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## Memorandum

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<b>Re</b>	<b>Position Paper Supporting Greater Use of Arbitration in Connection with Insolvency Matters</b>		

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This Position Paper advocates greater respect for pre-bankruptcy arbitration agreements and greater use of arbitration to aid the bankruptcy and restructure process (“Insolvency Related Arbitration”). It currently summarizes the published work of five members of the International Insolvency Institute (“III”): Professor Jay Westbrook, Judge Allan Gropper, Professor Christoph Paulus, Steve Kargman and Zack Clement.

This Paper, along with many of the articles cited in it, will be posted on the III website as a current resource for people seeking to make greater use of Insolvency Related Arbitration. It is expected to evolve as additional papers are written on this subject by III members and others, and they are included in this summary.

III has initiated a survey of its members concerning Insolvency Related Arbitration (the “Survey”). The results of that survey will be described in an update of this Paper and in a longer, more scholarly Memorandum providing the foundation for it. III members are encouraged to take time to respond to this Survey.

### I. Three Important Questions

- A. How can the following three kinds of arbitration (a) comport with bankruptcy policies and (b) meet the standards for the enforceability of arbitral awards under the New York Convention because they are (i) capable of resolution by arbitration and (ii) it should not be against public policy to enforce an arbitral award concerning them.

#### 1. Claims Arbitration

Pre-bankruptcy agreements to arbitrate a claim against an entity that later files a bankruptcy case where the bankruptcy court permits the arbitration to continue in order to liquidate the amount of the claim, with details of the treatment of the arbitral award possibly reserved to the bankruptcy court which has control over the debtor’s assets and will ultimately decide how they are allocated (“**Claims Arbitration**”).

## 2. Arbitration of Disputes Arising in Bankruptcy Cases

Issues that come up during a bankruptcy case that the bankruptcy court authorizes an estate representative to agree to arbitrate and opposing parties agree to arbitrate, including disputes between affiliated bankruptcy estates pending before courts in different countries (whether cases for foreign divisions of one company or for different members of a corporate group) ("**Arbitration of Disputes Arising in Bankruptcy Cases**").

## 3. Restructure Arbitration

Arbitration of debt restructuring issues between a debtor and major claimants in its capital structure that resolves insolvency without the filing of a bankruptcy case, leaving unchanged the rights of parties that do not agree to participate in the arbitration. This would function similar to out of court or pre-packaged plan of reorganization negotiations, but with the parties agreeing to mediate or arbitrate certain issues that they are unable to resolve ("**Restructure Arbitration**").

### B. Use of Insolvency Related Arbitration.

**Claims Arbitration** will actually succeed better if the claimant asks the bankruptcy court for permission to pursue an arbitration against a debtor which is in a bankruptcy case. This will permit the bankruptcy court to balance bankruptcy policies against policies favoring agreement to arbitrate, and to make findings about arbitrability of the matter that will actually facilitate enforcement of the arbitral award under the **New York Convention**.<sup>1</sup>

This will avoid years of contention where the bankruptcy court might otherwise be asked to enjoin an arbitration that it had not permitted to go forward and to refuse to enforce the award from that arbitration. The bankruptcy court has ultimate control over the debtor's assets and the duty to distribute them fairly in accordance with applicable law. It can either exercise its discretion to authorize arbitration of a claim against a debtor to proceed, or exercise its substantial power to block pursuit and ultimate enforcement of the award from that arbitration against the debtor's assets.

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1

#### **New York Convention, Article II**

Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, **concerning a subject matter capable of settlement by arbitration**.

#### **New York Convention, Article V**

Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

The subject matter of the difference **is not capable of settlement by arbitration** under the law of that country; or The recognition or enforcement of the award would be **contrary to the public policy of that country**.

**Disputes Arising in Bankruptcy Cases** provide a good example of how greater use can be made of arbitration. It is very important to coordinate insolvency cases for members of an enterprise group that are pending in courts in different countries to maximize their values and make fair allocation to creditors. The UNCITRAL Model Law was drafted to address this issue and encourages cooperation between estates. Still, there is often no tribunal with power to resolve inter-estate disputes arising between different estates in different courts in different countries, that have not been able to be resolved through cooperation.

