International Insolvency Institute 8th Annual International Insolvency Conference
Committee on International Jurisdiction and Coordination

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Discussion Draft of Proposed Principles for
Rescue of Multi-National Enterprise Groups

It is proposed that the principles outlined below will apply to a group of companies or enterprises established or centered in more than one country which are connected either by common or interlocking shareholding or by contract by which their businesses are controlled or coordinated.[1] In some cases, the principles may also be of assistance in coordinating the insolvencies of multi-national enterprises whose component parts operate with relative independence. It is advisable for the courts and parties to consider and where appropriate implement these principles before taking decisive action that may have precedential effect within a case. It may also be appropriate for courts and parties to consider modification of actions taken and orders entered prior to the establishment of communication among courts and proceedings.

Communications and Notice

1. The courts should require the parties to establish a web site on which all pleadings in all jurisdictions are available to all parties at no cost to creditors, at which news of the cases can be posted for the benefit of all creditors, and which can facilitate communication among representatives of members of the enterprise as well as among creditors. In multi-language cases the courts should require that key documents be translated.[2]

2. To ensure that proper notice has been given, the courts should communicate with one another using the Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases developed by the American Law Institute and International Insolvency Institute (the "Court-to-Court Communications"). Factors that should be subject to this communication include (a) allegations regarding COMI made by any parties before each court, (b) all petitions and pleadings, and (c) the nature of notice provided.

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[1] This definition of a multi-national enterprise group is drawn from I. Merovach, "The 'Home Country" of a Multinational Enterprises Group Facing Insolvency," ICLQ Vo. 57, April 2008, p 431.

[2] We recognize that translating pleadings will be expensive, but believe that the costs will be offset by the gains in maximizing values. The courts may allocate the costs of translation among the parties as seems appropriate under the particular circumstances. It may prove efficient to coordinate the translation process so that there is common understanding of how commonly used terms will be translated throughout a case.

3. After affording adequate notice to all parties in interest, the courts should solicit statements from the parties regarding material issues/concerns including positions on enterprise COMI ("ECOMI"),[3] and should then convene a preliminary joint hearing to air these issues and to determine areas of agreement and disagreement. In a proceeding under the EU Regulation, where the opening court makes a jurisdictional COMI determination about the individual entity before it, before other courts are engaged, the court should carefully distinguish between the jurisdictional COMI decision, relating to the specific entity before it, and the ECOMI decision that may need to be made with respect to the enterprise.

Judicial Considerations Regarding Administration of Multinational Enterprises

1. When an enterprise group is administered, organized, or operated centrally, it may be said to have a single ECOMI. This may be the case even, as noted in paragraph 3 above, when under the EU Regs there are jurisdictional COMIs established in various countries for individual subsidiaries. The ECOMI of enterprises with strong, centrally administered and integrated organization will presumably be a matter of public knowledge and easily identifiable by creditors of the enterprise. This should, however, be the place from which the enterprise is actually operated rather than merely a registered place of business with no relationship to the real management.[4]

2. Even in the absence of strong central organization, integration and management, a multi-national enterprise may benefit from recognition of an ECOMI, in which case the courts may need to balance a number of factors arguably relevant to determination of the ECOMI. It may in such cases be more appropriate to recognize multiple COMIs and to maximize value by coordination of multiple proceedings rather than administrative consolidation of those proceedings under one ECOMI. The factors listed below may be of assistance in determining (a) whether an ECOMI is appropriate, and if so in what location, or in the alternative (b) whether coordination among courts with jurisdiction over multiple COMIs is more feasible.

A. The historical location or locations from which the enterprise is managed;

B. The historical location or locations at which high level coordinated economic decisions of the enterprise as a whole are made;

C. The location of the registered office of the enterprise's parent corporation;[5]

[3] We are indebted to Professor Jay Westbrook for bringing this term to our attention.

[4] Some members of an enterprise may not be eligible to be debtors in the nation in which the ECOMI is determined to be located. This should not prevent the national court from acknowledging an ECOMI, because it is not required to, nor has it authority to, assert personal jurisdiction over all of the members of the enterprise.

