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# CROSS-BORDER INSOLVENCY OF ENTERPRISE GROUPS: THE CHOICE OF LAW CHALLENGE

*Irit Mevorach\**

## INTRODUCTION

It is not surprising that the problems of choice of law and international group insolvency have not been sufficiently addressed during the initial development of cross-border insolvency frameworks.<sup>1</sup> The choice of law problem raises difficult questions and affects substantive rights in the context of cross-border insolvency.<sup>2</sup> International group enterprises come about in different legal and operational structures, requiring a sufficiently nuanced regime that could properly accommodate the diverse types of groups.<sup>3</sup> Generally, the regulation of groups is difficult, as it raises a concern of defeating the economic merits of the corporate form.<sup>4</sup> Addressing the combined problem of international groups and choice of law presents significant challenges, and requires careful analysis of economic structures and their implications on both creditors' expectations regarding their substantive rights and the ability to achieve efficient solutions in insolvency. This Article aims to provide a roadmap of choice of law solutions in international enterprise group cases, and to compare these solutions with the existing cross-border insolvency practice and the cross-border insolvency frameworks.

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1. The EU Regulation on Insolvency Proceedings (Council Regulation 1346/2000, On Insolvency Proceedings, 2000 O.J. (L 160) 1 (EC) [hereinafter EU Insolvency Regulation]) that entered into force in 2002 includes a choice of law regime, but the UNCITRAL Model Law (U.N. COMM. ON INT'L TRADE L., UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION, U.N. Sales No. E.14.V.2 (1997) [hereinafter MODEL LAW]) of 1997 does not. *See infra* Part V. Both frameworks currently do not explicitly address group insolvencies.

2. *See generally* Jay Lawrence Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L.J. 457 (1991) [hereinafter Westbrook, *Theory and Pragmatism*].

3. *See* IRIT MEVORACH, *INSOLVENCY WITHIN MULTINATIONAL ENTERPRISE GROUPS* 30–31, 127 (Oxford Univ. Press 2009).

4. *See* Tom Hadden, *Regulating Corporate Groups: An International Perspective, in* CORPORATE CONTROL AND ACCOUNTABILITY: CHANGING STRUCTURES AND THE DYNAMICS OF REGULATION 343, 358–60 (1993); CLIVE M. SCHMITTHOFF, *The Wholly Owned and the Controlled Subsidiary, in* CLIVE M. SCHMITTHOFF'S SELECT ESSAYS ON INTERNATIONAL TRADE LAW 218 (Chia-Jui Cheng ed., 1978); PHILLIP I. BLUMBERG, *THE MULTINATIONAL CHALLENGE TO CORPORATION LAW: THE SEARCH FOR A NEW CORPORATE PERSONALITY* (1993).

Part I of this Article discusses the main schools of thought with regard to the resolution of cross-border insolvency, and considers which theory generally provides a more compelling choice of law solution for international insolvency cases. Part II considers how the preferred choice of law solution may apply in cases of groups, and what might be the specific concerns in its application to such cases. Part III looks at the diversity of group structures and considers the choice of law solutions that may be applied in these different circumstances. Part IV analyzes the EU Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency in terms of their choice of law mechanisms (to the extent such exist) and their application to group cases.

This Article argues that in general, an efficient and fair international insolvency process requires a “universalist” approach, whereby a single jurisdiction governs the proceeding and applies its laws (the laws of the forum) regarding the insolvency matters, subject to limited exceptions. It also argues that universalism applied to the international group as a whole is often the preferred approach, since many groups operate a single global business that require a group-wide solution in the course of insolvency. The concern that group-wide global solutions that encompass several companies would interfere with the corporate form is of lesser relevance in this regard and is generally unjustified, since the choice of law determination does not entail “lifting of the corporate veil.” Rather, it is a private international law determination linked to expectations regarding forum and law that should derive from ascertaining a real connection to a home country. Indeed, given the diversity of group structures, a one size fits all solution is not appropriate, and while some groups will require a global group-wide solution in insolvency, others may not. Still, although a toolkit of solutions is required, the focus should be on the universalist solutions that would target many group (or parts of groups) that enter insolvency as a whole, and that would promote rescues and going concern sales.

The universalist approach suggested in this Article for the private international law problem should not be confused with issues concerning the substantive rules of group insolvency and solutions such as “substantive consolidation” (the pooling of assets and debts of the different group entities together in the course of insolvency) that do entail “veil lifting.” The substantive consolidation dilemma is outside the scope of this paper.<sup>5</sup> This Article focuses on the private international law solution that may

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5. The application of such a solution requires more caution. The starting position should be respect of the corporate form. Substantive consolidation should only be applied when the group was heavily integrated and its assets and debts were intermingled. See MEVORACH, *supra* note 3, at 215–29; see also U.N. COMM’N ON INT’L TRADE LAW, UNCITRAL LEGISLATIVE GUIDE ON INSOLVENCY LAW, PART THREE, rec. 220, U.N. Sales No. E.12.V.16 (2012) [hereinafter UNCITRAL LEGISLATIVE GUIDE PART THREE]. For a different approach, see Leif M. Clark, *Managing Distribution to Claimants in Cross-Border Enterprise Group Insolvency*, 9 BROOK. J. CORP. FIN. & COM. L. 111 (2014).

support any type of group treatment, including procedural or substantive consolidation, as may be appropriate in the circumstances.

## I. THE SUPREMACY OF THE UNIVERSALIST ONE LAW LINKED TO ONE FORUM SOLUTION

The design of cross-border insolvency frameworks requires consideration of the opposing theories of universalism and territorialism.<sup>6</sup> Universalism is founded on the idea of “unity of bankruptcy;” for every given debtor there should logically be a unified process of administration of the estate in the event of insolvency.<sup>7</sup> It corresponds with the assertion that, as insolvency should entail a collective process, an effective insolvency system should be symmetrical with the market—covering all or nearly all transactions and stakeholders in that market.<sup>8</sup> Territorialism, on the other hand, stresses state sovereignty and emphasizes the importance of and unique distinctions between national legal regimes. It strives to ensure minimum interference with domestic policies. It also suggests that nations may be concerned about subordinating their own bankruptcy laws and policies to the laws and policies of another jurisdiction.<sup>9</sup> Indeed, legal systems often tend to take a territorialist stance in the absence of binding global frameworks.<sup>10</sup>

Specifically, under universalism, cross-border insolvencies would be administered by a single court that would apply a single insolvency law.<sup>11</sup> In the absence of unified international institutions,<sup>12</sup> the application of such regime could be achieved by harmonizing the private international law rules pertaining to insolvency.<sup>13</sup> Thus, the rules would identify the “home country” of the multinational debtor, namely the forum to which the debtor has the most substantial connections. Assets of the debtor located in other countries would be transferred to this jurisdiction.

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6. See IAN F. FLETCHER, *INSOLVENCY IN PRIVATE INTERNATIONAL LAW* 15 (James J. Fawcett ed., 2d ed. 2005).

7. See *id.* at 11–12.

8. The concept of collectivism in insolvency is widely accepted in bankruptcy theory. See *id.* at 8–10.

9. Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy*, 98 MICH. L. REV. 2216 (2000); Reuven S. Avi-Yonah, *National Regulation of Multinational Enterprises: An Essay on Comity, Extraterritoriality, and Harmonization*, 42 COLUM. J. TRANSNAT'L L. 5, 8–9, 12 (2003); Frederick Tung, *Is International Bankruptcy Possible?*, 23 MICH. J. INT'L L. 31 (2001).

10. See Ian F. Fletcher, *Insolvency in Private International Law* 12 (James J. Fawcett ed., 2d ed. 2005).

11. Westbrook, *Theory and Pragmatism*, *supra* note 2, 458; Jay Lawrence Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276, 2277 (2000) [hereinafter Westbrook, *A Global Solution*].

