more than a hundred entities, were commenced in Parma, Italy. Indeed, it is suggested that a vast majority of European courts have broadly interpreted Article 3(1) of the EU Regulation, and found that the COMI of each entity in a group of companies is located in the country of the parent company's registered office.[167]

1. ECOMI

A new concept, not contained in the present international insolvency regime (or in any other law), is needed to discuss the appropriate common venue for the commencement of insolvency cases for a group of companies. This should be the enterprise center of main interests[168] ("ECOMI.")[169]

The ECOMI for an enterprise group should be the country where the enterprise group conducts the collective administration and management of its interests on a regular basis and is therefore ascertainable by third parties.[170] Thus, the test for the location of the ECOMI of an enterprise group should be the country where its management headquarters or head office is located.[171] This is the country where strategic business planning takes place, where financial operations are planned and carried out, and where directions are transmitted to local managers located elsewhere. The ECOMI for an enterprise group is the place where it is actually managed, not the

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[167] *See* Dammann, *supra* note 155, at 112.

[168] The International Insolvency Institute Report designates this location the "coordination center" for the enterprise group. *See* III Judicial Guidelines – Enterprise Groups, *supra* note 17, at 8. For a description of the difference between COMI and ECOMI, see *supra* note 28.

[169] The term "ECOMI" has been used by other writers to discuss this concept. *See, e.g.,* Ralph R. Mabey & Susan Power Johnston, *Coordination Among Insolvency Courts in the Rescue of Multinational Enterprises,* 2009 NORTON REV. OF INT'L INSOLVENCY 33, 48 n.53 (attributing the term to Professor Jay Westbrook).

[170] While neither the Model Law nor the EU Regulation has a formal definition of COMI, the EU Regulation preamble (13) specifies that the COMI "should correspond to the place where the debtor conducts the administration of [its] interests on a regular basis and is therefore ascertainable by third parties." *See* EU Regulation, preamble (13). The "third parties" to which this definition refers are the creditors and other parties in interest of the enterprise group.

[171] *See, e.g.,* EU Commission Report, *supra* note 10, Pt. 3, ¶ 1(A).

country where some of its constituents are registered, if different from that where the group is managed.

Like the COMI,[172] the ECOMI should be located in a country that is determinable by actual and potential creditors of the group members, so that creditors can determine the applicable insolvency law that will apply to them in case of financial difficulties, and properly assess the credit risk undertaken.[173] This location must be differentiated from the place where business is carried out,[174] which may be in various countries.

Like the COMI, there should be a single ECOMI for an enterprise group.[175] Thus, the ECOMI may be located in a different country from the locations of the COMIs of constituent members of the group.[176]

In most case, the location of an enterprise group's ECOMIs is not difficult to determine. For the occasional difficult case, a number of factors may help to determine the location of the ECOMI. These factors include: (a) the location of the main headquarters or "nerve center" of the enterprise group; (b) the location of the managers, corporate records and group bank accounts (including a concentration account for the group); (c) the location of the principal creditors of the enterprise group; (d) the location where design, marketing, pricing, delivery of products and office functions are directed; (e) the location of employees of the enterprise group; (f) the

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[172] The concept of COMI was first used in the Istanbul Convention of 1990. *See* Istanbul Convention, *supra* note 32. The COMI concept is related to the continental European concept of the "real seat" of a corporation. *See, e.g.,* Gabriel Moss, *Beyond the Sphinx – Is Chapter 15 the Sole Gateway*, 20 INSOLV. INT. 56, 56 (2007). For a discussion of the European concept of "real seat," see Christian Kersting, *Corporate Choice of Law – A Comparison of the United States and European Systems and a Proposal for a European Directive*, 28 BROOK. J. INT'L L. 1, 36-38 (2002). By extension, one could say that the concept of ECOMI is related to a continental European concept of a "real seat" for an enterprise group. However, no such concept yet exists in European law for enterprise groups.

[173] This definition adopts the view taken by the EU Regulation for determining the location of the COMI for individual entities. *See id.* at preamble (13) (stating that a debtor's COMI "should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties."). *See also* Mabey & Johnston, *supra* note 169, at 62.

[174] *See* Dammann, *supra* note 155, at 116.

[175] *See* Mabey & Johnston, *supra* note 169, at 62.

[176] *See id.*

location of the COMIs of the constituent enterprise group entities, and (g) if applicable, the country where one or more of the constituent entities is publicly traded.

The concept of an ECOMI is similar to that of a COMI for an individual entity. One could say that the concept of ECOMI is the familiar concept of COMI writ large. Tying the proper location for insolvency proceedings for an enterprise group and its member entities to the location of the enterprise ECOMI promotes legal predictability, efficiency, and responsibility.

The concept of ECOMI should be used only to determine the appropriate venue for the commencement of insolvency proceedings for the enterprise group and its members.[177] This determination does not require that all members of an enterprise group be obligated to commence insolvency proceedings. In many enterprise groups, some members of the group may be solvent and able to continue operating while others may need insolvency relief. However, such a rule puts pressure on the group to have the controlling entity commence an insolvency case so that the group can take advantage of the insolvency benefits for the enterprise group.

Each insolvency case for a member of the enterprise group commenced in the ECOMI venue should qualify as the main insolvency proceeding for that entity. No main proceeding for any such entity should be permitted in another country, absent authorization by the ECOMI court.[178] In addition, the international insolvency regime should provide that, to the extent feasible, proceedings already commenced with respect to a single entity that is a member of the enterprise group be suspended (or stayed) until a determination is made in the home court as to how the earlier case should proceed.

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[177] The INSOL Europe Report also argues that, if the main insolvency proceeding for a subsidiary is commenced in a country different from that where the registered office of the subsidiary is located, the subsidiary will likely have a secondary proceeding in its home country, and the effects of the main proceeding on the subsidiary will be very limited. *See* INSOL Europe Report, *supra* note 8, at 92-93. If the operations of the subsidiary are that separated from the operations of the other members of the group, this result is probably appropriate. Where they are not so separated, this result is unlikely to be realized.

[178] It may be appropriate in certain circumstances to commence a non-main or secondary proceeding in a country where a particular debtor has either its COMI or an establishment. For a discussion of secondary or non-main proceedings in the enterprise group context, see *infra* text at notes 219-247.

a. Presumption for Location of ECOMI

The determination of the location of the ECOMI for the enterprise group should be determined from the vantage point of creditors.[179] In this respect, the approach of the present UNICTRAL Model Law[180] and EU Regulation[181] for the location of the COMI should be adopted. It is important for those creditors who extend credit voluntarily[182] be able to determine where the ECOMI of the enterprise group is located before they extend credit. Thus, they will be able to assess the risk of their treatment in an insolvency case if one should eventually be commenced by the enterprise group.[183]

Both the UNCITRAL Model Law and EU Regulation specify that the COMI of a legal entity is presumed to be located in the country where its registered office is located.[184] Similarly, the law for the insolvency of enterprise groups should adopt a presumption to facilitate a determination of where the ECOMI is located.

Because an enterprise group does not have a separate legal existence under most national laws, the relevant registered office for the application of the presumption for the location of the ECOMI should be the country of the registered office of the parent or controlling group member.[185]

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[179] *See, e.g.,* Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Nanterre, Feb. 15, 2006 [2006] BCC 681, 687-88 (Fr.) (MPOTEC GmbH) (holding that, in the context of a strongly integrated group of companies with head-office functions in France, the group COMI should be based on the location of the head office functions which is visible to third parties, and not on the fact that the Mpotec subsidiary's registered office was in Germany).

[180] *See* UNCITRAL Model Law, art. 16(3).

[181] *See* EU Regulation, art. 3(1).

[182] Typically, the vast majority of creditors for an enterprise group and its constituent entities are voluntary creditors. The major exceptions are employees, tax creditors (governmental entities at various levels in most countries where the conducts business) and tort (extra-contractual liability) creditors.

[183] If the credit is extended to the controlling entity for the enterprise group, this determination is much simpler—the creditor only needs to make the risk of insolvency evaluation for the borrowing entity.

[184] *See* UNCITRAL Model Law, art. 16(3); EU Regulation, art. 3(1).

[185] *Accord* UNCITRAL – Enterprise Groups, *supra* note 17, at 61, 69 (2010); Mevorach, *supra* note 4, at 392. INSOL Europe uses the concept of "parent company" to indicate the entity whose insolvency case is the dominant case among the insolvency cases of members of an enterprise group. In turn, INSOL Europe gives a sophisticated definition of "parent company":

b. Procedure for Determining the Location of ECOMI

A new procedure is needed for the home court to determine that it is the country where the ECOMI of the enterprise group is located, and that its enterprise group proceeding is the main proceeding for the group.[186] Such a procedure would be analogous to a court's determination for a single entity that its COMI is located in the country where the case is commenced.[187] In fact, neither the EU Regulation nor the UNCITRAL Model Law incorporates such a decision-making procedure[188] for the court.[189]

> [T]he parent company is (i) the company which has a majority of the shareholders' or members' voting rights in the other company[. I]f no company meets such definition it is (ii) the company that has the right to appoint or remove a majority of the members of the administrative, management or supervisory body of the other company and is at the same time a shareholder in a or member of that other company[. I]f no company meets the definitions under (i) and (ii) it is (iii) the company that has the right to exercise a dominant influence over another company of which it is a shareholder or member, pursuant to a contract entered into with that other company or to a provision in its memorandum or articles of association. The parent company of a parent company of the other company is deemed the parent company of the other company as well.

See INSOL Europe Report, *supra* note 17, at 30. In my view, this is a useful definition for the ultimate parent or controlling group member.

[186] Within a particular country, the location of an entity's COMI or an enterprise group ECOMI is not an issue for international insolvency law. Among the various courts and locations in a particular country, the proper venue for the insolvency case of an entity or an enterprise group may be based on the location of its COMI or ECOMI within the country, or it may be based on other factors. For example, a particular country may want to locate the venue for the insolvency proceeding in a particular location (e.g., the national capital), or in a particular court that could be located anywhere within the country. These are issues of domestic law (and may be based on political factors), and are not issues for the international insolvency regime. The main interest of the international insolvency regime in the resolution of these issues is that the proper court be one that has the appropriate integrity, expertise, and capacity to handle such a case.

[187] It is highly unusual for a country to adopt a procedure for a determination that an insolvency case commenced in that country is a main proceeding, and the international insolvency law commentaries have not focused on this problem.

