# Global Insolvency Proceedings for a Global Market: The Universalist System and the Choice of a Central Court

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In this time of relative prosperity, large multinational companies are filing insolvency proceedings all over the world.[1] Restructuring is now part of the daily routine of global business—back then a bit more, at the moment a bit less, but always a stream of needed repairs. The overall challenge is to manage damaged enterprises across borders in a world governed by nation-states. In this Article, I suggest that we should enlarge our perspective to embrace not only the Model Law on Cross-Border Insolvency (Model Law),[2] but also the larger system of modified universalism that it both presupposes and anticipates.

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1. At the time of writing, recent filings have included *In re* Premium Point Master Mortg. Credit Fund, Ltd., No. 1:18-BK-10586 (Bankr. S.D.N.Y. filed Mar. 1, 2018); *In re* PT Bakrie Telecom Tbk, No. 1:18-BK-10200 (Bankr. S.D.N.Y. filed Jan. 29, 2018); *In re* RCR Int'l Inc. and RCR Int'l Inc., No. 1:18-BK-10112 (Bankr. D. Del. filed Jan. 18, 2018); *In re* Bibby Offshore Servs. Plc, No. 1:17-BK-13588 (Bankr. S.D.N.Y. filed Dec. 20, 2017); *In re* CGG Holding (U.S.) Inc., No. 1:17-BK-11637 (Bankr. S.D.N.Y. filed June 14, 2017); *In re* Toys "R" Us, Inc., No. 3:17-BK-34665 (Bankr. E.D. Va. filed Sept. 19, 2017); *In re* Zetta Jet USA, Inc., No. 2:17-BK-21386-SK (Bankr. C.D. Cal. filed Sept. 15, 2017); *In re* Seadrill Ltd., No. 6:17-BK-60079 (Bankr. S.D. Tex. filed Sept. 12, 2017); *In re* Takata Americas, No. 1:17-BK-11372 (Bankr. D. Del. filed June 25, 2017) (seeking chapter 15 relief in aid of a Japanese proceeding); *In re* Ultra Petroleum Corp., 575 B.R. 361 (Bankr. S.D. Tex. 2017); *see also* Michael O'Boyle & Michael Perry, *Mexico's ICA Says Filed Pre-packaged Bankruptcy Plan*, REUTERS (Aug. 26, 2017), https://www.reuters.com/article/us-mexico-ica/mexicos-ica-says-filed-pre-packaged-bankruptcy-plan-idUSKCN1B604S [https://perma.cc/8NDV-VLLU].

2. U.N. COMM'N ON INT'L TRADE LAW (UNCITRAL), UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION, U.N. Sales No. E.14.V.2 (2014) [hereinafter UNCITRAL MODEL LAW].

## I. Background

As explained just below, I have argued that the text of the Model Law should be interpreted as a "systems" text consistent with its intended purpose as a major part of that international system. I expand the argument here to say that the needs of the system of modified universalism embodied in the Model Law should govern judicial action over an expanding pool of issues touching international insolvency. Those jurisdictions that have adopted texts or judicial principles similar to the Model Law should embrace a similar understanding, even if they do not adopt the Model Law itself.[3]

This Article discusses these key elements of the Model Law system:

1. At the heart of the system of modified universalism is the choice of a central court to coordinate a multinational case, so the discussion includes an analysis of the general rule for choosing the central court and important exceptions to that rule;
2. The "center of the debtor's main interests" (COMI) test best identifies the central court because the court's relationship to the debtor legitimates its actions as the jurisdiction with the strongest interest in the case;
3. Certain situations create exceptions to the COMI test or require supplementation of that test; and
4. Every multinational case requires real-time coordination and cooperation among jurisdictions, which in turn require an active judicial role in guiding professionals toward international communication and cooperation.

### *A. "Systems" Texts*

When a binding legal text is adopted that has a purpose or rationale only if applied as part of a system, the courts should be active to resolve issues it does not squarely cover in a way that facilitates that system. To retain old doctrines or refuse to consider new issues may amount to obstruction of the system that the lawgiver meant to adopt.[4] In this Article, my central objective

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3. A number of countries that have not adopted the Model Law nonetheless follow similar principles under the doctrine of "comity" or international cooperation. *See, e.g.*, Jay Lawrence Westbrook, *Chapter 15 at Last*, 79 AM. BANKR. L.J. 713, 721 & nn.50–53 (2005) (discussing German and Spanish bankruptcy law).

4. This Article is not the place to launch an extensive discussion of textualism, so I will merely note my disagreement with any doctrine that permits the courts to announce they will not move an inch beyond what a legal text requires even to further the policy that is reflected in the text. I must observe, however, that allegiance to such doctrines seems often to turn on judicial views about the underlying policy. For a juxtaposition of the ever-narrowing scope of "extraterritorial" effects of Congressional enactments with the constantly expanding boundaries of the Federal Arbitration Act in the United States, compare *In re* Ampal-Am. Isr. Corp., 562 B.R. 601 (Bankr. S.D.N.Y. 2017) (refusing to apply provisions of the Bankruptcy Code extraterritorially absent clear statutory intent), *with* Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013) (holding that the FAA does not

is to describe the needs of the global insolvency system as represented by the Model Law. As one consequence, I hope to advance our understanding of the Model Law as a systems law that should be interpreted in ways that advance the needs of the system. In a recent article, I outlined the systems analysis:

> One useful distinction that I have not found in the literature is the difference between a standards text and a system text. It seems plausible to divide international instruments into two broad categories: those that seek to establish international (or universal) standards and those that seek to establish an international system. . . .
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> As a general proposition, it would seem that the international rule for the standards texts would usually be focused almost entirely on uniformity, so that states and individual actors could conform their conduct . . . to those international norms, and nations could be consistent in applying those norms. By contrast, uniformity would be an important but subsidiary goal for a system text. There the overriding need is for decisions that enable the international system to function as designed. Uniformity would certainly contribute to that goal, but would hardly be enough by itself.[5]

I concluded by proposing that "courts should determine if an international text establishes a system rather than standards; if so, it should adopt whatever [rule] best enables that system to achieve its intended ends."[6] In that analysis, the Model Law is a systems (institutional) text, while a text devoted to international rules (for example, about priority in insolvency distributions) would be a "standards" text. While any legal text must be applied as written, most texts require interpretation and occasionally the filling of an unintended gap that impedes the text's intended function. Understanding the needs of the global insolvency system helps both in applying the Model Law and in achieving the demands of modified universalism where the Model Law does not apply.[7] This Article starts with that understanding and proceeds from there.

### *B. Goals of Global Insolvency Law*

In that context, we begin with the fundamental goals of insolvency law that are common to all of us: maximizing value for all stakeholders and

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permit courts to invalidate a contractual waiver of class arbitration on the ground that the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery), and AT&T Mobility v. Concepcion, 563 U.S. 333 (2011) (invalidating a law that conditioned the enforcement of arbitration on the availability of class procedures because that law interfered with fundamental attributes of arbitration).

5. Jay Lawrence Westbrook, *Interpretation Internationale*, 87 TEMP. L. REV. 739, 750–53 (2015).

6. *Id.* at 750–51.

7. *See supra* notes 2–3 and accompanying text.

satisfying public policy in a fair allocation of that value.[8] Nations still differ substantially in defining the classes of stakeholders in an insolvency proceeding and in the allocation of value to each class,[9] but we are united in seeking to obtain as much value as possible and to achieve socially desirable ends in a fair and orderly process.