12. That is to say, a single international bankruptcy law and a single international bankruptcy court system. See Westbrook, *A Global Solution*, *supra* note 11.

13. Ordinary private international law principles would continue to govern questions of non-insolvency law such as the validity of claims.

Ideally, the forum administering the case would apply its own rules regarding matters of insolvency—the *lex fori concursus* (the law of the state of the opening of proceedings)—to govern the commencement, conduct, administration, and conclusion of the insolvency proceedings.<sup>14</sup> Insolvency is regarded as based on procedural norms that are typically within the domain of the forum under private international law regimes. In addition, insolvency embodies fundamental values, which should be protected by the forum.<sup>15</sup> The application of the law of the forum where insolvency proceedings are administered avoids potentially costly and extensive litigation to determine issues of applicable law. As long as the insolvency law of the forum is uniformly applied in its entirety, the case is governed by a single coherent system. Under a unified approach to cross-border insolvency, stakeholders can expect increased predictability, which in turn can reduce transaction costs and risk premiums.<sup>16</sup> Universalism also accords with the idea that all creditors wherever located should be treated equitably.<sup>17</sup>

Territorialism suggests that the universalist single law/single forum approach is unrealistic and instead the cross-border insolvency framework should follow the territorialist inclination of states.<sup>18</sup> Often, national private international laws of insolvency that afford insolvency proceedings of the national system with universal effects do not reciprocally acknowledge the effects of foreign insolvency proceedings conducted under the laws of a

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14. See Jay Lawrence Westbrook, *Locating the Eye of the Financial Storm*, 32 BROOK. J. INT'L L. 1019, 1021–22 (2007). This concentrated choice of law concept applies only to insolvency matters and does not affect rules in regard to the creation of rights and claims. The latter continues to be governed by general conflict of law rules. Thus, the insolvency forum will need to apply its conflict of law rules to determine which laws govern the validity and effectiveness of a right or claim.

15. FLETCHER, *supra* note 6, at 89.

16. Westbrook, *A Global Solution*, *supra* note 11, at 2286; Andrew T. Guzman, *International Bankruptcy: In Defence of Universalism*, 98 MICH. L. REV. 2177, 2179, 2181, 2270 (2000); Robert K. Rasmussen, *Resolving Transnational Insolvencies Through Private Ordering*, 98 MICH. L. REV. 2252, 2255. Indeed the *lex fori concursus* is the dominant rule, adopted in the EU Insolvency Regulation, *supra* note 1, art. 4(1); U.N. COMM'N ON INT'L TRADE LAW, UNCITRAL LEGISLATIVE GUIDE ON INSOLVENCY LAW, rec. 31, U.N. Sales No. E.05.V.10 (2004) [hereinafter UNCITRAL LEGISLATIVE GUIDE]; AM. LAW INST., *Global Rules on Conflict-of-Laws Matters in Insolvency Cases*, in TRANSNATIONAL INSOLVENCY: GLOBAL PRINCIPLES FOR COOPERATION IN INTERNATIONAL INSOLVENCY CASES ann. at 200, r. 12, (2012), available at <http://www.iiiglobal.org/component/jdownloads/finish/557/5932.htm> [hereinafter Global Rules]. It is often subject to exceptions, though. See discussion *infra* Part V.

17. FLETCHER, *supra* note 6, at 11–12. Cf. Edward J. Janger, *Universal Proceduralism*, 32 BROOK. J. INT'L L. 819 (2007), who would favour a solution of one court but multiple laws to avoid incentives for forum shopping or the need for excessive harmonization.

18. Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy*, 98 MICH. L. REV. 2216 (2000); Reuven S. Avi-Yonah, *National Regulation of Multinational Enterprises: An Essay on Comity, Extraterritoriality, and Harmonization*, 42 COLUM. J. TRANSNAT'L L. 5, 8–9, 12 (2003); Frederick Tung, *Is International Bankruptcy Possible?*, 23 MICH. J. INT'L L. 31 (2001).

foreign state.<sup>19</sup> Thus, under territorialism, insolvency should be handled on a separate territorial basis, that is, in each jurisdiction where the company has assets. The universalist concept of a single forum and law presiding over an international insolvency is also regarded by territorialists as unfeasible, due to the potential difficulty in identifying a “home country” for a multinational corporation for the purpose of insolvency.<sup>20</sup> Finally, even if such a place can be ascertained, territorialists remain concerned that local creditors might be in a disadvantageous position because of the difficulty of participating in foreign proceedings and because creditor rights may be adversely affected by the change of the forum and laws.<sup>21</sup>

However, territorialism does not address the special problems of international insolvencies. It could actually prove counter-productive for reorganization or efficient liquidations of an entire international company if each jurisdiction involved handles a fraction of the case. Fragmented administration and multiplicity of applicable laws could increase the cost of the process and make it difficult to reach a package sale or a restructuring of the business as a whole.<sup>22</sup> Furthermore, notwithstanding the pessimistic prediction that a one law linked to one forum approach would be “politically impossible and wholly unworkable,”<sup>23</sup> evidence suggests that cross-border insolvency frameworks adopting versions of universalism have thus far managed to produce quite consistent, predictable, and appropriate results.<sup>24</sup>

Nonetheless, universalism requires some mitigation to take into account local policies, expectations, and diversity of enterprise structures. Indeed, the key existing cross-border insolvency frameworks adopt a modified version of universalism.<sup>25</sup> Proponents of universalism have also proposed modified universalism as the best solution in the short- to medium-term.<sup>26</sup>

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19. FLETCHER, *supra* note 6, at 12.

20. See Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 CORNELL L. REV. 696, 716–25; 751–53 (1999).

21. See *id.* at 713–18.

22. Professor LoPucki has suggested, though, that territorialism may have a ‘cooperative’ element whereby States will retain full sovereignty, yet may collaborate in international insolvency cases when they find it mutually beneficial. LoPucki, *supra* note 9; LoPucki, *supra* note 20.

23. See, e.g., Tung, *supra* note 9.

24. See Irit Mevorach, *Jurisdiction in Insolvency: A Study of European Courts’ Decisions*, 6 J. PRIVATE INT’L L. 327 (2010) [hereinafter Mevorach, *Jurisdiction in Insolvency*]; 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. 517 (2011) [hereinafter Mevorach, *On the Road to Universalism*] (claiming that the Model Law has been a catalyst of universalism); JAY LAWRENCE WESTBROOK, AN EMPIRICAL LOOK AT CHAPTER 15 (2010) (as presented to the National Conference of Bankruptcy Judges). Cf. Jeremy Leong, *Is Chapter 15 Universalist or Territorialist? Empirical Evidence from United States Bankruptcy Court Cases*, 29 WISC. INT’L L.J. 110 (2012).

25. See *infra* Part V.

26. See Westbrook, *A Global Solution*, *supra* note 11.

Under modified universalism, a cross-border insolvency system would identify the main insolvency jurisdiction that would administer the case, and whose laws would apply to most of the insolvency matters. Indeed, modified universalism's aim would be to administer the case by taking a global collective perspective. Yet, modified universalism would also subject the global approach to certain specific exceptions to accommodate local expectations, for example, regarding rights *in rem*.<sup>27</sup> Furthermore, additional proceedings may be opened and regarded as “ancillary,” in aid of a “main” (i.e., primary) proceeding. A modified universalist regime may also provide for “secondary” proceedings in cases in which this would better fit with creditors' expectations, for example because the enterprise had a significant presence in the jurisdiction, or where it would assist the proceedings in the main forum. If secondary proceedings are opened, the local forum may apply its own laws with regard to assets located in the jurisdiction, though indeed the more the system allows secondary proceedings to take place, the less it may benefit from the advantages of universalism.<sup>28</sup> Under modified universalist regimes, recognition of foreign insolvency proceedings and assistance to the foreign courts may not be automatic. Domestic courts might retain discretion to evaluate the fairness of the home country procedures and laws, or apply public policy safety valves to deny recognition or assistance and protect the interests of local creditors.<sup>29</sup> Modified universalism accommodates situations where a number of full parallel processes take place, and still provides for cooperation towards a harmonized solution to the multiple proceedings.

