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The Road to a Suitable and Comprehensive Global Approach to Insolvencies Within Multinational Corporate Groups

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1. Introduction

Recent years have exhibited a growing number of multinational insolvency incidents resulting from the increase of internationally integrated businesses and globalization. These special cases posed new demands on the legal and economic systems yielding novel doctrines and models for addressing these special complex problems.

The multinational business failure may take many shapes: an insolvent company with an international network of branches, a company holding assets around the world or simply a company employing foreign employees or dealing with foreign creditors. These examples all involve a single debtor having worldwide operations or relations. However, the international insolvency scenario may take a more complex form: that of a failure within a multinational corporate group (hereinafter referred to as "MCG"[1]). In fact, corporate group is the most typical structure of modern international enterprises[2]. The issue then no longer concerns only one debtor but rather a bundle of affiliated companies. These debtors, although legally separated, can in fact be tied together in various ways, including mutual transactions and cross guaranties or even through a single control directing all the companies as a united business. This form of insolvency brings to the cross-border insolvency arena more complex legal issues that need to be resolved.

Several approaches for handling multinational insolvency situations have been developed during the years. On the national level, a significant number of countries have recently introduced rules and procedures regarding aspects of cross border insolvency, international co-operation and assistance. Naturally however, even the most modern local approaches are limited to their boundaries and depend on other jurisdiction laws and policies, thus incapable of creating a truly systematic and harmonized international method for handling multinational cases[3]. Although an ideal (yet improbable) solution such as an international treaty or even an international instance applying single bankruptcy law is not within reach[4], several significant initiatives emerged on the international level. One such approach is the EU Regulation on Insolvency Proceeding[5], which is already in effect for all member states (except Denmark), providing orderly rules for managing multinational failures with close coordination and control. More recent regional approach derived from the private sector is the ALI Principles of cooperation in transnational insolvency cases

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[1] Altough the term multinational enterprises ('MNE') is often used in the literature also with regard to corporate group this work will make use of the term 'MCG' since it avoids any confusion with enterprises or corporations that operate worlwide without incorporating separate entities. It is thought that 'MCG' better expresses the fact that two or more separate corporations are invovled in these cases.

[2] See Jacob S. Ziegel, "Corporate Groups and Crossborder Insolvencies: A Canada- United States Perspective" [2002] 7 Fordham J. Corp. & Fin. L. 367, 369; Robert K. Rasmussen, "The Problem of Corporate Groups, a Comment on Professor Ziegel" [2002] 7 Fordham J. Corp. & Fin. L. 395; Lynn M. LoPucki, "Cooperation in International Bankruptcy: A Post-Universalist Approach" [1999] 84 Cornell L. Rev. 696, 716.

[3] See Ian F. Fletcher, *Insolvency in Private International Law* (1999) [hereinafter: Fletcher, Insolvency] p. 367, 370; Jay Lawrence Westbrook, "A Global Solution to Multinational Default" [2000] 98 Mich. L. Rev. 2276, 2279.

[4] See Fletcher, Insolvency, p. 368; Jay Lawrence Westbrook, "A Global Solution to Multinational Default" [2000] 98 Mich. L. Rev. 2276, 2292-2298.

[5] Council Regulation No. 1346/2000 on Insolvency Proceedings [http://www.europa.eu.int/eur-lex] [hereinafter: EU Regulation].

among the members of the North American free trade agreement ("ALI Principles")[6]. This initiative provides unofficial best-practice recommendations encouraging close coordination and universal approach[7]. Other initiatives emerged from international organizations such as the International Monetary Fund[8] and the World Bank[9].

The UNCITRAL Model Law on Cross-Border Insolvency[10] provides the broadest global framework for cooperation and coordination of cross-border insolvencies. This remarkable achievement was driven from the notion of constructing a "compromised" model, such that provides a framework for easy recognition, access and relief and encourages coordination and cooperation. It does not involve, however, rules of direct jurisdiction and choice of law[11]. Moreover, the ultimate form of the enactment of the Model Law lies within the discretion of each state wishing to embrace it, as it is a 'model' and not a convention. Thus, the success of the Model Law is dependant on being embraced by a significant number of countries and on these countries' willingness to adopt it in a manner consistent with its basic concepts[12]. As for today, only several states embraced or are in the process of adopting the Model Law. However, it is being strongly considered in a number of major states, among them the United States and the United Kingdom[13]. In the lack of any applicable model upon relevant parties (or when otherwise appropriate), ad-hoc solutions can also be applied. These tools usually take the form of either international agreement ("Protocols") drafted and concluded to the specific case, appointment of examiners or foreign representatives[14]. Recent important breakthrough in terms of international cooperation involves the use of direct judicial communications and negotiations by various means such as telephone conversations, videoconferences and exchanging emails[15].

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[6] American Law Institute, *Transnational Insolvency: Cooperation among the NAFTA Countries* (2003) [hereinafter: ALI Principles].

[7] See J.L. Westbrook, "Multinational Enterprises in General Default: Chapter 15, The ALI Principles, and The EU Insolvency Regulation" [2002] 76 Am. Bankr. L.J. 1, 33.

[8] See Legal Dept., Int'l Monetary Orderly Fund, & Effective Insolvency Procedural Principles: Key Issues (1999).

[9] See Principles and Guidelines for Effective Insolvency and Creditor Rights Systems, April, 2001, <Http://www.worldbank.org/legal/insolvency<uscore>in/overview.htm> [hereinafter: the World Bank Principles]. For a list of International organization projects see the International Insolvency Institute website (http://www.iiiglobal.org/organizations/index.html).

[10] U.N. Comm'n on Int'l Trade Law, Model Law on Cross-Border Insolvency with Guide to enactment, U.N. Sales No. E.99.V.3 [hereinafter "Model Law"]; United Nations Commission on International Trade Law, 30th Sess., at 3, U.N. Doc. A/CN.9/442 (1997), reprinted in 6 Tul. J. Int'l & Comp. L. 415, 439 (1998). [http://www.uncitral.org/en-index.htm] [hereinafter "Guide to Model Law"].

[11] See Fletcher, Insolvency (*supra* note 3), p. 368-369 (explaining that the Model Law reflects the 'art of the possible' and offers the best prospects of formulating a global framework for international cooperation in cross-border-insolvencies; *See also* I.F.Fletcher, *The Law of Insolvency* (3rd Edn. 2002) [hereinafter: Fletcher, The Law of Insolvency] p. 862.

[12] See R. W. Harmer, "Documentation B, UNCITRAL Model Law on Cross-Border Insolvency" [1997] 6 Int. Insolv. Rev., 145, 152-153.

[13] See Bankruptcy Reform Act of 1999, H.R. 833, 106th Congress (1999) (passed by the House, 5/5/1999; passed by the Senate, in lieu of s. 625, 2/2/2000) (The Model Law is included in a new chapter 15 of the United States Bankruptcy Code, and has been contained in every version of the pending bankruptcy legislation in both houses); Insolvency Act 2000, Ch. 39, s.14 (Eng.) (The English Insolvency Act, 2000 includes a specific provision for future adoption of the Model Law). For a list of countries that have adopted the Model Law see <http://www.uncitral.org/en-index.htm.

[14] See *infra* note 24.

[15] See *infra* notes 25-27 and accompanied text.

Returning to the MCG case, there is a clear absence of explicit reference to the special case of insolvency within the MCG in major international models. Indeed, the UNCITRAL Model Law does not mention the MCG case. Rather, its express scope lies on a “single debtor” situation[16]. The same is true for the EU Regulation, which does not include any specific provisions for dealing with such cases[17]. Apparently, the only current approach explicitly addressing the matter is the ALI Principles, which provide two basic principles to apply in MCG cases[18]. Essentially, these principles encourage a global approach to these cases, while still respecting the corporate form[19]. Thus, the ALI Principles definitely acknowledge the possibility of having close relations between different members of MCG and hence accept the need for an international approach for such cases. Accordingly the Principles encourage coordination between concurrent proceedings of affiliated companies and suggest that joint filings for affiliates should be permissible[20]. However, the Principles are somewhat limited in their scope. For instance, the issue of group liability is left beyond the scope of the Principles[21]. Also, although helpful in many aspects to other countries,[22] they currently apply only to the three NAFTA states[23] reflecting accepted concepts specifically in these countries.

A significant number of large MCGs' insolvencies were operated with notable transnational cooperation through the use of ad-hoc means of communication and cooperation. This approach has in most cases resulted in efficient administration of the whole insolvency proceedings and in some cases enabled a worldwide settlement or an optimal combined plan of reorganization[24]. Communication between courts

[16] See for example Model Law (*supra* note 10), Article 1(c).

[17] As was expressly indicated in the Report Virgos/Schmit (1996) (The report indicates in Paragraph nr. 76 that ”The Convention offers no rule for groups of affiliated companies (parent-subsidiary schemes). The general rule to open or to consolidate insolvency proceedings against any of the related companies as a principal or jointly liable debtor is that jurisdiction must exist according to the Convention for each of the concerned debtors with a separate legal entity. Naturally, the drawing of a European norm on associated companies may affect this answer”). The Report has been issued to serve as an interpretive guide to the Insolvency Convention of 1995, which five years later has been altered to the Insolvency Regulation. The Report has been recognized as an unofficial guide to interpretation (see comments made in this regard in EU Regulation courts’ decisions for instance *In re* Brac Rent-A-Car Inc [2003] EWHC (Ch) 128, [2003] BCC 504 and in Geveran Trading Co Ltd v Skjevesland [2003] BCC 209; See further Bob Wessels, "International Jurisdiction to Open Insolvency Proceedings in Europe, In Particular Against (Groups of) Companies" Working Papers Series, Institute for Law and Finance, Johann Wolfgang Goethe University, (http://www.iiiglobal.org/country/european_union/InternJurisdictionCompanies.pdf)).

[18] See ALI Principles (*supra* note 6), p. 76-82 (Procedural Principle 23 and 24).

[19] *Id.*; *See* also J.L. Westbrook, "Multinational Enterprises in General Default: Chapter 15, The ALI Principles, and The EU Insolvency Regulation" [2002] 76 Am. Bankr. L.J. 1, 33, 38.

[20] ALI Principles (*supra* note 6), Procedural Principles 23 and 24.

[21] *Id.*, p. 77.

[22] J.L. Westbrook, "Multinational Enterprises in General Default: Chapter 15, The ALI Principles, and The EU Insolvency Regulation" [2002] 76 Am. Bankr. L.J. 1, 33, 39.

[23] Namely: the United States, Canada and Mexico; Procedural Principle 23 is not applicable in Mexico. *See* ALI Principles (*supra* note 6), p. 79.

[24] See, e.g., *Re* Maxwell Communications Corp., [1993] 1 W.L.R. 1402 (Ch. 1993)*;* 170 B.R. 800 (Bankr. S.D.N.Y. 1994); *In re* Inverworld 267 B.R. 732, 740 n. 10 (Bankr. W.D. Tex. 2001); *In re* Smouha 136 B.R. 921 (in the BCCI cases); *In re* Loewen Group Int'l., Inc., No. 99-1244, 2002 U.S. Bankr. LEXIS 199 (Bankr. D. Del. 1999); *In re* Enron, No. 01-16034, 2001 Extra Lexis 304, at 2, (Bankr. S.D.N.Y. Dec. 10, 2001); *In re* Singer Company N.V., 262 B.R. 257 (Bankr. S.D.N.Y 2001); Global Crossing Ltd (Chapter 11 No. 02-40188-reg (REG) (Bankr. S.D.N.Y.); Federal Mogul (Re T&N Ltd And Others ([2004] All ER (D) 283 (Oct)); *See* also Jay Lawrence Westbrook, "International Judicial Negotiations" [2003] 38 Tex. Int’l L.J. 567, 571-573 (referring to the Maxwell, re Loewen and

both through the use of Protocols and the use of direct judicial conversations is now a routine in cases involving Canada and the United States,[25] which involves both the use of agreements and the use of direct judicial communication. Similar time zones and a common spoken language that although being 'technicalities' may be crucial in cross-border insolvency in which timing and speed are vital perhaps facilitate the latter. However, producing "real-time" responses through the use of judicial communication may prove difficult in cases were numerous parties are involved especially when they belong to different time-zones and use different languages. Anyhow, very recently (and for the first time), a formal inter-court communication has been conducted involving England and the United States, in respect of Cenargo International Plc and related companies[26]. This may be a guiding case with more to follow, in which close and collaborative communication will play a significant role[27].

However, contemporary or future courts applying some of the main existing international cross-border insolvency models (specifically the EU Regulation and the Model Law) may lack a clear guidance for international cooperation in such cases. In the absence of any specific communication initiative (e.g., designing adequate Protocols for the specific case) the "member state" court or "Model Law" one, might

re Inverworld cases); Jacob S. Ziegel, "Corporate Groups and Crossborder Insolvencies: A Canada-United States Perspective" [2002] 7 Fordham J. Corp. & Fin. L. 367, 369 (explaining the phenomena of corporate groups cases operating both in Canada and in the United states); Robert K. Rasmussen, "The Problem of Corporate Groups, a Comment on Professor Ziegel" [2002] 7 Fordham J. Corp. & Fin. L. 395, 404 (referring to the re Loewen Group case); Even D. Flaschen, Anthony J. smoth, Leo Plank, "Case Study: Foreign Representatives in U.S. Chapter 11 Cases: Filling the Void in the Law of Multinational Insolvencies" [2001] 17 Conn. J. Int'l L. 3 (examining several solutions for international cooperation, arguing the appointment of foreign representatives to be the most adequate solution to the multinational corporate group situation); Douglas G. Baird & Robert K. Rasmussen, "The Four (or Five) Easy Lessons from Enron" [2002] 55 Vand. L. Rev. 1787 (discussing the Enron group case); E. Bruce Leonard, "Coordinating Cross-Border Insolvency Cases" International Insolvency Institute, June 2001 (http://www.iiiglobal.org/members/committee_a/Co-ordinating_Cross-Border_Insolvency_Cases.pdf).

[25] See Jay Lawrence Westbrook, "International Judicial Negotiations" [2003] 38 Tex. Int'l L.J. 567, 572 footnote 30 ; *See* also generally Jacob S. Ziegel, "Corporate Groups and Crossborder Insolvencies: A Canada- United States Perspective" [2002] 7 Fordham J. Corp. & Fin. L. 367; Robert K. Rasmussen, "The Problem of Corporate Groups, a Comment on Professor Ziegel" [2002] 7 Fordham J. Corp. & Fin. L. 395.

[26] On April 14, 2003 there was a telephone discussion between Lightman J. and Judge Drain of the US Bankruptcy court for the Southern District of New York in respect of Cenargo International Plc. And related companies, which are under administration orders in England and chapter 11 proceedings in the United States (*Re* Norse Irish Ferries & Cenargo Navigation Limited (unreported, 20 February, 2003), Ch D); *See*: Insolv. Int. 2003, 16 (6), 47-48 (NOTICEBOARD- Co-operation Between Courts); Shandro, Sandy and Tett, Richard, "The Cenargo Case: A Tale of Conflict, Greed Contempt, comity and Costs", Insol World- Fourth Quarter 2003, 33-35; Susan Moore, "Cenargo: A Tale of two courts, comity and (aleged!) comtemp!", January 2004 (http://www.iiiglobal.org/members/committee_c/cenargo.PDF).

[27] The Model Law also provides explicitly for direct communication between courts (see Article 21 of the Model Law (*supra* note 10). The ALI Principles encourage direct communication and adopt guidelines for such communications (The American Law Institute, Transnational Insolvency: Cooperation among the NAFTA Countries, Principles of Cooperation Among the NAFTA Countries, Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases (www.ali.org) [hereinafter: ALI Guidelines for Communication]). The International Insolvency Institute has a new project developing the ALI Guidelines for use in various regions of the world (see Institute's Guidelines for Court-to-Court Communication Gain International Approval, ALI Rep., Fall 2002, at 18; also see Jay Lawrence Westbrook, "International Judicial Negotiations" [2003] 38 Tex. Int'l L.J. 567, 581.

base its decision regarding the relevant company at hand as entirely separate entity although part of a group. For example, in the basic matters of jurisdiction and recognition, the court will most likely simply apply the rules of "centre of main interests" (COMI) and "establishment" (adopted within the EU Regulation[28] and in the Model Law[29]) upon the specific company. Thus, the court will not give any effect to possible implications of the fact that it might be in reality a case of a financial collapse of a single multinational business consisting of several companies or that the company at issue might be closely connected to other entities relevant to the matter. In addition, this court might decline requests of representatives or office holders of other companies from a same collapsing enterprise, who do not represent the single debtor the court is dealing with. However, these different companies might be closely connected and therefore it is a matter for consideration whether there is a need to handle those companies together or with active cooperation between the different proceedings.

In several recent cases applying the EU Regulation, the problems of dealing with group insolvencies and the lack of explicit reference to this issue were quite evident[30]. To take just a few examples, in two occasions[31], the English court dealt with the question of jurisdiction to conduct insolvency proceedings in respect of a foreign company[32]. The companies in both cases were evidently part of a single multinational business. In Daisytek the English court applied the test of COMI upon the specific company at issue, while refrained from basing its decision on the whole factual

[28] The Regulation provides that the state within whose territory the debtor's COMI is situated is the proper venue for handling the insolvency proceedings. No other parallel proceedings can be opened in another state unless there is an establishment there, and then only with territorial effect. The COMI is presumed to be in the place of the debtor's registered office. This presumption can be rebutted if a party can show that the company's main interests is conducted on a regular basis at a place in some other Member State in a manner which is ascertainable by third parties (EU Regulation (*supra* note 5), Article 3(1) and Article 3(2); I.F.Fletcher, "The European Union Regulation on Insolvency Proceedings" [2003] INSOL INTERNATIONAL CROSS-BORDER INSOLVENCY A Guide to Recognition and Enforcemnt, 15, 27-31). See also on the concept of COMI in *infra* note 240.

[29] See Model Law (*supra* note 10), Article 2 (see also UNCITRAL Legislative Guide on Insolvency Law (2004) [http://www.uncitral.org/en-index.htm] [hereinafter: UNCITRAL Legislative Guide], part two, IA2 (a), p. 52)).

[30] See *In re* Daisytek- ISA Ltd [2003] BCC 562 (16 May 2003, Chancery Division, Leeds D.R.); *In re* Daisytek ISA Ltd (Tribunal de Commerce, Cergy-Pontoise, 1 July 2003) ; *In re* Daisytek-ISA Ltd (Cour d'Appel, Versaille, 4 September 2003); In re Daisytek ISA Ltd (Dusseldorf County Court, 19 May 2003; 10 July, 2003); In re Daisytek ISA Ltd (Dusseldorf Court of Appeal, 23 October 2003; 12 March, 2004); *In re* Brac Rent-A-Car Inc [2003] EWHC (Ch) 128, [2003] BCC 504; AG Monchengladbach of April 27, 2004 (EMBIC I) in ZIP 2004, 1066; Eurofood IFSC Limited [2004] BCC 383; Eurofood IFSC, Re (Trib (I) 19 February 2004 [2004] I.L.Pr.14); Re Parmalat Hungary/Slovakia, Municipality Court of Fejer, 14 June, 2004; Re Crisscross Telecommunications Group (unreported, 20 May 2003), Ch.D; Cirio del Monte (Italian court of Rome, August, 2003) (unreported); Re Enron Directo SA (England Ch D, 4 July, 2002) (unreported); Telia Soneria AB v. Hilcourt "Docklands" Ltd. [2002] EWHC 2377 (Ch); Ci4net.com Inc (England, Ch D, May 20, 2004); Hettlage Osterrich (Munich District Court, May 4, 2004); Automold (Regional Court of Cologne, January 23, 2004) (see cases in www.eir-database.com); Re TXU Europe German Finance BV (Unreported, October 29, 2004) (Ch D).

