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### Locating the Eye of the Financial Storm

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# LOCATING THE EYE OF THE FINANCIAL STORM

*Jay Lawrence Westbrook\**

Bankruptcy law has become a prominent part of the effort to bring coherence to the management of a global economic system that operates through multinational enterprises but must function in a world of sovereign states.<sup>1</sup> The very nature of bankruptcy law requires a unified legal response to a debtor's general default.<sup>2</sup> In the case of a multinational enterprise, that response requires identification of a single jurisdiction that will control, or at least coordinate, the task. Any standards chosen for specifying the primary jurisdiction will necessarily be approximate and imperfect, given the fundamental mismatch between the broad scope of our economic institutions and the narrower reach of our political organizations. This Article addresses recent efforts to develop workable standards for that purpose.

## I. CHOICE OF LAW AND COMI

Together, the establishment of the European Union Insolvency Regulation (E.U. Regulation)<sup>3</sup> and the widening adoption of the Model Law on Cross Border Insolvency (Model Law)<sup>4</sup> represent a powerful trend to-

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1. See generally Christoph Paulus, *The Global Insolvency Law And The Role Of Multinational Institutions*, 32 BROOK. J. INT'L L. 755 (2007).

2. Jay Lawrence Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276 (2000). In an interesting Article in this symposium, Professor Rasmussen suggests that creditor control of bankruptcy proceedings may lead to a market solution to coordination of multinational bankruptcies. Robert K. Rasmussen, *Where are all the Transnational Bankruptcies?: The Puzzling Case for Universalism*, 32 BROOK. J. INT'L L. 983 (2007). He points to the absence of multiple proceedings in some major bankruptcies as evidence. His thesis deserves serious attention. While this Article is not a suitable vehicle for this discussion, I can point out that it seems equally interesting that so many practicing lawyers of great experience in multinational bankruptcies, including some distinguished contributors to this symposium, seem to believe the legal issues that we are discussing—and the choice between universalism and territorialism—are important.

3. Council Regulation 1346/2000, Council Regulation on Insolvency Proceedings, 2000 O.J. (L 160) 1 (EC).

4. U.N. Comm'n on Int'l Trade Law [UNCITRAL], *Model Law on Cross-Border Insolvency with Guide to Enactment*, U.N. Sales No. E.99.V.3 (1999). The United States version of the Model Law was adopted as Chapter 15 by the 2005 amendments to the Bankruptcy Code. 11 U.S.C. § 1501 *et seq.* (2007). The language of Chapter 15 is very

ward universalism in the management of multinational bankruptcies.<sup>5</sup> Both regulations require deference to a “main” proceeding, so identification of that jurisdiction is central to their proper application. Both laws place the main proceeding at the “the center of [the debtor’s] main interests” (COMI). The choice of principal forum in turn will have important implications for the choice of the bankruptcy rules to be applied and therefore the substantive outcomes for stakeholders.

COMI is similar to standards like “principal place of business,” “chief executive offices,” or “real seat”<sup>6</sup> that one finds in many statutes in the United States and elsewhere. It is not hopelessly vague, but it is clearly subject to various interpretations. This Article addresses a fundamental question about the interpretation of the COMI standard: what policy factors should influence the interpretation of that standard? I will argue that the two primary factors are predictability and the likelihood of selection of an acceptable substantive law. I will also argue that we should not necessarily apply the same COMI standard under the Model Law and the E.U. Regulation. Finally, I will conclude that in the current, evolving state of the management of multinational bankruptcies, a “Dual COMI” standard<sup>7</sup> is an acceptable, if imperfect, basis for the application of modified universalism.

Central to universalism in bankruptcy matters is the ideal of a single worldwide proceeding in which one court or administrative body administers the default of a multinational corporation with the assistance of other courts as necessary.<sup>8</sup> It is conceded that this ideal will not be reached in the near future, so the notion of modified universalism has

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close to that of the Model Law. H.R.REP. No. 109–31, pt. 1, at 105 (2005). Virtually everything I have to say about the Model Law is meant to apply to Chapter 15 as well.

5. I use the term “bankruptcy” in the North American way given Brooklyn’s present location, but I mean to refer to a bankruptcy or insolvency proceeding involving a business corporation.

6. 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, 1008 (2007). An excellent discussion in English of the real seat doctrine is found in Tobias Caspary, *The Freedom of Establishment and the Real Seat Doctrine after the Überseering Decision of the ECJ 2003* (unpublished Article, on file with the author).

7. See *infra* notes 71–72 and accompanying text.

8. See *Cambridge Gas Transp. Corp. v. Official Comm. of Unsecured Creditors*, [2006] UKPC 26, [2006] 3 W.L.R. 689, para. 16 (appeal taken from the Isle of Man) (U.K.); see also American Law Institute, *Principles of Cooperation Among the NAFTA Countries* 8 (2003) [hereinafter ALI Principles]. (I had the privilege of serving as the U.S. Reporter for the project.) For the current state of the debate between territorialism and universalism and some interesting suggestions of a middle way, see Edward Janger, *Universal Proceduralism*, 32 BROOK. J. INT’L L. 819 (2007).

been advanced to describe an approach that seeks to achieve pragmatic results as close to the universalist ideal as possible.<sup>9</sup>

I have long believed that in multinational bankruptcies choice of bankruptcy law and choice of bankruptcy forum are intimately related—and should be.<sup>10</sup> Every aspect of any national bankruptcy law is part of an integrated set of decisions about the policies to be served and the stakeholders to be benefited. Thus, for example, the point of the avoiding powers found in virtually every bankruptcy law is to recover value that was misallocated pre-bankruptcy and to redistribute it. The avoiding powers vindicate the desire for orderly and fair distributions to the favored stakeholders in a bankruptcy proceeding. That benefit must be balanced against the cost of the disruption to markets inherent in avoidance of transactions that are ordinarily unexceptionable. Each jurisdiction draws that balance differently and also has different priorities in management and distribution of bankruptcy assets.<sup>11</sup> Thus it would rarely make sense to void a pre-bankruptcy transaction under the bankruptcy policies of Country A in a proceeding in which the distribution of any avoidance recovery would be vindicating the policies of Country B.<sup>12</sup> That result would ill-serve the policies of both countries. B would not avoid because of market disruption concerns, while A would give the avoidance recovery to a different set of beneficiaries. The avoidance and the distribution are mismatched like brown shoes with a black suit.

The close integration among bankruptcy rules and policies in each jurisdiction applies to the big four of bankruptcy policy: control, priority, avoidance, and reorganization policy. In a system of universalism each of

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9. ALI Principles, *supra* note 8, at 8; Janger, *supra* note 8.

10. See generally Janger, *supra* note 8, at 831; Jay Lawrence Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L.J. 457 (1991); Jay Lawrence Westbrook, *Choice of Avoidance Law in Global Insolvencies*, 17 BROOK. J. INT'L L. 499 (1991). Cf. *In re Board of Directors of Telecom Argentina, S.A.*, No. 06 Civ. 2352NRB, 2006 WL 3378687, at \*6 (S.D.N.Y. Nov. 20, 2006) (Trust Indenture Act satisfied by Argentinean bankruptcy procedures).