Universalism can be further supported by “contractualist” solutions. The contractualist theory suggests, with regard to international insolvency, giving full effect to parties' choice of the international insolvency regime. This theory has gained little support.<sup>30</sup> Indeed, it fails to appreciate the multiparty nature of insolvency regimes and the divergence in the nature of claimants.<sup>31</sup> However, ad hoc contractualism in the course of the international insolvency, whereby parties agree on how to coordinate the cross-border insolvency process by way of agreement on “protocols,” could contribute to an effective implementation of global universalist solutions in insolvency.<sup>32</sup>

Thus, the universalist one law linked to one forum approach, achieved by the harmonization of private international laws of insolvency, is an

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27. See EU Insolvency Regulation, *supra* note 1, art. 5–15; see also Global Rules, *supra* note 16, r. 15–22. Cf. UNCITRAL LEGISLATIVE GUIDE PART THREE, *supra* note 5, recs. 32–33.

28. See *infra* Part V on the EU Insolvency Regulation scheme.

29. See *infra* Part V on the Model Law scheme.

30. See Rasmussen, *supra* note 16, at 2255.

31. See Elizabeth Warren & Jay Lawrence Westbrook, *Contracting Out of Bankruptcy: An Empirical Intervention*, 118 HARV. L. REV. 1197, 1201, 1248–54 (2005).

32. See Irit Mevorach, *Towards a Consensus on the Treatment of Enterprise Groups in Insolvency*, 18 CARDOZO J. INT'L & COMP. L. 359, 405 (2010).

effective way to deal with cross-border insolvencies. It should be subject to safety valves and exceptions in a restrained manner so that exceptions do not “swallow” the universalist rule,<sup>33</sup> and it should be sufficiently flexible to accommodate different enterprise structures. Such an approach accommodates territorialism concerns, without considerably sacrificing insolvency objectives. Contractualism also fits well within a modified universalist paradigm where it contributes to the achievement of a global approach without undermining those same concerns of territorialism.

## II. UNIVERSALISM AND THE GROUP CONTEXT

Cross-border insolvencies involving groups present greater complexities compared with cases of single company insolvency, and the appropriateness of universalism to resolve such cases is accordingly less straightforward. Indeed, territorialist arguments against a global perspective to multinational default are stronger in an enterprise group context, i.e., where the “single law linked to a single forum” approach purports to apply to a group as a whole. In cases involving groups, the problems highlighted by territorialists and mentioned above—such as predictability of a home country forum, possible defeat of creditor entitlement by the alteration of the forum and law, and interference with state sovereignty—might be more pronounced. Group enterprises may operate as conglomerates of independent and separate entities located in different jurisdictions. Dislocating the insolvency forum from the entities’ home country to another forum (a group forum of some sort), and applying that other forum’s laws, could therefore distort such expectations and preclude state control over locally formed and controlled entities. Arguably, a universalist approach applied to the group as a whole may not be necessary at all, and territorialism may better fit with the way groups operate.<sup>34</sup>

The reality, though, is more multifaceted. There is, in fact, a wide range of group structures, and group entities often operate beyond national

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33. See Jay Lawrence Westbrook, *Breaking Away: Local Priorities and Global Assets*, 46 TEX. INT’L L.J. 601 (2011); 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 (2011). Cf. Edward J. Janger, *Reciprocal Comity*, 46 TEX. INT’L L.J. 441 (2011) (who suggests giving a greater role to local priorities in the context of modified universalist solutions); John A. E. Pottow, *A New Role for Secondary Proceedings in International Bankruptcies*, 46 TEX. INT’L L.J. 579 (2011) [hereinafter Pottow, *A New Role for Secondary Proceedings in International Bankruptcies*] (discussing the merits of synthetic secondary proceedings over traditional secondary proceedings). Pottow suggests that secondary proceedings are a necessary evil, required to get skeptical states to subscribe to universalism. *Id.* at 581, 584. See also John A. E. Pottow, *Beyond Carve-Outs and Toward Reliance: A Normative Framework for Cross-Border Insolvency Choice of Law*, 9 BROOK. J. CORP. FIN. & COM. L. 202, 205–06 (2014) [hereinafter Pottow, *Beyond Carve-Outs and Toward Reliance*].

34. LoPucki, *supra* note 20, at 750. See also the regime proposed for international enterprise groups in the UNCITRAL LEGISLATIVE GUIDE PART THREE, *supra* note 5, which is mainly based on cooperation of multiple territorial proceedings. See *infra* Part V.



borders through their close affiliation with the other entities, even when the enterprise is formally segregated into separate entities in different countries. Moreover, the group as a whole may be functionally integrated and operate a single business or single lines of businesses across entities. In some circumstances, the enterprise may even be so heavily integrated that assets and debts were intermingled in the ordinary course of business.<sup>35</sup> A one size fits all solution that provides for separate territorial proceedings at the location of the subsidiaries for any group in cross-border insolvency would often diverge from the way multinational groups actually operate and therefore fail to facilitate beneficial global group-wide solutions.<sup>36</sup> Furthermore, at least with regard to those international groups whose subsidiaries are significantly linked to the home country group's nerve center the application of local policies to the group entities might be in any event limited in the ordinary course of business. Therefore, taking a multinational approach in insolvency in such cases would not defeat state sovereignty in functional terms.<sup>37</sup>

Territorialists argue that even if there is some sense in universalism in a group context, it is impractical since it is impossible to identify a group home country in which proceedings could be centrally administered with sufficient predictability.<sup>38</sup> Yet, this concern should be evaluated in view of the diversity of group structures, and the fact that in practice some common group organizational forms may have a clear group center. In other words, territorialist concerns regarding the feasibility of universalism in a group context are overstated to some extent and require closer evaluation of group economic reality and its effect on the need for a global approach in insolvency, on expectations, and on local control.

There may also be a concern that universalism applied to groups would defeat the fundamental company law principle of the corporate form. Yet, this concern is largely misconceived. Indeed, the key economic rationale for respecting the corporate form and, in a group context, applying entity principles<sup>39</sup> is the reduction of transaction costs and encouragement of

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35. See MEVORACH, *supra* note 3, ch. 5.

36. A coordinated group-wide approach can avoid separate sales of assets resulting from disintegration which may be value destroying as was apparent in the case of *KPNQwest N.V.* See ROBERT VAN GALEN, THE EUROPEAN INSOLVENCY REGULATION AND GROUPS OF COMPANIES (2003) (presented at the INSOL Europe Annual Congress). It can also avoid lack of smooth cooperation between affiliates. An example is the *Lehman Brothers* case where the UK administrators of Lehman Brothers International (Europe) (LBIE) refused to become a party to a cross-border protocol proposed by the U.S. Bankruptcy court. See *In re Lehman Brothers International (Europe)* (in administration), [2011] EWHC (Ch) 2022.

37. See also Westbrook, *A Global Solution*, *supra* note 11, 2298–99, 2310–11.

38. See LoPucki, *supra* note 20 at 716–18.

39. The respect of corporate personality and limited liability in the regulation of groups can be contrasted with “enterprise law,” which suggests considering the group as the relevant “entity.” See Phillip I. Blumberg, *The Corporate Entity in an Era of Multinational Corporations*, 15 DEL. J.

commerce through the segregation of assets and debts (“asset partitioning”) among affiliates in a group.<sup>40</sup> However, private international laws that would take account of group interconnectedness in order to ascertain the proper forum and the applicable law would not interfere with asset segregation within the group.