[31] *In re* Daisytek- ISA Ltd, and others [2003] BCC 562 (16 May 2003, Chancery Division, Leeds D.R.); *In re* Brac Rent-A-Car Inc [2003] EWHC (Ch) 128, [2003] BCC 504.

[32] In Daisytek 14 companies were at issue, amongst them a French trading company and two German trading companies as well as their German holding company. According to the facts presented at the case, all the trading companies were managed as a group and were coordinated by the head office in the United Kingdom. The question of jurisdiction arose in respect of the German companies and the French company. In Brac the company at issue was an American Parent company.

picture of the group's global operations[33]. This resulted at some stage with contradicting decisions of the English and the French and German courts (at first instances), with regard to the appropriate place to administer the insolvencies of the French and German subsidiaries[34]. In Brac[35] Mr. Justice Lloyd indicated the need for a prudent approach, particularly in cases of insolvent debtors appearing to be affiliated to other companies, when determining which forum would be appropriate for the case. Otherwise, the corporate bodies involved could exploit the situation for forum shopping. This is specifically due to the fact (as the judge argued) that there are no explicit rules in the EU Regulation for handling group of companies or affiliated companies' cases[36].

The lack of a comprehensive orderly model for treating MCGs in major international approaches may result from various reasons. Primarily, underlying the quest for a principled global approach is a "battle" between the desire to find ways of connecting between the components of a global group for the benefit of the international insolvency process and for promoting the reliability of the international insolvency system[37] (which in certain cases may even suggest dismantling the walls or 'piercing the veil' of the corporate entities) and the obvious demands on behalf of traditional corporate theory that the integrity and distinctiveness of the corporate form be respected[38]. This conflict is augmented by the fact that in these sorts of cases the enterprise is one of a worldwide nature with components operating within the borders of different states. As of today national laws widely differ in the extent to which they adhere to entity law. Different countries use different circumstances to justify 'lifting' the corporate 'veil' or operating other doctrines and concepts (such as 'enterprise law'[39]) for the purpose of imposing group liability or interconnecting separate entities in the course of their insolvency[40]. Hence, a global approach entails a 'double

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[33] *In re* Daisytek- ISA Ltd, and others [2003] BCC 562 (16 May 2003, Chancery Division, Leeds D.R.), at 5-8.

[34] *In re* Daisytek ISA Ltd (Tribunal de Commerce, Cergy-Pontoise, 1 July 2003); In re Daisytek ISA Ltd (Dusseldorf County Court, 19 May 2003; 10 July, 2003); See further *infra* section 3.1.3.7.

[35] *In re* Brac Rent-A-Car Inc [2003] EWHC (Ch) 128, [2003] BCC 504.

[36] *Id.*, at para 27.

[37] The benefits from such approach will be discussed in the subsequent sections.

[38] See OECD, The Responsibility of Parent Company for Their Subsidiaries (1980), "Summary of comparative findings", paras 65-70 (this document is a comparative analysis of the legal situation concerning financial responsibility in OECD member countries) [hereinafter: OECD comparative findings]; Richard D. Kauzlarich, "The review of the 1976 OECD declaration on international investment and multinational enterprises" [1980-1981] 30 Am. U.L. Rev. 1009 1021 (explaining with regard to the OECD comparative findings that "it was clear that the legal systems of all OECD countries upheld the principle of limited liability of companies in the absence of contractual liability, with certain fairly consistent but limited exceptions"); ALI Principles (*supra* note 6), p. 80, stating that the respect for the corporate form is strongly grounded in the laws of all three NAFTA countries; P.T. Muchlinski, *Multinational Enterprise and the Law* (Oxford, Blackwell Publishers, 1999, Revised Paperback Edition) [hereinafter: Muchlinski, Multinational Enterprises], p. 328 (indicating that even the most advanced corporate group law, the German Stock Corporations Act 1965 (*Aktiengesetz*) seeks to preserve the subsidiary as a separate enterprise in that the parent owes duties of compensation to the creditors and minortiy shareholders of the subsidiary in return for the power of control).

[39] Evaluating corporate groups according to the economic inter- relations within the group, regarding it as a single entity in various legal matters. *See* Phillip I. Blumberg, *The Law of Corporate Groups: Bankruptcy Law* (1985, Supp 1992) [hereinafter: Blumberg, Bankruptcy], [hereinafter: Blumberg, Bankruptcy]; p. 695; Muchlinski, Multinational Enterprises (*supra* note 38), p. 328.

[40] See, for instance, the reforms in this respect in the New Zealand law and the mechanisms of procedural and substantive consolidation and subordination available under the US bankruptcy regime,

interference’ difficulty- a clash with the corporate entity and a clash with the country’s (within which it operates) sovereignty and legal policy.

In addition, there is an inherent difficulty in devising a model that enables international cooperation whilst refraining from creditors' prejudice and at the same time remains clear and predictable and is apt to deal with possible manipulations. This difficulty is mainly attributed to the complexity of the multiple debtor scenarios in which case there may be a spread of assets and debts among entities and large diversification of interests. Furthermore, the proper jurisdiction to handle the group insolvency case is presumably difficult to ascertain since different entities may have been incorporated or operated in different countries[41].

As insolvency within an MCG may take many forms a specific solution, perhaps appropriate to one possibility, may in fact be completely inadequate to deal with a different scenario. Consider first the different types of insolvencies: It can be a case in which only one subsidiary of the MCG is under insolvency or a number of subsidiaries or a case of an entire MCG in distress. This will undoubtedly reflect on the relevant issues to be resolved in the context of the insolvency and the specific appropriate means to be applied. For instance, an insolvency of a subsidiary may put the focus on issues of liability[42], while a total collapse may suggest the need for joint administration[43]. A second critical variable is the diversification in organizational structures of MCGs and the degree of integration of management and control. Similarly, this factor will have profound implications on the appropriate insolvency means to be applied. Thus, it could be a case of intermingling of assets and debts between entities and hosting states or conversely a case of an MCG that was operating in a more separate mode, neatly organized within its borders, functioning in accordance with national regimes and so on[44]. Accordingly, a global approach that

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and on the other hand the more strict application of the entity doctrine under English legal regime (*infra* sections 3.3.4, and 4.2.4.4).

[41] It has been argued in this regard that international models for cross-border insolvencies would be impractical in cases of MCGs, mainly since they can not resolve which is the appropriate jurisdiction for administering the insolvency proceedings and to what extent this jurisdiction can exert its authority over foreign affiliates (See Lynn M. LoPucki , "Cooperation in International Bankruptcy: A Post-Universalist Approach" [1999] 84 Cornell L. Rev. 696, 716-720).

[42] See *infra* section 4.2.4.

[43] See *infra* section 3.1.3.2.

[44] See Blumberg, Bankruptcy (*supra* note 39), p. 14-16; Blumberg, The Law of Corporate Groups: Procedural Problems in the Law of Parent and Subsidiary Corporations (1983, Supp 1992) [hereinafter: Blumberg, Procedure] p. 432-438. Professor Blumberg classifies corporate groups into strongly integrated groups, weakly integrated groups, conglomerate groups, and investment companies depending on the extent of interrelationship of organization, market and public posture. Various factors should be considered in this regard. Ultimately, it is a combination of the fundamental elements which are (a) financial interdependence; (b) economic integration; (c) participation by the parent in the decision making of the constituents; and (d) holding out of the group to the public as a single integrated enterprise (see also Blumberg, Bankrupcy (*supra* note 39), p. 696- 699). Other findings have concentrated on two sets of factors in ascertaining the degree of integration in management and control: first, the general influences on the locus of decision taking and, secondly, the degree of influence commonly exercised by the parent in relation to particular types of decisions (see OECD Structure and Organization of Multinational Enterprises (Paris, 1987); J.H.Dunning, *Multinational Enterprises and the Global Economy* (Wokingham, Addison-Wesley Publishing Co, 1993), [hereinafter: Dunning, Multinational Enterprises] p. 222-232; Martinez and Jarillo "The Evolution of Research on Co-ordination Mechanisms in Multinational Corporations" [1989] 20 Journal of International Business Studies, 489; P.T.Muchlinski, "Corporations in International Litigation: Problems of Jurisdiction and the United Kingdom Asbestos Cases" [2001] 50 *ICLQ* I).

would suggest for example a pooling of assets and debts mechanism to be applied on the MCG insolvency case[45] may be appropriate to the former above mentioned scenario but unsuitable to the latter. Whether and to what extent the MCG was centrally managed and controlled is an important factor in determining the degree of integration[46]; however an MCG can be integrated although decentralized[47]. In any case, the way the MCG was operated in this regard and the degree of autonomy of its components[48] will also affect the ability to identify a particular venue to handle the MCG insolvency process and may suggest different solutions to the handling of the MCG insolvency case[49]. Thus, it will also be critical to distinguish between scenarios where the MCG was controlled and managed from one specific country, and a case of an MCG whose entities had high degree of autonomy in decision making.

The following discussion will question the actual need for a global approach to MCG insolvencies[50]. It will begin by setting forth the key factors pertaining to the administration of MCG's insolvency, in light of which it will be subsequently considered whether unified proceedings for related companies would be advantageous and whether there would be circumstances in which the corporate form should be ignored in the context of the insolvency proceedings. It will explore the influence and effect a global model has on promoting or otherwise withholding of these factors, and the possibility to overcome any major flaws a global approach entails. It will include examples and reference to actual cases in order to accurately illustrate the strengths and potential weaknesses a global approach possesses. It will also refer to current national views to insolvencies within a corporate group. Focus will be put on three insolvency regimes- the United States', United Kingdom's and New Zealand's laws– which represent different approaches to these matters.

As we will go along discussing these issues and factors, the essential characteristics of an optimal global approach will emerge. Thus, we will be able to propose for each of the relevant goals, the characteristics and traits an adequate global approach should display. Essentially, these characteristics will suggest the 'right' ways of 'piercing the veil' in the MCG insolvency cases and linking between related entities in the course of their insolvency.

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[45] See *infra* sections 3.3.5-3.3.7.

[46] *Supra* note 44.

[47] Transnational businesses may be linked by contract rather than equity and may be organized with a high degree of decentralization. Such enterprises may still display systems of managerial control and productive cooperation or have a significant level of interdependance (see Phillip I. Blumberg, *The Multinational Challenge to Corporation Law: the search for a new corporate personality* (1993) [hereinafter: Blumberg, The Multinational Challenge], p. 142; Muchlinski, Multinational Enterprises, p. 327; G. Teubner, "Unitas multiplex: corporate Governance in group enterprises" in *Regulating Corporate Groups in Europe* (D. Sugarman and G. Teubner eds., 1990), p. 67, 87-92.

[48] It has been suggested that the size of the group, the type of products it manufactures, the degree of integration of activities with the other members of the group, the targeted market and the degree of ownership are relevant factors to consider for determining the degree of autonomy a group's constituent company has (OECD Structure and Organization of Multinational Enterprises (Paris, 1987), p. 35).

[49] See *infra* section 3.1.3.8.

[50] The term "global approach" refers here to an international approach that both takes on a worldwide perspective and may disregard the corporate form in relevant circumstances. It applies both to issues of administration and liability issues (hereafter and above referred to as: "a global approach" or "a global model").

2. Setting forth the key factors to be discussed

Modern, internationally-accepted practices[51], as well as the key objectives of existing models for cross-border insolvencies (involving a single debtor with either 'foreign' assets or 'foreign' creditors) postulate that insolvency proceedings should operate efficiently and effectively, maximizing value of the debtor's assets and increasing return to creditors[52]. In the relevant cases it should be able to rescue financially viable businesses in the course of such process[53].

In addition, creditors' rights should be a fundamental concern of the bankruptcy system, as when the enterprise becomes insolvent they become its real financial stakeholders[54]. Therefore, an effective and meaningful insolvency process should aim to treat creditors fairly, impartially and equally, and to generally promote integrity in the system[55]. In the international context, existing models suggest that the system should minimize disadvantages for creditors when participating in foreign insolvency proceedings, and be sensible to their legitimate interests[56]. This goal is first expressed by the application of the 'pari passu' principle, which provides for an equal distribution from the insolvent estate for similarly situated creditors (domestic and foreign), and by upholding the rights and priorities of creditors and preserving their legitimate expectations[57]. In addition, protecting creditors against manipulation by the debtor and insiders[58] also serves as an important component of maintaining fairness.

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[51] See for example: the International Monetary Fund ('Orderly and Effective Insolvency Procedures' May, 1999), http://www.imf.org/external/pubs/ft/orderly/index.htm; the Asian Development Bank ('Good Practice Standards for an Insolvency Regime' in Law and Policy Development at the Asian Development Bank, April 2000), http://www.adb.org, the World Bank Principles (*supra* note 9) and the UNCITRAL Legislative Guide (*supra* note 29).

[52] See for example Article 6 and 9 of the Model Law (*supra* note 10), and the Recitles of the EU Regulation (*supra* note 5) especially Recitles (2) and (8); also *see* Ian F. Fletcher, "The European Union Regulation on Insolvency Proceedings", INSOL INTERNATIONAL CROSS-BORDER INSOLVENCY A Guide to Recognition and Enforcemnt, 15, 20 (2003); Fletcher, Insolvency, p. 368-369.

[53] See for example Articles 6 and 9 of the Model Law (*supra* note 10).

[54] See West Mercia Safetywear Ltd (in liq) v Dodd [1988] BCLC 250; World Bank Principles, principle 79, p. 27; J.H. Farrar, *Corporate Governance in Australia and New Zealand* (Oxford, University Press, 2001) [hereinafter: Farrar, Corporate Governance], p. 250, indicating the general view that, as the insolvency of companies increases, so the duty to creditors and the interests of the creditors in the company's assets increases, to the detriment of the shareholders.

[55] See Blumberg, Bankruptcy (*supra* note 39), p. 9, stating that the underlying policies of the bankruptcy law are essentially equitable in nature: to achieve fair treatment to creditors and other claimants; Article 3 chapter II of the Model Law (*supra* note 10); World Bank Principles (*supra* note 9), principle 6, p.24 and article 72 p. 25; I. F. Fletcher, "The European Union Regulation on Insolvency Proceedings" [2003] INSOL International, Cross-Border Insolvency, a Guide to Recognition and Enforcement 15, 20, explaining that a main objective of the EU Regulation is that the principle of equality of creditors shall be fully respected.

[56] See for example Article 6 of the Model Law (*supra* note 10), and the Recitals to the EU Regulation (*supra* note 5), especially Recitals 12 and 13; See also, Fletcher, Insolvency (*supra* note 3), p. 368-369.

[57] Recitals 12, 24 of the EU Regulation (*supra* note 5); World Bank Principles (*supra* note 9), article 71. p. 25, principle 7 article 79 p. 27 and article 131 (principle 16) p. 40; See Lynn M. LoPucki, "Cooperation in International Bankruptcy: A Post-Universalist Approach" [1999] 84 Cornell L. Rev. 696, 703, indicating that one of the international bankruptcy system's recognized (as identified by

The economic efficiency and the integrity of the system will also demand the application of predictable, clear and transparent rules[59].

Existing models for cross-border insolvencies of single debtors were designed to achieve these goals (in the more complicated cases of insolvencies with international elements) by applying a 'global approach' that delineates tools for recognition, easy access and cooperation among courts and administrators[60]. To promote greater efficiency and in order to avoid forum shopping[61] the EU Regulation also applied rules of international jurisdiction and choice of law[62]. An additional factor which is relevant to the design of international models is the need to take into account differences in national insolvency laws (dependant on the scope of the model and the 'group of state' in relation to which it is designed to be applied)[63].

The analysis provided in the next sections will focus on the two main insolvency goals, namely economic efficiency and fairness to creditors. It will explore the ability of a global model applied to the specific case of insolvency within MCG to attain these goals[64]. It will consider the particular problems inherent to these cases, identifying the specific ways and appropriate circumstances in which it would be indeed advantageous and justifiable to impose a global approach on the MCG scenario.

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universalist scholars) goals is that distributions should be equitable, which usually means pro rata among unsecured creditors.

[58] See Blumberg, Bankruptcy (*supra* note 39), p. 9, explaining that fairness has at least two dimensions- equality of distribution among general creditors and protection of creditors and public investors against manipulation by the debtor and insiders; See also World Bank Principles (*supra* note 9), principle 7, article 79, p. 27.

[59] See for example Article 6 of the Model Law (*supra* note 10); Principle 6 article 73 to the World Bank Principles (*supra* note 9), p. 25; *See* also Lynn M. LoPucki, "Cooperation in International Bankruptcy: A Post-Universalist Approach" [1999] 84 Cornell L. Rev. 696, 702-703, summerizing the 'accepted set of goals' that were identified by universalist scholars.

[60] See *supra* notes 5- 12 and accompanied text.

[61] See Recital 4 to the EU Regulation (*supra* note 5).

[62] See Recital 12 and 23 to the EU Regulation (*supra* note 5).

[63] See for example Article 5 to the Model Law (*supra* note 10), and Recital 11 to the EU Regulation (*supra* note 5).

[64] Existing models and initiatives to cross-border insolvency suggest a 'universalist' appraoch as a device to international insolvency cases, incorporating tools of cooperation among the courts having jurisdiction over aspects of the assets and affairs of a distressed multinational enterprise. This may be in fact a sort of 'modified universalism', that is an approach less complete and ideal than true universalism as a short term solution (see Jay Lawrence Westbrook, "A Global Solution to Multinational Default" [2000] 98 Mich. L. Rev. 2276, 2299-2302). In any case, the neccesity of such global methods in the multinational insolvency case involving a single debtor can be accounted as an international consensus, as it is reflected in the various current international insolvency models (see- *supra* notes 5- 12 and accompanied text). Nevertheless, to some extent there is still a debate between teritorialist and universalist approaches (*see* Professor Lopucki's arguments in favour of cooperative territorialism in Lynn M. LoPucki, "Cooperation in International Bankruptcy: A Post-Universalist Approach" [1999] 84 Cornell L. Rev. 696; And see Professor Westbrook's comments in this regard in Jay Lawrence Westbrook, "A Global Solution to Multinational Default" [2000] 98 Mich. L. Rev. 2276). This debate is not within the scope of this paper. This paper examines the effectiveness and need of a global approach in the particular case of insolvencies within MCGs assuming that a global approach to cross-border insolvencies in general is accepted to be advantageous. Clearly, though, if concluding that a global approach is benficial to the MCG cases as well this will reinforce arguments in favour of universalism in general.