[5] The Model Law, the EU Regulations and Chapter 15 presume that the debtor's registered office is the COMI of a single corporate debtor, but the presumption is rebuttable by evidence or proof to the contrary. There may be less
(continued…)

D. The location or locations in which the enterprise's managers are located;

E. The location from which the enterprise's finances are managed;

F. The location of the enterprise's creditors;

G. The location of the majority of the enterprise's employees;

H. The location and ownership of the majority of the enterprise's assets;

I. The location or locations whose local law will govern most disputes arising in the enterprise's insolvency proceedings;

J. The size of the group;

K. The nation with the greatest interest in the enterprise;

L. The degree of business integration and interdependence among the members of the group;

M. The degree of financial integration and interdependence among the members of the group, including the existence of joint borrowing arrangements and/or cross-guarantee provisions;

N. The degree of common administrative support for the members of the group;

O. The extent of common ownership among members of the group;

P. Where ascertainable, creditors' expectations as to where they would enforce their rights; and

Q. Which of the possible COMI courts can deliver and enforce the most pervasive relief?

3. The courts should strive to reach a consistent and joint decision on the ECOMI with the understanding that the national courts in the nation in which the ECOMI is located will supervise and coordinate all of the related insolvency proceedings wherever located. The other courts should abstain from addressing issues more properly decided by the court with jurisdiction over the ECOMI with the goal of maximizing enterprise value for the benefit of all parties.

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reason to presume that the registered office of the parent of an enterprise is the COMI for the enterprise as a whole. The location of the parent's registered office continues to be a relevant, but not conclusive, factor if other factors suggest that the ECOMI is elsewhere.

4. In cases in which there is no clear ECOMI (for example, because the enterprise is not centrally managed, or because the enterprise is comprised of multiple lines of business that are not closely related or integrated), the courts may consider whether it is desirable, and if desirable, whether it is feasible, for two or more COMIs to be recognized for different parts of the enterprise. In such cases, there may be significantly less need or justification for a single central judicial administration of the enterprise insolvency, but communication and coordination among the courts will still be advisable to ensure that values are maximized.

5. If existing law does not permit the courts to recognize an ECOMI as opposed to individual COMIs for each member of the enterprise, or if multiple COMIs are appropriate given the nature of the enterprise, the courts should strive to establish corporate governance provisions, as discussed below, and other guidelines for global case administration and agreements between the parties about governing law and other issues essential to effective global reorganization or liquidation, thereby overcoming any obstacles to an effective global reorganization imposed by such limitations in existing regulations.

6. Courts with jurisdiction over insolvent enterprises with multiple COMIs may wish to consider the applicability of the Principles of Cooperation Among the NAFTA Countries, and specifically those guidelines relevant to corporate groups, developed by the American Law Institute in developing appropriate protocols or governance guidelines.

7. At the outset of the case, each court in which an insolvency proceeding has been opened for a member of a multi-national group should ascertain whether other members have filed or will file, or have or will be filed against, in other jurisdictions. When the petitioners are creditors or creditor representatives, the court should also solicit information from the debtor and/or any other court appointed representatives of other affiliated entities on this topic as well.[6]

8. Where the law allows, the ECOMI decision should be deferred until adequate notice is given to all parties in interest and a joint hearing can be convened including all courts in which proceedings have been filed, or at least all courts which any party contends have jurisdiction over the ECOMI.[7] Necessary interim relief to shield assets and permit operations need not be delayed.

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[6] The Model Law, Chapter 15 and the ALI Principles require the debtor to provide the courts with updates on the foreign proceedings.

[7] It is not evident that any statutory or regulatory regime requires the courts to determine these issues in the initial days of an insolvency case. For example, Chapter 15, enacting the UNCITRAL Model Law, requires that the court determine at the earliest possible time the petition for recognition of a foreign proceeding, but there is no similar requirement for early determination of whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding. But see, e.g., *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*,
(continued…)

9. In appropriate cases, the courts or the parties may provide for the appointment of an arbitrator to determine key issues relating to the ECOMI or to facilitate development of an appropriate protocol.

10. The courts may consider deferring COMI decisions, or the ECOMI decision, to afford the parties an opportunity to develop a consensual protocol that addresses the jurisdictional and administrative issues.

Proposed Protocol Provisions With Specific
<u>Reference to Multinational Enterprise Insolvencies</u>

In the absence of agreement by the parties, courts should consider these provisions as an appropriate baseline for court-to-court cooperation in multi-enterprise insolvencies.