Conflict of law rules are characteristically based on connecting factors linking the legal relationship to the appropriate forum and applicable law. The connecting factor in corporate insolvency that determines both forum and laws choices is primarily based on geography, i.e. the presence of the main economic activity of the debtor in a particular country. In the case of integrated groups, there is no reason why the geographical link of a debtor to a jurisdiction would not be created through its connection to other entities in a group that have presence in that forum. Thus, a universalist approach applied to groups would determine the choice of law and forum in accordance with economic reality, taking account of the specific group scenario. Accordingly, it would in many cases find that the entire integrated group has a unified main forum to which all entities are connected. The universalist approach would have no say, though, on the issue of liability between affiliates and the segregation of asset and debts. Indeed, in the course of insolvency of enterprise groups (wherever the case may take place and under which laws), it may be determined by the presiding forum, based on the applicable law, that a parent should be liable for the debts of the subsidiary, or that proceedings should be substantively consolidated. Such solutions that an insolvency law might provide would no doubt directly interfere with asset partitioning, as they would allow the “lifting” of the “corporate veil.” Therefore, clearly and strictly defined pre-requisites may apply in such scenarios, such as the proof of fraud, wrongful trading by shadow corporate directors or very strong integration.<sup>41</sup> However, such determination of whether to treat the entities separately or link them substantively is a different matter, separate from the private international law aspects of the administration of a group insolvency case.

### III. APPLYING THE GROUP FORUM LAWS: NOT A ONE SIZE FITS ALL SOLUTION

Many cross-border insolvency cases of groups involve economically integrated enterprises because such enterprises are prone to the “domino effect,” with the insolvency of one or few entities of the group cascading

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CORP. L. 283 (1990); Clive M. Schmitthoff, *The Wholly Owned and the Controlled Subsidiary*, J. BUS. L. 218, 219–22 (1978).

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

41. See MEVORACH, *supra* note 3, at 215–29, 294–318.

throughout the entire integrated enterprise.<sup>42</sup> Integration may be in terms of the group business, where the entire group or some parts thereof have run a single or an interdependent business. In the more rare cases, the integration is in terms of the assets and debts, whereby the affairs and liabilities of the different entities have been intermingled and inseparable.<sup>43</sup>

In any event, the existence of integration would suggest that some degree of coordination in the course of insolvency would be critical for achieving efficient solutions, connecting the different entities proceedings together—potentially centralizing all proceedings in a single jurisdiction and governing the process by a single set of laws. Centralization of the process and concentration of the laws may be particularly important where the envisaged solution is reorganization or a going concern sale of the integrated business. In a piecemeal liquidation, it is possible to break the integrated group into pieces and address the insolvency on a jurisdiction-by-jurisdiction basis. Even then, a group may benefit from a joint “package sale” of its assets; however, the going concern value of the joint business could be lost and reorganization of the enterprise might be impossible in the absence of a group-wide approach. Achieving such group-wide solutions may be possible through cooperation across borders. Still, mere cooperation between parallel processes taking place in different countries and subject to different laws may not be sufficiently effective. In particular, coordinated solutions may be hampered where different insolvency laws would apply to the different entities in insolvency. It may be especially difficult to achieve group-wide reorganizations where rules—for example, regarding voting, plan confirmation, and new financing—are different,<sup>44</sup> and even more so where multiple jurisdictions are involved. Concentration of the laws and processes in one or two jurisdictions could facilitate the reorganization significantly.<sup>45</sup>

Concentration of laws and proceedings is also particularly sensible where substantive consolidation is envisaged for the enterprise, since substantive consolidation would require treating the enterprise as a single entity for distributional purposes, ignoring the random position of assets in different jurisdictions.<sup>46</sup> Indeed, such a solution should be applied sparingly.

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42. Non-integrated groups are less likely to collapse as a whole and thus the question of whether to apply universalist or territorialist solutions to the group would not normally arise.

43. See MEVORACH, *supra* note 3, at 30–31, 132.

44. See, e.g., the *Enron* case in which a complex plan needed to be designed in order to overcome the differences between the chapter 11 and scheme of arrangement regimes (*In re Enron*, No. 01-16034, 2001 Extra LEXIS 304 (Bankr. S.D.N.Y. Dec. 10, 2001)).

45. Subject to the same exceptions to the *lex concursus* rule that would apply in a single company insolvency case. The nature and rationale for such exceptions is beyond the scope of the paper. *But see* the discussion in Pottow, *Beyond Carve-Outs and Toward Reliance*, *supra* note 33; Edward J. Janger, *Silos: Establishing the Distributional Baseline in Cross-Border Bankruptcies*, 9 BROOK. J. CORP. FIN. & COM. L. 180, 184–87 (2014).

46. Such a solution was achieved by way of agreement between the liquidators in the BCCI case. The assets and debts of the different entities were pooled together under the supervision of

The rationale for applying substantive consolidation and the extent to which such solution should be pursued in relevant circumstances is, as noted earlier, beyond the scope of this paper.<sup>47</sup> What is relevant for the purpose of the private international law and choice of law analysis is that the cross-border insolvency framework be able to support a group solution, including where substantive consolidation is necessary. If different laws apply to the group enterprise's insolvency, each set of laws may impose different preconditions for applying substantive consolidation. For example, the parent company's forum laws may provide for substantive consolidation only where assets and liabilities of the group entities were intermingled in the course of business, while the subsidiary's forum laws may require as a condition for substantive consolidation proof of creditor reliance on the group as a whole. Legal systems may also vary in the way to apply substantive consolidation. The fragmentation of applicable law is likely to impede any coherent solution.

Centralization of the law and forum in cases of integrated enterprises is thus conducive to group-wide solutions that may better match the economic reality of the enterprise. However, the assumption of efficiency of this universalist approach, as well as the question of compatibility with spheres of control and expectations, requires consideration of the degree of geographical spread of the enterprise and the way it has been managed internationally. Specifically, it requires drawing a distinction between two typical structures of integrated enterprise groups: those groups that have been controlled centrally (centralized groups) and those groups that although integrated in various ways, have been managed in a decentralized manner and operated the global business through autonomous entities (decentralized groups).<sup>48</sup>

#### A. INTEGRATED CENTRALIZED GROUPS

It is submitted that in cases where the integrated group was controlled and managed centrally,<sup>49</sup> the optimal approach in the course of insolvency would also be full centralization of the forum and law.<sup>50</sup> The integrated, centralized enterprise group is in functional (economic connections) terms

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the principal process in Luxemburg that also applied its insolvency laws, though some of the jurisdictions involved ring fenced assets or applied some of their local insolvency rules. *See Re BCCI SA (No. 10)* [1997] 2 WLR 172 (Ch 1996); *Re BCCI SA (No. 2)* [1992] BCLC 715.

47. *See, e.g.,* MEVORACH, *supra* note 3, at 215–35; Henry Peter, *Insolvency in a Group of Companies, Substantive and Procedural Consolidation: When and How?*, in *THE CHALLENGES OF INSOLVENCY LAW REFORM IN THE 21ST CENTURY* (Henry Peter et al. eds., Verlag Schulthess 2006); Douglas G. Baird, *Substantive Consolidation Today*, 47 B.C. L. REV. 5 (2005); William H. Widen, *Corporate Form and Substantive Consolidation*, 75 GEO. WASH. L. REV. 237 (2007).

48. *See* MEVORACH, *supra* note 3, at 133–35.

49. The whole or part of the group may operate in this way.

50. Subject to the same limited exceptions to the *lex fori concursus* rule that should apply to a single company's cross-border insolvency.

the same as a single enterprise that operates across borders via offices or branches; only these “branches” are in fact formally separated entities and therefore require separation between the assets and the debts of each entity in the course of insolvency. Thus, as it is most effective to handle the cross-border insolvency of single companies centrally in terms of the law and forum, so would be the case for the integrated, centralized group. Similarly, the argument about the defeat of state sovereignty in such cases is weak. Like the multinational corporation that is not in fact governed locally, the integrated centrally controlled group is in reality significantly linked to the home country forum in the ordinary course, and centralization in insolvency only follows this reality.