In the **Nortel** cases, assets were sold that were owned by many affiliated debtors with cases pending in many countries, and over \$7 billion dollars of sale proceeds still await judicial determinations in three countries about which estates should receive what portion of these funds. No single national court has sufficient authority to decide this issue, and settlement talks and mediation have failed.

A late 2013 decision in the **Nortel** cases by the U.S. Third Circuit Court of Appeals found that there had been no agreement to arbitrate these kind of issues. The Third Circuit said plainly, however, that **“The parties could have agreed to allocate the escrowed funds through arbitration.”**

The Third Circuit accepted the denial of motions to compel arbitration made by courts in multiple countries where there had been no prior agreement to arbitrate. However, it did not rule out future motions by the debtor estates in those same courts seeking bankruptcy court authority to enter into an agreement to arbitrate. The parties have not yet tired enough of fighting in different courts trying to get a larger share of the \$7 billion of available proceeds to propose to actually resolve their intractable dispute by agreeing to arbitrate it. At some point, the respective parties in interest might tire of interesting debates about who might gain greater strategic advantage in what separate court, and agree to a procedure to arbitrate this dispute that would actually resolve it and pay them promptly some of this \$7 billion.

As to **Restructure Arbitration**, parties regularly have negotiations that result in agreements to restructure just the claims of the parties that participate in the negotiations. Bankruptcy policy favors approval of out of court restructure agreements. Sometimes they are approved in a later filed bankruptcy case as a pre-negotiated plan of reorganization. One of the purposes of many pre-negotiated plans of reorganization is to make the agreement of a majority of creditors binding on the minority who cannot be found, or are recalcitrant.

**The out of court restructure of commercial entities can be facilitated by the presence of a mediator, and parties can agree to submit unresolved disputes to arbitration.** There is no bankruptcy policy reason to refuse to enforce an award resulting from the parties' agreement to submit a restructure issue to an arbitral panel. The same bankruptcy policies that support enforcement of an agreement to restructure, support enforcement of an award that comes from the parties agreement that an arbitral panel will tell them certain

details of their agreement to restructure, provided that the arbitration award will be binding only on those who have agreed to the arbitration and all others are left unimpaired.

**Restructure of the debt of cities and counties is fundamentally similar to the restructure of the debt of commercial entities.** If counties and major suppliers of capital and labor agree to arbitrate restructure of their claims, leaving unchanged the claims of those who have not agreed to participate in this arbitration, those disputes are also arbitrable and public policy should support their enforcement.

**In his 2012 article in the American Bankruptcy Law Journal, Judge Gropper summarized this well, saying that there is (1) no authority that parties should not be able to arbitrate core insolvency disputes, (2) no authority that this is not capable of being arbitrated, (3) raises no more public policy issues than an out of court workout, and (4) these principles could be applied to sovereign restructuring.**

Mediation has worked extremely well thus far in resolving insolvency matters and, with continued cooperation and enhanced communication between the arbitration and insolvency communities, arbitration could be used more broadly to deal with insolvency related issues.

**C. INSOLVENCY RELATED ARBITRATION AND THE UNCITRAL MODEL LAW ON CROSS BORDER INSOLVENCY**

The UNCITRAL Model Law on Cross Border Insolvency, as it has been enacted in the US and elsewhere, encourages courts and estates in different countries to cooperate. It encourages the kind of approach advocated by Professor Westbrook and Judge Gropper in which a debtor's "main case" bankruptcy court exercises discretion about how to harmonize bankruptcy and arbitration principles based on the facts of the case before it, and uses arbitration as the ultimate way to cooperate in the resolution of disputes between estates.

U.S. Chapter 15, based on the Model Law, provides that "the court shall cooperate to the maximum extent possible with a foreign court or foreign representative... including coordination of the administration and supervision of the debtors assets and affairs." This open ended language permits a broad range of cooperative actions between courts presiding over cases for the same debtor in many countries, including the courts appointing mediators for disputes and authorizing their respective estates to enter into agreements to arbitrate un-resolvable inter-estate disputes.