Neither of these goals can be fully realized unless a single collective insolvency proceeding extends over an entire market. Only in a single proceeding can all assets be assembled to be sold or recapitalized free of prior claims and value allocated fairly to all stakeholders.[10] Only a unified approach can produce predictable results that enhance the efficiency of market transactions based on a common understanding of the effects of insolvency.[11] For that very reason, the founders of the United States, in

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8. *See* Jay Lawrence Westbrook, *Systemic Corporate Distress: A Legal Perspective*, *in* RESOLUTION OF FINANCIAL DISTRESS: AN INTERNATIONAL PERSPECTIVE ON THE DESIGN OF BANKRUPTCY LAWS 47, 55 (Stijn Claessens et al. eds., 2001) ("General agreement exists on the central purposes of insolvency law: maximizing asset values, providing equality of treatment for creditors and other parties with similar legal rights, preventing and undoing fraud, and providing commercially predictable results and transparent legal procedures.").

9. *See, e.g.*, JANIS P. SARRA, EMPLOYEE AND PENSION CLAIMS DURING COMPANY INSOLVENCY: A COMPARATIVE STUDY OF SIXTY-TWO JURISDICTIONS 9, 13 (2008) (finding that some nations use a priority system for employees, who are viewed as "particularly vulnerable claimants," and that many of those countries institute caps on the amounts of claims that are given priority).

10. *See* Jay Lawrence Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276, 2292–93 (2000) (explaining that a single bankruptcy proceeding can provide a unified approach to assembly and sales of assets, increase the possibility of reorganization, and ensure equality for stakeholders with similar legal rights around the world).

11. *Id.* at 2293 ("A single court would maximize asset values . . . by providing a unified approach to assembly and sale of assets as a whole. If it commanded a worldwide stay, it could most effectively protect those assets prior to sale."). *See also* Cambridge Gas Transp. Co. v. Official Comm. of Unsecured Creditors [2006] UKPC 26, [2007] 1 AC 508 (appeal taken from the Isle of Man) (reaffirming the universalist tradition of the English common law and recognizing pragmatism and realism that are integral features of the notion of "modified universalism"); McGrath v. Riddell (*in re* HIH Cas. & Gen. Ins. Ltd.) [2008] UKHL 21, [2008] 1WLR 852, [6]–[7], [30], [36] (appeal taken from Eng.) (advocating for the principle of universalism); World Bank Group [WBG], *Principles for Effective Insolvency and Creditor/Debtor Regimes*, at 20 (2016), http://documents.worldbank.org/curated/en/518861467086038847/pdf/106399-WP-REVISED-PUBLIC-ICR-Principle-Final-Hyperlinks-revised-Latest.pdf [https://perma.cc/4WWQ-GDZW] (discussing the objectives of effective insolvency systems); TRANSNATIONAL INSOLVENCY: GLOBAL PRINCIPLES FOR COOPERATION IN INTERNATIONAL INSOLVENCY CASES princ. 1–2 (AM. LAW INST. & INT'L INSOLVENCY INST. 2012) (outlining the objectives and aim of the Global Principles) [https://perma.cc/T7MS-CJV7] [hereinafter ALI–III GLOBAL PRINCIPLES]; Todd Kraft & Allison Aranson, *Transnational Bankruptcies: Section 304 and Beyond*, 1993 COLUM. BUS. L. REV. 329, 364 (1993) ("A system that brings together all the creditors, and all the debtors' property, for a single distribution is the most efficient and equitable system possible."); John Lowell, *Conflict of Laws as Applied to Assignments for Creditors*, 1 HARV. L. REV. 259, 264 (1888) ("[I]t would be better in nine cases out of ten that all settlements of insolvent debtors with their creditors should be made in a single proceeding, and generally at a single place[.]"); Jay Lawrence Westbrook, *Multinational Financial Distress: The Last Hurrah of Territorialism*, 41 TEX. INT'L L.J. 321, 324–25 (2006) ("To function effectively, bankruptcy law must have a reach co-extensive with the market

seeking to create a single national market, realized that one of the few specific powers that must be given to the new national government was the authority to make uniform national laws on the subject of bankruptcy.[12] Similarly, older writers asserted the "universalism" of insolvency law.[13]

It follows that the globalized marketplace of the twenty-first century requires a global insolvency proceeding. That should be our goal. However, because insolvency laws differ considerably around the world, and it is a technical and difficult area of law, that ideal will not be achieved for some time.[14] In light of that, an increasing number of courts and academics have come to accept a standard that I have suggested—"modified universalism"—which is universalism adapted to the political realities of differing laws in a world in which law is administered by nation-states.[15] The objective is to

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in which it operates. It is for that reason that most bankruptcy laws are national in scope, even in countries like the United States where much commercial and property law is regional.").

12. U.S. CONST. art. I, § 8. *See* Dan J. Schulman, *The Constitution, Interest Groups, and the Requirements of Uniformity: The United States Trustee and the Bankruptcy Administrator Programs*, 74 NEB. L. REV. 91, 99–105 (1995) (discussing the original intent behind the bankruptcy power); Westbrook, *supra* note 10, at 2286–87 (noting that the Founders gave the national government the power to govern general defaults while reserving the commercial law-making power to states).

13. *See, e.g.*, J.H. DALHUISEN, 1 DALHUISEN ON INTERNATIONAL INSOLVENCY AND BANKRUPTCY 3-3, 3-11 (7th ed. 1986) (indicating that the need for coordination was becoming more widely recognized among nations and asserting that "full faith and credit" treaties have forwarded coordination in bankruptcy); JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS 7–8 (Morton J. Horwitz et al., eds., Arno Press Inc. 1972) (1834) (proposing that the public welfare may necessitate exceptions to the general rule that the laws of one country are limited to that country); Lowell, *supra* note 11, at 264; Kurt Nadelmann, *Legal Treatment of Foreign and Domestic Creditors*, 11 LAW & CONTEMP. PROBS. 696, 709–10 (1946); Jay Lawrence Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L.J. 457, 458 (1991); *see also* FRIEDRICH CARL VON SAVIGNY, PRIVATE INTERNATIONAL LAW AND THE RETROSPECTIVE OPERATION OF STATUTES: A TREATISE ON THE CONFLICTS OF LAWS 257–64 (William Guthrie trans., 2d ed. 1880) (discussing the peculiar nature of bankruptcy and its implications on the conflict of laws); John D. Honsberger, *Conflict of Laws and the Bankruptcy Reform Act of 1978*, 30 CASE W. RES. L. REV. 631, 675 (1980) (discussing the trend toward harmonization between the bankruptcy systems of the United States and Canada); Stefan A. Riesenfeld, *The Evolution of Modern Bankruptcy Law*, 31 MINN. L. REV. 401, 415 & nn.95–97 (1947) (surveying classic leading scholarships in international insolvency law and theory of universality); Barbara K. Unger, *United States Recognition of Foreign Bankruptcies*, 19 INT'L L. 1153, 1183 (1985) (observing the U.S. courts' increasing recognition of foreign proceedings, which demonstrates a more cooperative universality view).

14. *See* JAY LAWRENCE WESTBROOK, CHARLES D. BOOTH, CHRISTOPH G. PAULUS & HARRY RAJAK, A GLOBAL VIEW OF BUSINESS INSOLVENCY SYSTEMS 232 & n.19 (2010) (discussing the practical obstacles faced by a unitary approach as a result of the disparities in the laws of various countries) [hereinafter WESTBROOK ET AL., A GLOBAL VIEW]; Westbrook, *supra* note 10, at 2299 (recognizing that to realize a universalist approach requires international consensus and would take a long time).

15. *See* Cambridge Gas [2006] UKPC 26 [16]–[20] (appeal taken from Isle of Man) (recognizing that English common law has traditionally believed the importance of universality in international insolvency proceedings and that the underlying principle of universality requires foreign courts' recognition and assistance); Rubin v. Eurofinance SA [2012] UKSC 46 [51] (appeal

produce results as close as possible to those that would emerge from a single global proceeding.

Modified universalism lies at the heart of the Model Law.[16] The traditional concept of "territorialism," or the "grab rule," has been largely abandoned.[17] Unlike territorialism, modified universalism requires a "central" proceeding that serves a coordinating role, as well as a sophisticated, policy-sensitive approach for choice of law.[18] The most important task of a system of modified universalism is to identify the jurisdiction that should host the central proceeding.