Even in the cases of centralized groups, however, it might be that some of the subsidiary entities are heavy in assets and local presence, to the extent that it would be efficient to conduct local proceedings. However, whether or not to open additional proceedings should ideally be a decision made by the insolvency representative supervising the main group proceedings who would be obliged to regard the interests of the stakeholders as a whole. Furthermore, the opening of additional proceedings regarding the same integrated, centralized group may be merely ancillary to the main process, and may not require the application of a separate set of laws.

In any event, any further decentralization of the law and process would not match the economic reality of the business enterprise. At the same time, creditors’ entitlements vis-à-vis the entity with whom they were dealing, and their prediction regarding the law and forum that will preside in the event of insolvency, would not be hampered by the centralization of the applicable law and forum. In cases of integrated centralized groups, voluntary creditors are capable of conducting the *ex ante* predictions to ascertain the group’s home country in the same way that they would for a single company with foreign branches. Identifying a mutual predictable center is especially feasible if the key connecting factor for insolvency jurisdiction is the location of the economic center, rather than the place of incorporation, and as will be noted below, cross-border insolvency frameworks, increasingly emphasize economic reality over mere registration as their jurisdictional test. Indeed, the place of incorporation or registered office is likely to refer to multiple jurisdictions where entities were registered, yet the economic center, in particular if it is equated with the operational headquarters of the business, is likely to refer the case to a common center for the group as a whole.<sup>51</sup> In fact, in cases of integrated

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51. In cases decided under the EC regulation, it was possible to identify a mutual predictable center for all group members at the location of the central head-office. See *Daisytek-ISA Ltd* High Court of Justice Leeds (UK) 16 May 2003, [2003] BCC 562 (ChD); *Re Parkside Flexibles SA*, [2006] BCC. 589 (Eng.); *MPOTEC GmbH*, tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Nanterre, [2006] BCC 681 (Fr); *Re Creative Building Maintenance Inc.*, et

centralized groups, the central management of the group coincides with the center of each group entity, and therefore can be predicted in the same way. Because each group entity is centrally controlled from the group head office (since the group is centralized), the entities' home countries and the group home country would be the same.

### B. INTEGRATED DECENTRALIZED GROUPS

The choice of law analysis may be different where the group is integrated but *decentralized*, that is, where the group entities—all or some of them—are managed independently, with significant autonomy in their respective jurisdictions, and are more loosely controlled from a group headquarter. Although the integration of the group still suggests that the group stakeholders would benefit from some degree of global group-wide approach, full centralization might not be the optimal solution if entities were locally administered. Collection of evidence and relevant information may be difficult without opening local proceedings. Decentralization may also suggest that separate reorganization plans or restructurings for different divisions may be most effective. Other territorialist concerns might also be paramount in such cases. Since the entities in a decentralized enterprise were independent and controlled domestically or on a regional level, creditors likely had dealings with the local or regional management, and therefore, they expect the applicable insolvency law to be linked to that territorial forum. The primary choice of law solution in such cases should, therefore, be the application of the entity's *lex fori concursus*, rather than that of a group center.<sup>52</sup> Still, the process may be usefully synchronized to promote an efficient solution through the leadership of the forum where the whole integrated group was to some extent coordinated in the ordinary course—that is, at the group coordination center. The coordination center equates with the place of an enterprise's headquarters, only that the function of the headquarters has been somewhat different in the case of the decentralized group as it coordinated the enterprise rather than closely controlled it. The purpose of such coordination between entities of a decentralized group, in the course of insolvency may be to exchange relevant information or collaborate in view of a forthcoming investment in

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al., Nos. 06-03586, 03587 (Bankr. W.D.N.Y. 2006); *Re ROL Manufacturing (Canada) Inc., et al.*, No. 08-31022 (Bankr. S.D. Ohio 2008). See also Gabriel Moss & Michael Haravon, "Building Europe"—the French Case Law on COMI, 20 *INSOLVENCY INTELLIGENCE* 20 (2007); Gabriel Moss, *Group Insolvency—Choice of Forum and Law: The European Experience Under the Influence of English Pragmatism*, 32 *BROOK. J. INT'L L.* 1005 (2007).

52. Note that the local entity too may represent a regional group center, of a regionally integrated centralized group, in which case the law of that entity may apply to additional entities that were under the control of that separately managed part of the group.

the group as a whole, but not to fully centralize the proceedings and the laws.<sup>53</sup>

However, the proper private international law solution for an integrated group in insolvency may be less clear-cut. Even though in decentralized groups, entities may exercise local autonomy, centralization in the course of insolvency may still be the most effective approach, especially if reorganization of the entire integrated group, or substantive consolidation, is envisioned.<sup>54</sup> As mentioned above, achieving group-wide reorganizations or substantive consolidation is difficult where the process is fragmented and multiple laws apply. The future structure planned for the enterprise may also be such that centralization is required in the course of insolvency. Thus, while it may have been the case that prior to the insolvency proceedings part of the group was decentralized, a new structure may be envisaged post-insolvency in the context of a plan that may entail a transformation of the enterprise into a more centralized organization. At the same time, the fact of pre-insolvency decentralization requires consideration of the redistribution risk and the potential uncertainty regarding the applicable law.

These scenarios, therefore, present some degree of conflict or mismatch between the advance of optimal insolvency solutions *ex post* after the opening of insolvency proceedings (and in view of future restructuring of the business) and the respect of pre-insolvency rights and expectations that affect *ex ante* efficiency. The dilemma can be resolved, though, through a sufficiently nuanced choice of law regime that would allow the central (main) group forum to address the applicable law question more flexibly. The main group forum at the group headquarters, where proceedings would be centralized, may be required to uphold creditor pre-insolvency entitlements in such cases, pursuant to the subsidiary's center of main interests (COMI) insolvency law and ensure that creditors are not worse off by the application of the laws of the group forum. Yet, the center forum may not apply the local laws wholesale. Such an approach might be counter-productive to achieving group-wide effective solutions. It will be sufficient to ensure that specific protections afforded to local creditors are upheld through, for example, respecting priorities under the local law regarding the local assets. The application of other rules and processes of the group center is justifiable—both because it will promote the insolvency goals by allowing efficient solutions in the course of insolvency and because it fits with the private international law analysis that is based on a

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53. See Irit Mevorach, *The Home Country of a Multinational Enterprise Group Facing Insolvency*, 57 INT'L & COMP. L.Q. 427, 446–47 (2008).

54. Indeed, the latter scenario (substantive consolidation for decentralized groups) is less likely to occur, since it is more conceivable that a heavily integrated intermingled group that would require substantive consolidation would also be centralized in terms of its management. It is a more conceivable scenario in circumstances of fraud.

connection between entities and jurisdictions.<sup>55</sup> In the integrated but decentralized cases, in addition to having distinct centers, the group entities have also had a significant link to the group center forum that has been coordinating the enterprise. The approach is similar to the “synthetic secondary proceeding”<sup>56</sup> solution that has been employed in practice, whereby all proceedings were opened at group headquarters and the opening of additional secondary proceedings regarding the same group entities was avoided by applying certain local laws that grant protections to creditors.<sup>57</sup>

### C. OTHER INTEGRATED GROUPS

Finally, some group enterprises, even if integrated, may be structured in a way that would make it difficult to identify a single economic center where the group as a whole is centrally controlled or coordinated. For example, a group enterprise may be split organizationally whereby several sets of management control the group,<sup>58</sup> or it may be structured in a way in which there is no central location exercising control over subsidiaries. Thus, instead of having one “head” and “brain” controlling or coordinating the entire group, there may be two or more heads of the enterprise. Decision-making may also take place between management centers of equally positioned entities in horizontal types of structures.<sup>59</sup> In the event of insolvency of such groups, it may be appropriate to open more than one central proceeding and apply more than one set of laws. It might be

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55. A connection that also generates expectations and reliance.