[188] In contrast, in a proceeding for recognition of a foreign proceeding (whether main or non-main), the UNCITRAL Model Law provides for making an application for recognition, and that the

A decision in an insolvency case that the home country is the location of the ECOMI for an enterprise group should be made "at the earliest possible time."[190] Like a decision under the UNCITRAL Model Law on the recognition of a foreign proceeding (as a foreign main proceeding or a foreign secondary proceeding), this "earliest possible time" concept is subject to due process and equality of arms[191] requirements.

2. Commencement of Separate Case for Each Legal Entity

Each legal entity should have its own separate case. This requirement solves a host of procedural problems. National insolvency laws are drafted to deal with the insolvency cases of specific legal entities. It is important to take advantage of the clarity that these laws provide for many issues in insolvency cases.

The commencement of a separate insolvency proceeding for each legal entity eliminates any uncertainty as to whether a particular entity is the subject of an insolvency proceeding for an enterprise group. It also permits the commencement of insolvency proceedings for certain members of the group, while permitting solvent members to operate without insolvency supervision.

This requirement clarifies that the assets of the enterprise group subject to insolvency administration are the assets belonging to each of the entities for which insolvency cases are commenced. Such a procedure also clarifies the scope of any applicable moratorium resulting from the commencement of the insolvency case for the enterprise group. In addition, this procedure makes clear that the parties entitled to

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decision thereon should be made "at the earliest possible time." *See* UNCITRAL Model Law, art. 17(3). The recognition procedure provided in the UNCITRAL Model Law relates only to the recognition of a *foreign* proceeding (as either a foreign main proceeding or a foreign secondary proceeding), and not to a domestic main (or secondary) proceeding.

[189] Presumably such a procedure could be provided under local law, and would not need to be a part of the international insolvency regime.

[190] This language is borrowed from Article 17(3) of the UNCITRAL Model Law, where it is applied to the recognition of a foreign proceeding. *See* UNCITRAL Model Law, art. 17(3).

[191] For a discussion of equality of arms, as it is used in EU Court of Justice jurisprudence interpreting the EU Regulation, see *supra* text at notes 47-54.

make claims against the assets of the group are those who are entitled to make claims in the cases of the respective member entities.[192]

3. Which Group Members are Included

The international regime should authorize the commencement of main insolvency proceedings for the members of the enterprise group in the country where the ECOMI is located. This includes the authorization for filing insolvency cases for foreign affiliates (i.e., affiliates whose individual COMIs are located in other countries) in the same court as the main proceeding for the enterprise group. This will require a change from present law, which requires a separate determination of the COMI for each entity, and that the main proceeding for that company be filed in the individual applicable country.

All business entities sharing a qualifying affiliation should be eligible to commence their main insolvency cases in the ECOMI court. However, qualification as a member of a group of companies can be a very complex matter. Enterprise groups may have very simple or very complex structures, "involving numbers of wholly or partly owned subsidiaries, operating subsidiaries, sub-subsidiaries, sub-holding companies, service companies, dormant companies, cross directorships, equity ownership and so forth."[193]

To resolve this issue, I propose three rebuttable procedural presumptions. First, there should be a simple default rule: where fifty percent or more of the ownership interests of a legal entity are held by other entities in an enterprise group,[194] that legal entity is presumed to be a part of the enterprise group for international insolvency law

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[192] A procedure would be needed for claimants to specify the entity against whom their claims are made.

[193] *See* UNCITRAL – Enterprise Groups, *supra* note 17, at 6.

[194] The ownership of the member of the enterprise group does not need to be held directly by the managing entity. Corporate ownership in an enterprise group can be very complex, and ownership interests held by a number of entities in the group. *See, e.g., In re* Daisytek-ISA Ltd., [2003] B.C.C. 562, [2004] B.P.I.R. 30, 2003 WL 21353254, Ch. Leeds. (May 16, 2003) (UK) (describing complex ownership of European subsidiaries and sub-subsidiaries through multiple related entities).

purposes.[195] The entity is thus entitled to commence an insolvency case in the venue where the ECOMI of the enterprise group is located.

Second, there should be a presumption that an affiliate not owned at least fifty percent by members of the enterprise group should not be included in the insolvency of the enterprise group. Third, there should be a presumption, for an entity that does not qualify for treatment as part of the enterprise group pursuant to the first branch, that the entity qualifies for commencement of its insolvency case in the ECOMI venue if it is subject to control, direct or indirect, by a member of the enterprise group that meets the first presumption.

These presumptions may be rebutted by showing that the individual entity operates independent of the enterprise group.[196] Both of these presumptions should be subject to rebuttal in the same manner as the presumption where the ECOMI is located. The burden of proof should be imposed on any party in interest who wants to challenge the application of this presumption in either respect to a particular entity (i.e., whether the presumption properly authorizes the entity to commence its insolvency case in the ECOMI venue, or the entity is required to commence its insolvency case in the State where its own COMI is located).[197]

A simple allegation that the second presumption is satisfied should be sufficient unless it is challenged by a creditor or other party in interest. When commencing an insolvency case for a structurally complex entity, the task of clarifying the status of each of multiple entities in such a structure should be made as simple as possible.

In a typical enterprise group, there are some entities that are closely integrated or intertwined, and operate together in such a way that they would have difficulty

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[195] *Compare* UNCITRAL – Enterprise Groups, *supra* note 17, at 15 (noting that membership qualifications for an enterprise group vary from five percent to more than eighty percent, and are calculated either on percentage of capital or percentage of votes).

[196] I have previously argued that the insolvency cases for integrated members of an enterprise group should be commenced in the ECOMI venue, and that the cases for enterprise group members that can stand alone should be commenced in their own COMI States. *See* Hon. Samuel L. Bufford, *Global Venue Controls are Coming: A Reply to Professor LoPucki,* 79 AM. BANKR. L.J. 105, 136-37 (2005). In this paper, I refine my previous position by recommending a presumption in favor of the ECOMI venue, and a requirement that the ECOMI judge decide if a particular member of the group should have its insolvency case in another State.

[197] The UNCITRAL Model Law makes use of presumptions for several purposes. *See* UNCITRAL Model Law, art. 16. However, "burden of proof" may not be a well-developed concept in the legal systems of some States. Even where it is well known, as in the United States, it may have a variety of meanings. *See* BUFFORD, *supra* note 36, at 116-18.

operating independently. For example, a member of an enterprise group may provide the financing for the entire group, and would have no purpose outside of the group context. In contrast, an enterprise group often has members that largely stand alone, and can operate independently of the larger group. For example, the group may have acquired a business that previously stood alone, and could be sold or spun off as an independent entity. Generally, the degree of integration varies from one enterprise group to another, and there are an unlimited variety of ways that the entities may be integrated.[198]

A number of scholars take the position that an ECOMI venue filing for a subsidiary should be authorized only if an enterprise group is integrated.[199] In my view, the benefits of a centralized venue are realizable in most multinational insolvency cases, whether or not the enterprise is integrated. In addition, the degree of integration can vary enormously from one enterprise group to another. If the entities are not integrated, there may be grounds to permit a non-integrated entity to have its own insolvency case in the State where its own COMI is located.[200]

In my view, the concept of "integration" is too amorphous to serve as a basis for permitting the commencement of a main insolvency proceeding for a subsidiary in the ECOMI venue. My proposal is much more workable in three respects. First, it creates a bright line test for the application of a presumption of qualification to commence a case in the ECOMI venue. Second, it permits the commencement of the case in the first instance, and leaves it to the ECOMI court to decide (promptly after the case is commenced) whether the ECOMI venue is the proper one for the case for the particular entity at issue. Third, it puts the burden of proof on the objecting party to show that the ECOMI venue is not appropriate for the subsidiary in question: if the burden is not carried, the case remains in the ECOMI venue.

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[198] *See generally* UNCITRAL – Enterprise Groups, *supra* note 17, at 10.

[199] *See, e.g.,* Miller, *supra* note 154, at 208-10; Mevorach, *supra* note 4, at 392-94; Edward S. Adams & Jason Fincke, *Coordinating Cross-Border Bankruptcy: How Territorialism Saves Universalism,* 15 COLUM. J. EUR. L. 43, 84 (2009).

[200] *See infra* note 235 and accompanying text. In considering whether a subsidiary should have its insolvency case in the State where its own COMI is located, whether the enterprise group is integrated may be a substantial factor. Other factors may also be relevant and important in particular circumstances.

4. International Recognition of Insolvency Judgments

It is important that the decisions of the court opening the insolvency proceedings for the members of an enterprise group be respected by courts in all of the relevant countries. It is also important that subsequent decisions enjoy equal respect, provided that the court has applied the proper choice of law principles.

Two different techniques have developed in the international insolvency legal regime to ensure the respect of foreign insolvency decisions.[201] Both the EU Regulation[202] and the OHADA Act[203] contain provisions that make a decision in one country's insolvency case automatically binding automatically in all other applicable countries unless its effects "would be manifestly contrary to the State's public policy" in the country where enforcement is sought. These provisions only apply to the EU countries and the OHADA countries, respectively.[204]

In contrast, the UNCITRAL Model Law requires a domestic court to give respect only to a decision of a foreign court opening insolvency proceedings for the same legal entity,[205] and to the foreign court's appointment of a foreign representative to appear in the domestic court to request the opening of an ancillary case under the UNCITRAL

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[201] In the United States, "full faith and credit" is the principle that binds states to respect the orders of other states' courts. *See* U.S. CONST., amend. XIV, art. IV, §1.

[202] *See* EU Regulation, art. 16; *See also* WESSELS, *supra* note 68, at 659 ("Article 16 provides for the immediate recognition of judgments concerning the opening, conduct and closure of insolvency proceedings and judgments handed down in direct connection with such insolvency proceedings.").

[203] *See* OHADA Act, *supra* note 68.

[204] *See* EU Regulation, art. 26. There is one known decision where the public policy provision of the EU Regulation was invoked by a national supreme court. In the *Eurofood* case, the Irish Supreme Court found that giving priority to the decision in the Parma court to open insolvency proceedings for the Eurofood subsidiary of Parmalat violated due process requirements under Irish law. *See In re* Eurofood IFSC Ltd., [2004] IESC 45 (Ir.). In its review of the *Eurofood* decision, the European Court of justice found it unnecessary to apply the public policy provision (which could be applied, in the Court's view, only where the decision is taken "in flagrant breach of the fundamental right to be heard"), because the Court found other grounds to uphold the Irish court decision. *See* Case 341/04, Eurofood IFSC Ltd., 2006 E.C.R. I-3813.