Under the Model Law, the "main" insolvency proceeding is the one opened at the debtor's center of main interests, or COMI.[19] The preferred result under the Model Law is that the main proceeding should be the central one that coordinates the global insolvency process. This Article discusses circumstances in which that might not be true or might not be entirely true.

## II. A Moratorium with Global Effect

The purposes of insolvency law cannot be vindicated without court control of the affairs of a debtor.[20] To apply insolvency law properly to a

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taken from Eng.) (accepting the "general principle of private international law . . . that bankruptcy (whether personal or corporate) should be unitary and universal." (quoting *In re* HIH [2008] UKHL 21, [6]–[7] (appeal taken from Austl.))); ALI–ILL GLOBAL PRINCIPLES, *supra* note 11, princ. 10; Jay Lawrence Westbrook, *Choice of Avoidance Law in Global Insolvencies*, 17 BROOK. J. INT'L L. 499, 517 (1991) ("[Modified universalism] accepts the central premise of universalism, that assets should be collected and distributed on a worldwide basis, but reserves to local courts discretion to evaluate the fairness of the home-country procedures and to protect the interests of local creditors.").

16. *See, e.g.*, Lynn M. LoPucki, *Global and Out of Control?*, 79 AM. BANKR. L.J. 79, 82–83, 86 (2005) (summarizing the history behind the promulgation of the UNCITRAL Model Law, which incorporated the universalists' "home country" concept); *see generally* UNCITRAL MODEL LAW, *supra* note 2.

17. *See* Jay Lawrence Westbrook, *Universalism and Choice of Law*, 23 PA. ST. INT'L L. REV. 625, 625 (2005) (noting that these traditional approaches have been replaced by modified universalism).

18. *See id.* at 631–32 (explaining that, under the modified universalism approach, courts should consider the usual choice of law factors like place of contracting, the parties' choice of law, principal place of business, principal location of assets, location of most creditors, and the like); *see also* WESTBROOK ET AL., A GLOBAL VIEW, *supra* note 14, at 238 (discussing how the degree of adaptability of insolvency laws in different jurisdictions affects modern universalism and choice of law).

19. UNCITRAL MODEL LAW, *supra* note 2, art. 17(2)(a); *see also* WESTBROOK ET AL., A GLOBAL VIEW, *supra* note 14, at 236 ("Under the lead of the European Union Regulation and the UNCITRAL Model Law it becomes nowadays increasingly accepted that the correct place for opening the main proceeding should be the center of the debtor's main interests.") (internal citations omitted); Susan Block-Lieb, *The UK and EU Cross-Border Insolvency Recognition: From Empire to Europe to "Going It Alone"*, 40 FORDHAM INT'L L.J. 1373, 1395–1400 (2017) (explaining the application of the COMI test to British and European laws); Lynn M. LoPucki, *Universalism Unravels*, 79 AM. BANKR. L.J. 143, 143 (2005) (describing the universalism approach under the Model Law as applying the COMI country's law to control a company's worldwide bankruptcy).

20. *See, e.g.*, Jay Lawrence Westbrook, *The Control of Wealth in Bankruptcy*, 82 TEXAS L.

global market requires the power to halt collection efforts all over the world as quickly as possible to prevent the great loss of value that would result from a mad scramble for assets by creditors. Control is also necessary to ensure the allocation of that value in an orderly and fair way. The Model Law provides for an automatic moratorium or injunction upon recognition of a main proceeding by another jurisdiction.[21] The injunction provides the necessary cooperation by enjoining seizures by creditors, thus giving the courts control of the relevant assets in both the main and recognizing jurisdictions. The Model Law also permits interim injunctive relief prior to recognition.[22] However, the scope of this recognition injunction is not explicitly global and is subject to the constraints and limitations imposed under the law of the recognizing state,[23] so it is not a complete protection against creditor or debtor activity inconsistent with the necessary court control. That protection is also limited insofar as it may require some time to obtain relief in other jurisdictions after the filing of the main proceeding.

A better solution would be a worldwide injunction, or "stay" (in some countries a "moratorium"). No country in the world claims the power to impose a stay everywhere on the planet. But its closest approximation is what I would call an "indirect global stay," which is a stay that applies to any person (or legal entity) subject to the personal jurisdiction of a court and forbids that person from acting anywhere in the world in a way inconsistent with the court's insolvency moratorium.[24] Such a stay is limited because it applies only to persons subject to the court's personal jurisdiction, but it is global insofar as it restricts such persons' activities everywhere in the world.[25] While such a stay does not bind an actor not subject to personal jurisdiction in the country issuing the stay, it can block a large amount of debtor and creditor activity globally if the issuing court has personal

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REV. 795, 823 (2004) (discussing the importance of control in enforcing the collective process of bankruptcy); Oscar Couwenberg & Stephen J. Lubben, *Corporate Bankruptcy Tourists*, 70 BUS. LAW. 719, 742 (2015) (noting that the global stay available in U.S. bankruptcy proceedings provides better protection of debtors' assets and therefore was one of the reasons foreign corporations were attracted to the idea of filing bankruptcy in the United States).

21. UNCITRAL MODEL LAW, *supra* note 2, art. 20(1)(a).

22. *See id*. art. 19(1) (allowing courts to grant urgent relief upon application for recognition of a foreign proceeding).

23. *See id*. art. 29 (noting that the Model Law does not necessarily import the consequences of the foreign law into the insolvency system of the enacting state but that the relief granted may be aligned with a comparable proceeding commenced under the law of the enacting state).

24. I offer this phrase because I have not seen a term used to describe this sort of effect that a national court may give to an insolvency moratorium.

25. *See* Jay Lawrence Westbrook, *Multinational Insolvency: A First Analysis of Unilateral Jurisdiction*, *in* NORTON ANNUAL REVIEW OF INTERNATIONAL INSOLVENCY 11, 17–18 (2009) (explaining the personal jurisdiction requirement for the U.S. Bankruptcy Court to exercise control over bankruptcy proceedings, and the court's power to have effects on debtors' assets and actions outside of the United States).

jurisdiction over major creditors of a given debtor. For example, such a stay issued in Manhattan as to Debtor Corporation would bind JPMorgan Chase, which is undoubtedly subject to the orders of the bankruptcy court in that place. Because U.S. law says the order constrains that bank everywhere in the world,[26] the stay may prevent a large amount of activity against Debtor Corporation's assets in which that very large lender might otherwise engage.

## III. Control Countries

Because it depends on personal jurisdiction, a stay has its greatest effect when the issuing court is located in a country in which a number of major international creditors do substantial business and therefore are subject to the personal jurisdiction of that court.[27] A court in a country that is an economic backwater might not have personal jurisdiction over many important creditors in a given case, but a country located in a financial center may have great indirect power to constrain creditor activity everywhere.[28] The bankruptcy courts in Manhattan are a good example, given that a substantial percentage of the world's financial institutions do business there. I will call countries whose courts are in that position "control countries." Three of the

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26. *See, e.g.*, U.S. Lines, Inc. v. GAC Marine Fuels Ltd. (*In re* McLean Indus.), 76 B.R. 291, 295–96 (Bankr. S.D.N.Y. 1987) (finding creditors subject to the U.S. court's jurisdiction and enforcing as to property in Hong Kong and Singapore a worldwide automatic stay). Bankruptcy is not the only area in which the United States sometimes issues injunctions that include conduct outside its borders. *See, e.g.*, United States v. First Nat'l City Bank, 379 U.S. 378, 410 (1965) (affirming the imposition of a temporary injunction in an action by the United States for foreclosure of a tax lien as against a Uruguayan corporation); *see also* Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468, 1482 (9th Cir. 1992) (contempt sanctions issued against a Chinese party for non-compliance with discovery order); *In re* Grand Jury Proceedings Bank of Nova Scotia, 740 F.2d 817, 829 (11th Cir. 1984) (contempt sanction issued against a Cayman Island party for non-compliance with discovery order); Rogers v. Webster, No. 84-1096, 1985 U.S. App. LEXIS 13968, at *9–10 (6th Cir. Oct. 22, 1985) (ordering delivery of stock certificates located in Canada to Michigan); *In re* Gaming Lottery Sec. Litig., 96 Civ. 5567 (RPP), 2001 U.S. Dist. LEXIS 1204, at *18–19 (S.D.N.Y. Feb. 13, 2001) (ordering delivery of bank accounts in Scotland to New York); Koehler v. Bank of Bermuda Ltd., 12 N.Y.3d 533, 541 (2009) (ordering delivery of stock certificates located in Bermuda to New York). Many other countries do the same. *See, e.g.*, David Capper, *Worldwide Mareva Injunctions*, 54 MOD. L. REV. 328, 329–30 (1991) (U.K. Mareva injunctions).

