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Robert W. Miller

*Emory University School of Law*

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## ECONOMIC INTEGRATION: AN AMERICAN SOLUTION TO THE MULTINATIONAL ENTERPRISE GROUP CONUNDRUM

*Robert W. Miller\**

The first step to dealing with a problem is admitting its existence. Commentators have overcome this initial barrier for administering insolvent multinational enterprise groups, and many have chronicled the problems in great detail. Yet, most commentators have either settled on the current solutions or created broad theoretical frameworks. Commentators agree that any test should consider a group's of integration. Moreover, a finding of economic integration could sway a foreign proceeding to provide the comity necessary for a consolidated proceeding. Defining integration, however, has proven difficult.

Finding a solution need not entail turning away from American bankruptcy law. The framework used in *In Re General Growth Properties* provides an excellent foundation for analyzing whether a multinational enterprise group is sufficiently integrated to conduct a consolidated proceeding.<sup>1</sup> The efficacy of the framework is not accidental as the problems raised by solvent subsidiaries pulled into bankruptcy are very similar to the problems of consolidated multinational enterprise group proceedings. In both cases, creditors will often oppose consolidating some members and the court must decide the propriety of consolidating the group. The Economic Integration Test serves the same function as the analysis in *General Growth*. Namely, it ensures that a consolidated multinational enterprise group proceeding is beneficial for both the individual members and the group, is feasible, and is done in good faith. Courts should apply the Economic Integration Test to consolidated multinational enterprise groups proceedings in the United States under either the current version of the Bankruptcy Code or an amendment to the Model Law.

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\* Law Clerk to the Honorable William L. Stocks, United States Bankruptcy Judge for the Middle District of North Carolina; J.D. with Honors, Emory University School of Law. I would like to thank Professor Peter Hay for helping me formulate this topic. I would also like to thank Judge Stocks for giving me the opportunity to improve my knowledge of bankruptcy law as his law clerk. Lastly, I would like to thank Susan Miller and Alexandra Dugan for their love and support.

<sup>1</sup> See *In re Gen. Growth Props., Inc.*, 409 B.R. 43 (Bankr. S.D.N.Y. 2009).

## INTRODUCTION

In today's globalized economy, Multinational Enterprise Groups ("MEGs") are extremely prevalent. The finances and operations of group members are often integrated to minimize costs and increase productivity. The success of an individual group member may be contingent upon the success of the group. Once bankruptcy proceedings commence against members of the MEG in different States, however, adjudicators do not treat the group as an economically integrated unit, and only members in the same State may consolidate bankruptcy proceedings.<sup>2</sup> As a result, group-wide solutions, such as cross-border sales or restructurings, are restricted and both the potential continued operations of the MEG and the potential returns for creditors are limited.

Many academics have considered, commented, and critiqued how international bankruptcy treats MEGs. Most scholars agree that consolidating proceedings in one court reduces costs and increases recoveries, especially in reorganizations.<sup>3</sup> Both the United Nations Committee on International Trade Law's Model Law on Cross-Border Insolvency (the "Model Law")<sup>4</sup> and the European Union's Regulation on Insolvency (the "EC Regulation")<sup>5</sup> (when addressed together the "Insolvency Regimes") hinder consolidation, by requiring separate treatment of each debtor, including separate Center of Main Interest

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<sup>2</sup> Paul H. Zumbro, *Cross-Border Insolvencies and International Protocols—An Imperfect But Effective Tool*, 11 BUS. L. INT'L 157, 162 (2010).

<sup>3</sup> See, e.g., Edward S. Adams & Jason Fincke, *Coordinating Cross-Border Bankruptcy: How Territorialism Saves Universalism*, 15 COLUM. J. EUR. L. 43, 84 (2009); Samuel L. Bufford, *Global Venue Controls are Coming: A Reply to Professor LoPucki*, 79 AM. BANKR. L.J. 105, 117-18 (2005); Susan P. Johnston & John Han, *A Proposal for Party-Determined COMI in Cross-Border Insolvencies of Multinational Corporate Groups*, 16 NORTON J. BANKR. L. & PRAC. 811 (2007).

<sup>4</sup> Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law, G.A. Res. 52/158, U.N. Doc. A/RES/52/158 (Jan. 30, 1998) [hereinafter Model Law]. The U.N. promulgated the Model Law on May 30, 1997. Legislation based upon the UNCITRAL Model Law has been enacted in Australia (2008), the British Virgin Islands (2003), Canada (2009), Colombia (2006), Eritrea (1998), Great Britain (2006), Japan (2000), Mauritius (2009), Mexico (2000), Montenegro (2002), New Zealand (2006), Poland (2003), the Republic of Korea (2006), Romania (2003), Serbia (2004), Slovenia (2007), South Africa (2000), United States (2005), and Greece (2010). *Status*, UNCITRAL, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/insolvency/1997Model\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html) (last visited Feb. 7, 2012).

<sup>5</sup> Council Regulation 1346/2000, 2000 O.J. (L 160) 1 (EC) [hereinafter EC Regulation]. The EC Regulation applies to all European Union members except Denmark and the United Kingdom.

(“COMI”) analyses.<sup>6</sup> Instead of consolidating all of the group members<sup>7</sup> in one jurisdiction applying its substantive bankruptcy law, each COMI administers its members separately.<sup>8</sup> The resulting duplicative bankruptcy cases waste resources and limit potential group-wide solutions. What test courts should use to decide where the consolidation should occur (the “COMI of the Group”) remains unsettled. Yet, the emergence of at least two reasonable proposals, illustrates the feasibility of creating a framework.<sup>9</sup>

A number of academics have noted the necessity of consolidating some corporate groups on the basis of “economic integration.”<sup>10</sup> The importance of economic integration stems from the efficacy of group-based solutions for interdependent MEGs. Cases like *In re HiH*<sup>11</sup> and *In re Avianca*<sup>12</sup> illustrate the potential for consolidated MEG proceedings. Comity remains a necessity for a consolidated MEG proceeding, however, because the COMI of the Group does not control the assets of foreign members. A finding of economic integration by the COMI of the Group could be vital to securing comity. Irit Mevorach, one of the foremost scholars of MEG bankruptcies, has outlined many useful considerations of whether to consolidate an MEG’s bankruptcy case and what type of consolidation should occur.<sup>13</sup> No scholar has yet suggested a framework for testing economic integration in the United States.

Although changes to international bankruptcy law may facilitate consolidation of MEG cases, the United States is already equipped to consolidate MEG proceedings. Filing bankruptcy in the United

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<sup>6</sup> Miguel Virgos & Etienne Schmit, *Report on the Convention on Insolvency Proceedings*, at 51-52 (May 3, 1996), 1996 O.J. (L 6500/96).

<sup>7</sup> This article refers to the entities comprising an MEG as members rather than parents and subsidiaries as it more accurately describes the term enterprise group, compared to corporate group. See Irit Mevorach, *Towards a Consensus on the Treatment of Multinational Enterprise Groups in Insolvency*, 18 CARDOZO J. INT’L & COMP. L. 359, 361-62 (2010) [hereinafter *Towards a Consensus*].

<sup>8</sup> Universal Proceduralism, as profiled later, provides an alternative consolidation framework with the consolidated proceeding applying the substantive law of the situs of the assets. See *infra* Part I(A). However, this article assumes that *lex concursus* is the future for consolidated MEG proceedings.

<sup>9</sup> See *infra* Part II(c)(v)(A).

<sup>10</sup> See, e.g., Adams & Fincke, *supra* note 3, at 84; Mevorach, *Towards a Consensus*, *supra* note 7, at 364.

<sup>11</sup> *McGrath v. Riddell (In re HIH Cas. & Gen. Ins., Ltd.)*, [2008] UKHL 21, [2] (appeal taken from Eng.) (Lord Hoffman) [hereinafter *McGrath*].

<sup>12</sup> *In re Aerovias Nacioales de Columbia S.A. Avianca*, 303 B.R. 1 (Bankr. S.D.N.Y. 2003).

<sup>13</sup> See IRIT MEVORACH, *INSOLVENCY WITHIN MULTINATIONAL ENTERPRISE GROUPS* 153-59 (2009) [hereinafter *INSOLVENCY WITHIN*]; Mevorach, *Towards a Consensus*, *supra* note 7, at 364.

States is relatively easy because all related cases, foreign and domestic, may be filed in one bankruptcy court.<sup>14</sup> An amendment to the Model Law may facilitate consolidated MEG proceedings in the future. Additionally, economic integration is also compatible with Universal Proceduralism—another promising theory.<sup>15</sup>

After deciding the COMI of the Group, the analysis should consider the economic integration of the MEG. Then, if the group is economically integrated, the proceedings should analyze whether procedural consolidation or substantive consolidation applies. The Economic Integration Test (the “Test”) based upon *In re General Growth Properties*,<sup>16</sup> a recent chapter eleven bankruptcy case, should function as a blueprint to test economic integration in the United States under section 1112(b) of the Bankruptcy Code (the “Code”)<sup>17</sup> or a future amendment to the Model Law. The Test seeks to ensure four things: (1) consolidation is in the best interests of each member to be consolidated, (2) consolidation is not objectively futile, (3) each member who will be consolidated has a bankruptcy purpose, and (4) a group-wide solution is practical. The Test’s different parts embody these four goals through an analysis of each foreign member. The first part of the Test, known as the Interests of the Group, is a fact-specific inquiry into whether both the member’s and the group’s interests would be served by consolidating the member’s bankruptcy with other group members.<sup>18</sup> The second part of the Test, the Good Faith Analysis, considers the objective futility of the member’s bankruptcy and whether the member’s filing has a bankruptcy purpose.<sup>19</sup> If a member fails either the Interests of the Group or the Good Faith Analysis, the member’s case is dismissed. Once the Interests of the Group and the Good Faith Analysis are complete for each member, the court applies the cumulative analysis to consider whether the members of the MEG who passed, plus any domestic members, would be sufficient to create a group-wide solution. If the members who own the most valuable assets are dismissed because they failed either prong, a group-wide solution could be impossible and the foreign members’ cases would be dismissed.

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<sup>14</sup> 1 ALAN N. RESNICK ET AL., COLLIER ON BANKRUPTCY ¶ 13.14[1] (16th ed. 2011).

<sup>15</sup> Edward J. Janger, *Reciprocal Comity*, 46 TEX. INT’L L.J. 441 (2011) [hereinafter *Reciprocal Comity*]; Edward J. Janger, *Universal Proceduralism*, 32 BROOK. J. INT’L L. 819 (2011) [hereinafter *Universal Proceduralism*]; Edward J. Janger, *Virtual Territoriality*, 48 COLUM. J. TRANSNAT’L L. 401 (2010) [hereinafter *Virtual Territoriality*].

<sup>16</sup> *In re Gen. Growth Props., Inc.*, 409 B.R. at 62-65.

<sup>17</sup> 11 U.S.C. §§ 101-1532 (2006). All sections in this article refer to the Code unless otherwise stated.

<sup>18</sup> *In re Gen. Growth Props., Inc.*, 409 B.R. at 61.

<sup>19</sup> *Id.* at 65.

Part I summarizes international bankruptcy, the Insolvency Regimes, and the numerous problems posed by MEGs. Part II considers the current solutions to the problems of MEGs. Part III discusses commentators' proposed solutions. Part IV profiles the potential COMI of the Group analyses. Part V considers the importance of deciding the type of consolidation, compares a potential amendment to the Model Law with the current potential for consolidated MEG proceedings in the United States, and illustrates why MEGs would want to file for bankruptcy in the United States. Part VI is an analysis of the Economic Integration Test. It considers both the Test origins and, through an analogy to *Yukos Oil*, Test application.

## I. INTERNATIONAL BANKRUPTCY AND TREATMENT OF MEGS

First, Part I outlines the theoretical underpinnings of bankruptcy while focusing on the international aspects. Second, it describes how the bankruptcy regimes based on the Insolvency Regimes function. Third, it profiles the difficulties that insolvent MEGs pose.

### A. *Theoretical Underpinnings*

The primary goal of bankruptcy is to solve the common pool problem and maximize the returns of a debtor's creditors. A debtor has a single pool of assets to satisfy all creditors. In the vast majority of cases, the pool is not large enough to satisfy all relevant debts. Without bankruptcy, creditors would "race to collect" on their debts at the first scent of a debtor's financial trouble.<sup>20</sup> The "race to collect" is not only costly but some creditors will receive nothing while similarly situated creditors receive full compensation.<sup>21</sup> Bankruptcy reduces the costs of the "race" and the variances in recovery amongst similarly situated creditors.<sup>22</sup> To best effectuate liquidation, reorganization, or even discharge, all jurisdictions where a debtor has debts must recognize the proceeding. In the United States, "the Framers' primary goal was to prevent competing sovereigns' interference with the debtor's

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<sup>20</sup> Collection is a simplification. Unsecured creditors usually must get a judgment from the court on a debt, then secure the judgment against the debtor's property through a lien and finally record the secured lien. See ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *THE LAW OF DEBTORS AND CREDITORS* 33-54 (3d ed. 1996).

<sup>21</sup> Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 *YALE L. J.* 857, 861 (1982); see also Elizabeth Warren, *Bankruptcy Policymaking in an Imperfect World*, 92 *MICH. L. REV.* 336, 350 (1993) (describing the perverse incentives for creditors to not work with a debtor because those who collect first without engaging the debtor receive better returns).

<sup>22</sup> Jackson, *supra* note 21, at 862; Warren, *supra* note 21, at 350.

discharge.”<sup>23</sup> Hence, bankruptcy is federal law and a bankruptcy proceeding has preclusive effect throughout the nation.<sup>24</sup> Universalists, who support one worldwide procedural and substantive bankruptcy regime, champion this view internationally.<sup>25</sup> In a Universalist system, one proceeding is opened in the debtor’s domicile (“Main Proceeding”), all the debtor’s assets are pooled, and then administered using *lex concursus*—the Main Proceeding’s substantive and procedural law.<sup>26</sup> Furthermore, the Main Proceeding’s rulings will have preclusive effect worldwide, as other jurisdictions must honor any relief that the Main Proceeding grants.<sup>27</sup> Universalism’s greatest draw is efficiency. Multiple proceedings based on position of the debtor’s assets compounds transaction costs, while linguistic, cultural, and legal verities hinder the debtor’s administration and coordination between proceedings.<sup>28</sup>

The efficacy of bankruptcy is largely dependent upon a “court’s ability to control and marshal assets.”<sup>29</sup> Territorialism represents this view as each country administers a debtor’s assets and operations within its jurisdiction using its own substantive and procedural laws in an effort towards worldwide consistency.<sup>30</sup> A Territorialist system governed international bankruptcy prior to the enactment of the Insolvency Regimes and its best attribute is predictability.<sup>31</sup> Territorialism does not require the sometimes difficult task of deciding a debtor’s

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<sup>23</sup> Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 373 (2006).

<sup>24</sup> See *id.* at 366-68 (stating that framers created the bankruptcy clause so that a bankruptcy discharge would have preclusive effect throughout the United States).

<sup>25</sup> McGrath, [2008] UKHL at [6]; see, e.g., Jay Lawrence Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276 (2000) [hereinafter *A Global Solution*]; Jay Lawrence Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L. J. 457 (1991) [hereinafter *Theory and Pragmatism*]; Liza Perkins, Note, *A Defense of Pure Universalism in Cross Border Corporate Insolvencies*, 32 N.Y.U. J. INT’L L. & POL. 787 (2000).

<sup>26</sup> McGrath, [2008] UKHL at [20]; Jonathan M. Weiss, *Tax Claims in Transnational Insolvencies: A “Revenue Rule Approach”*, 30 VA. TAX REV. 261, 269 (2010). As opposed to the *lex situs*, the laws of the States where the debtor’s assets are located. See Janger, *Virtual Territoriality*, *supra* note 15.

<sup>27</sup> Rosalin Mason, *Cross-Border Insolvency Law: Where Private International Law and Insolvency Meet*, in INTERNAL INSOLVENCY LAW: THEMES AND PERSPECTIVES 27, 45-48 (Paul J. Omar ed., 2010).

<sup>28</sup> Bufford, *Global Venue*, *supra* note 3, at 111.

<sup>29</sup> Underwood v. Hilliard (*In re Rimsat, Ltd.*), 98 F.3d 956, 961-62 (7th Cir. 1996).

<sup>30</sup> Lynn M. LoPucki, *Universalism Unravels*, 79 AM. BANKR. L.J. 143, 160 (2005).

<sup>31</sup> Territorialism still reigns in some countries including Israel. See *In re Gold & Honey Ltd.*, 410 B.R. 357, 369 (Bankr. E.D.N.Y. 2009) (paraphrasing the Israeli Court, who denied the effect of the automatic stay in Israel because “a United States court cannot control the actions of a foreign court, nor can it exercise control over assets in a foreign country . . .”); see generally Samuel L. Bufford et al., *Inter-*

“home country.”<sup>32</sup> It also limits potential forum shopping because moving the situs of assets is more difficult than changing a debtor’s domicile.<sup>33</sup> Lastly, local creditors receive the treatment they expect when local substantive bankruptcy law, including statutory priorities of payment, is applied to local assets. Therefore, unlike Universalism, Territorialism does not require “acceptance of outcome differences,” which occur when local assets are administered under non-local bankruptcy law to the detriment of local creditors.<sup>34</sup>

Universal Proceduralism purports to combine the best attributes of Universalism and Territorialism by applying the procedural law of the debtor’s domicile and the substantive law of the situs of the debtor’s assets.<sup>35</sup> This new theory suggests harmonizing international choice of law principles to coordinate administration of the debtor using the procedural law of the debtor’s domicile.<sup>36</sup> The substantive law of the situs of the assets, however, would determine issues such as the validity of contract or property rights and the statutory priority of claims—a process known as Virtual Territoriality.<sup>37</sup> Advocates suggest that the pressure of designating the debtor’s domicile, an issue this article visits in greater detail in Part I(C)(i), would be mitigated because the rewards for choosing a particular forum erode if the substantive law of the situs governs the assets.<sup>38</sup> Moreover, applying the procedural law of the debtor’s domicile preserves the benefits of consolidated administration and coordination the debtor’s bankruptcy proceedings.<sup>39</sup> Critics counter that the line between procedure and substance has always been elusive<sup>40</sup> and the pressure on deciding the

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*national Insolvency*, FEDERAL JUDICIAL CENTER (2001), available at [http://www.fjc.gov/public/pdf.nsf/lookup/IntlInso.pdf/\\$file/IntlInso.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/IntlInso.pdf/$file/IntlInso.pdf).