The complex case of a multiple debtor operating in different states demands a specific attention while considering what sort of insolvency regime will be the optimal in order to achieve the most cost-efficient results. As will be described herewith, assets of the estate may be spread between different entities and may be located within different states; solvent entities may be dependant on insolvent related companies; inter group dealing may be difficult to ascertain; creditors may have claims against more than one entity and so on. It is the interest of all parties involved in any MCG's insolvency to be subjected to such a regime that may tackle this unique situation and facilitate the process while making the most of the unique structure of the trans-national corporate group. A delineation of the problems and the prospects pertaining to the insolvency of an MCG in terms of achieving cost efficient results may assist in appreciating the importance of a global approach in this regard. It may also assist in establishing the characteristics a global approach should encompass in order to guarantee cost-efficient outcome.

The treatment of creditors and their point of view also become more compound in the MCG scenario. In the case of a single debtor (that is not part of a group) it is clear that rights can be enforced against it and its assets in places where it operated; creditors should be able to be involved in the insolvency process of the debtor; distribution should be conducted from this debtor's assets only; creditors should be protected from manipulations done by him. Conversely, the question of morality and the ability to preserve it in the multiple companies' situation is much more sensitive with the multinational scenario augmenting the difficulties[65]. Unique issues and problems arise from the fact that a business is comprised of separate entities located in different states. It is unclear, for instance, whether proceedings against an MCG or against any of its members can be opened in other places where it had operations through subsidiaries; whether legitimate expectations of creditors of companies in specific states should be kept or overruled for the sake of the benefit to the group as a whole; whether there is a right to be involved in foreign proceedings of a related company; whether the pari passu principle is limited to each specific component's own estate; how inter-group claims should be treated in the transnational insolvency scenario; whether there is a way to protect creditors of a component from manipulations of related companies or the shuttle of assets to foreign members.

The diversity of interests in the case of the MCG is overwhelming compared with the case of a single debtor. There is no one single set of creditors of a single debtor, but rather a number of 'groups of creditors' (of each component) dependent on the amount of companies comprising the group. Furthermore, these sets of creditors may be in very different positions (apart of the classification within each component). Some may have dealt with a stronger entity than others; some may still be 'potential' creditors of a solvent member of the group. Some may have dealt with the group as a 'group' and some only with a local component. In addition, the type of creditors may

[65] See Blumberg, Bankruptcy (*supra* note 39), p. 9, stating with regard to domestic corporate groups in general that in proceedings involving constituent companies of corporate group or other enterprises under common control, these problems arise in particularly sensitive form; Farrar, Corporate Governance (*supra* note 54), p. 234, explaining that when some of the affiliated companies are in different jurisdictions the problems of dealing with unfairness within corporate groups are increased; A. Muscat, *The Liability of the Holding Company for the Debts of its Insolvent Subsidiary* (Dartmouth, 1996) [hereinafter: Muscat, The Liability], p. 22 stating that in the transnational dimension the complexity of the problems raised by the group phenomenon is heightened and in addition other issues of a different nature arise, associated with conflict of laws.

be different, as some may be considered 'insiders' (if the companies had inter-group dealings) while others 'outsiders' or 'third party creditors'. This special situation should be explicitly addressed on the global level. Understanding the problems relating to fairness in the cases of insolvencies within MCGs will help us value the importance of a global approach and will put focus on the problems that need to be resolved on the global level. We will now proceed to systematically explore the above issues.

3. Enhancing Economic Efficiency

3.1. Maximizing asset values of an integrated MCG in distress

3.1.1. Possible alternatives for a company in distress

In the case of a single debtor entering into insolvency process various options may be available. It may be that liquidation is the best path, meaning the cessation of the business, the sale of its productive units or the piecemeal sale of its assets. Usually, however, the company would do better to operate as a complete productive unit prior to its sale so as to preserve the value of its assets. Modern views suggests that in many cases rehabilitation would be the preferred path an insolvent debtor should take, since as a general rule the value of the whole (the debtor as a complete business) is greater than the value of its parts[66]. Essentially that means restructuring a corporation which may be restored to productivity and regain its competitiveness. In practice, there may be a range of options to choose from, including a variety of arrangements not necessarily leading to the survival or the rehabilitation of the company that may indeed contemplate an eventual liquidation or sale of the business[67].

3.1.2. The degree of integration and inter-group connections as the dominant factor predicting the need for linkage between the MCG's components in distress

In the case of a group of companies in distress (either a domestic or a multinational group) the above-mentioned alternatives may be applied separately to each specific company comprising the group. Imposing ‘insolvency solution’ to each insolvent part thereof as a separate process may be appropriate if the group was not economically integrated or was weakly integrated[68]. Linking between such proceedings may be superfluous and provide additional costs of communicating between foreign proceedings, when no such need exist. Most often, the insolvency of one part of such a group will not affect the rest[69], so an entire collapse would be rare. Even if the insolvency will encompass the whole group typically linking between the fragments of the group will not provide a significant advantage in terms of increasing revenues. The proceedings will involve a variety of unrelated business of different nature, assets from diverse sorts and generally an assortment of components that do not represent

[66] The World Bank Principles (*supra* note 9), p. 24. This approach also reflects another objective, which is to preserve jobs (*Id*).

[67] The availability of the various procedures for the company in distress varies amongst national laws. Most jurisdictions have a liquidation law; while the rescue process is in some instances more limited (see The World Bank Principles (*supra* note 9), p. 24-25, 27).

[68] See *supra* note 44 and accompanied text.

[69] See *infra* section 3.1.3.1 below for the discussion on the 'domino effect' often occurs in cases of integrated MCGs.

one single business, which would gain from reconstruction or from a joint sale. Therefore, at least as a starting point, in terms of cost efficiency demands, the insolvencies may be better handled separately, keeping the option of future linkage should an advantageous opportunity rise.

The cases of integrated MCGs - those worldwide enterprises that were managed as a group (before the collapse), together operating a single business that was coordinated and centrally controlled (to a certain extent), or that were inter-linked resulting with financial and administrative interdependence[70], suggest a fundamentally different approach. As will be shown below, if the group was conducted as an integrated one then profitable 'cross-entity' insolvency solutions are very likely to be attainable and thus it would be beneficial to operate a joint insolvency process for such an MCG. This is true not only in the strongly integrated or intertwined scenario (in which case it would be efficient to operate a more unified operation and treat the group as a single entity at least to some extent[71]), but also in cases of integrated groups in general which were comprised of distinct entities with identifiable assets and debts[72].

As will be shown below, whether for the purpose of liquidation or reorganization, it will frequently be advantageous to link between the separate entities, their assets and businesses "mimicking" the corporate group's 'real' way of conducting the business in its 'golden days' and its operational links. This linkage in the course of the insolvency procedure will broaden the opportunities available to the stakeholders. In the case of a multinational group this advantage will be even more pronounced, since the geographical spread of the business can be used to increase its attractiveness and appeal.

The existence of inter-group transactions or cross- guarantees is also not a pre condition for a beneficial linkage (although, it adds a reinforcing justification for connecting between the insolvencies). In fact, it may be the case of a host of subsidiaries neatly organized within national borders each operating separate local activities and owns separate assets with no mutual transactions. Still, the fact that all the fragments were connected in such a way that they all operated a single business and were managed as a group suggests that it would benefit from global asset realizations in the event of insolvency. Similarly, if there were inter-group links this may result with a de facto integration even though the businesses may appear to be separate[73]. The fact that 'under the surface' linkages and inter-relations (such as administrative support and financial interdependence) exist, may imply that the different companies are not truly commercially and financially independent and a linkage in the course of insolvency may be needed.

In terms of the 'insolvency scenario' we are dealing here with a situation where more than one company within an MCG is under insolvency, so that a linkage may be

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[70] It should be looked at as a combination of factors that reaches a critical mass of links and integration (see *supra* note 44 and accompanied text).

[71] See *supra* note 44; The special case of the strongly integrated MCGs and the specific problems it contains in terms of achieving cost efficient results in the course of insolvency will be discussed in *infra* section 3.3.

[72] The approach should not be limited, though, to the scenario of equity based hierarchical group but should encompass the various forms of distressed MCGs, including those enterprises linked via contract (see *supra* note 47).

[73] See Blumberg, The Multinational Challenge (*supra* note 47), p. 142.

needed between the two or more proceedings in order to maximize asset values. However, this may also include situations were any of the companies are on the verge of insolvency or are most likely to enter into insolvency as a result of their integration with the rest of the group[74].

As long as the entities are integrated there is no relevance in this case to whether the companies at stake are a subsidiary and an immediate holding company, a bundle of sister companies or otherwise a subsidiary and an ultimate holding company[75]. The exact ownership structure is also immaterial as subsidiaries may be partly or fully owned by a parent company[76]. The critical question is whether the companies at hand were integrated in the ordinary course of business. It is a matter of economic essence and the examination of the actual links existing within the group at stake. This economic reality is the relevant predictor for gaining economic advantages in the course of insolvency as a result from linking between the MCG components. The linkage applied follows the amount of actual integration present in the case, rather than shareholder scenario generally.

Nevertheless, the optimum cost efficient solution for a distressed MCG may change in the course of its insolvency process. Initially, it may seem that a certain company within a group should conduct separate proceedings without linking it in any way to another insolvent entity of the same group. Further in the process, as a result of new information being revealed or new opportunities that come along, it may appear beneficial to tighten the linkage between the insolvencies and even treat the companies as one single entity (in the manner that will be suggested herewith with regard to the strongly integrated MCGs[77]). Insolvency proceedings in their nature are dynamic, thus parties should be able to embrace various solutions compatible to the specific scenario they face.

3.1.3. Effective Reorganizations within MCGs

3.1.3.1. Integrated business scenario: the benefits of a unified reorganization

A collapsed MCG may be able to produce higher returns to creditors if it will restructure itself or reorganize. Such course of action may be available for certain companies or parts of a group separately. However, if the group or any part thereof was integrated with the rest, it will often be extremely disadvantageous or even impossible to rescue only parts of the business. As aforesaid, usually, in reorganization case of a single debtor the goal is to preserve the business as a whole[78]. Similarly, reorganization of an MCG should be aimed at preserving the business as a

[74] See *infra* section 3.1.3.9.
[75] It is assumed, though, with regard to a multi-tiered structures, that more often subsidiaries and their immediate parent will constitute together a commercial division or one enterprise in one sector. Other subsidiaries with their own immediate parent would constitute another enterprise in a different sector (see Muscat, The Liability (*supra* note 65), p. 444).
[76] The percentage of equity holding is one of the factors to consider while evaluating the degree of integration (less autonomy is expected if the parent company holds a large portion of the equity), however it is not a decisive factor (see *supra* note 44).
[77] See *infra* section 3.3.
[78] See *infra* section 3.3.1.

whole rather than at disintegrating it. This outcome would be very improbable unless the insolvent MCG would be put under such a regime that will link its various components and operate a reorganization, which will embrace the complete business. Under such regime, one could consider the entire enterprise's situation and seek for the best solution. This may include actions such as closing down particular parts of the business, concentrating on specific more viable elements, cutting down the number of employees or activities and basically seeking the best utilization of the MCG's resources.

Moreover, the financial state of a member of a group may jeopardize the financial survival of other affiliates[79]. Thus, the interest of any specific company within a group, that anticipates better values if it is preserved is that the entire business (or its viable part) will be preserved as well. Liquidation of another particular component may have a damaging effect upon the reputation of the rest of the group. It may also affect the financial viability of the others resulting with a 'domino affect' leading to a total shutdown. Conversely, when a certain subsidiary is a burden on the others then in order to stabilize the business it may be necessary to close it down.

It may be even more crucial to have a cross-frontiers rescue for the MCG if there were inter group links such as cross-guarantees. The inter dependence between the related companies means that the economic situation of any part of the group has the ability to severely affect the others, thus a global solution would prove to be the reasonable way to approach the process.

A global reorganization will also make possible an intelligent use of the groups' assets[80], to control the operation of the group as a whole and direct the way the business goes ahead. It would be extremely problematic to reorganize such business if each part of it is managed separately and is 'left' to pull to its own direction.

Thus, for instance, a local bank of a certain subsidiary could enforce a security or push the company into liquidation, whereas if it had the sufficient information with regard to the whole group and if it was assured that its interests will be represented in the global operation[81] it would have acted differently. In other words, local creditors of local components (belonging to a group) may have their own (usually more narrow) interests that may drive them to take actions that can in fact produce considerable damage to the wider purpose. Therefore, they may undermine a more global solution that may benefit the stakeholders as a whole, eventually achieving better results to the particular local creditors as well. If indeed this company was an

[79] See Jacob S. Ziegel, "Corporate Groups and Crossborder Insolvencies: A Canada- United States Perspective" [2002] 7 Fordham J. Corp. & Fin. L. 367, 370.

[80] In a reorganization of a single debtor, it is regarded as crucial that the debtor should be able to use all the assets which are important for the continuation of the business' operations, and that would be impossible if creditors in different jurisdictions can attach them, or if assets are concealed in other jurisdictions (See e.g., Article 9 of the Guide to the Model Law (*supra* note 10), explaining that "To the extent there is a lack of communication and coordination among courts and administrators from concerned jurisdictions, it is more likely that assets would be concealed or dissipated, and possibly liquidated without reference to other possible, more advantageous solutions"); also see K.S. Alwang, "Notes, Steering the most appropriate course between admiralty and Insolvency: Why an International Insolvency Treaty should Recognize the Primacy of Admiralty Law over Maritime Assets" [1995-1996] 64 Fordham L. Rev. 2613, 2625 (claiming that "reorganization is unlikely if foreign creditors can attach, in multiple countries, the assets necessary for the debtor to continue operating")).

[81] See also *infra* section 4.1.

integral part of the business as a whole the rescue of the group may increase the value of the assets that the creditors wanted to sell. In addition, these creditor banks will obviously be able to continue benefiting from doing business with the company.

Local creditors may also be prone to take actions against a local company in order to gain control or an influential position over its administrator so that they will be able to influence the proceedings against the other parties. These actions may again threaten the prospect of maximizing the overall return.

3.1.3.2. The need for a global approach

A 'separable' approach to the case of MCG's insolvencies cannot provide efficient means to conduct global restructurings. For this purpose, a method of linking between the components' insolvencies and conducting some sort of joint administration is required. We do not mean here a complete disregard of the corporate form and treating all components as if all were one single entity[82]. In the ordinary case of integration, each company will remain responsible to its own creditors and have separate assets. Distribution of dividends will be done separately for each entity. However, the proceedings will be conducted jointly and coordinately. It will then enable joint decisions with regard to the reorganization of the enterprise, the transfer of information with relation to the feasibility of a rescue plan for it or any of its divisions, and the operation of a plan itself. With no such approach, as demonstrated, stakeholders will often act according to their specific and narrow interests without considering the benefit of the whole group[83].

3.1.3.3. National laws' approaches

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[82] This approach will be later on discussed with regard to the strongly integrated MCG case (see *infra* section 3.3).

[83] *See* Jay Lawrence Westbrook, "Theory and pragmatism" [1991] 65 Am. Bankr. L.J. 457, 465 (arguing that without universalism, creditors would have distorted incentives when choosing between reorganization and liquidation); But *see* also Lynn M. LoPucki, "Cooperation in International Bankruptcy: A Post-Universalist Approach" [1999] 84 Cornell L. Rev. 696, 707 (LoPucki claims that Westbrook's argument incorrectly assumes that creditors, rather than estate representatives, control the decision to reorganize or liquidate. This argument is unconvincing bearing in mind the ability of creditors to open liquidation proceedings, as being done in practice, sometimes purposely to gain control and influence on the course of the group proceedings. See, for example, the creditors' insolvency proceedings being opened against a number of Parmalat's subsidiaries in the Cayman Islands, and the courts' rejection to replace the appointed provisional liquidators at the request of the group's administrator (see the judgment of the grand court of the Cayman Islands in the administrator application to replace the provisional liquidators appointed to a Cayman Islands' subsidiary of Parmalat- Parmalat Capital Finance Ltd. (Grand Court of the Cayman Islands, March, 2004) [hereinafter: the Cayman Islands' court decision]. I am grateful to Mr. Michael Crystal, QC, of 3/4 South Square, who represented the Joint Provisional Liquidators in their successful response to the Italian administrator claim to replace them in their appointment, for supplying a copy of this document); See also David Reilly, "Judge Rejects Administrator's Push To Control Parmalat's Cayman Units, *DOWJONES Newsletters,* International Insolvency, March 2, 2004, p. 1; See further on the case of Parmalat *infra* notes 102- 107 and accompanied text.

Indeed, several national laws provide that corporate groups can make joint insolvency filings encompassing all or most of the members of the group so as to facilitate reorganization of the affairs of the whole enterprise or to bring about a going concern sale (dependant on the appropriate course of action). In Canada and the U.S., for example, it is counted as essential that corporate groups will be subjected to a joint administration (procedural consolidation) when a financially distressed group seeks to reorganize itself[84].

3.1.3.4. The preferable approach for the international scenario

On the international level such approach is less 'obvious', even in terms of cost efficiency. It entails jurisdictional complications including the need to subject an entity to a different legal regime (dependant on the specific means applied in a global model, as will be herewith suggested) and added costs of communication[85]. Hence, if not truly justified[86] the outcome may be additional burden of costs and efforts on the estate. However, if the MCG was indeed integrated it will be even more crucial to provide such means for its insolvency compared with the national case. No doubt, it will be much more complicated to attempt a worldwide reorganization with no means of cooperation where different legal regimes are involved and entities are geographically spread across countries and continents.

As was mentioned earlier[87], ad-hoc means of communication and cooperation were recently used in MCG cases, mainly such that the 'centre of gravity' was in the US. Cases such as *Maxwell*[88], *ICO*[89], *Global Crossing*[90] and *Federal Mogul*[91] demonstrate the significant advantage in handling a group's insolvency proceedings jointly, as a group, and not as separate insolvencies, ultimately resulting in a worldwide settlement or an optimal combined plan of reorganization.

A global approach specifically designed to the unique case of MCG can similarly apply means to link between the proceedings and to facilitate a joint process for more profitable restructuring of an integrated global business. Such 'linkage' may indeed be achieved by Ad Hoc cooperation as mentioned above. However, relying only on Ad Hoc means may not be a sufficient solution. Agreeing on the appropriate way ahead for the MCG at stake and consequently implementing and operating it without any guidelines or acceptable rules may demand extensive costs. It may also reduce the

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[84] See Blumberg, Bankruptcy (*supra* note 39), p. 402-405 (on procedural consolidation in the United States); Jacob S. Ziegel, "Corporate Groups and Crossborder Insolvencies: A Canada- United States Perspective" [2002] 7 Fordham J. Corp. & Fin. L. 367, 376 (explaining that procedural consolidation "is almost de rigueur" in Canada and US corporate groups' reorganizations).
[85] See *infra* section 3.2.3.
[86] As explained above (see *supra* section 3.1.2), such is often the case if the MCG was not integrated or if any specific company within the group is operationally and functionally separated.
[87] See *supra* notes 24- 26 and accompanied text.
[88] *In re* Maxwell Communications Corp., [1993] 1 W.L.R. 1402 (Ch. 1993); 170 B.R. 800 (Bankr. S.D.N.Y. 1994).
[89] *In re* ICO Global Communications Servs. Inc., Case No. 99-2933 (Bankr. D. Del. 1999).
[90] Chapter 11 No. 02-40188-reg (REG) (Bankr. S.D.N.Y.).
[91] Re T&N Ltd And Others ([2004] All ER (D) 283 (Oct)).

probability of achieving any agreement at all. Furthermore, it may be problematic with regard to certain jurisdictions, which lack the means to cooperate without the specific authority[92].

