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CORPORATE GROUP CROSS-BORDER INSOLVENCIES BETWEEN THE UNITED STATES & EUROPEAN UNION: LEGAL & ECONOMIC DEVELOPMENTS

*Nora Wouters**
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INTRODUCTION

As corporations become increasingly globalized, cross-border insolvencies are more prevalent. Insolvency raises the problems of any cross-border dispute: reciprocity, venue, choice of law, and cultural differences. However, unlike a typical adversarial dispute, successful insolvency proceedings do not have a single “winner,” and therefore raise unique problems. Insolvency’s goal of maximum private and public economic benefit is best achieved through cooperation, efficiency, and overall asset maximization.

Disparate parties each fighting for their best private outcome would contravene a harmonious proceeding to achieve this goal. However, the absence of a universal insolvency law makes achieving harmony through cooperation across borders especially difficult. Each country has its own laws and procedures, and each citizen creditor has expectations based on their respective sovereign’s laws. Differences in these laws range from specific (such as priorities and dischargeable claims) to the overarching goals (such as creditor returns or job preservation).¹

Navigating these competing laws is a significant problem for corporate groups, or companies with many different entities comprising a larger entity. Corporate groups often have branches or separate legal entities in different countries and are therefore common in cross-border insolvencies. A successful corporate group insolvency would accomplish several key goals: (1) maximization of enterprise-wide value, (2) clarity and predictability in

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¹ Harmonisation of Insolvency Law at EU Level, EUR. PARL. DOC. PE 419.633 (2010).

applying the law, (3) treating similarly situated creditors equally, (4) procedural fairness, (5) protection of employment, and (6) respecting the separate legal status of entities.²

The ideal way to achieve these goals would be through a single, centralized insolvency proceeding, but choosing the appropriate venue (COMI) for this is problematic. This centralized proceeding would provide oversight to ensure that these goals are pursued most effectively. A single proceeding would minimize costs, expedite the proceedings, provide a single forum for comparison of relevant options, discourage individual parties-in-interest from taking action beneficial to them but suboptimal for the entire corporate group, and ensure cooperation among all the parties. However, single proceedings face three impediments to implementation: (1) adhering to creditors' rights and expectations under their country's laws, so as to not discourage cross-border lending; (2) inducing creditors of diverse and conflicting interests to cooperate for collective asset maximization; and (3) respecting national sovereignty.

In the U.S., corporate groups can have a single consolidated proceeding,³ but there is no such mechanism for E.U. corporate groups. The European Insolvency Regulation ("EIR"), which dictates how its signees treat intra-E.U. insolvencies, does not explicitly address corporate groups. While a single, efficient proceeding is possible under the EIR, it is not legally prescribed. The difficulty of achieving a single efficient proceeding is exacerbated when a cross-border E.U.-U.S. firm must coordinate proceedings under the EIR and the U.S. Bankruptcy Code (the "U.S. Code"). Unlike the U.S., the E.U. has no continent-wide system of courts. Moreover, the EIR grants its member states far more autonomy to apply local law than the U.S. Code grants its states.

Reorganizations of corporate groups, treated as a single entity, have a greater chance at success than those treated as separate entities. A single proceeding affords economic efficiencies, lower administrative costs, and centralized control of restructuring. A standardized policy to guide cross-border group insolvencies would provide predictability to creditors, increase the chances of successful restructuring, achieve maximization of the sale of assets on an integrated level, and provide guidance to complete insolvencies. Ultimately, such a policy would provide a workable solution to the inherent tension between respecting the bounds of legally separate entities, while

² Samuel L. Bufford, *Coordination of Insolvency Cases for International Enterprise Groups: A Proposal*, 86 AM. BANKR. L.J. 685, 692 (2012).

³ See *infra* Part II.C.

achieving asset maximization at the corporate group level. Leaving creditors no worse off than in liquidation would be the guiding baseline for such a solution.

In the absence of a single binding procedure, there are several means by which private parties can ensure efficient proceedings. This Article addresses the issues a practitioner will face in an E.U.-U.S. cross-border insolvency. Part I discusses the current state of international insolvency law: the United Nations Model Law, the European Union's EIR, and the U.S.'s chapter 15. Part II addresses corporate groups—what they are, their benefits, and the challenges they face in insolvency. Determining a center of main interests (“COMI”) is frequently the greatest challenge. Part III then discusses the costs of a corporate group proceeding and how to maximize the proceedings' efficiency. This Part also highlights case examples of corporate groups that achieved efficient proceedings and those that did not. Finally, Part IV provides guidelines for private parties to use protocols to coordinate efficient proceedings and how administrators can ensure efficiency.

I. EXISTENT CROSS-BORDER INSOLVENCY LAW

This Part will discuss the philosophical debate that has emerged around cross-border insolvencies. There are two dominant philosophies to cross-border insolvency: universalism, which calls for a single proceeding and harmonized insolvency law; and territoriality, which advocates separate proceedings, with separate laws for each country in which the debtor has assets. In practice, a hybrid “modified universalism” prevails. Part I.B. explains how these philosophies have shaped the existent law. The United Nations Commission on International Trade Law's (“UNCITRAL”) Model Law espouses modified universalism. Part I.C. describes the U.S.'s version of the model law: chapter 15. While several European nations have also adopted versions of the model law, insolvencies between E.U. member states is governed by the European Insolvency Regulation (EIR), discussed in Part I.D.

A. *Philosophical Underpinnings*

The two diametrically opposed approaches to cross-border insolvencies are universalism and territorialism.⁴ Most international insolvency law operates

⁴ E.g., 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, 687–94 (2000); Lucian Arye

under the hybrid modified universalism, which aspires towards universalism, but maintains elements of territorialism.

Universalism propounds a single unified law to govern bankruptcy proceedings.⁵ This would be a regime similar to the U.S. Code—federal law that controls in all U.S. states. Under universalism, all proceedings would take place in a centralized court and proceedings would be subject to a single law (with minor concessions to state law).⁶ Territorialism imposes no single law but relies on each jurisdiction to apply its own laws. It subjects a multinational debtor to parallel proceedings in each country in which its assets are located, but each country's court's jurisdiction does not extend beyond the country's borders.⁷ Territorialism proponents argue that a formal universalist law infringes upon national sovereignty, and private parties can enter into private agreements, or protocols,⁸ to achieve efficiency without imposing a universal law on sovereign states.⁹ Absent a universal policy, the chances of parallel proceedings increase; multiple hearings add the costs of court-to-court coordination and the risks of local jurisdictions creating self-protective law or bias jurists.¹⁰ Intuitively, fewer competing proceedings are more efficient. Nonetheless, universalism's ideal of a single proceeding is difficult to implement: countries and their citizen creditors are hesitant to cede their sovereignty.

Bebchuck & Andrew T. Guzman, *An Economic Analysis of Transnational Bankruptcies*, 42 J.L. & ECON. 775 (1999); Robert K. Rasmussen, *A New Approach to Transnational Insolvencies*, 19 MICH. J. INT'L L. 1 (1997); Donald T. Trautman et al., *Four Models for International Bankruptcy*, 41 AM. J. COMP. L. 573 (1993); Philipp Wagner, *Insolvency and Arbitration: A Pleading for International Insolvency Law*, 5 DISP. RESOL. INT'L 189 (2011); Liza Perkins, Note, *A Defense of Pure Universalism in Cross-Border Corporate Insolvencies*, 32 N.Y.U. J. INT'L L. & POL. 787 (2000).

⁵ Andrew T. Guzman, *International Bankruptcy: In Defense of Universalism*, 98 MICH. L. REV. 2177, 2179; (2000); Jay Lawrence Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276, 2292–98 (2000).

⁶ For example, state laws have a greater impact on how personal insolvencies are resolved (homestead exemptions and mortgage laws). Contract and tort law will vary by U.S. state and affect chapter 11 proceedings.

⁷ See Samuel L. Bufford, *Global Venue Controls Are Coming: A Reply to Professor LoPucki*, 79 AM. BANKR. L.J. 105, 108 (2005).

⁸ See *infra* Part IV.B. (discussing the benefits of protocols, how they are used, and guidelines for developing protocols).

⁹ Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 CORNELL L. REV. 696, 2219 (1999); see also John J. Chung, *The New Chapter 15 of the Bankruptcy Code: A Step toward Erosion of National Sovereignty*, 27 NW. J. INT'L L. & BUS. 89 (2006); Edward J. Janger, *Virtual Territoriality*, 48 COLUM. J. TRANSNAT'L L. 401, 407 (2010) (citing *Federal Mogul* as an example of a case where territorial rules—the priority in of creditors—were ignored).

¹⁰ Evelyn H. Biery et al., *A Look at Transnational Insolvencies and Chapter 15 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 47 B.C. L. REV. 23, 31–32 (2005).

The existent practice of cross-border insolvency is neither of these absolutes, but is a “modified universalism.”¹¹ Modified universalism embraces the economic efficiency of single proceedings without a single universal bankruptcy law.¹² It strikes a compromise between the two by allowing secondary proceedings¹³ and emphasizes cross-border cooperation, with cooperating countries maintaining their own laws.¹⁴

B. *The Model Law*

UNCITRAL’s Model Law on Insolvency¹⁵ has influenced cross-border cooperation and created a uniform adoption of modified universalism.¹⁶ Under the Model Law, adopting countries decide their own substantive law, but must allow foreign representatives “equal, simple, and fast access” to their law.¹⁷ The Model Law provides a tool for “authorizing and encouraging cooperation and coordination between jurisdictions.”¹⁸ Its four key elements are access, recognition, relief (assistance), and cooperation.¹⁹

¹¹ Leif M. Clark & Karen Goldstein, *Sacred Cows: How to Care for Secured Creditors’ Rights in Cross-Border Bankruptcies*, 46 TEX. INT’L L.J. 513, 518–22 (2011). See generally Westbrook, *supra* note 5 (describing modified universalism as a solution and critiquing other alternatives).

¹² Jamie Altman, *A Test Case in International Bankruptcy Protocols: The Lehman Brothers Insolvency*, in 2011 NORTON ANN. REV. INTL. INSOLVENCY 11.

¹³ See *infra* text accompanying notes 47–52 (explaining secondary proceedings).

¹⁴ Altman, *supra* note 12.

¹⁵ U.N. Comm’n on Int’l Trade Law, Model Law on Cross-Border Insolvency with Guide to Enactment, U.N. Sales No. E.99.V.3 (1997).

¹⁶ Matthew T. Cronin, Comment, *UNCITRAL Model Law on Cross-Border Insolvency: Procedural Approach to a Substantive Problem*, 24 J. CORP. L. 709, 710 (1999). The Model Law on Cross-Border Insolvency was adopted by the U.N. in 1997. Legislation based on the Model Law has been adopted twenty countries to date—Eritrea (1998), Mexico (2000), South Africa (2000), Japan (2000), Montenegro (2002), Romania (2003), Poland (2003), Serbia (2004), the British Virgin Islands (2005), Ireland (2005), the United States of America (2005), Great Britain (2006), New Zealand (2006), and Colombia (2006), Republic of Korea (2006), Australia (2008), Mauritius (2009), Greece (2010), Uganda (2011). *Status, 1997—UNCITRAL Model Law on Cross-Border Insolvency*, U.N. COMM’N ON INT’L TRADE LAW, http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html (last visited May 20, 2013).

¹⁷ Jenny Clift, *The UNCITRAL Model Law on Cross-Border Insolvency—A Legislative Framework to Facilitate Coordination and Cooperation in Cross-Border Insolvency*, 12 TUL. J. INT’L & COMP. L. 307 (2004).

¹⁸ U.N. Comm’n on Int’l Trade Law, Model Law on Cross-Border Insolvency: The Judicial Perspective (Feb. 2012), http://www.uncitral.org/pdf/english/texts/insolven/V1188129-Judicial_Perspective_ebook-E.pdf.

¹⁹ *Id.* For more resources on the Model Law, see Clift, *supra* note 17; Allan L. Gropper, *The Model Law After Five Years: The U.S. Experience with COMI*, in 2011 NORTON ANN. REV. INTL. INSOLVENCY 13; Anthony Sexton, *Current Problems and Trends in the Administration of Transnational Insolvencies Involving Enterprise Groups: The Mixed Record of Protocols, The UNCITRAL Model Insolvency Law, and the EU Insolvency Regulation*, 12 CHI. J. INT’L 811 (2012).