<sup>32</sup> See Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy*, 98 MICH. L. REV. 2216 (2000) [hereinafter *Cooperative Territoriality*].

<sup>33</sup> LYNN M. LOPUCKI, *COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS* 210 (2005) (listing alleged examples of forum shopping in international bankruptcy). The COMI of a debtor is presumed to be at its registered seat. See *Model Law*, *supra* note 4, at art. 16(3).

<sup>34</sup> Westbrook, *Theory and Pragmatism*, *supra* note 25, at 458; see also McGrath, [2008] UKHL at [24-25] (noting the greater the outcome differences the more difficult it is to allow a foreign jurisdiction to apply its law to your assets).

<sup>35</sup> See, e.g., Janger, *Reciprocal Comity*, *supra* note 15; Janger, *Universal Proceduralism*, *supra* note 15; Janger, *Virtual Territoriality*, *supra* note 15.

<sup>36</sup> Janger, *Virtual Territoriality*, *supra* note 15, 433-34.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Jay Lawrence Westbrook, *A Comment on Universal Proceduralism*, 48 COLUM. J. TRANSNAT’L L. 503, 509-12 (2010).



debtor's domicile will simply be shifted to litigating the location of the debtor's assets.<sup>41</sup>

### B. *Insolvency Regimes*

The current impossibility of Universalism led to the Insolvency Regimes being based upon Modified Universalism, a compromise between Territorialism and Universalism.<sup>42</sup> A world-wide treaty is necessary to implement Universalism but many states are unwilling to surrender all Territorialist protections.<sup>43</sup> The Insolvency Regimes circumvent the "territorialism vs. universalism" debate by focusing the bulk of their provisions on procedural matters.<sup>44</sup> Chapter 15 of the United States Bankruptcy Code ("chapter 15")<sup>45</sup> is derived from the Model Law,<sup>46</sup> basing the vast majority of its sections upon Model Law provisions.<sup>47</sup> The Model Law influenced the EC Regulation, which represents a Modified Universalist view.<sup>48</sup> Unlike chapter 15, it is not derived from the Model Law.<sup>49</sup> Closer ties between European Union members<sup>50</sup> allow stronger Universalist measures that the Model Law cannot accommodate.<sup>51</sup>

Recognition of a proceeding under the Model Law is a three step process with three potential conclusions: (1) the debtor files for

<sup>41</sup> *Id.* at 513. Westbrook suggests that instead of forum shopping, "forum stashing" will occur as debtors transfer readily moveable assets to bankruptcy havens whose law will govern under Universal Proceduralism. *Id.*

<sup>42</sup> Westbrook, *A Global Solution*, *supra* note 25, at 2301.

<sup>43</sup> Jay Lawrence Westbrook, *Creating International Insolvency Law*, 70 AM. BANKR. L.J. 563, 570-71 (1996) (discussing the inability of even the United States and Canada to adopt a Universalist treaty between the two nations).

<sup>44</sup> John A.E. Pottow, *Procedural Incrementalism: A Model for International Bankruptcy*, 45 VA. J. INT'L L. 935, 961 (2005) [hereinafter *Procedural*].

<sup>45</sup> See 11 U.S.C. §§ 1501-32 (2006) (Chapter 15 uses the Model Law as a template with some modifications).

<sup>46</sup> *Id.* § 1501(a) ("The purpose of this chapter is to incorporate the Model Law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency.").

<sup>47</sup> See Jay Lawrence Westbrook, *Chapter 15 at Last*, 79 AM. BANKR. L.J. 713, 718-19 (2005) [hereinafter *Chapter 15 at Last*]. *But see* Alesia Ranney-Marinelli, *Overview of Chapter 15 Ancillary and Other Cross-Border Cases*, 82 AM. BANKR. L.J. 269, 269 (2008) (outlining the differences between the Model Law and Chapter 15 as well as their impact).

<sup>48</sup> See Bufford, *Global Venue*, *supra* note 3, at 118.

<sup>49</sup> See Ranney-Marinelli, *supra* note 47, at 273.

<sup>50</sup> See EC Regulation, *supra* note 5, at ¶ 2 ("The proper functioning of the *internal* market requires that cross-border insolvency proceedings should operate efficiently and effectively. . .") (emphasis added).

<sup>51</sup> See *O'Sullivan v. Loy (In re Loy)*, 432 B.R. 551, 560 n.12 (E.D. Va. 2010) (stating that the EC Regulation does not provide for a Non-Main Proceeding).

bankruptcy in State A where a proceeding is commenced, (2) then a representative of State A applies for recognition of State A's proceeding in a proceeding in State B,<sup>52</sup> and (3) State B's proceeding may recognize State A's proceeding as: (1) the COMI of the debtor and the site of the Main Proceeding,<sup>53</sup> (2) not the COMI but a Non-Main Proceeding,<sup>54</sup> or (3) A Non-Recognized Proceeding.<sup>55</sup> The Main Proceeding is held at the COMI of the debtor, which applies its substantive and procedural bankruptcy law.<sup>56</sup> Among the Main Proceeding's powers, it may issue a worldwide stay halting all proceedings and collection actions against the debtor.<sup>57</sup> The Main Proceeding may also request turnover of the debtor's assets worldwide for administration under the substantive law of the COMI.<sup>58</sup>

Non-Main Proceedings, or Secondary Proceedings,<sup>59</sup> may be held in any jurisdiction where the debtor has an establishment. An "establishment" means "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services."<sup>60</sup> Parties open Non-Main Proceedings to protect local businesses and creditors.<sup>61</sup> A Non-Main Proceeding may decline to turn over local assets to a Main Proceeding if the interests of domestic creditors would be inadequately protected.<sup>62</sup> This territorialist ele-

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<sup>52</sup> See Model Law, *supra* note 4, at art. 15.

<sup>53</sup> See *id.* art. 17(2)(a); *In re Ernst & Young*, 383 B.R. 773, 780 (Bankr. D. Colo. 2008) (recognizing an earlier Canadian proceeding as a Main Proceeding by bankruptcy court).

<sup>54</sup> See Model Law, *supra* note 4, at art. 17(2)(b).

<sup>55</sup> See *In re Basis Yield Alpha Fund (Master)*, 381 B.R. 37, 49 (Bankr. S.D.N.Y. 2008) (granting summary judgment for neither foreign Main nor Non-Main proceeding for a Cayman Islands liquidation).

<sup>56</sup> See Model Law, *supra* note 4, at arts. 15-24.

<sup>57</sup> See *id.* art. 20(1).

<sup>58</sup> See *id.* art. 21(2).

<sup>59</sup> See John A.E. Pottow, *A New Role For Secondary Proceedings in International Bankruptcy*, 46 TEX. INT'L L.J. 579, 581-83 (2011) (explaining traditional notions of Non-Main Proceedings) [hereinafter *A New Role*].

<sup>60</sup> See Model Law, *supra* note at 4, at art. 2(f). 11 U.S.C. § 1502(2) (2006) uses slightly different language ("establishment" means any place of operations where the debtor carries out a nontransitory economic activity").

<sup>61</sup> See *Fogerty v. Condor Guaranty, Inc. (In re Condor Ins. Ltd.)*, 601 F.3d 319, 329 (5th Cir. 2010) (Higginbotham, J.) ("Providing access to domestic federal courts to proceedings ancillary to foreign Main Proceedings springs from distinct impulses of providing protection to domestic business and its creditors as they develop foreign markets.").

<sup>62</sup> See Model Law, *supra* note 4, at art. 21(2).

ment allows a Non-Main Proceeding to protect local creditors by applying local substantive bankruptcy law to local assets.<sup>63</sup>

Neither the Model Law nor chapter 15 explicitly assists Non-Recognized Proceedings, also known as Tertiary Proceedings.<sup>64</sup> A Non-Recognized Proceeding occurs when a debtor's bankruptcy proceeding is held in a country where the debtor does not have an establishment.<sup>65</sup> An ironclad chain linking the requirement for establishment with recognition and relief means that a Non-Recognized Proceeding receives no direct aid from either a Main or Non-Main Proceeding.<sup>66</sup> Thus, without recognition, a Non-Recognized Proceeding cannot take advantage of any relief that the Model Law provides.<sup>67</sup> Part II(C)(v) will discuss the effect of Non-Recognized Proceedings on administering MEGs.

### C. Issues Caused by MEGs

The ability to administer MEGs through international bankruptcy remains limited even as they multiply. This section summarizes the problems inherent in administering insolvent MEGs. First, it considers the uncertainty caused by potential consolidation that may vest as an increased cost of capital for individual MEG members, easier forum shopping, and heavier pressure on judges. Second, it examines how state sovereignty over individual entities and the protection of local creditors, together a concept known as "Pride,"<sup>68</sup> hinder international comity. Third, it outlines how corporate separateness and state sovereignty spawn multiple proceedings and duplicative costs.

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<sup>63</sup> *In re Millennium Global Emerging Credit Master Fund Ltd.*, 458 B.R. 63, 82 (Bankr. S.D.N.Y. 2011) ("U.S. creditors are not precluded from filing an involuntary plenary proceeding against the debtor in the United States if there is a showing of a need for additional protection."); see Pottow, *Procedural*, *supra* note 44, at 961.

<sup>64</sup> See Samuel L. Bufford, *Tertiary and Other Excluded Foreign Proceedings Under Bankruptcy Code Chapter 15*, 83 AM. BANK. L. J. 165, 166 (2009) (coining the term tertiary proceeding) [hereinafter *Tertiary*]. See generally Ranney-Marinelli, *supra* note 47, at 299-305 (discussing the difficulties Non-Recognized Proceedings have in obtaining judicial relief in the United States).

<sup>65</sup> Bufford, *Tertiary*, *supra* note 64, at 166.

<sup>66</sup> See *In re Millennium Global Emerging Credit Master Fund Ltd.*, 458 B.R. at 81 n.42.

<sup>67</sup> See Model Law, *supra* note 4, at art. 21(1) (discussing the forms of judicial relief that are available only upon recognition of a foreign proceeding).

<sup>68</sup> Professor John A.E. Pottow coined the term "Pride" for protection of local creditors and state sovereignty in international insolvency. John A.E. Pottow, *Greed and Pride in International Bankruptcy: The Problems of and Proposed Solutions to "Local Interests"*, 104 MICH. L. REV. 1899, 1919 (2006) [hereinafter *Greed and Pride*].

Fourth, it inspects the problem of more developed nations' probable hegemony over consolidated MEG proceedings. Fifth, it analyzes the problems that Non-Recognized Proceedings pose for the Model Law in general, and chapter 15 in particular.

(i) *Uncertainty*

Consolidating MEGs' bankruptcy proceedings may create uncertainty about the applicable bankruptcy law of group members. A popular suggested solution for administering MEGs is to consolidate all the group members in one State, which then applies its substantive bankruptcy law to all the consolidated entities.<sup>69</sup> A system of consolidation based upon anything less than Universalism, however, will breed uncertainty.<sup>70</sup> States may refuse to grant assistance to a Main Proceeding for the MEG or creditors may be unable to ascertain where a MEG will be consolidated.<sup>71</sup> Such uncertainty will impact the creditworthiness of MEG members because creditors must consider which substantive bankruptcy law will apply to potential claims.<sup>72</sup> Because States differ in their treatment of creditors, potential creditors will hedge their risk by structuring financing to protect their interests under all potential States' bankruptcy regimes. The increased protection required by potential creditors will manifest as increased lender and supplier requirements and a higher cost of capital for MEG members.<sup>73</sup> Although the Insolvency Regimes already create some uncertainty about the individual corporation's COMI,<sup>74</sup> a potentially different COMI of the Group would further muddle creditors' expecta-

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<sup>69</sup> See *infra* Part II(b).

<sup>70</sup> See LoPucki, *Universalism Unravels*, *supra* note 30, at 143.

<sup>71</sup> *Id.*

<sup>72</sup> See Mevorach, *Towards a Consensus*, *supra* note 7, at 385. Unless an ironclad rule develops regarding consolidation, an element of uncertainty will be added. An ironclad rule of automatic recognition could potentially cause only a one-time change in the creditworthiness of entities. Such a rule has been suggested, but its current potential is limited. See *id.* at 408. But see Bufford, *Global Venue*, *supra* note 3, at 138 (consolidating will not significantly impact the cost of capital because creditors will know they are dealing with a company that could be procedurally consolidated).

<sup>73</sup> See generally John C. Coffee & William A. Klein, *Bondholder Coercion: The Problem of Constrained Choice in Debt Tender Offers and Recapitalizations*, 58 U. CHI. L. REV. 1207, 1224 (1991) (discussing impact of uncertainty on an enterprise's cost of capital).

<sup>74</sup> See, e.g., Alexandra C.C. Ragan, *COMI Strikes a Discordant Note: Why U.S. Courts are not in Complete Harmony Despite Chapter 15 Directives*, 27 EMORY BANKR. DEV. J. 117, 120 (2010).

tions about what substantive law would apply to a future bankruptcy.<sup>75</sup>

MEG Consolidation could increase uncertainty by spurring invidious forum shopping and forcing judges to make difficult fact-based decisions.<sup>76</sup> A debtor's ability to manipulate its COMI in bad faith is a subject of much debate.<sup>77</sup> Because a debtor's COMI is presumed to be located at its registered office,<sup>78</sup> a debtor can thwart creditors by registering in a "bankruptcy haven" just prior to filing for bankruptcy.<sup>79</sup> Consolidation proponents assert, however, that it is much harder to manipulate the COMI of an entire MEG compared to an individual member<sup>80</sup>—a full discussion of which is beyond the scope of this article. Uncertainty also manifests as a further strain on the judiciary whose ability to cope is disputed.<sup>81</sup> Deciding a COMI of the Group could be a difficult and technical task for a judge, which at least one commentator describes as "highly subjective."<sup>82</sup> Samuel L. Bufford instead argues that the process is objective.<sup>83</sup> Bufford, a former bankruptcy judge,<sup>84</sup> cites the many guides and commentaries available to aid judges and the protection that the appellate process's objective standards provide.<sup>85</sup>

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<sup>75</sup> See LoPucki, *Universalism Unravels*, *supra* note 30, at 143.

<sup>76</sup> See *id.*

<sup>77</sup> Compare LoPucki, *Cooperative Territoriality*, *supra* note 32, at 2230-31 (suggesting the ease of forum shopping), with John A.E. Pottow, *The Myth (and Realities) of Forum Shopping in Transnational Insolvency*, 32 BROOK. J. INT'L L. 785, 786 (2007) (arguing that forum shopping has not been a significant problem) [hereinafter *The Myth*].

<sup>78</sup> See 11 U.S.C. § 1516(c) (2006); Model Law, *supra* note 4, at art. 16(3). The registered office is analogous to the principal place of business under U.S. law. See *In re Tri-Continental Exch. Ltd.*, 349 B.R. 627, 634-35 (Bankr. E.D. Cal. 2006). The United States Supreme Court case further illuminated the standard as the "nerve center" or the location from which the corporation is directed. See *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1193-94 (2010).

<sup>79</sup> LoPucki, *Cooperative Territoriality*, *supra* note 32, at 2230-31.

<sup>80</sup> Bufford, *A Global Venue*, *supra* note 3, at 137 (citing Andrew T. Guzman, *International Bankruptcy: In Defense of Universalism*, 98 MICH. L. REV. 2177, 2214 (2000)).

<sup>81</sup> See LoPucki, *Universalism Unravels*, *supra* note 30, at 143.

<sup>82</sup> See *id.* at 153-54.

<sup>83</sup> Bufford, *Global Venue*, *supra* note 3, at 118. Judge Bufford was a bankruptcy judge in the Central District of California. He is currently the distinguished scholar in residence at Penn State University's Dickenson School of Law.

<sup>84</sup> *Id.* at 105.

<sup>85</sup> See *id.* at 119.

*(ii) Pride*

Pride exacerbates the problems of administering MEGs. The first element of Pride is the States' (and their proceeding's) desire to uphold their sovereignty by regulating domestic corporations, including their corporation's bankruptcy proceedings. The United States Supreme Court observed that, "every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting the powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes."<sup>86</sup> A proceeding, therefore, would try to control all the debtor's assets over which it can plausibly claim jurisdiction.<sup>87</sup> Hence, the assets of an individual MEG member will be administered at either the location of the individual member's COMI, or the situs of the assets, but not the COMI of the Group.<sup>88</sup> The second element of Pride is the protection of local creditors who expect local bankruptcy law to govern their claims. Many States treat secured and general unsecured creditors in similar ways, but statutory priority rules vary significantly.<sup>89</sup> Although some priorities are based on efficiency,<sup>90</sup> many represent State specific policy judgments that chosen classes of creditors should receive better treatment than general unsecured creditors.<sup>91</sup> A change in forum for a group member may impact the substantive rights of local creditors by applying different statutory priority rules for payment of claims.<sup>92</sup> Recent scholarship discussed in greater depth in Part III (D) illustrates that Pride acutely affects United States Bankruptcy Courts.

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<sup>86</sup> *Canada S. Ry. Co. v. Gebhard*, 109 U.S. 527, 537-38 (1883).

<sup>87</sup> Pottow, *Greed and Myth*, *supra* note 65, at 1915. In contrast, a lesser held view of State sovereignty would also consider the level of state interest in a MEG. For instance, Italy had a much stronger interest in the restructuring or liquidation of members of the Parmalat group than other countries. See Matteo M. Winkler, *From Whipped Cream to Multibillion Euro Financial Collapse: The European Regulation on Transnational Insolvency in Action*, 26 BERK. J. INT'L L. 352, 369 (2008) [hereinafter *From Whipped Cream*].

<sup>88</sup> *Id.*

<sup>89</sup> See, e.g., Jay Lawrence Westbrook, *Breaking Away: Local Priorities and Global Assets*, 46 TEX. INT'L L.J. 601, 602 (2011).

<sup>90</sup> See, e.g., 11 U.S.C. § 507(a)(2) (2006) (providing for administrative expense priority for attorney fees. Bankruptcy attorneys would be unwilling to work on cases if they received only a pro-rata return like general unsecured creditors).

<sup>91</sup> See, e.g., Emilie Beavers, Note, *Bankruptcy Law Harmonization in the NAFTA Countries: The Case of the United State and Mexico*, 2003 COLUM. BUS. L. REV. 965, 985-88 (2003) (discussing the drastic differences between Mexican and United States statutory priorities for taxes and employee wage claims).