3.1.3.5. Providing adequate tools

Therefore, a global approach providing a set of a-priori guiding rules and possible modes of action for cooperation in distressed MCGs is truly needed. The main idea is that the goal of a global approach should be to facilitate cooperation and coordination between administrators of separate entities and the corresponding courts when more than one insolvency proceeding are being held in more than one country with relation to an integrated MCG. Accordingly, a global approach should expressly provide that courts supervising insolvency proceedings of related companies (belonging to an integrated MCG) should cooperate and communicate either directly or through local representatives or administrators. This can be implemented by embracing particular means of communication such as provided in the Model Law for the case of a single debtor or in the ALI Guidelines for communication[93], or similar to 'in action' practices that are being used in current MCG cross-border insolvency cases[94].

It should also be provided, with regard to those MCGs that are initially identified as not integrated or weakly integrated[95], that a 'line of cooperation' should remain open (although it may be inactive), to enable future cooperation should the need arise. A global model should be sensitive to the dynamics of these cases (as explained above[96]) thus avoid giving 'black or white' solutions.

A global approach may provide additional mechanisms that are required in order to arm administrators and courts with the necessary authority to exert control (at least to some extent) over foreign insolvency proceedings of affiliate companies and to be able to take urgent actions in the foreign proceedings for the interest of the group as a whole (or of any relevant part of it). Cooperation and coordination might take time to reach the stage when they will have an effect. Yet, administrators may need to take immediate actions in the proceedings of affiliates in order to stabilize a business, or protect it from its creditors[97]. For that purpose, tools such as easy access to other member's proceedings, recognition of foreign decisions, assistance and relief, provided in cross-border models with regard to single debtors[98] should be applied to the case of an MCG. As a result, an interim stay of proceedings (provided to protect the debtor's assets), for instance, should embrace affiliates of the debtor as well.

Here, it would also be extremely beneficial to provide the means for appointing a supervisor over all the elements of the integrated MCG, thus subjecting the process to

[92] Similarly, with regard to single debtors, the adoption of the Model Law (that provides a system of cooperation) has been viewed as a way to facilitate cooperation with courts in other countries, and as an essential legislative direction for civil law jurisdictions in this respect (see Jay Lawrence Westbrook, "A Global Solution to Multinational Default" [2000] 98 Mich. L. Rev. 2276, 2280).
[93] See *supra* note 27.
[94] See *supra* notes 24- 26.
[95] See *supra* note 44 and accompanied text.
[96] See *supra* section 3.1.2.
[97] See *supra* section 3.1.3.1.
[98] See, for instance, chapters II and III of the Model Law (*supra* note 10).

a single direction[99]. Otherwise, administrators and courts will still need to agree on every issue pertaining to the reorganization process within a system of 'equal' parties. It will undoubtedly be advantageous to provide ways to avoid the difficulties in cooperating within such a (worldwide) system.

3.1.3.6. A centralized proceedings approach

A global approach can further contribute to the effective enterprise recovery if it will enforce rules of international jurisdiction and applicable law, thus enabling a unitary process with universal effects for the MCG with a single court that leads the entire process. It is true, that successful international insolvencies of MCGs were conducted in the past relying mainly on cooperation[100], without the need to centralize the process to a single place. Yet, these occasions were most notably a matter of parties' good will and courts cooperating with each other. In addition, as was mentioned earlier[101] it may be difficult to achieve such cooperation when numerous parties are involved and when obstacles such as different time zones or languages exist (as is usually the case with large MCG). It would be accepted to say hence, that in the average case operating a global reorganization from different places under different legal regimes would be very hard at best. Examples of international insolvency cases, as will be discussed herewith, reinforce this assertion.

3.1.3.7. Examples on the international level

The commencement of the *Parmalat* multinational group's insolvency process[102] exemplifies the difficulties that a global plan initiative usually faces. In this case proceedings were opened in different countries with no sufficient cooperation and no one single direction for the entire group. As this is the preferred course of action in these cases, the mandate of the Italian Extraordinary Administrator appointed by the Italian government for several companies in the group[103] was to try and design a global reconstruction plan for the group as a whole. The specific aim was to preserve the group as a going concern[104]. However, one of the greatest threats the administrator faced is disintegration, brought on by local creditors opening separate proceeding in different places around the world[105]. Such actions posed a major obstacle for the

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[99] As will be discussed herewith this has been actually done in EU Regulation cases using the concept of COMI to subject an entire group to a single court (see *infra* section 3.1.3.7).
[100] See for example the case of the Maxwell Group (*In re* Maxwell Communications Corp., [1993] 1 W.L.R. 1402 (Ch. 1993)*;* 170 B.R. 800 (Bankr. S.D.N.Y. 1994)), in which proceedings took place both in the UK and in the US. The courts agreed on a joint administration of the estate facilitating a worldwide coordinated and harmonized solution. See also the cases cited at *supra* note 24.
[101] See *supra* section 1.
[102] The Italian Dairy group of companies that was operated in Europe, but also in many other parts of the world, including South America, South Africa, Canada, U.S. and Australia, and that was headquartered from Italy. The restructuring of Parmalat is an ongoing case.
[103] The appointment took place at the end of the year 2003, in the wake of revelations of widespread fraud by executives.
[104] See Parmalat News Briefs, DOWJONES Newsletters, International Insolvency, March 9, 2004, p. 9.
[105] One example is the provisional liquidation process against three Cayman Islands subsidiaries being opened by US insurance companies, and that were continued to be handled ‘separately’, after the Italian administrator’s loss in gaining control over the process (see the Cayman Islands' court decision (*supra* note 83)); Also see “Parmalat ask Kroll to find assets”, Financial Times, March 2, 2004; David

administrator as they reduced his hold on the units outside Italy and thus interfered with his efforts towards a global reconstruction of the group. Obviously this is true mainly with regard to those units of the group that were part of the integrated dairy business and that were essential for its industrial restructuring plan[106]. In general, the experience of the beginnings of the Parmalat insolvency process demonstrated a lack of sufficient cooperation and lack of central direction and single supervision[107].

Having concurrent proceedings taking place in different jurisdictions regarding related companies may be problematic in achieving a global plan also because there may be significant differences in the bankruptcy laws of the countries involved. For instance, one of the jurisdictions involved may provide for a reorganization process while another has more limited schemes for rescuing companies or even lack such mechanisms completely[108]. Furthermore, even in the case that a certain way to rescue the enterprise is applicable in both jurisdictions, it may still be that differences regarding for instance the ability to re-finance the business may raise substantial difficulties during the course of the reorganization[109].

Reilly "Judge Rejects Administrator's Push To Control Parmalat's Cayman Units", DOWJONES Newsletters, International Insolvency, March 2, 2004, p. 1, 3); Other examples can be seen in the Brazilian court's decision to appoint administrators to the Brazilian unit (see "Brazil Unit Says Two Banks Will Provide Credit Lines, DOWJONES Newsletters, International Insolvency, March 2, 2004, p. 6), in the administration order that has been given by a French court against Parmalat's milk supplier group Laitier des Pyrenees (see "Parmalat is not Europe's Enron It's Italy's Maxwell", GLOBALTURNAROUND, January 2004, issue 48, p. 2) and in the Irish high court's decision to approve the appointment of Irish provisional liquidators to Parmalat's subsidiary Eurofood IFSC (see Eurofood IFSC Limited [2004] BCC 383; Previously to this decision an Italian court in Parma declared the company insolvent and placed it under Italy's jurisdiction (see Eurofood IFSC, Re (Trib (I) 19 February 2004 [2004] I.L.Pr.14). The Italian administrator is appealing against the decisions. On May 27, 2004 the Irish Supreme Court decided to refer to the European Court of Justice the questions of whether the Irish or Italian Courts opened main proceedings first and whether the Irish courts were entitled to invoke the public policy exception to recognition; See also Peter J.M. Declercq, "Restructuring European Distressed Debt: Netherlands Suspension of Payment Proceeding… The Netherlands Chapter 11?" [2003] 77 Am. Bankr. L.J. 377, note 30 at 383 (referring to the judgments given with regard to Eurofood IFSC Limited)).

[106] For instance, with regard to Eurofood IFSC, the Irish unit (*Id*), it has been argued (by this subsidiary's US bondholders) that it was a standalone unit and irrelevant to the group restructuring. Eurofood IFSC was a wholly owned subsidiary of Parmalat SpA and in essence a financing vehicle for the Parmalat group (see "Italian and Irish courts clash over Parmalat", GLOBALTURNAROUND, April 2004, issue 51, p. 3).

[107] See "Parmalat is not Europe's Enron It's Italy's Maxwell", GLOBALTURNAROUND, January 2004, issue 48, p. 2; Also see the Cayman Islands' court decision in relation to the agreement between the Italian administrator and the provisional liquidators appointed to the subsidiaries in the Cayman Islands. There, although the parties agreed upon a memorandum providing for co-operation and a mutual exchange and access to information and documentation, in reality "there has been less then optimal cooperation extended by each party to the other under their memorandum of agreement".

[108] This might be a significant obstacle were for examples a developing country (whose insolvency regime might still lack basic tools for reorganizations) and a developed country both hosted subsidiaries of a group willing to rescue itself (see *supra* note 67); But, it may create problems even in less dramatic differences among legal regimes (see, for instance, the Enron case in which a complex plan needed to be designed in order to overcome the differences between the chapter 11 and scheme of arrangement regimes (*In re* Enron, No. 01-16034, 2001 Extra Lexis 304, at 2, (Bankr. S.D.N.Y. Dec. 10, 2001); *GLOBALTURNAROUND*, "To scheme or not to scheme Lessons from Enron", October 2004, issue 57, p. 11). See also Muscat, the Liability, p. 23 (indicating the problem of conducting cross- border insolvencies, where there is a variety, as between the legal systems, in the type of proceedings that may be initiated when a debtor is unable to pay its debts).

[109] For example, if the group is looking for liquid funds to pay for crucial supplies of goods and services to maintain the business activities, it will be problematic if certain jurisdictions (to which

A global approach should therefore desire to subject the entire operation to a single court and a single legal regime. This way, it will enable an optimum of harmonized process. Regarding reorganization of a group within the United States it is indeed widely accepted, that a single court and a single representative should coordinate the entire business[110].

On the international level, the EU Regulation's for instance (as was previously mentioned) does not provide a straightforward mechanism to deal with corporate groups. Nevertheless, in a number of recent cases the concept of COMI[111] was applied to such an extent that resulted in putting all the components of the insolvent group under the same court in the same country. It therefore promoted the supervision of a single court and a single appointee, thus facilitating a cost-efficient administration of the estate[112]. In these cases proceedings were still separated in the sense that administration orders were issued for each company, creating a sort of parallel yet 'local' insolvency proceedings.

Such was the case of *Crisscross*[113], a pan-European Telecommunication group of companies. An English court granted administration orders over the entire MCG that was comprised of eight separate companies registered in several EU jurisdictions and Switzerland each having its own assets and creditors. This decision was apparently made on the basis that each of the companies had its COMI within the UK. However, the underlying rationale for placing all the proceedings in the UK appears to be that the companies effectively formed one business and that the management of this business was handled from the UK[114]. Granting an administration order within the UK to each of the group's companies was regarded as beneficial for the stakeholders[115]. Since this group actually formed a single business, placing it into administration under the control of one administrator and under the supervision of a single court had the potential of better returns for creditors as a whole[116].

In the case of *Daisytek*, a multinational computer peripherals group[117], again an English appointee attempted to facilitate a pan-European restructuring by opening proceedings for the different companies comprising the European division of the group at the same place (the UK)[118]. The idea here was to administer the proceedings

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certain affiliates are subjected) do not provide for a form of priority funding and safeguards for the recovery of ‘new’ money. A bank for example may refuse to give credit to these parts of the business. As a result, it may be extremely difficult to enable to stabilize and sustain the entire business operations.

[110] See Lynn M. LoPucki, "Cooperation in International Bankruptcy: A Post-Universalist Approach" [1999] 84 Cornell L. Rev. 696, 707; Also see Blumberg, Bankruptcy, chap. 13.04. Blumberg explains, with regard to American Bankruptcy law, that the filing in the same court of petitions pertaining to a parent corporation and its subsidiary has considerable significance. Unless the proceedings relating to these separate components of a corporate group are pending in the same court, it is not possible for the court to consider either procedural or substantive consolidation.

[111] See *supra* note 28.

[112] See I.F. Fletcher, "The Challenge of Change: First Experiences of Life under the EC Regulation on Insolvency proceedings in the UK”, Annual Review of Insolvency Law, 2003 (Toronto, Carswell, 2004), pp.431-455.

[113] Re Crisscross Telecommunications Group (unreported, 20 May 2003), Ch.D.

[114] See Lyndon Norley, "INSOLVENCY: Tooled up" The Lawyer, November 10, 2003.

[115] See Crisscross is First Group Admin, GLOBALTURNAROUND, June 2003, issue 41, p. 3.

[116] *Id*.

[117] *In re* Daisytek- ISA Ltd [2003] BCC 562 (16 May 2003, Chancery Division, Leeds D.R.).

[118] The court gave fourteen administration orders against the parent and thirteen subsidiaries.

jointly, instead of having a 'patchwork of different cases in different countries'[119]. It could be argued that the Daisytek group was in fact integrated in the sense that it was managed as a group, with a single direction and control, coordinated and headquartered from England[120]. However, the court had not expressly based its decision to make the administration orders on the group situation (since the EU regulations do not provide a mechanism for dealing with groups). Rather, the court had given separate considerations to each subsidiary as a separate legal entity[121]. In any case, the court's decision gave the group a chance of saving itself as a whole, rather than splitting up its various European assets[122].

In the case of *Cenargo*[123], a shipping group of companies, the English judge placed the majority of the group's proceedings in the UK, including the administration of those components that were incorporated in the Isle of Man[124]. The joint administration resulted in rehabilitation of many companies in the group and was completed within 12 months of the commencement of proceedings. Apart from the jurisdictional issues at the beginning it has been largely a consensual process gaining support from creditors[125].

In one of the proceedings related to the *Parmalat* collapse[126], a Hungarian court placed a Slovakian subsidiary of a Hungarian company (which was also under insolvency proceedings) under insolvency proceedings in Hungary. Both companies belonged to the Parmalat group and between themselves were closely connected;

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[119] See Stephen Taylor, "Daisytek chain reaction", *GLOBALTURNAROUND*, July 2003, issue 42, p. 10.

[120] The court stated for instance that: "the evidence shows that the trading companies in the group are managed to a large extent from Bradford and that they are managed and controlled as a group so that the activities of the group companies throughout Europe are co-ordinated by the head office in Bradford". It also indicated that the English parent, who performed the head office function for the group gave various guarantees to major suppliers and trade creditors of its subsidiaries (*In re* Daisytek-ISA Ltd, and others [2003] BCC 562 (16 May 2003, Chancery Division, Leeds D.R., at p. 2; *See* also Bob Wessels, "International Jurisdiction to Open Insolvency Proceedings in Europe, In Particular Against (Groups of) Companies" Working Papers Series, Institute for Law and Finance, Johann Wolfgang Goethe University (http://www.iiiglobal.org/country/european_union/InternJurisdictionCompanies.pdf).

[121] This was also the finding of the French court of appeal overturning the initial decisions of the Commercial Court of Pontoise, which refused to recognise the English orders (*In re* Daisytek-ISA Ltd (Cour d'Appel, Versaille, 4 September 2003). But, see the case of TXU in which Mr Registrar Baister did expressly take into account (in its decision to place an Irish and a Dutch debtors insolvency proceedings in the UK) the fact that a related company (of these debtors) was already the subject of an administration order in England. Placing all related companies "under one roof", as was held, could "achieve consequential savings in costs" and result with a better coordinated process (Re TXU Europe German Finance BV (Unreported, October 29, 2004) (Ch D); See also G. Moss, "Creditors voluntary liquidation for foreign registered companies" Insol. Int. 2005, 18(1), 12-13).

[122] See "French breakthrough for Euro Regulation" Global Turnaround, Oct 2003, issue 45, p. 9. However, these attempts to apply a joint administration idea on the related and arguably integrated Daisytek companies were not smoothly achieved. The appointee encountered vast contests and refusals of foreign courts to accept the idea of placing the subsidiaries' proceedings in a single place (see further *infra* section 4.1.4).

[123] *Re* Norse Irish Ferries & Cenargo Navigation Limited (unreported, 20 February, 2003), Ch D.

[124] Based on the decision in Brac (*In re* Brac Rent-A-Car Inc [2003] EWHC (Ch) 128, [2003] BCC 504).

[125] See *GLOBALTURNAROUND,* "Cenargo: The shape of things to come" January 2004, issue 48, p.10, 11.

[126] Re Parmalat Hungary/Slovakia, Municipality Court of Fejer, 14 June, 2004.

hence the idea was to have main proceedings for both companies at the same jurisdiction, under a single court and a single appointee.

3.1.3.8. Determining the proper venue for the MCG insolvency

The above mentioned cases demonstrate the advantage in placing the proceedings of related companies in a single location all subjected to a single supervision and a single insolvency regime for facilitating global (pan European in these cases) restructurings. However, ascribed to the lack of rules for dealing with affiliated companies, the EU Regulation only provides a 'black or white' solution to these cases, namely the joint administration is solely achievable when all companies involved share a mutual COMI. A global approach designed to meet the needs of the specific case of MCGs' insolvencies will be able to achieve this kind of solution in a wider variety of circumstances. With respect to economic efficiency, a global approach could justify such a mechanism by considering the particular practical gains that may occur from the centralized proceedings for the entire group rather than looking at each component separately. It would take into account the way the entire group was managed, the inter relations among the members and the goal of the process in terms of maximizing the value of the group's assets as a whole[127]. As demonstrated above, in the appropriate circumstances, that is where the MCG formed an integrated group, a centralized process would be, in principle, most beneficial. It will also accord with the concept of applying a vigorous use of the "doing of business" or "presence" criteria of jurisdiction for the purpose of opening insolvency proceedings in the context of an MCG[128]. Indeed, it has been suggested, with regard to jurisdiction over holding companies in countries where their subsidiaries operate and vice versa (whether creditors of a subsidiary can sue in the home country of the parent) that referring to each company separately or relying on a pure agency relationship might not be the ideal solution[129]. Similarly, a more flexible test should be applied to the case of

[127] This will go along with the concept of applying a 'mind of management' theory rather than a 'business activity' theory, as was recently expressed in EU Regulation cases (such as the case of Enron Directo ((England Ch D, 4 July, 2002) (unreported)) and the case of Parmalat Hungary/Slovakia (Municipality Court of Fejer, 14 June, 2004)).