[205] *See* UNCITRAL Model Law, art. 17(1)(a).

Model Law.[206] After the opening of an ancillary proceeding, the UNCITRAL Model Law arguably requires some level of respect for other decisions of the foreign court, particularly if the foreign proceedings are main proceedings. However, the level of respect for such decisions is a lesser standard.[207]

The requirements for recognition of judgments could be met with suitable modifications to the recognition provisions in Chapter III of the UNCITRAL Model Law. For the EU Regulation, relatively minor changes in the recognition provisions would be sufficient to implement the recognition of foreign judgments and court orders.[208] Once article 3 is modified to provide international jurisdiction for enterprise groups, articles 16 and 17 could provide for the recognition of judgments opening such cases (article 16) and the recognition of other orders and judgments in such cases.

5. Forum Shopping

One of the alleged evils frequently charged against the universalist view adopted herein[209] is that it promotes "forum shopping."[210] Forum shopping refers to a party's efforts to choose the national insolvency law system and venue that is most favorable to it.[211]

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[206] *See id*. at art. 17(1)(b).

[207] Respect for subsequent decisions in the foreign court is implicated in the obligations for communication and cooperation provided in UNCITRAL Model Law, articles 25 and 26.

[208] *See* UNCITRAL Model Law, arts. 16, 17.

[209] For a more extensive discussion of the impact of the proposal herein for the universalist-territorialist debate, see *infra* text at notes 312-323.

[210] I have doubts about whether the alleged evils of forum shopping are actually as bad as they are alleged, or even that they are bad at all. However, that is a topic beyond the scope of this paper. *See generally* Pottow, *supra* note 40 (arguing that the territorialist charge that universalism leads to inappropriate forum shopping depends on two assumptions, neither of which can be reliably realized).

[211] *See, e.g.,* Lynn M. LoPucki, *Global and Out of Control?,* 79 AM. BANKR. L.J. 79, 81 (2005); *but see* Pottow, *supra* note 40. In addition, Professor Pottow argues that the merits of the territorialist position are undercut by the ready possibility of moving assets (apart from real estate) from one country to another and thus evading the application of the law of the State where they are located before their transfer. *See id.* at 799-801.

The ECOMI concept includes features that avoid some of these criticisms because it is much more difficult to change the location of an ECOMI than it is to change the location of a COMI. The criticism that the concept of COMI is subject to manipulation across borders to facilitate international forum shopping[212] is far more difficult to support with respect to an ECOMI. It may be possible (as it is claimed) to make a change in the country of the registered office (or the country of incorporation) and to transfer enough assets to support a change in the country of an entity's COMI within a reasonable time before commencing an insolvency case for the entity.[213] An ECOMI has far more stability in one country than a COMI for an individual legal entity, and is far less amenable to migration to another country for insolvency venue purposes. Further, the location of the ECOMI of an enterprise group is far more visible to creditors that the location of the COMI of a particular entity.

Predictability of the likely location of insolvency proceedings for the entire enterprise group is thus promoted substantially by the utilization of the ECOMI as the basis for international jurisdiction and venue. A creditor may have much more confidence that the ECOMI will remain in its present location, and that the enterprise will be subject to the insolvency regime of the country where the ECOMI is located, than in the case of the COMI of an individual legal entity. This assists creditors by making it easier to evaluate the risks of such an insolvency, and allows creditors to accommodate these risks by pricing their credit appropriately for the risk they undertake.[214]

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[212] *See, e.g.,* LoPucki, *supra* note 211, *passim.*

[213] *See, e.g., id.* at 97-101.

[214] To be sure, there are several categories of creditors whose status as creditors is involuntary, and the cost of this credit cannot take account of the insolvency regime in a particular venue. These creditors include tort liabilities, employers (perhaps excepting the most highly compensated executives) and taxes. However, these creditors do not have choices at all as to the legal regime applicable to their claims. Furthermore, their claims are likely to be subject to local law, and may not vary with the location of the venue selected for the applicable insolvency case.

C. Common Administrators and Office Holders

It is important that a common administrator be appointed to administer all of the entities in the enterprise group for which insolvency cases are commenced.[215] This principle applies both where an external administrator is appointed to administer the insolvency, and where a debtor in possession administers a reorganization of an enterprise group. For the same reasons, there should ordinarily be a common set of office holders[216] for all of the members of the group that commence insolvency cases in the ECOMI country[217] (subject to applicable conflict of interest rules).[218] In effect, this principle codifies the practice already followed for enterprise groups where their insolvency cases are commenced in the same country.

Transaction costs resulting from separate administrators for separate legal entities in an enterprise group can be astronomical. The Lehman case, for example, demonstrates that the costs of coordinating separate administrators in separate countries for entity group members consume a substantial amount of resources that would otherwise be available for distribution to creditors.

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[215] *See* Moss, *supra* note 37, at 1009 (stating that, in the domestic context in England, the normal practice is for the same persons to be appointed as administrators for all members of an enterprise group that have commenced insolvency cases). For a discussion of the use of a single administrator for the insolvency cases of the members of an enterprise group, *see* UNCITRAL – Enterprise Groups, *supra* note 17, at 106-07.

[216] Such office holders may include legal counsel, accountants, restructuring officers, committees of creditors and their professionals, and creditors' representatives.

[217] *See, e.g.,* UNCITRAL – Enterprise Groups, *supra* note 17, at 76-77 (suggesting that the coordination of multiple proceedings for members of an enterprise group may be facilitated by the appointment of a single or the same insolvency representative). It may be useful for the law to provide also that a common administrator or other office holder may be appointed for related cases for members of the group of companies that commence their insolvency cases in different countries.

[218] In certain circumstances, the appointment of common counsel may raise conflict of interest problems. One way of resolving this problem is to appoint "conflicts counsel" to step in for the appointed counsel and to handle those matters that raise conflicts of interest. *See, e.g., In re* Washington Mutual, Inc., 442 B.R. 314 (Bankr. D. Del. 2011).

D. Secondary Proceedings

Both the EU Regulation and the UNCITRAL Model Law divide the relevant cross-border insolvency proceedings into main proceedings and secondary (non-main) proceedings.[219] A main proceeding must be commenced in the country where the debtor's COMI is located, while a secondary or non-main proceeding may be commenced in a non-COMI country where the debtor has an "establishment."[220]

1. Existing Law on Secondary Proceedings

Under both regimes, a secondary or non-main proceeding is restricted to the debtor's assets in the country where such a proceeding is commenced.[221] Under the EU Regulation, a secondary proceeding is governed by local law, except where the EU Regulation provides otherwise.[222] While the UNCITRAL Model Law has no choice of law provision, a non-main proceeding is presumptively governed by the law of the forum.[223]

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[219] The EU Regulation uses the term "secondary proceedings," while the UNCITRAL Model Law uses the term "non-main proceeding." *Compare* EU Regulation, art. 3(3) *with* UNCITRAL Model Law, art. 2(c). Their definitions are essentially similar: each may be opened in a non-COMI country, but each requires that the debtor have an "establishment" in that country.

[220] The definition of "establishment" is also essentially the same. *Compare* EU Regulation, art. 2(h) (establishment means "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods") *with* UNCITRAL Model Law, art. 2(f) ("establishment means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services").

[221] *See* EU Regulation, arts. 3(2) & 27; UNCITRAL Model Law, art. 28. Article 28 further provides that a non-main proceeding may also include assets that, under the law of the State where the non-main proceeding is opened, should be administered in the non-main proceeding, but only necessary to implement cooperation and communication provided under articles 25, 26 and 27. *See* UNCITRAL Model Law, art. 28.

[222] *See* EU Regulation, art. 28. The EU Regulation has several provisions on choice of law that apply for both main proceedings and secondary proceedings. *See id*. at arts. 4-15.

[223] The applicability of local law in a secondary proceeding includes the local choice of law rules. Thus, where such a rule is applicable, the relevant issue may be determined by the law of the forum of the main proceeding, or by the law of another State.

The EU Regulation specifies that a secondary proceeding must be a winding-up (liquidation) proceeding.[224] However, after a secondary proceeding is commenced, it requires the court to stay that proceeding (in whole or in part) if such a request is made by the liquidator in the main proceeding.[225] Such a stay may be issued for three months, and may be renewed for successive three-month periods.[226] To obtain such a stay, the liquidator in the main proceeding may be required to provide a suitable guaranty of the interests of the creditors in the secondary proceeding and of individual classes of creditors.[227] In addition, the court where the secondary proceeding is pending may deny such a stay "only if it is manifestly of no interest to the creditors in the main proceedings."[228]

The UNCITRAL Model Law is less explicit on the function of a non-main proceeding. It provides mainly that the insolvency proceedings in the non-COMI country must be administered in coordination with the main proceedings, and that the relief granted pursuant to the recognition of a foreign main proceeding must be limited to the assets subject to the non-main proceeding.[229] Because, under the UNCITRAL Model Law, a non-main proceeding is a proceeding under the local insolvency law, presumptively the proceeding is either a liquidation or a reorganization under the local law. Both the UNCITRAL Model Law and the EU Regulation recognize that the main proceeding is the dominant proceeding for a legal entity, and a secondary or non-main proceeding is limited and subordinate to a substantial extent.

Thus, while the provision for main proceedings in both the UNCITRAL Model Law and the EU Regulation is essentially universalist, a secondary or non-main proceeding is typically territorialist[230] in its function. The provision for secondary or non-main proceedings is the principal respect in which universalism is modified in both the

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[224] *See id.* at art. 3(3).

[225] *See id.* at art. 33(1).

[226] *See id.*

[227] *See id.*

[228] *See id.*

[229] *See* UNCITRAL Model Law, art. 29.

[230] For a further explanation of universalism and territorialism, see *infra* text at notes 312-323.

UNCITRAL Model Law and the EU Regulation in order to take account of a number of issues relating to international insolvency cases, such as differing national insolvency laws, differing rights of secured creditors, differing rights of other creditors (such as employees) under national non-insolvency laws, and other local interests.[231]

2. Expanded Use of Secondary Proceedings for International Enterprise Group Insolvency Cases

The provision for insolvency cases of enterprise groups in the ECOMI country may result in an expanded need for secondary or non-main proceedings. I propose substantially broader functions for secondary or non-main proceedings in insolvency cases for enterprise groups.[232]

I see at least six possible functions for a secondary or non-main proceeding. First, an international insolvency case may be too complex to administer in the ECOMI forum, and more functionally administered in several courts in several countries.[233] Second, it may be more efficient for certain matters to be resolved in another country, such as its COMI country, rather than the enterprise's ECOMI country.