11. See, e.g., Nick Segal, *The Effect of Reorganisation Proceedings on Security Interests—The Position under English and U.S. Law*, 32 BROOK. J. INT'L L. 927 (2007); see generally Jay Lawrence Westbrook, *Universal Participation in Transnational Bankruptcies*, in MAKING COMMERCIAL LAW, ESSAYS IN HONOUR OF ROY GOODE 419 (Ross Cranston ed., 1997); Jay Lawrence Westbrook, *Universal Priorities*, 33 TEX. INT'L L.J. 27, 30 (1998).

12. See Jay Lawrence Westbrook, *Avoidance of Pre-Bankruptcy Transactions in Multinational Cases*, \_\_ TEX. INT. L.J. \_\_ (forthcoming 2007) [hereinafter Westbrook, *Pre-Bankruptcy*] [on file with *Brooklyn Journal of International Law*]. But see *Al Sabah v. Grupo Torras S.A.* [2005] 2 W.L.R. 904, [2005] UKPC 1. Avoidance under a nonbankruptcy avoiding power may require a different analysis. Westbrook, *Pre-Bankruptcy*, *supra*.

these four elements should be governed by the law of the main proceeding.<sup>13</sup> Under modified universalism, such centralization should be the goal, although not always the result. I will leave the argument thus stated without further elaboration for the purposes of this Article, but I have spelled it out in other Articles, including one currently pending publication.<sup>14</sup>

The immediate consequence of linking choice-of-law decisions to COMI is to increase greatly the stakes for choosing the correct COMI. It therefore increases the willingness of parties to litigate the COMI issue, because the choice of forum will come ever closer to determining substantive outcomes in a Model Law-EU Regulation world. The larger implication is that this link makes it inevitable that we should be concerned about the substantive law likely to be applied by the adoption of various interpretations of COMI.

## II. FACTORS THAT SHOULD INFLUENCE INTERPRETATION OF THE COMI STANDARD

Two policy factors may be important in determining the best standard for interpreting the COMI requirement: predictability and the likely quality of the substantive law of the chosen jurisdiction. Neither should be overemphasized and no one should imagine a perfect fit from any possible rule, a goal that is as elusive in this area of the law as in all the others. Both predictability and substantive law are important in interpreting COMI, but they may differ in importance between the Model Law and the E.U. Regulation, producing defensible differences in interpretation of COMI under the two texts. I will work through the analysis of the two factors and then discuss the Model Law-E.U. Regulation distinction.

### *A. Predictability*

To one degree or another, creditors may rely upon the laws of a corporation's state of incorporation or principal place of business to regulate the management of a general default by the corporation, a point recognized in the United States as long ago as 1883.<sup>15</sup> It seems hard to argue that this reliance—or potential reliance—is not important to the interpre-

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13. *Cambridge Gas Transp. Corp. v. Official Comm. of Unsecured Creditors*, [2006] UKPC 26, [2006] 3 W.L.R. 689, para. 16 (appeal taken from the Isle of Man) (U.K.); *In re Collins & Aikman Europe SA*, [2006] EWHC (Ch) 1343 (English liquidators may distribute under foreign priority schemes as part of a worldwide settlement). *But see* *HIH Cas. & Gen. Ins. Ltd.*, [2005] EWHC (Ch) 2125, [2006] All E.R. 672 (English priority scheme must control for distributions from English assets).

14. Westbrook, *Pre-Bankruptcy*, *supra* note 12.

15. *Canada S. Ry. Co. v. Gebhard*, 109 U.S. 527, 537–38 (1883).

tation of COMI, if only in a negative sense. As the United States Supreme Court said in *Gebhard*:

Such being the law, it follows 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. To all intents and purposes, he submits his contract with the corporation to such a policy of the foreign government, and whatever is done by that government in furtherance of that policy, which binds those in like situation with himself, who are subjects of the government, in respect to the operation and effect of their contracts with the corporation, will necessarily bind him.<sup>16</sup>

However, while it seems likely that creditors rely upon the bright-line distinction between domestic and foreign laws, it is much less clear whether that reliance goes farther to a reliance on a specific foreign law governing bankruptcy. Do creditors just note that some strange law may apply or do they focus on the specific law that might govern a bankruptcy of their debtor? That question should be the subject of serious empirical study.<sup>17</sup> An interim position may be more plausible: that creditors may go one step beyond the domestic-foreign distinction to rely upon the difference between corporations organized in jurisdictions with which the creditors are “legally comfortable” and those organized in other jurisdictions.<sup>18</sup> To that extent predictability may be important. If so, then predictability of that sort should be a major concern in identifying a COMI.

Predictability is always in tension with correctness of result. The world offers endless variations of the clash between competing values and policies, leaving the judge torn between the predictable result and the one that is correct in this case or that establishes a correct rule for the future. So, we may expect that a balance between predictability and flexibility must be drawn with regard to COMI as well. The question remains as to where the balance should be struck. Two recent cases mark the ends of the spectrum—the *SPhinX* case establishing maximum discretion and the *Eurofood* case focusing on maximum predictability.

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16. *Id.*

17. See Part IV *infra*.

18. They might be legally comfortable based on fact or on prejudice, of course. In large transactions, they might inquire closely, through lawyers, and develop real knowledge.

### 1. Discretion and the Right Result Today

Maximum discretion, ignoring predictability, permits a judge to achieve what seems to the court to be the right result, but often at a considerable cost to commercial tranquility and efficiency. A central point of the Model Law was meant to be adoption of a structure less amorphous than comity and a procedure more suited to bankruptcy than the ancient machinery of judgment recognition. It was also designed quite specifically to replace the *structure* of U.S. Bankruptcy Code section 304, in which section 304(c) imposed sometimes tight restrictions on cooperation based on the substance of the foreign law,<sup>19</sup> while drawing no distinction between primary and secondary bankruptcy proceedings in other countries.

The new structure in the Model Law would serve several important purposes. First, it would guide the court, while giving assurance to other jurisdictions that decisions were not arbitrary or based on local favoritism. The uniformity of structure would serve the latter purpose by increasing the transparency of the process. The Model Law grants great discretion as to specific relief, but imposes a fairly rigid procedural structure for recognition of foreign proceedings. It also establishes a hierarchy of main and non-main proceedings that draws a sharp distinction between the two. COMI is a central organizing element in that hierarchical structure. It would be a mistake to adopt an approach that adds a further layer of discretion and that blurs even the limited amount of structure the Model Law is able to impose.