<sup>92</sup> Pottow, *From Greed to Pride*, *supra* note 68, at 1906.

*(iii) Parallel Proceedings*

If a MEG's corporate separateness and Pride are respected, a different Main Proceeding will occur in at least every group member's COMI. A Main Proceeding will occur at the COMI of each member; a Non-Main Proceeding may occur everywhere else the group members have establishments. When Main and Non-Main Proceedings occur simultaneously, they are known as parallel proceedings.

Unfortunately, parallel proceedings hinder potential group-wide solutions, such as reorganizations<sup>93</sup> or packaged sales,<sup>94</sup> because substantive bankruptcy rules often conflict and greater cross-border coordination is required.<sup>95</sup> When parallel proceedings are opened, group member's assets may be sold piecemeal in jurisdictions around the world.<sup>96</sup> Such disjointed sales under different substantive bankruptcy regimes limit both a party's ability to purchase all of a MEG's assets and also to continue operating a MEG as an integrated going concern.<sup>97</sup> The loss of value from individual sales is particularly acute when the debtor is worth more as an integrated group than as separate entities.<sup>98</sup> Moreover, like the removal of a wall from a house of cards, additional, unnecessary liquidations could be triggered when members' reorganizations are contingent upon already-liquidated members. The ability of a debtor's management to continue running the debtor's business during bankruptcy proceedings also varies. Some States usually allow management to continue in place while others require its removal.<sup>99</sup> Without overarching administration, reorganizing on a group basis becomes difficult. Parallel proceedings require additional foreign judges and governmental representatives who slow proceedings, as decision-making is more disparate.<sup>100</sup> The often complex factual and legal scenarios bearing on multiple group mem-

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<sup>93</sup> See Mevorach, *Towards a Consensus*, *supra* note 7, at 420.

<sup>94</sup> MEVORACH, *INSOLVENCY WITHIN*, *supra* note 13, at 153-59.

<sup>95</sup> Mevorach, *Towards a Consensus*, *supra* note 7, at 393.

<sup>96</sup> MEVORACH, *INSOLVENCY WITHIN*, *supra* note 13, at 167.

<sup>97</sup> Legislative Guide on Insolvency Law, Part Three: Treatment of Enterprise Groups in Insolvency, U.N. Comm'n on Int'l Trade Law [UNCITRAL], Working Group V (Insolvency Law), 38th Sess., ¶ 4, U.N. Doc. A/CN.9/WG.V/WP.92/Add.1 (Feb. 11, 2010) [hereinafter *Legislative Guide on Insolvency Law 2010*].

<sup>98</sup> MEVORACH, *INSOLVENCY WITHIN*, *supra* note 13, at 153; *see also* Lucien A. Bebchuk, *A New Approach to Corporate Reorganizations*, 101 HARV. L. REV. 775, 776 (1988).

<sup>99</sup> *See* Legislative Guide on Insolvency Law 2010, *supra* note 97, at 2-4.

<sup>100</sup> Mevorach, *Towards a Consensus*, *supra* note 7, at 420.

bers are better understood in a forum with collective knowledge of all the proceedings.<sup>101</sup>

(iv) *Hegemony*

Consolidating MEGs exacerbates more developed nations' ("MDNs") hegemony over international bankruptcy law. Some commentators have reasoned that State A should not complain when State B's laws govern State A's assets because State A's laws will apply in future situations.<sup>102</sup> This view is known as the "rough wash."<sup>103</sup> The COMI designation, however, favors MDNs where enterprises often headquarter over less developed nations ("LDNs"), where enterprises often operate.<sup>104</sup> The divergence between headquarters and operations means the laws of MDNs govern more international bankruptcies because the debtor's registered seat, usually its headquarters, is presumed to be its COMI.<sup>105</sup> Consolidating MEGs aggravates the divergence because the headquarters of MEGs are even more likely to be in a MDN.<sup>106</sup> Because of this unequal spread of future international bankruptcy cases, support among LDNs for Universalism should be minimal unless LDNs believe that proceedings will be more evenly spread in the future or they derive other benefits from MDNs administering their enterprises or assets.<sup>107</sup> In comparison, under Territorialism, LDNs can administer local assets and enterprises using their local laws.<sup>108</sup> Therefore, LDNs may favor territorial administration of MEGs and thereby limit cooperation in consolidated MEG cases.

(v) *Establishment issues*

The requirement of an establishment for recognition of a Main or Non-Main Proceeding could hinder MEG consolidations. A precondition for recognition of a foreign proceeding is that the debtor must have an establishment in the foreign jurisdiction.<sup>109</sup> MEG members may not have an establishment, however, in the COMI of the Group. Without an establishment, a proceeding will not be recognized and

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<sup>101</sup> Irit Mevorach, *The Road to a Suitable and Comprehensive Global Approach to Insolvencies for Multinational Corporate Groups*, 15 NORTON J. BANKR. L. & PRAC. 5, art. 1 (2006).

<sup>102</sup> See, e.g., Robert K. Rasmussen, *Resolving Transnational Insolvencies Through Private Ordering*, 98 MICH. L. REV. 2252, 2274 (2000).

<sup>103</sup> See Pottow, *From Greed to Pride*, *supra* note 68, at 1921-22.

<sup>104</sup> *Id.* at 1922.

<sup>105</sup> Tung, *supra* note 5; Model Law, *supra* note 4, at art. 16(3).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> See Lucian Arye Bebchuk & Andrew T. Guzman, *An Economic Analysis of Transnational Bankruptcies*, 42 J. LAW & ECON. 775, 806 (1999).

<sup>109</sup> Model Law, *supra* note 4, at art. 17(2)(b).



Model Law-based relief cannot be granted.<sup>110</sup> Non-US Model Law enactors may have more flexibility when confronted with a Non-Recognized Proceeding because some can provide additional assistance or comity to facilitate a foreign court's administration of domestic assets.<sup>111</sup> In contrast, chapter 15 does not allow additional assistance or comity in the absence of recognition.<sup>112</sup>

Recognition is the key that unlocks the relief available under the Model Law; while a Non-Recognized Proceeding must use comity or other common law doctrines to obtain any relief. Article seven of the Model Law states that “[n]othing in this Law limits the power of a court. . .to provide additional assistance to a foreign representative under other laws of this State.”<sup>113</sup> Therefore, a State that has enacted Article seven can provide other aid, including comity, to a foreign proceeding regardless of a lack of establishment. For instance, both English and Australian courts recognized a Cayman Islands liquidation even though the debtor lacked an establishment in the Cayman Islands.<sup>114</sup> In the MEG context, a country which adopts Article seven of the Model Law can provide assistance to the COMI of the Group without recognition. Although this avenue requires assistance from the State where the assets are located, any solution short of pure Universalism requires some comity to administer assets located outside of a proceeding's jurisdiction.<sup>115</sup> MEGs, by nature, have assets outside of the COMI of the Group and require comity and assistance to consolidate.

Chapter 15 abolishes any additional assistance or comity-based discretionary power, making all relief contingent upon recognition and the prerequisite of an establishment.<sup>116</sup> As one commentator states,

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<sup>110</sup> *Id.* art. 21(1).

<sup>111</sup> *Id.* art. 7.

<sup>112</sup> *See infra* Part II(v)(b).

<sup>113</sup> Model Law, *supra* note 4, at art. 7.

<sup>114</sup> Sandy Shandro, *A Plea for the Amendment of Chapter 15*, AM. BANKR. INST. J., Mar. 2009, at 48, 49, 63; *see also In re Basis Yield Alpha Fund (Master)*, 381 B.R. 37, 42 (Bankr. S.D.N.Y. 2008) (discussing the English High Court of Justice's granting of recognition for Cayman Island liquidation even though it was “not an UNCITRAL type proceeding” and it “did not determine COMI”).

<sup>115</sup> “The English court would be entitled to exercise its *discretion* by remitting the assets to the principal jurisdiction and leaving it to apply its own law.” *McGrath*, [2008] UKHL at [25] (emphasis added).

<sup>116</sup> MEGs are just one example of a non-recognized proceeding. Other examples include the possibility that a COMI country may be unsuitable due to an inability to obtain jurisdiction over creditors or the local bar may be insufficiently versed in complex insolvency law or too corrupt. *See Bufford, Tertiary, supra* note 64, at 166-71 (stating that although *Avianca* would not have been a tertiary proceeding, the main case was held in the United States in spite of the debtor's much smaller

“Chapter 15 and § 103(k) deny virtually all relief to foreign representatives in non-qualifying foreign proceedings.”<sup>117</sup> Section 1507 of the Code precludes a foreign representative from seeking any assistance under any United States law unless it is granted recognition.<sup>118</sup> Although strongly at odds with the section 1501’s focus on cooperation,<sup>119</sup> “[c]hapter 15 is intended to be the exclusive door to ancillary assistance to foreign proceedings. The goal is to concentrate control of these questions in one court.”<sup>120</sup> Therefore, if a foreign MEG based in State A has an operating affiliate in the United States but the affiliate does not have an establishment in State A, the COMI of the Group, a United States bankruptcy court will not only deny recognition to the COMI of the Group, but also deny other comity or assistance.<sup>121</sup> Commentators have suggested solutions to the discrepancy between the Model Law and chapter 15, including an amendment<sup>122</sup> and a broader interpretation of establishment.<sup>123</sup> Although a full consideration of this predicament is outside the scope of this article, to fully effectuate a MEG solution, such as the Economic Integration Test, the United

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presence due to its ability to obtain jurisdiction over creditors in the United States). *But see In re Millennium Global Emerging Credit Master Fund Ltd.*, 458 B.R. 63, 82 (Bankr. S.D.N.Y. 2011) (noting that no court has endorsed tertiary proceedings). Form B1, the cover sheet for a voluntary petition, only allows a debtor to seek recognition as a foreign Main Proceeding or a foreign Non-Main Proceeding.

<sup>117</sup> Ranney-Marinelli, *supra* note 47, at 299-305.

<sup>118</sup> 11 U.S.C. § 1507 (2006).

<sup>119</sup> Chapter 15 has the “objectives of cooperation between courts of the United States. . . and the courts and other competent authorities of foreign countries involved in crossborder insolvency cases.” *Id.* at § 1501(a); *see also In re Atlas Shipping*, 404 B.R. 726, 740 (Bankr. S.D.N.Y. 2009) (noting the increased emphasis on comity in Chapter 15).

<sup>120</sup> H.R. REP. NO. 109-31, pt. 1, at 110 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 173.

<sup>121</sup> *In re Bear Stearns High Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. 325, 333-34 (Bankr. S.D.N.Y. 2008) (“A foreign proceeding should not be entitled direct access to or assistance from the host country courts unless the debtor had a sufficient pre-petition economic presence in the country of the foreign proceeding.”); *see also Lavie v. Ran (In re Ran)*, 607 F.3d 1017, 1026 (5th Cir. 2010) (“The plain language of Chapter 15 requires a factual determination with respect to recognition before principles of comity come into play.”); *In re British American Ins. Co.*, 425 B.R. 884 (Bankr. S.D. Fla. 2010).

<sup>122</sup> Timothy T. Brock, *Canada’s “Northern Lights” Could Dispel Shadow of Bear Stearns over Ch. 15 Practice*, 30 AM. BANKR. INST. J. 34-35 (2011) (arguing for a deletion of the term “establishment” from Chapter 15); Shandro, *supra* note 114, at 63.

<sup>123</sup> Ranney-Marinelli, *supra* note 47, at 302-03 (noting the different definitions of establishment in the Model Law compared to Chapter 15 could serve as grounds for a more expansive interpretation).

States should allow some basis for assistance or comity to debtors lacking an establishment at the COMI of the Group.<sup>124</sup> Stripped of any ability to assist such proceedings, the rough wash is compromised. Some States may be unwilling to allow their enterprises or assets to be administered in consolidated MEG proceedings in the United States using the Economic Integration Test, or any other framework, because of the lack of reciprocity.

## II. CURRENT PROBLEMS AND ATTEMPTED FIXES

Part II first outlines the respect of the Insolvency Regimes for corporate separateness. Then, it highlights the problems of parallel proceedings by analyzing the Parmalat/Eurofood insolvency. Lastly, it considers the three solutions which currently facilitate MEG coordination and consolidation: protocols, an expanded definition of COMI, also known as “de facto consolidation,”<sup>125</sup> and synthetic secondary proceedings.

The Insolvency Regimes respect corporate separateness by focusing their jurisdictional queries on the COMI of each MEG member. Under the Model Law, “the debtor’s registered office. . . is presumed to be the [COMI].”<sup>126</sup> Therefore, each member has a separate COMI determination.<sup>127</sup> The UNCITRAL Guide on Insolvency Law (the “UNCITRAL Guide”)<sup>128</sup> attempts to provide further guidance on the treatment of corporate groups in insolvency, but in doing so becomes

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<sup>124</sup> In contrast, if a U.S. based debtor-subsiary has an establishment in the foreign jurisdiction where the corporate parent is based and where it has filed for bankruptcy, a U.S. bankruptcy court may grant the foreign proceeding the status of the Main Proceeding of the debtor-subsiary. *In re RHTC Liquidating Co.*, 424 B.R. 714 (Bankr. W.D. Penn. 2010); see also Jay Lawrence Westbrook, *The Model Law in the United States: COMI and Groups*, in INTERNATIONAL INSOLVENCY INSTITUTE, COORDINATION OF MULTINATIONAL CORPORATE GROUP INSOLVENCIES: SOLVING THE COMI ISSUE 10 (2010), available at <http://www.iiiglobal.org/component/jdownloads/?task=view.download&cid=3882>.

<sup>125</sup> MEVORACH, *INSOLVENCY WITHIN*, *supra* note 13, at 181.

<sup>126</sup> Model Law, *supra* note 4, at art. 16(3).

<sup>127</sup> See Treatment of Corporate Groups in Insolvency, U.N. Comm’n on Int’l Trade Law [UNCITRAL], Working Group V (Insolvency Law), 32d Sess., ¶ 4, U.N. Doc. A/CN.9/WG.V/WP.76/Add.2 (Mar. 6, 2007) [hereinafter Treatment of Corporate Groups 2007]; Legislative Guide on Insolvency Law, Part Three: Treatment of Enterprise Groups in Insolvency, UNCITRAL, Working Group V (Insolvency Law), 35th sess., ¶ 5, U.N. Doc. A/CN.9/WG.V/WP.82/Add.4 (Sept. 10, 2008) [hereinafter Legislative Guide on Insolvency Law 2008].

<sup>128</sup> U.N. COMM’N ON INT’L TRADE LAW, LEGISLATIVE GUIDE ON INSOLVENCY LAW, U.N. Sales No. E.05.V.10 (2004).

fixated on the complexities associated with MEGs<sup>129</sup> and the obstacles presented by substantive consolidation and intergroup debts.<sup>130</sup> Nonetheless, the pervasive theme of corporate separateness throughout the UNCITRAL Guide only strengthens the plain language of the Model Law. The EC Regulation presumes that the debtor's COMI is located at its registered office.<sup>131</sup> According to the Virgos-Schmidt Report, the default rule is to open proceedings for each entity in a corporate group.<sup>132</sup> In *Eurofood*, the European Court of Justice reinforced the EC Regulation's respect for corporate separateness.<sup>133</sup> Eurofood was a wholly owned shell corporation created for cash flow management purposes.<sup>134</sup> Even though the separateness between Eurofood and its corporate parent, Parmalat, was largely illusory, "[t]he [European Court of Justice] stated that 'each debtor constituting a distinct legal entity is subject to its own court jurisdiction.' In consequence, the COMI of each legal entity must be determined separate from the COMI of any related entity in the corporate group."<sup>135</sup>

*Eurofood* illustrates the EC Regulation's ability to mitigate the problem of parallel proceedings. In the wake of the Parmalat MEG collapse at the end of 2003, its subsidiaries throughout Europe filed for bankruptcy.<sup>136</sup> Eurofood first filed in Ireland where liquidation proceedings were commenced and later in Italy where restructuring began.<sup>137</sup> Both the Irish courts and the Italian courts believed that Eurofood's COMI was within their respective jurisdictions, which led to an appeal of the cases to the European Court of Justice.<sup>138</sup> The European Court of Justice held that once a proceeding decides the COMI of an entity, Ireland in *Eurofood*, the decision is automatically recog-

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<sup>129</sup> The Legislative Guide begins, "[r]eflecting the complexity of this topic, the discussion that follows is intended only as a brief introduction to some of these issues . . . ." *Id.* at 277.

<sup>130</sup> *See id.* at 276-78.

<sup>131</sup> EC Regulation, *supra* note 5, at art. 3(1).

<sup>132</sup> Virgos & Schmit Report, *supra* note 6, at 53. The Virgos and Schmit Report was originally supposed to be the authorized guide for the 1995 EU Convention on Insolvency. Even though the EU Convention was never actually adopted, the EC Regulation largely copies the EU Convention. Hence, the Report remains a valuable interpretive resource. *See* Ragan, *supra* note 74, at 168 n.198 (2010).

<sup>133</sup> *See* Winkler, *From Whipped Cream*, *supra* note 87, at 365.

<sup>134</sup> *Id.* at 357.

<sup>135</sup> Samuel L. Bufford, *Center of Main Interests, International Insolvency Case Venue, and Equality of Arms: The Eurofood Decision of the European Court of Justice*, 27 NW. J. INT'L L. & BUS. 351, 406 n.364 (2007) (quoting Case C- 341/04, *Bondi v. Bank of Am. (Eurofood IFSC Ltd.)*, 2006 E.C.R. I-3813, at ¶ 30).

<sup>136</sup> *See* Winkler, *From Whipped Cream*, *supra* note 87, at 354.

<sup>137</sup> *See id.* at 355-56.

<sup>138</sup> *See id.* at 356.

nized and binding upon all other member states.<sup>139</sup> *Eurofood's* requirement of automatic recognition short-circuits parallel proceedings.<sup>140</sup>

The Model Law does not attempt automatic recognition of a Main Proceeding.<sup>141</sup> With neither the overarching framework of the European Union nor a final arbiter like the European Court of Justice, parallel proceedings may occur under the Model Law.<sup>142</sup> Like the game-theoretic-based arguments leveled against the turnover of assets required for Universalism,<sup>143</sup> deferring to another State's claim of jurisdiction over members of a MEG is irrational under a prisoner's dilemma. Unless curbed by a belief in the rough wash or other benefits of consolidated proceedings, an equilibrium of mutual defection results with States opening parallel proceedings for MEG members where the individual members have their respective COMIs, irrespective of the COMI of the Group.