Third, an important creditor or group of creditors (especially secured creditors) may be located in a non-ECOMI country where their interests may be more efficiently administered.[234] Fourth, it may be particularly useful to have a secondary or non-main proceeding for a constituent entity of an enterprise group in the country where that entity's COMI is located. Fifth, a secondary proceeding may be more expeditious for a

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[231] For a skeptical view of the possibility of setting aside local interests in the multinational group insolvency arena, see Ian F. Fletcher, *Maintaining the Momentum: the Continuing Quest for Global Standards and Principles to Govern Cross-Border Insolvency*, 32 BROOK. J. INT'L L. 765, 780-84 (2007).

[232] My view that the use of secondary proceedings may need to be expanded in a world of enterprise group insolvency law differs from the INSOL Europe view, that secondary proceedings may unnecessarily complicate the administration of an insolvency of an enterprise group. *See* INSOL Europe Report, *supra* note 8, at 78; *accord* Moss, *supra* note 37, at 1017-18.

[233] *See* EU Regulation, preamble (19).

[234] *See, e.g., In re* Aerovias Nacionales de Colombia S.A. Avianca, 303 B.R. 1 (Bankr. S.D.N.Y. 2003), which involved the reorganization of the national Columbian airline in the United States, because its principal bank creditors were located in the United States. However, the resolution of claims against the estate was handled in Colombia (where, at the time, bankruptcy cases were handled through administrative procedures rather than through the courts).

member of an enterprise group in a country where it faces important and difficult relations and negotiations with regulatory authorities in that country.

Sixth, it may be useful to use a secondary or non-main proceeding (as now authorized by the EU Regulation) to provide a local territorial forum for creditors in the country where an establishment is located, and to divide those assets among local creditors. Such interests could include local governmental regulation and taxation, employee rights under domestic law, rights *in rem* (to the extent governed by local law), contracts relating to real estate (immoveable property), rights subject to national or local registration, payment systems and financial markets, and executor rights of purchases of property from the debtor.[235] A secondary or non-main proceeding, if used for this purpose, should be limited to addressing those interests of creditors that have substantial local importance.

This list of possible uses for secondary or non-main proceedings in the enterprise group insolvency context is likely not exhaustive. Other uses for a secondary or non-main proceeding likely will certainly emerge as courts deal with enterprise group insolvency cases.

This list suggests a multiplicity of uses for which a secondary proceeding could be initiated. For all of these uses of a secondary proceeding (probably excepting the sixth use), it will be necessary to lift the restriction in both the UNCITRAL Model Law and the EU Regulation limiting secondary proceedings essentially to the assets located in the State where the secondary proceeding is commenced.[236] The ECOMI court should have the power to enlarge the function of a secondary proceeding for one of the enterprise group's constituent members as appropriate.

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[235] This list parallels, to a substantial extent, the list in the EU Regulation in articles 4-15 specifying choice of law rules for particular types of creditor rights.

[236] *See supra* text at note 222.

3. Coordination and Communication for Main and Secondary Insolvency Cases in the Enterprise Group Context

The EU Regulation emphasizes that main and secondary proceedings must be coordinated to achieve the effective realization of the total assets of an entity.[237] Such coordination and cooperation are especially important in the context of enterprise group insolvencies.

The international regime for enterprise group insolvencies should include a provision to protect the dominance of the enterprise group proceeding in the country where the ECOMI is located. This will require that an entity insolvency proceeding in a non-ECOMI State must be subordinate[238] to both the enterprise group insolvency proceeding and that for the individual entity in the ECOMI State.

The EU Regulation relies on "close cooperation" among the various liquidators to achieve the overall realization of the maximum value of the insolvency estate.[239] This encouragement is not sufficient if the parties and office holders do not voluntarily undertake such cooperation.[240]

A stronger tool is needed where voluntary close cooperation is insufficient to facilitate the realization of the maximum value of the enterprise. If sufficient cooperation is not otherwise realized, the court in the ECOMI country should have the power to require such cooperation.

To provide such power, the commencement of an insolvency case for an entity that is a member of an enterprise group should not be permitted unless the court with the ECOMI case of an enterprise group authorizes the commencement of such a

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[237] *See* EU Regulation, preamble (20).

[238] "Subordinate" is perhaps too strong a term, because it could conceivably raise an issue of State sovereignty. Although raising such an issue is rare in the international insolvency context, perhaps it would be better to adopt a strategy like that in EU Regulation article 33, providing that, upon the request of the administrator in the main proceedings for a stay in secondary proceedings, the court may reject the request only "if it is manifestly of no interest to the creditors in the main proceedings." EU Regulation, article 33.

[239] *See* EU Regulation, preamble (20).

[240] For example, in the *Lehman Holdings* case, the U.K. administrators refused to cooperate sufficiently with the administrators in the United States and other European countries to permit the orderly administration of the global *Lehman* insolvency case.

case.[241] If such a case has been commenced before the commencement of the ECOMI case, that court should be required[242] to suspend the case until further proceedings are authorized by the ECOMI court.[243] An exception should be carved out for emergency matters that cannot await a ruling in the ECOMI case. Since presumptively every case for an entity in the enterprise group will be commenced in the ECOMI court,[244] the requirement for authorization by the ECOMI court also applies to the commencement of an insolvency case for an enterprise group member in the country where its own COMI is located.

4. Transfer of Insolvency Case to COMI State for Constituent Entity

In some circumstances, a constituent member of an enterprise group (whose COMI is located in a country separate from that where the group ECOMI is located) may be reorganized or liquidated more effectively in the country where its COMI is located. This would be especially true under two conditions: (a) the subsidiary can function alone without the affiliation with the enterprise group, and (b) the form of the expected reorganization is to eliminate the shareholders (thus cutting the ownership bond with the enterprise group) and issue new shares to the creditors,[245] thus making

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[241] An exception to control of the ECOMI court over the insolvency case of a subsidiary should be recognized where the purpose of the insolvency case of the subsidiary is to adopt a reorganization plan that cancels its stock, thereby cutting the subsidiary free from the enterprise group. This kind of case, in my view, should be commenced in the country where the subsidiary's own COMI is located. *See supra* text at note 202.

[242] This requirement should be specified in the international insolvency regime itself.

[243] This principle would avoid problems like those that arose in the *Eurofood* case, where a fight broke out between the case for Eurofood IFSC Ltd. in the Italian courts (where most of the other Parmalat-related entities commenced their insolvency cases) and the Irish courts, where Eurofood's COMI was located. *See* Case 341/04, Eurofood IFSC Ltd., 2006 E.C.R. I-3813. There were decisions from five courts, all relating to Eurofood IFSC Ltd. The decision by the Dublin High Court is *In re* Eurofood IFSC Ltd., [2004] No. 33 Dublin H. Ct. The decision on appeal of that decision to the Irish Supreme Court is *In re* Eurofood IFSC Ltd., [2004] IESC 45 (Ir.). The decision of the court in Parma, Italy is *In re* Eurofood IFSC Ltd., Parma Civil & Criminal Ct., Feb. 19, 2004 (unpublished opinion, on file with author), *aff'd*, Trib. Amm. Reg. 10 June 2004, n.6998/2004 (on file with author). The decision of the Italian court of appeal is *In re* Eurofood IFSC Ltd., Trib. Amm. Reg. 10 June 2004, n.6998/2004 (on file with author).

[244] *See supra* text at notes 151-167.

[245] This procedure could also be applied to several subsidiary entities in an enterprise group that operate together in a national market different from the country where the ECOMI is located.

them the new owners of the entity.[246] In such a circumstance, the case likely should be transferred to the country where the entity's COMI is located.

Strictly speaking, it is not possible to transfer an insolvency case from one country to another. Within a country, a case can be transferred from one court to another, depending on internal national procedural rules. Internationally, in contrast, transfer from one State to another cannot be accomplished directly.

If the court in State X decides that an insolvency case should properly be venued in State Y, the court in State X typically dismisses the case and leaves it to the parties to commence an equivalent case in State Y. If the case in State X is simply dismissed, typically all of the orders issued in that case are usually retroactively vacated and have no continuing effect. State Y must begin anew with a new case and determine again what orders to issue and what relief to grant the parties in interest.

A functional equivalent of an international transfer of an insolvency case, however, can be accomplished. The court in State X can give a conditional dismissal of the insolvency case, contingent on the commencement of a parallel case in State Y, so that the dismissal order in State X becomes effective only upon the commencement of the case in State Y. Alternatively, the court in State X may suspend or order a stay with respect to the pending case, to await the commencement of a case for the same entity in the more appropriate State. With either procedure, a main proceeding for a subsidiary entity, which is commenced in the ECOMI State, can in effect be transferred to another State, such as that where the subsidiary's own COMI is located.

It is less clear that the court in State Y where the insolvency case is recommenced should be bound by the determinations and orders made by the court in State X in these circumstances. The better procedure would be for the court in State Y to make a determination as to which of the orders issued by the court in State X should continue in force, unless and until a further order is made by the State Y court. This would give the State Y court the option of preserving some (or all) of the State X court orders in the State Y case, or preserving none of them.

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[246] This procedure was used in the *Parmalat* cases, where a number of the Parmalat subsidiaries conducted retail operations in the dairy products industries of various countries. While the Parmalat ECOMI was located in Parma, Italy, Parmalat subsidiaries functioned rather independently in other countries. After the collapse of the Parmalat enterprise and the commencement of insolvency cases in Parma for more than a hundred of its entities, a number of its operating entities (including those in the United States, Venezuela and Brazil) reorganized by canceling their stock (thereby cutting their ties to Parmalat) and establishing stand-alone separate operating entities in these countries.

The possibility of using this functional approach turns on the applicable laws of State X and State Y. The greater flexibility given to common law courts[247] makes it more likely that this result can be achieved between common law courts than between civil law courts.

E. Cooperation and Communication

The adoption of an international legal regime for the insolvencies of enterprise groups requires a much expanded use of cooperation and communication[248] among the courts and the parties in interest across the entire scope of the enterprise.