Comity is integral to the Model Law.²⁰ Under the Model Law, the principle of comity has evolved into “recognition.”²¹ Once a court recognizes a foreign main proceeding, the recognizing court should use its equitable discretion to fashion post-recognition relief, equivalent to what that foreign court would anticipate under its own laws.²² According to one study, out of 195 cases, recognition was granted in 95% of all cases under the Model Law.²³

C. U.S. Law: Chapter 15²⁴

In 2005, the U.S. adopted the Model Law in chapter 15. It encourages cooperation for transnational cases and provides for fair and efficient administration of cases.²⁵ Like the Model Law, it prescribes recognition of foreign proceedings but limits recognition if actions would violate the recognizing country’s public policy.

Chapter 15 was an extension of former 11 U.S.C. § 304,²⁶ which permitted foreign representatives to appear in U.S. court without submitting to that court’s jurisdiction.²⁷ U.S. courts have recognized that absent recognition of foreign proceedings, equitable and orderly distribution of assets would not be possible.²⁸ One court explained chapter 15’s emphasis on cooperation:

United States courts, trustees, examiners, debtors and debtors in possession and the courts and other competent authorities of foreign countries; greater legal certainty for trade and investment; fair and efficient administration of cross-border insolvencies that protects the

²⁰ Comity is the mutual recognition of acts of other political entities. It “is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.” BLACK’S LAW DICTIONARY (2009) (quoting *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895) (internal quotation marks omitted)).

²¹ See *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122, 126–32 (Bankr. S.D.N.Y. 2007), *aff’d* 389 B.R. 325 (S.D.N.Y. 2008).

²² See *In re Atlas Shipping A/S*, 404 B.R. 726, 738–46 (Bankr. S.D.N.Y. 2009).

²³ Irit Mevorach, *On the Road to Universalism: A Comparative and Empirical Study of the UNCITRAL Model Law on Cross-Border Insolvency*, 12 EUR. BUS. ORG. L. REV. 520, 533 (2011) (noting that of the 195 cases, only in 9 did the court not approve recognition).

²⁴ 11 U.S.C. §§ 1501–1532 (2006).

²⁵ H.R. REP. NO. 109-31 at 105 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 169; see also *In re Basis Yield Alpha Fund (Master)*, 381 B.R. 37, 44 (Bankr. S.D.N.Y. 2008).

²⁶ 11 U.S.C. § 304 (2002) (repealed 2005).

²⁷ See Biery, *supra* note 10, at 31–32 (discussing the evolution of precedent under § 304 and the ramifications of chapter 15). Courts have relied on pre-chapter 15 precedents to adjudicate cases, particularly when it comes to recognition and comity.

²⁸ *Vitrix S.S. Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 713–14 (2d Cir. 1987).

interests of all creditors and other interested entities, including the debtor; the protection and maximization of the debtor's assets; and the facilitation of the rescue of financially troubled businesses.²⁹

A foreign court or representative recognized by a U.S. court may also inure the benefits of other U.S. Code provisions.³⁰ A representative may also ask the court for relief beyond what is already provided in the Code.³¹

Comity has a rarely invoked exception³² to ensure it “does not prejudice the rights of United States citizens or violate domestic public policy.”³³ Chapter 15, as well as other Model Law adoptions, except otherwise mandatory recognition for actions “manifestly contrary to the public policy of the United States.”³⁴

In the U.S., all bankruptcy courts operate under chapter 15 for dealing with foreign debtors and proceedings. Within the E.U., the EIR guides the interactions of insolvencies between the E.U. member states.

*D. The European Insolvency Regulation (EIR)*³⁵

While the EIR favors a universalist approach, it allows for the opening of secondary proceeding in addition to the main proceeding. This Subpart describes provisions of the EIR which protect creditors' property rights and expectations, and why secondary proceedings are sometimes necessary to protect those rights. It then discusses proposed reforms to the EIR.

The EIR came into effect in 2002.³⁶ Its goals were to enable cross-border proceeding to operate efficiently, provide measures for coordinating the

²⁹ *In re Basis Yield Alpha*, 381 B.R. at 44.

³⁰ 11 U.S.C. § 1520 (2006) (incorporating 11 U.S.C. §§ 361, 362, 363, 549, 552).

³¹ *United States v. J.A. Jones Const. Grp., LLC*, 333 B.R. 637, 638 (E.D.N.Y. 2005) (quoting 11 U.S.C. § 1521); *In re AJW Offshore, Ltd.*, Nos. 13-70078-ast, 13-70082-ast, 13-70085-ast, 13-70087-ast, 2013 WL 1147203 (Bankr. E.D.N.Y. Mar. 19, 2013) (explaining that a foreign representative in the Cayman Islands could get the turnover of debtor records, as long as adverse parties had an opportunity for hearing).

³² Megan R. O'Flynn, Comment, *The Scorecard So Far: Emerging Issues in Cross-Border Insolvencies Under Chapter 15 of the U.S. Bankruptcy Code*, 32 NW. J. INT'L L. & BUS. 391, 413 (2012) (citing two rare examples: *In re Toft*, 453 B.R. 186 (Bankr. S.D.N.Y. 2011); *In re Gold & Honey, Ltd.*, 410 B.R. 357 (Bankr. E.D.N.Y. 2009)).

³³ *Vitrix S.S.*, 825 F.2d at 713 (citing *Hilton v. Guyot*, 159 U.S. 113, 164 (1895)).

³⁴ 11 U.S.C. § 1504 (2006). In the EIR, the public policy exception is Article 26. Council Regulation 1346/2000 of 29 May 2000 on Insolvency Proceedings 2000 O.J. (L 160) 1 (EC), at art. 26 [hereinafter EIR].

³⁵ EIR, *supra* note 34.

³⁶ See generally BOB WESSELS, EUROPEAN UNION REGULATION OF INSOLVENCY PROCEEDINGS: AN INTRODUCTORY ANALYSIS (3d ed. 2003).

handling of debtors' assets, and to avoid forum shopping.³⁷ It applies only when the debtor has operations in two or more E.U. member States, but does not apply to non-E.U. countries.³⁸

Once the main proceeding is opened in the debtor's "home country," all other countries where the debtor has assets are subject to the laws of the main proceeding country.³⁹ Other E.U. countries must recognize the main proceedings, and the main proceeding's local laws dictate the liquidator's powers.⁴⁰ Article 16(1) mandates recognition of other E.U. member states.⁴¹

Important to the integrity of a universalist regime is a respect for local property rights. Article 5 guarantees creditors that their rights in rem will not be vitiated by another country's laws;⁴² it is an exception to the general rule that the main proceeding's country's laws operate.⁴³ Any creditor has the legal right to open "secondary proceedings" in the country of the assets to pursue its rights in rem.⁴⁴ Balancing property rights and efficiency drive varying interpretations of when creditors should be allowed to open secondary proceedings.⁴⁵ Limiting secondary proceedings to only when a creditor's rights would be diminished without them would be most efficient. This interpretation ensures creditors do not receive unfair discriminatory treatment.⁴⁶

³⁷ Bob Wessels, *EU Insolvency and Its Impact on European Business*, CESIFO DICE REPORT, Jan. 2006, at 16, 17, available at <http://www.cesifo-group.de/portal/pls/portal/docs/1/1193244.pdf>.

³⁸ *Id.*

³⁹ Samuel L. Bufford, *International Insolvency Case Venue in the European Union: The Parmalat and Daisytek Controversies*, 12 COLUM. J. EUR. L. 429, 434 (2006).

⁴⁰ *Id.*

⁴¹ EIR, *supra* note 34, at art. 16(1) ("Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings.").

⁴² *Id.* at art. 5.

⁴³ INSOL EUROPE, REVISION OF THE EUROPEAN INSOLVENCY REGULATION: PROPOSALS 51 (May 2012).

⁴⁴ The four possible interpretations for opening secondary proceedings are:

(1) the national law where the assets are physically located ("*lex rei sitae*") set a floor for the rights, but the rights shall also not be greater than in the *lex rei sitae*; (2) the rights via the *lex rei sitae* will be unaffected by the main proceedings; (3) the rights are only limited by the lesser of the two limitations (and may profit from the difference); or (4) a "hard and fast rule," which allows opening proceedings for any alleged violation of rights.

Id. at 51–52.

⁴⁵ *Id.* at 53.

⁴⁶ Unfair and discriminatory treatment is a driving principle in confirmation of chapter 11 plans. See 11 U.S.C. § 1129(b)(2)(B)(iv) (2006).

Article 27 governs secondary proceedings,⁴⁷ sometimes known as ancillary proceedings.⁴⁸ The EIR mandates that the liquidators of secondary proceedings cooperate closely with other liquidators.⁴⁹ Despite this mandate, the main liquidator may not learn of the initiation of a secondary proceeding early enough to request a stay for a proceeding that may interfere with the most efficient resolution to the insolvency.⁵⁰ The EIR limits secondary proceedings to winding up proceedings, thereby favoring liquidation over group reorganization.⁵¹ As an alternative to secondary proceedings, some commentators have suggested the main proceedings execute “synthetic proceedings,” in which the main court would operate under the law of a foreign member state to replicate the outcome of a secondary proceeding, without opening another proceeding in another court.⁵²

Recently, one court issued a formalistic reading of the EIR.⁵³ The court read the EIR’s purpose as coordinating efficient proceedings.⁵⁴ This reading suggests that secondary proceedings are the only proceedings other than the main proceedings that may be opened.⁵⁵ The decision explained that when secondary proceedings are opened, the main proceedings must serve to protect debtor’s entire asset pool.⁵⁶

1. *E.U. Recommended Reforms*

In 2011, the European Parliament called for a revision of the EIR.⁵⁷ In 2012, a Working Group made recommendations to improve the law by including a chapter devoted to corporate groups. These recommendations included requiring the court to hear the administrator of the main proceedings

⁴⁷ EIR, *supra* note 34, at art. 27.

⁴⁸ See Jose M. Garrido, *No Two Snowflakes the Same: The Distributional Question in International Bankruptcies*, 46 TEX. INT’L L.J. 459, 473 (2011).

⁴⁹ Michel Menjucq & Reinhard Dammann, *Regulation No 1346/2000 on Insolvency Proceedings: Facing the Companies Group Phenomenon*, 9 BUS. L. INT’L 145, 148 (2008).

⁵⁰ EIR, *supra* note 34, at art. 33.

⁵¹ *Id.* at art. 27.

⁵² See, e.g., John A. E. Pottow, *A New Role for Secondary Proceedings in International Bankruptcies*, 20 J. BANKR. L. & PRAC. 5, Art. 1 (2011).

⁵³ *Bank Handlowy v. Warszawie SA C-116/11* [Judgment of the Court of the (First Chamber)] Nov. 22, 2012 (Pol.).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ See Harmonisation of Insolvency Law at EU Level, EUR. PARL. DOC. PE 419.633 (2010).

prior to opening any secondary proceedings. This would enable a court to postpone (or eliminate altogether) the need for secondary proceedings.

Prior to the issuance of the Working Group's recommendations, the E.U. commissioned a study to elicit responses from insolvency participants in E.U. member states.⁵⁸ Respondents reported that despite guidance encouraging cooperation, there was a lack of cooperation and communication between courts.⁵⁹ Given the amount of money and information that moves across borders, it is essential to coordinate the sharing of information and cooperation.⁶⁰ A specific EIR provision to govern coordination for corporate groups, including those groups that have non-E.U. entities, would mitigate these concerns.

II. CORPORATE GROUPS

A corporate group is a number of companies consisting of parent and subsidiary companies.⁶¹ However, neither the EIR nor chapter 15 define a corporate group or stipulate an insolvency process for a corporate group's multiple entities.⁶² While the U.S. Code permits group reorganizations through a single insolvency venue,⁶³ the EIR's strong theory of separateness prevents it from being as effective in consolidating group proceedings.⁶⁴

This Part addresses why corporate groups are so prevalent and the unique problems they pose in insolvency. One of the key benefits of groups—flexibility, also makes standardized rules for groups difficult to define with

⁵⁸ Commission Staff Working Document Executive Summary of the Impact Assessment accompanying the document Revision of Regulation (EC) No 1346/2000 on Insolvency Proceedings, COM (2012) 742 final (Dec. 12, 2012) [hereinafter EC Impact Assessment].

⁵⁹ *Id.*

⁶⁰ Leah Barteld, *Cross-Border Bankruptcy and the Cooperative Solution*, 9 B.Y.U. INT'L L. & MGMT. REV. 27, 43 (2012) (quoting Quentin Peel, Keynote at International Bar Association 2009 Annual Conference (Oct. 4, 2009)).