Protocols represent a limited but flexible avenue for aiding cooperation and communication in MEG insolvency cases. Protocols are court-authorized multiparty agreements facilitating cooperation and coordination of concurrent cross-border bankruptcy proceedings.<sup>144</sup> They attempt to overcome conflicts between variations in bankruptcy regimes and are especially helpful in coordinating proceedings that apply different standards for the debtor's continued operation.<sup>145</sup> One of the strengths of protocols is their flexibility because they permit the court to customize the protocol to the debtor.<sup>146</sup> Furthermore, their use is not limited to signatories of the Model Law.<sup>147</sup>

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<sup>139</sup> See Case C-341/04, *Bondi v. Bank of Am. (Eurofood IFSC Ltd.)*, 2006 E.C.R. I-3813 ¶¶ 41, 42.

<sup>140</sup> Compare *id.* at ¶¶ 41, 42, with EC Regulation, *supra* note 5, at art. 16(2).

<sup>141</sup> Model Law, *supra* note 4, at art. 17.

<sup>142</sup> See Mevorach, *Towards a Consensus*, *supra* note 7, at 391.

<sup>143</sup> See Fredrick Tung, *Is International Bankruptcy Possible?*, 23 MICH. J. INT'L L. 31, 100-01 (2001).

<sup>144</sup> See Zumbro, *supra* note 2, at 157-58.

<sup>145</sup> *Id.* at 161. On the one hand, some jurisdictions, including the United States, usually allow a debtor-in-possession to operate the entity while insolvency proceedings are ongoing. On the other hand, some European jurisdictions, including Ireland, require liquidation of a debtor's business in a very short time without the input of the debtor. See generally Case C-341/04, *Bondi v. Bank of Am. (Eurofood IFSC Ltd.)*, 2006 E.C.R. I-3813 (serving as an example of such a conflict between variations in bankruptcy regimes).

<sup>146</sup> Johnson & Han, *supra* note 3, at 811-12.

<sup>147</sup> Compare *In re Nakash*, 190 B.R. 763 (Bankr. S.D.N.Y. 1996), and District Court of Jerusalem, Case No. 1595/87 (May 23, 1996), available at <http://www.iiiglobal.org/component/jdownloads/viewdownload/395/1529.html> (describing Cross-Border Insolvency Protocol between United States and Israel, specifically that after alleged violation of the automatic stay through opening of a second pro-

Some commentators have shortsightedly maintained that protocols are the best solution for coordinating MEG bankruptcy proceedings. Proponents of protocols pinpoint the current impossibility of a Universal bankruptcy regime as the most important reason for the supremacy of protocols.<sup>148</sup> The protocol-governed coordination and communication, however, may be insufficient to overcome differences between national laws.<sup>149</sup> For instance, when substantive laws differ markedly and a protocol fails to address post-petition financing, or only uses general language, the potential for post-commencement financing may be limited.<sup>150</sup> In reality, both protocols and procedural consolidation require the blessing of multiple jurisdictions.<sup>151</sup> Comity is as much a prerequisite for a consolidated proceeding as it is for a protocol. Consolidation under the substantive law of the COMI of the Group, nevertheless, will overcome all differences between national laws because only one substantive law will apply.

European Union courts have used de facto consolidation to consolidate MEGs. De facto consolidation expands the definition of COMI to allow all the group members' COMIs to be located in the same State. One famous example involved the Daisytek-ISA group.<sup>152</sup> An English court seized jurisdiction over a number of subsidiaries with COMIs arguably in either France or Germany.<sup>153</sup> Although French and German courts attempted to seize jurisdiction, on appeal, French

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ceeding in Israel (a nonsignatory to the Model Law), a cross border protocol was negotiated which led to cooperation for investigating, preserving and marshalling the debtor's assets), *with In re Gold & Honey Ltd.*, 410 B.R. 357, 368-69 (Bankr. E.D.N.Y. 2009) (reviewing the second proceeding brought in Israel in opposition to the earlier automatic stay issued in the United States but even after reviewing *Nakash*, the Israeli court tried to continue liquidation proceedings).

<sup>148</sup> Johnson & Han, *supra* note 3, at 811; Zumbro, *supra* note 2, at 160.

<sup>149</sup> MEVORACH, *INSOLVENCY WITHIN*, *supra* note 13, at 186.

<sup>150</sup> Draft UNCITRAL Notes on Cooperation, Communication and Coordination in Cross-Border Insolvency Proceedings, United Nations Comm. on Int'l. Trade Law [UNCITRAL], Working Group V (Insolvency Law), 35th Sess., ¶ 136, U.N. Doc. A/CN.9/WG.V/WP.83 (Sep. 2, 2008) (evidencing an example of general language given by the working group, specifically, the "authoriz[ation for] the applicants to pursue all avenues of refinancing and the sale of material parts of their business or assets, subject to prior approval of the court and the lenders.").

<sup>151</sup> Jamie Altman, *A Test Case in International Bankruptcy Protocols: The Lehman Brothers Insolvency*, 12 SAN DIEGO INT'L L.J. 463, 493 (2011) ("Ultimately, no matter how expertly a protocol is drafted, and no matter how well it should work in theory, a protocol is of no value if parties refuse to adopt it.").

<sup>152</sup> *Id.*

<sup>153</sup> *In re Daisytek-ISA Ltd.*, [2003] B.C.C. 562, [2004] B.P.I.R. 30, 2003 WL 21353254, at \*1 (Ch.D.) (U.K.). Similarly, in the Schefenack and Deutsche Nickel Insolvencies German holding companies were found to have COMIs in England. Adam Gallagher, *European Insolvency Regulation: German Court Blesses Change*

and German courts upheld the original English COMI designation based upon the corporate parent's COMI.<sup>154</sup> The German *PIN* insolvency represents the most creative use of de facto consolidation.<sup>155</sup> The Cologne District Insolvency Court allowed a Luxembourg subsidiary to reincorporate in Germany for the expressed purpose of changing its bankruptcy case's location.<sup>156</sup> Although the bankruptcy court noted the potential pitfalls of forum shopping for COMI, it found that the German venue benefited creditors and increased the potential for a successful reorganization.<sup>157</sup>

De facto consolidation is too flexible, and unguided, for effective use as a test for consolidation of MEGs. The importance of consolidation derives from potential group-wide solutions, and de facto consolidation does not necessarily analyze if such a solution would be in each member's best interest.<sup>158</sup> If a group-wide solution is not in the best interest of a group member, then its individual COMI, or the proceedings controlling its assets, would not provide comity or other assistance. Consequently, the Main Proceeding for the de facto consolidation would not be able to administer the group member's assets. Although comity is also a necessity for the Economic Integration Test, if the COMI of the Group analyzes and finds increased potential for a group-wide solution in a consolidated proceeding, such analysis and findings could make recognition of the COMI of the Group by a foreign proceeding more acceptable.

Synthetic secondary proceedings offer a potential avenue for consolidation but they have significant limitations.<sup>159</sup> In *In re Collins & Aikman Eur. S.A.* ("*Collins & Aikman*"), the English court fore-

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of COMI to Bolster Cross-Border Group Restructuring, 27 AM. BANKR. INST. J. 30, 49 (2008).

<sup>154</sup> See 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, 1010-12 (2007) (describing the *Daisytek* cases in England, France, and Germany). More recently, French courts have adopted the English view. The EMTECT MEG had subsidiaries in both Belgium and Germany who were largely administered by the French parent. Even though the subsidiaries' assets and registration were located in Belgium and Germany, the French court found that they had French COMIs. See Gallagher, *supra* note 153, at 47-49.

<sup>155</sup> See Gallagher, *supra* note 153, at 47-48.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 48.

<sup>158</sup> Although one would hope that a proceeding would only seize jurisdiction to aid a MEG's restructuring or sale, more invidious concerns such as pride or even worse the lure of simply presiding over a high profile bankruptcy case may prevail. See LOPUCKI, *COURTING FAILURE*, *supra* note 33, at 36, 210.

<sup>159</sup> Pottow, *A New Role*, *supra* note 59, at 581-83 (coining the term "synthetic secondary proceeding").

stalled the opening of Non-Main proceedings in Spain by carving out a special claim category for Spanish creditors so they would receive the treatment they would have received in Spain.<sup>160</sup> With Pride restored, Spanish creditors were more willing to accept administration of claims in England. If this solution becomes widely used, the potential for consolidated proceedings will improve because creditors will have less reason to open secondary proceedings and consolidation will be more acceptable.<sup>161</sup>

Will synthetic secondary proceedings extinguish Non-Main Proceedings and make the Economic Interest Test unnecessary? Even its advocates admit this is not the case. Some priorities are not politically viable for another regime to apply.<sup>162</sup> Moreover, unlike *Collins and Aikman*, a carve-out could disrupt distributions of domestic creditors of the Main Proceeding.<sup>163</sup> Instead, synthetic secondary proceedings should be viewed as complimentary to the Economic Integration Test. In *Collins & Aikman*, the consolidation was also driven by the need to “continue to trade the businesses, fund the administrations and conduct sales processes on a group-wide basis.”<sup>164</sup> By analyzing the potential for group-wide solutions and the feasibility of members’ bankruptcies, the Economic Integration Test covers all three of these considerations. Therefore, the Economic Integration Test can work with the creation of synthetic secondary proceeding to help obtain comity. Or, if a synthetic secondary proceeding cannot be created, the Economic Integration Test could potentially inspire comity by itself.

### III. THEORETICAL SOLUTIONS

Part III considers potential solutions for administering MEGs. First, it will analyze the evolution of the UNCITRAL Working Group V’s (the “Working Group”) conclusions. These conclusions exhibited Universalist promise, but over time, they became watered-down by Territorialist concerns. Next, it outlines the first proposed consolidation rule for MEGs; the American Law Institute’s “Transnational Insolvency Principles of Cooperation among NAFTA countries”<sup>165</sup> (the

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<sup>160</sup> Collins & Aikman, [2006] EWHC (Ch) 1343 [41] (Eng.); see also Pottow, *A New Role*, *supra* note 59, at 584-86 (discussing *Collins & Aikman*).

<sup>161</sup> See Pottow, *A New Role*, *supra* note 59, at 584-586 (explaining that Non-Main proceedings are often derived from a concern about differences in priorities for local creditors).

<sup>162</sup> *Id.* at 586-89 (discussing why nonmonetary relief should not be considered in a synthetic secondary proceedings because it is too divisive).

<sup>163</sup> *Id.* at 592.

<sup>164</sup> *Collins & Aikman*, [2006] EWHC at [8]; see Pottow, *A New Role*, *supra* note 59, at 591-92.

<sup>165</sup> In February 2006, the American Law Institute and the International Insolvency Institute (III) announced the inception of a



“NAFTA Principles”). It also weighs the suggestions of Irit Mevorach, an advisor to the Working Group and a preeminent scholar of MEGs. Each of these three frameworks have flaws, however, that the Economic Integration Test remedies. Lastly, the treatment of MEGs as part of Professor Edward J. Janger’s theory, Virtual Territoriality, is also examined. The Economic Integration Test could be incorporated into his framework.

#### A. *The Working Group*

Realizing the shortcomings of the Model Law’s framework for MEGs, UNCITRAL designated Working Group V to propose and evaluate possible changes to the treatment of MEGs to encourage “cost reduction of parallel proceedings; coordination of a global sale of assets; maximization of the value of all group members; minimization of forum shopping; and global reorganization of the group.”<sup>166</sup> They produced the Proposed Legislative Guide,<sup>167</sup> a set of recommendations for better administration of MEG bankruptcies under the current Model Law provisions and by amending the Model Law. The Working Group appeared to be focused on a Universalist solution of an Enterprise Group COMI, or a COMI of the Group, to consolidate all members’ proceedings.<sup>168</sup> The Working Group found the obstacles for creating a COMI of the Group concept too daunting. In particular, four specific problems proved insurmountable: 1) defining how the COMI of the Group would be decided,<sup>169</sup> 2) defining the degree of integration neces-

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joint dissemination and extension project with respect to the “Principles of Cooperation” developed in the ALI Transnational Insolvency Project. The stated objective of the two bodies was to establish acceptance of the ALI’s *Principles of Cooperation Among the NAFTA Countries (NAFTA Principles)* in jurisdictions across the world, subject to any necessary local modifications, and to obtain the endorsement of leading domestic associations, courts, and other groups in those jurisdictions.

Ian F. Fletcher, *Maintaining the Momentum: The Continuing Quest for Global Standards and Principles to Govern Cross-Border Insolvency*, 32 BROOK. J. INT’L L. 767, 777 (2007).

<sup>166</sup> Mevorach, *Towards a Consensus*, *supra* note 7, at 389.

<sup>167</sup> *Id.* at 367-70 (providing a detailed analysis of the Working Group).

<sup>168</sup> Treatment of Corporate Groups in Insolvency, United Nations Comm. on Int’l. Trade Law [UNCITRAL], Working Group V (Insolvency Law), 31st Sess., ¶ 33(b), U.N. Doc. A/CN.9/WG.V/WP.74 (Oct. 4, 2006) [hereinafter Treatment of Corporate Groups 2006].

<sup>169</sup> Legislative Guide on Insolvency Law, Part Three: Treatment of Enterprise Groups in Insolvency, United Nations Comm. on Int’l. Trade Law [UNCITRAL], Working Group V (Insolvency Law), 35th Sess., ¶ 12, U.N. Doc. A/CN.9/WG.V/WP.82/Add.4 (Sept. 10, 2008) [hereinafter Legislative Guide on Insolvency Law 2008].

sary for the COMI of the Group to be used,<sup>170</sup> 3) the great potential for parallel proceedings because of the lack of worldwide automatic recognition,<sup>171</sup> and 4) the necessity of widespread adoption and enforcement.<sup>172</sup> Eventually, the Working Group focused on less controversial measures to aid coordination and cooperation between courts and representatives in the different bankruptcy proceedings of a MEG.<sup>173</sup>

The Proposed Legislative Guide suggests increased cooperation and coordination between courts, representatives, and parties in MEG proceedings while still protecting the substantive and procedural rights of parties and the independence of courts.<sup>174</sup> Some less controversial suggestions include expanded use of protocols,<sup>175</sup> encouragement of greater direct communication, and document sharing between proceedings.<sup>176</sup> A more radical suggestion is the appointment of a single representative for all, or at least some, of the members of a MEG.<sup>177</sup> The notes accompanying the recommendation highlight the importance of deciding whether a single representative is appropriate. They advocate a two-step process. First, decide whether an entire MEG is sufficiently integrated and if so, decide whether the relationship between the parent and the specific subsidiaries is appropriate for a single representative's oversight.<sup>178</sup> When deciding whether a MEG is sufficiently integrated, the relevant factors are: (a) "The holding, whether directly or indirectly, of a specified percentage of capital or votes" of group members; (b) The ability to determine "financial and operating policy and decision making" of group members; (c) "The ability to appoint or remove all or a majority of the directors or governing [officials of group members]"; (d) "The ability to cast or regulate the casting of, a majority of the votes that are likely to be cast at a

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<sup>170</sup> *Id.* at ¶ 13.

<sup>171</sup> See Report of Working Group V (Insolvency Law) on the Work of Its Thirty-Eighth Session (New York, 19-23 April 2010), United Nations Comm. on Int'l Trade Law [UNCITRAL], 43d Sess., ¶¶ 63-83 U.N. Doc. A/CN.9/691 (April 19-23, 2010) (approved with only minor textual changes the substance of Working Group V (Insolvency Law)) [hereinafter Report of Working Group 2010]; Legislative Guide on Insolvency Law 2010, *supra* note 97, at ¶¶ 5 & 6.

<sup>172</sup> Report of Working Group V (Insolvency Law) on the Work of Its Thirty-Fifth Session (Vienna, 17-21 Nov. 2008), United Nations Comm. on Int'l Trade Law [UNCITRAL], 42d Sess., ¶¶ 26 & 27, U.N. Doc. A/CN.9/666 (Dec. 2, 2008) [hereinafter Report of Working Group 2008].

<sup>173</sup> *Id.*

<sup>174</sup> Legislative Guide on Insolvency Law 2010, *supra* note 97, at 72.

<sup>175</sup> *Id.* at 89.

<sup>176</sup> *Id.* at 82.

<sup>177</sup> *Id.* at 81.

<sup>178</sup> *Id.* at 85.

general meeting of [a group member], irrespective of whether that capacity arises through shares or options.”<sup>179</sup>

These factors are instructive and should form part of any analysis of a MEG’s integration. Analyzing corporate governance is insufficient, however, to decipher whether it will be in the best interests of the individual members to take part in a group-based solution. The Economic Integration Test incorporates the Working Group’s factors but they only comprise part the Interests of the Group analysis.

### B. NAFTA Principles

The NAFTA Principles were the first proposed framework for consolidating MEG bankruptcy proceedings. In 2003, the American Law Institute developed the NAFTA Principles to accelerate convergence amongst United States, Canadian, and Mexican bankruptcy laws.<sup>180</sup> Two of the NAFTA Principles focus on MEGs. NAFTA Procedure Principle 23 allows a subsidiary to file for bankruptcy in the same jurisdiction as its corporate parent.<sup>181</sup> The substantive law of the parent would also govern whether the subsidiary was procedurally or substantively consolidated unless a proceeding was opened at the COMI of the subsidiary. In that case, coordination between the two proceedings “should achieve the benefits of consolidation where possible.”<sup>182</sup> Procedure Principle 24 suggests that respect for corporate form could limit consolidation or coordination if parallel proceedings are opened in the COMI of the parent and the COMI of the subsidiary.<sup>183</sup> The NAFTA Principles are over-inclusive, as they do not require an analysis of the relationships between the group members. Consolidating a MEG

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<sup>179</sup> Treatment of Corporate Groups in Insolvency 2006, *supra* note 168, at ¶¶ 35-38.

<sup>180</sup> See Jay Lawrence Westbrook & Jacob S. Ziegel, *The American Law Institute NAFTA Insolvency Project*, 23 BROOK. J. INT’L L. 7 (1997).