The *SPhinX* case in New York carries the flexible interpretation of COMI to an extreme.<sup>20</sup> The analysis in the court's opinion offers much to admire as to specific points, but overall it seems to virtually eliminate predictability in determining COMI, consigning each case to the unrestrained discretion of the judge. *SPhinX* was incorporated in the Cayman Islands, but had no other substantial connection with that jurisdiction—no employees, operations, or assets. All of its directors and most, if not all, of its creditors and investors were located elsewhere. The court found that both objective and pragmatic considerations would locate the debtor's COMI outside the islands and therefore make the Caymans case a non-main proceeding under Chapter 15. Yet the court went on to state that in a different case it would have ignored all those factors on the sole

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19. See *In re Treco*, 240 F.3d 148 (2d Cir. 2001).

20. *In re SPhinX*, 351 B.R. 103 (Bankr. S.D.N.Y. 2006), *aff'd*, 2007 WL 1965597 (S.D.N.Y. July 3, 2007) (The district court affirmance was published just before this Article went to press. The opinion simply approved the bankruptcy court analysis.).

ground that the parties in interest had not objected to the Cayman proceeding and had not initiated a bankruptcy anywhere else.<sup>21</sup>

The implicit rule seems to be that creditors and other parties in interest may simply agree about the COMI and may be deemed to have done so if they have not affirmatively objected, even where there is virtually no other basis for the COMI finding. In the end, however, the court refused main status on the ground of *the bad faith motives* of those who brought the case in the Cayman Islands.<sup>22</sup> The court, in effect, found that its discretion as to the COMI is so complete that any good reason to deny relief permits a finding that the foreign proceeding is non-main and the debtor's COMI located somewhere else.

The court's central concern was that the Cayman proceeding was a ploy to delay, and perhaps derail, the settlement of a claim against the debtor in a U.S. lawsuit.<sup>23</sup> Recognition of the foreign proceeding as a main proceeding would have triggered the automatic stay of section 1520 of the Bankruptcy Code. The opinion does not explain why the court could not have avoided this difficulty simply by finding a U.S. COMI for the company. That finding would have made the Cayman proceeding non-main and any injunction would have been discretionary. Instead, for reasons that are not apparent, the court went out of its way to state in dictum that a COMI could be based purely on creditor consent. It, then, refused to do so in this case on a ground wholly unrelated to the location of the company's main interests.<sup>24</sup> Even had the court held that the debtor's COMI was in the Cayman Islands based on creditor consent, it could still have foiled the attempt to block the settlement simply by recognizing the

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21. *Id.* at 120. The court noted that no other proceeding involving the debtor has been brought and "someone needs to manage the Debtors' winding up." *Id.*

22. *Id.* at 121–22. Unfortunately, the district court seemed to approve specifically the jurisdiction-by-consent holding of the bankruptcy court. 2007 WL 1965597, at \*8–9.

23. The debtor had been sued for the return of an alleged preference in another bankruptcy case.

24. *Cf. In re Aerovias Nacionales de Columbia S.A. (Avianca)*, 303 B.R. 1 (Bankr. S.D.N.Y. 2003). In *Avianca*, the New York bankruptcy court permitted a Colombian company to conduct what amounted to a main proceeding in the United States while there was no proceeding pending in Columbia. The result rested primarily on creditor consent and some connections with the United States. The larger question of bankruptcy jurisdiction by consent must be left to discussion on another occasion, but it seems to me that the result is hard to square with the Model Law or Chapter 15 of the U.S. Bankruptcy Code. The Model Law COMI provision on its face does not allow consent to determine if a foreign proceeding is a main proceeding. If that is true, it is hard to see how an adopting state (like the United States) can justify permitting consent to make a proceeding in a U.S. court a main proceeding when it would deny that status to a foreign proceeding in equivalent circumstances.



Cayman proceeding as a main proceeding and then lifting the automatic stay on bad-faith grounds.<sup>25</sup>

These holdings in *SPhinX* were the culmination of pages of analysis that reduced the carefully crafted structure of Chapter 15 to nothing more than a broad grant of judicial discretion. Now freed of the section 304(c) limitations, the court's interpretation effectively eliminates the new structure that replaces it under the Model Law. The result is that the court may do pretty much as it thinks best. There is no doubt that the Model Law and Chapter 15 give the court great discretion to *grant or deny relief* of various sorts, but a recognition of a proceeding and finding it to be main or non-main also invokes provisions that must be given effect.

The *SPhinX* court was unwilling to accept the restraints imposed by that structure, even though Chapter 15 has abolished the more specific restraints previously imposed by section 304.<sup>26</sup> The lesson for courts in other adopting jurisdictions will be clear: the local court may do exactly as it pleases, thus undoing the effort to create a procedure that would make good faith cooperation or its absence more certain and more transparent.<sup>27</sup> Predictability and transparency have considerable importance and decisions such as *SPhinX* essentially eliminate them.

The central mechanisms of Chapter 15 are recognition of the foreign proceeding and characterization of that proceeding as main or non-main. The *SPhinX* court essentially ignores the first mechanism, yet one of the most important changes brought by the Model Law is to centralize recognition in the bankruptcy courts using the Chapter 15 proceedings.<sup>28</sup> No court is entitled to grant comity or otherwise react to a foreign bank-

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25. See 11 U.S.C. §§ 362(d), 1520(a). These sections make section 362 applicable to the debtor and its property and therefore incorporate the grounds for lifting the stay under section 362(d), including "cause." H.R.REP. No. 109-31, at 114-15; United Nations Commission on International Trade Law (UNCITRAL), *Legislative Guide on Insolvency*, ¶ 33 (rev. 2005), available at [www.uncitral.org/pdf/english/texts/insolven/05-80722\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf).

26. See *In re Treco*, 240 F.3d 148, 154-55 (2d Cir. 2001) (requirements of section 304(c)).

27. The court relied fairly heavily on *Hoffman v. Bullmore (In re Nat'l Warranty Ins. Risk Retention Group)*, 306 B.R. 614 (B.A.P. 8th Cir.), *aff'd* 384 F.3d 959 (8th Cir. 2004), apparently because it also involved an offshore incorporation of a company whose objective COMI was undoubtedly in the United States. It did not note, however, that the decision preceded the adoption of Chapter 15, and involved vigorously objecting creditors (one of them represented by the current author). The then-applicable language of the Bankruptcy Code was much broader in identifying the debtor's location than is COMI under the 2005 Amendments that added Chapter 15. § 101(23) (amended) ("domicile, residence, principal place of business, or principal assets").

28. See Jay Lawrence Westbrook, *Chapter 15 At Last*, 79 AM. BANKR. L.J. 713, 726-27 (2005); see also H.R.REP. No. 109-31 (2005), at 111-12.

ruptcy proceeding unless Chapter 15 recognition is obtained from a bankruptcy court.<sup>29</sup> Conversely, every American court must grant comity to a foreign bankruptcy proceeding once it has received Chapter 15 recognition. These provisions highlight the importance of Chapter 15 recognition as such, aside from the grant of specific relief. They are entirely new and quite different from section 304.