56. See Pottow, *A New Role for Secondary Proceedings in International Bankruptcies*, *supra* note 33, at 199. The concept is referred to as “virtual territoriality” in Edward J. Janger, *Virtual Territoriality*, 48 COLUM. J. TRANSNAT’L L. 401, 408–09 (2010), and as the “as if” approach in Bob Wessels, *Contracting Out of Secondary Insolvency Proceedings: The Main Liquidator’s Undertaking in the Meaning of Article 18 in the Proposal to Amend the EU Insolvency Regulation*, 9 BROOK. J. CORP. FIN. & COM. L. 63, 75–76 (2014).

57. See, e.g., *Re MG Rover Belux SA/NV (In Administration)*, [2006] EWHC (Ch) 1296 (Eng.); see also Heribert Hirte, *Towards a Framework for the Regulation of Corporate Groups’ Insolvencies*, EUR. CO. & FIN. L. REV. 213, 218 (2008). The pending amended EU Regulation will explicitly authorize liquidators to make such undertakings to local creditors to avoid the opening of secondary proceedings (*Proposal for a Regulation of the European Parliament and of the Council Amending Council Regulation (EC) No 1346/2000 on Insolvency Proceedings*, art. 18(1), COM (2012) 744 final (Dec. 12, 2012) [hereinafter *Proposal for Amending the EU Insolvency Regulation*]); Council of the European Union, 10284/14 add 1. ann. art. 42d1-42d17 (June 3, 2014). [hereinafter *Compromise Text*]. See also Janger, *supra* note 45, at 187–89 (Janger would give an even greater role to the synthetic proceedings approach and apply it more generally in cross-border insolvency).

58. An example is the case of *Eurotunnel* (Tribunal de Commerce, Paris, Aug. 2006 (Fr.)) (unreported), where two parent companies, French and English, jointly owned the global integrated operation. Indeed the decision on the location of COMI in this case was not “clear cut.” Eventually the global restructuring took place under the French “Procédure de Sauvegarde”. The French court concluded *inter alia* that the various group entities’ management was largely concentrated in France, as was also described in the annual reports of the parent companies.

59. Mevorach, *supra* note 53, at 447–48.



possible, however, to centralize the process to some extent where centralization can promote the goals of the process. The court may also consider alternative connecting factors (i.e., degree of activities, assets, creditors etc.) to ascertain an approximate center that can lead the case especially if a group reorganization, going concern sale or substantive consolidation is being considered. Furthermore, by way of agreement or cooperation between insolvency representatives or the courts, some of the center forums may defer to a single center that would oversee the process.

The usefulness of “ad-hoc contractualism” to achieve group universalist solutions has been noted; it may be particularly sensible to utilize this measure in order to minimize the number of proceedings and laws that would apply, where the envisaged solution is reorganization or substantive consolidation that would encompass those parallel-managed parts of the group. It is important, though, to set limitations to contractual solutions or discretionary powers given to the court to employ alternative jurisdictional tests. To the extent that deference and centralization entail redistribution of rights because of a real shift of an entity’s center, there should be means of compensation in a reorganization plan. A no worse-off rule, or requirement of consent of those whose rights are impaired by the jurisdictional shift, should be applied when confirming agreements on applicable law or localizing group proceedings in an approximate center, in a way that could advance a group plan or other group-wide solutions.

Thus, a choice of law regime applicable to groups can be nuanced enough to accommodate the diversity of group managerial structures and insolvency scenarios. The more the enterprise has been integrated and centralized, and the more it requires solutions that envisage a continuation of the group or its business, the more crucial it is to apply a universalist solution to the group as a whole, to centralize the process and laws. The toolkit of solutions should also include the possibility of accommodating local priority rights in cases where entities had distinct centers yet the process still requires a large degree of centralization. In cases of significant decentralization or where piecemeal liquidation is desired, looser connections between the group entities’ insolvency proceedings may be employed through the private international law/choice of law regime. Yet, the cases of integrated enterprises that require a large degree of centralization in insolvency, be it because the group was significantly integrated or because it would benefit from some type of reorganization or going concern sale, are common cases of group insolvency on which cross-border insolvency frameworks should focus, as practice also shows.

#### IV. CHOICE OF LAW SOLUTIONS FOR GROUPS UNDER THE CROSS-BORDER INSOLVENCY FRAMEWORKS

The two main cross-border insolvency frameworks on the regional and international levels are the EU Insolvency Regulation and the UNCITRAL Cross-Border Insolvency Model Law. Below it is considered to what extent these frameworks, in their current form and in view of forthcoming developments, facilitate the type of optimal solutions suggested above for the cases of international groups' insolvency.

##### A. EU INSOLVENCY REGULATION

Under the EU Insolvency Regulation scheme, only one main proceeding may be opened against a debtor, in the forum of its COMI, and this proceeding should automatically be recognized and given full effect in other Member States.<sup>60</sup> The *lex fori concursus* (the law of the forum) is the applicable law regarding insolvency matters, subject to certain exceptions, including the possibility that secondary proceedings will be opened in which case the law of the secondary forum will apply regarding locally situated assets.<sup>61</sup> Thus, the EU Regulation adopts the mitigated one law linked to one forum approach. However, the group case is not addressed explicitly. Currently, there are no provisions regarding centralization, coordination, or cooperation in cases where two or more entities belonging to the same enterprise group are in insolvency. The EU Regulation would apply in such cases with regard to each entity separately.<sup>62</sup>

Nevertheless, the Regulation has generated pragmatic solutions in cases of groups. Many group cases have been centralized in one forum allowing the design of group-wide solutions through the identification of the same COMI for all group entities at the group headquarters, and the application of the forum law.<sup>63</sup> The practice of the application of the EU Regulation shows a large proportion of group cases, of which many required group-wide solutions and that had a structure that could indicate a mutual place of command and control.<sup>64</sup> COMI was also interpreted as referring to a real

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60. Subject to the "public policy exception." EU Insolvency Regulation, *supra* note 1, art. 26.

61. *Id.* art. 4(2).

62. See Miguel Virgós & Etienne Schmit, Report on the Convention of Insolvency Proceedings, para. 76, (May 3, 1996), available at [http://aei.pitt.edu/952/1/insolvency\\_report\\_schmidt\\_1988.pdf](http://aei.pitt.edu/952/1/insolvency_report_schmidt_1988.pdf). See also Eurofood IFSC Ltd. (Case /c-341/04) [2006] OJ 2006 C143/11, [26]-[37].

63. See, e.g., In re Daisytex-ISA Ltd., [2003] BCC 562; Energotech SARL, [2007] BCC 123 (Tribunal de Grande Instance) (Fr.); Hettlage-Austria, Munich District Court (Amtsgericht), 4 May 2004, AG Munchen Beschl.v.4.5.2004-1501 IE 1276/04; Eurotunnel (Tribunal de Commerce, Paris, Aug. 2006 (Fr.)). In some cases the forum allowed giving effect to local priorities. See *supra* note 58.

64. See Mevorach, *Jurisdiction in Insolvency*, *supra* note 24, at 327; see also Gabriel Moss, *Group Insolvency — Forum — EC Regulation and Model Law Under the Influence of English*

economic center, primarily the enterprise actual head-office.<sup>65</sup> Courts and insolvency representatives have acknowledged the reality of integrated groups in insolvency and ensured that a global centralized approach can be applied in such cases. Thus, the practice developed optimal effective rules. Nonetheless, the manner in which such group-wide approach should be applied could be made more explicit in the Regulation. Indeed, the need to address the case of group insolvency has been acknowledged and a new chapter on enterprise groups has been formulated for a revised EU Regulation (negotiations on the revised Regulation text are still ongoing).<sup>66</sup> However, while the new chapter on groups provides means for cooperation and coordination of group insolvencies, it does not sufficiently endorse the practice of centralization.