<sup>181</sup> AMERICAN LAW INSTITUTE, PRINCIPLES OF COOPERATION AMONG THE NAFTA COUNTRIES (2003) (listing Procedural Principle 23, Coordination with Subsidiaries: “It should be permissible to file bankruptcy for a subsidiary in the same jurisdiction as the parent’s bankruptcy, and to have either procedural or substantive consolidation under applicable law, absent a proceeding involving the subsidiary in the country of its main interests. Where the subsidiary is in a parallel proceeding in the country of its main interests, coordination between the two proceedings should achieve the benefits of consolidation where possible.”).

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* (listing Procedural Principle 24: Principles as Applied to Subsidiaries. “The principles of coordination and cooperation should include parallel proceedings involving a subsidiary of a foreign parent debtor to the same extent as with parallel proceedings involving the debtor, although certain decisions, such as allocation of value, may be differently determined because of the need to honor the corporate form.”).

whose members are not strongly linked unnecessarily infringes on the Pride of the States whose proceedings are consolidated. The Economic Integration Test's analysis of the Interests of the Group focuses on whether a group solution will be in the best interests of each group member.

### C. *Mevorach*

Mevorach suggests a test of business integration and asset integration to decide whether a MEG should be procedurally consolidated, substantively consolidated, or neither. When a MEG has assets and debts mixed amongst the members ("asset integrated"), Mevorach argues that substantive consolidation should be applied to collapse all the liabilities and assets of each group member into one estate.<sup>184</sup> Substantive consolidation saves procedural costs and facilitates group solutions by applying only one law.<sup>185</sup> Additionally, it reflects the economic reality for creditors, who, due to the intermingling of assets and inter-group debts of an asset integrated MEG, must analyze the MEG's operations when monitoring an individual member.<sup>186</sup> A "business integrated" MEG that is not asset integrated should be procedurally consolidated.<sup>187</sup> The test for business integration is the strength of the links between entities and whether a coordinated solution would benefit the enterprise.<sup>188</sup> A business integrated MEG bankruptcy would be based in one State and that State's substantive insolvency law would apply to the case. The separateness of each entity would be respected, however, and the assets and liabilities of each entity would remain partitioned.<sup>189</sup> If the MEG is neither asset integrated nor business integrated ("nonintegrated"), then the members would file separate bankruptcies in their respective COMIs.<sup>190</sup> Consolidation of nonintegrated MEGs would unnecessarily infringe upon the Pride of States who could hold proceedings for individual group members.<sup>191</sup> The three categories used by Mevorach are well designed. The only problem is the availability of substantive consolidation, a very controversial doctrine.<sup>192</sup> A further level of analysis may be necessary to quell creditor unrest and make substantive consolidation more palat-

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<sup>184</sup> MEVORACH, *INSOLVENCY WITHIN*, *supra* note 13, at 225.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 226.

<sup>187</sup> *Id.* at 159.

<sup>188</sup> *Id.* at 153-59.

<sup>189</sup> *Id.* at 165-66.

<sup>190</sup> Mevorach, *Towards a Consensus*, *supra* note 7, at 377-78.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* Mevorach makes an excellent point that creditors of an asset integrated MEG should not be surprised if it is substantively consolidated because the corporate petitioning is a mere facade. *Id.* at 377.

able, a prime concern in a world where comity is a precondition to any consolidated MEG framework.

Mevorach's adaptive framework mirrors a MEG's bankruptcy proceedings to how it operated prior to bankruptcy. Using a sliding scale, the more centralized a MEG, the more centralized its bankruptcy proceedings.<sup>193</sup> If a parent operated with very centralized control over its affiliates, then the MEG's bankruptcy proceedings would be very centralized and Non-Main proceedings may not even be opened. A more decentralized, yet still business integrated, group would feature Non-Main proceedings for its affiliates coordinated by the COMI of the Group. Mevorach suggests a number of factors for determining the level of centralization: the size of the group, the type of product the group produces, the group's target market, and ownership of the group's subsidiaries.<sup>194</sup> Although the framework should be commended for moving away from a mechanical test requiring a prescribed level of ownership,<sup>195</sup> it is too flexible and difficult to apply.<sup>196</sup> The three-step approach of deciding 1) the level of consolidation, 2) the level of integration, and 3) what type of proceedings matches with the level of integration, creates unnecessary uncertainty. Although the first two steps are necessary, the last, although optimal in a Universalist system, obscures an already difficult analysis. Translating the level of integration to the level of oversight would be difficult and the bifurcation of procedural and substantive consolidation would already distinguish extremely integrated MEGs from their lesser integrated brethren.<sup>197</sup>

#### D. Janger and Virtual Territoriality

Professor Janger's theory, Universal Proceduralism, could incorporate an analysis of the economic integration of MEGs.<sup>198</sup> The

<sup>193</sup> MEVORACH, *INSOLVENCY WITHIN*, *supra* note 13, at 174-94.

<sup>194</sup> *Id.* at 133.

<sup>195</sup> Legislative Guide on Insolvency Law 2010, *supra* note 97, at ¶ 29 (noting the greater importance of the substance of relationships between group members rather than the form of those relationships).

<sup>196</sup> Eva M.F. de Vette, Comment, *Multinational Enterprise Groups in Insolvency: How Should the European Union Act?*, 7 *UTRECHT L. REV.* 216, 224 (2011).

<sup>197</sup> *Id.*

<sup>198</sup> Universal Proceduralism is a new theory and although it is certainly not half baked, it has not been as thoroughly vetted as Modified Universalism. Therefore, where the line between procedural and substance falls is still uncertain. *See* Janger, *Virtual Territoriality*, *supra* note 15, at 435 ("Essential procedures to be determined by the law of the forum *might* include. . .") (emphasis added). Hence, whether the sale of a MEG, such as under § 363, would be characterized as procedural and the law of the COMI of the Group would apply is also unclear. *See id.* (noting that the "scope of discharge (subject to best interests)" is procedural).

COMI of the Group would consolidate all the member's proceedings.<sup>199</sup> On one hand, the COMI of the Group's law would apply to the administrative and procedural aspects of the case. On the other hand, the COMI of the Group would apply the law of the foreign members' COMIs and the States where their assets are located "as if they [were] filed in the COMI of the [foreign member]"<sup>200</sup> in a process known as Virtual Territoriality. A recent empirical study has strengthened Virtual Territoriality as priority differences may represent a far larger problem than once thought.<sup>201</sup> United States bankruptcy courts only allowed a foreign court unfettered discretion to administer United States-based assets in 9.1% of cases.<sup>202</sup> In over 90% of the cases, United States bankruptcy courts either refused to allow administration of the United States-based assets or placed significant limitations on their administration. Requirements have included that United States statutory priorities apply or that United States creditors be paid in full.<sup>203</sup> No less significantly, research also shows that almost 94% of the filings for recognition were granted.<sup>204</sup> Thus, controversy usually surrounds the type of relief, or substantive law, as opposed to the jurisdictional, or procedural law.<sup>205</sup> Universal Proceduralism seeks to relieve this pressure by applying the local law of the debtor's assets when possible.

The Economic Integration analysis is compatible with Universal Proceduralism. Janger advocates for a "mandatory rule for choice of forum."<sup>206</sup> Although the COMI of the Group would comprise part of this rule, a member's choice of forum is also impacted by whether a group is economically integrated. If a MEG is not economically inte-

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<sup>199</sup> *Id.* at 434.

<sup>200</sup> *Id.* Janger conclusively proclaims that this is "not much more difficult than what happens when U.S. bankruptcy courts administer cases that have been administratively but not substantively consolidated." *Id.* at 436. Even after *Stern v. Marshall*, 131 S. Ct. 2594 (2011), bankruptcy courts do apply state law in many situations. However, bankruptcy is ruled mostly by the Code with state law filling in the gaps. Applying another State's bankruptcy regime, without probable prior experience, seems a far more difficult task.

<sup>201</sup> Professor Westbrook estimated that United States bankruptcy courts would act in a Universalist manner and accept other States' priorities in seventy five percent of cases. Jay L. Westbrook, *Multinational Financial Distress: The Last Hurrah of Territorialism*, 41 TEX. INT'L L.J. 321, 327 (2005) (reviewing LYNN M. LOPUCKI, *COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS* (2005)).

<sup>202</sup> See Jeremy Leong, *Is Chapter 15 Universalist or Territorialist? Empirical Evidence from United States Bankruptcy Court Cases*, 29 WIS. INT'L L.J. 110 (2011).

<sup>203</sup> *Id.* at 117-18.

<sup>204</sup> *Id.* at 123-25.

<sup>205</sup> See *id.* at 128-29.

<sup>206</sup> Janger, *Virtual Territoriality*, *supra* note 15, at 432.

grated then it should not be consolidated because an infringement upon Pride is unnecessary. Although Modified Universalism remains the predominate theory and will probably remain in that position for the foreseeable future,<sup>207</sup> if Universal Proceduralism were to surmount it, an analysis such as the Economic Integration Test should play a role for its mandatory choice of forum rule.

#### IV. COMI OF THE GROUP

Deciding the COMI of a single enterprise under the Model Law can be difficult, and deciding the COMI of a MEG multiplies these difficulties. The COMI analysis of a single enterprise or a MEG presents an inherent tension between flexibility, which promotes fairness and hinders forum shopping, and predictability, which fulfills creditors' reasonable expectations and lowers the derivative cost of capital. Both the frameworks identified by the Working Group and Irit Mevorach reasonably balance this tension. Although the COMI of the Group could be part of an amendment to the Model Law,<sup>208</sup> it could have broader application. A proceeding could use either analysis as a guide for whether to provide assistance to a Non-Recognized Proceeding pursuant to Article 7 of the Model Law.<sup>209</sup> If a Recognized Proceeding (either Main or Non-Main) finds that the Non-Recognized Proceeding is actually the COMI of the Group, the Recognized Proceeding could allow the administration of its assets by the COMI of the Group. Additionally, a State that has not enacted the Model Law could use the COMI of the Group analysis to decide where a MEG's bankruptcy should be consolidated.<sup>210</sup>

##### A. Working Group Test

Although the Working Group eventually decided not to apply the term COMI to consolidated MEGs, it suggested an analogous test for the coordination center of the group based on the rebuttable presumption of the seat of the controlling member.<sup>211</sup> The Working Group considered extending the concept of COMI to MEGs but found the absence of automatic recognition would create an unacceptable

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<sup>207</sup> 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, 522-23 (2011) (noting that another model is unlikely to displace Modified Universalism and the Model Law due to the incredible investment of both effort and consensus-building necessary to bring the Model Law to fruition).

<sup>208</sup> See *infra* Part (IV)(B).

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> Report of Working Group 2010, *supra* note 171, at ¶ 31.

risk of parallel proceedings.<sup>212</sup> Instead, it shunted the test into an analysis of the coordination center of the group's location.<sup>213</sup> To promote predictability, the analysis uses a rebuttable presumption of the registered seat of the controlling group member to increase predictability.<sup>214</sup> To promote flexibility, the Working Group settled on a consideration of multiple factors, which could collectively rebut the presumption.<sup>215</sup> The applicable factors include the locations of assets, creditors, and substantive operations.<sup>216</sup>

### B. Operational Head Office Factor

Irit Mevorach and Christoph Paulus suggest using the head office of the MEG as COMI of the Group.<sup>217</sup> Relevant considerations for deciding the location of the head office include where the MEG conducts executive meetings and the majority of procedural functions as well as the location of the parent's registered office.<sup>218</sup> Focusing on the head office should help alleviate forum shopping because formalities such as the place of registration are more easily manipulated than a physical headquarters.<sup>219</sup> Using the head office of the MEG would not drastically depart from current COMI analysis of individual multinational enterprises because both analyses share many factors.<sup>220</sup> Mevorach argues that the registered seat should not be the basis for identifying the home country of a MEG due to entity separation. A MEG is not actually registered in a particular country.<sup>221</sup> Each of its separately registered members is a separate entity, while the MEG is

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<sup>212</sup> *Id.* ¶ 26-27.

<sup>213</sup> *Id.* ¶ 32.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> Legislative Guide on Insolvency Law, Part Three: Treatment of Enterprise Groups in Insolvency, United Nations Comm. on Int'l. Trade Law [UNCITRAL], Working Group V (Insolvency Law), at 6, U.N. Doc. A/CN.9/WG.V/WP.85/Add.1 (March 6, 2009) [hereinafter *Legislative Guide on Insolvency Law 2009*]. A huge issue noted by the Working Group was confusion regarding the factors to rebut the presumption of the registered seat of the parent as the coordination center and the factors for deciding whether sufficient integration existed between the parent and subsidiaries to allow a group proceeding. *Id.* at 4.

<sup>217</sup> See Gabriel Moss & Christoph G. Paulus, *The European Insolvency Regulation – The Case for Urgent Reform*, 19 *INSOLVENCY INTELLIGENCE* 1 (2006).

<sup>218</sup> MEVORACH, *INSOLVENCY WITHIN*, *supra* note 13, at 198.

<sup>219</sup> Mevorach, *Towards a Consensus*, *supra* note 7, at 402 n.191.

<sup>220</sup> See, e.g., *In re Bear Stearns High Grade Structured Credit Strategies Master Fund Ltd.*, 389 B.R. 325, 333-34 (Bankr. S.D.N.Y. 2008); *In re Basis Yield Alpha Fund (Master)*, 381 B.R. 37, 47 (Bankr. S.D.N.Y. 2008); *In re Sphinx Ltd.*, 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2007).

<sup>221</sup> LoPucki, *Universalism Unravels*, *supra* note 30, at 143.



not a recognized legal entity.<sup>222</sup> Additionally, Mevorach suggests that ad hoc contractualism could assist in situations where multiple reasonable candidates exist.<sup>223</sup>

## V. THE PRESENT AND FUTURE OF MEG PROCEEDINGS IN THE UNITED STATES

An amendment to the Model Law could facilitate consolidated MEG proceedings. Changes in the near future appear unlikely because the Working Group was considered the probable low adoption rate of any strong Universalist measure for MEG consolidation and the Group rejected the latest proposals.<sup>224</sup> Yet, the United States need not wait for an amendment because the Code's tax requirements for filing already facilitate MEG proceedings in the United States. Comity is still necessary, however, for consolidating MEG proceedings, and analyzing economic integration could prove an important step for securing the requisite comity. Allowing the United States to administer a foreign bankruptcy may seem farfetched but States without significant bankruptcy expertise could benefit from procedural consolidation of their corporations or assets in the United States. The availability of post-commencement financing in the United States further increases its attractiveness. Part VI first examines the two types of consolidation used in the United States: procedural and substantive. Then, a potential amendment to the Model law and current ability of the United States to administer MEGs are considered. Lastly, it analyzes why other States would allow the United States to administer their corporations and assets.

### A. Consolidation

Although Consolidation of facilitates group-based MEG solutions, comity is a vital consideration and solutions should be as palatable as possible. Therefore, procedural consolidation should be the default consolidation approach as it leaves the corporate partitioning between entities intact. Substantive consolidation, the collapsing of group members' corporate partitioning, should only be employed when all creditors will benefit.

Procedural consolidation, also known as joint administration or administrative consolidation, saves costs, eases administration, and applies one substantive bankruptcy law, while respecting corporate separateness. In the United States, procedurally consolidated proceedings save time and money by using one trustee, one docket, and

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<sup>222</sup> MEVORACH, *INSOLVENCY WITHIN*, *supra* note 13, at 194.

<sup>223</sup> Mevorach, *Towards a Consensus*, *supra* note 7, at 386.

<sup>224</sup> Legislative Guide on Insolvency Law 2008, *supra* note 127, at ¶ 12.

one judge.<sup>225</sup> A party in interest may move to procedurally consolidate the proceedings of some, or all, debtor subsidiaries with the proceedings of the debtor parent.<sup>226</sup> The Federal Rules of Bankruptcy Procedure explicitly allow the procedural consolidation of debtor affiliates in the same court.<sup>227</sup> To aid procedural consolidation, once a debtor files for bankruptcy in a district, venue in that district is also proper for any affiliate of the debtor.<sup>228</sup> Although unimportant in a domestic case because the Code is federal law, procedurally consolidating a MEG's foreign and domestic members in one court allows the same substantive law to apply to all the procedurally consolidated members. When a single law governs a MEG's insolvency proceedings, it helps effectuate a group-wide solution such as a sale or reorganization.<sup>229</sup> If a sale of multiple entities or the entire MEG occurs, each group member sold will be credited a pro-rata portion of the proceeds based on their contribution to the sale price.<sup>230</sup> The group member's creditors will then receive their portion of the proceeds, if any, based on secured, priority, general unsecured, equity, or subordinated status.<sup>231</sup> *In re Aerovias Nacionales de Columbia S.A. Avianca* ("Avianca"),<sup>232</sup> illustrates how procedural consolidation is applied. The United States Bankruptcy Court for the Southern District of New York procedurally consolidated both Avianca, a Columbian corporation, and Avianca, Inc., a United States corporation.<sup>233</sup> The corporate partitioning between the debtors remained intact and the creditors remained distinct. The bankruptcy court applied the Code to both debtors and jointly decided motions to dismiss and rejection of leases.<sup>234</sup>

Substantive consolidation, unlike procedural consolidation,<sup>235</sup> infringes on MEG members' legal separateness. Substantive consoli-

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<sup>225</sup> *In re Coles*, 14 B.R. 5 (Bankr. E.D. Pa. 1981). *Cf. In re Marshall*, 291 B.R. 855 (Bankr. C.D. Ca. 2003), *aff'd*, 403 B.R. 668 (C.D. Ca. 2009) (changing assignment of judge to allow judicial economy for a very complex factual scenario where the new judge was already assigned a case with significant factual overlap).

<sup>226</sup> *In re Apex Oil*, 406 F.3d 538 (8th Cir. 2005); *Grand Pier Ctr. LLC v. ATC Group Servs.*, 2007 U.S. Dist. LEXIS 75672, at \*35 (N.D. Ill. Oct. 9, 2007) ("it is commonplace for a large corporation to place some, but not all, of its subsidiaries or affiliated entities into the consolidated reorganization.").

<sup>227</sup> FED. R. BANKR. PRO. 1015.

<sup>228</sup> 28 U.S.C. § 1408 (2006).

<sup>229</sup> Legislative Guide of Insolvency Law 2010, *supra* note 97, at ¶ 4.

<sup>230</sup> MEVORACH, *INSOLVENCY WITHIN*, *supra* note 13, at 165.

<sup>231</sup> *Id.*

<sup>232</sup> *Avianca*, 303 B.R. at 1.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* (ruling on a motion to dismiss); *In re Avianca*, 323 B.R. 879 (Bankr. S.D.N.Y. May 6, 2005) (ruling on a motion to reject leases).