The *SPhinX* opinion rests largely on the suggestion that Chapter 15 makes little real distinction between main and non-main proceedings.<sup>30</sup> With respect, that suggestion is clearly incorrect on the face of the statute. In fact, there are a number of important distinctions. For example:

1. Under section 1520, recognition of a main proceeding leads automatically to imposition of the usual stay under section 362(a). The stay can be lifted for the usual reasons, but it springs into place as soon as the relatively simple and relatively mechanical requirements of section 1517 have been satisfied.

2. Sections 1521(c) and 1523(b) sharply limit the relief that can be granted to a non-main proceeding, confining it to assets that the court specifically finds should be administered in that secondary jurisdiction.

3. Perhaps most important, recognition of a main proceeding limits any subsequent full American bankruptcy proceeding to those assets located in the territory of the United States, in sharp contrast to the usual worldwide effect of a United States bankruptcy. A non-main proceeding has no such effect.

The *SPhinX* opinion hinted that a main/non-main finding could be skipped altogether in an appropriate case, because cooperation between courts is what really matters, a proposition that fails to account for the clear language of section 1517(b)(1) that requires that the foreign proceeding be recognized as either main or non-main.

It is especially striking that the *SPhinX* court made almost no reference to the legislative history of this brand new statute. By contrast, the court in *Tri-Continental* discussed in detail both the U.S. legislative history and the background legislative history contained in the UNCITRAL Legislative Guide that accompanies the Model Law (Legislative Guide).<sup>31</sup> Instead, the *SPhinX* court cited U.S. Bankruptcy Code section 304 cases

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29. 11 U.S.C. § 1509(c)–(d) (2005).

30. *In re SPhinX*, 351 B.R. 103, 114–15 (Bankr. S.D.N.Y. 2006), *aff'd*, 2007 WL 1965597 (S.D.N.Y. July 3, 2007). Under prior law, ancillary relief was limited to foreign proceedings that were in some sense “main” by the definition of “foreign proceeding,” but the definition provided a broad menu of choices for the primary proceeding, including the state of incorporation if that were understood to be within the term “domicile.” See *In re Nat’l Warranty*, 306 B.R. at 620.

31. *In re Tri-Continental Exchange Ltd.*, 349 B.R. 627 (Bankr. E.D. Cal. 2006).

extensively, along with the EU Regulation and *Eurofood*.<sup>32</sup> Thus a key point of Chapter 15, the introduction of structure and uniformity, was ignored.

## 2. Predictability Over All

On the other hand, too exclusive a focus on predictability is also a mistake, especially if it leads to a rule that would choose legal “havens” as COMIs. One reading of *Eurofood*<sup>33</sup> would do just that if applied under the Model Law. Its emphasis on the jurisdiction of incorporation might threaten to award the COMI prize to that jurisdiction in almost every case.<sup>34</sup>

*Eurofood* has been much discussed,<sup>35</sup> so I will just sketch it briefly here. Eurofood was a subsidiary of the spectacularly fallen Parmalat group. It was incorporated in Ireland and was apparently a shell used by Bank of America in structuring financing transactions for the Parmalat group, having no actual employees, business, or operations.<sup>36</sup> The COMI question before the European Court of Justice (ECJ)<sup>37</sup> was whether, under the E.U. Regulation, the company’s center was its jurisdiction of incorporation, Ireland, or its alleged jurisdiction of administration, Italy.<sup>38</sup> The court chose the jurisdiction of incorporation with a strong emphasis on the presumption in favor of that jurisdiction.<sup>39</sup> In this section of the Article, I will discuss that sort of rule as it might be applied under the COMI provision of the Model Law. It creates two problems in that it both overemphasizes predictability and it too often chooses laws that are not in fact predictable in their results.

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32. *In re SPhinX*, 351 B.R. 103, 116–20 (Bankr. S.D.N.Y. 2006), *aff'd*, 2007 WL 1965597 (S.D.N.Y. July 3, 2007).

33. Case C-341/04, *Eurofood IFCS Ltd. v. Bank of America, N.A.*, 1999 E.C.R. I-3813 (2006).

34. *Id.* paras. 34–36.

35. Samuel L. Bufford, *Center of Main Interests, International Solvency Case Venue, and Equality of Arms: The Eurofood Decision at the European Court of Justice*, 27 NW. J. INT'L L. & BUS. 351 (2007); see also Gabriel Moss & Christoph Paulus, *The European Insolvency Regulation—The Case for Urgent Reform*, 19 INSOLVENCY INTELLIGENCE 1, 2 (2006); Christoph Paulus, *Two Comments on Advocate General Jacobs’ Opinion in the Eurofood Case*, GLOBAL TURNAROUND, Nov. 2005, available at <http://www.globalturnaround.com>.

36. In Star Trek terms, it was Crewman Number Six. See GALAXY QUEST (Dreamworks SKG 1999).

37. There were five questions all told.

38. Case C-341/04, *Eurofood IFCS Ltd. v. Bank of America, N.A.*, 1999 E.C.R. I-3813 (2006).

39. *Id.*

The first problem with a strong incorporation presumption is that we have little data about the extent or the mechanisms of reliance by creditors.<sup>40</sup> We risk giving the reliance factor much more weight than reality justifies, thus incurring too few benefits at considerable cost. One reason to be skeptical about creditor reliance is that we have weak laws about disclosure of jurisdiction of incorporation. A law requiring a corporation to disclose prominently its jurisdiction of incorporation on every piece of paper it emitted (stationery, invoices, checks, EFT documentation, etc.) would substantially increase the plausibility of such reliance, but I do not believe that such a legal regime exists today in most countries.<sup>41</sup> I have not seen a profile of Eurofood's creditors, but it would be interesting to know how many of them knew it was an Irish company.<sup>42</sup> Even if its status as a financing shell meant it had no unknowledgeable creditors, the same would not be true of cases like *National Warranty* in the United States, discussed below.<sup>43</sup> The claimed importance of creditor reliance rests on a shaky and undemonstrated premise of creditor knowledge and reliance without even a strong intuition that it is true.<sup>44</sup>

Even if creditors do know about a debtor's jurisdiction of incorporation, companies are often incorporated in legal havens—tax havens, bank secrecy havens, and the rest. Because I have many good friends who are prosperous professionals living on various enchanting islands, I will discuss a fictional island called “Outlier” where the laws are attractive to the management of corporations that are “external” or “exempted” so that they do no real business in Outlier.<sup>45</sup> A strong presumption of jurisdiction of incorporation as COMI would often choose Outlier as the COMI.

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40. Professor Paulus has offered a further insight into the reliance problem. He wants to know whose reliance is relevant. See Christoph G. Paulus, *Group Insolvency—Some Thoughts About New Approaches*, 42 TEX. INT'L L. J. (forthcoming 2007).

41. Better still would be an additional disclosure of the state of incorporation of the ultimate legal-entity parent of the corporation's corporate group.