The following protocol provisions for use in insolvencies of multinational enterprises are proposed.

1. A primary goal of the insolvency proceedings, wherever and however many filed, of a multinational enterprise group is or should be to maximize enterprise value. The parties agree to cooperate in all ways permitted by national laws to achieve that goal for the benefit of the creditor body as a whole.

2. Courts should abstain from procedural decisions that might interfere with an ECOMI decision, unless they think that better results would follow from not establishing an ECOMI.

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372 B.R. 122, 126 (Bankr. S.D.N.Y. 2007) (the recognition process under Chapter 15 is a single step, involving both recognition and COMI determination.). While the EU Regs require all member states to honor a sister court's determination that it has opened the main proceedings and has jurisdiction over the debtor's COMI, it does not establish a time within which that initial COMI determination must be made, nor, assuming the initial COMI determination is a jurisdictional requirement for the case to be opened, does it address ECOMI, or whether the ECOMI could be located elsewhere. The Cross-Border Insolvency Concordat encourages recognition of a single main forum but it too does not mandate an early determination of the COMI, nor does it address ECOMI.

We note that the Model Law does not require that pre-existing law relating to comity, coordination and cooperation among courts be repealed as a condition for its enactment. The courts should therefore consider whether pre-existing principles survive enactment of the Model Law that may be employed to facilitate recognition of ECOMI.

Even if the COMI of an individual debtor must, under the applicable law or regulations, be determined in conjunction with recognition as a threshold inquiry, the courts should nevertheless be prepared to consider the question of ECOMI separately from the determination of an individual debtor's COMI in order to further the cooperative rescue of the enterprise.

3. If the parties are unable to agree on an ECOMI, the courts with jurisdiction over components of the enterprise should coordinate in appointing an independent officer or an arbitrator to attempt to assist the parties in reaching consensus.

4. The national courts of the ECOMI will have jurisdiction over all assets of the enterprise. In cooperation with the relevant national courts having control of asset segments, the national courts of the ECOMI may apply one or more of the following choice of law principles:

(a) The court with jurisdiction over the ECOMI will apply the avoiding powers of the jurisdiction with the greatest contacts to the challenged transaction;

(b) With respect to interests in property, the court with jurisdiction over the ECOMI will apply, as applicable, (1) the UN Convention on Assignment of Receivables in International Trade, (2) the UNCITRAL Legislative Guide on Secured Transactions; or (3) the law of the nation where the property is located;

(c) The court with jurisdiction over the ECOMI will recognize and defer to the national laws and national courts regarding taxation over assets within the national court's jurisdiction;

(d) The court with jurisdiction over the ECOMI will apply the law of the nation where employees of the enterprise are employed to issues affecting the employees;

(e) The court with jurisdiction over the ECOMI will apply the non-bankruptcy law of the nation that is specified in a contract that is the subject of dispute to that dispute;

(f) The court with jurisdiction over the ECOMI will determine choice of law issues, and may defer to a national court whose law applies for determinations on the merits, provided a proceeding has been instituted in that nation; and

(g) Unless necessary to preserve or enhance the going concern value of the enterprise for the benefit of all parties in interest, the court with jurisdiction over the ECOMI will not consolidate value or assets from multiple locations until (i) the creditors in that forum are paid in full under the provisions of local law, or (ii) the creditors in that forum agree.

5. In the event that the parties are not able to agree on an ECOMI, or courts issue competing orders asserting that the entity over which it has jurisdiction is the ECOMI or the COMI of a member of the enterprise:

(a) the representatives of subsidiaries and affiliates of the enterprise will provide prompt and effective notice to the representatives of the parent entity of the enterprise of all proceedings in all other related insolvencies, and the parent representatives may be recognized and heard as stakeholders in all related insolvency proceedings;

(b) the representatives of all members of the enterprise will cooperate in developing a corporate governance protocol to facilitate effective decision-making during the insolvencies; and if agreement is not reached, will ask the courts to consider whether appointing an independent officer to mediate a corporate governance protocol is appropriate; and

(c) the representatives of subsidiaries and affiliates of the enterprise will confer with the representatives of the parent entity regarding all decisions affecting the liquidation, sale or disposition of assets of, or reorganization of any subsidiary or affiliate in the enterprise, to ensure that the proposed liquidation, asset sale or reorganization will support the overall goal of maximization of value for the benefit of the enterprise's creditors.