⁶¹ INSOL EUROPE, *supra* note 43, at 30 (EIR Proposed Article 2(j): "a number of companies consisting of parent and subsidiary companies"). *But see* Irit Mevorach, *INSOL Europe's Proposals on Groups of Companies (in Cross-Border Insolvency): A Critical Appraisal*, 21 INT'L INSOLVENCY REV. 183, 188–89 (2012).

⁶² Gabriel Moss, Proposal for Group COMI and its Consequences at the Tenth Annual International Insolvency Conference (June 7–8, 2010) (available at <http://www.iiiglobal.org/component/jdownloads/finish/39/3890.html>).

⁶³ 28 U.S.C. § 1408(2) (2006).

⁶⁴ *See* Mevorach, *supra* note 61, at 194 & n.41.

universal agreement.⁶⁵ Part II.B. addresses the foremost problem for any corporate group insolvency: determining its COMI. The E.U. has a place of registration rebuttable presumption and the U.S. had a main office test. Any approach should provide predictability to creditors, and clarify COMI early in the proceedings. Part II.C. explains how, once a COMI is established, proceedings could be made more efficient through consolidation. There are two forms of consolidation: procedural consolidation resolves the issues of all the group's entities in one proceeding; substantive consolidation shatters the legal barriers between the entities and treats them as one. Procedural consolidation is more commonly employed, while substantive consolidation is rarer and more maligned.

A. *The Benefits of Corporate Groups*

The term “enterprise group” covers an array of economic organizations with two or more distinct legal entities linked through either an indirect or direct form of control or ownership.⁶⁶ This Subpart discusses the different forms corporate groups take and how legal systems treat these forms. Structural flexibility benefits the corporate group by allowing for the allocation of risk and reduction of the cost of capital through the leverage effect. All sorts of group structures can benefit from a centralized, more efficient insolvency proceeding.⁶⁷ However, centralized proceedings conflict with most legal systems' emphasis on respecting the separateness of legal entities. While some non-legal mechanisms, such as contractualism,⁶⁸ may lead to efficient outcomes, the status quo of corporate group insolvencies is done on a case-by-case basis,⁶⁹ providing little confidence in an efficient result.

Corporate group's structural dynamism makes it difficult to pre-determine third-party expectations about the corporate group's structure. Corporate

⁶⁵ UNCITRAL explains that the term “enterprise group” covers various forms of economic organizations that are treated as a single entity but composed of two or more legal entities linked together by direct or indirect ownership. U.N. Comm'n on Int'l Trade Law, Model Law on Cross-Border Insolvency: Legislative Guide on Insolvency Law, U.N. Sales No. E.12.V.16, at 85–86 (July 2012), available at <http://www.uncitral.org/pdf/english/texts/insolven/Leg-Guide-Insol-Part3-ebook-E.pdf> [hereinafter Legislative Guide]; see also Bufford, *supra* note 2, at 688 n.16 (providing several different definitions).

⁶⁶ Legislative Guide, *supra* note 65, at 5.

⁶⁷ Centralization is not always sought, even if it may be beneficial. Mevorach, *supra* note 23, at 542. Even with a universalist approach, there may sometimes still be subsequent appeals and litigation. *Id.* at 547.

⁶⁸ See e.g., Robert K. Rasmussen, *Resolving Transnational Insolvencies Through Private Ordering*, 98 MICH. L. REV. 2252 (2000).

⁶⁹ Several European jurisdictions, such as the UK, Germany, France, Italy, and Hungary have found partial case-law solutions to group insolvencies. Moss, *supra* note 62.

groups may be decentralized or centralized. Subsidiaries in foreign countries may operate independently of its parent and have little connection to it aside from legal arrangements.⁷⁰ A subsidiary may appear to the public as an independent company, and the size and complexity of the group is unapparent.⁷¹ Contrarily, the public image of the corporate group may be that of a unitary organization operating under a single corporate identity, despite having separate legal entities in each country.⁷² An entity in the group may enter into contracts independently, on behalf of another, or through intercompany and transfer pricing agreements.⁷³

There are many economic and legal benefits to allowing the corporate group to structure in a way that makes most sense for it.⁷⁴ Most legal systems emphasize respect for corporate entity separateness. While some countries, such as Germany, have adopted specific legal regimes for corporate groups, attempts to do so at the E.U. level have failed.⁷⁵ The law is reluctant to ignore its reverence for legal separateness; however, balancing this reverence with the goals of insolvency creates difficulties.⁷⁶

Risk allocation and the structural flexibility can mitigate the likelihood of corporate group insolvency. Individual subsidiaries of a group usually will not file for bankruptcy unless the parent's health requires it.⁷⁷ Aggregation of companies into a large unit creates a "leverage effect," which reduces the cost of capital, because companies supported and backed by others are less likely to file bankruptcy.⁷⁸ Independent subsidiaries allow for an apportioning of risk where each legal entity has an easily ascertainable level of risk, independent from another one, which may be more attractive to different creditors.⁷⁹

⁷⁰ See Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 437 (2000).

⁷¹ IRIT MEVORACH, *INSOLVENCY WITHIN MULTINATIONAL ENTERPRISE GROUPS* 154–55 (2009).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ See Hansmann & Kraakman, *supra* note 70, at 437.

⁷⁵ MEVORACH, *supra* note 71, at 52–56.

⁷⁶ Robert K. Rasmussen, *Where Are All the Transnational Bankruptcies? The Puzzling Case for Universalism*, 32 BROOK. J. INT'L L. 983, 994 (2007). (citing John Armour & Simon Deakin, Norms in Private Insolvency: The "London Approach" to the Resolution of Financial Distress, 1 J. CORP. L. STUD. 21 (2001)).

⁷⁷ Thomas C. Baxter, Jr. & Joseph H. Sommer, *Breaking Up is Hard to Do: An Essay on Cross-Border Challenges in Resolving Financial Groups*, in SYSTEMIC FINANCIAL CRISES: RESOLVING LARGE BANK INSOLVENCIES (Douglas D. Evanoff & George G. Kaufman, eds. 2005).

⁷⁸ Nico Dewaelheyns & Cynthia Van Hulle, *Corporate Failure Prediction Modeling*, 33 J. BUS. & ACC. 909, 912-915 (June–July 2006) (discussing liquidity, size, and efficiency as influential factors).

⁷⁹ Alexander Dähnert, *The Threat of Corporate Groups and the Insolvency Connection*, 18 INSOL INT'L INSOLVENCY REV. 209 (2009) (discussing the reasoning behind groups and strategies considered); Nico

However, systemic failure can lead to corporate group failure.⁸⁰ In Europe, the vast majority of cases filed under the EIR are corporate groups.⁸¹ In the U.S., the majority of chapter 15 cases also involved corporate groups.⁸² Three key features that distinguish the corporate group insolvency from a standard individual insolvency are: (1) each entity in the group has its own legal status, shareholders, creditors, and assets; (2) each entity may have a unique COMI; and (3) coordination between the entities is difficult.⁸³

All types of groups may benefit from centralized proceedings.⁸⁴ Often, “cooperation may be the only way to reduce the risk of piecemeal insolvency proceedings that have the potential to destroy going concern value and lead to asset ring-fencing, as well as asset shifting or forum shopping by debtors.”⁸⁵ If there are multiple proceedings for legally distinct entities, the debtors may have to rely on the corporate group identity to get recognition for another proceeding.⁸⁶ Being able to reorganize as a full entity, rather than piecemeal, can also permit the group to continue as a going concern and inure the benefits of the leverage effect.

Flexibility in the corporate structure has important ex ante benefits, but can continue to have benefits as to how the enterprise restructures ex post through private ordering. One example of private ordering is the “London Approach” (or ad hoc contractualism).⁸⁷ This entails getting standstill agreements pre-insolvency from creditors to guarantee no secondary proceedings.⁸⁸ Though

Dewaelheyns & Cynthia Van Hulle, *Internal Capital Markets and Capital Structure: Bank Versus Internal Debt* (2007), available at http://www.econ.kuleuven.be/eng/tew/academic/afi/pdfs/afi_0703.pdf.

⁸⁰ Cf. Alexandra CC Ragan, Comment, *Comi Strikes A Discordant Note: Why U.S. Courts Are Not in Complete Harmony Despite Chapter 15 Directives*, 27 EMORY BANKR. DEV. J. 117, 168 (2010).

⁸¹ Irit Merovach, *The Road to a Suitable and Comprehensive Global Approach to Insolvencies Within Multinational Corporate Groups*, 15 J. BANKR. L. & PRAC. 5 ART. 1 (2006).

⁸² A 2010 study found of 383 cases filed, 232 involved enterprise groups. Jay Lawrence Westbrook, *The Model Law and the United States: COMI and Groups at the Tenth Annual International Insolvency Conference* (June 7–8, 2010) (available at <http://www.iiiglobal.org/component/jdownloads/finish/362/4114.html>).

⁸³ Bufford, *supra* note 2, at 690.

⁸⁴ Eberhard Neitzer, *Guidelines for Coordination of Multinational Enterprise Group Insolvencies*, 4 INT’L INSOLVENCY L. REV. 491, 499 (2012)

⁸⁵ Legislative Guide, *supra* note 65, at 41–42.

⁸⁶ *Id.* at 42.

⁸⁷ Rasmussen, *supra* note 76, at 997 (citing Armour & Deakin, *supra* note 76). Several sources urge private cooperation outside of court. *E.g.*, TRANSNATIONAL INSOLVENCY: COOPERATION AMONG THE NAFTA COUNTRIES (A.L.I. 2003); Bob Wessels & Miguel Virgós, *European Communication and Cooperation Guidelines for Cross-border Insolvency* (July 2007), available at <http://www.insol.org/INSOLfaculty/pdfs/BasicReading/Session%205/European%20Communication%20and%20Cooperation%20Guidelines%20for%20Cross-border%20Insolvency%20.pdf>.

⁸⁸ Rasmussen, *supra* note 76, at 997.

private ordering has its benefits, the London Approach presumes that management will foresee financial difficulties early enough to seek the agreements and secure the cooperation of the creditors.

While many group insolvencies have had positive outcomes, limited predictability has resulted in a case-by-case approach that is “haphazard.”⁸⁹ Opening of separate proceedings with independent administrators leads to the disintegration of the business and ultimately a decrease in the returns to the creditors.⁹⁰ Determining an appropriate home for group main proceedings is essential to preventing disintegrated main proceedings.

B. *Center of Main Interests (COMI)*

Where is the “right” place to complete the group insolvency proceedings?⁹¹ The E.U. and the U.S. have different approaches to COMI. In most instances the outcome will be the same, but there can be some variance. Both approaches are concerned with predictability to creditors, but the E.U. focuses on formal registration, whereas the U.S. focuses on the head office test. There is no concept such as a corporate group COMI; each legal entity may have its own COMI.⁹² It is probably too difficult to set up an unflagging rule for determining COMI.⁹³ Flexibility granted to corporation groups also requires courts be reciprocally flexible for proceedings.⁹⁴ Nonetheless, predictability is a key tenet for effective insolvency policy.

A COMI is integral to a single (universalist) proceeding.⁹⁵ It is the venue for proceeding, and triggers the venue’s applicable law for the proceedings. A COMI is perpetual for the insolvency and at any given time, a company can

⁸⁹ Irit Mevorach, *Towards A Consensus on the Treatment of Multinational Enterprise Groups in Insolvency*, 18 CARDOZO J. INT’L & COMP. L. 359, 366 (2010) (explaining a lack of explicit rules leads to the haphazard approach).

⁹⁰ See Ian Fletcher, *The European Union Regulation on Insolvency Proceedings*, in INSOL INTERNATIONAL, CROSS-BORDER INSOLVENCY: A GUIDE TO RECOGNITION AND ENFORCEMENT 15, 20 (2003).

⁹¹ See, e.g., Mevorach, *supra* note 89, at 388–98; Irit Mevorach, *The “Home Country” of a Multinational Enterprise Group Facing Insolvency*, in 2009 NORTON ANN. REV. INTL. INSOLVENCY 5; Jay Lawrence Westbrook, *Locating the Eye of the Financial Storm*, 32 BROOK. J. INT’L L. 1019 (2007).

⁹² Janis Sarra, *Oversight and Financing of Cross-Border Business Enterprise Group Insolvency Proceedings*, 44 TEX. INT’L L.J. 547, 562 (2009).