42. Admittedly, it was a finance subsidiary, so it may not have had many non-lender creditors.

43. *Hoffman v. Bullmore (In re Nat'l Warranty Ins. Risk Retention Group)*, 306 B.R. 614 (B.A.P. 8th Cir.), *aff'd* 384 F.3d 959 (8th Cir. 2004).

44. A few creditors, primarily lenders, will engage in sufficiently large transactions with debtors that they will make it a point to learn as much as possible about the debtor's legal location, will demand representations about the relevant facts from its officers and principals, and will obtain covenants and even security interests that protect them against manipulation of the location. I believe those creditors will be able to predict COMI with a high degree of certainty in most cases under the Dual COMI approach discussed below.

45. See, e.g., *In re SPhinX*, 351 B.R. 103, 107, n.2 (Bankr. S.D.N.Y. 2006), *aff'd*, 2007 WL 1965597 (S.D.N.Y. July 3, 2007).

Outlier may have laws that are hard to find and recent enactments may not be published. The complex statutory analysis in the recent *Al Sabah* case in the Privy Council illustrates difficulties of interpretation found in the often untidy statutory residue left behind by the ebb of the colonial tide.<sup>46</sup> The law in action in Outlier may be untransparent, except to a limited bar of local lawyers and certain elite international practitioners. Thus, a creditor's knowledge that a corporation is organized in Outlier may not, in fact, produce much outcome predictability unless the creditor is engaged in a large transaction that justifies substantial expenditures on top-drawer legal assistance. That is, a rule that makes Outlier's law predictably applicable may not do much to serve the ultimate purposes of predictability. By contrast, the predictable application of British or Japanese law may be of real value. Even a creditor who does not know the details of those laws may feel comfortable that those jurisdictions would apply sensible and transparent bankruptcy laws to govern their commercial communities. A creditor who is sufficiently concerned can ascertain their substance relatively easily.

#### *B. Acceptability of the Substantive Law*

The second factor that should inform interpretation of the COMI standard is the likelihood that acceptable substantive law will be chosen. I previously summarized the arguments for application of a choice-of-law rule that would generally select the law of the main proceeding with regard to control of assets, priorities, avoidance, and reorganization policy. That connection makes the substantive law of the COMI important. It seems to me that even one who does not wholly accept that argument must concede that the substantive law of the main jurisdiction will have an important impact on outcomes under the Model Law.

On that basis, I think it is hard to resist the proposition that the interpretation of COMI under the Model Law should, to some extent, take account of the likely quality of the substantive law of the COMI jurisdiction. The argument in support of that proposition is similar to the case *against* "contractualism," the academic idea that parties should be allowed to adopt a binding bankruptcy law by contract.<sup>47</sup> A COMI that

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46. *Al Sabah v. Grupo Torras S.A.* [2005] 2 W.L.R. 904, [2005] UKPC 1.

47. See, e.g., Barry E. Adler, *Financial and Political Theories of American Corporate Bankruptcy*, 45 STAN. L. REV. 311, 319–24 (1993); Lucian Arye Bebchuk, *A New Approach to Corporate Reorganizations*, 101 HARV. L. REV. 775, 776–77 (1988); Robert K. Rasmussen, *Debtor's Choice: A Menu Approach to Corporate Bankruptcy*, 71 TEX. L. REV. 51, 117 (1992); Alan Schwartz, *A Contract Theory Approach to Business Bankruptcy*, 107 YALE L.J. 1807, 1850–51 (1998). These theories have been roundly criticized. See, e.g., Elizabeth Warren & Jay Lawrence Westbrook, *Contracting Out of Bank-*

permits a choice of haven law is much the same as one that permits a corporation to adopt a provision in its articles setting forth a default management system that would override an otherwise applicable bankruptcy law, one of the leading contractualist approaches.<sup>48</sup> Outlier and other havens would no doubt make available just about any form of bankruptcy that managements and certain key creditors might find attractive. One great source of abuse with havens, of course, is that they regulate conduct that has no effect on the regulating jurisdiction or its citizens, so they are free to accept results that no polity would be likely to permit as applied to its own citizens or its own economy.

Bankruptcy involves many externalities not fairly or efficiently governed by contract or by a haven law. Creditors often include involuntary creditors, like tort victims and taxing authorities, as well as maladjusting creditors, like employees, small suppliers, and warranty-purchasing customers.<sup>49</sup> These creditors have little or no opportunity to understand or make credit judgments about the substantive effects of Outlier's laws, including distribution priorities and protection of creditors via monitors or creditors committees. These sorts of creditors often have no meaningful opportunity to participate in the control of the haven proceeding. The jurisdictions where these creditors reside will bear the resulting costs. Perhaps the most important difficulty is that Outlier is unlikely to have a robust, fair, and transparent reorganization process designed to save jobs and preserve communities through a financial restructuring or a sale of assets. The lack of these opportunities will create externalities that other jurisdictions must bear, while Outlier enjoys the professional fees associated with liquidation.<sup>50</sup>

The point is not that we cannot tolerate differences in laws. For some time to come, a system of modified universalism must accept differences in policy judgments and, therefore, substantive outcomes. For example, a U.S. court may be right to acquiesce in the nonrecovery of \$100 million in pre-bankruptcy payments, even though U.S. creditors would have

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*ruptcy: An Empirical Intervention*, 118 HARV. L. REV. 1197 (2005); Susan Block-Lieb, *The Logic and Limits of Contract Bankruptcy*, 2001 U. ILL. L. REV. 503, 504–508; Lynn M. LoPucki, *Contract Bankruptcy: A Reply to Alan Schwartz*, 109 YALE L.J. 317 (1999).

48. Robert K. Rasmussen, *A New Approach to Transnational Insolvencies*, 19 MICH. J. INT'L L. 1 (1997).

49. See Lucian Arye Bebchuk & Jesse M. Fried, *The Uneasy Case for the Priority of Secured Claims in Bankruptcy*, 105 YALE L.J. 857, 864, 881 (1996); Warren & Westbrook, *supra* note 47 (empirical study of various types of creditors).

50. See, e.g., *In re Treco*, 240 F.3d 148, 159 (2d Cir. 2001) (professional fees in Bahamas \$8 million of \$10 million estate in uncompleted case).

benefited quite substantially from a recovery.<sup>51</sup> Yet, these examples produce results that fall within a range of reasonable commercial regulation that courts and creditors in most countries can accept, given the benefits of modified universalism and assuming a growing reciprocity.<sup>52</sup> The difficulty with the application of haven law is that, both formally and in action, it is too likely to fall outside that range of acceptable outcomes. It may also lack essential procedural characteristics, such as sufficient transparency and an acceptable judicial system.

It seems to me unlikely that modified universalism could long survive a COMI rule that chose *Outlier* and its sisters to manage a worldwide default. It seems much more likely that courts would use public policy to apply local law to evade the worst results, drifting back toward territorialism. If they did not, surely legislatures would do just that soon after the first major economic downturn revealed the effects of permitting the havens to serve the dominating role. Thus, I believe that we must not adopt a COMI rule that is likely to permit havens to serve often as the COMI of a corporation whose headquarters and operations are elsewhere. Yet a strong presumption in favor of jurisdiction of incorporation might have just that effect. Thus, the most predictable rule may not be the best one under the Model Law.