[128] The traditional view of the "doing of business" test with regard to bankruptcy proceedings (of an individual debtor) was expressed in Re Brauch ([1978] CH 316, [1978] 1 ALL ER 1004, [1977] 3 WLR 354. It has been held there, that in order to establish that the debtor had 'carried on business in England', within S 4(1) of the English Bankruptcy Act 1914 (now repealed), it was not sufficient to show that he had been running his company's business in England, even if he was the sole beneficial shareholder and in complete control. Rather, the court needs to find that he had been carrying on personally a business of his own in England independently of that of the companies (albeit his modus operendi involved the use of the companies as vehichles for achieving his business objectives).

[129] See P.T. Muchlinski, "Corporations in International Litigation: Problems of Jurisdiction and the United Kingdom Asbestos Cases" [2001] 50 ICLQ I; Muscat, The Liabiliy, p. 23; Lawrence p. Kessel "Trends in the Approach to the Corporate Entity Problem in Civil Litigation" [1953] 41 Georgetown L.J. 525, 526-532; J.J. Fawcett, "Jurisdiction and Subsidiaries" [1985] J.B.L. 16; John K. Rothpletz, "Ownership of a Subsidiary as a basis for jurisdiction" [1965] 20 New York University Intramural Law Review 127; Muchlinski, Multinational Enterprises (*supra* note 38), chap. 5 and chap. 9 p. 328-329; Certain legal systems have asserted the right to extend their law exterritorialy on the basis of the economic unity of the MCG (see for example Article 10 of the Argentinian Draft Code of Private International Law. The full text of the Code can be found in 24 ILM 269 [1985]; Muchlinski, Multinational Enterprises (*supra* note 38), p. 138-139). In American law there is a strong tendency towards the application of enterprise law to the problem of jurisdiction over foreign components (see Blumberg, Bankruptcy (*supra* note 39), p. 678; Blumberg, Procedure (*supra* note 44), chs. 3 to 5). This is consistent with the assertion of 'long arm' jurisdiction in the United States and the constitutional

relationship between affiliate companies in the context of handling insolvency of an MCG. The focus here should be on the economic reality of the relationship between the parent and subsidiaries rather than looking at each company separately. In any case, such approach should be applied carefully, recognizing that in the case of opening insolvency proceedings the basis of assertion of jurisdiction may in fact suggest the assertion of substantive issues as well[130].

Such an approach can extrapolate the idea of identifying a COMI for a debtor[131] to identifying the COMI for the entire integrated MCG. Thus, a group's COMI should first reflect a real nexus between the group and the proper venue to handle the joint process[132]. In addition, it should take into account the group's operation as a whole (as opposed to looking for the centre of interests of each company separately). Accordingly, it is suggested that the centre of main interests of a group of companies should be at the place where the high level decision making with regard to the enterprise was performed, namely at the state from which the business was actually controlled and managed. Subsidiaries are generally directed from headquarters. Headquarters is the brain and nerve centre, while the subsidiaries are the limbs[133]. The headquarters thus reflect the 'meeting point' for the various entities. The idea is hence to look for the place of command and control which will usually be located where the headquarters are situated. However, it should be the place of actual operating headquarters rather than a façade of headquarters[134]. Indeed, in recent EU Regulation MCG cases, as well as other MCG cases, proceedings of the various entities comprising the group at hand were placed in the jurisdiction in which the

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guarantee of 'due process' which requires only certain 'minimum contacts' with the forum (International Shoe Co v Washington 326 US 310 (1945); see also A. Bell, *Forum Shopping and Venue in Transnational Litigation (2003),*, p. 6, 7 and 11).

[130] See *infra* section 4.2.1 on the effect of applying an idea of international jurisdiction and applicable law on distribution rights. Indeed, the distinction between the basis for assertion of jurisdiction and the assertion of substantive liability has contributed significantly to the acceptance of the 'enterprise view' in jurisdiction cases (see P.T. Muchlinski, "Corporations in International Litigation: Problems of Jurisdiction and the United Kingdom Asbestos Cases" [2001] 50 ICLQ I; Blumberg, Bankruptcy (*supra* note 39), p. 678).

[131] See *supra* note 28.

[132] It would be insufficient, hence, to provide a test based merely on place of incorporation (of any of the group's entities). The COMI concept suggests that place of incorporation is only presumed to be the centre of main interests of the debtor, while this presumption can be rebutted by pointing out to another state within which the company's main interests is conducted on a regular basis in a way ascertainable by third parties (see *Id.*). In addition, this presumption has been weakened in courts' decisions (See, for instance, Ci4net.com Inc (England, Ch D, May 20, 2004). As was commented, the judge in this case was willing to look behind the corporate veil and see where the company was really controlled from (*GLOBALTURNAROUND*, "US company fails to escape Euro Regulation", July 2004, issue 54, p. 1-2); See also Richard Tett, Nicola Spence, "COMI: Presumption, what presumption" Insolv. Int. 2004, 17(9), 139-141; J. L. Westbrook, "Theory and pragmatism" [1991] 65 Am. Bankr. L.J. 457, 486 expressing reservations about incorporation-based test to determine jurisdiction).

[133] C. Tugendhat, *The Multinationals* (1971) p. 22, 23.

[134] In the case of BCCI, for instance (see *infra* note 199), the group had only a "brass plate" headquarters in Luxemburg (see Andrew Hill, "BCCI Debt Proposal Resisted by Creditors" Financial Times (London), Oct. 8, 1992, p. 22; Lynn M. LoPucki, "Cooperation in International Bankruptcy: A Post-Universalist Approach" [1999] 84 Cornell L. Rev. 696, 714). However, its operational headquarters and effective control were in London (before being moved to Abu Dhabi, shortly before filing bankruptcy). Although the main proceedings against the group took place in Luxembourg (where the parent company was also incorporated) commentators expressed the opinion that England was the actual centre of interests of the transnational group (see Ian F. Flecther, "The European Union Convention on Insolvency Proceedings: An Overview and Comment, with U.S. Interest in Mind" [1997] 23 Brook. J. Int'l L. 25, 37).

management and control of the group was situated[135]. The place of main decision making would be relatively easy to identify, and will not involve the need to 'weight' the amount of operations or assets the group may have had in different states (as is the case when adopting a 'place of principle operations' test)[136].

Yet, as will be shown hereafter[137], 'centralizing' the proceedings may in certain cases result with higher costs, thus eventually leading to a less cost efficient result. In addition, placing all proceedings under a single regime may affect other factors (as will be discussed in the subsequent section[138]) which may influence the success of the insolvency regime. However, even if the case suggests it is preferable to have concurrent proceedings (either in terms of costs or as a result of other considerations), it will still gain from a linkage and cooperation between the various proceedings. A global approach will be able to link between the various proceedings in this case, and to subject all the affiliates to one single court and administrator whereas other current international tools (e.g., the EU Regulation) cannot[139]. A global model should hence provide in these cases that the place of main decision making should be given the supervisory role over the entire process. The amount of control exerted over the other affiliates' processes should be appropriated according to the circumstances, thus forming a flexible solution, which depends on the specific case and the amount of coordination that is needed.

Anyhow, a global approach will still need to deal with possible strategic manipulations that may be taken by debtors, moving the group's headquarters[140] or

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[135] In Criscross, for instance, the actual headquarters were located in England. The high court placed all the companies under insolvency in England although subsidiaries were incoprporated in different countries (Re Crisscross Telecommunications Group (unreported, 20 May 2003), Ch.D); Proceedings of affiliated companies were also placed at the location of main decision making in other EU Regulation cases, such as Daisytek (*In re* Daisytek- ISA Ltd [2003] BCC 562 (16 May 2003, Chancery Division, Leeds D.R.)), Cirio Del Monte (Cirio del Monte (Italian court of Rome, August, 2003) (unreported)); Parmalat Hungary/Slovakia (Re Parmalat Hungary/Slovakia, Municipality Court of Fejer, 14 June, 2004); Enron Directo (Re Enron Directo SA (England Ch D, 4 July, 2002) (unreported)); Hettlage-Austraia (Amtsgericht (Munich) (Hettlage-Austria) (Unreported, May 4, 2004) (Germany)). In the case of Bramlea, a United States- Canadian group of companies (*infra* note 203), Canada was the jurisdiction supervising the reorganization. Although the day-to-day operations of U.S. affiliates were carried out and managed locally, large strategic decisions were likely dealt in Toronto, were the group's head office was located (see R. Gordon Marantz, "The Reorganization of a Complex Corporate Entity: The Bramalea Story" in *Case Studies in Recent Canadian Insolvency Reorganizations* 1, 17-18 (Jacob S. Ziegel ed., 1997)).

[136] As was noted elsewhere, in many cases, a company's operations will be spread among several countries so that none has a majority. In some cases, the principal assets will be either mobile or outside the boundaries of any country (Lynn M. LoPucki, "Cooperation in International Bankruptcy: A Post-Universalist Approach" [1999] 84 Cornell L. Rev. 696, 716). Similarly, in the case of a corporate group assets and operations may be spread among entities and countries in a way that would make it difficult to identify a single centre. See also Jay Lawrence Westbrook, "The Lessons of Maxwell Communication" [1996] 64 Fordham L. Rev. 2531, 2538 claiming that in the case of Maxwell (Maxwell Communication Corp., 170 B.R. 800 (Bankr. S.D.N.Y. 1994); Maxwell Communication Corp., [1993] 1 W.L.R. 1402 (Ch. 1993)) the UK was the centre of main interests of the group (where the group had its headquarters) even though most of the debtor's assets were in the United States.

[137] See *infra* section 3.2.3.

[138] See *infra* section 4.1.

[139] Under the EU Regulation regime, if the COMI of an affiliate is not found to be at the same place of that of another affiliate then each proceeding will be handled separately, since we are dealing with different entities.

[140] See, for instance, the case of BCCI (*infra* note 199) where the group's headquarters were moved to Abu Dhabi shortly before filing bankruptcy (see Richard Donkin, "Troubled BCCI Shifts Base to Abi Dhabi", Financial Times (London), Sept. 20, 1990, p. 34).

using successive filings[141] to pick a preferable jurisdiction for the MCG in anticipated distress. In order to overcome manipulations of the MCG's COMI being taken at the eve of insolvency, a global model should look for the real centre of control for a set amount of time prior to the insolvency[142]. In case there was more than one such place within this period of time the model should designate the venue in which the place of control was residing longer[143]. It should also take into account the entire group situation and preferably place all affiliates under the insolvency regime, to avoid the downsides of successive filings by debtors related to a group[144]. However, if the entity which exerted control over the various affiliates joins the process only after proceedings against the other affiliates already started to a substantial level then it should be permissible to move or alter the supervisory authority to the court where this entity is located.

In addition to the above, some scenarios of MCGs' insolvencies[145] may present difficulty in centralizing the process or even applying single supervision particularly, where the controlling entity is not under insolvency (for instance, a bundle of insolvent subsidiaries without the parent or an individual shareholder), or where the MCG operated in a decentralized way in its ordinary course of business[146]. In these cases it might prove to be difficult to ascertain a single place of common control. A global model should provide a 'second best' test for such cases. This should be the location of the group's main operations mentioned above[147]. It might be possible to point out to one of the affiliate's locations as the place with the major volume of assets and activities. However, as this is a problematic test, it might be impossible to locate a centre in such cases. If indeed this is the case, and if the parties themselves will not agree on a mutual 'centre' in which proceedings should be handled for the benefit of all parties, then other global mechanisms as suggested above (close coordination and cooperation, mutual recognition, access and relief) should be applied.

3.1.3.9. Including the entire group in the reorganization

[141] See *infra* section 3.2.4.
[142] See also the case of Ci4net.com in which the judge stressed that the COMI must have some degree of permanence (it should not move around with the location of the directors) (England, Ch D, May 20, 2004); See also *infra* section 4.1 for fairness considerations.
[143] Resembling the English rule that resolves a jurisdictional dilema which arises when the debtor's residential address or business address has changed from one insolvency district to another within a 6 months period prior to the presentation of insolvency petition. The insolvency rules provide that the court within whose jurisdiction the debtor has been resident for the longest time prevails even if it is not the current address at the time of filing (Insolvency Rules 1986, rr.6.9.(4), 6.40(2)(c); Also see I.F.Fletcher, The Law of Insolvency (*supra* note 11) p. 131-132).
[144] See further *infra* section 3.2.4.
[145] As explained earlier (see *supra* notes 42-49 and accompanied text) there is a diversity of possible MCG organizational structures and insolvency secnarios.
[146] See Dunning, Multinational Enterprises (*supra* note 44), p. 223 (suggesting that as a firm becomes multinational the division of responsibilities and tasks between the headquarters, regional offices and affiliates changes. In cases where the need to coordinate the global activities is important, the locus of decision taking remains in the centre. Where the managements of local units need a great deal of local information the locus of decision taking may be largly decentralized to regional offices and/or local affiliates). See also *supra* notes 47 and 72.
[147] *Supra* note 136.

Another advantage of a global approach in this respect is that it could extend the insolvency regime to include allegedly still solvent parts of the group. While attempting a reorganization of an MCG all integrated parts thereof should be considered as they all take part in the group's business. Hence, even when some parts appear to be solvent, excluding them from the reorganization regime could significantly hamper the chances of successful restructuring. Indeed, under the US bankruptcy regime the large corporate groups will usually file for chapter 11 proceedings for all subsidiaries, solvent and insolvent. It is justified there, as it is clearly prevents inefficiency, among other things[148].

This concept was also de facto applied in EU Regulation cases, for example, in Daisytek[149]. Administration orders were requested for all the European subsidiaries that were part insolvent and part likely to become insolvent within a short time[150].

A mechanism of extending the insolvency regime over apparently solvent components of the group can be adapted specifically to the case of MCG. Once again, applying such a mechanism should be based on a thorough examination of the inter-relations between the related companies and the nature of the group as a whole.

3.1.4. Facilitating Global Sales

3.1.4.1. The benefits of global sales in the integrated business scenario

A sale of the entire business will often be more attractive than a sale of specific parts thereof. Thus, in the cases of integrated MCGs assets will often be more valuable when presented as a package deal[151]. An obvious example will be when each company comprising the MCG owned a certain part of a complete product. In this case a combined sale may be much easier to achieve and most probably receive a higher price than separate sales.

3.1.4.2. Examples of types of global sales

Consider for instance a railway network operating in a number of countries. The assets of this network are actually divided between subsidiaries incorporated in the different states in which the railway is operating. To sell the network in pieces may

[148] In most large chapter 11 cases the court confirms only a single plan covering all of the debtor entities (see information provided by Professor LoPucki in Jacob S. Ziegel, "Corporate Groups and Crossborder Insolvencies: A Canada- United States Perspective" [2002] 7 Fordham J. Corp. & Fin. L. 367, 387). The author also queried Mr R. DeKoven of 3/4 South Square barrister chambers about US procedural and substantive consolidation as being conducted in practice. Mr DeKoven explained that the common practice in large bankruptcy cases is that proceedings are being opened for all subsidiaries in the group even if any of them are not insolvent at the time, to avoid the ineffiency of having new proceedings being opened consequetivelty and 'inorderly' and so that a plan for the group as a whole could be deviseed. This is possible under US bankruptcy law since insolvency is not a prerequisite for commencing the process. It should be added that this is also facilitated by the fact that the U.S. bankruptcy regime provides for a 'debtor in possession' device, encouraging group's managers to rescue their enterprise without fear that they will necessariliy loose their positions.

[149] *In re* Daisytek- ISA Ltd, and others [2003] BCC 562 (16 May 2003, Chancery Division, Leeds D.R.).

[150] *Id.*, at p. 4.

[151] See ALI Principles (*supra* note 6), p. 81.

significantly reduce the price received. Similarly, if a number of related patents and licenses are owned each by a different entity in a group then obviously selling the assets in parts is extremely disadvantageous.

It may also be the case when assets of similar sort are spread amongst various entities that are valuable as a mass of assets and less attractive if sold to different buyers. Generally speaking, multiple sales of different assets and parts in a group will most likely take longer, involve more effort on behalf of the administrators and will incur a larger cost from the estate compared with a single package sale. It is even likely, that a buyer for an entire enterprise (although comprised of separate entities) may be willing to pay an added premium comparing to the price of the assets alone or to the price of the separate activities of each component.

In the case of KPNQwest N.V. data communication MCG[152], for example, the assets of the group's components were sold separately, sometimes in knock- down prices[153]. The fact that the sales were conducted dis-jointly was apparently disadvantageous in terms of maximizing values. Since the companies' assets together comprised a data communication network (although different components owned different parts of cable rings) it would apparently have been more beneficial to sell the European cyber centres network as a global network of Internet and data hosting facilities, rather than sell it in parts[154].

Enabling global deals also broadens the opportunities available for the companies in distress. It gives the administrators ‘a room for manoeuvre’ ultimately reaching the best deal and the best price. It may be, for example, financially wiser to reject certain offers that may be available to a specific component in a certain moment, since a larger and better deal is starting to form elsewhere.

3.1.4.3. The advantages of a global approach

A global approach is thus needed in order to prevent connected activities and assets from being divided resulting with a serious impediment to the global returns[155]. A joint administration will be able to facilitate the process through a coordinated operation for the entire business. Thus, assets may be jointly sold even though eventually each entity will have an identified portion in the proceeds, which will then be distributed to its own creditors. The system should be cautious not to harm creditors as a result of a joint administration, as there is no justification here to ignore

[152] KPNQwest group owned cables in Europe and across the Atlantic Ocean. The cables ran through various countries and were owned by subsidiaries of the group situated in these countries. On 32 May 2002 the Dutch parent company entered bankruptcy proceedings. As a result, many of its subsidiaries were put under insolvency process as well (see Van Galen, Robert, The European Insolvency Regulation and Groups of Companies, October 2003, http://www.iiiglobal.org/country/european_union/Cork_paper.pdf).

[153] Estate Gazette, "Leading data hosting site offered at a 55M GBP discount" September 14, 2002, NEWS, p. 43; *GLOBALTURNAROUND*, “KPNQwest in sales drive”, June 2002, issue 29, p. 11.

[154] *GLOBALTURNAROUND*, “Parmalat is not Europe’s Enron It’s Italy’s Maxwell”, January 2004, issue 48, p. 2.

[155] *See* Crisscross is First Group Admin, GLOBALTURNAROUND, June 2003, issue 41, p. 3.

the corporate form, but only to connect between the related companies in the course of their insolvency administration[156].

3.1.4.4. Applying proper global tools

Joint administration can be conducted by applying means of cooperation and coordination as was discussed above with regard to reorganizations[157]. This way, liquidators can reach joint decisions with regard to the options available to the group and the conduct of the realization itself. Here as well, a more effective solution would also permit to subject the process to a single direction thus to minimize differences and facilitate the joint operation. Especially when a large enterprise is at stake with its spread activities a single supervision will be beneficial, as it would allow a global consideration of the complete picture thus opt for the very best solution and available deals for the benefit of the creditors as a whole.