⁹³ See U.N. Comm’n on Int’l Trade Law, Working Group V (Insolvency Law), *Treatment of Corporate Groups in Insolvency*, ¶¶ 39–47, U.N. Doc. A/CN.9/WG.V/WP.74 (Oct. 4, 2006).

⁹⁴ U.N. Comm’n on Int’l Trade Law, Working Group V (Insolvency Law), *Report of Working Group V (Insolvency Law) on the Work of Its Thirty-Fifth Session*, ¶¶ 28–29 U.N. Doc. A/CN.9/666 (Dec. 2, 2008).

⁹⁵ Mevorach, *supra* note 89, at, 397 (citing the EIR, the UNCITRAL Model Law, and the ALI Principles).

only have one COMI.⁹⁶ Corporate groups may not have an easily ascertainable home or may have many homes each with an equal proportion of the group's operations.⁹⁷ The E.U.'s research has shown that COMI issues arose in 40–50% of all insolvency cases, though COMI was not always contested.⁹⁸

In the most efficient procedure, the beginning of a case should look to determine an enterprise-wide COMI. There need not be a rigid COMI rule, but a set of criteria to determine COMI is in the right forum early in the proceedings. Then, creditors can level their expectations and be aware that secondary proceedings are not permissible unless there is a credible threat that their Article 5 rights would not be protected.

1. *E.U. Approach*

EIR Article 3 dictates that the COMI is the place of registration, but this is a rebuttable presumption.⁹⁹ The 2006 *Eurofood* decision explained that this presumption is very strong, rebuttable only by a clear set of factors that cumulatively indicate to third parties a different COMI.¹⁰⁰ *Eurofood* reduced the scope for procedural consolidation of separate legal entities.¹⁰¹ Some

⁹⁶ Adam Gallagher, *Center of Main Interest: The EU Insolvency Regulation and Chapter 15*, AM. BANKR. INST. J., July–Aug. 2009, at 44, 79.

⁹⁷ LoPucki, *supra* note 9, at 713–18 (1999).

⁹⁸ EC Impact Assessment, *supra* note 58, at 5. INSOL recommends the following definition for COMI:

the place of the registered office, except that, (i) where the operational head office functions of the company or legal person are carried out in another Member State and that other Member State is ascertainable to actual and prospective creditors as the place where such operational head office functions are carried out, it shall mean and refer to the Member State where such operational head functions are carried out and (ii) where the company or legal person is a mere holding company or mere holding legal person, within a group with head office functions in another Member State, the centre of main interests as defined in the previous sentence is located in such other Member State. The mere fact that the economic choices and decisions of a company are or can be controlled by a parent company in another Member State than the Member State of the registered office does not cause the centre of main interests to be located in this other Member State. In the case of individuals, the centre of main interests shall mean the place of habitual residence, except that in case of professionals it shall be the professional's principal office or principal location from which his profession is conducted.

INSOL EUROPE, *supra* note 61, at 9.

⁹⁹ “For a company or legal person, the place of its registered office shall be presumed to be the centre of its main interests, in the absence of proof of the contrary.” EIR, *supra* note 34, at art. 3.

¹⁰⁰ Menjucq & Reinhard Dammann, *supra* note 49, at 148.

¹⁰¹ *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee, on the application of Council Regulation (EC) No 1346/2000 of 29 May 2000 on Insolvency Proceedings*, at 15 COM (2012) 743 final (Dec. 12, 2012) [hereinafter *Insolvency Report*].

nations may take a stricter view of this presumption.¹⁰² *Interdil* tempered the harshness of *Eurofood*, to allow COMI based on the parent company's location, but only if the parent company's COMI was objectively observable by the subsidiary's creditors.¹⁰³ There are no concrete rules for determining what the ascertainable facts to myriad creditors will be.¹⁰⁴ Corporate groups may also strategically migrate their COMI for more advantageous insolvency law.¹⁰⁵ There is no data to demonstrate whether creditors, particularly of the largest corporate groups, are truly confused as to with which member of the group they are dealing.¹⁰⁶ Thus, it is difficult to predict when the strong presumption may be rebutted.¹⁰⁷

The EIR does not include an express duty for a court to investigate whether it has proper jurisdiction before initiating a main proceeding.¹⁰⁸ This is problematic because it gives *too much* leverage to a corporate group to choose its COMI, but also incentivizes the opening of secondary proceedings when the main proceedings began in a sub-optimal jurisdiction for the group. Because secondary proceedings are limited to winding up proceedings,¹⁰⁹ this minimizes the effectiveness of reorganizations. This may happen because of a lack of communication and no centralized information repository for insolvency proceedings in other E.U. member states.¹¹⁰

¹⁰² *E.g.*, INSOL INT'L, CROSS-BORDER INSOLVENCY II: A GUIDE TO RECOGNITION AND ENFORCEMENT 34–35 (2012).

¹⁰³ *Id.*

¹⁰⁴ *See* Gabriel Moss & Michael Haravon, “Building Europe”—the French Case Law on COMI, 20 INSOLVENCY INTELLIGENCE 20, 22 (2007) (explaining that courts in the United Kingdom, Germany, Hungary, Italy and France have adopted the “head office functions” as a guide).

¹⁰⁵ *E.g.*, *In re Hellas Telecommunications (Luxembourg) II* SCA [2009] EWHC 3199 (Ch) (the Luxembourg-based Wind Hellas Telecoms re-registered in England three months before opening insolvency proceedings).

¹⁰⁶ Westbrook, *supra* note 91, at 1036.

¹⁰⁷ *See* Ragan, *supra* note 80, at 133.

¹⁰⁸ EC Impact Assessment, *supra* note 58, at 5 (discussing that there is no such requirement in the EIR). However, some courts do dismiss cases for lack of jurisdiction. *See, e.g.*, Teresa Camacho & Alberto Nunez-Lagos Burguera, *Secondary Proceedings: Are Cross-Border Insolvencies in the EU Dealt with Efficiently?*, 2 INT'L INSOLVENCY REV. 140, 145 & n. 10 (2013) (citing Judgment issued by the Commercial Court No. 1 of Bilbao on 13 Dec. 2011, auto 528/2011).

¹⁰⁹ *See supra* text accompanying notes 48–52.

¹¹⁰ *See* Camacho & Burguera, *supra* note 108, at 143–44.

2. U.S. Approach

In contrast to the EIR, the U.S. Code says a court must determine the COMI upon the commencement of proceedings.¹¹¹ Recently, a court clarified commencement is different from recognition, even if the COMI may have changed in the interim.¹¹² For a proceeding to be recognized, it must be classified as either a foreign main (those in the debtor's COMI) or non-main proceeding.¹¹³

The U.S. approach to determining the COMI is a “command and control test.”¹¹⁴ *In re Bear Stearns* noted the presumption of registration is helpful when there is no serious controversy, but listed a number of alternate factors to determine the COMI:

the location of the debtor's headquarters; the location of those who actually manage the debtor (which, conceivably could be the headquarters of a holding company); the location of the debtor's primary assets; the location of the majority of the debtor's creditors or of a majority of the creditors who would be affected by the case; and/or the jurisdiction whose law would apply to most disputes.¹¹⁵

The District Court's affirmed the bankruptcy court and favorably quoted these factors.¹¹⁶

Prior to chapter 15, the concept of COMI was unknown in the U.S.,¹¹⁷ but it resembles the principle place of business test used in civil procedure, which

¹¹¹ *In re Betcorp Ltd.*, 400 B.R. 266, 291–92 (Bankr. D. Nev. 2009).

¹¹² *In re Kemsley*, No. 12-13570 JMP, 2013 WL 1164930 (Bankr. S.D.N.Y. Mar. 22, 2013) (“It did not matter that, after these insolvency proceedings were commenced, the debtor's wife moved with their children back to the UK and the debtor allegedly began to think of repatriating to be with his children, since the debtor's COMI had to be determined as of the date the foreign proceedings commenced, not when recognition was sought.”). *But see In re Fairfield Sentry Ltd.*, No. 11-4376., 2013 WL 1593348 (2d Cir. Apr. 16, 2013) (“But given the EU Regulation and other international interpretations, which focus on the regularity and ascertainability of a debtor's COMI, a court may consider the period between the commencement of the foreign insolvency proceeding and the filing of the Chapter 15 petition to ensure that a debtor has not manipulated its COMI in bad faith.”).

¹¹³ 11 U.S.C. § 1502(4).

¹¹⁴ *In re Betcorp*, 400 B.R. at 290; *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122, 126–32 (Bankr. S.D.N.Y. 2007), *aff'd* 389 B.R. 325 (S.D.N.Y. 2008); *In re Sphinx*, 351 B.R. 103, 117–21 (Bankr. S.D.N.Y. 2006); Gropper, *supra* note 19.

¹¹⁵ *In re Bear Stearns* 374 B.R. at 128 (citing *In re Sphinx*, 351 B.R. at 117).

¹¹⁶ *Id.* at 336 (citing additional cases which relied on these factors: *In re Ernst & Young, Inc.*, 383 B.R. 773, 779 (Bankr.D. Colo. 2008); *In re Basis Yield Alpha Fund (Master)*, 381 B.R. 37, 47 (Bankr. S.D.N.Y. 2008); *In re Loy*, 380 B.R. 154, 162 (Bankr. E.D. Va. 2007)).

looks at where the majority of the group's operations take place.¹¹⁸ This test is not as rigid as the EIR's rebuttable presumption, but it still emphasizes the predictability to third parties.

3. A Combined Approach

The E.U. approach of relying on registration and objective factors evident to creditors presents problems for determining a corporate group-wide COMI, particularly given the emphasis on respecting legal separateness. The head office approach would still be ascertainable for creditors.¹¹⁹ Several European courts followed this test for successful group proceedings.¹²⁰ The more flexible approach also caters to a wider range of corporate group structures. There may be complex cases where court involvement is necessary to adjudge the COMI, but these cases would be the exception, not the rule. A determination that the chosen COMI is appropriate should be made early in the process.

Despite the problem in determining E.U. corporate groups COMI and no mechanism by which to consolidate proceedings, several corporate groups have successfully had single proceedings in the home of the parent.¹²¹ Examples include *Daisytek* and *Nortel*.¹²²

C. Procedural Consolidation

Procedural consolidation is the consolidation of all proceedings into a single proceeding, to allow for a common claims procedure and prevent the disturbance of the group's assets and debts.¹²³ In the U.S., and in Canada,

¹¹⁷ See Mark Lightner, *Determining the Center of Main Interests Under Chapter 15*, 18 NORTON J. BANKR. L. & PRAC. 519, 521 (3d ed. 2009) ("Bankruptcy courts have struggled somewhat to define COMI, in part because COMI was not, before BAPCPA, part of American law.").

¹¹⁸ See *Hertz Corp. v. Friend*, 559 U.S. 77 (2009) (defining a corporation's principal place of business for determining diversity jurisdiction under 28 U.S.C. 1332(c)(1) as its "nerve center"); see also *Bennett Truck Transp. LLC v. Tri-Continental Exch. Ltd. (In re Tri-Continental Exch. Ltd.)*, 349 B.R. 627 (Bankr. E.D. Cal. 2006) (explaining that the drafters chose COMI over the principal place of business for consistency with other countries' terminology).

¹¹⁹ See Mevorach, *supra* note 89, at 403.

¹²⁰ Gabriel Moss & Tom Smith, *Commentary on Council Regulation 1346/ 2000 on Insolvency Proceedings*, in *THE EC REGULATION ON INSOLVENCY PROCEEDINGS—A COMMENTARY AND ANNOTATED GUIDE*, (Gabriel Moss et al., eds. 2009) (noting Eurotunnel, Collins & Aikman, Hettlage AG & CO KG, EMTEC).

¹²¹ Mevorach, *supra* note 61, at 194 (citing several examples).

¹²² Gallagher, *supra* note 96, at 79.

¹²³ See Sarra, *supra* note 92, at 656; see also Christoph G. Paulus, *Group Insolvencies—Some Thoughts About New Approaches*, 42 TEX. INT'L L.J. 819, 826 (2007).

procedural consolidation is commonplace. Several other countries have provisions for it, but the EIR does not.¹²⁴ Procedural consolidation allows a corporate group to have a common court filing, a single set of notices, a common administrator, and joint proceedings; however, the individual legal entities can retain their separate insolvency estates and create different reorganization plans.¹²⁵

In the E.U., the lack of an explicit procedural consolidation provision creates inefficient proceedings: the E.U. estimates that 700 companies with multi-national subsidiaries open hundreds of secondary proceedings.¹²⁶ Because U.S. law authorizes the commencement of a case in the same bankruptcy court for affiliated entities,¹²⁷ secondary proceedings are rare.¹²⁸ U.S. Federal Rule of Bankruptcy Procedure 2009(a) allows for the election of a single trustee to preside over the joint process.¹²⁹ Consolidation reduces transactional costs.¹³⁰

The EIR allows secondary proceedings only for winding up proceedings, and courts do not have to determine whether opening secondary proceedings is reasonable or advisable.¹³¹ Courts should consider efficient administration of the overall estate.¹³² Courts exercising discretion to determine best interests would minimize abusive proceedings.¹³³ Additionally, the EIR could allow secondary proceedings for more than winding up procedures, to avoid compromising a group restructuring and forcing liquidation.