The Model Law directs a bankruptcy court to cooperate concerning the administration of a debtor's estate ("coordination of the administration and supervision of the debtors assets and affairs"). This plainly involves allowing claims and distributing estate assets pro rata among allowed claims. It, thus, presents the issue whether a claim should be decided in the bankruptcy claims process or the arbitration that the debtor agreed to before its bankruptcy.

The UNCITRAL Model Law's encouragement to cooperate to resolve disputes, expresses a policy to resolve restructure disputes through agreement. Likewise, the policy underlying the New York Convention is to enforce agreements among parties to resolve disputes through arbitration. Both these policies, plus general public policies favoring settlements, support use of Restructure Arbitration. The challenge is to develop forms and procedures to carry out Restructure Arbitration.

The III intends to work with arbitral organizations, UNCITRAL, ALI and others to promote greater use of all these kinds of Insolvency Related Arbitration.

## II. WRITING BY THREE INTERNATIONAL INSOLVENCY INSTITUTE MEMBERS' ABOUT INSOLVENCY RELATED ARBITRATION.

- A. The earliest work in this area was Professor Jay Westbrook's **The Coming Encounter: International Arbitration and Bankruptcy**, 67 Minn. L. Rev. 595 (1983) ("**Westbrook Article I**"). This article exhibited foresight about the impending collision between policies favoring arbitration and bankruptcy policies, and offered a way to harmonize them that is still valid 30 years later. Professor Westbrook concluded that bankruptcy courts should make the decision whether arbitration of a claim can go forward after a debtor goes into a bankruptcy case because they have control over a debtor's assets and can enjoin claim arbitrations and deny distributions to arbitral awards. They can balance bankruptcy policies with arbitration policies, permitting pre-bankruptcy agreed arbitration, unless it undermines bankruptcy policies on the facts of the particular case before the court.
- B. At the 2007 UNCITRAL Congress, Zack Clement presented an III paper titled **Greater Use of International Arbitration in Cross-Border Insolvency Cases** (the "**III 2007 UNCITRAL Paper**"), explaining how arbitration could be used to extend the international cooperation in bankruptcy matters promoted by the UNCITRAL Model Law on Cross-Border Insolvencies and the UNCITRAL Legislative Guide on Insolvency Law. He outlined in a brief six page paper how a bankruptcy court could authorize arbitration (1) to adjudicate certain claims, (2) to resolve certain disputes about bankruptcy court orders (whether certain property is free and clear of liens or subject to a court granted first lien), (3) to resolve disputes between affiliated estates and (4) even to adjudicate fundamental restructure issues between parties who agree to do so. This **III 2007 UNCITRAL Paper** asked UNCITRAL to pursue further work on this subject.
- C. In 2008, III Members, Christoph Paulus and Steve Kargman, presented to the III Annual Conference and to a United Nations Workshop on Debt, Finance and Energy Issues, a paper titled **Reforming the Process of Debt Restructuring - A Proposal for a Sovereign Debt Tribunal**. This would be a permanent "international arbitral tribunal" to deal with sovereign debt restructure issues.
- D. In 2010, Professor Westbrook again argued that a bankruptcy court should be permitted to balance bankruptcy and arbitration principles to decide whether to honor a pre-bankruptcy agreement to arbitrate a claim against an entity that later

goes into a bankruptcy case. J. Westbrook, **International Arbitration and Multinational Insolvency**, 29 Penn St. Intl. L. Rev. 635 (2010) (“**Westbrook Article II**”). He concluded that principles of modified universalism, that are embodied in the UNCITRAL Model law dealing with coordination of cross border bankruptcy cases, establish that the main case insolvency court should exercise the discretion whether to honor such an arbitration agreement, or not, based on the facts of the particular case before the court.