Indeed, the design of provisions for groups presented challenges, and the drafting of the chapter on groups involved several iterations and negotiations between the Parliament and the Commission. The European Commission's original proposal (from 2012) of a group chapter only contained provisions on cooperation between multiple group proceedings.<sup>67</sup> The idea was that liquidators appointed in proceedings concerning entities of the same group would cooperate if such cooperation would facilitate the effective administration of the proceedings, including sharing information, exploring the possibilities of group restructuring, and coordinating the supervision of the group affairs. The courts too would similarly cooperate. The liquidators would have the right to be heard and participate in other group entities' proceedings, to request a stay of such proceedings, and to propose a rescue plan.<sup>68</sup>

The Commission's initial approach resembles the manner in which the relationship between *main* and *secondary* proceedings is addressed in the current text of the revised Regulation. In that context too, liquidators and courts are duty-bound to cooperate. However, regarding secondary proceedings, it may now be possible to limit the opening of such proceedings to circumstances where it is necessary to protect the interests of local creditors.<sup>69</sup> In contrast, no limitations were suggested regarding the opening of parallel proceedings against related companies. Various other new provisions will ensure that the leading role of the liquidator in the main proceeding is retained *vis-à-vis* the secondary proceedings. In contrast, the Commission did not include similar limitations regarding the opening or the

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*Pragmatism Revisited*, 9 BROOK. J. CORP. FIN. & COM. L. 250 (2014) (discussing the use of the "head office functions" test to determine COMI).

65. See Mevorach, *Jurisdiction in Insolvency*, *supra* note 24.

66. See *Proposal for Amending the EU Insolvency Regulation*, *supra* note 57, ch.IV a; *Compromise Text*, *supra* note 57, ch. IVa. The negotiations on the revised Regulation were still ongoing at the time this Article went to print.

67. See *Proposal for Amending the EU Insolvency Regulation*, *supra* note 57, ch. IVa.

68. *Id.* art. 42a-d.

69. *Id.* art. 29a; see also *Compromise Text*, *supra* note 57, art. 29a.

handling of parallel proceedings against related companies of a group enterprise. All liquidators were to have the same status and all could have asked to stay other proceedings and propose a rescue plan. It was not required or suggested to file the proceedings in a single jurisdiction, or to instigate main or supervisory proceedings at a group center.

The initial proposal of the European Parliament for a group chapter (proposed in 2011) was a much more obtrusive yet adaptive approach and more akin to the practice of centralization. It provided concrete solutions for different types of groups and suggested the centralization of group proceedings in a single forum as the primary approach.<sup>70</sup> The Parliament recommended that where the group structure allows it, proceedings should be centralized in the jurisdiction of the group headquarters.<sup>71</sup> That would have led to the application of that forum's laws, based on the EU Insolvency Regulation scheme whereby the forum applies its laws subject to exceptions. Any additional proceedings opened against entities of the same group would be ancillary to the main group proceedings. Where the group is decentralized, the Parliament recommended that coordination mechanisms should be used.

Indeed, to some extent, the practice of centralization was acknowledged in the 2012 Commission's proposal as well, through the introduction of a new recital that stated that the rules proposed for groups should not limit the possibility of a court's opening of insolvency proceedings for several companies belonging to the same group in a single jurisdiction.<sup>72</sup> Such joint opening would be possible if the court finds that the COMI of these companies is located in a single member state. In such situations, the court should also be able to appoint, if appropriate, the same insolvency representative in all proceedings concerned. Yet, the centralization concept was mentioned *only* in a recital and had no resonance within the body of the group chapter.<sup>73</sup>

The European Parliament subsequently introduced amendments to the Commission's text. The revised Parliament's proposal (of December 2013) could be seen as a compromise between its original approach that distinguished between different group scenarios and focused on centralization, and the Commission's "one-size fits all" cooperation-based proposal.<sup>74</sup> The Parliament suggested that in addition to the provisions regarding cooperation among parallel proceedings of group entities, it

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70. European Parliament, Comm. of Legal Affairs, *Rep. with Recommendations to the Commission on Insolvency Proceedings in the Context of EU Company Law*, Part 3: Recommendations on the Insolvency of Groups of Companies, 2011/2006(INI) (Oct. 17, 2011).

71. *Id.*

72. *Proposal for Amending the EU Insolvency Regulation*, *supra* note 58, recital 20b.

73. *Id.*

74. European Parliament, Comm. on Legal Affairs, *Draft Report on the Proposal for a Regulation of the European Parliament and of the Council Amending Council Regulation (EC) No. 1346/2000 on Insolvency Proceedings*, COM (2012) 0744 (Dec. 20, 2012).

should be possible for a court to open what is called “coordinating proceedings” at any jurisdiction where a proceeding against a group entity is pending, provided that the entity serves “crucial functions” within the group and has its COMI in the jurisdiction.<sup>75</sup> Where there is an attempt to open such proceedings in several forums, the group coordinating proceedings should be opened at the COMI of the most crucial member of the group.

A more recent Compromise Text adopted by the Council of Ministers (in June 2014) provides that such group coordination proceedings may be requested at any court having jurisdiction over the insolvency proceedings of a member of the group by a practitioner appointed in a proceeding opened in relation to a member of the group. If there are several requests, the court first seized has jurisdiction. Where at least two-thirds of all insolvency practitioners appointed in insolvency proceedings of the members of the group have agreed that a court of another Member State having jurisdiction is the most appropriate for the opening of group coordination proceedings, that court shall have exclusive jurisdiction.<sup>76</sup>

The coordinator officer will have responsibility for mediating between office-holders appointed in the various proceedings, identifying and outlining recommendations for the conduct of the insolvency proceedings, and proposing a group-wide plan if suitable. Once coordinating proceedings are opened other office-holders would no longer have the right to request a stay of measures with regard to other group members’ proceedings.<sup>77</sup> The Compromise Text further emphasizes that participation in a coordinated proceeding is voluntary.<sup>78</sup>

Thus, the current text of the new group chapter is premised on cooperation and coordination of multiple proceedings.<sup>79</sup> No doubt, cooperation and coordination are important mechanisms in the toolkit of measures for addressing group insolvencies. As suggested above, cooperation and coordination between parallel proceedings may be particularly suitable for cases of decentralized groups that may not require tighter solutions and full centralization of the process post-insolvency. Indeed, such enterprises or parts thereof may be significantly decentralized and not require any coordination at all, and therefore, the possibility to include only some of the entities in a coordinated insolvency process is commendable. Regrettably, though, still no reference is made in the current

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75. “Crucial functions” refers to the ability, prior to the opening of insolvency proceedings with respect to any member of the group, to take and enforce decisions of strategic relevance for the group or parts of it. Alternatively, it means the economic significance within the group, presumed if the group member contributed at least ten per cent to the consolidated balance sheet total and consolidated turnover. *Id.* art. 2 (ja).

76. See *Compromise Text*, *supra* note 57, arts. 42d1-42d17.

77. *Id.*

78. *Id.* arts. 42d4-42d5.

79. *Compromise Text*, *supra* note 56, Ch. IVa.

text of the group chapter, or elsewhere in the body of the (revised) Regulation, to the new recital that mentions the possibility of identifying a single COMI for all group entities. The impression might be, therefore, that the primary (perhaps, even the only) relevant cross-border insolvency measure for groups going forward is the opening of multiple proceedings in different jurisdictions, with the possibility of coordinating them through the group coordination proceedings.