<sup>235</sup> *Unsecured Creditors Comm. v. Leavitt Structural Tubing Co.*, 55 B.R. 710, 711-12 (N.D. Ill. 1985) (stating "procedural consolidation is merely a matter of

dation is an equitable doctrine used by bankruptcy courts to collapse legally separate entities into one.<sup>236</sup> The assets and liabilities of all substantively consolidated entities are placed in one estate, intergroup debts are eliminated, and creditors are combined.<sup>237</sup> Because the substantively consolidated entities undoubtedly have different ratios of assets to liabilities and different amounts of priority claims, substantive consolidation often significantly affects the returns of unsecured creditors.<sup>238</sup> The doctrine's limited application derives from the general view that "[t]he power to [substantively] consolidate should be used sparingly."<sup>239</sup> A leading treatise suggests that this view is justified due to the potential harm to innocent creditors.<sup>240</sup> Fulfilling creditors' expectation is a prime concern for any MEG framework. Procedural consolidation would change the applicable bankruptcy law; it would not destroy the legal separation between entities.<sup>241</sup> Some United States courts have approved substantive consolidation orders "only when separately accounting for the assets and liabilities of the distinct entities will reduce the recovery of every creditor—that is, when every creditor will benefit from the consolida-

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convenience and cost saving; it does not confer a substantive rights."); see *supra* Part II (b)(i) (suggesting that the facilitation of coordination and cooperation could help ameliorate this issue); see also Official Comm. of Unsecured Creditors v. Schwartzman (*In re Stansbury Poplar Place, Inc.*), 13 F.3d 122, 123-26 (4th Cir. 1993) (arguing that at least one commentator suggested procedural consolidation could hinder participation by smaller creditors and employee groups in a foreign jurisdiction); Janis Sarra, *Oversight and Financing of Cross-Border Business Enterprise Group Insolvency Proceedings*, 44 TEX. INT'L L.J. 547, 571 (2009).

<sup>236</sup> STAN BERNSTEIN ET AL., *BUSINESS BANKRUPTCY: ESSENTIALS* 211 (2009); Dennis J. Connolly, John C. Weitnauer, & Jonathan T. Edwards, *Current Approaches to Substantive Consolidation: Owens Corning Revisited*, 2009 ANN. SURV. BANKR. L. pt. I § 9 (noting substantive consolidation is the bankruptcy equivalent of piercing the corporate veil and is not found in the Code).

<sup>237</sup> *In re Augie/Restivo Baking Co.*, 860 F.2d 515, 518 (2d Cir. 1988) (discussing the most frequently stated reasons for substantive consolidation are the use of the corporation as a mere instrumentality of another, to halt fraudulent transfers between debtors or the debtors are extremely intertwined); Forrest Pearce, *Bankruptcy-Remote Special-Purpose Entities and the Right of a Business To Waive Its Ability to File for Bankruptcy*, EMORY BANKR. DEV. J. (forthcoming) (citations omitted).

<sup>238</sup> 2 ALAN N. RESNICK ET AL., *COLLIER ON BANKRUPTCY* ¶ 105.09[1][a] (16th ed. 2011).

<sup>239</sup> *Chem. Bank of N.Y. Trust Co. v. Kheel*, 369 F.2d 845, 847 (2d Cir. 1966).

<sup>240</sup> RESNICK, *supra* note 238, at ¶ 105.09[1][d].

<sup>241</sup> See Mevorach, *Towards a Consensus*, *supra* note 7, at 364, 399-404 (discussing the acceptance of outcome differences as one of the most troubling requirements for true universalism); see also *supra* note 31 and accompanying text.

tion.”<sup>242</sup> The same standard should be applied to consolidating MEGs.<sup>243</sup> The importance of comity cannot be overstated and many nations do not allow substantive consolidation or drastically limit its application.<sup>244</sup> Procedural consolidation would sufficiently concentrate proceedings to allow group-wide solutions using the same substantive law and, at the same time, fulfill the creditors’ expectations of corporate separateness where not all creditors will benefit from substantive consolidation.<sup>245</sup>

### B. MEGs in America

UNCITRAL may eventually enact an amendment to the Model Law to aid consolidation of MEGs.<sup>246</sup> In the interim, the United States can already consolidate MEGs because the Code has a low threshold to satisfy statutory jurisdiction. Yet, as *Yukos Oil* illustrates, statutory jurisdiction itself is insufficient and comity is necessary. In contrast, Lord Hoffman’s opinion in *In re HiH*, as well as other recent English cases, shows the potential for comity-based consolidated MEG proceedings. The Economic Interest Test could help persuade a foreign proceeding to react like Lord Hoffman *In re HiH* as opposed to the Russians in *Yukos Oil*.

Although the Working Group did not create an amendment to the Model Law, as the number of enactors grows and MEG proceedings between members become more prevalent, the pressure to create a framework will increase. Many enactors of the Model Law impose a reciprocity requirement on foreign debtors, which limits the influence of the Model Law.<sup>247</sup> The Proposed Legislative Guide is more generally applicable because its influence is not restricted to Model Law enactors.<sup>248</sup> Therefore, as the Proposed Legislative Guide affects more MEG bankruptcies, UNCITRAL may pursue an amendment once potential adoption is sufficiently broad.

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<sup>242</sup> *In re Owens Corning*, 419 F.3d 195, 214 (3d Cir. 2005).

<sup>243</sup> Legislative Guide on Insolvency 2008, *supra* note 127, at ¶¶ 11, 14.

<sup>244</sup> *See de Vette*, *supra* note 196, at 226 (noting the only European Union members to allow substantive consolidation are France, Ireland, the Netherlands).

<sup>245</sup> *Id.* at 227 (explaining that although this produces problems of Pride for States who relinquish administration of assets under their territorial control, any MEG solution short of a globally accepted Universalist regime will cause such problems and the only real solution in comity and a belief in the rough wash).

<sup>246</sup> *See Mevorach, Towards a Consensus*, *supra* note 7, at 369 (explaining the importance of creating a “coherent international framework” not just a “set of recommendations which allow considerable flexibility.”).

<sup>247</sup> Ranney-Marinelli, *supra* note 47, at 271 (citing H.R. REP. NO. 109-31, pt. 1, at 113 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 175-76).

<sup>248</sup> Mevorach, *Towards a Consensus*, *supra* note 7, at 370.

The predominate framework for consolidating MEGs focuses primarily on deciding the COMI of the Group. Next, it examines the degree of the group's integration to decide whether the group should be consolidated. Finally, it considers which type of consolidation should be applied.<sup>249</sup> The analysis for fleshing out this framework is now available. Although a procedure or presumption for deciding recognition of the COMI of the Group would be required, scholars have already created two acceptable alternatives.<sup>250</sup> How economic integration will be decided is analyzed in Part VI. As noted, procedural consolidation should be the default choice for consolidation. Additionally, to facilitate a bankruptcy court administration of assets extraterritorially, the communication aiding measures suggested by the Working Group should be added as well.<sup>251</sup> Focusing on the United States, the establishment issues posed by chapter 15's omission of Article 7 of the Model Law must be addressed to promote reciprocity between the United States and other Model Law enactors.<sup>252</sup> This could also be achieved if the United States Bankruptcy Court allowed more unfettered administration of United States-based assets.<sup>253</sup>

Nevertheless, under existing law, all members of a MEG may file for bankruptcy in the United States. A foreign enterprise may file a voluntary bankruptcy in the United States pursuant to § 301 of the Code.<sup>254</sup> Although filing itself is insufficient, the barriers to establishing statutory jurisdiction are low. As one of the bases for statutory jurisdiction,<sup>255</sup> § 109(a) only requires a debtor to have property in the United States on the date the bankruptcy is filed.<sup>256</sup> A negligible

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<sup>249</sup> See Mevorach, *supra* note 7 (outlining different approaches to consolidation); Janger, *Virtual Territoriality*, *supra* note 15 (advocating similar approaches to consolidation).

<sup>250</sup> See *supra* Part III.

<sup>251</sup> Report of Working Group 2008, *supra* note 172, at 82.

<sup>252</sup> See Ranney-Marinelli, *supra* note 47, at 271 (citing H.R. REP. NO. 109-31, pt. 1, at 113 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 175-76); *supra* Part II(c)(v)(B) (stating that, once this issue is rectified, the United States has a greater potential to consolidate a MEG than other Model Law enactors because the United States does not impose a reciprocity requirement on non-Model Law enactors).

<sup>253</sup> See *supra* Part III (D).

<sup>254</sup> 11 U.S.C. § 301 (2006); see *Evans v. Hancock, Rothert & Bunshoft (In re Evans)*, 177 B.R. 193, 195 (Bankr. S.D.N.Y. 1995) (recognizing that a foreign entity could have filed a voluntary petition pursuant to § 301 of the Code).

<sup>255</sup> Constitutional jurisdiction is not necessarily coextensive with statutory jurisdiction. See *Gmam Inv. Funds Trust v. Globo Comunicacoes e Participacoes, S.A. (In re Globo Comunicacoes e Participacoes, S.A.)*, 317 B.R. 235, 251-52 (S.D.N.Y. 2004); see also *Stern v. Marshall*, 131 S. Ct. 2594, 2608 (2011).

<sup>256</sup> 11 U.S.C. § 109(a); *In re Global Ocean Carriers Ltd.*, 251 B.R. 31, 37-39 (Bankr. D. Del. 2000) (finding that each group member must independently meet

amount of funds in a bank account,<sup>257</sup> or an unearned retainer,<sup>258</sup> even when deposited pre-petition to establish jurisdiction,<sup>259</sup> is sufficient.<sup>260</sup> A debtor also need not be insolvent to file for either chapter 11 (reorganization)<sup>261</sup> or chapter 7 (liquidation) protection.<sup>262</sup> Even an involuntary petition can be maintained against foreign debtors who satisfy § 109.<sup>263</sup> Although unlikely considering the necessity of comity for any consolidated MEG solution, an involuntary filing could be required when a chapter 15 petition cannot be filed because a foreign

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this requirement); *Bank of Am. N.T. & S.A. v. Communications & Studies International, Ltd.*, 23 B.R. 1015 (N.D. Ga. 1982).

<sup>257</sup> *Global Ocean Carriers*, 251 B.R. at 37-39.

<sup>258</sup> *Id.* at 39; *Indep. Eng'g Co., Inc. v. U.S. Tr. (In re Indep. Eng'g Co. Inc.)*, 232 B.R. 529, 533 (B.A.P. 1st Cir. 1999).

<sup>259</sup> *Yukos Oil Co. v. Russian Federation (In re Yukos Oil Co.)*, 320 B.R. 130, 132 (Bankr. S.D. Tex. 2004). *But see* Marc Solomon, *Foreign Companies and Affiliates Under § 109: The Benefits and Risks of "Manufactured" Eligibility*, AM. BANKR. INST. J., Sept. 2004, at 26, 58 (listing earlier cases where paltry bank accounts or establishing a mailing address were held insufficient to satisfy § 109).

<sup>260</sup> Even if a member of a MEG does not "manufacture jurisdiction" by opening a bank account, it may satisfy § 109 by having a place of business in the United States. 11 U.S.C. § 109. Bankruptcy courts have also set a very low bar to satisfy this requirement. *See* Allan L. Gropper, *Current Developments in International Insolvency Law: A United States Perspective*, 15 NORTON J. BANKR. L. & PRAC. 145, 169 (2006) ("[E]ven a miniscule amount of U.S. property may be sufficient to sustain jurisdiction in the U.S. courts under [section] 109 of the Bankruptcy Code . . . ."); Kurt A. Mayr, *Enforcing Prepackaged Restructurings of Foreign Debtors Under the U.S. Bankruptcy Code*, 14 AM. BANKR. INST. L. REV. 469, 475-76 (2006) (listing cases).

<sup>261</sup> A Chapter 11 may also provide for a liquidation of the debtor pursuant to a plan. 11 U.S.C. § 1123(b)(4); Stephen J. Lubben, *Business Liquidation*, 81 AM. BANKR. L.J. 65, 67 (2007).

<sup>262</sup> *See In re The Bible Speaks*, 65 B.R. 415, 424 (Bankr. D. Mass. 1986).

<sup>263</sup> Section 303 sets the requirements for an involuntary petition. 11 U.S.C. § 303 (2006); *Gmam Inv. Funds Trust v. Globo Comunicacoes e Participacoes, S.A. (In re Globo Comunicacoes e Participacoes, S.A.)*, 317 B.R. 235, 251-52 (S.D.N.Y. 2004) (failing to dismiss an involuntary petition based upon satisfaction of § 109). The district court noted that a constitutional basis for personal jurisdiction is required and the if the debtor did not have minimum contacts, the power of the bankruptcy court would be limited to *in rem* jurisdiction over the debtor's assets in the United States (citing *Burnham v. Sup. Ct.*, 495 U.S. 604, 618 (1990)). However, the court suggested that the debtor may have purposely availed itself and thereby established minimum contacts with the United States through its borrowings from U.S. creditors and targeting of U.S. markets. *Id.*

proceeding is not pending.<sup>264</sup> A foreign proceeding may not be pending due to resistance of the debtors or a lack of proof of insolvency.<sup>265</sup>

As the *Yukos Oil* cases show, however, the filing of a MEG's foreign members in the United States is not sufficient to consolidate an MEG.<sup>266</sup> Yukos Oil was Russia's largest oil company with approximately two hundred subsidiaries operating under the laws of Russia, Cyprus, the United Kingdom, and the United States.<sup>267</sup> In 2004, the Russian Federation began to expropriate Yukos' assets using a retroactive application of Russian tax law in a selective manner without due process.<sup>268</sup> To satisfy the retroactively assessed taxes, Yukos' principal assets were to be auctioned off on December 19, 2004.<sup>269</sup> In an effort to halt the auction, Yukos filed a chapter 11 bankruptcy petition in the Southern District of Texas on December 14, 2004.<sup>270</sup> The bankruptcy court found that it had statutory jurisdiction over Yukos because the debtor opened a bank account and made deposits which satisfied § 109.<sup>271</sup> In the same order, the bankruptcy court also issued a temporary restraining order to stop the Russian auction and prohibit certain entities from taking part.<sup>272</sup> The Russian government was undeterred and it held the auction as scheduled.<sup>273</sup> The court granted a subsequent motion to dismiss the debtors' cases based upon § 1112(b).<sup>274</sup> The court's § 1112(b) analysis evaluated the debtor's

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<sup>264</sup> Section 1504 requires an already commenced foreign proceeding to file a chapter 15. 11 U.S.C. § 1504; see Mayr, *supra* note 260, at 472-73.

<sup>265</sup> See generally Daniel M. Glosband, *UNCITRAL's New Working Group on Insolvency Law*, AM. BANKR. INST. J., Apr. 2000, at 28 (noting that many countries require proof of insolvency which prolongs case commencement).

<sup>266</sup> *Yukos Oil Co. v. Russian Federation (In re Yukos Oil Co.)*, 320 B.R. 130, 132 (Bankr. S.D. Tex. 2004) [hereinafter *Yukos I*]; *In re Yukos Oil Co.*, 321 B.R. 396 (Bankr. S.D. Tex. 2005) [hereinafter *Yukos II*].

<sup>267</sup> *Yukos II*, 321 B.R. at 400 (stating that the Texas corporation, Yukos USA, Inc., was incorporated one day prior to the petition).

<sup>268</sup> Dmitry Golobov & Joseph Tanega, Practitioner Note, *Yukos Risk: The Double-Edged Sword – A Case Note on International Bankruptcy Litigation and the Transnational Limits of Corporate Governance*, 3 N.Y.U. J.L. & BUS. 557, 580 (2007).

<sup>269</sup> *Yukos I*, 320 B.R. at 132.

<sup>270</sup> *Id.*

<sup>271</sup> The court also relied upon the nationality of the Chief Financial Officer and that the United States was the location for over fifteen percent of Yukos' stock. *Id.*

<sup>272</sup> *Id.* at 137-38.

<sup>273</sup> Matteo Winkler, *Arbitration Without Privity and Russian Oil: The Yukos Case Before the Houston Court*, 27 U. PA. J. INT'L ECON. L. 115, 119-20 (2006).

<sup>274</sup> 11 U.S.C. § 1112(b)(1) provides that:

on request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the

good faith through an analysis of “the debtor’s financial condition, motives, and local financial realities.”<sup>275</sup> The court found a lack of good faith based on four conditions. First, the lack of bankruptcy purpose, as the debtors only wanted to subordinate their tax debt and transfer potential causes of action into a litigation trust, not reorganize.<sup>276</sup> Second, administration and enforcement of the case was objectively futile given the lack of cooperation of the Russian Federation, and the location of the Yukos’ primary assets in Russia.<sup>277</sup> Third, other proceedings existed involving the debtor including those in the European

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court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.

Furthermore paragraph (b)(4) enumerates the a non-exhaustive list of “causes” including:

(A) substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation; (B) gross mismanagement of the estate; (C) failure to maintain appropriate insurance that poses a risk to the estate or to the public; (D) unauthorized use of cash collateral substantially harmful to 1 or more creditors; (E) failure to comply with an order of the court; (F) unexcused failure to satisfy timely any filing or reporting requirement established by this title or by any rule applicable to a case under this chapter; (G) failure to attend the meeting of creditors convened under section 341(a) or an examination ordered under rule 2004 of the Federal Rules of Bankruptcy Procedure without good cause shown by the debtor; (H) failure timely to provide information or attend meetings reasonably requested by the United States trustee (or the bankruptcy administrator, if any); (I) failure timely to pay taxes owed after the date of the order for relief or to file tax returns due after the date of the order for relief; (J) failure to file a disclosure statement, or to file or confirm a plan, within the time fixed by this title or by order of the court; (K) failure to pay any fees or charges required under chapter 123 of title 28; (L) revocation of an order of confirmation under section 1144; (M) inability to effectuate substantial consummation of a confirmed plan; (N) material default by the debtor with respect to a confirmed plan; (O) termination of a confirmed plan by reason of the occurrence of a condition specified in the plan; and (P) failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition.

11 U.S.C. § 1112(b)(1), (4) (2006).

<sup>275</sup> *Yukos II*, 321 B.R. at 410 (citing *In re Elmwood Dev. Co.*, 964 F.2d 508 (5th Cir. 1992)).

<sup>276</sup> *Id.* at 411.