Although proceedings in the U.S. may be consolidated into one proceeding, cross-border enforcement of those judgments is subject to recognition of the U.S. court's findings. Recently, in *Rubin Finance*,¹³⁴ the English Supreme

¹²⁴ Heribert Hirte, *Towards a Framework for the Regulation of Corporate Groups' Insolvencies*, 5 EURO. CO. & FIN. L. REV. 213, 218–19 (2008) (noting Germany, Hungary, France, and Spain have allowed corporate group procedural consolidations).

¹²⁵ Bufford, *supra* note 2, at 737.

¹²⁶ EC Impact Assessment, *supra* note 58, at 6.

¹²⁷ 28 U.S.C. § 1408 (2006).

¹²⁸ Bufford, *supra* note 2, at 737.

¹²⁹ MEVORACH, *supra* note 71 at 160.

¹³⁰ Bufford, *supra* note 2, at 709–10; *see also* Rasmussen, *supra* note 76, at 989 (citing *In re UAL Corp.*, No. 02-B-48191, 2006 WL 6593116 (Bankr. N.D. Ill. Jan 3, 2006) (28 petitions consolidated into one); *In re Sea Containers Ltd.*, No. 06-11156, 2009 WL 2208128 (Bankr. D. Del. Oct. 15, 2006); *In re Calpine*, No. 05-60200 (BRL), 2007 WL 685595, at *2-3 (Bankr. S.D.N.Y. Mar. 5, 2007)).

¹³¹ Camacho & Burguera, *supra* note 108, at 144.

¹³² *Id.*

¹³³ *Id.* at 147.

¹³⁴ *Rubin v Eurofinance S.A.* [2012] UKSC 46.

Court refused to recognize the U.S. court judgment.¹³⁵ The court rejected the argument that a universalist policy compelled enforcement, and instead noted there was no basis in English law to enforce the foreign law upon third parties (in this instance, an avoidance action).¹³⁶ The court emphasized that the Model Law does not extend to enforcing judgments on third parties *in personam*.¹³⁷ The impact of this ruling is yet to be seen.¹³⁸ The case leaves questions on how to handle a E.U.-U.S. insolvency proceedings: even if a debtor files a consolidated proceeding in the U.S., all parties involved may be weary of a series of appeals and the inability to get recognition of U.S. judgments in E.U. countries. *Rubin Finance* was a departure from precedent,¹³⁹ and the dissent noted it deviated from modified universalism's principles that had long guided English insolvency proceedings.¹⁴⁰ Another case, *Waste2Energy*, issued just weeks before *Rubin Finance*, but with distinct facts,¹⁴¹ expresses that offshore jurisdictions are embracing universalism.¹⁴² These opinions creates some confusion for UK practitioners, but proposed amendments to the EIR may provide clarification between the two cases.¹⁴³

D. Substantive Consolidation

While procedural consolidations are common in the U.S., a more controversial approach to dealing with corporate groups is substantive consolidation, which abolishes the barriers between legal entities and consolidates them into one entity. Dismantling the pre-established legal separateness may not offer a broad solution, but can be useful in limited circumstances.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ Paul Atherton, *United Kingdom: UK Supreme Court Rules on Cross-Border Insolvencies*, MONDAQ, Mar. 25, 2013, <http://www.mondaq.com/x/224122/Insolvency+Bankruptcy/UK+Supreme+Court+Rules+On+CrossBorder+Insolvencies>.

¹³⁸ David L. Barrack & Beret L. Flom, *U.K. Court's Impact on Cross-Border Insolvency Landscape*, AM. BANKR. INST. J., Apr. 2013, at 52, 100.

¹³⁹ The decision overruled *Cambridge Gas Transportation Corp. v Official Comm. of Unsecured Creditors of Navigator Holdings Plc.* [2006] UKPC 26.

¹⁴⁰ *Rubin v Eurofinance S.A.* [2012] UKSC 46; *New Cap Reinsurance Corp & Anor v Grant & Ors* [2012] UKSC 46.

¹⁴¹ *Interdelvelco Limited v. Waste2Energy Group Holdings PLC*, High Court of Justice of the Isle of Man, CHP 12/0056, Decision 10th Oct. 2012, *available at* www.judgments.im/content/j1185.htm.

¹⁴² Wayne P. Weitz & Tally M. Wiener, *Offshore Jurisdictions Embrace Universalism in Waste2energy*, AM. BANKR. INST. J., Apr. 2013, at 42, 118.

¹⁴³ Frank Tschentscher, *A Change of Direction for English Cross-Border Insolvency Law*, AM. BANKR. INST. J., Feb. 2013, at 38, 39.

U.S. courts have consolidated entities on limited occasions.¹⁴⁴ The term “substantive consolidation” does not appear anywhere in the U.S. Code, but courts have exercised their equitable powers under 11 U.S.C. § 105, when they deem it necessary.¹⁴⁵ *In re Owens-Corning*¹⁴⁶ set the standard for substantive consolidation. It should be a rare tool used only when the legal separateness of the entities prepetition was a mere formality; because assets and liabilities were so intertwined, creditors recognized no borders between the entities and it would not benefit them to respect the separateness of the entities.¹⁴⁷

Substantive consolidation is often employed as a tool of partial integration, or “de facto substantive consolidation.”¹⁴⁸ This may be practically applied when entities are legally distinct, but their finances are so intertwined that disentanglement proves impossible.¹⁴⁹ Thus, “de facto” substantive consolidation could be a useful tool for corporate group insolvencies to minimize the number of proceedings without a broad rule razing entity separateness.¹⁵⁰

III. COST EFFICIENCY & SINGLE PROCEEDINGS

Insolvency’s goal of maximizing creditor wealth is best achieved by minimizing unnecessary transaction and ex post insolvency costs.¹⁵¹ A controlling policy for maintaining corporate group insolvencies would resolve the conflicts between separate legal entities and creditors in favor of the maximum benefit for *all* creditors. While such a result is not impossible under the current regime, it is not guaranteed.¹⁵² This Part explains the economic theory of why individual creditors sacrificing their purported rights would

¹⁴⁴ Weitz & Wiener, *supra* note 142, at 42.

¹⁴⁵ *Eastgroup Props. v. S. Motel Ass’n, Ltd.*, 935 F.2d 245, 248 (11th Cir. 1991); *accord* *First Nat’l Bank of El Dorado v. Giller (In re Giller)*, 962 F.2d 796 (8th Cir. 1992); *Union Savings Bank v. Augie/Restivo Baking Co., Ltd. (In re Augie/Restivo Baking Co., Ltd.)*, 860 F.2d 515 (2d Cir. 1988); *In re Vecco Constr. Indus.*, 4 B.R. 407 (Bankr. E.D. Va. 1980).

¹⁴⁶ *In re Owens Corning*, 419 F.3d 195 (3d Cir. 2005) (amended 2007).

¹⁴⁷ *Id.* at 211.

¹⁴⁸ Jacob Ziegel, *Canada-United States Cross-Border Insolvency Relations and the UNCITRAL Model Law*, 32 *BROOK. J. INT’L L.* 1041, 1050 (2007).

¹⁴⁹ *See id.*

¹⁵⁰ *See infra* Part III.D.3. (discussing *General Growth Properties* as an example of de facto substantive consolidation).

¹⁵¹ SAMUEL L. BUFFORD ET AL., *UNITED STATES INTERNATIONAL INSOLVENCY LAW 2008–2009*, 21–22 (2009); MEVORACH, *supra* note 71, at 107.

¹⁵² *See supra* Part II.B.1. (citing examples of cases where a single COMI was achieved despite no law requiring it); *infra* Part III.B.1. (discussing examples of cases with good outcomes).

ultimately benefit them, other creditors, and the economy overall. It then goes on to discuss the impact of corporate groups' size on the costs of the proceedings: the time it takes to wind up and the direct fees to professionals involved. This Part also highlights several group insolvencies, which provide insight on factors that determine insolvency proceedings' efficiency or lack thereof.

A. *Economic Theories of Single Proceeding Efficiency*

A standardized policy for dealing with corporate groups would not only provide a framework to efficiently conclude proceedings, but stabilize ex ante capital markets by minimizing uncertainties in the event of future insolvencies.¹⁵³ This Subpart discusses the harms of uncertainty absent a policy of efficient proceedings. The *Collins & Aikman* insolvency demonstrates how and why competing interests can coordinate to achieve an efficient outcome.

The specter of feuding creditors opening numerous proceedings, prolonging proceedings, and diminishing overall value and return to creditors could be detracting for a potential creditor.¹⁵⁴ Uncertainty can also have the negative market effects of decreasing ex ante credit, increasing the associated interest rates, and creating economic deadweight.¹⁵⁵ It could deter "the free flow of capital among counties and creates a disincentive to investment across borders."¹⁵⁶

Uncertainty diminishes incentives for cooperation between creditors. Absent a guarantee that other creditors will not attempt to open secondary proceedings, any creditor with a viable claim under Article 5¹⁵⁷ faces an anticommons problem—if every creditor is grabbing for their own best interest, why would one creditor sacrifice its own interests for the corporate group's collective good?¹⁵⁸ However, when parties do not coordinate for a common goal,¹⁵⁹ they each attain suboptimal results.¹⁶⁰ One means to avoid

¹⁵³ See David C. Webb, *The Importance of Incomplete Information in Explaining the Existence of Costly Bankruptcy*, 54 *ECONOMICA* 279, 279 (1987).

¹⁵⁴ *Id.*

¹⁵⁵ Lawrence A. Weiss, *Bankruptcy Resolution: Direct Costs and Violation of Priority of Claims*, 27 *J. FIN. ECON.* 285, 285 (1990); Bebchuk & Guzman, *supra* note 4, at 779–80.

¹⁵⁶ Altman, *supra* note 12.

¹⁵⁷ See *supra* Part I.D.

¹⁵⁸ Mevorach, *supra* note 89, at 371.

¹⁵⁹ BOB WESSELS, BRUCE A. MARKELL & JASON J. KILBORN, *INTERNATIONAL COOPERATION IN BANKRUPTCY AND INSOLVENCY MATTERS* 167 (2009).

this problem are private protocols—private guarantees that the proceedings will follow the planned route.¹⁶¹

While individual creditors may object to the idea of a single proceeding, efficient consolidation puts the interests of all the creditors above those of an individual creditor. Theoretically, an individual creditor's abrogated rights under the local law would be mitigated by the overall increase in the enterprise asset maximization from a single proceeding in a different jurisdiction.¹⁶² The creditor would be in no worse a position than it would have been under local law. This is known as the “rough wash theory.”¹⁶³

The *Collins & Aikman*¹⁶⁴ insolvency exemplifies an efficient global sale and the rough wash theory. Collins & Aikman was an automotive parts supplier.¹⁶⁵ Twenty-four companies in nine E.U. states were consolidated into one centralized proceeding in England.¹⁶⁶ Though the COMI could have been one of many places in Europe, the company filed in England, and once proceedings were initiated, the English-appointed joint administrators took quick action to contact creditors throughout the continent, and request they not open secondary proceedings.¹⁶⁷ The administrators assured these creditors that the main proceeding in England would respect what their financial positions would have been, had the proceedings taken place under their local law.¹⁶⁸ Reviewing these assurances, the court considered the equitable nature of insolvency proceedings and found no reason why it could not abide by the administrators' guarantees.¹⁶⁹

One of Collins & Aikman's larger creditors was U.S. based J.P. Morgan. J.P. Morgan would have been benefited more under U.S. priority law than under English law. Nonetheless, J.P. Morgan submitted to the court a letter of

¹⁶⁰ See Robert B. Ahdieh, *The Visible Hand: Coordination Functions of the Regulatory State*, 95 MINN. L. REV. 578, 618 (2010).

¹⁶¹ See discussion *infra* Part IV.A.