Effective cooperation and communication are especially vital to avoid the inherent disadvantages to creditors and other parties in interest who are located outside the country where the proceedings are commenced. Special care is needed to assure that their views are properly considered and their interests are properly accommodated in the enterprise group insolvency and the insolvency cases of their constituent entities. Under my proposal, this is especially important because many of the main insolvency cases for members of the enterprise group may be commenced in a venue different from that where their COMIs are located.

The obligation for cooperation and communication, with respect to insolvency cases for enterprise groups, should begin with the standards in the UNCITRAL Model Law,[249] which require both courts and office holders to cooperate "to the maximum extent possible" with courts and office holders in related insolvency cases for the same legal entity.[250] In addition, the UNCITRAL Model Law also authorizes both courts and office holders in one case to communicate directly with courts or office holders in any

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[247] *See, e.g.,* JAMES G. APPLE, FED. JUDICIAL CENTER, A PRIMER ON THE CIVIL-LAW SYSTEM 36-37 (1995).

[248] For guidelines on communication and cooperation in cross-border insolvency contexts, see Transnational Insolvency, *supra* note 47; CoCo Guidelines, *supra* note 89.

[249] I have argued elsewhere that the EU Regulation should be modified to include the obligations for communication and cooperation set forth in the UNCITRAL Model Law. *See* Bufford, *supra* note 9, at 348-55. Notably, neither the Model Law nor the EU Regulation presently addresses directly the application to enterprise groups of the obligations of cooperation and communication. *See* UNCITRAL – Enterprise Groups, *supra* note 17, at 119.

[250] *See* UNCITRAL Model Law, arts. 25(1) and 26(1).

other case in another country for the same entity.[251] Furthermore, the UNCITRAL Model Law authorizes a court to request information or assistance from another court or office holder in another country with respect to a case for a common legal entity.[252]

To accommodate insolvency cases for enterprise groups, the cooperation and communication requirements should be broadened to apply with respect to every entity in an enterprise group for which an insolvency case is commenced. The administrators and office holders in enterprise group insolvency proceedings should be obligated to communicate and to cooperate with each other across the entire spectrum of insolvency cases for each of the members of the group. The courts involved in these proceedings should also have an obligation to communicate and to cooperate with each other and with the office holders.[253] Further, a court in any country where an insolvency proceeding for any member of the enterprise group is pending should be authorized to request information or assistance from any office holder for any group member in any other country.

It is noteworthy that the obligations of cooperation and communication are independent of the recognition of a foreign proceeding under the present UNCITRAL Model Law.[254] Thus, cooperation and communication should begin as soon as involved parties learn of related proceedings in more than one country for separate members of an enterprise group.

A very important part of the communication and coordination process is the use of protocols.[255] Protocols are especially useful in the context of enterprise group

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[251] *See id.* at arts. 25(2) and 26(2).

[252] *See id.* at art. 25(2). The scope of authorized cooperation, communication and assistance extends to foreign assistance sought with respect to a single insolvency case, and to foreign creditors or other parties in interest participating in a domestic insolvency case. *See id.* at arts. 25(1) and 26(1) (referring to all matters described in art. 1). For means of communication, see *generally* UNCITRAL – Enterprise Groups, *supra* note 17, at 75. For forms of cooperation, see *id.* at 83-85.

[253] *See, e.g.,* UNCITRAL – Enterprise Groups, *supra* note 17, at 119.

[254] *See* BUFFORD, *supra* note 36, at 564-65; UNCITRAL – Enterprise Groups, *supra* note 17, at 88.

[255] *Accord* INSOL Europe Report, *supra* note 8, at 119. For a detailed description of protocols and their use in international insolvency cases, see U.N. Comm'n on Int'l Trade Law (UNCITRAL), UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation 27-113 (2010), *available at*

insolvencies.[256] The law should explicitly provide for the use of protocols and for court approval of protocols in international insolvency cases.[257] An international legal regime for enterprise group insolvencies will likely require a substantially expanded use of protocols in many countries.

Court to court communication, as provided in the UNCITRAL Model Law, will be very important in the context of insolvency cases for enterprise groups. The law should explicitly authorize judges to communicate with each other on related cases (as well as main and secondary cases for the same entity), subject to appropriate controls.[258]

Court to court communications may also involve joint hearings, where the judges in two or more States hold hearings on related cases at the same time with videoconference connections so that the judges and parties can participate jointly.[259] The international regime should explicitly authorize joint hearings by video conference, subject to appropriate procedures and safeguards.[260]

F. Other Considerations

Two major issues can arise from the proposal for a legal regime providing common international jurisdiction and venue for insolvency cases of enterprise groups. First, the determination and application of the proper governing law can be problematic, especially within an insolvency case for a member of an enterprise group whose COMI

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http://www.uncitral.org/pdf/english/texts/insolven/Practice_Guide_Ebook_eng.pdf [hereinafter "UNCITRAL Practice Guide"].

[256] In the *Lehman* case, for example, the protocol negotiated among many of the administrators has proven especially useful in coordinating more than 80 cases in some fifteen countries. For the *Lehman* protocol, see http://www.globalturnaround.com/cases/Lehman Protocol.pdf.

[257] Particularly in civil law countries, judges have often been reluctant to use protocols because of lack of statutory authority for them. *See* UNCITRAL Practice Guide, *supra* note 255, at 34.

[258] For model regulations on court-to-court communications, *see* American Law Institute, see *Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases*, 2003.

[259] For a description of this process, see BUFFORD, *supra* note 36, ch. 13.2. On the coordination of hearings in multinational enterprise insolvency cases, *see generally* UNCITRAL – Enterprise Groups, *supra* note 17, at 119.

[260] *See, e.g.,* BUFFORD, *supra* note 36, at 551-55.

is located in country different from that where the ECOMI, and thus the insolvencies of the member entities of the enterprise group, is located. Second, particular care is required in dealing with the possibility of procedural or substantive consolidation of international member entities in an enterprise group whose insolvency cases are commenced in the ECOMI venue. The following section addresses these problems.

1. Governing Law for the Insolvency of an Enterprise Group Member

If the foregoing proposal is adopted, courts will need to take more seriously the obligation to apply conflict of law and choice of law principles in a variety of contexts.[261] Because my proposal will likely bring the main insolvency cases of foreign affiliates into a court in the country where the ECOMI is located, it will be necessary to apply foreign law in a much larger variety of contexts in those cases. Clearly, the filing of insolvency proceedings for legal entities of various countries may pose difficult choice of law problems in the forum court. These problems should be resolved under traditional choice of law or international private law principles.

Two different aspects of applicable law must be considered—the procedural rules to be applied in the proceeding, and the applicable substantive law applicable to the case of an affiliate with a COMI in another country.

a. Procedural Rules

For an insolvency case of a foreign member of an enterprise group, the general rule should be that the law of the forum (the ECOMI country) provides the applicable procedural law. This law should govern such matters as the opening of an insolvency case, obtaining relief from a moratorium or stay imposed by the insolvency case, the procedure for confirming a reorganization plan including any voting requirements relating thereto, the procedure for creditors to register claims, the claims objection process,[262] and the procedure for closing a case.[263] In general, this rule will result in the application of many features of the forum's insolvency law to these insolvency cases.

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[261] *Accord* Mevorach, *supra* note 4, at 378-79.

[262] *Accord* EU Regulation, art. 4, § 2(h).

[263] *Accord id.* at art. 4, § 2(j).

This proposed rule should not upset expectations of voluntary creditors. Before providing credit to an enterprise group entity, creditors should be obligated to know the country of the debtor's ECOMI, and understand the legal consequences of that location. Additionally, the application of the procedural rules of the forum country will usually not affect the substantive rights of the parties in interest.

It is important that the applicable procedural rules treat foreign creditors and parties in interest equally with domestic creditors (the "equal treatment principle"). The equal treatment principle raises a number of issues. First, effective procedures should be adopted to assure that foreign creditors are given adequate notice of the commencement of the insolvency case. Consideration should be given to whether the notice should be given in a national language of the country where the creditor or party in interest is located.[264] In addition, sufficient time should be given to a foreign creditor or party in interest for an opportunity to register a claim and to participate in the case.

Second, a foreign creditor should be authorized to register a claim to the same extent as a domestic creditor. It is appropriate for the ECOMI court to expect that a claim be in its local language. However, a foreign creditor should be given additional time to provide a translation, if use of the local language of the ECOMI court is required.

Third, it is essential that a foreign claim be treated equal to a domestic claim for the entity at issue.[265] This principle requires that the court give a foreign creditor a full and fair opportunity to defend the creditor's claim (if it is challenged), and that the creditor be entitled to its *pari pasu* share of the debtor's estate. The UNCITRAL Model Law addresses this problem in a general fashion by providing that foreign creditors have the same rights as domestic creditors with respect to commencement of, and participation in, a bankruptcy case.[266]

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[264] For an example of a rule requiring notice to a foreign creditor in a national language of the creditor's country, see Bankr. C.D. Cal. R. 2085(f)(4). In a country where there is more than one national language, notice in one of those languages should be sufficient: it is not unreasonable to expect a national of a country to be able to understand a notice in an official language, or at least to obtain a translation to the person's own language.

[265] Special consideration may be needed for the treatment of sovereign claims of a foreign sovereign. *See, e.g.,* 11 U.S.C. § 1513 (2012) (providing that U.S. bankruptcy law chapter 15 does not change the U.S. law with respect to foreign public law claims, and that foreign tax claims are governed by U.S. treaties with the respective foreign sovereigns).

[266] *See* UNCITRAL Model Law, Art. 13(1).

b. Applicable Substantive Law

The determination of the choice of law issues for the insolvencies of the members of an enterprise group is a complex and subtle enterprise beyond the scope of this paper. I sketch a few general principles here.

Ideally, an international regime for the insolvencies of enterprise groups would have its own choice of law rules for certain substantive law matters.[267] This would be especially helpful for an enterprise group member having its COMI in a different country from the ECOMI. The EU Regulation provides its own choice of law rules for a substantial number of issues.[268]

In addition to those issues listed in the EU Regulation, several other substantive law matters should ordinarily be governed by the law of the nation of the entity's COMI (including its choice of law rules). These matters may include the avoidance of suspect transactions,[269] the merits of claims registered against the debtor, and the distribution of assets (to the extent not governed by a reorganization plan).[270]

At the same time, certain substantive law matters should ordinarily be governed by the law of the ECOMI forum, notwithstanding that certain members of the enterprise group have their COMIs in other countries. These matters include the nature of the property of the estate, the terms and extent of the applicable moratorium or stay, the financing of a reorganization effort for multiple entities including foreign entities, the treatment of executory contracts, and the performance of a reorganization plan (except to the extent that performance is to be accomplished in another country).[271]

In contrast, many substantive law matters should be governed by the law of the debtor's COMI, although that debtor is a member of an enterprise group whose ECOMI (and presumptive location of the main cases for the group members) is in another

[267] *Accord* Edward J. Janger, *Virtual Territoriality,* 48 COLUM. J. TRANSNAT'L L. 401, 434 (2010).