- E. In 2012, Ill member, U.S. Bankruptcy Judge Allan Gropper, published an article dealing with agreements to arbitrate claims against a debtor (**Claims Arbitration**), and to arbitrate disputes between bankruptcy estates that arise during a case (**Arbitration of Disputes Arising in Bankruptcy Cases**). He also discussed a new issue - - whether parties can agree to arbitrate fundamental debt restructure issues so that no bankruptcy case need be filed, as long as this arbitration does not adversely affect claims of entities that have not agreed to arbitrate (**Restructure Arbitration**). A. Gropper, **The Arbitration of Cross Border Insolvencies**, 18 ABLJ 201 (2012). (“**Gropper Article**”)

As to **Arbitration of Disputes Arising in Bankruptcy Cases**, Judge Gropper argued that authorizing arbitration of intractable inter estate disputes would vindicate the Model Law’s policy of encouraging cooperation between debtors’ estates in different countries.

As to **Restructure Arbitration**, Judge Gropper said:

**“There does not appear to be any authority that parties should not be able to agree to arbitrate a core insolvency dispute on condition that non-consenting parties be left unimpaired,”** Gropper Article, 18 ABLJ at p. 239;

“No authority has been found that arbitration of the type proposed in this paper is “incapable of being performed,” *id.* at p. 237;

“No legal authority has been found to the effect that insolvency disputes are not arbitrable because of the nature of the subject matter,” *id.*;

“Arbitration of insolvency issues should not raise public policy concerns to any greater extent than does a workout – provided that those parties who have not agreed to the arbitration are left unimpaired,” *id.* at p. 240;

“[T]he principle that arbitration has no place in the insolvency sphere (that insolvency might be a subject not suitable for arbitration) has been subject to significant erosion in recent years,” *id.* at p. 242.

**In recent years, arbitration has been considered as a means of resolving disputes relating to sovereign debt defaults,**

**another matter not subject to the effective control of any single courts.** See Christoph G. Paulus & Steven T. Kargman, *Reforming the Process of Debt Restructuring—A Proposal for a Sovereign Debt Tribunal* 3 . . . (Preliminary Draft Presentation to the United Nations Workshop on “Debt, Finance and Emerging Issues in Financial Integration”). **Although entitled a proposal for a “tribunal” its authors do not envision an international court, but an “international arbitral tribunal for resolving disputes arising in sovereign debt restructurings.”** *id.* at p. 242.

F. At the 2012 III Annual Conference, Zack Clement published a paper titled **Arbitration of a Country’s Financial Reorganization**, containing a **Proposal** for a sovereign state to agree with major parties in its capital structure to arbitrate restructure issues among themselves. **Under this Proposal, the parties would pick an arbitral panel on an *ad hoc* basis, as a Sovereign Debt Tribunal has not yet been established.**

G. In August 2013, Insolvency Intelligence published an article based on this **Proposal** titled **Restructuring Government Finances – In Public and in Less Than a Year**. The last page of this article describes why countries and their labor and capital suppliers might choose to use arbitration to process insolvency issues more promptly and efficiently. It concludes:

**“Quantifying opposing positions about how much austerity and tax increase can reasonably be borne so that these issues can be argued in a [public arbitral] forum and adjudicated will lead to more prompt and less acrimonious resolution of these issues. Conversely, permitting these questions to languish unresolved for many years leads to economic stagnation, does not serve the citizens of insolvent governments, and makes ultimate resolution of these issues much more painful. A prompt [public arbitral] trial and resolution based as much possible on quantification of these issues will be better for the general public interest than years of politicization of these issues as they remain unresolved.”**

H. Restructure Arbitration awards should be enforced under the **New York Convention** as public policy has always favored agreements to restructure outside of bankruptcy and additional public policies favor enforcement of awards resulting from an agreement to arbitrate.