The concern is that there may be less room under the framework proposed in the revised Regulation for initiating proceedings against several group members in the same forum and allowing that forum to apply its laws, subject to possible modifications and protection of local interests. The result may be that cooperation and coordination in cases of group insolvencies may be enhanced. Yet, the insolvency process might be more complicated than it could have been if more emphasis was put on centralized solutions. In addition, under the proposed revised Regulation, certain group solutions may not be possible at all. Thus, for example, even if the applicable law of what could be regarded as the main group (coordinating) forum would allow, in accordance with international standards,<sup>80</sup> the substantive consolidation of the estates where assets and debts were significantly intermingled, the multiplicity of the proceedings may preclude such a solution. The new chapter on groups also specifically prohibits any possibility of consolidating the proceedings or the estates by the coordinating practitioner.<sup>81</sup>

## B. UNCITRAL MODEL LAW

The cross-border insolvency scheme under the UNCITRAL Model Law is similarly based on the notion of identifying the COMI of the debtor, although such a determination is required for *recognizing* foreign proceedings rather than for the purpose of opening proceedings.<sup>82</sup> The Model Law does not unify choice of law rules, as it only provides rules on access, recognition, assistance, and relief.<sup>83</sup> Therefore, both the recognizing court and the opening court may apply their own private international law rules to determine which laws to apply regarding insolvency matters. Nonetheless, it is possible under the Model Law that the opening court will apply its domestic laws and then seek their recognition through the Model Law's relief provisions,<sup>84</sup> achieving a de facto centralized applicable law solution. Indeed, the Model Law envisions that the recognizing court may

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80. See UNCITRAL LEGISLATIVE GUIDE PART THREE, *supra* note 5.

81. See *Compromise Text*, *supra* note 56, art. 42d12(3).

82. MODEL LAW, *supra* note 1, art. 16.

83. See 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, 324 (2004).

84. MODEL LAW, *supra* note 1, art. 21.

turn over assets to the foreign representative and entrust the foreign representative with the administration or realization of assets as well as the distribution of assets located in the recognizing state.<sup>85</sup> The consequence of such relief is that the assets will become part of a single insolvency estate and will be distributed, unless other conditions apply, according to the laws of the opening state.<sup>86</sup>

The concentrated *lex fori concursus* approach is further reinforced by the recommendation in the UNCITRAL Legislative Guide on Insolvency Law to afford the *lex fori concursus* a dominant role.<sup>87</sup> Indeed, under the Model Law framework, this solution would primarily apply to single companies, as the Model Law does not provide rules for groups. Nonetheless, it is possible that proceedings that were opened with regard to two or more member entities of a group in the same forum will be recognized under the Model Law. Similar to the position under the EU Insolvency Regulation, such a conclusion could be based on the finding that all entities had their COMI in the same forum, and would be facilitated by focusing on the location of the entities' central administration (headquarters) and by considering the purpose of the proceedings. Courts in the United States and Canada have been particularly inclined to apply the Model Law in this way to facilitate group-wide solutions. Thus, they have often recognized foreign proceedings opened against related companies, including entities registered in the local (recognizing) forum, in the jurisdiction of the group head office.<sup>88</sup> Such solutions are likely to be further promoted by the recent revision to the Guide to Enactment of the Model Law that clarified the meaning of COMI, and now provides that COMI primarily refer to the location of the company's headquarters.<sup>89</sup> Centralization of group proceedings (and the applicable laws) through the recognition and relief provisions in the Model Law could be subject to conditions, to reflect, for example, a scenario of decentralization and

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85. *Id.*

86. Such relief is subject to the requirement that the court is satisfied that the interests of the local creditors are adequately protected. MODEL LAW, *supra* note 1, arts. 21(2), 22. *See also* Mevorach, *On the Road to Universalism*, *supra* note 24, at 543–50.

87. *See* UNCITRAL LEGISLATIVE GUIDE, *supra* note 16, rec. 31.

88. *See, e.g.*, Petroflow Energy Ltd, 17 September 2010, No. 1001-13659 (Court of Queen's Bench, Alberta); TerreStar Network Inc., 19 October 2010, 21 October 2010, 9 November 2010, 19 November 2010, No. CV-10-8944-00CL (Ont. S.C.J. [Commercial List]); TLC Vision Corporation, 21 December 2009; 23 December 2009 (Ont. S.C.J. [Commercial List]); Pope & Talbot, Inc., et al., No. 08-11933 (Bankr. D. Del., 2008); *Shermag Inc.*, No. 08-12015 (Bankr. M.D.N.C., 2008); Madill Equipment Canada, et al., No. 08-41426 (Bankr. W.D. Wa., 2008). *See also* Mevorach, *On the Road to Universalism*, *supra* note 24, at 537–43.

89. *See* U.N. Secretariat, *Interpretation and Application of Selected Concepts of the UNCITRAL Model Law on Cross-Border Insolvency Relating to Centre of Main Interests (COMI)*, ¶¶ 123D-123I, U.N. Doc. A/CN.9/WG.V/WP.112 (Feb. 11, 2013). The final text of the revised Guide to Enactment should be available soon on the UNITRAL website (<http://www.uncitral.org>). The author had the privilege of participating in the deliberations as adviser to the United Kingdom delegation. All views expressed here, though, are solely those of the author.

mismatch between the insolvency solutions and *ex ante* realities and expectations. Thus, group optimal solutions could be, and have been, achieved under the Model Law.

Indeed, the global cross-border insolvency framework too could be developed further to provide greater clarity and guidance through the design of explicit provisions concerning groups, as well as rules regarding the applicable law. The need for such rules has been acknowledged by UNCITRAL, which is now considering the development of its regime to address international groups in insolvency.<sup>90</sup> It has also indicated an intention to develop choice of law rules in future projects. Such initiatives are particularly important in view of sometimes inconsistent applications of the Model Law, in particular the relief provisions, which are currently loosely defined and leave considerable room for discretion and varied interpretation.<sup>91</sup>

## CONCLUSION

The analysis in this Article showed that, most often, the optimal choice of law solution for group insolvency would be a universalist centralized one, whereby all of the process will take place in one forum that would apply its laws. Many groups (or parts thereof) that enter into insolvency as a whole are integrated and therefore would benefit from a global group-wide solution. A concentration of the process and laws can facilitate such an approach. Creditors' expectations are not defeated by such centralization if the cross-border insolvency framework ensures that the forum that applies its laws to the insolvency matters represents a real connection to each of the entities. There is also no defeat of the corporate form since assets and debts remain separate, except for specific justifications that would allow "lifting the corporate veil" (that are beyond the private international law analysis).

In certain cases, the group, although integrated, has decentralized management structure with subsidiaries having distinct centers, in addition to being linked to the group center forum. In such cases, it was submitted, the presumption in terms of choice of law and forum should be the handling of multiple, coordinated, proceedings. However, even in cases of decentralized enterprise structures, often the process will require centralization, especially if the group or the business plans to go forward in a more unified manner. A cross-border insolvency framework should be equipped with nuanced measures, allowing the pursuit of centralized solutions in these cases too, while ensuring that the group forum can give effect to local creditor protections. In cases where no center of control or

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90. Deliberations started in April 2014.

91. See *Tacon v. Petroquest Res. Inc. (In re Condor Ins. Ltd.)*, 601 F.3d 319 (5th Cir. 2010). Cf. *Jaffé v. Samsung Elecs. Co. (In re Qimonda)*, 737 F.3d 14 (4th Cir. 2013). See also Janger, *supra* note 45, at 184–85.



coordination can be identified, the proceedings may be handled in parallel, and group solutions may be achieved through cooperation.

Current frameworks for cross-border insolvency provide some answers along the above lines, even if not explicitly, and the practice has evolved in a pragmatic way that has reflected group economic realities. Further developments of the frameworks present an opportunity to provide clearer and more comprehensive solutions. Yet, such developments also entail the risk that in attempting to provide specific rules for groups, a one size fits all solution might emerge, or that the unjustified concern regarding “veil lifting” would take the regime a step backwards by giving primacy to solutions that are merely based on cooperation or on a minimal degree of coordination, between multiple proceedings. It is hoped, though, that even if the cross-border insolvency frameworks will end up appearing as constraining group solutions by focusing merely on cooperation and coordination, pragmatic optimal approaches will continue to prevail.