[268] *See* EU Regulation, arts. 4-15.

[269] *See, e.g.,* Maxwell Communications Corp. v. Société Générale (*In re* Maxwell Communications Corp.), 93 F.3d 1036 (2d Cir. 1996).

[270] *See, e.g.,* Garrido, *supra* note 76.

[271] A detailed examination of which issues should be determined by the law of the forum, where an insolvency case for a member of an enterprise group commences its insolvency case in the ECOMI State, and which should be governed by the entity's own COMI state, is beyond the scope of this paper.

State. For example, to the extent that the ranking or priority of claims is governed by law (and not a reorganization plan),[272] the ranking should generally be governed by the law of the State where an entity's COMI is located,[273] not where the group ECOMI is located.[274] Similarly, in my view, avoidance powers should be governed by the COMI State. Thus, for an entity with a COMI in another State, the ECOMI court should apply the law on ranking of claims of the COMI State (including its choice of law rules, where appropriate).

2. Consolidation – Substantive and Procedural

The international regime for enterprise group insolvency should provide for both procedural and substantive consolidation, including the consolidation of entities whose registered office and COMIs are located in different countries, in appropriate circumstances.

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[272] In reorganization cases, the ranking of claims is generally determined by the reorganization plan, and not by law: to the extent that the domestic law of the ECOMI country permits this procedure, this issue disappears as a choice of law issue.

[273] *Accord* Jay Lawrence Westbrook, *Breaking Away: Local Priorities and Global Assets,* 46 TEX. INT'L L.J. 601 (2011) (arguing, in addition, that choice of law rules should be applied in a more vigorous fashion in determining priorities). In contrast, as to ranking of a claim by an entity foreign to the State where a debtor's COMI is located, the UNCITRAL Model Law provides that ranking of claims is subject to local law. *See* UNCITRAL Model Law, art. 13(2). This provision permits the local law to rank foreign claims lower than domestic claims, provided that no foreign claim may be ranked below the level for unprivileged claims unless domestic claims of the same category are ranked lower.

[274] For a contrary view, see Jay Lawrence Westbrook, *Universalism and Choice of Law*, 23 PENN ST. INT'L L. REV. 625, 632 (2005) ("as to distribution rules and other rules governing bankruptcy, [the court] must choose the applicable bankruptcy law by focusing upon the debtor's affairs as a whole on a worldwide basis, looking to factors such as principal place of business, principal location of assets, residence of most creditors, center of financial interests, and the like." I disagree. This approach is far too complex and cumbersome for practical application in the context of an international enterprise group insolvency case (perhaps unless it is made on a one-time basis for the entire case). International insolvency law for enterprise groups does not require that the commencement of a main proceeding for a member of an enterprise group in the ECOMI State, rather than in the State of its own COMI, should affect the priority rights of a creditor under the insolvency law of the COMI State for the entity.

a. Procedural Consolidation

Procedural consolidation and substantive consolidation are very different in character. Procedural consolidation is an administrative process to facilitate the management of court records. This limits the extent to which papers must be duplicated in multiple files, and streamlines the transmission of copies of documents to the parties in interest.[275] Such a procedure should be typical in the ECOMI forum where the insolvency cases of the enterprise group are commenced.

The procedural consolidation of insolvency cases for two or more members of an enterprise group typically permits a common court file, a single set of notices to creditors, a common administrator, and joint proceedings in the court.[276] Such procedural consolidation is accomplished pursuant to a court order, which is typically issued early in the cases, shortly after the insolvency cases of the affected entities are commenced.

Under procedural consolidation, the individual entities retain their separate identities, their separate insolvency estates, and their separate bodies of creditors. Typically, a separate reorganization plan is required for each entity that is to be reorganized, as well as separate procedures for approving the plan.[277] In consequence, procedural consolidation typically has no important substantive consequences.

b. Substantive Consolidation

Substantive consolidation should be available in the international enterprise group insolvency context.[278] However, substantive consolidation should be used sparingly and in well-defined circumstances so that it does not prejudice the rights of the creditors of the respective entities.

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[275] *See, e.g.,* Gill v. Sierra Pacific Construction, Inc. (*In re* Parkway Calabasas Ltd.), 89 B.R. 832, 836 (Bkrtcy.C.D.Cal.,1988), *aff'd sub nom.* Sierra Pacific Constructors, Inc. v. Gill (*In re* Parkway Calabasas, 949 F.2d 1058 (9th Cir. 1991).

[276] *See, e.g.,* UNCITRAL – Enterprise Groups, *supra* note 17, at 27-32.

[277] *See, e.g., id.* at 80-81.

[278] *Accord id.* at 98-100.

In contrast to procedural (or administrative) consolidation, substantive consolidation is a procedure with far-reaching consequences for the creditors of the respective entities, and is the insolvency law equivalent of a corporate merger. Substantive consolidation accomplishes the merger of the estates of the respective entities, so that there becomes a single insolvency estate, a common pool of assets, a common body of creditors (who are all treated as the creditors of a single entity), and a common disposition of the case (whether by way of restructuring or liquidation).[279] For all purposes thereafter, the combined entity is a single legal entity.[280] The impact of substantive consolidation is the insolvency law equivalent of corporate merger.

One of the most important impacts of substantive consolidation is to provide a larger pool of assets from which the creditors may collect their claims.[281] If the pool of assets is protected so that other creditors are not disadvantaged by substantive consolidation, it may be appropriate for the court to impose such relief.

There is a tension between substantive consolidation and respect for legal entities, which is firmly grounded in non-insolvency entity law and should be respected in insolvency law subject to limited exceptions.[282] Procedural consolidation has no

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[279] *See, e.g.,* BUFFORD, *supra* note 36, at 567. *See also, In re* Owens Corning, 419 F.3d 195, 205 (3d Cir. 2005) (amended 2007) (stating, "[s]ubstantive consolidation . . . treats separate legal entities as if they were merged into a single survivor left with all the cumulative assets and liabilities (save for inter-entity liabilities, which are erased). The result is that claims of creditors against separate debtors morph to claims against the consolidated survivor.") (internal quotations omitted).

[280] For a discussion of substantive consolidation in the enterprise group insolvency context, see UNCITRAL – Enterprise Groups*, supra* note 17, at 98-100. This report likewise says that substantive consolidation should be a rare exception. *See id.* at 91-92.

[281] While it may appear that substantive consolidation is a zero sum game (where the gains of some creditors are balanced by losses to others), this is frequently not the case. The merger of two or more insolvency estates may result in the elimination of a substantial number of overlapping claims (where the creditor does not know which entity owes the debt). In addition, respecting corporate boundaries in the insolvency context involves substantial transaction costs that can be avoided if the corporate entities are combined. These cost savings can enlarge the pool of assets sufficiently that all creditors gain from the substantive consolidation.

[282] In certain circumstances, other law may provide for the consolidation of legal entities for certain purposes. For instance, U.S. tax law authorizes the filing of consolidated tax returns for members of an enterprise group where at least eighty percent of the stock ownership of members is owned within the group. *See* 26 U.S.C. §§ 1501, 1504 (2012).

impact on the respect for entity status, but substantive consolidation has a dramatic impact.

It is important to respect the limited liability of the members of an enterprise group in the insolvency context, absent circumstances that make the respect for such boundaries inappropriate.[283] Limited shareholder liability is an essential feature of the modern business corporation under the laws of most countries. This feature, as much as any other, has enabled the growth of the large industrial marketplace that exists today. The essential feature of limited liability is that, absent exceptional circumstances, the liability of a shareholder is limited to the amount of capital that the shareholder has invested. Insolvency is not a qualifying exceptional circumstance. An international enterprise group typically includes multiple legal entities whose shareholders enjoy such limited liability.[284]

Creditors are also substantially impacted by the limited liability character of a corporate entity. Respect for the entity partitions in an enterprise group permits creditors to focus their attention on the individual entity that is indebted to them, and they may disregard the financial status of other related entities for the most part.[285] Absent an agreement to the contrary,[286] creditors' recovery is normally limited to the assets contained within the walls of the entity indebted to them.

The most typical features of substantive consolidation do not endanger the limited liability of shareholder investors for two reasons. First, a typical substantive consolidation involves the consolidation of legal entities in the enterprise group only. The corporate shield on individual shareholder liability is retained. Thus, the individual shareholders retain their original entitlement that their liability is limited to the investment they made. Second, when an entity becomes insolvent, the financial interest of the individual shareholders largely disappears, except to the extent that they

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[283] Non-bankruptcy law typically provides, for example, that the limited liability of a corporate entity may be disregarded in the case of fraud, abuse of the corporate form, or the payment of illegal dividends. These remedies remain available in the insolvency context. But insolvency itself is not an event that merits setting aside the protections of the corporate form of business.

[284] An enterprise group may also contain entities without separate legal status.

[285] *See* Mevorach, *supra* note 4, at 375.

[286] A voluntary creditor may negotiate for a guarantee from another entity (or entities) in the enterprise group, including shareholders, for greater economic protection.

may reasonably anticipate the entity's financial future will improve. Upon insolvency, the residual interest holders become the unsecured creditors, not the shareholders.

Substantive consolidation is a very unusual remedy,[287] even in countries like the United States where groups of companies have a right to commence each of their insolvency cases in the same forum.[288] While substantive consolidation should be authorized, it should be used sparingly.

Substantive consolidation is authorized in the United States and several other countries in appropriate circumstances.[289] Although no specific statutory support for substantive consolidation exists in the United States, it is well established in case law.