I. **THE UNCITRAL MODEL LAW ON CROSS BORDER INSOLVENCY ENCOURAGES USE OF INSOLVENCY RELATED ARBITRATION**

The UNCITRAL Model Law on Cross Border Insolvency, as it has been enacted in the US and elsewhere, encourages courts and estates in different countries to cooperate. It encourages the kind of approach advocated by Professor Westbrook and Judge Gropper in which a debtor’s “main case” bankruptcy will decide how to harmonize bankruptcy and arbitration principles based on the facts

of the case before it and uses arbitration as the ultimate way to cooperate in the resolution of disputes between estates.

For example, U.S. Chapter 15, based on the Model Law, provides that "the court shall cooperate to the maximum extent possible with a foreign court or foreign representative... including coordination of the administration and supervision of the debtors assets and affairs."

This open ended language permits a broad range of cooperative actions between courts presiding over cases for the same debtor in many countries, including the courts appointing mediators for disputes and authorizing their respective estates to enter into agreements to arbitrate un-resolvable inter-estate disputes.

The Model Law directs a bankruptcy court to cooperate concerning the administration of a debtor's estate ("coordination of the administration and supervision of the debtors assets and affairs"). This plainly involves allowing claims and distributing estate assets pro rata among allowed claims. It, thus, presents the issue whether a claim should be decided in the bankruptcy claims process or the arbitration that the debtor agreed to before its bankruptcy.

Further work concerning the UNCITRAL Legislative Guide on Insolvency Law could explain how the existing broad language of the Model Law permits a broad range of forms of cooperation, including mediation and arbitration, and provide form orders and agreements to aid practice.

It could also provide a protocol for cooperation between courts and arbitral panels under which the main bankruptcy case court would balance bankruptcy and arbitration policies to decide whether to permit a pre-bankruptcy agreement to arbitrate a claim against a debtor to be carried out, as described in the Westbrook and Gropper articles.

- J. This Position Paper is supported by a longer **Memorandum** that summarizes the foregoing articles, organized around the three issues described above: (1) how **Claims Arbitration** can be done in connection with a bankruptcy case and enforced under the New York Convention; (2) how **Arbitration of Disputes Arising in Bankruptcy Cases** can be done and enforced under the **New York Convention**; and (3) how **Restructure Arbitration** can be done and enforced under the New York Convention.
- K. The following Overviews from that **Memorandum** provide a more detailed discussion of **Claims Arbitration**, **Arbitration of Disputes arising in Bankruptcy Cases** and **Restructure Arbitration**.

### III. CLAIMS ARBITRATION OVERVIEW.

As business has evolved, more companies do business across borders and many of them have chosen arbitration to resolve disputes so that they do not have to depend on the courts of a foreign county. The international arbitration system is designed to permit providers of capital and credit to collect their claims without having to go to court in the

country into which they provided financial accommodation. Arbitration promotes a policy of predictability, essentially meaning that the capital providers place greater trust in an international arbitral panel than in the courts of the debtor's country to apply the agreed upon law.

When parties to these arbitration agreements become insolvent and go into bankruptcy cases, there will be inevitable conflicts between bankruptcy law and the agreement to arbitrate.

Generally, bankruptcy policy favors having the bankruptcy court in the country where the debtor has its operations and assets collect all estate assets, resolve and allow all claims under uniform standards, and distribute estate assets to claimants. This is complicated when a debtor has cases in many countries. The UNCITRAL Model Law contemplates that the parties will sort through which is the main bankruptcy case that will lead all the debtor's bankruptcy cases.

The Model Law's search for the court at the debtor's center of main interest, thus the closest ties with the debtor and its assets, is, of course, at odds with arbitration policy which is premised on the fear that a court so close to the debtor will have a partisan preference in favor of the debtor.

Depending on the country, bankruptcy law might impose an automatic stay of claims collection and permit a reorganization plan if it pays creditors at least as much as they would receive in liquidation. In other countries, bankruptcy is intended to promote a prompt and efficient liquidation in which creditor claims are fairly decided and receive their proper *pro rata* amount of distributions. Both are premised on the bankruptcy court having centralized control over claims and distribution of assets.

In either case, if a claim is sent off to arbitration and that takes three times longer, costs twice as much to adjudicate and an arbitral award provides for priority distribution, that would plainly conflict with bankruptcy principles. Some rule needs to be applied to decide whether to permit the arbitration to proceed or have the bankruptcy court resolve the claim (a "**Claim Arbitration Rule**").