Furthermore, extending jurisdiction over solvent parts of an insolvent MCG will considerably aid the administrators' efforts towards a package sale and better realization of assets. In cases where it is anticipated that the solvent parts will eventually fall into insolvency[158] it will be unfortunate to miss deals that would have been available for the business if the whole of it was 'for sale'. And, the fact that in a given moment only part of the group is under administration would make it difficult for the group's business to be adequately marketed and ultimately achieve the best price[159]. As aforesaid a global approach may adopt means of placing an entire group under administration. Conversely, under a 'separate regime' the decision whether to grant, for example, an administration order can only be grounded on the specific company's financial situation with no relation to that of the group.

3.2. Reducing the costs and length of the proceedings

3.2.1. Dealing with extensive litigation

The event of insolvency of an MCG whose subsidiaries were located in different jurisdictions and were inter- linked by a host of inter-group transactions and guarantees will most probably elicit multiple cross-border claims. Parent companies may have claims against their subsidiaries and vice versa (as a result of inter group loans for instance). A creditor may have claims against several companies regarding the same debt (as a consequence of cross-guarantees for instance). Several Creditors of different components may have claims regarding the same asset (resulting for instance from intra-group transactions and cross-credits). In this course of action, it may be unclear which part of the group is the 'proper' debtor in relation to a given

[156] See *infra* section 4.2.1.
[157] See *supra* section 3.1.3.5.
[158] See *infra* section 3.2.4 on the issue of successive filings.
[159] *See* Crisscross is First Group Admin, GLOBALTURNAROUND, June 2003, issue 41, p. 3. (Ms. Godfrey who was acting on behalf of Crisscross Telecommunication Group claimed that as in many group cases it was beneficial for creditors as a whole that all group companies were placed into administration).

claim[160]. Finally, various components of the group may be located and operated in different countries which may elicit a flood of contested proceedings, jurisdictional conflicts, a need to shuttle claims to different entities of the enterprise etc. All such claims and disputes evidently result in high costs and lengthy processes.

Here too, the complexity and magnitude of litigation may be substantial even in the case where the MCG was not totally intermingled[161]. When the companies had a significant amount of mutual transactions it would undoubtedly reflect on the complexity of claims.

Extensive litigation may also be a result of the way the group was managed and controlled and the behaviour practiced by the corporate group. Liability claims may flood the enterprise, based on allegations of corporate group abuse and issues such as shareholders' misconduct, misrepresentation of the financial situation of a certain entity or contribution to its collapse by another affiliate[162]. If all such litigation is taking place trans- nationally with duplications with regard to the causes of action or parties involved then costs inevitably increase. Here as well, jurisdictional and choice of law conflicts will add costs to the process. Furthermore, the 'territorial' scenario of concurrent jurisdictions may result with the refusal of a certain court to enforce judgments given by other foreign courts. This is costly in that it might require repetitive procedures over the same issues in the courts of the various entities of the group relevant to the dispute[163].

Another aspect of further litigation may revolve around questions of control over assets and over subsidiaries. That is, administrators appointed to reconstruct or to liquidate a company, which in fact was related to a wider business with operations (through subsidiaries) across the globe may attempt to expand control over cross-border assets and subsidiaries in order to be able to design a workable plan for the business or to maximize value for creditors in any possible way. However, since each of these administrators is appointed to supervise a company rather than the entire group, such intentions are bound to end up in massive litigation. Disputes with other administrators appointed to supervise affiliates' proceedings or otherwise with local creditors are sure to emerge in addition to extensive jurisdictional battles, all of which are obviously expensive and time-consuming.

In the case of Parmalat[164], for example, the attempts of the Italian Extraordinary Administrator to gain control over foreign units of the group already resulted with significant costs. As mentioned above[165], the administrator mission was to engineer a global restructuring plan for the business. Since the enterprise was sprawled all over the world, the administrator needed to get a grip on the non-Italian units as well. For this purpose he tried either to place non-Italian subsidiaries under Italian jurisdiction,

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[160] See the circumstances in the case of BCCI (see *infra* section 3.3.2). There, the situation was so complex that a pooling concept was applied (see *infra* section 3.3.5).

[161] The impact of costs in the strongly integrated MCGs cases will be discussed below (see *infra* section 3.3).

[162] See *infra* section 4.2.4.

[163] See K. Hofstetter, "Multinational Enterprise Parent Liability: Efficient Legal Regimes in a world Market Invironment" [1990] 15 North Carolina J. of Int'l Law and Comm. Reg. 299, 330, further stating that there is a potential for mutual opportunism and conflicting assertions among host country courts (in which a certain subsidiary is located) and home country courts (in which a parent is located) in applying checks on regulatory and adjudicatory powers.

[164] See *supra* notes 102-107.

[165] See *supra* section 3.1.3.7.

or to place its own people as supervisors of foreign subsidiaries[166]. However, this effort was not all successful, as separate administration proceedings have been opened against Parmalat's subsidiaries in different countries[167]. The administrator 'fought back' trying to regain control over the subsidiaries and keep his control on the sprawling assets[168], thus incurring additional costs on Parmalat's estate[169].

Further to increasing the burden of expenses on the insolvency proceedings, such amount of litigation may also slow down the whole process. It may seriously interfere with the effort to quickly stabilize the business and to present a restructuring plan for it. In order to prevent a total collapse of the estate, and to be able to use assets wisely in addition to securing refinance for going forward, claims must be resolved speedily with real time responses to conflicts arising in the course of the insolvency. Multiple worldwide proceedings will obviously prevent that. In principle, efficient administration is regarded as highly important for maximizing asset recoveries, as time is of essence especially in rehabilitation proceedings[170]. However, extensive and long litigation will take its toll on liquidation cases as well and may result in considerable value loss for the group's assets[171].

Means of linking between the insolvency proceedings even placing them under the same regime, as mentioned above, are thus crucial in order to reduce the amount of litigation and inefficiency in administrating the integrated MCG's proceedings[172]. As both administrators and courts will be able to efficiently communicate and coordinate their actions, quick resolution of claims and disposition of assets will be achieved. It will also reduce the disputes regarding the control of assets and subsidiaries' proceedings within the MCG as administrators involved in the group's insolvency process will share a common cause and interest. Additional means (rather than granting an independent cause of action for each plaintiff) will be needed to enable a

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[166] For instance, the Italian administrator succeeded to get five Dutch subsidiaries (Parmalat Finance Corporation B.V., Parmalat Netherlands B.V., Parmalat Capital Netherlands B.V., Parma Food Corporation B.V. and Dairies Holding International B.V.) and two Luxemburg Parmalat entities (Olex S.A. and Parmalat Soparfi S.A) to be placed under Italian jurisdiction (see "Parmalat unit account unfrozen", Financial Times, February 26, 2004, p. 29; Peter, J.M.Declercq, "Restructuring European Distressed Debt: Netherlands Suspension of Payment Proceeding… The Netherlands Chapter 11?", [2003] 77 Am. Bankr. L.J. 377, 383); The Italian administrator also tried to subject the Irish unit (Eurofood IFSC) to Italy's jurisdiction by opening proceedings against it in the Parma court in Italy under the EU Regulation (see *supra* note 105); On June 22, 2004 the Italian administrator also filed for bankruptcy protection in New York to shield assets from creditors there, and to force them to participate in the proceedings in Italy (see Company news: Parmalat files for bankruptcy protection in New York, NYTimes, June 23, 2004; *GLOBALTURNAROUND,* "Parmalat unveils recovery plan and seeks protection in US", July 2004, issue 54, p. 3).

[167] See *supra* note 105.

[168] For instance, the administrator was seeking to replace the provisional liquidators appointed for the Cayman Islands' subsidiary. The Cayman Islands' court rejected the request and confirmed the appointment of the provisional liquidators (see The Cayman Islands' court decision, *supra* note 83). An extensive litigation is taking place with regard to the Irish unit (see *supra* note 105).

[169] One observer commented with regard to Parmalat that "there is only about US $1 Billion of value left in Parmalat. At the rate things are going, half that could go in legal fees. And, if all this litigation continues, the restructuring could be held up for years" ("Parmalat at legal crossroads" News, GLOBALTURNAROUND May 2004, issue 51, p. 4).

[170] See, for instance, The World Bank Principles (*supra* note 9), p. 48.

[171] See Jay Lawrence Westbrook, "International Judicial Negotiations" [2003] 38 Tex. Int'l L.J. 567, 573.

[172] See also *Id.*, at p. 572-573.

unified resolution of creditors' claims concerning abuse of the corporate form, as will be discussed later on in this work[173].

3.2.2. The expenses and time waste on obtaining information

A major mission of administrators appointed to supervise insolvency proceeding of a distressed company and one that is done immediately with the break of the proceedings is to gather all relevant information and data regarding the affairs of the company. Such information usually includes the company's financial situation, its activities and customers, its assets and liabilities, the market within which it operates and so on and so forth. In turn, this information (as well as the current situation on all fronts) will also disseminate to all parties involved.

However, in a case of integrated companies (either those who had inter group links or simply were managed as a group) information relevant to a certain company may be in the possession of another (for instance, if assets were shuttled from one company to another). Furthermore, actions being made in the course of the insolvency process regarding any of the group's members, such as motions filed to court, or attempts to sell assets or to negotiate with a potential investor and so on will also be of importance (and therefore should be known) to other members of the group. Obtaining such additional necessary information will inevitably induce more efforts and costs.

During the Parmalat insolvency proceedings[174], for instance, the administrator had problems of getting sufficient notice on actions being taken and application submitted *ex parte* with regards to Parmalat's subsidiaries[175]. It has also been noted[176] that it is very likely that magistrates will have difficulties in getting access to documents as a result of lack of judicial control over foreign financial units that are part of the group.

By applying means of linking between the affiliates proceedings and preferably conducting it all at a single centre, a global approach can facilitate sharing and transferring information between affiliates' administrators and courts. This will reduce the need to seek data that was already gathered by a related company. It can enable easy and quick access to information regarding other affiliates or information that is held by such. It should hence expressly provide that information should be accessible to other affiliates' administrators who participate in any joint insolvency process[177]. Consequently, it may reduce costs involving the necessary actions directed at obtaining required information in the course of the insolvency proceedings.

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[173] See *infra* section 4.2.4.5.
[174] See *supra* notes 102-107.
[175] See the Cayman Islands' court's decision *(supra* note 83*)* at p. 20.
[176] *See* "Parmalat unit account unfrozen", Financial Times, February 26, 2004.
[177] Similar to what is provided in existing models with regard to the single debtor scenario (see, for instance, Article 31 of the EU Regulation (*supra* note 5), and Article 21(1) of the Model Law (*supra* note 10)) or in the ALI Principles (*supra* note 6) with regard to parallel proceedings (see Procedural Principles 8 and 21).

3.2.3. The costs of conducting multiple insolvency proceedings

The unique characteristics of an MCG usually result with multiple proceedings being held in different places regarding the same multinational business. Thus, duplicate processes are being conducted with overlap between the duties of the different appointees as well as the actions they take. It is widely accepted that when a single debtor with branches abroad is being put into insolvency and consequently proceedings are being conducted in all those places where it had activities, this situation is inefficient and therefore should be avoided[178]. Likewise, managing a number of proceedings for an integrated MCG can be regarded as disadvantageous as a result of redundant costs.

Having several insolvency proceedings instead of one joint together, will entail having hearings for each company separately, as well as notices for creditors and meetings. In many occasions parties involved would need to be represented in more than one proceeding due to the consequences one proceeding may have on other parts of the group. Administrators might eventually do the same 'job' twice since any particular activity being done for a certain company may be relevant for another and vice versa. The recent case of *Parmalat*[179] exemplifies this kind of redundancy in actions and costs. On one occasion for instance, the Italian administrator needed to examine the records of one of the subsidiaries[180], which was located in Malta[181]. However, both he and the provisional liquidators (appointed to supervise this subsidiary's liquidation) went to Malta for the same task of reviewing these documents, ending up with completely unnecessary expenses for both[182].

In an MCG it is not only a question of one vs. a number of processes dealing with the group, it is also a matter of multiple processes held in different countries. This inevitably raises the costs of transferring information and any sort of communication that will usually demand for travelling between countries and overcoming language and sometimes time zone differences.

Such problems were quite prominent in the case of *BCCI* banking group's insolvency proceedings[183]. In this case a globally coordinated effort was conducted in order to close all the group's operations in 1991[184]. However, since the group had operations (part through subsidiaries and part through branches) in many countries liquidators were appointed in more than 50 different jurisdictions (with the three main

[178] See Articles 3(1), 3(2) and paragraph (12) of the Recitals to the EU Regulation (*supra* note 5); Also see I.F.Fletcher, "The European Union Regulation on Insolvency Proceedings" [2003] INSOL INTERNATIONAL, Cross-Border Insolvency, 15, 27-31; Robert K. Rasmussen, "A New Approach to transnational Insolvencies" [1997] 19 Mich J. INT'L L. 1, 18 (asserting that "the preference of most, if not all, academic commentators would be a meta-rule that the 'home' country of the multinational firm provide the single forum, and controlling law, for handling all transnational bankruptcies"); Jay Lawrence Westbrook, "Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum" [1991] 65 Am. Bankr. L.J. 457, 461 (claiming that it is "nearly unanimous agreement across the world that the financial difficulties of a multinational should be resolved in one central forum, the 'universalist' principle").

[179] See *supra* notes 102-107.

[180] Parmalat Capital Finance Limited, which is a member of the Parmalat group of companies.

[181] The direct parent of this subsidiary was a company incorporated in Malta.

[182] See The Cayman Islands' court decision (*supra* note 83) at p. 15, 16. The court eventually decided that the costs issue is not a major factor comparing to the views of third party creditors willing to have the separate provisional liquidators remain in place.

[183] See *infra* note 199.

[184] *Id*.

proceedings taking place in London, Luxemburg and the Cayman Islands from where BCCI was ultimately regulated). The liquidators ended up commuting between jurisdictions in an expensive and time-consuming operation[185]. Dealing with multiple insolvency proceedings under different time zones was also a difficulty the administrators of Barings Bank had to face subsequent to the bank's collapse in 1995[186].

The restructuring of the *Global Crossing* MCG[187] also involved a parallel proceedings taking place in the US and Bermuda[188]. Although successful, the process was highly expensive, as a result of the need to oversee and co-ordinate parallel proceedings for 16 different subsidiary companies. The multi-jurisdictional element added a further layer of intricacy to an already large-scale assignment[189].

Consequently, in the case of an integrated group, placing the entire estate in a single place and handling its proceedings jointly from there as was suggested above will reduce costs of multiple proceedings and trans-national communication. If on the other hand, the companies comprising the MCG were not significantly connected in the ordinary course of business[190] then usually what is being done in one of the affiliates' proceedings will not hold significant relevance to the rest of the group. If a joint administration will not be required and therefore will not be conducted then substantial communication, shuttle of information and so on and so forth will not be needed in the first place. Consequently no added costs will occur as a result of the fact that there are multiple proceedings taking place with regard to that sort of group.

However, even in the integrated MCG cases, changing forum and applicable laws for a business that prior to the event of insolvency had substantial activities and operated under a rather different regime may turn out to be inefficient. It may add complexities rather than facilitate the process, since the business was well established in a specific

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185 *See* GLOBALTURNAROUND, February 2004, issue 49, p. 11; John Willcock, Letter from the Editor, GLOBALTURNAROUND, June 2003, issue 41, p. 2.

186 Barings collapsed in February 1995 as the result of trading activities carried on in the Far East. The holding company of the group was Barings Bank PLC. On 26 February 1995 Knox J made administration orders in respect of both the holding company and certain subsidiaries and appointed joint administrators to manage the affairs of these companies in London (see in Barings plc and Anor v Internationale Nederlanden Group NV [1995] C.L.Y. 777 1995 WL 1082385 background on the Barings administration). On 27 February 1995 judicial managers were appointed in Singapore to manage the affairs of Barings Singapore (see generally Christopher Brown, "Report of the Board of Banking Supervision Inquiry into the Circumstances of the Collapse of Barings" J.I.B.L. 1995, 10(10), 446-452; Sheila C. Bair, "Remarks, Lessons from the Barings collapse" [1995-1996] 64 Fordham L. Rev. 1). The creditors were eventually rescued from a 1.4$ billion debt as a result of a buyout by a Dutch bank and insurance firm in March 1995. However, the lack of an orderly process for administration of the insolvent multinational enterprises aggravated the debt (see Jhon K. Londot, "Handling priority rules conflicts in international bankruptcy: assessing the international bar associatio's Concordat" [1996-1997] 13 Bankr. Dev. J. 163, 167).

187 Global Crossing Ltd (Chapter 11 No. 02-40188-reg (REG) (Bankr. S.D.N.Y.).

188 The group comprised over 200 companies registered in 27 jurisdictions. The top holding companies were Bermudian registered (for tax reasons). However, the group's business was conducted primarily from the U.S. As a result, when the group sought the protecion from its creditors it simultaniously filed for chapter 11 in the US and sought the protection of the Bermudian court through provisional liquidation proceedings (see Moore, Susan, "Global Crossing versus Cenargo The right way and the wrong way, *GLOBALTURNAROUND*, January 2004, issue 48, p. 8.; *GLOBALTURNAROUND*, "How Global Crossing made it to safety", January 2004, issue 48, p. 6).

189 *GLOBALTURNAROUND*, "How Global Crossing made it to safety", January 2004, issue 48, p. 6.

190 See *supra* section 3.1.2.

country working under certain rules[191]. Therefore, it should not be a fixed rule that an integrated group should always conduct a centralized process (in which all proceedings are held within a particular state). Rather, when affiliates comprising the group had significant autonomy it should be possible to have local proceedings. However, the various proceedings should be subjected to a single supervision as suggested above[192].

3.2.4. Reducing the inefficiency as a result of successive filings

Another common scenario of an integrated MCG is that of initially solvent components that as the main process progresses become insolvent as well. The fact that in reality the business is divided into several entities will usually mean that not all companies become insolvent simultaneously or file for insolvency at the same instance[193]. However, it is most probable that the collapse of one member within a group will affect other members as well, if they were both integrated; especially if there were significant inter company links, such as mutual transactions and cross guarantees[194].

In terms of administrative costs this may suggest increased complexities. If parts of the group continue to operate regularly, then it might be more difficult to get information with relation to their financial state, existing assets and managers' actions. Administrators would need to update and modify their approaches, predictions and plans constantly, obviously resulting with inefficient administration. As was mentioned above with regard to the US bankruptcy regime[195], corporate groups there will usually file for bankruptcy for all subsidiaries, solvent and insolvent. The idea being there is no point in waiting for the inevitable, as all companies within the group should actually file for bankruptcy.

A cost-efficient solution should be given for the entire business and therefore the entire group must be considered from the very beginning. A global approach is thus advantageous in this respect if it enables to address the situation of the group as whole and then decide whether to place all affiliates under insolvency regime.