27. *See, e.g.*, Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC, 474 B.R. 76, 81 (S.D.N.Y. 2012) (upholding bankruptcy court's extraterritorial application of the automatic stay, rendering a creditor's action in the Cayman courts void); *In re* Nortel Networks Inc., No. 09–10138–KG, 2011 WL 1154225, at *1 (D. Del. Mar. 29, 2011) (affirming bankruptcy court's order enjoining administrative proceedings against the debtor in the United Kingdom in a multinational company's bankruptcy proceeding); *In re* McLean Indus., Inc., 76 B.R. at 295–96. For a current sweeping example, see Order Restating and Enforcing the Worldwide Automatic Stay, *In re* Seadrill Ltd., No. 6:17-BK-60079 (Bankr. S.D. Tex. Sept. 13, 2017), ECF No. 91.

28. *See* Westbrook, *supra* note 25, at 17–18 ("[T]he effect of the automatic stay may be to block collection efforts anywhere in the world by any creditor that does business in the U.S., including most of the major international lenders, underwriters, and investors.").

countries that will often be in that position are the United Kingdom, the United States,[29] and now Singapore.[30]

While control countries may well serve as home to central proceedings for multinational insolvencies—that is, might host the central proceeding for a given case—their final insolvency judgments may be of limited value unless they are recognized and enforced in countries that have territorial control of the debtor's assets. The specific requirements for market-wide recognition are discharge (or nonenforcement) of prior debts and recognition of changes in title to property.[31] After a reorganization plan has been approved by a court with proper jurisdiction, only the debts recognized in the plan should be enforceable in any country.[32] Following either a reorganization or a liquidation, there must also be global acceptance of the effect of the proceeding on title to property, especially as to the results of sales.[33] If an insolvency-court judgment encounters substantial local

29. There may be some question about the extent of personal jurisdiction in such matters. *See* Daimler AG v. Bauman, 134 S. Ct. 746 (2014) (sharp limitation on general jurisdiction); Walden v. Fiore, 134 S. Ct. 1115 (2014) (limiting specific jurisdiction). This line of cases may suggest difficulty in obtaining jurisdiction over foreign entities in bankruptcy proceedings, but the Supreme Court has told us repeatedly that bankruptcy is an exceptional sort of legal procedure with special rules. In the area of the Tenth Amendment, for example, the Court has found that states may be subject to federal judgments in a way not possible in other sorts of federal lawsuits. *See* Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 362 (2006) ( "Bankruptcy jurisdiction, at its core, is in rem."); Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 447 (2004) ("The discharge of a debt by a bankruptcy court is similarly an in rem proceeding."). *See also* Jay Lawrence Westbrook, *Interpretation Internationale*, 87 Temple L. R. 739 at nn.37–39 (2015). The "in rem" analysis of those cases is especially applicable to the automatic stay.

30. *See* Companies (Amendment) Act 2017, § 211B(1)(d) (Sing.) (allowing Singapore courts to issue an order "restraining the commencement, continuation or levying of any execution, distress or other legal process against any property of the company"). This provision was added in the recent reform in which the Model Law was adopted. NAT'L ARCHIVES OF SINGAPORE, FACT SHEET ON THE COMPANIES (AMENDMENT) BILL 2017 AND LIMITED LIABILITY PARTNERSHIPS (AMENDMENT) BILL 2017, http://www.nas.gov.sg/archivesonline/data/pdfdoc/20170310004 /Factsheet%20on%20CA%20and%20LLP%20Act%20amendments_media.pdf [https://perma.cc/3F23-HXHG].

31. *See* ALI-III GLOBAL PRINCIPLES, *supra* note 11, princ. 27.1 (requiring each administrator in parallel international insolvency proceedings to obtain court approval of any action affecting assets or operations in a particular jurisdiction if approval is required under the laws of that jurisdiction). As to discharge, a control country would be able to bind a number of creditors by a discharge injunction like that arising from a chapter 11 plan in the United States, but there would likely be many smaller local creditors and property owners who would not be bound. The result would be highly inefficient and litigious. The same thing would be true of property-rights rulings including the validity of sales. Of course, it may be possible in a given case to buy out all such creditors and owners at a reasonable cost. There might remain problems of public policy and judicial conflict, especially at the COMI.

32. *See, e.g.*, *id*. princ. 37 & cmt. (recognizing a plan of reorganization adopted by a main proceeding under stated conditions, including notice).

33. *See id*. princ. 29, 36, 37 & comts. (demanding that each state assist and recognize the sales that generate maximum value for debtor's assets, and designating the reorganization plan adopted by a main proceeding as final and binding upon the debtor and every creditor when the issuing state

resistance to recognition and enforcement, the reorganization or sale may be a fiasco.

The need for a consensus on the standard for choosing a central court is actually increased as countries adopt an indirect global stay because its adoption will itself create a greater possibility of conflict among jurisdictions, especially control countries. Thus, a court who claims the role of the central court as to a debtor should seek to adopt standards that will encourage other courts to accept that court's jurisdiction as legitimate and to enforce the results obtained in the central court. Where that is true, efficient and effective coordination of international insolvency proceedings can be achieved.

## IV. Choice of Central Court

### *A. Incorporation versus COMI*

Some courts continue to look to the traditional notion that the central court should be the one presiding where a debtor company is incorporated.[34] A recent Scottish decision has strikingly highlighted the anomalies in the registration approach as applied in a globalizing world.[35] It adopted the common law idea that the law of the jurisdiction of incorporation controls the affairs of the corporation to apply Scotland's law to a thoroughly Indian company. In so doing, it stated that it was following the Privy Council in the *Singularis* case but ignored the Model Law, which applied in Scotland as it did not in *Singularis*.[36]

The Pacific Andes bankruptcy, discussed below, further illustrates the defects of the incorporation approach: diffusing control of a multinational insolvency and adding to expense and difficulty. It increases the likelihood of wasteful expense and inefficient results. It is noteworthy that in the recent

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court has international jurisdiction over the debtor and there is no pending parallel proceeding).

34. *See, e.g.*, Singularis Holdings Ltd. v. PricewaterhouseCoopers [2014] UKPC 36, [12] (appeal taken from Berm.) (elaborating on the common law rule of comity that recognizes the vesting of a company's assets under the law of its incorporation); Case C-341/04, Eurofood IFCS Ltd. v. Bank of Am. (*in re* Eurofood IFCS), N.A., 2006 E.C.R. I-3813, I-3844–45 (finding the center of the debtor's main interests in the country of its incorporation instead of the country of its administration). Some courts have reached that result only because they did not proceed beyond the presumption in the Model Law. *Cf. infra* note 40. For more detailed discussion, see Jay Lawrence Westbrook, *Locating the Eye of the Financial Storm*, 32 BROOK. J. INT'L L. 1019, 1028–30 (2007).

35. *In re* Hooley Ltd. [2016] CSOH 141 (Scot.).