¹⁶² Jay Lawrence Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L. J. 457, 464–66 (1991).

¹⁶³ *Id.*

¹⁶⁴ Re Collins & Aikman Europe SA, [2006] EWHC 1343 (Ch).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* However, German law may sometimes require substantive consolidation, with a single administrative for the groups. See *supra* note 75 and accompanying text.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

support for the proposed deal and agreed not to open secondary proceedings.¹⁷⁰ J.P. Morgan explained that foregoing any further actions and completing the sale on the administrators' proposed terms would be a better deal for it in the end.¹⁷¹ Ultimately, Collins & Aikman liquidated for \$45 million more than estimated.¹⁷² The case is hailed as a model for how to complete single corporate group proceedings.¹⁷³

B. The Impact of a Debtor's Size on Efficiency

Economies of scale operate in insolvency proceedings. Larger enterprises will absorb costs because the fixed costs of insolvency will be the same regardless of the size of the debtor, but are less significant relative to the size of the entire debtor. Several studies have sought to prove that there is a correlation between the size of the debtor and a reduction in costs of bankruptcy.¹⁷⁴ However, such studies acknowledge that insolvencies are complex, with too many variables to do a fair comparison.¹⁷⁵ Furthermore, there are questions about how one defines the debtor's size: assets, assets *and* liabilities, employees, or more qualitative factors.¹⁷⁶

Capitalizing on the size and leverage effect,¹⁷⁷ a corporate group, if reorganized in a centralized manner, is more likely to continue as a going concern. In the U.S., the general policy is to favor reorganization because of its macroeconomic benefits. Despite the macroeconomic benefits, liquidation is

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ See, e.g., Gabriel Moss QC, *Group Insolvency-Choice of Forum and Law: The European Experience Under the Influence of English Pragmatism*, 32 BROOK. J. INT'L L. 1005, 1018 (2007). Even this case, despite its overall efficiency, had one secondary proceeding open in Austria. *Id.*

¹⁷⁴ E.g., Oscar Couwenberg & Stephen J. Lubben, *The Costs of Chapter 11 in Context: American and Dutch Business Bankruptcy*, 85 AM. BANKR. L.J. 63 (2011); Abe De Jong & Oscar Couwenberg, *Costs and Recovery Rates in the Dutch Liquidation-Based Bankruptcy System*, 26 EURO. J. L. ECON. 105–27 (2008) (finding that with a 1% increase in the size of a debtor, professional fees grow by less than 0.05%, all else equal); Dewaelheyns & Van Hulle, *supra* note 78, at 912–15; Nico Dewaelheyns & Cynthia Van Hulle, *Filtering Speed in A Continental European Reorganization Procedure*, 29 INT'L REV. L. & ECON. 375, 383 (2009).

¹⁷⁵ See, e.g., Dewaelheyns & Van Hulle, *Filtering Speed*, *supra* note 174; De Jong & Couwenberg, *supra* note 174.

¹⁷⁶ Stephen J. Lubben, *What We "Know" About Chapter 11 Cost Is Wrong*, 17 FORDHAM J. CORP. & FIN. L. 141, 159–61 (2012).

¹⁷⁷ See *infra* Part III.C.

generally cheaper from the creditor's perspective.¹⁷⁸ However, one study concluded that chapter 7 (liquidation) is no less costly than chapter 11 (reorganization) proceedings, but the latter preserves assets better and creditors' returns are far greater.¹⁷⁹ With the cooperation of creditors in reorganizing, not only would the debtor and the economy benefit, so would the creditors themselves.

Unlike the U.S.'s policy favoring reorganization, the EIR's structure encourages liquidation. Article 27 says secondary proceedings may *only* be opened for liquidation proceedings, which makes restructuring challenging.¹⁸⁰ The challenge can be exacerbated by the uncertainty of whether secondary proceedings will be opened. Liquidating chunks of the group while trying to preserve a going concern may prove next to impossible.¹⁸¹

The preference for liquidations is beginning to be counteracted by the increasing use of coordinated insolvency proceedings across subsidiaries.¹⁸² Forcing liquidation instead of reorganization sacrifices the benefits gained by forming corporate groups.¹⁸³

C. *Speed & Costs of Proceedings*

The ability to go in and out of insolvency quickly will minimize both the direct and indirect costs of bankruptcy. While the complexities of corporate groups' structures may complicate proceedings, the structures may allow for more rapid restructuring. Avoiding secondary proceedings will minimize the time and expense of having to cooperate between more parties and duplicate efforts. It will also limit the need to incur more professional fees (such as liquidators, attorneys, and accountants), who charge high rates for complex group matters.

¹⁷⁸ Reorganizations involve tremendous costs. See Douglas G. Baird, *The Uneasy Case for Corporate Reorganizations*, 15 J. LEGAL STUD. 127 (1986); Kevin A. Kordana & Eric A. Posner, *A Positive Theory of Chapter 11*, 74 N.Y.U. L. REV. 161 (1999); Stephen J. Lubben, *The Direct Costs of Corporate Reorganization: An Empirical Examination of Professional Fees in Large Chapter 11 Cases*, 74 AM. BANKR. L.J. 509 (2000); Stephen J. Lubben, *Some Realism About Reorganization: Explaining the Failure of Chapter 11 Theory*, 106 DICK. L. REV. 267 (2001).

¹⁷⁹ Arturo Bris, Ivo Welch, & Ning Zhu, *The Costs of Bankruptcy: Chapter 7 Liquidation versus Chapter 11 Reorganization*, 61 J. FIN. 1253 (2006).

¹⁸⁰ EIR, *supra* note 34, at art. 27.

¹⁸¹ This preference toward liquidation is being counteracted by the increasing use of coordinated activities across subsidiaries. EC Impact Assessment, *supra* note 58, at 8.

¹⁸² *Id.* at 4.

¹⁸³ BOB WESSELS, INTERNATIONAL INSOLVENCY LAW 15 (3d ed. 2012).

Based on the leverage effect and the flexibility of corporate groups,¹⁸⁴ corporate groups are more likely to structure a deal that is more attractive to prospective buyers or future creditors.¹⁸⁵ Groups are sold faster than stand-alone firms.¹⁸⁶ Groups are more quickly able to find buyers for their troubled subsidiary than an individual company would be.¹⁸⁷ However, correlation between speed of the proceedings and return to creditors depends on the firm's financial condition.¹⁸⁸ A firm in poorer health will more likely be pushed into liquidation regardless of whether this will yield the highest return.¹⁸⁹ The length of the proceedings logically correlates with direct costs incurred. But even if length is not correlated to the direct costs, it has an effect on ex post costs (such as goodwill and managerial behavior).¹⁹⁰

Resolving the insolvency through a single proceeding would expedite the proceedings and help save on costs. Parallel proceedings are likely to trigger inter-creditor disputes on points of law and proliferate proceeding time and litigation costs.¹⁹¹ In the E.U., the estimated cost of a secondary proceeding for a foreign creditor is €2000–5000 (this includes costs of reviewing, defining priority rights, compiling documents, liaising between courts).¹⁹² The E.U.'s Impact Statement Survey indicates that more effective coordination could more than halve these costs.¹⁹³ Additionally, avoiding multiple proceedings will reduce the need for the duplication of costs.

¹⁸⁴ *Supra* Part II.A.

¹⁸⁵ *Id.*

¹⁸⁶ Dewaelheyns & Van Hulle, *Filtering Speed*, *supra* note 174, at 383.

¹⁸⁷ Douglas C. Baird & Robert K. Rasmussen, *The End of Bankruptcy*, 55 STAN. L. REV. 751, 778 (2002); Bufford, *supra* note 39, at 485 (citing English forklift manufacturer Lancer Boss as an example of a piecemeal sale which received less than it would have through a sale of assets integrated with those of its German subsidiary).

¹⁸⁸ Dewaelheyns & Van Hulle, *Filtering Speed*, *supra* note 174, at 383 (noting that data may be skewed because creditors will push liquidation for healthier firms).

¹⁸⁹ *See id.*

¹⁹⁰ John Armour et al., *The Costs and Benefits of Secured Creditor Control in Bankruptcy: Evidence from the UK* 10–11 (Univ. of Cambridge Centre for Bus. Research, Working Paper No. 332) (Mar. 1, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=912302.

¹⁹¹ Jason J. Kilborn, *The Raging Debate Between Territorial and Universal Theories of Value Sharing in International Bankruptcy*, in WESSELS, MARKELL, & KILBORN, *supra* note 163.

¹⁹² *Commission Staff Working Document Impact Assessment accompanying the document Revision of Regulation (EC) No 1346/2000 on Insolvency Proceedings*, at 29 COM (2012) 416 final (Dec. 12, 2012).

¹⁹³ *Id.*

1. Liquidators

In the universalist scenario, there would be one lead liquidator who will receive fees as agreed upon. The liquidator's fee arrangement would be based upon the laws and customs of the COMI. Liquidators receive fees based on the funds recovered (typically 3% or 5%) or at an hourly rate.¹⁹⁴ If secondary proceedings are unavoidable, a lead liquidator may need to apportion fees to another liquidator, thereby increasing costs. However, a lead liquidator should have the ability to intervene in non-main proceedings; prevent them from occurring unnecessarily; and most importantly, ensure that secondary proceedings do not contravene the interests of the corporate group.¹⁹⁵ The EIR has a duty for cooperation amongst liquidators,¹⁹⁶ but a definite hierarchy which allows one liquidator to take control of proceedings and minimize costs would be beneficial.

2. Attorneys & Other Professionals

In a complicated case, a debtor will hire both financial advisors¹⁹⁷ and lawyers.¹⁹⁸ In both the U.S. and E.U., professional fees require authorization, but jurisdictions vary on how and to whom such authorization is granted.¹⁹⁹ Furthermore, between E.U. countries, laws may dictate different fee structures for liquidators and administrators. The rules for liquidators also differ between the U.S. and E.U.

A larger corporate group will have more contracts, employees, assets, and other issues to deal with, and professionals set their rates based on the estimated, or the actual time the matters require.²⁰⁰ A complex cross-border case can be very lucrative for the professionals, because it requires proceedings in different courts and fee schedules under different legal regimes.²⁰¹ Studies have indicated that the debtor's size and the number of professionals retained have a greater impact on the total fees incurred than the speed of the

¹⁹⁴ John Armour et al., *supra* note 190, at 11–12.

¹⁹⁵ Legislative Guide, *supra* note 65, at 9, 19–20.

¹⁹⁶ EIR, *supra* note 34, at art. 31; Legislative Guide, *supra* note 56, at 6–7.

¹⁹⁷ Stephen J. Lubben, *The Chapter 11 Financial Advisors*, 28 EMORY BANKR. DEV. J. 11 (2011).

¹⁹⁸ Stephen J. Lubben, *The Chapter 11 Attorneys*, 84 AM. BANKR. L.J. 447 (2012).

¹⁹⁹ Couwenberg & Lubben, *supra* note 174.

²⁰⁰ Lubben, *supra* note 176, at 168.

²⁰¹ Lynn M. LoPucki & Joseph W. Doherty, *Professional Overcharging in Large Bankruptcy Reorganization Cases*, 5 J. EMPIRICAL LEGAL STUDS. 983, 1010–11 (2008).

proceedings.²⁰² Avoiding secondary proceedings and the need to hire redundant professionals per country will minimize costs.

D. Case Examples

Each corporate group case offers unique circumstances that make their outcomes difficult to compare.²⁰³ Projecting a baseline empirical outcome before insolvency proceedings may prove difficult, and any assumptions made may prove faulty as the proceedings unwind. However, based on the discussion above, there are several objective factors that serve as indicia of successful proceedings. Such indicia include single proceedings (or at least minimizing secondary proceedings), successful cooperation, limiting the length of proceedings, and minimal professional fees incurred.

1. Global Sales

A sale of all the assets of an insolvent group proves the easiest route for successful evaluation: comparison of the projected value of assets and the sale price. *Collins & Aikman* was one such example.²⁰⁴ *In re Smurfit-Stone Container Corp.*²⁰⁵ is an example of a successful U.S.-Canada insolvency. Smurfit-Stone was one of North America's leading packaging manufacturers.²⁰⁶ It employed over 20,000 people.²⁰⁷ In its insolvency, there were two proceedings opened, in Delaware and Canada on the same day.²⁰⁸ The courts approved a cross-border protocol between the Delaware and Canadian courts.²⁰⁹ The company was able to exit bankruptcy in less than seven months.²¹⁰ Upon doing so, it was sold to Rock Tenn Co. for \$3.5 billion.