Best Practices Principles Proposed for Multinational Enterprise Insolvencies: Protocols

In addition to the specific protocol provisions and baseline court-to-court cooperation suggested above, it is proposed that the principles set out below may assist parties and courts in developing appropriate protocols in multinational enterprise insolvencies.

1. Courts and parties in interest should consider protocols as a fundamental and primary tool for facilitating cross-border multi-national enterprise insolvencies. The protocols may address procedural and administrative issues. They may also reflect consensus concerning the enterprise's corporate governance while in insolvency proceedings (see discussion below regarding the usefulness of corporate governance protocols in the context of competing ECOMI decisions), and they may establish dispute resolution mechanisms. They may reflect agreement among the parties in interest on matters of substance, such as ECOMI, and which courts should exercise jurisdiction over what matters and assets.[8] Finally, they may recite agreement, made either before or after the commencement of proceedings, to submit certain trans-national issues to binding arbitration.

2. Parties and insolvency professionals should be encouraged to negotiate protocols before commencing insolvency proceedings.

3. If the parties do not present the courts with protocols negotiated before the commencement of the proceedings, the courts should consider directing the parties to develop a protocol tailored for the proceedings.

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[8] It is important to note that this is not a proposal to confer jurisdiction where it does not otherwise exist. Instead, if multiple courts could legitimately exercise jurisdiction, as may often be the case, it is proposed that the parties agree on which court should most properly exercise jurisdiction with respect to particular matters. Parties should not be free to agree on a jurisdiction with no connection with the enterprise.

4. Where necessary, and where permissible under local national law,[9] the courts should consider appointing independent officers to assist the parties in developing the protocols. These officers should be capable of mediating disputes between the parties in interest, and providing suggestions and guidance for the parties who may be inexperienced in cross border practice. The appointing order should give the independent officer the ability to report failures to cooperate to the courts, to provide the parties with incentives to reach workable agreements, and should explicitly empower (or direct) existing administrators or liquidators to engage in protocol negotiations. The costs of the independent officer should be born by the debtors' estates.

5. To be effective in facilitating the development of the protocol, the independent officer should be acceptable to the parties in interest and of a recognized stature in the international insolvency community. It may be advisable for a central listing of persons who have performed this task in the past, or who are widely recognized as capable of performing the task in the future, to be generated and maintained by one or more of the organizations concerned with international insolvencies.

6. If the parties fail to agree to an appropriate protocol, the courts should consider imposing one, relying on information about the case developed at an initial joint hearing with all relevant courts and following consultation among the relevant courts.

[9] It should of course be understood that all of these proposals are subject to their legality under local law.

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THE RESCUE OF MULTI- NATIONAL ENTERPRISE GROUPS

Enterprise COMI ("ECOMI"): Co-ordinating Competing Jurisdictions

Hypothetical

Leather Products Holdings ("Holdings") is a company organized under the laws of, and registered in, Liechtenstein. It is owned by members of an extended family residing for the most part in Madrid, Spain (the "Family"), and a group of additional outside investors (the "New Investors") who provided equity infusions and loans last year. The New Investors, who hold 49% of the stock, are international private equity funds, registered in the United Kingdom and the United States.

Holdings manufactures and sells high quality leather products, including briefcases, shoes, belts and ladies handbags. It operates its business through subsidiaries organized and located in a number of countries. An organizational chart may be found at the end of this hypothetical.