<sup>277</sup> *Id.*



Court of Human Rights and the arbitrazh courts of Russia.<sup>278</sup> Finally, “[t]he sheer size of Yukos, and correspondingly, its impact on the entirety of the Russian economy weighs heavily in favor of allowing resolution in a forum in which participation of the Russian government is assured.”<sup>279</sup> *Yukos* illustrates the necessity of comity when a foreign State controls the debtor’s assets.<sup>280</sup> Although, the § 1112(b) analysis did not examine the economic integration of *Yukos*, the bankruptcy purpose, futility, and necessity of comity inquiries all form part of the Economic Integration Test.

An analysis of economic integration is vital to securing support and comity from a foreign proceeding. The opening of a foreign proceeding at the COMI of the individual debtor and a subsequent Chapter 15 filing in the United States could marginalize a filing under Chapter 7 or Chapter 11. An analysis of the economic integration of the MEG under the Economic Integration Test could help sway a foreign proceeding to consider the United States as the COMI of the Group, even if the Model Law’s analysis would find that a proceeding in the United States is Non-Main or even Non-Recognized.<sup>281</sup> The Economic Integration Test could also strengthen the argument for a United States proceeding receiving common law-based comity from non-Model Law enactors.<sup>282</sup>

English Courts have recently shown an increased willingness to allow the administration of domestic assets at the domicile of a foreign enterprise. In *In re HHH*, the Australian proceedings would not replicate the English priorities for English assets.<sup>283</sup> Lord Hoffman, writing for a plurality of the High Court, noted that English courts have the discretion to allow administration of English assets even when English creditors may be hurt by the application of foreign law.<sup>284</sup> At least one English court has relied upon Lord Hoffman’s argument.<sup>285</sup> Additionally, administrative savings derived from a consolidated proceeding may also impact a proceeding’s decision to allow

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<sup>278</sup> *Id.*

<sup>279</sup> *Id.* at 410-11.

<sup>280</sup> Janger, *Universal Proceduralism*, *supra* note 15, at 842-43.

<sup>281</sup> *See supra* Part II(c)(v).

<sup>282</sup> *See McGrath*, [2008] UKHL at [5], [7], [10]. *See generally* *Hilton v. Guyot*, 159 U.S. 113 (1895).

<sup>283</sup> *McGrath*, [2008] UKHL at [2] (noting that reinsurance claims are treated *pari passu* in England while they treated less generously in Australia). This is an example of a rejection of a synthetic secondary proceeding. *See supra* notes 51-56 and accompanying text.

<sup>284</sup> *McGrath*, [2008] UKHL at [29], [30].

<sup>285</sup> *Rubin v. Eurofinance SA*, [2009] EWHC (Ch) 2129, [61] (citing *In re HiH*, [2008] UKHL 21, [2008] 1 W.L.R. 852 (H.L.), [29] (appeal taken from Eng.) (Hoffman, L.)).

foreign administration of its assets.<sup>286</sup> In effect, a balance exists between promoting a domestic policy and “co-operat[ing] with the courts in the country of the principal liquidation to ensure that all the company’s assets are distributed to its creditors under a single system of distribution.”<sup>287</sup>

As Lord Hoffman wrote in *In re HIH*, “[t]he power to remit assets to the principal liquidation is exercised when the English court decides that there is a foreign jurisdiction *more appropriate* than England for purpose of dealing with all the outstanding questions in the winding up.”<sup>288</sup> Additionally, one Canadian Justice stated that a consolidated MEG proceeding should “. . . implement a plan so as to reorganize as a global unit, especially where there is an established *interdependence* on a transnational basis. . . .”<sup>289</sup> What better way to establish appropriateness and show interdependence than through economic integration? With the foreign proceeding’s blessing, a United States bankruptcy court can administer the foreign members of a MEG under Article 7 of the Model Law or common law principles of comity.

### C. *The Potential for Consolidated MEG Proceedings*

Although the effects of States’ unwillingness to relinquish sovereignty over members of MEGs are well chronicled, the advantages offered by the United States can overcome this resistance. The United States has well respected, debtor-friendly bankruptcy laws. The United States’ deep Debtor-in-Possession (“DIP”) financing market could also be instrumental to a MEG’s reorganization.

*Avianca* illustrates the potential success of consolidated MEG proceedings in the United States. *Avianca* was the leading Columbian airline, but it filed for chapter 11 protection in the United States to avail itself of United States bankruptcy law.<sup>290</sup> *Avianca* could not obtain jurisdiction over many of its creditors in Columbia but it could in the United States.<sup>291</sup> Additionally, in 2003, the Columbian bankruptcy law was “only four years old and relatively untested, particu-

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<sup>286</sup> *McGrath*, [2008] UKHL at [11] (noting that the Court of Appeal considered the benefits of a foreign administration as a possible reason for allowing foreign administration of domestic assets to the detriment of domestic creditors).

<sup>287</sup> *Id.* at [30].

<sup>288</sup> *Id.* at [28] (emphasis added).

<sup>289</sup> *In re Babcock & Wilcox Canada Ltd., Re*, [2000] 5 B.L.R. (3d) 75, 18 C.B.R. (4th) 157 (Can. Ont. SCJ-CL) (emphasis added); James M. Farley, *Globalization and Its Impact on Cooperation and Coordination in Cross-Border Insolvency Cases*, Am. Bar Ass’n Conference (Sept. 24, 2008), at 32 (emphasis added).

<sup>290</sup> *Avianca*, 303 B.R. at 3.

<sup>291</sup> *Id.* at 10.

larly in large cases.”<sup>292</sup> Moreover, it did not have a provision for rejecting a lease.<sup>293</sup> Without the rejection of certain engine leases, Avianca’s reorganization would have been futile.<sup>294</sup> Section 365 proved invaluable to the debtors’ reorganizations.<sup>295</sup> Although one United States based creditor filed a motion to dismiss, most parties in interest either supported the filing or failed to file similar dismissal motions.<sup>296</sup> Because “Avianca’s principal creditors were located in the United States and the Columbian parties in interest were willing to participate in the United States, the court found that Avianca should be allowed to file in the United States.”<sup>297</sup>

Both creditors and debtors benefit from the United States’ debtor-friendly bankruptcy laws and rich body of case law. The United States’ bankruptcy laws are more debtor-friendly than most States’ regimes.<sup>298</sup> As illustrated by *Avianca*, the provisions of the Code can be more helpful than local bankruptcy law and can increase the prospects for maximum creditor recovery and continued existence of the debtor as a going concern.<sup>299</sup> More recently, European shipping magnates have turned to chapter 11 reorganizations to maintain control of their

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<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

<sup>295</sup> See *In re Avianca*, 323 B.R. at 879.

<sup>296</sup> *Avianca*, 303 B.R. at 7-8.

<sup>297</sup> *Id.* at 13.

<sup>298</sup> See, e.g., Theodore Eisenberg & Stefan Sundgren, *Is Chapter 11 Too Favorable to Debtors? Evidence From Abroad*, 82 CORNELL L. REV. 1532 (1997). Although critics may argue that the case would have eventuated differently after the enactment of Chapter 15, the facts of the case make this hypothesis unlikely. After the enactment of Chapter 15, a dissenting creditor could have commenced a proceeding in Columbia and then called upon the Columbian proceeding to stake its claim as the Main Proceeding for *Avianca, S.A.* However, no proceeding was pending at the time the Chapter 11 was filed. *Avianca*, 303 B.R. at 12. Even under the now-repealed version § 305(a)(2), one of the key considerations for dismissal was the existence of a foreign proceeding. See, e.g., *id.* at 11 (citing *In re Cenargo Int’l, PLC.*, 294 B.R. 571 (Bankr. S.D.N.Y. 2003); *In re Ionica*, 241 B.R. 829 (Bankr. S.D.N.Y. 1999); *In re Xacur*, 219 B.R. 956 (Bankr. S.D. Tex. 1998)). The creditors surely knew the importance of a parallel proceeding and they failed to commence a proceeding in the weeks following the petition date. See *Avianca*, 303 B.R. at 3, 7 (showing that the petition date was March 28, 2003, and the emergency motion to dismiss was filed on April 11, 2003).

<sup>299</sup> Even compared to Canada, a nation whose bankruptcy laws are very similar to the United States, the cramdown and automatic stay provisions of the Code are more generous for debtors. Jarred Leibner, Note, *An Executory Approach to Cross-Border Insolvencies*, 64 U. MIAMI L. REV. 1171, 1186 (2010).

fleets throughout the reorganization process.<sup>300</sup> Therefore, the United States' bankruptcy laws may mitigate concerns about hegemony and Pride. A foreign proceeding should be willing to allow administration of a local affiliate abroad if it increases the potential for a solution that allows the affiliate to continue operating as a going concern. Just as Delaware benefits from the depth of its corporate law compared to other states,<sup>301</sup> the depth of United States bankruptcy law allows for greater predictability.<sup>302</sup> If the major creditors recognize the value of a potential group-wide solution in the United States through the application of United States bankruptcy law,<sup>303</sup> foreign proceedings will become more helpful.<sup>304</sup>

Increased prospects for DIP financing could dampen the impact of increased uncertainty surrounding a member's COMI. DIP financing is often necessary for insolvent entities to fulfill their cash flow needs during a reorganization<sup>305</sup> or in the time prior to an asset sale.<sup>306</sup> Both the Working Group and commentators have discussed provisions for cross-border DIP financing and have emphasized the significant obstacles.<sup>307</sup> These include the priority of DIP finance in other jurisdictions and a solvent group member's ability to finance another group member. Many of these highlighted issues occur only be-

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<sup>300</sup> Michelle W. Bockmann, *European Shipowners to Seek U.S. Court Protection, Law Firm Says*, BLOOMBERG (Jan. 26, 2012), <http://www.businessweek.com/news/2012-01-26/european-shipowners-to-seek-u-s-court-protection-law-firm-says.html>.

<sup>301</sup> See Robert Daines, *Does Delaware Law Improve Firm Value?*, 62 J. FIN. ECON. 525, 526 (2001) (asserting that Delaware's large amount of judicial precedents allegedly leads to greater predictability). *But see* William J. Carney & George B. Shepherd, *The Mystery of Delaware's Continuing Success*, 2009 U. ILL. L. REV. 1, 55–64 (2009).

<sup>302</sup> See *Avianca*, 303 B.R. at 10.

<sup>303</sup> See *id.* at 13; *In re Cenargo Int'l, PLC.*, 294 B.R. 571, 592–94 (Bankr. S.D.N.Y. 2003) (overruling the objection to dismissal of the unsecured creditors committee for a British shipping company as it was the only party who wanted to pursue a bankruptcy case in the United States).

<sup>304</sup> Canadian Justice Farley suggested that consolidated proceedings for a MEG would be proper when one jurisdiction can independently administer the case effectively. Farley, *supra* note 289, at 32. He demonstrated his willingness to accommodate a group-based solution in *In re Babcock & Wilcox Canada, Ltd.*, where he allowed a solvent Canadian to seek relief in the United States even though solvent entities are ineligible to file for protection in Canada. 18 C.B.R. (4th) 157 (2000).

<sup>305</sup> DIP financing has positive impact on recovery rates for creditors. Maria Carapeto, *Does Debtor-in-Possession Financing Add Value?*, (Cass Bus. Sch. Research Paper, Paper No. 294-1999) (May 27, 1999), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=161428](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=161428).

<sup>306</sup> Sarra, *supra* note 235, at 572–73.

<sup>307</sup> Legislative Guide on Insolvency Law 2008, *supra* note 127, at 5–7; Sarra, *supra* note 235, at 576.

cause parallel proceedings are currently necessary.<sup>308</sup> If proceedings are consolidated in the COMI of the Group, its substantive bankruptcy law would apply to the priority of DIP financing.<sup>309</sup> The debtor's original lenders usually become its DIP lenders.<sup>310</sup> Therefore, some of the largest and most important creditors will benefit from attractive DIP financing law. When lenders benefit from attractive DIP financing law, it counterbalances the greater uncertainty surrounding the COMIs of the Group and individual members. Consolidation of MEGs in the United States would increase the potential for DIP financing in many cases due to the generous priority provisions of the Code for such financing.<sup>311</sup> Lender protection techniques such as roll-ups and the more controversial cross-collateralizations would also help.<sup>312</sup> The potential for greater returns on a procedurally consolidated MEG in the United States case may offset the increased uncertainty surrounding the COMI of the MEG's members.

## VI. ECONOMIC INTEREST TEST

Although scholars have mentioned "economic integration" as the touchstone for consolidating MEG proceedings,<sup>313</sup> few have tried to define the analysis, and for now, no one has suggested how it would apply in the United States. Analyzing the definition is important not only for a future amendment but also for the current U.S. bankruptcy regime. If economic integration is added as an amendment to the Model Law, it will probably be undefined like COMI.<sup>314</sup> United States

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<sup>308</sup> Legislative Guide on Insolvency Law 2008, *supra* note 127, at 5, 6.

<sup>309</sup> See Sarra, *supra* note 235, at 568.

<sup>310</sup> *Id.* at 574 (noting that pre-petition lenders are incentivized to provide post-petition financing to preserve their spot in the hierarchy of priorities).

<sup>311</sup> See 11 U.S.C. § 363(c)-(e) (2006); see also Sarra, *supra* note 235, at 573 (citations omitted) (explaining that Canadian bankruptcy laws do not expressly allow priority DIP financing and that it is an "extraordinary remedy"); David A. Skeel, Jr., *The Past, Present and Future of Debtor-In-Possession Financing*, 25 CARDOZO L. REV. 1905, 1933-34 (2004) (noting the sparse use of Hungary's DIP financing provision because unlike the Code's, it did not provide for special priority for the DIP lender).

<sup>312</sup> Scott D. Cousins, *Postpetition Financing of Dot-Coms*, 27 DEL. J. CORP. L. 759, 798-801 (2002) (discussing roll-up and cross-collateralizations generally).

<sup>313</sup> See, e.g., Adams & Fincke, *supra* note 3, at 84; Bufford, *Global Venue*, *supra* note 3, at 136.

<sup>314</sup> LoPucki, *Universalism Unravels*, *supra* note 30, at 143 (describing COMI as "vague and practically meaningless"). The Model Laws seeks to minimize conflict by not creating substantive rules. Universal Proceduralists believe this is the best for international law as harmonized substantive law will decrease constructive competition across regimes. See Janger, *Universal Proceduralism*, *supra* note 15, at 821-22.

bankruptcy courts will be forced to analyze the term and create an analytical framework. In the case of COMI, bankruptcy courts use relevant U.S. precedent as well as EC precedent and EC law to help guide their analysis.<sup>315</sup> Unless another State adopts a framework for economic integration first, United States bankruptcy courts would not have direct precedent to help analyze economic integration. Therefore, bankruptcy courts will consider sources such as the Proposed Legislative Guide, analogous precedent, and academic commentary. As profiled in Part V, a consolidated MEG proceeding could currently occur in the United States and the Economic Integration Test could form part of a § 1112(b) analysis of the foreign members.

Deciding whether a MEG is economically integrated is important both to mitigate concerns about consolidation injuring Pride and to increase acceptance of group-based MEG solutions. Without sufficient tethers binding the various members to the parent, each member is an independent entity with its own COMI. Even procedural consolidation unnecessarily infringes on Pride.<sup>316</sup> Moreover, if the members of the MEG are not integrated, a group solution will maximize neither creditor returns nor the chances of a successful reorganization.<sup>317</sup> As noted previously, courts attempting to seize jurisdiction of all MEG members should use a test of economic integration to ensure consolidation is in the members' best interests and thereby further the acceptability of a consolidated proceeding.

The Economic Integration Test relies upon a test formulated by the bankruptcy court for the Southern District of New York in the case of *In re General Growth Properties* ("GGP").<sup>318</sup> The first two parts of the Test use analyses from *GGP*.<sup>319</sup> The Interests of the Group Analysis decides whether the interests of the group and the individual members would be best served by allowing the individual members to file. The Good Faith Analysis judges the objective futility of the member's filing and whether the member has a subjective bankruptcy purpose.<sup>320</sup> Although these two analyses are applied slightly differently

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<sup>315</sup> See *In re Fairfield Sentry Ltd.*, 2011 U.S. Dist. LEXIS 105770, at \*10, \*20–21 (S.D.N.Y. Sept. 16, 2011) (analyzing the principal place of business as part of COMI analysis); *In re Millennium Global Emerging Credit Master Fund Ltd.*, 458 B.R. 63, 74 (Bankr. S.D.N.Y. 2011) (citing, *inter alia*, Collins & Aikman Corp. Group, [2005] EWCH (Ch) 1754 P 39, 2005 WL 4829623; Shierston v. Vlieland-Boddy, [2005] WECA Civ. 974 [2005] W.L.R. 3966 (2005)); *In re Sphinx Ltd.*, 351 B.R. 103, 118–19 (Bankr. S.D.N.Y. 2006).

<sup>316</sup> Mevorach, *Towards a Consensus*, *supra* note 7, at 399.

<sup>317</sup> *Id.*

<sup>318</sup> *In re Gen. Growth Props., Inc.*, 409 B.R. at 43.

<sup>319</sup> *Id.* at 61.

<sup>320</sup> The Test is stricter than that applied in *GGP* which required dismissal only upon a satisfaction of both prongs of the Good Faith Analysis. *In re Gen. Growth*

in a MEG case, they remain vital considerations. Comity and assistance are necessary for the COMI of the Group to administer assets of foreign members. Foreign proceedings will be unwilling to aid a consolidated proceeding in the United States if the States where important members possess assets will not cooperate, thereby making a group-based solution futile. Furthermore, allowing abusive filings by foreign members will undercut support for future proceedings.<sup>321</sup> Analyzing the benefits of a potential consolidated proceeding is important to garner support from foreign proceedings that control the MEG's assets. The Cumulative Analysis then decides whether the members who passed the Interests of the Group and the Good Faith Analysis, plus domestic members, are potentially sufficient to create a group-based solution. If members fail the Interests of the Group or the Good Faith analysis, they will not be considered in analyzing whether a consolidated solution should be pursued.<sup>322</sup>

*GGP* was not a chapter 15 case, but much of the court's analysis is applicable to MEGs.<sup>323</sup> The court considered whether solvent subsidiaries should be allowed to file with their parent in a procedurally consolidated case. Whether to allow a subsidiary to file in a consolidated case in the COMI of the Group is a synonymous inquiry. In both cases a consolidated proceeding should only occur when the members are economically integrated—a group solution will benefit the individual members as well as the group as a whole—and their filings will be in good faith.