²⁰² Stephen J. Lubben, *Corporate Reorganization & Professional Fees*, 82 AM. BANKR. L.J. 77, 80 (2008) ("time spent in chapter 11 seems to have very little independent effect on the costs of the case. Factors like the size of the debtor corporation, the number of professionals retained, and whether a committee is appointed play much bigger roles").

²⁰³ See *supra* text accompanying note 178.

²⁰⁴ *Supra* text accompanying notes 168–77.

²⁰⁵ *In re Smurfit-Stone Container Corp.*, No. 09-10235 (BLS), 2010 WL 2403793 (Bankr. D. Del. June 11, 2010).

²⁰⁶ *Id.* at *1.

²⁰⁷ Amir Kurtovic, *Bankruptcy Aids Smurfit-Stone Value in Rare Deal: Biggest Deals of 2011*, ST. LOUIS BUS. J. (Dec. 16, 2011), available at <http://www.bizjournals.com/stlouis/print-edition/2011/12/16/bankruptcy-aids-smurfit-stone-value-in.html?page=all>.

²⁰⁸ *In re Smurfit*, 2010 WL 2403793, at *1.

²⁰⁹ Order Approving Cross-Border Insolvency Protocol, *In re Smurfit-Stone Container Corp.*, No. 09-10235 (Bankr. D. Del Mar. 12, 2009).

²¹⁰ Kurtovic, *supra* note 207.

This value was higher than expected during the bankruptcy and about a 27% premium to shareholders.²¹¹ Though the case was a parallel proceeding, the two courts' actions were in full coordination with one and another and offer an example of successful protocols.²¹²

On the other hand, one of the E.U.'s first insolvencies under the EIR, KPNQwest, was a cross-border sale that garnered creditors significantly less than there likely would be under a single coordinated procedure. KPNQwest owned cables across several European countries.²¹³ The parent company was in the Netherlands, but several subsidiaries in other E.U. member states opened proceedings.²¹⁴ The Dutch trustee did not have power to coordinate the subsidiaries' proceedings.²¹⁵ Each proceeding had its own representative and liquidations took place in a disaggregate form.²¹⁶ Each representative took the course that he thought would elicit the highest returns for the creditors.²¹⁷ Thus, the representatives acted without consideration that the assets' value in that nation were only a component of a more valuable cross-border entity. The sale proceeds were lower than had liquidations resolved as a single unit.²¹⁸

2. *Complications in Proceedings*

Other cases that involved complex issues (fraud), such as *Stanford Bank*²¹⁹ and *Lernout & Hauspie*,²²⁰ have created further problems for insolvency proceedings. In *Stanford International Bank*, the English court refused to recognize the U.S. court-appointed receiver as a foreign representative or

²¹¹ *Id.*

²¹² CROSS-BORDER INSOLVENCY PROTOCOL IN RE SMURFIT-STONE CONTAINER CANADA INC., <http://iiiglobal.com>, <http://www.iiiglobal.org/component/jdownloads/viewdownload/573/1824.html> (last visited May 20, 2013).

²¹³ Robert van Galen, The European Insolvency Regulation and Groups of Companies, *available at* http://www.iiiglobal.org/country/european_union.html; Eva M.F. de Vette, *Multinational Enterprise Groups in insolvency: How Should the European Union Act?*, 7 *UTRECH L. REV.* (2011); Lynn M. LoPucki, *Global and Out of Control?*, 79 *AM. BANKR. L.J.* 79, 96–97 (2005).

²¹⁴ *LoPucki*, *supra* note 213, at 96.

²¹⁵ Robert van Galen, The European Insolvency Regulation and Groups of Companies, at *INSOL Europe Annual Congress* (Oct. 16–18, 2003) (*available at* www.insol-europe.org/download/file/575).

²¹⁶ de Vette, *supra* note 213.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Stanford Int'l Bank Ltd.* [2009] EWHC 1441 (Ch).

²²⁰ *Stonington Partners, Inc. v. Lernout & Hauspie Speech Products N.V.*, 310 F.3d 118, 133 (3d Cir. 2002).

recognize the proceedings as a collective proceeding because of the involvement of the Securities and Exchange Commission to prevent fraud.²²¹

Nortel Networks is another case that receives both positive and negative evaluations. Positively, *Nortel* was a successful universalist proceeding.²²² Nortel employed 30,000 people, with operations and customers across 150 countries.²²³ The parent company filed in Canada, the European subsidiaries filed in the U.K., and the U.S. subsidiaries filed in Delaware.²²⁴ The Delaware bankruptcy court recognized the Canadian and the U.K. proceedings as foreign main proceedings under chapter 15, on the premise that Canada was the COMI of the Nortel parent and the U.K. was the COMI of the European subsidiaries.²²⁵ The three proceedings were able to successfully facilitate the sale of Nortel's extensive patent assets.²²⁶ Nortel would have been very complicated in the disaggregated form because of how intertwined the assets of the company (networks) were. Nonetheless, after the sales, there were still disputes between the different affiliates with competing interests.²²⁷ The result has been ongoing litigation in different countries, and a boon for the professionals who continue getting fees from the estates.²²⁸

3. U.S. Proceedings

There are relatively few reported U.S. decisions involving inter-company claims.²²⁹ When a proceeding is opened in the U.S., the chapter 11 plan will

²²¹ U.N. Comm'n on Int'l Trade Law, Model Law on Cross-Border Insolvency: The Judicial Perspective 21 (Feb. 2012), http://www.uncitral.org/pdf/english/texts/insolven/V1188129-Judicial_Perspective_ebook-E.pdf.

²²² Scott Brown et al., Understanding Cross-border Issues in a Restructuring Situation at the American Bankruptcy Institute Southwest Bankruptcy Conference (Sept. 9–10, 2009) (available at Westlaw 091009 ABI-CLE 331).

²²³ *Id.*

²²⁴ *In re Nortel Networks*, No. 09-10138-KG, 2011 WL 1154225 (Bankr. D. Del. Mar. 29, 2011); *Re Nortel Networks SA & ORS* [2009] EWHC 206 (Ch).

²²⁵ *Nortel's Legal Mess Pits Bondholders Against Retirees*, REUTERS.COM (Jan. 11, 2013, 4:45 PM), <http://www.reuters.com/article/2013/01/11/nortel-bankruptcy-mediation-idUSL1E9CBDMQ20130111>.

²²⁶ Brown et al., *supra* note 222.

²²⁷ Allan L. Gropper, *The Arbitration of Cross-Border Insolvencies*, 86 AM. BANKR. L.J. 201, 214–15 (2012).

²²⁸ Carolyn Van Hasselt, *Big Winners in Nortel's Demise? Lawyers*, WSJ.COM (Jan. 15, 2013, 12:18 PM), <http://blogs.wsj.com/canadarealtime/2013/01/15/big-winners-in-nortels-demise-lawyers/>; *Judge: Lehman Can Pay \$26 Million to Creditors' Lawyers*, WSJ.COM (Feb. 19, 2013, 12:55 PM), <http://online.wsj.com/article/SB10001424127887324449104578314201446721018.html>.

²²⁹ Jacob Ziegel, *Corporate Groups and Cross-Border Insolvencies: A Canada-United States Perspective*, 7 FORDHAM J. CORP. & FIN. L. 367, 383 (2002).

often deal with the claims to avoid post-proceedings litigation.²³⁰ Other U.S. cases will reorganize, but have suboptimal results because of the complexity of disjointed proceedings. One such example is Global Crossing.²³¹ The company ultimately reorganized successfully, but it was a very expensive proceeding because it had parallel proceedings in the U.S. and Bermuda and required coordination for each of the sixteen subsidiaries involved.²³²

*In re General Growth Properties*²³³ was a successful coordination of a diffuse corporate group reorganization, in retrospect. However, the court's approach and the blurring of entity separateness garnered criticism.²³⁴ General Growth was the second-largest mall owner in the U.S. with 180 properties in forty-three states.²³⁵ The parent corporation managed properties throughout the U.S. and had hundreds of subsidiaries.²³⁶ Creditors objected to including all of the entities together, because the entities included Special Purpose Entities who themselves were solvent, and the reorganization plan allowed all the cash to flow upstream to the parent during the reorganization.²³⁷ The court nonetheless approved the plan, which treated the debtor as a single entity.²³⁸ The court stated that it was not substantively consolidating all the entities, but consolidating the proceedings for *administrative efficiency*.²³⁹ The court focused on whether the joint filing was in good faith, and one commentator has suggested that evaluation of the good faith of the filing could be a model for how a court could consider whether a de facto substantive consolidation²⁴⁰ is

²³⁰ See e.g., *In re 360 Networks (USA)*, 282 B.R. 756 (Bankr. S.D.N.Y. 2001); *Urban Retail Properties v. Loews Cineplex Entm't (In re Loews Cineplex Entm't, No. 01. CIV.8946 (RGW), 2002 WL 53479 (Bankr. S.D.N.Y. Apr. 9, 2002)*.

²³¹ *In re Global Crossing Ltd.*, 295 B.R. 726 (S.D.N.Y. 2003).

²³² Merovach, *supra* note 81.

²³³ *In re Gen. Growth Props., Inc.*, 409 B.R. 43 (Bankr. S.D.N.Y. 2009).

²³⁴ See, e.g., Richard J. Corbi, *How Remote is "Bankruptcy Remote" for Special Purpose Entities*, NORTON BANKR. L. ADVISER, Nov. 2009, at 5; Brian M. Resnick & Steven C. Krause, *Not So Bankruptcy-Remote SPEs and In re General Growth Properties Inc.*, 28 AM. BANKR. INST. J. at 8, Oct. 2009; Forrest Pearce, Comment, *Bankruptcy-Remote Special Purpose Entities and A Business's Right to Waive Its Ability to File for Bankruptcy*, 28 EMORY BANKR. DEV. J. 507 (2012); Samantha J. Rothman, Note, *Lessons from General Growth Properties: The Future of the Special Purpose Entity*, 17 FORDHAM J. CORP. & FIN. L. 227 (2012); Kris Hudson & Lingling Wei, *Move by General Growth Rattles Malls' Investors*, WALL ST. J., May 8, 2009, <http://online.wsj.com/article/SB124163910180492861.html>.

²³⁵ *In re Gen. Growth Props., Inc.*, 409 B.R. 43 (Bankr. S.D.N.Y. 2009).

²³⁶ *Id.*

²³⁷ Pearce, *supra* note 234, at 513.

²³⁸ *Id.*

²³⁹ Corbi, *supra* note 234.

²⁴⁰ See *supra* Part III.

appropriate for cross-border filings,²⁴¹ since such an approach prioritizes the interests of the group as a whole. Nonetheless, many creditors and scholars have expressed concern because the creditors' expectations that the Special Purpose Entities would be treated separately were contravened.²⁴² After the bankruptcy, General Growth paid back its creditors in full, provided some recovery to its shareholders, and spun off a large portion of its properties under a new name.²⁴³

Despite the ample criticism of the court's legal approach in *General Growth*, the criticism does not undercut the economic benefit of its universalist approach. While the integrity of the legal system is an important virtue, the reorganization's success should provoke some questioning of the insistence of utmost respect to legal separateness. A better policy to unflagging reverence would be one that considers creditors' reasonable expectations but prioritizes economic efficiency to legal formalities.

In the absence of a standardized policy for E.U.-U.S. cross-border insolvencies, there are several private mechanisms and rules by which a corporate group can ensure its proceedings maximize their efficiency and minimize costs.

IV. GUIDELINES FOR E.U.-U.S. CROSS-BORDER INSOLVENCY CASES

Protocols are a means to achieve the efficient universalist goal absent laws. Protocols are flexible tools which can reflect the needs of the parties and ensure predictability and cooperation based on private agreement. This Part discusses how protocols can be used effectively and discusses the first successful worldwide protocol: *Maxwell Communications*. This Part then discusses how the insolvency administrator can most efficiently execute the insolvency given the considerations discussed above.

²⁴¹ Robert W. Miller, *Economic Integration: An American Solution to the Multinational Enterprise Group Conundrum*, 11 RICH. J. GLOBAL L. & BUS. 185, 235 (2012).

²⁴² See sources cited *supra* note 233.

²⁴³ David McLaughlin & Brian Louis, *Ackman Makes Long Bet on Property Reversal with Howard Hughes*, BLOOMBERG.COM (Oct. 15, 2010, 12:01 AM), <http://www.bloomberg.com/news/2010-10-15/ackman-makes-long-wager-on-property-reversal-wit4-general-growth-spinoff.html>; *General Growth Properties' Reorganization Plan Is Approved*, L.A. TIMES, Oct. 21, 2010, <http://articles.latimes.com/2010/oct/21/business/la-fi-general-growth-20101021>.