If a claimant wishes to pursue arbitration of its claim without seeking permission from the debtor's bankruptcy court, it runs the risk of being enjoined by the bankruptcy court, or having it rule, for example, that its debtor lacks the capacity to arbitrate, or ultimately to refuse to honor the arbitral award against the debtor's assets, all powerful tools to thwart an arbitration the bankruptcy court has not authorized.

If a party claiming against a debtor seeks an order from a court in the forum of the arbitration authorizing the arbitration to go forward after the debtor has filed a bankruptcy case in its home forum, this will present a choice of law issue. Should the law of the forum of the arbitration supply the **Claim Arbitration Rule** or should that rule should be supplied by the forum for the debtor's bankruptcy case ("**Claim Arbitration Choice of Law Rule**").

In this setting, some courts in the forum of the arbitration have applied their law to whether the arbitration should go forward, and some have applied the law of the forum of

the bankruptcy. This happened in the **Elektrin/Vivendi** cases where the debtor had filed a bankruptcy case in Poland. One arbitration was permitted to go forward in London under English law, and another arbitration was stayed in Switzerland because it looked to Polish law which would stay the arbitration.

If the question whether the arbitration should be permitted to go forward is brought to a bankruptcy court for resolution, it will apply its **Claim Arbitration Rule** and the **Choice of Law** issue will be rendered moot.

As to **Claim Arbitration Rules**, a number of bankruptcy courts have developed a case by case analysis to decide whether to exercise discretion to refer resolution of a claim to an arbitration trying to enforce the agreement to arbitrate unless it interferes with the bankruptcy process.

**In two articles, written 27 years apart, Professor Westbrook has suggested a highly rational approach to all this. Ask the bankruptcy court for permission to pursue a Claim Arbitration, instead of trying to proceed with the arbitration without consulting the bankruptcy court essentially challenging it to try to stop you. The bankruptcy court should try to honor the arbitration agreement unless the arbitration will (1) be too slow, (2) cost too much, (3) involve something too important to the bankruptcy case, or (4) not likely be enforceable under the New York Convention anyway. If there are many bankruptcy courts for the debtor in many countries, this decision should be made by the bankruptcy court that has the main case because it has the primary responsibility to coordinate the debtor's bankruptcy.**

#### **IV. ARBITRATION OF CLAIMS ARISING DURING A BANKRUPTCY CASE AND RESTRUCTURE ARBITRATION OVERVIEW.**

In a 2012 article titled **Arbitration of Cross Border Insolvencies**, U.S. Bankruptcy Judge Gropper described the development of cross-border insolvency law that began with the 1997 UNCITRAL Model Law on Cross Border Insolvency, which has essentially been adopted as Chapter 15 in the United States, and in many other countries. A somewhat similar law has been adopted as the E.U. Regulation. This is the same law discussed in **Westbrook Article II** that provides the basis for the recommendation that the bankruptcy court in the main case should decide whether to permit a pre-petition arbitration agreement to be performed post-bankruptcy.

Judge Gropper's article argues that inter-estate disputes that arise during a bankruptcy case could be resolved through arbitration, breaking the log jam on some of the most fundamental issues in a bankruptcy case, such as the allocation of the proceeds of the sale of the assets of many estates (that have been sold together as an integrated going concern), among the different estates to then be shared with their creditors. The Third Circuit Court of Appeals said in late 2013 in *Nortel* said that such fundamental issues could be arbitrated, it simply found that there had not been an agreement to arbitrate in that case.

If such fundamental issues that arise post-bankruptcy can be authorized to be arbitrated, then a wide range of disputes that arise post-bankruptcy could also be authorized to be

decided through arbitration, including disputes over implementation of rights under post-petition granted liens and sales free and clear of liens. See the III 2007 UNCITRAL Paper.