36. *See In re* Hooley Ltd. [2016] CSOH 141 [33]–[36] (Scot.) (finding foreign proceedings in India as ancillary to insolvency proceedings in Scotland because Scotland is the debtor's place of incorporation). In reaching its decision, the court cited *Singularis*, a case involving countries that had not adopted the Model Law and therefore applied common law principles. *Singularis*, UKPC 36, [1], [9].

*Opti-Medix*[37] case the Singapore court focused on COMI-type factors for choosing a central court rather than the old incorporation doctrine.[38]

COMI (the location of the "main" proceeding) is the central-court concept generally accepted in the United States, the European Union, and elsewhere.[39] In the Model Law, the place of incorporation remains as an initial presumption about the center of the debtor's affairs,[40] but ease of manipulation and lack of connection to economic reality have made that standard subject to challenge in contentious insolvency cases.[41] On the other hand, the empirical work that I and others have done in the United States has shown that COMI is rarely subject to serious dispute in U.S. cases under the Model Law.[42] In turn, the finding of COMI in a jurisdiction provides a strong, legitimate basis for recognition of that jurisdiction's proceeding as central and promotes deference to its rulings to the maximum extent possible under local laws.[43]

### *B. Non-COMI Central Court*

Nonetheless, there are circumstances in which it may be plausible to argue for a central court other than the COMI court:

1. Where the case cannot be filed in the COMI court;[44]

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37. Re Opti-Medix Ltd. [2016] SGHC 108 (Sing.).

38. *See id.* at [24]–[25] (using the COMI test and recognizing the main insolvency proceedings in Japan, where the debtor's principle businesses were carried out).

39. 11 U.S.C. § 1502(4) (2012); Regulation 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast), 2015 O.J. (L 141) 19, 21–22; UNCITRAL MODEL LAW, *supra* note 2, art. 2(b); Block-Lieb, *supra* note 19, at 1395–1400.

40. UNCITRAL MODEL LAW, *supra* note 2, at 8 ("In the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests.").

41. *See, e.g.*, *In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 374 B.R. 122, 129 (Bankr. S.D.N.Y. 2007) (refusing to recognize Cayman Islands proceedings despite Cayman Islands being the place of the debtor's incorporation); *In re* BRAC Rent-A-Car Int'l Inc. [2003] EWHC (Ch) 128 [1], [4]–[5] (Eng.) (finding English court's jurisdiction to make an administration order over debtor company, which is incorporated in Delaware, United States, because debtor's center of main interest is in England and it had no employees in the United States); MG Rover [2005] EWHC 874 (Ch) (Eng.) (finding MC Rover France's center of principal interest located in England despite the company registration in France).

42. *See* Jay Lawrence Westbrook, *An Empirical Study of the Implementation in the United States of the Model Law on Cross Border Insolvency*, 87 AM. BANKR. L.J. 247, 261–62 (2013) (reporting that the COMI-based objection was raised only in 64 out of 573 chapter 15 cases in the study, and the argument was seriously litigated in only 7% of the overall cases).

43. Westbrook, *supra* note 34, at 1032–33. Sometimes local laws will not permit a grant of all of the relief that the central court has prescribed. For example, in a few countries it may not be possible to do anything that affects the rights of a secured creditor.

44. *See* Stipulation as to Republic of Marshall Islands Law, *In re* Ocean Rig UDW, Inc., 570 B.R. 687 (Bankr. S.D.N.Y. 2017) (No. 17-10736 (MG)) (Marshall Islands have no bankruptcy or insolvency laws).

2. Where the insolvency system in place in the COMI jurisdiction is simply unable to properly manage a multinational case, so that a filing in a control court would better serve all or virtually all the debtor's stakeholders; and
3. Where it is claimed that there is consent to the non-COMI court as the central court.

The first case is self-explanatory.

The most common situation under the second heading may be where the laws of the COMI country do not permit invocation of an indirect global stay and the debtor cannot be efficiently reorganized or liquidated on a global basis without such a stay. As long as the debtor company has a significant connection with a control court, it may be in the best interests of all concerned to permit that court to take over the case and manage it on a worldwide basis. On the other hand, the control court might still defer to the COMI court, providing the stay as assistance to that court, something that happened between the United States and Japan some years ago.[45] Another example is a debtor whose COMI jurisdiction lacks any reorganization proceeding in its laws, while the debtor is a solvent company with a cash-flow problem such that virtually all of its stakeholders would benefit from a reorganization under a modern statute.

A recent case of a corporate group, Pacific Andes Resources Development Limited, includes some elements of both examples. Pacific Andes had subsidiaries in Peru that were in insolvency proceedings there, while its parent holding company filed in Singapore, which may have been its COMI.[46] It appears that neither Peru nor Singapore was able at that time to impose an indirect global stay,[47] so some of its lenders proceeded to file full insolvency proceedings and take other actions in several other jurisdictions. The debtor group responded by filing several of its affiliates in a chapter 11 proceeding in New York, where the bankruptcy court had personal jurisdiction over the key creditors and thus could enforce an indirect global stay.[48]

The case illustrates some of the serious issues that can arise when a potential control country (here, the United States) assumes jurisdiction. First,

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45. Arnold M. Quittner, *Cross-Border Insolvencies – Ancillary and Full Cases: The Concurrent Japanese and United States Cases of Maruko Inc.*, 4 INT'L INSOLVENCY REV. 171, 181 (1995).

46. *See In re* Pac. Andes Res. Dev. Ltd. [2016] SGHC 210, [4] (Sing.) (noting that PARD was listed on the Singapore Exchange and carried out business activity in Singapore). "China Fisheries" is another common name for this case.

47. *See id.* at [53] (denying a global stay).

48. *See In re* China Fishery Grp. Ltd. (Cayman), No. 16-11895 (JLG), 2016 WL 6875903, at *1–3 (Bankr. S.D.N.Y. Oct. 28, 2016) (granting creditors' motion for the appointment of a chapter 11 trustee).

the United States had no substantial connection with the corporate group or any of its affiliates.[49] American jurisdiction was founded on a fictional connection arising from the deposit of money with the group's law firm in New York.[50] If one believed action by the U.S. court was justified nonetheless because of the absence of an alternative jurisdiction able to impose the necessary multinational stay, the court could have deferred to the Singaporean or Peruvian courts, using its control–country power in aid of coordination by the central court. Instead, it chose to take over the case and appoint a trustee to seek a solution on a worldwide basis.[51] While I am not involved in the case and do not know the details, I cannot believe that a U.S. court should take a central role absent a substantial connection with the debtor or the debtor group.[52]

Another separate insolvency proceeding was filed after the U.S. court acted, this time in the British Virgin Islands (BVI) where some of the Pacific Andes group affiliates were incorporated.[53] Lack of perceived legitimacy of the U.S. proceeding may have been part of the reason for this additional filing. Overall there have been proceedings in four or five jurisdictions and a great need for international coordination.

Pacific Andes would have been a quite different case if the debtor had had substantial assets or operations in the United States. That fact combined with the special position of the United States as a control country might have justified the United States acting as the central court and the COMI court might have agreed. If the COMI court did not agree, the courts, directly or

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49. *See id*. at *2 (recognizing that the Debtors China Fishery Group comprise a small part of the Pacific Andes Group of companies and have no assets in the United States apart from retainers pre-paid to advisors).

50. *See id*.

51. *See id*. at *20 (asserting that a trustee would be able to review and address Debtors' balances and investigate accounting irregularities without conflicts of interest, facilitate between hostile parties in the proposal, and evaluate the optimal way to maximize and realize the value of the Peruvian business; it should be said that the trustee has apparently been doing all that pretty well). It remains to be seen if the prestige of the American courts can overcome the fictional nature of this jurisdictional assertion.