A. *CoCo Guidelines*

European Communication and Cooperation Guidelines for Cross-border Insolvency²⁴⁴ (known as the “CoCo Guidelines”) provide guidance for dealing with insolvencies that pans across several E.U. jurisdictions.²⁴⁵ The guidelines provide clarity to items left vague in the EIR.²⁴⁶ These guidelines are not binding, but are “a framework to realize the objective of enabling liquidators and courts to efficiently and effectively operate in cross-border insolvency proceedings.”²⁴⁷

The CoCo Guidelines outline the role of the liquidator, communication, information exchange, notices, among many other things.²⁴⁸ Primarily, these guidelines emphasize the collaborative spirit of the Article 31 of the EIR to achieve efficiency.²⁴⁹ Although following the CoCo Guidelines help make proceedings more efficient, the guidelines nonetheless recommend the use of protocols to span aspects not covered in the guidelines.²⁵⁰

B. *Protocols*

Protocols are private agreements between the parties that are then endorsed by the court.²⁵¹ They help facilitate the proceedings, clarify expectations, and add overall harmony to the insolvency proceedings.²⁵² These agreements may be oral or written, and range in their scope; they address the procedure but do not decide substantive issues.²⁵³ The UNCITRAL Practice Guide encourages the use of protocols and also for transnational courts to cooperate together to approve and successful execute these protocols.²⁵⁴ Ideally, these agreements would be reached prior to the commencement of any proceedings; however

²⁴⁴ See generally Wessels & Virgós, *supra* note 87.

²⁴⁵ Bob Wessels, European Communication and Cooperation Guidelines for Cross-Border Insolvency: Also of Interest for North-American Practitioners and Judges, 4 ABI COMM. NEWS: INT’L COMM. (Nov. 2007), available at <http://www.abiworld.org/committees/newsletters/international/vol4num4/European.html>.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ Wessels & Virgós, *supra* note 88.

²⁴⁹ Wessels, *supra* note 245.

²⁵⁰ *Id.*; see *infra* Part IV.B (describing protocols).

²⁵¹ Janis Sarra, *Maidum’s Challenge, Legal and Governance Issues in Dealing with Cross-Border Business Enterprise Group Insolvencies*, 17 INT’L INSOLVENCY REV. 73, 84 (2008).

²⁵² U.N. Comm’n on Int’l Trade Law, Practice Guide on Cross-Border Insolvency Cooperation, U.N. Sales No. E.10.V.6, at 28 (2010), available at http://www.uncitral.org/pdf/english/texts/insolven/Practice_Guide_Ebook_eng.pdf [hereinafter Practice Guide].

²⁵³ *Id.* at 28.

²⁵⁴ *Id.*

this is not always possible because of the speed at which a corporate group's financial condition deteriorates.²⁵⁵

Implementing protocols not only gives parties a chance for efficient private ordering,²⁵⁶ but gives some guarantee of reducing the cost of litigation and allows parties to focus on the insolvency proceedings during the case rather than how to manage conflicts of law issues or cooperate with foreign parties.²⁵⁷

UNCITRAL estimates that in one notable case, *Everfresh*,²⁵⁸ the use of protocols enhanced the value in the proceedings by over 40%.²⁵⁹ Examples of successful protocol implementation are readily available as useful guidance.²⁶⁰

One of the most successful (and first) examples of a protocol for a worldwide liquidation was *Maxwell Communications*.²⁶¹ Maxwell filed for chapter 11 in the U.S., and entered into a protocol with the English administrators.²⁶² The case involved \$2 billion in assets and over \$4 billion in liabilities.²⁶³ Following the protocol, the U.S. examiner and the U.K. administrator completed the proceedings with "unprecedented cooperation."²⁶⁴ The protocol provided that all the assets would be pooled together, rather than carved out for each court.²⁶⁵ Creditors in either country could then submit their claims to their respective court.²⁶⁶ Despite the size of the assets at issue, there were hardly any material conflicts, and the court described it as a "remarkable" orderly liquidation.²⁶⁷

²⁵⁵ *Id.* at 31.

²⁵⁶ MEVORACH, *supra* note 71, at 174.

²⁵⁷ Janis Sarra, *Crossing the Finish Line: the Potential Impact on Business Rescue of Adoption of new Cross-Border Insolvency Provisions*, Report to the Office of the Superintendent of Bankruptcy, available at [http://www.ic.gc.ca/eic/site/bsf-osb.nsf/vwapj/Crossing_the_Finish_Line-EN.pdf](http://www.ic.gc.ca/eic/site/bsf-osb.nsf/vwapj/Crossing_the_Finish_Line-EN.pdf/$FILE/Crossing_the_Finish_Line-EN.pdf).

²⁵⁸ *In re Everfresh*, 238 B.R. 558 (Bankr. S.D.N.Y. 1999).

²⁵⁹ Practice Guide, *supra* note 252, at 28 n. 17.

²⁶⁰ See INTERNATIONAL INSOLVENCY INSTITUTE, *Cross-Border Insolvency Orders and Protocols (Alphabetical)*, <http://www.iiiglobal.org/component/jdownloads/viewcategory/573.html>.

²⁶¹ Westbrook, *supra* note 5, at 2321.

²⁶² *In re Maxwell Comm'n Corp.*, 170 B.R. 800, 802 (Bankr. S.D.N.Y. 1994), *aff'd*, 186 B.R. 807 (S.D.N.Y. 1995).

²⁶³ Evan D. Flaschen & Ronald J. Silverman, *Cross-Border Insolvency Cooperation Protocols*, 33 TEX. INT'L L.J. 587, 592 (1998).

²⁶⁴ *In re Maxwell*, 170 B.R. at 802.

²⁶⁵ Jay Lawrence Westbrook, *The Lessons of Maxwell Communication*, 64 FORDHAM L. REV. 2531, 2535 (1996).

²⁶⁶ *Id.*

²⁶⁷ See Flaschen & Silverman, *supra* note 263, at 592 (quoting *Maxwell Comm'n Corp.*, 93 F.3d 1036, 1042 (2d Cir. 1996)).

The contents of protocols depends on the needs of the parties. Protocols' flexibility caters to those needs. Protocols should establish what information the parties must share and how they will do so.²⁶⁸ Protocols can also include mechanisms to preserve asset value, policies on how to administer claims, procedures to handle intercompany claims, and meetings among the signatories.²⁶⁹ Communication between the parties and the courts is one of the most palpable problems. E.U. surveys showed that although cooperation and communication is encouraged by the EIR, it generally is insufficient and poorly coordinated.²⁷⁰ Protocols can ensure that the parties pre-determine exactly how, when, and with whom such communications must happen.²⁷¹ The communications provisions should stipulate the time, place, and manner of communication; what kind of notice is necessary for communication; which parties have a right to participate and are entitled to notice; confidentiality; what goes into the records; and the effects of any given communication.²⁷² Additionally, protocols can, as did the *Maxwell* protocols, specify how to coordinate hearings and ensure that different courts are not resolving the same issues.²⁷³ Parties privately agreeing to protocols not only helps courts minimize disputes and maximize asset value, but also increases court efficiency and the need for a judge's involvement.

C. *Insolvency Administrator Guidelines*

The administrator of insolvency will vary from country to country.²⁷⁴ Most European countries have a liquidator in charge of overseeing the process.²⁷⁵ In Canada, a monitor will be appointed.²⁷⁶ This would be akin to the appointment of a U.S. Trustee or a receiver. Regardless of the representative's title and responsibilities, she will play a pivotal role in organizing the liquidation or reorganization proceedings.²⁷⁷ The representative must have a clear and distinct authority to undertake the role as coordinator for ensuring

²⁶⁸ See *id.* at 599–600.

²⁶⁹ *Id.*

²⁷⁰ Insolvency Report, *supra* note 101, at 14–16.

²⁷¹ Legislative Guide, *supra* note 65, at 46–50.

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ See generally INSOL INT'L, *supra* note 102 (summarizing insolvency proceeding by country).

²⁷⁵ Mevorach, *supra* note 23, at 525.

²⁷⁶ See Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (Can.).

²⁷⁷ Legislative Guide, *supra* note 65, at 54.

cooperation.²⁷⁸ Effective cooperation includes cooperation with the court, other representatives, other courts, and coordination amongst creditors.²⁷⁹

For a corporate group, the ideal would be the appointment of a single, or lead, representative.²⁸⁰ While other representatives may have dealings with creditors in their respective nations, the lead representative will have the ultimate power to ensure that all actions are in the best interest of the estate as a whole, but still ensure that no one creditor's in rem rights are sacrificed.²⁸¹ A focus on the corporate group worldwide, rather than multiple administrators fighting for their insular interests, will provide more coherent and efficient management of the insolvency.²⁸²

One step for a lead representative then is to understand the local laws, and be able to foresee what kind of synthetic proceedings may be necessary or possible, and how to ensure creditors' in rem rights are left intact. A court recognizing the main proceedings may turn over assets to a foreign representative.²⁸³ The representative is responsible for the administration of the proceedings, the distribution of assets, and administering the assets that are part of the estate, unless subject to other local laws.²⁸⁴

Another priority for protocols is to establish the protocols by which all the representatives will communicate with one and other. EIR Article 31 already mandates that liquidators in the E.U. communicate with each other, but there are no stipulations as to how they must do so. Detail on communications will ensure orderly proceedings; additionally, Article 31 does not bind U.S. representatives.²⁸⁵ Administrators should get notice of any secondary proceedings that are opened. Notice will prevent the administrator from missing the opportunity to get a stay for secondary proceedings that would disrupt efficient proceedings. The English administrators in *Nortel* requested that the English courts send letters to all other E.U. member courts to give the

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ Legislative Guide, *supra* note 65, at 56.

²⁸¹ *See supra* Part I.

²⁸² *See* Jay Lawrence Westbrook, *Multinational Finance: The Last Hurrah of Territorialism*, 41 TEX. INT'L L.J. 321, 326 (2006).

²⁸³ EIR, *supra* note 34, at art. 21(2)–22.

²⁸⁴ Mevorach, *supra* note 23, at 525.

²⁸⁵ EIR, *supra* note 34, at art. 31 (“[T]he liquidator in the main proceedings and the liquidators in the secondary proceedings shall be duty bound to communicate information to each other. They shall immediately communicate any information which may be relevant to the other proceedings, in particular the progress made in lodging and verifying claims and all measures aimed at terminating the proceedings.”).

English administrators notice of any secondary proceedings and an opportunity to be heard on the matter.²⁸⁶ The *Nortel* administrators were granted such authorization because the administrators argued before the court that it was necessary for the maximization of the integrated proceedings.²⁸⁷

Recently, some commentators have also suggested mandatory arbitration for parties, to avoid the prolonged and costly litigation that may arise from substantive disputes detracting from efficient liquidation.²⁸⁸ While mandatory arbitration may go too far, encouraging private and early arbitration would be consistent with the spirit of cooperation outside of court.

CONCLUSION

Under current insolvency law, the most efficient insolvency procedure requires voluntary cooperation of all the parties involved. The Model Law, when employed to achieve a single proceedings, has proven to be an effective tool for efficient universalist procedures.²⁸⁹ Single proceedings are the most cost-effective means of insolvency, but because of the complexity and diversity of corporate groups' structures, it is difficult to ordain a universal approach to deal with every corporate group insolvency. This Article has highlighted some of the key problems and issues that arise for corporate group insolvencies and how they can be dealt with efficiently. Employing tools such as the CoCo Guidelines and protocols can help establish predictability and a common goal amongst the debtor, creditors, and courts. Predictability and accord among all parties will help achieve a better insolvency outcome for the debtor, the creditors, and the overall economy.

²⁸⁶ Eberhard Braun et al., *Cross-border Insolvency Protocol Agreements between Insolvency Practitioners and their Effect on the Rights of Creditors* (Mar. 8, 2011), <http://www.iiiglobal.org/component/jdownloads/finish/362/4271.html>.

²⁸⁷ *Id.*

²⁸⁸ E.g., Gropper, *supra* note 227, at 214–15; Jay Lawrence Westbrook, *International Arbitration and Multinational Insolvency*, 29 PENN ST. INT'L L. REV. 635, 638 (2011).

²⁸⁹ See generally Mevorach, *supra* note 23.