Judge Gropper goes further to discuss agreements to arbitrate fundamental restructure issues when there is no pending bankruptcy case, thus, no bankruptcy court to provide rulings that the subject is suitable for arbitration, or that its arbitration is in keeping with public policy. He argues persuasively, however, that such an agreement to arbitrate fundamental restructure issues meets these standards.

**The introduction to the Gropper Article provides a detailed overview of his views concerning Arbitration of Disputes Arising in Bankruptcy Cases and Restructure Arbitration.**

The subject of cross-border insolvency—the recognition that a bankruptcy or insolvency proceeding brought in one jurisdiction is accorded in another—has received significant attention in recent years, commensurate with the growth of international trade. Efforts to meet the challenges created by cross-border business failure have included a Model Law on Cross-Border Insolvency, drafted by the United National Commission on International Trade Law (“UNCITRAL”) and adopted in many of the world’s leading commercial nations, including the United States, where it is codified as chapter 15 of the Bankruptcy Code. The goal of the drafters has generally been to realize the universalist ideal of a single proceeding that will coordinate the insolvency of a multinational enterprise, providing for centralized control over its worldwide assets, the possibility of a reorganization, and a single, uniform distribution to creditors of the same priority.

Even for multinational enterprises administered and controlled from a central headquarters, however, cross-border insolvencies usually involve the opening of a proceeding in each jurisdiction in which assets are located. This creates conflicts, costs and inefficiencies, and substantial loss of value, by making it difficult and often impossible to sell or reorganize the assets of a global enterprise on a going concern basis. To promote coordination and centralization, the UNCITRAL Model Law posits an enterprise’s “center of main interests” or “COMI,” which will presumably have some form of primacy. However, it is not clear that the COMI principle can act as a force for simplification or unification. It has proven difficult to locate the COMI of an enterprise, and, even when ascertained, the COMI may be situated in one of the many countries that lack a functioning insolvency law or a court system in which creditors have confidence. Moreover, the COMI principle founders on the fact that multinational companies ordinarily form distinct legal entities in the jurisdiction in which they operate, each of which is considered a separate unit for insolvency purposes, leading to the likelihood that multiple courts will administer the assets of an enterprise based on their location, with little regard for the fact that they may be essential parts of an integrated whole.

This paper purposes international arbitration as a new approach to achieve the goals espoused by the Model Law in a world without an international court or another means to exercise authority over disparate national proceedings.

Arbitration would be particularly useful in connection with two types of proceedings that have proven particularly difficult to resolve in cross-border insolvencies. The first involves disputes among estates of affiliated debtors in insolvency cases in different jurisdictions. In a world where proceedings are usually opened in multiple jurisdictions, there are few effective means to resolve disputes between affiliates, especially as the Model Law has very few provisions that apply to corporate groups.

Second, arbitration could play a positive role in the reorganization of the debt of an insolvent or financially distressed enterprise that does not have access to an effective reorganization law. In present practice, the debtor and its principal creditors, who are ordinarily its lenders, attempt to “work out” the problem. Arbitration would complement the workout process by providing a neutral arbitrator or panel to attempt to effectuate a consensual restructuring while keeping in reserve a binding process that would provide an enforceable decision in a reasonable time frame. Arbitration would also provide the parties with the ability to designate the applicable law, the forum, and prospective neutral decision-makers, whose awards would be prima facie enforceable.

Arbitration would thus benefit all the parties involved in the economic distress of a multi-national entity by consolidating and centralizing disputes relating to the debtor and its affiliates in a single proceeding, in an ascertainable neutral or acceptable venue, before expert arbitrators. Under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, an arbitration agreement and award is enforceable unless it is “null and void, inoperative, or incapable of being performed.” There is no reason to believe that the arbitration of issues relating to the financial distress of a business enterprise would be unenforceable.

As is the invariable rule in any arbitration, cross-border insolvency arbitration would be based on consent. In an arbitration among affiliates, the consent of the affiliates (and presumably the respective courts) would be required. An arbitration of a debt restructuring would also require consent and would ordinarily bind only the borrower (debtor) and its principal lenders, a limited group of entities whose consent could be obtained. However, the benefits of arbitration ought to be great enough for the lenders to consent to the process, even though creditors not participating in the arbitration would have to be paid in full or left unimpaired.