52. *Cf. In re* Patriot Coal Corp., 482 B.R. 718, 747 (Bankr. S.D.N.Y. 2012) (referring to domestic venue, explaining that a forum like Manhattan would always trump many other fora if only efficiency mattered). In that case, Judge Chapman also noted that the location of key corporate functions matters more when the company is seeking to reorganize. *Id.* at 753–54. *See generally* Gregory W. Fox, *Patriot Coal: Interest of Justice Trumps Convenience of the Parties*, 32 AM. BANKR. INST. J., Feb. 2013, at 20. The larger point, for another day, is that bankruptcy implicates many public interests that should be considered by the courts most closely connected with the debtor company by real economic ties.

53. *See* Bank of Am., N.A. v. Pac. Andes Enter. (BVI) Ltd. (*In re* Pac. Andes Enter. (BVI) Ltd.), BVIHC (COM) 132 (2016), at https://www.eccourts.org/bank-america-n-v-pacific-andes-enterprises-bvi-limited-et-al/ [https://perma.cc/T2QN-3MY8] (allowing the Debtors' corporate group's insolvency to proceed in the British Virgin Island court and appointing joint liquidators over the debtors).

through the professionals, could seek a middle ground in negotiations, as discussed below.[54] In that situation, at least three courts important to the result—Singapore, the BVI, and the United States—would be adherents to the Model Law and thus required by statute to communicate and cooperate.[55]

A closely related point is the claim in some cases that a court other than the COMI court has "better law" and should therefore take the central role.[56] In a broad sense, that is the basis for a court to exercise the role of a central court in the cases discussed above where the COMI court cannot enforce an indirect global stay effectively or where that jurisdiction lacks a reorganization law and a reorganization is clearly best for all concerned. However, this justification blurs in a more nuanced circumstance where a COMI country has the necessary legal tools, but its laws will not permit the relief that some or all of the parties would like to see.

A leading example of this last situation in the United States involved a foreign airline that had regular flights to New York, along with many other destinations.[57] It presumably had assets of the usual sort associated with regular airline activities in the United States, but its COMI was clearly in another country.[58] Despite recently enacted modern legislation in the COMI country, the U.S. bankruptcy court found that the United States had "better law" for the case because of the favorable treatment that U.S. bankruptcy law provided to airplane lessees.[59] It is hard to see just why the U.S. Bankruptcy Code necessarily represented better choices than the decisions the legislators in the COMI country had made for their companies in their recent enactment—especially as applied to their national airline. This example illustrates why the "better law" ground may be subject to serious challenge as to the legitimacy of a non-COMI court's assumption of the role of central

54. *See infra* text accompanying notes 87–90.

55. *See* UNCITRAL MODEL LAW, *supra* note 2, at 95 (explaining that articles 25 and 26 mandate cross-border cooperation by providing that the court and the insolvency representative "shall cooperate to the maximum extent possible"). Note that the statutory language is not precatory. For more discussion of Model Law communication requirements, see generally Jay Lawrence Westbrook, *The Duty to Seek Cooperation in Multinational Insolvency Cases*, *in* THE CHALLENGES OF INSOLVENCY LAW REFORM IN THE 21ST CENTURY 361 (Henry Peter et al., eds., 2006), *reprinted in* ANNUAL REVIEW OF INSOLVENCY LAW 187 (Janis P. Sarra ed., 2004).

56. *See* Westbrook, *supra* note 54, at 23–28 (explaining the "better law" arguments). *See also In re* Aerovias Nacionales de Colombia S.A. Avianca, 303 B.R. 1, 10–11 (Bankr. S.D.N.Y. 2003) (pointing out that both the creditors and debtors had benefitted from application of U.S. law and that applicable Colombian bankruptcy law was relatively new and untested); *In re* Monitor Single Lift I, Ltd., 381 B.R. 455, 469 (Bankr. S.D.N.Y. 2008) (noting the additional protections that U.S. bankruptcy laws provide to debtors).

57. *In re* Avianca, 303 B.R. at 1.

58. *Id*. at 3–4 (finding that Avianca has 14 locations in Colombia and 12 locations in other countries, mostly in Central and South America, and that Avianca employed 4,153 employees in Colombia and 28 in the United States, but allowing Debtor's chapter 11 proceeding to continue in the United States).

59. *Id*. at 10–11.

court. That role may thus be seen as illegitimate and may provoke a justified refusal to enforce the result.

Another case in which there is reason to question a non-COMI assumption of jurisdiction would arise where the debtor is not eligible to file an insolvency proceeding in the COMI country. For example, in the United States and some other countries, an insurance company cannot file for bankruptcy;[60] there is a separate procedure for distressed insurers that is initiated by regulators. Should an English court permit an American insurer to file an insolvency proceeding in England? It would not be inconsistent with the Model Law if the English court simply accepted the filing and maintained the status quo in England, along with protection of English creditors, in close consultation with the American regulators and with a proceeding brought in the United States. A plenary proceeding with a claim to global effects on the U.S. insurance company and its stakeholders would not be legitimate.

The third ground to support non-COMI management of a case is consent.[61] In the airline case discussed above, it appeared that the great majority of creditors preferred the United States as a forum.[62] Yet the decision arose from precisely the fact that one substantial creditor objected to United States management.[63] Absent unanimous agreement (which might suggest an out-of-court solution in the first place), it seems problematic to rest non-COMI case management on consent. The ultimate practical solution that balances cost and fairness may require negotiation among courts as well as the parties unless the circumstances permit a buyout of the dissenting creditors. This solution should start from the idea that the proceeding should be centered in the COMI jurisdiction absent strong reasons to the contrary.[64]

A situation that may involve consent is the quandary posed by the "solitary non-COMI proceeding."[65] The airline case was an example here, too. It is clear that the non-COMI jurisdiction (in that case, the United States) has the right to deal with the case as to its creditors and the assets it controls,

60. 11 U.S.C. § 109(b)(2) (2012).

61. *See* TRANSNATIONAL INSOLVENCY: COOPERATION AMONG THE NAFTA COUNTRIES, INTERNATIONAL STATEMENT OF UNITED STATES BANKRUPTCY LAW 76 (AM. LAW INST. 2003) (stating that the U.S. courts can exercise control over debtors' overseas assets and prohibit creditors access to these assets only if (1) the U.S. courts have jurisdiction over the creditors, or (2) "[the creditors] have consented to United States jurisdiction").

62. *In re Avianca*, 303 B.R. at 8.

63. *Id*. at 7–8.

64. Any exceptions create the risk of unjustified deviations because of the disincentives discussed below.

65. I use this name to refer to a proceeding that could have been brought in its COMI jurisdiction but was not. *See* Westbrook, *supra* note 25, at 16–17 (defining the "solitary nonmain proceeding").

provided no COMI proceeding is filed. But a series of such cases would be a return to the inefficiencies and inequities of territorialism.

Instead, the non-COMI jurisdiction should maintain the status quo (possibly including the exercise of an indirect global stay) but order extensive notice to all creditors, including those in the COMI jurisdiction, along with notice to the appropriate court and officials responsible for insolvency matters in the COMI jurisdiction. If no proceeding is filed within a reasonable time, the non-COMI court could then proceed on a worldwide basis. If a proceeding is filed in the COMI jurisdiction, the non-COMI court still could maintain the status quo for the benefit of a worldwide proceeding led by the COMI court. In this way, a global-market approach could be maintained while adapting to the realities of a specific case.[66]

## V. Obstacles to Cooperation in Coordination Through a Central Court

Although a variety of factors challenge that multinational coordination, the three most important are as follows:

1. The variations in national policies concerning allocation of values realized in insolvency proceedings;
2. The treatment of corporate groups; and
3. The incentives for professionals to resist centralization.

### *A. Differing Policies and Priorities*

Several factors may result in varying allocations of value in a given case, but the most important are differences in national policies about social or commercial priorities. It is important to realize that these differences in policies comprise not merely traditional liquidation-distribution rules, but broader issues of preferred results. For example, some countries will be more concerned with preserving employment while others will emphasize a quick return to creditors. Given these varying policies and a natural concern for local stakeholders, courts must be persuaded that the overall benefits of cooperation in multinational cases exceed the costs of accepting a compromise in the application of local priorities and social policies.[67] The

66. On some occasions, the COMI is unclear. This problem can arise where the principal executive office and the principal assets of the debtor are in different jurisdictions. The awkward result is best resolved by negotiation as discussed below, with each jurisdiction maintaining the status quo in the meantime. *See infra* text accompanying notes 87–90.