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[287] Absent statutory authority, substantive consolidation is known in only a few countries. In addition to the United States, substantive consolidation is authorized by caselaw in the United Kingdom in exceptional circumstances. *See* Gabriel Moss, *supra* note 37, at 1006. Substantive consolidation has also been applied in France where there was no objection to its use. The French commercial court in Antibes had originally entertained a judicial liquidation case under French law for three related French entities: S.N.C. Summersun et cie., S.A. Summersun and S.A.R.L. Summerson. *See In re* Euro-Am. Lodging Corp., 357 B.R. 700, 709 (Bankr. S.D.N.Y. 2007) (describing the proceedings in the French case). More than five years later, the judicial liquidator appointed by the French court filed a petition in Antibes to include Euro-American Lodging, which owned a hotel in midtown New York City. The French court issued an order substantively consolidating the estates of all four debtors. *See id.* at 710 (stating that Antibes court issued order "extending" case to include Euro-American Lodging "with the creation of a unified mass of assets and liabilities").

[288] INSOL Europe, while proposing a statutory structure for the insolvency cases of groups of companies, would restrict substantive consolidation to those cases where "the insolvency proceedings of these companies cannot be conducted in a meaningful way . . . ." *See* INSOL Europe Report, *supra* note 8, at 50. INSOL Europe also proposes, where it is appropriate to grant substantive consolidation for two or more members of a group of companies and their insolvency cases are pending in separate courts, the court with the case for the entity ranking highest in the group hierarchy should be the one to supervise the consolidated case, and the court that would lose the case should decide whether substantive consolidation is appropriate. *See id.* at 49.

[289] Insofar as is known, only the United States, Canada, Australia, and New Zealand have statutory procedures authorizing substantive consolidation. The Australian business reorganization law provides for "pooling", which is essentially the same as substantive consolidation under U.S. law. *See* Corporations Act, 2001, arts. 571-579L (Austl.). For the Canadian law, see Bankruptcy and Insolvency Act, R.S.C., c. B-3 (1985) (Can.); *see also* Ashley v. Marlow Group Private Portfolio Mgmt. Inc., [2006] 22 C.B.R. (5th) 126 (denying substantive consolidation because movant failed to show effect of substantive consolidation on creditors of the various corporate entities and one such entity was not a debtor under relevant statutory provision). New Zealand law provides for substantive consolidation in Companies Act 1993, § 271 (N.Z.).

The leading U.S. published court opinion on substantive consolidation is *Owens Corning,*[290] where the circuit court, reversing the district court's order for the substantive consolidation of a multinational group of companies, adopted the following requirements for substantive consolidation under U.S. law: (a) the fundamental ground rule of U.S. bankruptcy law is to respect the separate status of legal entities; (b) substantive consolidation should nearly always address harms caused by debtors and the entities they control who disregard separateness—harms caused by creditors are typically remedied by other bankruptcy law provisions; (c) mere benefit of administration of a case is hardly a harm justifying substantive consolidation; (d) substantive consolidation is an extreme and imprecise remedy that should be used rarely and only as a last resort after considering and rejecting other remedies; and (e) substantive consolidation may only be used defensively to remedy identifiable harms caused by entangled affairs, and may not be used offensively to alter creditors' rights or to disadvantage tactically a group of creditors in the plan process.[291] The court summarized its rule as follows: absent consent, substantive consolidation may be approved only if (1) the entities to be consolidated "disregarded separateness [prepetition] so significantly their creditors relied on the breakdown of entity borders and treated them as one legal entity, or . . . (2) postpetition the assets and liabilities of the entities are so scrambled that separating them is prohibitive and hurts all creditors."[292]

Substantive consolidation should be available in the international regime. However, it should be used sparingly.[293] For enterprise groups, it should be available only in circumstances similar to those described in the *Owens Corning* decision. In addition, a sale of the collective assets of two or more entities as a package may provide a sufficiently higher price than would the sale of the assets of the individual entities, such that the assets of the entities involved should at least be substantively consolidated for the purposes of the sale.[294]

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[290] *In re* Owens Corning, 419 F.3d 195 (3d Cir. 2005) (amended 2007).

[291] *Id.* at 210-11.

[292] *Id.* at 211.

[293] *Accord* INSOL Europe Report, *supra* note 8, at 98-100.

[294] *See* Mevorach, *supra* note 4, at 374. Professor Mevorach suggests that substantive consolidation be limited to those enterprise groups whose business is integrated. *See id.* at 377-79. I agree with her that the conditions appropriate for substantive consolidation are more likely

G. Comparison with INSOL Europe Proposal

My proposal shares some similarities to the INSOL Europe proposal for revising the EU Regulation. INSOL Europe proposes a "European Rescue Plan,"[295] structured in the EU Regulation, which *would* permit the adoption of a rescue plan for two or more related companies with insolvency proceedings pending in different EU countries.[296] A plan for an enterprise group would be governed by EU law,[297] and would be proposed in the court where the insolvency case of the ultimate parent company is pending.[298] INSOL Europe would leave in place national legislation with respect to the substance of multinational rescue plans, but would introduce an additional instrument for the adoption of such plans.[299]

In broad outline, the European Rescue Plan proposes the division of creditors into separate classes for each entity included in the joint plan,[300] and that creditors of different ranking with respect to the same debtor also be placed in different classes.[301] Creditors are to vote by class,[302] and approval of the plan by a class would require an affirmative vote of a qualified majority of the creditors (such as two thirds) in the

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to occur in such circumstances. However, I disagree that it should be available only in these circumstances.

[295] The European Plan and the procedures for its approval by the court are inspired by the chapter 11 process under U.S. bankruptcy law, 11 U.S.C. § 1121-1129 (2012). *See* INSOL Europe Report, *supra* note 8, at 102. For an explanation and defense of the INSOL Europe plan, see Robert van Galen, *International Groups of Insolvent Companies in the European Community,* 3 INT. INSOLVENCY L. REV. 376 (2012).

[296] *See* INSOL Europe Report, *supra* note 8, at 101-08.

[297] *See id.* at 101.

[298] *See id.*

[299] See *id.*

[300] *See id.* at 101-08.

[301] *See id.*

[302] *See id*.

class.[303] If one or more classes does not vote in favor of the plan (by the required majority), the court may apply "cram down" provisions provided that (1) a specified majority of the creditors has accepted the plan, and (2) for any class of dissenting creditors, those class members (a) receive more benefits than they would receive if the company in question were liquidated, or (b) the benefits that they receive are fair in relation to the benefits which the members of the other classes are to receive, taking into account the relative strength of their respective positions.[304] If these requirements are met, the plan for the enterprise group may be approved by the court unless (a) approval has been obtained by dishonest means, or (b) an objecting creditor will receive less than it would in the liquidation of the relevant company.[305]

While the INSOL Europe proposal focuses principally on the plan of reorganization and its approval, for which the proposal suggests an international procedure, my proposal suggests a thoroughgoing structure to treat the insolvency problems of an international enterprise group.

The most striking substantive difference is that I propose that all of the insolvency cases for the members of the enterprise group may be commenced (and typically will be commenced) in the State where the ECOMI is located,[306] while INSOL Europe proposes that each member entity in the enterprise group commence its case in the State where its own COMI is located.[307] In addition, I propose a separately designated group insolvency case, to be commenced in the ECOMI venue at the outset of the enterprise group insolvency cases, to serve as an umbrella for coordinating the insolvency cases of the various group members.[308]

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[303] *See id.*

[304] *See id.*

[305] *See id.* at 107-08.

[306] *See supra* text at notes 151-167.

[307] *See* INSOL Europe Report, *supra* note 8, at 92-93. While the INSOL Europe Report discusses the advantages of locating the COMI of each entity in the enterprise group in the same State as the location of the ultimate parent company, on balance it takes the view that the drawbacks of this solution weigh in favor of a "less drastic solution." *See id.* at 47. The less drastic solution that INSOL Europe proposes is the administrator in the case of the ultimate parent "be given powers similar to those that the [administrator] in main proceedings has vis-à-vis secondary proceedings." *Id.* at 93.

[308] *See supra* text at notes 146-150.

INSOL Europe and I agree on several features of an insolvency system for enterprise groups, although we may differ in the details. The major issues on which we agree include: that each legal entity should have its own separate insolvency case;[309] that secondary proceedings should not be limited to liquidation proceedings;[310] and that substantive consolidation should be permitted for entities in an enterprise group case in appropriate circumstances.[311]

Perhaps the most important difference between my proposal and that by INSOL Europe is the scope of the two proposals. My proposal is for a world-wide international insolvency regime for multinational enterprise groups, while the INSOL Europe proposal is limited to the European Union. In consequence, my proposal has a multitude of details on issues not addressed at all by the INSOL Europe Proposal.

IV. Theoretical Consequences – Universalism and Territorialism

The views expressed in this paper are through and through universalist: the foregoing proposals fall clearly on the side of modified universalism in the universalism-territorialism debate.[312] The concept of a common venue for all of the insolvency cases for an enterprise group is firmly rooted in the universalist tradition.

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[309] *Compare* text at note 148, *supra with* INSOL Europe Report, *supra* note 8, at 92-93.

[310] *Compare* text at note 232-236, *supra with* INSOL Europe Report, *supra* note 8, at 87.

[311] *Compare* text at notes 279-294, *supra with* INSOL Europe Report, *supra* note 8, at 98-100. The INSOL Europe Report cogently makes provision for the termination of the insolvency case that is left behind when the estate of one entity is substantively consolidated with the estate of another pursuant to substantive consolidation. *See id*. at 98-99. If the non-surviving estate is located in a different State, the INSOL-Europe Report recommends that it become a secondary proceeding. *See id.*

[312] I have previously staked out my modified universalist views. *See* Bufford, *supra* note 196. For other commentators who have defended the universalist position (usually in modified universalist form), *see, e.g.,* Pottow, *supra* note 40; Brian M. Devling, *The Continuing Vitality of the Territorial Approach to Cross-Border Insolvency*, 70 UMKC L. REV. 435, 450-52 (2002); Kent Anderson, *The Cross-Border Insolvency Paradigm: A Defense of the Modified Universal Approach Considering the Japanese Experience*, 21 U. PA. J. INT'L ECON. L. 679 (2000); Hannah L. Buxbaum, *Rethinking International Insolvency: The Neglected Role of Choice-of-Law Rules and Theory*, 36 STAN. J. INT'L L. 23, 60 (2000); Liza Perkins, Note, *A Defense of Pure Universalism in Cross-Border Corporate Insolvencies*, 32 N.Y.U. J. INT'L L. & POL. 787 (2000); Ronald J. Silverman, *Advances In Cross-Border Insolvency Cooperation: The UNCITRAL Model Law on Cross-Border Insolvency*, 6 ILSA J. INT'L & COMP. L. 265 (2000); Jay L. Westbrook, *A*

Briefly, territorialism is the traditional perspective on international insolvency. Under this theory, each country takes control of the assets of an international entity or enterprise group within its national borders and administers them according to its domestic law for the benefit of its local creditors, with no consideration of the consequences to the enterprise as a whole.[313] Thus, bankruptcy laws traditionally were limited to debtors and property within the territorial boundaries of a particular country.[314]

Modified universalism,[315] in contrast, takes the view that the entire case and its assets should be administered under the local law of the venue State, except to the extent that choice of law rules lead to the application of foreign law. In addition, under this view, a non-home country court may open a secondary insolvency case to supplement the home country main case for a debtor.[316] Modified universalism seeks to achieve a global collective result to the maximum extent possible.[317] Modified

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Global Solution to Multinational Default, 98 MICH. L. REV. 2276, 2283-88 (2000); Lucian Arye Bebchuk & Andrew T. Guzman, *An Economic Analysis of Transnational Bankruptcies*, 42 J.L. & ECON 775 (1999); Lore Unt, Note, *International Relations and International Insolvency Cooperation: Liberalism, Institutionalism, and Transnational Legal Dialogue,* 28 LAW & POL'Y INT'L BUS. 1037 (1997); Todd Kraft & Allison Aranson, *Transnational Bankruptcies: Section 304 and Beyond*, 1993 COLUM. BUS. L. REV. 329, 349-51 (1993).