Gropper Article, at pp. 201-03.

**Certain Articles and Papers Concerning Use of International Arbitration in Connection With Reorganization of Insolvent Entities, International Bankruptcy Cooperation and Related Subjects (Available at [www.iiiglobal.org](http://www.iiiglobal.org))**

1. Jay L. Westbrook, *The Coming Encounter: International Arbitration and Bankruptcy*, 67 Minn. L. Rev. 595 (1982-1983)
2. Jay L. Westbrook, A Global Solution to International Default, 98 Mich. L. Rev. 2276 (2000)
3. Lee C. Buchheit and G. Mitu Gulati, *Sovereign Bonds and the Collective Will*, 51 Emory L.J. 1317 (2002)
4. Sean Hagan, *Designing a Legal Framework to Restructure Sovereign Debt*, 36 Geo. J. Int'l J. 299 (2004-2005)
5. E.W. Warren and J.L. Westbrook, *Contracting Out of Bankruptcy, An Empirical Intervention*, 118 Harv. L. Rev. 1197 (2005)
6. Kunibert Raffer, *Internationalizing US Municipal Insolvency: A Fair, Equitable, and Efficient Way to Overcome a Debt Overhang*, 6 Chi. J. Intl'l L. 361 (2005)
7. Zack Clement, *Greater Use of International Arbitration in Cross-Border Insolvency Cases*, UNCITRAL Congress, July 12, 2007.
8. Alan M. Resnick, *The Enforceability of Arbitration Clauses in Bankruptcy*, 15 Am. Bankr. Inst. L. Rev. 183 (2007)
9. Christoph G. Paulus and Steven T. Kargman, *Reforming the Process of Sovereign Debt Restructuring: A Proposal for a Sovereign Debt Tribunal* (International Insolvency Institute), June 10, 2008.
10. Jay L. Westbrook, *International Arbitration and Multinational Insolvency*, 29 Penn St. Int'l. L. Rev. 635 (2010)
11. Allan Gropper, *The Arbitration of Cross-Border Insolvencies*, 86 Am. Bankr. L.J. 201 (2012)
12. Zack Clement, *Arbitration of a Country's Financial Reorganization*, presented at the International Insolvency Institute Conference in Paris, France, June 21, 2012 (describing how Chapter 9 principles can be used in the arbitration of a country's reorganization). (77303696)
13. Zack Clement, *Arbitration of a Country's Financial Reorganization*, a speech made at the III Conference in Paris, France on June 21, 2012. (77967581)
14. Sebastian Seelmann-Eggebert, *Insolvency and International ADR: an Arbitrator's Perspective*, presented at the International Insolvency Institute Conference in Paris, France on June 21, 2012.

15. Lee Buchheit, *The Problem of Holdout Creditors in Eurozone Debt Restructurings*, Butterworth's Journal of International Banking and Financial Law, April 2013.
16. Zack Clement, *Restructuring Government Finances – In Public And In Less Than A Year* (applying Chapter 9 principles to arbitration of European county restructures), published in *Insolvency Intelligence* in London on August 15, 2013, available at Westlaw *Insolv. Int.* 2103, 26(6), 91-93.
17. Zack Clement, *Position Paper Concerning Greater Use of Arbitration in Connection with Insolvency Matters*, Zack Clement, April 21, 2014.
18. Zack Clement, *Memorandum Supporting Position Paper Concerning Greater Use of Arbitration*, in connection with *Insolvency Matters*, April 21, 2014.
19. Zack Clement and Andrew Black, *Proposal for Restructuring a Sovereign Debtor's Finances Through Arbitration*, *IBA Journal*, May 2014.
20. Zack Clement, *Revised Proposal for Arbitration of a Country's Financial Reorganization*, presented at the III Conference in Mexico City, June 10, 2014 (describing how sovereign states can lead their own financial reorganization).