It is instructive in this regard to consider the *National Warranty*<sup>53</sup> case in the United States.<sup>54</sup> *National Warranty* sold “extended” automobile warranties to thousands of people across the United States. Everything about it, except its Cayman Islands incorporation, was located in the United States. Its principal place of business was in Nebraska, a fact prominently stated on its contracts with American consumers.<sup>55</sup> It transferred all of its assets (mostly cash) to the Cayman Islands on the eve of filing bankruptcy there. It had no other assets, operations, headquarters personnel, or significant creditors in that jurisdiction. Yet it was permitted to obtain a section 304 injunction blocking all U.S. proceedings in deference to a Cayman proceeding in which there was little chance for consumers to participate.<sup>56</sup> The courts in that case held that the statutory criterion of “domicile” was sufficient to require deference to a foreign

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51. *In re Maxwell Communication Corp.*, 170 B.R. 800, 818 (Bankr. S.D.N.Y. 1994), *aff'd* 186 B.R. 807, 822 (S.D.N.Y. 1995), *aff'd*, 93 F.3d 1036, 1051 (2d Cir. 1996).

52. See Theory and Pragmatism, *supra* note 10 at 467-68.

53. *Hoffman v. Bullmore (In re Nat'l Warranty Ins. Risk Retention Group)*, 306 B.R. 614 (B.A.P. 8th Cir.), *aff'd* 384 F.3d 959 (8th Cir. 2004).

54. *Id.* I represented one of the objecting creditors in that case and therefore I am subject to the advocate's discount.

55. *Id.* at 617.

56. *Id.* at 622-23.

jurisdiction based on incorporation, without more.<sup>57</sup> They rejected the argument that they should interpret the statute otherwise because of the looming adoption of Chapter 15, under which the COMI standard would have barred recognition of the foreign proceeding as main, thus permitting a U.S. bankruptcy court to take charge of the case.<sup>58</sup> It is my belief that had Chapter 15 not arrived and had there been a few more decisions like *National Warranty*, a public outcry would have led to amendment of the Bankruptcy Code to bar such results.

Finally, I can speak with some confidence about the views of those of us who labored for some years at UNCITRAL and then worked with our legislatures to adopt the Model Law. For the purposes of the Model Law, the U.S. House Report is exactly correct in saying “[t]he presumption that the place of the registered office is also the center of the debtor’s main interest is included for speed and convenience of proof where there is no serious controversy.”<sup>59</sup> Along with the other presumptions in article 1516 of the Model Law, this one permits and encourages fast action in cases where speed may be essential, while leaving the debtor’s true “center” open to dispute in cases where the facts are more doubtful.<sup>60</sup> This presumption was never discussed as a preferred alternative where there was a separation between a corporation’s jurisdiction of incorporation and its “real seat.” The UNCITRAL Legislative Guide and the House Report on Chapter 15 make that clear.<sup>61</sup>

Judge Klein in *Tri-Continental* notes that Chapter 15 changed the Model Law standard for overcoming the presumption in favor of the jurisdiction of incorporation.<sup>62</sup> The Model Law established that presumption “[i]n the absence of *proof* to the contrary,” but the U.S. version states “[i]n the absence of *evidence* to the contrary.” The legislative history explains, “[t]he word ‘proof’ in subsection (3) has been changed to ‘evidence’ to make it clearer using United States terminology that the ultimate burden is on the foreign representative.”<sup>63</sup> Whatever may be the proper interpretation of the E.U. Regulation, the Model Law and Chapter

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57. *Id.* at 620.

58. *Id.* The argument appeared to have some bite given that Chapter 15 was unanimously recommended by an otherwise riven National Bankruptcy Review Commission and supported by the leadership on both sides of the aisle in both houses. It also faced very little opposition outside of Congress.

59. H.R. REP. NO. 109-31, at 113 (2005), reprinted in 2005 U.S.C.C.A.N. 88.

60. See *In re Tri-Continental Exchange Ltd.*, 349 B.R. at 635.

61. See *id.*; see also *In re SPhinX*, 351 B.R. 103, 120, n.22 (Bankr. S.D.N.Y. 2006), *aff'd*, 2007 WL 1965597 (S.D.N.Y. July 3, 2007).

62. See *In re Tri-Continental Exchange Ltd.*, 349 B.R. at 635.

63. H.R. REP. NO. 109-31 (2005), at 112-13 (emphasis added).



15 give limited weight to the presumption of the jurisdiction of incorporation as the COMI.

### 3. E.U. Regulation Versus Model Law

As noted earlier, the *Eurofood* case can be read to create a substantial presumption in favor of the state of incorporation.<sup>64</sup> The argument against such a strong presumption may not have as much force under the E.U. Regulation as it does under the COMI provision of the Model Law, despite their almost identical wording. The reason is that the ECJ in *Eurofood* emphasized the trust necessary for the functioning of the Union:

39. As is shown by the 22nd recital of the Regulation, the rule of priority laid down in Article 16(1) of the Regulation, which provides that insolvency proceedings opened in one Member State are to be recognized in all the Member States from the time that they produce their effects in the State of the opening of proceedings, is based on the principle of mutual trust.

40. It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the Convention are required to respect, and as a corollary the waiver by those States of the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of decisions handed down in the context of insolvency proceedings . . .<sup>65</sup>

To an American ear, this rule sounds similar to the sort of trust and deference among states dictated by the “full faith and credit” clause for the enforcement of sister state judgments in the United States.<sup>66</sup> If an E.U. court must assume that the bankruptcy laws of every other E.U. country are reasonably transparent and within the zone of reasonable commercial expectations, both formally and as applied, then much of the objection to a strong incorporation presumption falls away, especially with the ECJ’s safety-valve excluding a country of incorporation that was merely a “letter-box” headquarters. Whether these assumptions are justified is for others to say. But if there are no Outliers within the Union

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64. See *Eurofood* paras. 34–36. Other cases in that court, like the *Überseering* decision, may suggest a movement toward jurisdiction of incorporation as an acceptable location for an E.U. corporation. See Caspary, *supra* note 6.

65. *Eurofood* paras. 39–40.

66. U.S. Const. art. IV, §1. Much the same assumption of mutual trust must underlie the new domestic choice-of-law rule for secured transactions under Article 9 of the Uniform Commercial Code: state of incorporation is the debtor’s “location” and its laws apply for many purposes. U.C.C. §§ 9-307.

and if there is comfort about every possibly applicable law, then state of incorporation might provide a highly predictable COMI without much of the cost that might be incurred if a similar rule were applied under the Model Law.<sup>67</sup>

My concern is to point out that there are important differences between insolvency cooperation among member states under the E.U. Regulation and cooperation among countries under the Model Law. Thus, interpretations of the same COMI phrase may legitimately diverge in the two contexts, because the cost of predictability may be significantly smaller in intra-Union insolvency cases.