67. *See* Jay Lawrence Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L.J. 457, 465 nn. 27–28 and accompanying text (1991) (exploring this issue).

case for their cooperation must include their agreement that the court seeking to act as the central court is truly entitled to assume that role.

### *B. Corporate Groups*

A corporate group presents an important, common, and sometimes difficult case, largely because of legal technicalities. The group should ordinarily be understood to require the same unified treatment as an individual company. Generally, when a corporate parent files a bankruptcy proceeding, its COMI should be considered the COMI for the group. However, there are sometimes obstacles to this common-sense solution. First, some laws insist that each subsidiary must file in its own COMI as if it were an entirely independent entity[68]—a result that elevates form over substance in the great majority of cases. Second, because subsidiaries are routinely incorporated in various jurisdictions for tax and other reasons, jurisdictions that insist on an incorporation-based COMI almost guarantee a scattered and diffuse set of filings—as in the Pacific Andes case.[69] The diffuse filings make liquidation inefficient[70] and reorganization very difficult. Although some have concerns about ignoring the corporate form, permitting the affiliates to file with the parent in no way requires some form of consolidation of assets and liabilities other than for purely administrative purposes.[71]

### *C. Disincentives of Professionals*

The third serious obstacle to centralized coordination is the natural desire of professionals—lawyers, accountants, investment bankers, and others—to seek substantial opportunities for professional employment in the jurisdictions where they practice. A number of cases have failed to achieve coordination in recent years at least in part because of this difficulty. When the professional fees and costs for a company like Nortel in North America

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68. *See* U.N. Secretariat, Centre of Main Interests in the Context of an Enterprise Group, Note by the Secretariat, ¶¶ 5, 16, UNCITRAL Working Grp. V (Insolvency Law), U.N. Doc. A/CN.9/WG.V/WP.114 (Feb. 13, 2013) [hereinafter Centre of Main Interests] (reporting that an entity-by-entity approach to COMI of members of an enterprise group has been maintained, and the difficulty of defining COMI for enterprise group demands a focus on facilitating coordination and cooperation between the various courts); U.N. Secretariat, Treatment of Corporate Groups in Insolvency, ¶ 4, UNCITRAL Working Grp. V (Insolvency Law), U.N. Doc. A/CN.9/WG.V/WP.76/Add.2 (Mar. 6, 2007) [hereinafter Treatment of Corporate Groups] (noting that the Model Law does not specifically address the concept of COMI as it might apply to a corporate group).

69. Treatment of Corporate Groups, *supra* note 68, ¶ 6 (indicating that if the COMI test were adopted for each individual member in a corporate group, it would likely lead to insolvency proceedings being commenced in different jurisdictions).

70. See the discussion of Nortel, *infra* text accompanying notes at 72–82.

71. A second obstacle to a simple group COMI, where the subsidiaries file with the parent, is that sometimes the parent does not file. All these situations cry out for negotiated solutions, often requiring substantial judicial encouragement.

can reach nearly $2 billion,[72] it is understandable that local practitioners would oppose coordination procedures that they believe will leave them substantially excluded and that local judges would feel social pressure to prevent that exclusion. On the other hand, the *Nortel*[73] case paradoxically demonstrates the enormous benefits of coordination.

Nortel was a true multinational group engaged in the development and marketing of certain kinds of high-tech gear all over the world.[74] The parent company was based in Canada, as was the main operating subsidiary, while much of its business involved a subsidiary in the United States.[75] It also had subsidiaries in Europe, notably in the United Kingdom. Insolvency proceedings were filed in those three jurisdictions, although the United Kingdom court did not participate in the major international decisions in *Nortel*.[76] The results in the case represented the high and the low of recent multinational insolvencies:

*High*. After reorganization failed, the parties cooperated to sell the debtor's assets on a global basis, in large pieces that spanned many countries. In particular, the global sale of intellectual property yielded many billions of dollars.[77] The cooperative disposition, without regard to jurisdiction or geography, produced far more value than any isolated, jurisdiction-by-jurisdiction sales could have achieved. This result represented modified universalism at its best.

*Low*. After the great sales success, the parties could not agree on allocation of the roughly $7 billion in proceeds, rejecting repeated pleas by the U.S. and Canadian courts that the parties resolve the issue by negotiation or arbitration.[78] The final resolution took years, resulting in the nearly

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72. Jeff Montgomery, *Nortel OK'd for $14.2M Payout Amid 'Pandora's Box' Warnings*, LAW360 (June 6, 2016), https://www.law360.com/articles/803875/nortel-ok-d-for-14-2m-payout-amid-pandora-s-box-warnings [https://perma.cc/T3C4-GLH9] (reporting that the professional fee payouts in the case reached more than $1.9 billion in the United States by June 2016).

73. *In re* Nortel Networks, Inc., 669 F.3d 128 (3d Cir. 2011). I gave an opinion as an expert witness in the case on behalf of the UK pension creditors.

74. *Id.* at 130–31.

75. *Id.* at 131.

76. *Id.*

77. Nortel Networks Inc. v. Ernst & Young Inc. (*In re* Nortel Networks Inc.), Nos. 15-196(LPS), 15-197(LPS), 2016 WL 2899225, at *1 & n.1 (D. Del. 2016) (introducing the background of this litigation related to the allocation of the $7.3 billion proceeds of court-supervised sales of assets, principally an extensive portfolio of patents).

78. *See, e.g.*, *In re* Nortel Networks, Inc., 669 F.3d at 143. The court observed:

> Mediation, or continuation of whatever mediation is ongoing, by the parties in good faith is needed to resolve the differences. No party will benefit if the parties continue to clash over every statement and over every step in the process. This will result in wasteful depletion of the available assets from which each seeks a portion.

*Id.*

$2 billion of professional fees and costs.[79] The resolution of the case required joint management between the Canadian and U.S. courts, including a joint televised trial and coordinated (although independent) decisions by the two courts.[80] While the courts involved did a wonderful job in managing the awkward jumble of litigation, it seems clear that large amounts of money and time would have been saved had either court been permitted to manage the case centrally, albeit with mutual consultation at every stage.

In the *Nortel* case, as in other large cases in recent years, there was a failure to act quickly at the start of the case to seek recognition and coordination among the courts involved. The result is two or more independent insolvency proceedings with limited cooperation. The Lehman insolvency is a notable example. In the Lehman case, recognition and coordination were not even sought for many months.[81] In *Nortel*, the efforts were less laggard, but still too little and too late to produce the best results. Early cooperation permits the establishment of protocols and lines of authority in a cooperative direction from the start. It also has the benefit of being put in place before tactical considerations have become so apparent as to make it difficult for parties to agree.[82]

I do not suggest for a moment that the professionals in these and other cases planned, much less conspired, to delay or defeat coordination so they could feather their own nests. But I do think that the incentives for professionals are such that they require judicial encouragement to focus on international cooperation and recognition from the very start of a case—or indeed, during workout negotiations prior to any insolvency filing.[83] I think

79. Montgomery, *supra* note 72.

80. *In re* Nortel Networks Inc., 2016 WL 2899225, at *1; *see also* Tom Hals, *Nortel Cleared to End Bankruptcy, Distribute $7 Billion to Creditors*, REUTERS (Jan. 24, 2017), https://www.reuters.com/article/us-nortelnetworks-bankruptcy/nortel-cleared-to-end-bankruptcy-distribute-7-billion-to-creditors-idUSKBN1582TO [https://perma.cc/CDR8-UZ4S] (reporting that the two courts were linked by video throughout the proceedings).