3.3. The strongly integrated MCGs- A need for an interventionist global approach in order to avoid high inefficiency

3.3.1. The scenario

In some cases of insolvency within MCGs the corporate veil was not properly maintained in the ordinary course of the MCG's business in the sense that the companies were closely integrated, highly inter dependant or even totally

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[191] With regard to a single debtor, this is indeed one of the reasons why under the EU Regulation it is possible to have territorial (secondary) proceedings (Recital 19 to the EU Regulation (*supra* note 5)).
[192] See *supra* section 3.1.3.8.
[193] See Lynn M. LoPucki, "Cooperation in International Bankruptcy: A Post-Universalist Approach" [1999] 84 Cornell L. Rev. 696, 723 (arguing that filings by one or more members of the group followed later by filings of other members are common).
[194] See *supra* section 3.1.3.1.
[195] See *supra* note 148.

commingled[196]. Typically, this will present extreme difficulty to untangle the clutter and to identify the separate businesses of each member of the group when the MCG faces insolvency. In fact, it could practically be impossible or otherwise unprofitable to do so. Thus, an operation of insolvency proceedings for each of the members separately is very unlikely to be an efficient one[197]. It is important to note that the focus here is not on any sort of misconduct on part of the people who ran the MCG or on creditors' expectations and beliefs with regard to the MCG structure[198]. Rather we simply look at the situation in which distressed affiliate companies present with high degree of integration. The event of insolvency in this type of MCG may engulf all the affiliate companies as they will all face insolvency simultaneously, but it could also be initiated with only one insolvent company whereas the other affiliates are allegedly solvent (though veritably should all undergo insolvency proceedings).

3.3.2. Unique difficulties in strongly integrated MCGs - examples on the international level

In such strongly economic integration, tracking down the mutual transactions and pointing out the specific assets and debts of each component (for instance in the course of realizing the assets for each company and then distributing the proceeds to its specific creditors) will most likely amount in a substantial loss of money and prolonged proceedings (if at all possible). Consequently, it will dramatically reduce the amount of money available for distribution for the creditors as a whole.

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[196] The strongly integrated MCG case essentially refers to instances where the business of the group has been conducted (carelessly or as a strategy) as if it was a single entity and outsiders were not aware of the group's legal structure. That is, those cases where the group represented itself and acted functionally inter-dependendly. Ultimately, the test for strongly intgrated MCGs will be one that derives from a composition of facts (see *supra* note 44).

[197] See UNCITRAL Legislative Guide (*supra* note 29), p. 349 (explaining that: "where the debtor company belongs to a group of companies, it may be difficult to untangle the specific circumstances of any particular case to determine which group company particular creditors dealt with or to establish the financial dealings between group companies").

[198] This matters will be later on discussed (see *infra* section 4). Eventually, though, the scenario of abuse or creditors' reliance may reinforce the need to apply an interventionist approach in a strongly integrated case (and vice versa- a strongly integrated prototype of MCG will reinforce the application of an interventionost approach in an abusive event), as ultimately it is a combination of factors and goals (see *infra* section 4.2.3.3).

Such were the circumstances in the insolvency proceedings of the *BCCI* group[199]. The BCCI representatives[200] concluded that the two main entities comprising the group were inextricably intermingled. The representatives had difficulties in deciding which asset belonged to which BCCI component and which BCCI creditors and which BCCI debtors were the creditors or debtors of which BCCI company. The manner in which many of the BCCI books had been kept prevented clear answers to these questions and suggested prospects of lengthy and expensive litigation on the path for reaching sustainable resolutions for these difficulties[201].

In addition to the problem of wasting time and money on the attempt of figuring out the specific ownership of assets and debts, a commingled or highly inter dependant MCG insolvency case also entails an extreme difficulty to ascertain which parts of the group are truly insolvent and which are not[202]. Based on a balance sheet analysis, some components may show a stronger financial state than others, and some can arguably be solvent at the time of opening the proceedings. However, since the corporate form was not properly maintained, assets and debts could have been shuttled and therefore could not be traced back to their 'true' origins; it could not be readily proven that the correct state within the MCG in the time pf insolvency is a true reflection of the accurate state of affairs of each company within the group. Or, if the companies comprising the group were highly inter-dependent, an apparently solvent component may in fact be totally dependant on the support of its parent company or

[199] The BCCI group collapsed on July 1991 and was closed down by banking regulators. It was a multinational banking organization with operations in approximately seventy countries. The group was comprised of three different corporations: "BCCI Holdings", "BCCI SA" and "BCCI Overseas". BCCI Holdings operated as a holding company in Luxemburg, and owned the two other subsidiary banks, BCCI SA and BCCI Overseas, incorporated in Luxemburg and the Cayman Islands respectively. Each of these subsidiaries operated worldwide through branches and subsidiaries, one of the main branches in the United Kingdom with the preponderant volume of BCCI SA located there (See Re Bank of Credit & Commerce International S.A. (No.10) [1997] 2 W.L.R. 172 (Ch. 1996) [hereinafter: BCCI No. 10]; The BCCI insolvency happened before the EU regulation came into force, and in any case since it was a financial institution it would have not been subjected to the Regulation. Today, it would have been handled according to the winding up directive for credit institutions (Dir. 2001/24/EC of 4.4.2001; [2001] OJ L125/15.23; SI 2004/1045). However, the administration of the BCCI which operated internationally may teach lessons equally relevant for the handling of other business insolvencies (see Westbrook, Lawrence, Jay, and Ziegel, Jacob, S., "NAFTA Insolvency Project" [1997-1998] 23 Brook. J. Int'l L. 8); The proceedings were complex and produced many different episodes of litigation (See especially the Luxemburg winding up order (Bank of Credit and commerce International S.A. (District Court of Luxemburg, 3 January, 1992)) in which the Luxemburg court explained that according to the supervisory commisssioner's opinion it is essential to coordinate the liquidation operations by means of cooperation agreements to be concluded with the liquidators of the different foreign enities, subsidiaries and branches, with a view to create a common pot and a common administration) [hereinafter: the Luxemburg winding up order]; In re B.C.C.I. S.A. (No.2) [1992] B.C.L.C. 715 in which the English liquidators decided and the English courts determined that the insolvent estate of B.C.C.I. S.A. was to be administered in Luxemburg in accordance with Luxemburg law [hereinafter: BCCI No. 2] and BCCI No. 10 which includes background on the BCCI liquidation and a description of the agreements made between the liquidators; For general background on the collapse of BCCI see also Hal s. Scott, "Supervision of International Banking Post-BCCI" [1992] 8 Ga. St. U. L. Rev. 487; Hal S. Scott, "Multinational Bank Insolvencies: The United States and BCCI" in current Developments in International and Comparative Insolvency Law 733 (Jacob S. Ziegel Ed., 1994).

[200] Appointed by the courts in Luxemburg, United Kingdom and the Cayman Islands (*Id*).

[201] See BCCI No. 10 (*supra* note 199).

[202] In the case of BCCI mentioned above the majority of the group's componenets were formally solvent. 'Overseas' was the only insolvent company. Nevertheless, all of BCCI's components were lumped together and were subjected to the insolvency process.

other members in the group and could by no means be considered as a stand-alone entity. As a result, it would be difficult or even impossible to determine which members of the group ought to be subjected to an insolvency regime and which are not.

Such were the circumstances, for example, in the case of *Bramalea* group of companies[203]. Bramalea was a major North American real estate corporation, headquartered in Toronto, which carried on business through numerous operating subsidiaries in Canada and the U.S. (and was also a party to many partnerships and joint venture agreements). Bramalea filed for bankruptcy in Canada. Based on a balance sheet alone, some of the subsidiaries comprising the group arguably were not insolvent, thus were not supposed to be subjected to the insolvency regime. However, Bramalea argued that the viability of the subsidiaries could not be sustained without Bramalea's support thus it is hard to state that the subsidiaries should actually be separated and excluded from the insolvency process[204].

Another difficulty emerging in these cases relates to the veracity and magnitude of inter-company claims. If the group was highly integrated and commingled then inter-company trading or inter-company loans (that in the event of insolvency may become a basis for disputes within the group) may have been conducted with no sufficient records and documentation, as a consequence of the entanglement of the business. In such circumstances, trying to determine whom within the group owes what to any of the other members will again entail very expensive and prolonged proceedings with no guarantee of successful ending[205].

In the cases were reorganization may be viable, the disadvantage in conducting separate proceedings is even more pronounced. The incapability to resolve claims and provide responses speedily will have a devastating effect on the possibility to rescue the business[206].

3.3.3. A need for an adequate solution

To avoid overwhelming efforts of entangling the specific businesses and establishing the financial dealings between the members of such groups or to refrain from dealing with the entities separately (when the economic integration between the affiliates reached such an excessive degree that it is economically unwise) there is a need for a sort of solution that will allow to combine between the assets and liabilities of the components in the course of insolvency[207]. Chances are that the more ‘minor’ means

[203] An unreported case in the Ontario Court of Justice (for a description and discussion of the case see R. Gordon Marantz, “The Reorganization of a Complex Corporate Entity: The Bramalea Story” in Case Studies in Recent Canadian Insolvency Reorganizations 1 (Jacob S. Ziegel ed., 1997); See also Jacob S. Ziegel, "Corporate Groups and Crossborder Insolvencies: A Canada- United States Perspective" [2002] 7 Fordham J. Corp. & Fin. L. 367, 384-385).

[204] See R. Gordon Marantz, “The Reorganization of a Complex Corporate Entity: The Bramalea Story” in Case Studies in Recent Canadian Insolvency Reorganizations 1, 6 (Jacob S. Ziegel ed., 1997); Jacob S. Ziegel, "Corporate Groups and Crossborder Insolvencies: A Canada- United States Perspective" [2002] 7 Fordham J. Corp. & Fin. L. 367, 384-385.

[205] Also see the impact of fraud on the reliability of intra-group claims (*infra* note 375 and accompanied text).

[206] See *supra* section 3.2.1.

[207] See also K. Takeuchi, “Issues in Concurrent Insolvency Jurisdiction: Comments on the Papers by Grierson and Flaschen-Silverman” in Current Developments in International and Comparative Insolvency Law (Jacob s. Ziegel ed., 1994). Takeuchi suggests that consolidated parent-insolvency

for linking between the related companies' proceedings will not suffice in this case. A joint administration ('procedural' consolidation applied to the case of MCG) on a global level may reduce costs by facilitating jurisdictional disputes[208], yet it cannot solve the problem of entanglement since the rights and obligations of the group's members will be still left intact[209].

3.3.4. National laws' approaches

The problem of handling corporate groups' insolvencies which were conducted as a single entity also arises on the national level with regards to domestic enterprises. In fact, there are jurisdictions under which the court can order that the winding up or reorganization of related companies will proceed on the basis of pooling of assets (or substantive consolidation). The basic idea is to achieve just and equitable results as well as to deal with the inefficiency of handling separate proceedings in cases of highly commingled corporate groups by addressing the companies as a single unit in the course of their insolvencies[210]. In certain jurisdictions this includes the disregard of inter group claims[211]. Indeed, the economic integration within the corporate group plays a significant role in the substantive consolidation regime[212].

3.3.5. A stronger need for an interventionist approach on the global level

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proceedings in one country running concurrently with the subsidiary's foreign insolvency proceedings will enable to deal effectively with insolvency phenomena involving global enterprises. Takeuchi claims that even without misconduct and commingling of assets prevalent in the BCCI case, a pooling or similar harmonizing arrangements should be strongly supported as a way of dealing with the failure of a multinational enterprise. As it is suggested herewith, such approach should be indeed applied in cases where substantial elements of strong economic integration are present (as well as in the commingling of assets scenarios). The scenario of misconduct within the MCG is discussed in *infra* section 4.2.4.

[208] See *supra* section 3.2.1.

[209] See *supra* section 3.1.3.2.

[210] American Bankruptcy Courts are empowered to order substantive consolidation as part of their general "equity powers" provided in section 105 of the Bankruptcy Code (USC, s. 105, Supplement v 1987; See Blumberg, Bankruptcy, chap. 10 (on substantive consolidation in the US)); Using section 271(1)(b) of the New Zealand's Companies Act 1993 the courts there can order that that proceedings of two or more related companies will proceed together as if they were one company. The term 'related' is defined in section 2(3) of the Companies Act 1993. The definition includes reference to the definitions of 'holding' and 'subsidiary' company, and to the holding of majority shares, but also goes wider than referring only to the formalistic structure of the enterprise by including a fact-based provision where the businesses of the companies have been intermingled (see Farrar, Corporate Governance (*supra* note 54), p. 240-250; Blumberg, Bankruptcy (*supra* note 39), p. 618-622). This wide definition goes along with the above suggestion to include within a global approaches all variation of enterprises including those not linked via equity (see *supra* note 72). Specifically on equitable considerations and substantive consolidation (or pooling orders) see *infra* section 4.2.2. In the English system, courts does not have an equivalent wide discretion to enact pooling orders or substantive consolidation. However, English courts expressed some flexibility in this regard in exceptional cases of extreme intermingling (see Re BCCI (No 3) [1992] BCC 1490; Dean Willcocks v. Soluble Solution Hydroponics Pty Ltd. (1997) 15 ACLC 833).

[211] According to the American insolvency regime intra group obligations are terminated by the consolidation order (see Blumberg, Bankruptcy (*supra* note 39), p. 26, 402); Also see UNCITRAL Legislative Guide (*supra* note 29), p. 353).

[212] Blumberg, Bankruptcy (*supra* note 39), p. 419-420; Muscat, The Liability (*supra* note 65), p. 407.

The international level undoubtedly presents a stronger need for using such a method to deal with cases of strongly integrated MCGs. In cases of trans-national commingled or strongly integrated groups the disposition of assets and claims would be more difficult to resolve since assets are located within different countries and proceedings are being handled in competing jurisdictions. Hence, if the MCG was integrated to such a degree that it would be unreasonable to invest the time and money to untangle the separate businesses of each distinct entity it would make sense to embrace a more interventionist global approach that will consolidate or pool the assets and debts of the related companies together, ignoring the apparently artificial structure that divides between the members.

Indeed, this rational led courts and parties involved in several past cases of strongly integrated groups with cross-border dealings to agree on a sort of worldwide 'pooling' or 'consolidation' solution. The two cases mentioned above- the case of the BCCI group and the case of the Bramalea group, exemplify this approach. The circumstances in those cases and the ‘model’ adopted there demonstrate how parties (creditors and debtors corporations alike) accepted the necessity of some form of ‘cross- border substantive consolidation’ as a mean of avoiding expenses and vast difficulties of disentangling intra-group dealing and entitlements. The advantage in terms of cost efficiency was clear[213].

In the case of *BCCI*[214], the provisional liquidators devised a number of agreements of which the most significant was the 'pooling agreement'. An improvised 'pooling' solution was designed to avoid the winding up of the group from being lost in a morass of legal argument[215]. The idea was to create a structure under which all BCCI assets would be pooled, hence the tracing and recovery of assets would be a joint enterprise, and creditors in each of the liquidations would receive the same level of dividend from a central pool. One of the liquidations was granted a 'supervisory' role in the sense that it was regarded as the principal proceedings[216]. The determination of the claims of BCCI's creditors were to be carried out in accordance with this supervisory liquidation and most of the proceeds of the realization of BCCI property was to be transmitted to this place[217]. Utilizing a pooling concept encompassing companies situated and incorporated in different countries was regarded as essential in the particular circumstances of the case. It was the initiative of the representatives who concluded that it is inter alia the most efficient approach[218]. The reason was the intertwined scenario with which the representatives were faced and the need to

[213] It is a question, though, whether it was a just and equitable approach, at least from the point of view of certain creditors (see *infra* section 4.2.2.3).

[214] See *supra* note 199.

[215] See the Luxemburg winding up order (*supra* note 199) (concluding that "it results from the submissions of the supervisory commissioner of B.C.C.I. S.A. that the affairs of B.C.C.I. S.A. were inextricably linked with those of other entities of the BCCI group"), and BCCI No. 10 (*supra* note 199) (referring to the English court hearing of the winding up petition on 2 December 1991 indicating "the truly gargantum task of preserving and realising assets of B.C.C.I. worldwide").

[216] Luxemburg was the country of Principal liquidation (clause 3.1 and 3.11 of the pooling agreement (see BCCI No. 10, *supra* note 199)). For the discussion on the issue of principal place of proceedings in the case of MCG see *supra* section 3.1.3.8.

[217] Clause 3.1 and 3.11 of the pooling agreement (see BCCI No. 10, *supra* note 199).

[218] For the fairness aspect see *infra* note 303.

minimize time to unpick every claim, and determine who owes what to whom. Most importantly it proved successful, especially in terms of return to creditors[219].

Similarly, in the case of *Bramalea*[220], the group's counsel suggested treating the group as one single entity in its insolvency, since its components were strongly integrated. The Canadian parent company initially filed bankruptcy in Canada, and subsequently, the Canadian court imposed a global stay of proceedings. It also extended its jurisdiction over numerous subsidiaries including U.S. based and U.S incorporated subsidiaries (some of which were arguably not insolvent at that point[221]), treating the entire enterprise as a single entity. Eventually, Canadian and American subsidiaries were both subjected to one single insolvency regime (the Canadian) and were consolidated to one aggregate estate, eliminating the boundaries between the subsidiaries and affiliates, and ignoring national boundaries[222]. The justification for extending jurisdiction and consolidating the companies into one estate was based on the high level of integration between the entities[223]. The plan which applied the consolidation concept was supported by the creditors, thus overcoming legal difficulties and traditional barriers[224].

The above examples reinforce the claim that an interventionist global approach that may treat the different foreign companies as one single entity at least to some extent is at clear need in order to promote cost efficiency. Fundamentally, this would suggest the application of a 'pooling of assets and debts' mechanism (hereinafter interchangeably referred to as "a pooling concept" or "a pooling mechanism" or "substantive consolidation"), similar to what is being used on the local level in several national law systems (as mentioned above), to a multinational corporate group in distress.

3.3.6. Variations of pooling mechanisms

Naturally, a strongly integrated MCG could take various forms, which may pose different demands on the cost-efficient insolvency 'system', and therefore raise threats to its successful conduct. Concordantly, the pooling mechanism may be applied in variations so to accommodate for the particular demands.

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[219] As was explained to the author by Mr Michael Crystal, QC, who ran the joint operation of the BCCI winding up, creditors were paid 70 cents on the dollar, while at the beginning of the process it was predicted that no more than 10% of the claims will be returned to creditors. This outcome is still improving with more recoveries that keep coming in. See also Lynn M. LoPucki, "Cooperation in International Bankruptcy: A Post-Universalist Approach" [1999] 84 Cornell L. Rev. 696, 715 (footnote 98 and accompanied text).

[220] *Supra* note 203.

[221] See Jacob S. Ziegel, "Corporate Groups and Crossborder Insolvencies: A Canada- United States Perspective" [2002] 7 Fordham J. Corp. & Fin. L. 367, 384.

[222] See R. Gordon Marantz, "The Reorganization of a Complex Corporate Entity: The Bramalea Story" in Case Studies in Recent Canadian Insolvency Reorganizations 1, 6 (Jacob S. Ziegel ed., 1997).

[223] See Mike Sigal ET AL., "The Law and Practice of International Insolvencies, Including A Draft Cross-Border Insolvency Concordat" [1994] 95 ("The court accepted Bramalea's contention that it was, by and large, a single integrated business…"); Jacob S. Ziegel, "Corporate Groups and Crossborder Insolvencies: A Canada- United States Perspective" [2002] 7 Fordham J. Corp. & Fin. L. 367, 384.