- The enterprise is managed from the corporate headquarters in Madrid, where the product designers are also located. 5% of the total employees are employed in Madrid.
- The products are sold in high end stores around the world. Marketing and sales subsidiaries, owned indirectly by Holdings, are registered in the United Kingdom, the United States, Italy, Spain, France, Germany, Switzerland, Bahrain, Abu Dhabi and Singapore. 5% of the total employees of the company are involved in the marketing operations, and are dispersed throughout the countries in which the products are sold.
- In 1999 Holdings purchased 100% of the outstanding stock of "Texas Hides", located in Texas, USA, which buys raw hide and operates tanning and dying facilities. Texas Hides supplies between 50 and 75% of the raw materials needed by the enterprise each year. It also supplies finished hides to other manufacturers located in the US. 20% of the total employees of the enterprise reside in Texas.
- Holdings also owns a Mexican subsidiary, Leather Products Manufacturing ("Manufacturing"), which manufactures, assembles and ships the leather products. 65% of the total employees of the company are employed in Mexico.
- The enterprise's global finances are operated from a finance subsidiary, Leather Products Finance ("Finance"), registered in the UK and operated from London. Finance manages

the enterprise cash with an integrated global cash management system using cash collection accounts maintained in London. All expenses worldwide over a certain level are paid from the London accounts. 2.5% of the enterprise's employees are employed by Finance in London.

- A marketing subsidiary, Leather Products Marketing ("Marketing") runs the marketing side of the business and owns the marketing subsidiaries. Marketing is registered in and operated from the UK. 2.5% of the enterprise's total employees are employed by Marketing in London.

Management. *The directors of Holdings reside in Madrid, New York, Italy and London. They hold their quarterly board meetings in Madrid, except for annual visits to Texas and Mexico to visit the manufacturing facilities.*

Debt Structure. Texas Hides borrowed funds for capital improvements on a secured basis from a hedge fund consortium before Holdings acquired it. Manufacturing borrowed funds on a secured basis to build and equip its facilities from local Mexican lenders. Holdings guaranteed these loans. The New Investors lent funds to Holdings for use in supporting the expansion of the marketing and upgrade of the manufacturing facilities. These loans were secured by first liens on all unencumbered assets and by second liens on the manufacturing facilities, and were guaranteed by each of the subsidiaries. The Family also provided the New Investors a first lien on the valuable but previously unencumbered Madrid real estate in which the enterprise's head office is located, and which is owned by the retired matriarch (the "Matriarch") of the enterprise. The loan agreements with the New Investors were negotiated in London and contain choice of law provisions requiring the application of UK law to any disputes arising thereunder.

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Mad cow disease spreads to Texas, reducing the hides available for the company's products. Texas Hides no longer has adequate funds to service the hedge fund debt, pay its taxes and pay its employees. The Mexican operations are faltering due to insufficient supplies of leather, with the plant's landlord and other creditors threatening

It also comes to light that a rogue member of the Family has been causing Finance to transfer funds to his personal bank account. This improper diversion of funds, coupled with a falling off in demand for the products, has caused the enterprise to have insufficient liquidity - at least on a temporary basis - to service the debt owed to the New Investors.

Shortly thereafter, the Matriarch comes out of retirement to resume control of the enterprise's management. Her first act is to discharge the rogue family member and remand him for prosecution. Her second act is to consult insolvency counsel in Madrid, in the UK and in Texas for advice on how she can best rescue Holdings' global operations.

Bearing in mind the Committee's Discussion Draft of Proposed Principles for Rescuing Multi-National Enterprise Groups:

Question 1. How would you advise the Matriarch to proceed to harmonize the rescue of the enterprise? Can an enterprise COMI (an "ECOMI") be established in any of the jurisdictions in which the company operates, enabling the rescue to be directed from a single jurisdiction? Failing that, may the rescue be coordinated through a combination of other tools, including court to court communications, protocols, judicial abstention?

Question 2. Assume that the New Investors commence insolvency proceedings against Finance and Marketing in the United Kingdom and file an ancillary proceeding in Spain under the EU Regs seeking recognition of the UK proceedings as the main proceeding, and the assistance of the Spanish courts in liquidating the Spanish assets for the benefit of the creditors. How would UK counsel advise the Matriarch to proceed? How would Spanish counsel advise her to proceed?

Question 3. Assume that the US hedge funds - secured lenders to Texas Hides - commence an involuntary chapter 11 case against Texas Hides and move for the appointment of a Chapter 11 trustee, and the Mexican creditors simultaneously file proceedings against Manufacturing. How would US counsel with NAFTA experience advise the Matriarch to proceed?

Question 4. Assume that the ECOMI has been established in Spain. Assume further that important causes of action against the local managers of Finance, the UK entity, and the local managers of Texas Hides, the US entity, exist. How would you advise that the enterprise proceed with respect to these causes of action?