81. After the filing of bankruptcy, it took the insolvency administrators of the eighteen Lehman's affiliates seven months to work out a coordination and cooperation protocol. Lehman Bros. Holdings Inc., *Cross Border Insolvency Protocol for the Lehman Brothers Group of Companies* (May 12, 2009), https://www.insol.org/Fellowship%202010/Session%209/Lehman%20protocol%20executed.pdf [https://perma.cc/N3KF-L3RE]. For further discussion, see Hon. Allan L. Gropper, *The Model Law After Five Years: The U.S. Experience with COMI*, *in* LESSONS LEARNED AND PROBLEMS EXPOSED IN CROSS-BORDER CASES: THE JUDICIAL PERSPECTIVE (Int'l Insolvency Inst. ed., 2010), https://www.iiiglobal.org/sites/default/files/Allan_Gropper.pdf [https://perma.cc/Z7L3-JSLL].

82. There is a sort of Rawlsian proposition here that parties will be more cooperative and focused on common interests—like maximization of value—when the rush of events at the start of a case provides something of a "veil of ignorance." *See generally* JOHN RAWLS, A THEORY OF JUSTICE 17 (rev. ed. 1999).

83. If a clear judicial signal is sent that, after filing, professionals will be asked pointed questions about pre-filing negotiations with regard to these cooperation issues, professionals will be encouraged to give them attention even before filing.

that judicial encouragement may also serve to overcome difficulties of coordination among professionals who are naturally motivated to consider tactical and strategic advantages for their clients and who lack a broad vision of the needs of the case as a whole. In short, there is a substantial need for judicial activism to guide the parties toward the best results. Where such activism may be found, there will be opportunities for professionals to advance the interests of their clients by being in the forefront of an internationalist approach and being seen by the courts as taking cooperative and efficiency-promoting positions.

## VI. Strategies for Coordination

At the heart of the needed process is communication. When we were working on the UNCITRAL negotiations that produced the Model Law in the mid-Nineties, our inclusion of provisions concerning communication, including direct communication among courts, was regarded by many as radical and dangerous.[84] But we persisted in that effort through the American Law Institute Transnational Project. Others took up the banner in the Global Principles effort at the International Insolvency Institute.[85] These communications have increasingly become routine, although not always timely. Most recently, the creation of the Judicial Insolvency Network (JIN) and its Guidelines further extend those initiatives.[86] A special virtue of the

84. *See* U.N. Secretariat, Cross-Border Insolvency: Possible Issues Relating to Judicial Cooperation and Access and Recognition in Case of Cross-Border Insolvency, ¶¶ 99–100, UNCITRAL Working Grp. V (Insolvency Law), U.N. Doc. A/CN.9/WG.V/WP.42 (Sept. 26, 1995) (recognizing that communications between judges "may raise varying degrees of concern in particular in legal systems that are not accustomed to such initiatives by judges, and also concerns about procedural safeguards for the parties"); UNCITRAL, Rep. of the Working Group on Insolvency Law on the Work of the Eighteenth Session, ¶ 82, U.N. Doc. A/CN.9/419 (Dec. 1, 1995) (discussing judicial communication as an aspect of cooperation); AM. LAW INST., TRANSNATIONAL INSOLVENCY PROJECT: INTERIM REPORT 7–8 (1999) (reporting that some of the proposals being considered "are necessarily controversial," and special difficulties existed in implementing any particular approach to cooperation); Memorandum from Jay Lawrence Westbrook to Nat'l Bankr. Review Comm'n, Am. Law Inst. Transnational Insolvency Project 3 (July 29, 1997) ("The [UNCITRAL] insolvency project began with countries very reluctant to take substantial steps toward cooperation with foreign proceedings.").

85. ALI-III GLOBAL PRINCIPLES, *supra* note 11.

86. *See generally* GUIDELINES FOR COMMUNICATION AND COOPERATION BETWEEN COURTS IN CROSS-BORDER INSOLVENCY MATTERS (Judicial Insolvency Network ed. 2016), http://www.insol.org/emailer/January_2017_downloads/doc1a.pdf [https://perma.cc/6RRL-QESH] (providing rules to improve the interests of those involved in cross-border insolvency proceedings by "enhancing coordination and cooperation amongst courts under whose supervision such proceedings are being conducted"). Recently, the chief bankruptcy judge for the Southern District of Florida has ordered the adoption of JIN Guidelines on court-to-court communication and cooperation. Adoption of Guidelines for Communication and Cooperation Between Courts in Cross-Border Insolvency Matters, Administrative Order 2018-03 (Bankr. S.D. Fla. 2018), http://www.flsb.uscourts.gov/sites/flsb/files/documents/news/AO_2018-03_Adoption_of_Guidelines_for_Communication_and_Cooperation_Between_Courts_in_Cross-Border_Insolvency_Matters.pdf

JIN initiative comes from the fact that the establishment of personal relationships among commercial judges from different countries is a key to success in multinational cases. In that regard, not the least important benefit of the JIN Guidelines is the likelihood that they will tend to produce early direct communication by judges (with due notice to all) and will incentivize professionals to act quickly as well.

It may be useful to offer one example of an approach that can produce coordinated results. Some years ago, a financial company in North America called Inverworld collapsed in scandal, revealing that it had defrauded large numbers of investors in the United States and a number of Latin American countries of hundreds of millions of dollars.[87] The accountants had uncovered quite substantial assets for distribution, although much less than enough to pay creditors in full. Insolvency proceedings were brought in the United States, the Cayman Islands, and England.[88]

The representatives of various parties in the case agreed to a protocol that led to dismissal of the English insolvency proceeding, upon certain conditions protecting the claimants therein, and the allocation of functions between the two remaining courts.[89] The U.S. court was to resolve the outstanding legal and factual issues relating to entitlements as among various classes of investors, while the Cayman Islands court was to oversee the creation and operation of the mechanism of distribution of proceeds to claimants. Each court was to take the other court's actions as binding and thus to prevent parallel litigation. Ultimately, the process agreed to in the protocol led to a worldwide settlement at a cost far less than would have attended a three-court struggle.[90]

The key point is that there was substantial communication directed to the global case and its resolution. The judges involved actively encouraged the professionals to engage in cross-border negotiations with an emphasis on non-litigious solutions despite plausible conflicting claims for several groups of claimants under each of the seven arguably applicable laws. The professionals from each jurisdiction were importantly involved. Judicial activism combined with a first-rate performance by the professionals produced spectacularly fast, fair, and efficient results.

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[https://perma.cc/ANB6-WLVP].

87. San Antonio Express-News v. Blackwell (*In re* Blackwell), 263 B.R. 505, 506 (W.D. Tex. 2000).

88. *Id.*

89. See Jay Lawrence Westbrook, *International Judicial Negotiation*, 38 TEX. INT'L L.J. 567, 571 (2003) for a detailed discussion of the *Inverworld* case. I should mention I was appointed "special counsel" in the case and given a role similar to that of an examiner under § 1104(c) of the Bankruptcy Code. *See* 11 U.S.C. § 1104(c) (2012).

90. Westbrook, *supra* note 89, at 571.

## VII. Conclusion

Globalization continues to accelerate; new supply chains form every day. It is fueled by the enormous wealth it creates, despite the inevitable debacles it leaves in its wake. Globalization of the management of financial distress will be its companion. Some insist the process must await elegant ruminations about the evolution of the common law or endless debates over treaties about cross-border insolvency, but they will be disappointed. Economics will incentivize procedures to make cross-border insolvency proceedings efficient, and citizens will demand procedures to make it fair. Those results require cooperation around a coordinating central jurisdiction and the internationalization of the relevant professions. While legislation is necessary, the courts will, as always, be confronted with issues that run ahead of the legislative process. Indeed, court decisions will often drive that process. Judges and lawyers will continue to build the international insolvency system even though it's a bit like completing the assembly of an aircraft while in flight.

It is an exciting time to be an international lawyer or judge and not a time for the timid.