### III. THE DUAL COMI

Having discussed the key policy considerations in developing an interpretation of the COMI standard, we can now turn to the specific possibilities. I have a sense that in most countries, the standard for locating a corporation on a basis other than its place of incorporation is likely to be built on one of two concepts: the corporation's headquarters (e.g., "chief executive offices" or "real seat") or its operations (e.g., "principal assets"). Each has advantages and disadvantages as a COMI standard. I will discuss them briefly below, but the important point is that either will usually be workable. I call the pair of them the Dual COMI.<sup>68</sup>

If both of these standards are workable, then the Dual COMI rule can work a marvelous result. It can reduce the possible governing bankruptcy

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67. It must be acknowledged that such a rule might provoke a "race to the bottom" in which jurisdictions attract incorporations with lax, management-favoring rules, a charge often leveled at Delaware in the United States. *See, e.g.*, Lynn M. LoPucki, *COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS* 236–43 (2005) (venue shopping for Delaware jurisdiction); Lynn M. LoPucki & Sara D. Kalin, *The Failure of Public Company Bankruptcies in Delaware and New York: Empirical Evidence of a "Race to the Bottom"*, 54 *VAND. L. REV.* 231; Jason M. Quintana, *Going Private Transactions: Delaware's Race to the Bottom?*, *COLUM. BUS. L. REV.* 547 (2004).

68. The Federal Court of Justice has held that the COMI for an individual business person is the place of his principal revenue generation, not his family residence. BGH IX 8/06 (June 13, 2006). The court's guideline of the judgment, translated by Schultze & Braun, states:

The economic activity is a certifiable criterion that guarantees legal certainty and foreseeability of the identification of the court that is responsible for the opening of the main insolvency proceeding for merchants, tradesman and self employed persons. It is not significant that the debtor has his residence in Sweden and that, according to him, his wife lives there.

Email from Schultze & Braun to Jay Lawrence Westbrook (Jun. 18, 2007) (on file with author).

law for a multinational company from 191 countries to two. That result should be within an acceptable range of solutions given the policies discussed above, predictability and substantive acceptability.

The first point, of course, is that often the two standards will point to the same jurisdiction, especially for smaller corporations. Because nowadays more medium-sized companies are engaged in worldwide operations, many of these cases will be easily resolved under the Dual COMI. *National Warranty* is a classic instance.<sup>69</sup> Under either standard, its COMI was the United States and could not have been the Cayman Islands. The location of a COMI under the Dual COMI rule will frequently be easy for much larger companies as well. For example, it would be hard to argue that a Chapter 11 proceeding of the Ford Corporation in the United States would not be the main proceeding for that company under either standard.<sup>70</sup> Nonetheless there will be cases where it is plausible that the two standards point to different jurisdictions and we must consider how the relevant policy considerations might or might not be served by the Dual COMI.

In Part II, I discussed ignorance about the benefits of predictability. Empirical data is needed before we adopt rules that may create serious costs. Our lack of data is especially serious with regard to corporate groups, because creditors in all but the largest transactions are likely to be routinely confused about which member of the group with whom they are dealing. Until we have more data, any solution will be problematic with respect to corporate groups. In the meantime, it will be important to remember that we must hold two inconsistent thoughts in our heads at all times: we must respect the corporate form by focusing carefully on each corporation separately, yet we must also keep one eye on the effects of a rule on corporate groups.

To the extent that we intuit an importance to predictability, the Dual COMI will likely yield workable results even where two jurisdictions would qualify, because creditors are likely to have predicted that either might be home to the corporation's default. That will be especially true if, as I suggest below, predictability is enhanced by placing a thumb on the scales in favor of the headquarters standard.<sup>71</sup> The *Maxwell* case offers a good example, where the parent company's headquarters were beyond doubt in England, but its principal assets were American subsidiar-

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69. *Hoffman v. Bullmore (In re Nat'l Warranty Ins. Risk Retention Group)*, 306 B.R. 614 (B.A.P. 8th Cir.), *aff'd* 384 F.3d 959 (8th Cir. 2004).

70. Admittedly, if the corporation's North American operations collapsed while its foreign activities continued to flourish, the two COMI indicators could diverge.

71. See Jacob Ziegel, *Canada-United States Crossborder Insolvency Relations And The Uncitral Model Law*, 32 BROOK. J. INT'L L. 1041, 1072 (2007).

ies.<sup>72</sup> A creditor would have been likely to predict England as the focus of the management of any default by the parent, and would have been correct in the end, but a creditor would have been foolish to ignore the possibility that U.S. law might have an important and even dominating effect.<sup>73</sup>

Application of either side of the Dual COMI is likely to satisfy the acceptability criterion as well. It will be an unusual case where a plausible argument can be made that Outlier satisfies either branch of the test, so it will generally be true that the law to be applied in the main proceeding will be within the range of acceptable commercial regulation. Taking *Maxwell* as our example once again, the application of the legal systems of either the United Kingdom or the United States should have been both predictable and acceptable, even while we admit that greater certainty is a long-term goal to be pursued.

Judge Klein's opinion in *Tri-Continental* illustrates these points.<sup>74</sup> It is a model application of Chapter 15 that I would commend to every judge facing a COMI problem for the first time. The caveat is that it was a case apparently riddled with fraud from the very inception of the business,<sup>75</sup> so it may not be fully applicable in the more usual case.<sup>76</sup> In that case, the insurance company debtors were incorporated in St. Vincent and the Grenadines (SVG).<sup>77</sup> All of their customers and creditors were in the United States, but they had no presence in this country.<sup>78</sup> All of their twenty employees were in SVG. Fraud was the business, and it was done entirely in the islands.<sup>79</sup> All of their sales appear to have been through independent distributors in the United States or on the Internet.<sup>80</sup>

In the end, the court recognized the SVG liquidation as the main proceeding in the face of opposition from one substantial U.S. creditor that

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72. *In re Maxwell Communication Corp.*, 170 B.R. 800, 818 (Bankr. S.D.N.Y. 1994), *aff'd* 186 B.R. 807, 822 (S.D.N.Y. 1995), *aff'd*, 93 F.3d 1036, 1051 (2d Cir. 1996); see Jay Lawrence Westbrook, *The Duty to Seek Cooperation in Multinational Insolvency Cases*, in *THE CHALLENGES OF INSOLVENCY LAW REFORM IN THE 21ST CENTURY*, (Peter, et al. eds., 2006), *reprinted in* ANN. REV. OF INSOLVENCY LAW 2004 (Janis Sarra ed., 2005).

73. Presumably, the European banks would have taken their \$100 million pre-bankruptcy payment anyhow and hoped for the best in any preference litigation.

74. *In re Tri-Continental Exchange Ltd.*, 349 B.R. 627 (Bankr. E.D. Cal. 2006).