#### A. *Interests of the Group*

*GGP* considered why both the member and group interests would be best served by allowing the members to file for bankruptcy protection.<sup>324</sup> When the solvent subsidiaries were dragged into bankruptcy to aid a group-wide solution, their creditors objected that they should not have filed bankruptcy.<sup>325</sup> In denying the creditors' motion to dismiss, the court focused on the links between the parent and the subsidiaries.<sup>326</sup> First, it noted that the creditors "were unaware that they were extending credit to a company that was part of a much larger group, and that there were benefits as well as possible detri-

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*Props., Inc.*, 409 B.R. at 65-66; see also *In re Kingston Square Assocs.*, 214 B.R. 713, 725 (Bankr. S.D.N.Y. 1997).

<sup>321</sup> Leibner, *supra* note 299, at 1187 (listing a parade of horrors resulting from allowing abusive filings).

<sup>322</sup> *In re Gen. Growth Props., Inc.*, 409 B.R. at 59.

<sup>323</sup> *Id.* at 54.

<sup>324</sup> See *id.*

<sup>325</sup> *Id.* at 55.

<sup>326</sup> See *id.* at 48-53.

ments from this structure.”<sup>327</sup> Due to the integration of the group, “[i]f the ability of the Group to obtain refinancing became impaired, the financial situation of the [solvent] subsidiary[ies] would inevitably be impaired.”<sup>328</sup> Although the interests of the parent should be considered, *GGP* cautioned that neither “the interests of the subsidiaries or their creditors should be sacrificed to the interests of the parents and their creditors.”<sup>329</sup> Instead, “there need be no sacrifice of fundamental rights,” when, as in *GGP*, the interests of the individual subsidiaries and the group as whole all support the bankruptcy filings of the subsidiaries.<sup>330</sup>

*GGP* relied upon two other cases identifying how links between a subsidiary and its parent may support a subsidiary’s bankruptcy filing.<sup>331</sup> In *Heisely v. U.I.P. Engineered Products Corp.*, the Fourth Circuit Court of Appeals allowed the parent’s subsidiaries to file for bankruptcy hours before a state court judgment ordered the sale of the subsidiaries.<sup>332</sup> The Fourth Circuit found that it was “sound business practice for [the parent] to seek chapter 11 protection for its wholly owned subsidiaries when those subsidiaries were crucial to its own reorganization plan.”<sup>333</sup> Additionally, “an identity of interest . . . justifies the protection of the subsidiaries as well as the parent corporation.”<sup>334</sup> In *In re Mirant Corp.*, the bankruptcy court allowed the filing of an insolvent parent’s solvent subsidiary as well.<sup>335</sup> Because the solvent subsidiary was a vital piece to the parent corporation’s enterprise, “[a] failure to file for [relief for] an entity that is a principal member of the family could prove disastrous. . . .”<sup>336</sup> Moreover, the solvent subsidiary would have been injured by the filings of its affiliates.<sup>337</sup>

Although the Interests of the Group analysis is very fact specific, it should consider the extent to which a MEG’s members’ fates are intertwined, as well as the MEG’s corporate governance structure. If the fates of the MEG’s members are strongly intertwined, creditors

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<sup>327</sup> *Id.* at 61.

<sup>328</sup> *Id.*

<sup>329</sup> *Id.* at 63.

<sup>330</sup> *Id.*

<sup>331</sup> *See id.*

<sup>332</sup> *In re U.I.P. Engineered Prods. Corp.*, 831 F.2d 54, 55-56 (4th Cir. 1987).

<sup>333</sup> *Id.* at 56.

<sup>334</sup> *In re Gen. Growth Prods., Inc.*, 409 B.R. at 61-62 (quoting *In re U.I.P. Engineered Prods. Corp.*, 831 F.2d at 56).

<sup>335</sup> *In re Mirant Corp.*, No. 03-46590, 2005 WL 2148362, at \*13 (Bankr. N.D. Tex. Jan. 26, 2005).

<sup>336</sup> *Id.* at \*6.

<sup>337</sup> *Id.*



should expect MEG consolidation.<sup>338</sup> Creditors of group members located outside of the COMI of the Group will surely complain about the consolidation of the proceedings, but just as in *GGP*, the integration of the MEG members will provide notice that the group members' futures are interdependent.<sup>339</sup> Paralleling the analysis used in *Heisley*, an Interest of the Group analysis should consider the effects of a member being organized alone at its COMI compared to its potential place in a group-based proceeding administered by the COMI of the Group.<sup>340</sup> If a member were a vital cog in the MEG, but standing alone, it would be far less valuable or unable to operate. Then, similarly to *Heisley*, the interests of the group and member would both favor a group-based solution. Such a comparison would be vital for winning support and comity from other proceedings. The factors enumerated by the Working Group could also illustrate the interrelatedness of group members. The degree of control the parent exerts over the subsidiary, including its corporate governance, administrative functions, and corporate policy, as well as the size of the parent's ownership stake in subsidiary, could all be useful for analyzing whether a MEG is economically integrated.<sup>341</sup>

### B. Good Faith Analysis

The first prong of the Good Faith Analysis is objective futility.<sup>342</sup> *Carolyn Corp. v. Miller*,<sup>343</sup> the case *GGP* relied upon, explained that a debtor fails this prong when "there is no going concern to preserve. . . and. . . no hope of rehabilitation, except according to the debtor's 'terminal euphoria.'"<sup>344</sup> The court advocated a low threshold because even a remote chance of a successful reorganization or sale should be fostered.<sup>345</sup> One example of an objectively futile debtor occurred where a holding company for corporate debt experienced continuing losses without attempting to reorganize, rehabilitate, or liquidate.<sup>346</sup>

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<sup>338</sup> See generally *In re Gen. Growth Prods., Inc.*, 409 B.R. at 43.

<sup>339</sup> See generally *id.*

<sup>340</sup> See generally *In re U.I.P. Engineered Prods. Corp.*, 831 F.2d at 54.

<sup>341</sup> See *Treatment of Corporate Groups in Insolvency 2006*, *supra* note 168, at 14.

<sup>342</sup> *In re Gen. Growth Prods., Inc.*, 409 B.R. at 65-66.

<sup>343</sup> *Carolyn Corp. v. Miller*, 886 F.2d 693 (4th Cir. 1989).

<sup>344</sup> *Id.* at 701-02.

<sup>345</sup> *Id.* at 701.

<sup>346</sup> *In re Landmark Atlantic Hess Farm, LLC*, 448 B.R. 707, 718 (Bankr. D. Md. 2011) (dismissing case based on another Code section but finding that the circumstances "may be found to satisfy a separate cause for dismissal."). *Cf.* *Russel v. HSBC Bank USA N.A. (In re Awal Bank, BSC)*, Nos. 09-15923(ALG), 10-15518(ALG), 2011 WL 3416733, at \*8 (Aug. 4, 2011) (applying same standard but failing to dismiss foreign debtor).

International cases raise issues which may make objective futility a much more taxing requirement. International comity is necessary for a successful MEG consolidation. Lord Hoffman's beliefs notwithstanding, to allow a COMI of the Group to administer its assets, a foreign proceeding may require both administrative savings or benefits and little, if any, harm to local creditors.<sup>347</sup> Without the aid of a foreign proceeding, a member's case may be futile.<sup>348</sup>

The second prong of the Good Faith Analysis is subjective bad faith. To possess subjective bad faith, a debtor, *inter alia*, may lack a proper purpose for commencing a case. A proper purpose for commencing a chapter 11 case is preserving going concerns and maximizing property available to satisfy creditors.<sup>349</sup> A chapter 7 case only focuses on the later. *In re Mirant* is an example of a proper purpose as the subsidiary's filing was "to continue as a going concern as part of the corporate family enterprise."<sup>350</sup> The debtor's bankruptcy filing in *SGL Carbon* is an example of bad faith.<sup>351</sup> There, the solvent debtors tried to use bankruptcy as a shield against impending antitrust litigation.<sup>352</sup> Unlike mass-tort claims defendants who use bankruptcy as a

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<sup>347</sup> Compare *McGrath*, [2008] UKHL at [12] (noting the lack of administrative savings by Australia administering the English assets, yet still allowing their administration), *with id.* at [11] (noting that the Court of Appeal considered the benefits of a foreign administration as a possible reason for allowing foreign administration of domestic assets to the detriment of domestic creditors). This holdout power is very concerning but currently insurmountable. See Pottow, *A New Role*, *supra* note 59, at 586 (noting holdout power of local creditors to force synthetic secondary proceedings).

<sup>348</sup> *McGrath*, [2008] UKHL at [12].

<sup>349</sup> *In re Integrated Telecom Express*, 384 F.3d 108, 119 (3d Cir. 2004) (quoting *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 453 (1999)). The Third Circuit further explained that a liquidating sale must also have a proper purpose of "either preserv[ing] some going concern value *e.g.*, by liquidating a company as a whole or in such a way as to preserve some of the company's good will, or by maximizing the value of the debtor's estate." *Id.* at 120 n.4.

<sup>350</sup> *In re Mirant Corp*, No. 03-46590, 2005 WL 2148362, at \*8 (Bankr. N.D. Tex. Jan. 26, 2005). If the case is under Chapter 11 because no foreign proceeding has yet commenced, the bankruptcy court may dismiss a Chapter 11 for cause under § 1112(b)(4) which provides a non-exhaustive list of factors including the futility of a plan under § 1112(b)(4)(J), or rely upon § 305(a)(1) which allows dismissal if it would be in the best interests of creditors and the debtor. If the case is under Chapter 15 because a foreign proceeding has commenced, then the court may dismiss the case relying on § 305(a)(2)(A) and (B) if the purposes of Chapter 15 would be better served by dismissal. See Mayr, *supra* note 260, at 481-93.

<sup>351</sup> *In re SLG Carbon Corp.*, 200 F.3d 154 (3d Cir. 1999).

<sup>352</sup> *Id.* at 158 ("SGL AG Chairman Robert Koehler conducted a telephone conference call with securities analysts, stating . . . that SGL Carbon's Chapter 11 peti-

shield against massive adverse judgments,<sup>353</sup> SGL Carbon only faced claims that would not significantly affect its financial stability.<sup>354</sup> The debtor's plan of confirmation proposed to pay all claims in full, in cash, except antitrust claimants who would receive only "limited-time credits to purchase SGL Carbon's products."<sup>355</sup> The court found that the debtor's treatment of the claimants was an attempt to pressure the plaintiffs into accepting the debtor's settlement proposal of the antitrust litigation.<sup>356</sup> In other words, the court found that debtor's bankruptcy petition "lack[ed] a valid reorganizational purpose and consequently lack[ed] good faith making it subject to dismissal for 'cause.'"<sup>357</sup> Notwithstanding the holding in *SGL Carbon*, subjective bad faith is also a low bar.<sup>358</sup>

The incentive to escape foreign courts for invidious reasons, however, may make the Good Faith requirement more important in international cases.<sup>359</sup> This article already chronicled the saga of Yukos Oil and its attempt to evade its tax debts in Russia. Yukos Oil, however, is not the only example of a foreign debtor lacking a good faith, as foreign entities have attempted to succeed where SGL Carbon failed and obtain a litigation advantage by filing in the United States. For example, in *In re Head*, a Canadian debtor filed a chapter 11 petition in the United States to evade contractual insurance liability and forum selection obligations pursuant to contracts with Lloyds of London.<sup>360</sup> The bankruptcy court dismissed the filing because it lacked fundamental fairness and honest intentions.<sup>361</sup> Relying on *In re Head*, other bankruptcy courts have also dismissed bankruptcy proceedings filed by foreign debtors attempting to gain a "perceived legal advantage."<sup>362</sup>

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tion was 'fairly innovative [and] creative' because 'usually Chapter 11 is used as protection against serious insolvency or credit problems, which is not the case [with SGL Carbon's petition].')

<sup>353</sup> See, e.g., *In re Johns-Manville, Corp.*, 36 B.R. 727, 730 (Bankr. S.D.N.Y. 1984).

<sup>354</sup> *In re SGL Carbon*, 200 F.3d at 167-68.

<sup>355</sup> *Id.* at 167.

<sup>356</sup> *Id.*

<sup>357</sup> *Id.* at 169.

<sup>358</sup> See *In re SGL Carbon Corp.*, 233 B.R. 285 (D. Del. 1999), *rev'd*, 200 F.3d 154, 169 (3d Cir. 1999) (finding by the district court that the debtor's bankruptcy filing in good faith even considering the facts listed above).

<sup>359</sup> See Leibner, *supra* note 299, at 1186-87 (expressing concern about forum shopping by foreign debtors to use the United States' debtor-friendly bankruptcy laws).

<sup>360</sup> *In re Head*, 223 B.R. 648, 649 (Bankr. W.D.N.Y. 1998).

<sup>361</sup> See *id.* at 653-54.

<sup>362</sup> See Mayr, *supra* note 260, at 491 n.79 (listing cases).

### C. Cumulative Analysis

Consolidating cross-border bankruptcies effectuates more group-wide solutions. If, however, those solutions are impossible, then consolidation should not be attempted. If a member failed either the Interests of the Group or the Good Faith Analyses, then a court would dismiss the member's case.<sup>363</sup> After subjecting all foreign members to both Analyses, those members who passed both may take part of a group solution.<sup>364</sup> The court must then decide whether the domestic members and the remaining foreign members could comprise a group-wide solution. If a vital member's case was dismissed, then any type of group-wide solution might be impossible.

### D. Applying Economic Integration Through the Lens of Yukos

Although the *Yukos Oil* cases were MEG cases, not chapter 15 cases,<sup>365</sup> with some slight factual changes, the cases provide a realistic trial of the Test. Assume that *Yukos* was a chapter 11 case, and that *Yukos* was a United States MEG (the hypothetical "Yukos USA MEG"), controlled by a registered office in the United States. Thus, while the United States would be the COMI of the Group, almost all of *Yukos*' assets and subsidiaries are in Russia (including the hypothetical "Yukos Russia"). By opening bank accounts in the United States, the subsidiaries could easily satisfy the requirements of § 109 and file petitions with *Yukos USA* in the United States. Then, each foreign member of *Yukos USA MEG* would be subjected to the Interests of the Group Analysis and the Good Faith Analysis. Many of the members of *Yukos USA MEG* would probably fail the Test, including *Yukos Russia*. The Interests of the Group analysis is fact specific but some links which could be sufficient for *Yukos Russia* include, (i) *Yukos USA*'s substantial ownership of *Yukos Russia*, (ii) control over *Yukos Russia*'s corporate governance, or (iii) a finding that it had better prospects of continuing as a going concern by reorganizing with other group members.<sup>366</sup>

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<sup>363</sup> This is what the movants endeavored to do. See *In re Gen. Growth Prods., Inc.*, 409 B.R. at 45.

<sup>364</sup> The Cumulative Analysis deals with an issue suggested by Eva M.F. de Vette, who wondered whether an individual debtor's fortunes should be sacrificed for those of the group. de Vette, *supra* note 186, at 228.

<sup>365</sup> *Yukos* would have qualified as a Chapter 15 case if it had occurred after the effective date of Chapter 15, October 17, 2005, and a foreign representative had applied for recognition. See Bufford, *Tertiary*, *supra* note 64, at 171-72.

<sup>366</sup> These factors reflect not only those noted by *GGP* but also the original factors suggested by the Working Group but eventually, these factors became confused with the factors for deciding the COMI of the group. See Legislative Guide on Insolvency Law 2009, *supra* note 216, at ¶ 8-9 (comparing Legislative Guide on In-

Even if Yukos Russia satisfied the Interests of the Group Analysis, it would need to satisfy the Good Faith Analysis. First, to show that its case is not objectively futile, the cooperation of the Russian government would be a prerequisite to any reorganization or sale. The second prong, a subjective bankruptcy purpose, will usually follow the first because countries will not cooperate unless the end result will be reorganization or sale as compared to an end run on domestic policies such as taxes. Nonetheless, it is important to curb abusive filings.<sup>367</sup> If the Yukos Russia failed either the Interests of the Group or the Good Faith Analyses, the bankruptcy court would dismiss its case. Finally, the court would consider whether the subsidiaries that passed the Interests of the Group Analysis and the Good Faith Analysis could, together with the Yukos USA MEG and any other domestic members, effectuate a group-wide solution. If many of the subsidiaries' cases that controlled principal assets were dismissed, a group-wide solution could be impossible.

## CONCLUSION

Globalization requires a more efficient framework for administering insolvent MEGs because duplicative proceedings and lost value currently plague MEG bankruptcies. The current lack of a framework for consolidating MEG proceedings results directly from the many issues that MEGs pose.<sup>368</sup> The better a framework can mitigate issues, however, the more willing other States will be to allow member consolidation. Although the Test is designed to combat these issues, little other United States-specific commentary exists for comparison. Scholarship has directly impacted the Model Law and chapter 15,<sup>369</sup> and

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solvency Law 2008, *supra* note 127, at ¶ 13, with Treatment of Corporate Groups in Insolvency 2006, *supra* note 168, at ¶¶ 35-38).

<sup>367</sup> See Erin K. Healy, *All's Fair in Love and Bankruptcy? Analysis of the Property Requirement for Section 109 Eligibility and Its Effect on Foreign Debtors Filing in U.S. Bankruptcy Courts*, 12 AM. BANKR. INST. L. REV. 535, 560 (2004); *cf. In re Compania de Alimentos Fargo, S.A.*, 376 B.R. 427, 433-35 (Bankr. S.D.N.Y. 2007) (noting that a bankruptcy court may dismiss a concurrently pending chapter 11 case if the interests of the chapter 15 are served).

<sup>368</sup> Legislative Guide on Insolvency Law 2010, *supra* note 97, at 3 ("When the text of what became the UNCITRAL Model Law was debated, groups were regarded as 'a stage too far.'").

<sup>369</sup> Judges often cite law review articles about chapter 15 for support because of the immense changes it has wrought and the resulting lack of applicable case law. See, e.g., Westbrook, *Chapter 15 at Last*, *supra* note 47 (cited by 11 courts); Jay Lawrence Westbrook, *Locating the Eye of the Financial Storm*, 32 BROOK. J. INT'L L. 1019, 1024 (2007) (cited by 6 courts).

future scholarship should seize the opportunity to propose, analyze, and evaluate frameworks for consolidating MEGs under the Model Law generally and the United States in particular.