[313] *See, e.g.,* Bufford, *supra* note 196, at 113. The most vigorous defender of territorialism in recent years is Professor Lynn M. LoPucki. *See, e.g.,* LoPucki, *supra* note 212; Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy,* 98 MICH. L. REV. 2216 (2000); Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach,* 84 CORNELL L. REV. 696 (1999).

[314] The concept of COMI was first put into service in the firmly single-entity legal structures of the EU Regulation and the UNCITRAL Model Law.

[315] *See, e.g.,* Bufford, *supra* note 196, at 111-13; Westbrook, *supra* note 312, at 2299-2332. There is a pure form of universalism, which takes the view that an international case should be handled by a single court using a single legal system, and that all of the issues in the case should be handled under this single regime. *See, e.g.,* Perkins, *supra* note 312.

[316] For a debate between territorialism and universalism, see Lynn M. LoPucki, *Global and Out of Control?,* 79 AM. BANKR. L.J. 79 (2005) (defending the territorialist view); Bufford, *supra* note 196, at 105 (defending a modified universalist view); Lynn M. LoPucki, *Universalism Unravels,* 79 AM. BANKR. L. J. 143 (2005) (replying to Judge Bufford); Pottow, *supra* note 40 (replying to Professor LoPucki).

[317] Mevorach, *supra* note 4, at 383.

universalism has been largely adopted in the UNCITRAL Model Law, and is the viewpoint adopted in this proposal.

The concepts of "universalism," its counterpart "territorialism," and the universalist correlative of "modified universalism" have been elaborated upon principally in the traditional context of the multinational insolvency of a single legal entity. The position taken here is a substantial extension of these concepts to enterprise groups.

The maximization of value for international enterprise groups, like the maximization of value for a single legal entity, is best facilitated by the application of a modified universalist view of international insolvency, to the extent feasible, to the entire group's insolvency. "Pure universalism" is the view that insolvency cases should be resolved under the law of a single country, typically the "home country" of the enterprise group.[318] "Modified universalism" is the view that there should be a single main case or proceeding in the home country, assisted by secondary or non-main proceedings as needed in other countries.[319] Universalism, to the extent that it can be applied, substantially reduces transaction costs, compared to territorialism. This is especially true in the context of enterprise groups. Universalism, to a substantial extent, is already incorporated in the EU Regulation and the UNCITRAL Model Law, for single legal entities. The proposal herein reducing the generally accepted modification of universalism, applied to enterprise groups, is best suited to realize to the greatest extent the value of an enterprise group for the benefit of creditors and other parties in interest.

Indeed, this proposal makes fewer concessions to territorialism than are traditionally made by modified universalism. The concept that the insolvency cases for the members of an enterprise group should be commenced in the ECOMI State, and that these cases for each member of the enterprise group should be main proceedings (notwithstanding that the COMIs of some of the entities may be located in other States), is a substantial step toward universalism beyond what most universalists have been willing to take.

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[318] *See, e.g., id.* at 379 ("the ultimate aim of universalism is the administration of multinational insolvencies by a single court applying a single insolvency law").

[319] The purpose of modified universalism, in contrast with the pure form of univeralism, is to give recognition to the sometimes vastly different insolvency regimes in various countries. *See, e.g., id*. at 383-84.

However, universalism is not the driving force behind the proposals in this paper. Instead, they are driven by the need for a practical system of international insolvency law to preserve the value of enterprise groups.

This paper contends that territorialism cannot formulate an efficient or workable solution to the problem of the insolvencies of multinational enterprise groups, a solution that preserves the economic value of the group and that is workable in practice, to any suitable extent.[320] In contrast, universalism with limited modifications points us in the direction of a feasible solution.[321]

Furthermore, it is noteworthy that international enterprise groups in general (whether insolvent or not) escape the regulation and control of national policies.[322] It is not surprising that international insolvency law is likewise not amenable to local control.[323]

VI. Conclusions

An international legal regime to deal with the insolvencies of international enterprise groups remains the largest unsolved problem for the international insolvency law system. Major efforts are underway to resolve this problem in the EU Regulation, which will likely point the way to a similar resolution under the UNCITRAL Model Law.

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[320] Professor Mevorach contends that there is a role for territorialism to play, and for contractualism as well, in the context of insolvencies of multinational enterprise groups. *See id.* at 385-86.

[321] The view in this proposal gives even less credence to contractualism, a view espoused chiefly by certain law professors, chiefly in the United States. *See, e.g.,* Robert K. Rasmussen, *Debtor's Choice: A Menu Approach to Corporate Bankruptcy,* 71 Tex. L. Rev. 51, 100-11, 117 (1992). In my view, insolvency law is public law, adopted by the State to rescue debtors from their contractual agreements and other debts that, in retrospect, turn out to be improvident. The U.S. Supreme Court has described U.S. bankruptcy law as a "public regulatory scheme" chiefly consisting in public rights. *See* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 54-55 (1989) (finding that a fraudulent transfer action in a bankruptcy case against a third party did not fall within the public rights coverage of the bankruptcy public regulatory scheme, and thus that such third parties are entitled to a trial by jury). In addition, a regime where proper venue and jurisdiction are based on ECOMI or COMI is very non-contractarian in principle.

[322] *See* Mevorach, *supra* note 4, at 398-99.

[323] *See id.*; *see also* Westbrook, *supra* note 312, at 2298-99; 2310-11.

In my view, these goals are best realized through a system with the following features:

1. The country where an enterprise group's is located is the presumptively proper country for the commencement of main insolvency proceedings or cases for each member of the group. All business entities that are members of an enterprise group shall be permitted to commence their main insolvency cases in the ECOMI country. Any such case commenced in the ECOMI shall be assigned to the same judge for supervision and administration. Once such a main proceeding is commenced in the ECOMI State, no main insolvency proceeding for such an entity may be commenced or proceed in any other State, unless the appropriate court in the ECOMI country gives authorization.

2. Where insolvency cases for members of an enterprise group are commenced in the ECOMI State, the procedural rules of the ECOMI state will apply. The procedural rules will need augmentation to accommodate the rights of foreign creditors (including those in the COMI State of a member entity where it differs from the ECOMI State). Foreign creditors should be entitled to equal treatment with domestic creditors.

3. In addition, each such case will be governed for the most part by the substantive law of the ECOMI State (including applicable choice of law rules) for both insolvency and other issues. For certain issues, such as avoidance of suspect transactions, determining the merits of claims, and the ranking of claims for the distribution of assets, the law of the COMI State (including its choice of law rules) should govern.

4. The regime should permit a common administrator (e.g., trustee or liquidator) for all of the cases commenced for members of the enterprise group in the ECOMI court. Similarly, there should be common office holders (e.g., legal counsel, accountants, restructuring officers, committees of creditors and their professionals, and other creditors' representatives) for each other category provided under the insolvency law of the ECOMI State.

5. A secondary proceeding may be commenced for any member of the enterprise group in a non-ECOMI State, provided that the entity has either its individual COMI or an establishment in that country. The commencement of such a proceeding should be subject to approval of the home court in the ECOMI State.

6. Cooperation and communication should be authorized and encouraged "to the maximum extent possible"[324] between courts, judges, and office holders among all the related cases (including secondary cases) in all States were they are commenced.

These features, in my view, can lead to the adoption of a regime for the insolvencies of international enterprise groups that meet the main goals of such a system: maximizing enterprise value; providing clarity and predictability in the application of the law; treating similarly situated creditors equally, insofar as is reasonable across national boundaries: providing procedural fairness to creditors and parties in interest across national boundaries so that all creditors from all relevant countries are given a full and fair opportunity to explain their views to the tribunal: protecting important interests of the nations at issue: and protecting employment.

The pending revisions to the EU Regulation will likely lead the way in formulating an international legal structure for insolvencies of enterprise groups. While this subject is on the agenda for pending EU Regulation revisions, UNCITRAL has no procedure pending on this subject.[325] UNCITRAL Working Group V on Insolvency continues to be active in addressing the insolvency problems of international enterprise groups. Assuming that the European Union puts its enterprise group revisions in the EU Regulation, there will be substantial pressure on UNCITRAL do further work in this area.[326]

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[324] This language is taken from the UNCITRAL Model Law, art. 25.

[325] Revisions to the UNCITRAL Model Law would come from UNCITRAL Working Group V, which is responsible for the UNCITRAL Model Law and related matters. UNCITRAL has adopted a legislative guide on the subject of the insolvency of enterprise groups. *See* UNCITRAL – Enterprise Groups, *supra* note 17. However, the suggestions in that document have not been codified in the UNCITRAL Model Law, and no effort to do so is pending.

[326] It would be better for UNCITRAL to modify the present Model Law to incorporate provisions on multinational enterprise groups, rather than draft a separate model law. By incorporating the enterprise group provisions into the present model law, UNCITRAL would encourage an adopting State to enact the entire package at the same time. In contrast, if the provisions are incorporated into two separate model laws, many States would likely adopt one without the other. In addition, by using the present model law, UNCITRAL could take advantage of a number of existing provisions that could be applied to such enterprise groups, without repeating them in the new model law.