75. *See id.* at 630–31.

76. Enron, for example, was a legitimate company for many years before lapsing into fraud.

77. *In re Tri-Continental Exchange Ltd.*, 349 B.R. 627 (Bankr. E.D. Cal. 2006).

78. *Id.*

79. *Id.*

80. *Id.* Their U.S. activities seem to reflect a complete breakdown of regulation.

claimed a lien on certain funds in the United States.<sup>81</sup> Rather than yielding to the temptation to find the COMI in the United States, the court reacted to the interests of that creditor by recognizing the foreign proceeding as main, but then carefully examining the relief to be granted to ensure that the creditor was “sufficiently protected.”<sup>82</sup> The court noted that, because that the SVG liquidators were not seeking turnover, the creditor would have an opportunity to show the validity of its lien and demand section 363(c)(2) protections if the lien was upheld.<sup>83</sup> Thus, it could protect its interests, while the liquidators would have access to cash necessary to finance a plausible search for assets.

Although this case may look like a victory for the Outlier-type of jurisdiction, in fact the business of this company was carried out in SVG, unlike the business of *National Warranty* or *SPhinX*, a point not unrelated to the fraudulent nature of the business and the lack of proper U.S. regulation. In that regard, it is a bit of a sport.<sup>84</sup> However, even under these unusual circumstances, the foreign proceeding was in fact the main proceeding. The choice of SVG for that role would have been highly predictable, if the facts were known, and if anything can be said to be predictable to the victims of fraud. The case also illustrates the flexibility of Chapter 15: permitting the court to allow the case to be administered in another jurisdiction, while taking care to protect creditors if necessary. Thus, if the law of SVG should prove to create results outside of a broad range of commercial acceptability (not merely a result different from U.S. law), the court makes it clear that it is amply empowered to act protectively.

This discussion leaves open the question which of the Dual COMI should be applied, headquarters or operations? I am inclined to prefer the headquarters, but not exclusively. While I will not attempt to develop the analysis fully in this Article, I will note a few of the considerations that might be thought important pending the development of the necessary data.

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81. *Id.*

82. See *In re Tri-Continental Exchange Ltd.*, 349 B.R. at 639–40; see also 11 U.S.C. § 1522(a) (“The court may grant relief . . . only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected.”). The House Report explains that the term in Chapter 15 was changed from the Model Law’s “adequately protected” to avoid confusion with the well-established, narrower use of the latter term in American law. H.R. REP. NO. 109-31(Part I) (2005), reprinted in 2005 U.S.C.C.A.N. 88.

83. *In re Tri-Continental Exchange Ltd.*, 349 B.R. at 639; Bankruptcy Code §363(c)(2).

84. As pointed out earlier, most often an Outlier-type of jurisdiction requires that the company do no business within its borders. See *supra* text accompanying notes 45–46.

The headquarters choice of COMI will often be fairly predictable, especially for the benefit of lenders and other large creditors, and particularly when operations of a multinational are located in a number of jurisdictions. That will be true when the corporation in question is not part of a corporate group, is the parent of a corporate group, or is the only active member of a corporate group. As Gabriel Moss' insightful Article points out, in any of those circumstances, the headquarters rule offers a further advantage in permitting centralization of a corporate group in one court.<sup>85</sup> Given that some method of centralization seems essential to developing a coherent response to the default of a multinational group, that advantage to the headquarters rule is an important one.<sup>86</sup>

On the other hand, a headquarters rule will often be more manipulable than an operations rule. Some courts may feel free to disregard such manipulation, but others will not. Having an operations rule available will protect against manipulation and reduce the incentive to manipulate. This rule will also allow for the less common case where the operational center of a debtor company will actually have been much more visible to creditors than its headquarters. For these reasons, there is a case to be made for having a Dual COMI. As long as a headquarters rule is preferred, the loss of predictability arising from a dual standard will be greatly mitigated, especially since the operations standard is most likely to be applied in the unusual case when the headquarters rule is less predictable.

An independent ground of concern about a headquarters rule is that it will often prefer a developed country to a developing one, creating a risk of resistance by the latter to the creation of a universalist system. Although the problem should not be ignored, the COMI rule is just one of a hundred legal issues that create this policy tension. On balance, application of a Dual COMI rule with a preference for the headquarters standard is a good pragmatic choice for a court committed to modified universalism.

#### IV. AN EMPIRICAL AGENDA

The legal academy is leaving behind the tradition of making policy arguments that rest largely on intuition and anecdote. Increasingly, we are

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85. Moss, *supra* note 6.

86. A Working Group of the United Nations Commission on International Trade Law is currently addressing the problem of corporate groups in the context of insolvency. UNCITRAL Working Group V, [http://www.uncitral.org/uncitral/en/commission/working\\_groups/5Insolvency.html](http://www.uncitral.org/uncitral/en/commission/working_groups/5Insolvency.html) (last visited June 6, 2007). Centralization is to be sharply distinguished from "consolidation," where the corporations in the group are treated as one debtor. That is a much more serious and rare phenomenon.

demanding evidence, which, as lawyers, we should have thought to do all along. If we argue that a certain rule is more advantageous because of buyers' expectations and because sellers rely on certain facts to price their goods, we want to know that those factual assumptions have some basis. Of course, judgments have to be made pending empirical study, but we are disciplining ourselves to be tentative and unsatisfied until we have more confidence in our facts. One corollary is that an Article like this one ought to, at a minimum, set for an agenda for empirical research.

The central requirement is for more information about the degree to which creditors take into account the legal impact of a counterparty's home country in an international transaction. Do they attempt to ascertain that fact and even to try to protect against a change of COMI? Do they ignore it and hope to win a battle of forms? Do they use security interests or corporate structures to protect themselves against the risk of a bad choice of forum and choice of law? Or is insolvency such a low-probability event that they ignore it or lump it into their pricing along with hurricanes and expropriations? Do their present practices suggest methods by which a predictable and acceptable COMI could be fashioned from some pre-default system of registration or notice? What are the circumstances of different sorts of creditors (large companies, SAMI companies, consumers, involuntary creditors) in all these regards?

#### V. CONCLUSION

The two factors that should inform our understanding of the proper interpretation of the COMI standard in the EU Regulation and the Model Law are predictability and the likely quality of the chosen substantive law. In both respects, we can be content for now with a standard that is reasonably predictable and that produces reasonably acceptable substantive outcomes. The Dual COMI standard—with a preference for the headquarters alternative—does both. Additionally, despite having the same standard in both the EU Regulation and the Model Law, it is plausible that it will be permissible to interpret them somewhat differently. The reason is the predictability can safely be given more weight in the EU on the assumption that all member states have laws and procedures within the acceptable range and none of them are havens.

The traditional idea was that a journey of a thousand miles begins with a single step. We are several miles into our thousand-mile endeavor to unify and improve one important aspect of globalization, the management of the general default of a multinational corporation. It is a trip well-begun and the prospects for adventure are enticing.