[224] See Jacob S. Ziegel, "Corporate Groups and Crossborder Insolvencies: A Canada- United States Perspective" [2002] 7 Fordham J. Corp. & Fin. L. 367, 386. Nevertheless, there were arguments that the substantive consolidation applied was unjust to certain creditors (see *infra* section 4.2.2.3).

Thus, in a 'completely intertwined' scenario, in which both the assets and debts cannot be reasonably ascertained then it would prove efficient[225] to pool both assets and debts together (as was described above). Accordingly, the proceeds from assets sales will be distributed to the creditors as a whole, or otherwise a reorganization plan will be implemented on the entire estate while dividends will be distributed to all the creditors as if were one single estate.

If, in addition, the intra group claims are untraceable, it should be possible to avoid them in this course of action. It should be noted that in this regard deferring the inter group claims in priority (an approach provided in certain national insolvency regimes that adopted the subordination mechanism[226]) may not suffice. Presumably inquiring the nature of the claims (which is also a related factor in subordination regimes[227]) will be irrelevant here, since the mere existence and the amount of the claims are uncertain or would demand huge effort to resolve[228].

If, in other circumstances, the assets were commingled but it is possible to determine which creditors dealt with which company, then it should be permissible to pool the assets together and then distribute the proceeds to each company according to a compatible ratio (or to offer separate plans to each entity's creditors). In other circumstances it should be possible to avoid only inter group obligations without pooling the assets and debts.

Finally, if the evidence initially available suggests that a specific company was not strongly integrated with the rest of the group it should be possible to exclude it from the consolidation pro tem with the possibility to link it back up at a later stage as the proceedings progress should evidence connecting this component to the group (even to some extent[229]) come to light. An example may be a collapsed retailer conglomerate operating internationally with one of the components structured to be the financing unit. This component was not influenced by the collapse of the ‘core business'. Its assets were separated and identifiable. It also had separate creditors (bondholders, for instance). In such circumstances it is not justified in terms of cost-efficiency to pool this company with the rest of the group[230]. Often, in such circumstances there would not be much gain from pooling this unit together with the rest of the group, since it was not part of the main business[231] and its assets were not commingled with those of the group. In addition, as aforesaid with regard to the non-

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[225] Other reasons to apply substantive consolidation will be discussed in the subsequent section on the issue of fairness (*infra* section 4).

[226] On the equitable subordiantion mechanism (of intra group claims) in the United States see Blumberg, Bankruptcy (*supra* note 39), chap. 4.

[227] See *Id*.

[228] For a discussion of the difference between the elimination of inter-company claims in substantive consolidation and the equitable subordination judicil technique see Blumberg, Bankruptcy (*supra* note 39), p. 442-444. Blumberg notes that the differences may be thoretical, not practical, since in most cases when relegated to a junior rank, the subordinated claim in fact will never be paid. Even in the occasional cases where assets may be available after satisfaction of all claims of external creditors, the end result will be different only where the subsidiary os partly owned.

[229] See *supra* section 3.1.2.

[230] It may be that the people who ran the group purposely structured the enterprise so that certain parts of it would be 'bankruptcy remote'. It is questionable then whether it would be fair to creditors to recognize such moves in the course of insolvency (see *infra* section 4.2.4).

[231] This was one of the arguments presented by the U.S. bondholders with regard to the Irish unit of Parmalat (See "Italian and Irish courts clash over Parmalat", GLOBALTURNAROUND, April 2004, issue 51, p. 3; Eurofood IFSC Limited [2004] BCC 383; The subsidiary's US bondholders claimed in the Dublin hearings that Eurofood IFSC was a standalone unit and irelevant to the group restructuring).

integrated MCG scenario[232], redundant costs on any sort of coordination with this unit might increase the costs rather than reduce them.

These optional pooling or consolidation orders are 'partial' in the sense that they impose only part of the means available to deal with commingled businesses or apply it only on a specific section of a group[233].

3.3.7. The implementation of pooling mechanisms in the international scenario

The implementation of a pooling mechanism to the case of strongly integrated MCG demands the use of similar global means as in the case of joint administration that was discussed in respect of integrated MCGs. Most fundamental is the need for cooperation, as usually separate administrators are representing the companies in the first place. Hence, the administrators would have to coordinate in some way the unified operation, which is to be applied to the group as a whole.

This may be achieved through the application of an ad-hoc model, such that will initially require the parties to agree on the pooling concept and then to apply it and operate the process coordinately[234]. However, in a substantive consolidation case the costs of such approach are considerable. To negotiate such complex agreements from scratch and consequently coordinate tightly linked proceedings in which assets are pooled together and claims are jointly processed is obviously a challenging and expensive task. A pooling operation is rather prone to disagreements and is naturally complicated. Therefore, predefined modes for cooperation and coordination, accompanied by guidelines on the implementation of a pooling concept, will simplify the process immensely.

Moreover, in a case of a 'complete' substantive consolidation (in which all assets and debts are mixed and one distribution or one scheme of arrangement will be offered to all creditors together) such cooperation will need to be supported by a supervisory role to one specific authority and by putting the entire proceedings under a single law regime[235]. Otherwise, it will be impossible to treat the companies as one unitary entity and to distribute dividends to all creditors as if were not divided between separate entities and different nations.

If the consolidation is partial in the sense, for example, that the assets are pooled but the proceeds are to be distributed separately by each entity to its own creditors, then the distribution can be governed by each country's own insolvency laws. Which ever be the case, supervision would be most profitable, since actions being taken by any entity within the group and the way in which each part of the business is handled through the course of the insolvency process, has significant influence on the final outcome for the entire group. If it is impossible to assert the place in which supervision should be held over the proceedings or otherwise if the parties could not agree on a single supervision[236], then close cooperation between courts and

[232] See *supra* section 3.1.2.
[233] On the issue of partial consolidation see also *infra* sections 4.2.2 and 4.2.3.
[234] As was actually done in the BCCI insolvency *(*see *supra* section 3.3.5).
[235] Indeed, in the case of BCCI it was agreed that the entire proceedings will be supervised from one specific place (Luxemburg) (see *supra* section 3.3.5).
[236] This situation is most prominent in the scenario of integrated sister companies under insolvency or in the scenarios of decnetralized MCGs (See *supra* section 3.1.3.8).

administrators should be applied. Such cooperation should encompass a mechanism (expressly predefined within a global model) for determining the distribution of proceeds.

To avoid the massive expenses and the time it will take to operate a worldwide insolvency of essentially one entity but such that is located in different states it will usually be preferable[237] to place the operation in a single place[238]. In addition, a model that provides rules of international jurisdiction will facilitate overcoming problems and costs resulting from the need to agree initially on the pooling concept itself. A specific court can be authorized within such a global model to examine the facts and determine the appropriate solution for the case, thus dismissing the need to reach an initial agreement.

4. Fairness to Creditors

4.1. Creditors' rights pertaining to the administration and the location of the MCG insolvency - the question of meeting legitimate expectations, and securing proper representation and involvement

4.1.1. Introduction

In debating in the previous section whether to unify and centralize the insolvency process it was argued that the way the group was managed and operated (the degree of economic integration) prior to the insolvency should be taken into account as well as the 'aim' of the process and the specific insolvency scenario[239]. Here we suggest embedding another aspect into this debate namely, the view and expectations of creditors (related to 'local' subsidiaries) regarding the MCG member's location and administration, and their ability to be involved and to be adequately represented in any sort of a unified process. Although a global approach (embracing inter alia the idea of having a single process to the MCG through the application of international jurisdiction to these cases) may hold the danger of neglecting foreign creditors, it is submitted that such approach is able to overcome this difficulty and ultimately provide better means to ensure the protection of creditors' rights.

4.1.2. Considering creditors’ expectations and interests with regard to the insolvency location

Creditors' expectations are counted as essential in determining the issue of international jurisdiction in which to handle cross-border insolvencies[240]. Creditors

[237] See also *supra* sections 3.1.3.6- 3.1.3.8.

[238] In the case of BCCI (*supra* note 199) the operation took place in various states ending up with expensive and time consuming operation (see *supra* section 3.2.3).

[239] See *supra* sections 3.1.2, 3.1.3.5- 3.1.3.8.

[240] Thus, the EU Regulation applying the idea of having one centre for single debtor worldwide insolvency provides that a major factor in determining where the main proceedings of the debtor should be taking place is third party expectations (Recital 13 of the EU Regulation (*supra* note 5) provides that

should be able to foresee where the insolvency of the company is going to take place and calculate their risk accordingly[241]. As was suggested[242], economic efficiency considerations may justify a centralized process for the entire group's insolvency proceedings. The general idea is that a single location will be acknowledged as a centre of main interests for the entire estate in order to promote the efficiency of the proceedings in the appropriate MCG insolvency scenarios[243]. However, as our discussion here revolves around creditors' viewpoint, it can be argued that the location of proceedings of any member of a group (and the corresponding law and forum that should supervise the process) should be determined for each company separately. That is, without any considerations of the connections a particular member may have had with another related company or with a 'group' (even if this is beneficial for the group as a whole). Typically, creditors are related to a certain company and not to a group of companies. Therefore, they expect to enforce their rights upon it and to open insolvency proceedings in the place of its main operations[244]. Their rights should not be prejudiced because of any 'group' considerations, as they dealt with a separate legal personality.

Take an example of a subsidiary in Germany with substantial local operations. Its parent company is located in the Netherlands as are most of the other subsidiaries. All the subsidiaries are managed as a group with a general policy being imposed from the Netherlands. However, there is a separate local management to the German subsidiary with all the activities and business taking place only there. The creditors dealt with the company in Germany and were not aware of the fact that it was ultimately supervised from another country. These creditors may argue that looking at the German company alone, they saw its 'location' (for the purpose of any future default) in Germany. It is unfair to 'move' the location to any other place (in this case to the Netherlands) on the grounds that the ultimate management was situated there. The company they dealt with was German, it is the one that owes money to them, and they should be able to control its future in the course of default. Thus allegedly, in the name of 'unification' a global approach may neglect creditors' expectations and may not fit with their views regarding the forum which should supervise the process[245].

However, one of the obstacles this kind of simplified straight-forward approach must face is that different creditors may have different expectations. That is, other creditors involved with the group may have interests in the location in which a certain member's insolvency will be handled and may have different expectations. Creditors

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the fact that a particular place is the centre of the debtor's main interests must be 'acsertainable by third parties'). *See* also Report Virgos/Schmit (nr. 75); Geveran Trading Co Ltd v Skjevesland [2003] BCC 209; Daisytek- ISA Ltd, and others [2003] BCC 562 (16 May 2003, Chancery Division, Leeds D.R.); Eurofood IFSC Limited [2004] BCC 383; Re Parmalat Hungary/Slovakia, Municipality Court of Fejer, 14 June, 2004; Ci4net.com Inc (England, Ch D, May 20, 2004); Bob Wessels, "International Jurisdiction to Open Insolvency Proceedings in Europe, In Particular Against (Groups of) Companies" Working Papers Series, Institute for Law and Finance, Johann Wolfgang Goethe University, (http://www.iiiglobal.org/country/european_union/InternJurisdictionCompanies.pdf).

[241] See *Id*.

[242] See *supra* section 3.1.3.6.

[243] See *supra* section 3.1.3.8.

[244] The exact factors to determine the connections a company (a single debtor) should have to the country in order to commence insolvency proceedings against it there may differ according to the legal regime applied. For instance, under the EU Regulation, main proceedings can be opened against a debtor only in its centre of main interests (see *supra* note 240).

[245] See for example the arguments put in the Daisytek case (*infra* section 4.1.4).

of a certain subsidiary may wish that the company will be separately managed, while the creditors of other related companies would expect all proceedings to be conducted jointly since according to their view they were given the impression that they deal with the entire group and not only with a well bounded part.

In order to accurately consider the various expectations involved and to reach a just and true decision one forum should be able to evaluate the various views and decide on the appropriate weight each should be given, according to the circumstances. Furthermore, a thorough examination of the facts pertaining to a group's insolvency may reveal that it was indeed clear to 'locally oriented' creditors (of local subsidiaries) that they dealt with a member which was part of a group. In the relevant circumstances it can be concluded that these creditors could expect to have a mode of joint administration where a fragment of a greater empire fell. In fact, they may have negotiated with a holding company located elsewhere, or their contracts may have been subjected to the laws under which the parent company was operating. They may have supplied products to other members of the group or had other dealings with the various parts of the business. They may have received a guarantee from the parent company, and so on.

One of the issues raised in the case of the *Bramalea* group[246] was the creditors' viewpoint regarding the location of subsidiaries for the purpose of the assertion of jurisdiction over an entire MCG. There, Bramalea claimed that the operating subsidiaries in the U.S. were in fact carrying on business in Canada. The basis of this claim was that various officers of the U.S. affiliates were physically located in Canada at Bramalea's head office. It was submitted elsewhere[247] that there was a practical foundation for this position (although the basis for this claim was controversial, and remained unresolved). Many of the creditors which had loaned to the U.S. affiliates had in fact negotiated their loans with officers of the Parent in Toronto through sessions that had taken place in Toronto. Furthermore, many of those loans were in fact supported by the parent company's guarantee[248]. The Canadian court indeed extended its jurisdiction to include the U.S affiliates, adopting a flexible approach to the issue of a corporation's place of business to achieve a practical result and enable a joint administration for the group.

Examining the way the MCG was operating and the way creditors were doing business with the corporation may, therefore, point out the single location from where the group was managed and in which insolvency proceedings should be handled for the entire group. In particular circumstances, though, it may be that although the enterprise was managed as a group, the activities and dealings of creditors with the subsidiaries were entirely local with no awareness to the 'group scenario'. Accordingly, creditors may expect to have the main process against the particular entity taking place in the country in which it operated. However, it will still be justified to connect this proceeding and even subject it to those taking place elsewhere for the rest of the group or for the parent company, since ultimately the subsidiary was part of an integrated group. There could also be situations where the creditors did not precisely know with which entity within a group they were dealing and where it was

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[246] *Supra* note 203.
[247] See R Gordon Marantz, "The Reorganization of a Complex Corporate Entity: The Bramalea Story" in *Case Studies in Recent Canadian Insolvency Reorganizations* 1, 18 (Jacob S. Ziegel ed., 1997).
[248] *Id*.

incorporated or held its main operations. Indeed, the increasing complexity of a technologically advanced business world (where enterprises may operate through a baffling network of corporate relations) leads to increasing difficulty in establishing which company within the enterprise is actually at fault, making it hard even for more sophisticated creditors to ascertain the proper entity against which to open proceedings. In cases of small unsecured creditors there is even a greater difficulty in clearly identifying the corporate actor with whom one was contracting or suffered injury[249].

A global approach is essential in order to consider the entire group picture and the various expectations involved. It may then provide a variety of solutions to be able to meet parties' expectations.

4.1.3. Rights of involvement and adequate representation in the MCG context

What is happening in insolvency within an MCG may be relevant not only to members directly under the proceedings but also to other affiliates which may be located in other states. As was shown earlier, the financial situation of one member can influence the other, there may be mutual claims, there may be questions of group liability, and it may be relevant to consider the joining together of two or more proceedings (of affiliated companies) and so on. These affiliates may be under insolvency elsewhere, taking place concurrently, or not under insolvency at that time. It is important that the wishes of creditors of affiliated companies could be heard. In this regard a global approach is beneficial in that it looks at the MCG insolvency as linked (in the relevant circumstances) and as a result can provide means to ensure the involvement of creditors related to other separate entities.

On the other hand, a global approach may present a risk to creditors' involvement and representation rights[250]. When trying to unify the insolvency of a group there is a concern that creditors related to local subsidiaries will be neglected. Apparently, handling the proceedings of each entity separately and locally is better suited to ensure the participation of creditors in the process (of that subsidiary, to which they directly relate) in the most easiest and accessible manner. Conversely, if a subsidiary's insolvency is handled in some place of 'common control' or is subjected to some mode of mandatory single direction, certain creditors that might not have the sufficient means to embark on a multinational legal expedition (or from any other reason) would not be consulted even when a decision that pertains to them (and in which their expectations should be taken into account) is made. It could involve, for instance, the decision of opening proceedings in a specific location as well as the ongoing handling of the proceedings once they were opened. In fact, it may also be the direct consequence of a central administration that lacking any explicit guidelines and directions is more concerned with a certain party's needs and expectations and therefore forsake those of other, perhaps more 'remote' creditors.

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[249] See Jay Lawrence Westbrook, "A Global Solution to Multinational Default" [2000] 98 Mich. L. Rev. 2276, 2314.

[250] The impact of a global approach on distribution rights will be discussed in *infra* section 4.2.

In the latter type of scenarios there is also the risk of culminating into a de facto substantive consolidation[251] mostly for the sake of convenience of the administration rather than any substantial reason. Thus, separate entities in essence may eventually be lumped together without giving full consideration to the expectations of the entire group of creditors.

In any of these scenarios, creditors from foreign countries may find it expensive and difficult to object or to be actively involved in proceedings taking place in another place. In addition, as was indicated with regard to single debtor cross- border insolvencies and the use of the EU Regulation, there are practical disadvantages for foreign creditors due to language, distance and the differences between procedural requirements imposed by states' insolvency laws[252]. Applying that to the case of insolvencies within MCGs suggests that there is a 'double' barrier to foreign creditors when they relate to a separate entity.

The problem of inadequate representation and the need for active involvement increases since there is a potential conflict of interest in supervising an MCG process in a unified manner. The appointee or appointees, if handling the whole proceedings together, may be representing different interests. This problem is surely more pronounced, when there is only one appointee to all the proceedings, but also if there are several appointees handling the whole group. In such situations, the appointees are on the one hand operating for the benefit of the group as a whole (and the creditors in general) but on the other hand are dealing with separate entities that might have contradicting interests. In any case, a single appointee or a closely tied group of appointees can result in an all too ‘cozy’ situation, with the potential of neglecting certain creditors' interests.

A global approach should appreciate these difficulties and the dangers in neglecting foreign creditors, taking into account the fact that separate entities are involved in the joint process. It should provide adequate tools to overcome its potential flaws while enabling the needed linkage between affiliates and between local and foreign processes, consequently reaching fair results.

4.1.4. International experience demonstrating the difficulties in protecting creditors' rights with regard to the insolvency administration

Currently, parties and courts may be driven to try and devise practical solutions, to enable efficient liquidations or restructurings of MCGs. Lacking sufficient structured guidelines courts may tend to be inclined towards the direction to which local creditors may pull: either to protect creditors in the 'territory' in the case of a foreign subsidiary sacrificing the global economic consequences it may have, or enforce control over foreign members of a group even in cases where it may not exactly fit creditors' expectations. Creditors themselves may be reluctant to accept any 'joint process' when they are not certain that their rights will be preserved during this course

[251] On the application of substantive consolidation in MCG insolvency cases see *supra* secions 3.3 and 4.2.2-4.2.4.

[252] See I. F. Fletcher, "The European Union Regulation on Insolvency Proceedings" [2003] INSOL International, Cross-Border Insolvency, a Guide to Recognition and Enforcement 15, 41.

of action. The current difficulty to adequately impose a joint process for groups and at the same time satisfy creditors' expectations and protect their rights can be demonstrated in several recent cases of MCG's insolvencies.

The *Eurofood*[253] subsidiary company was incorporated in Ireland; however it was part of an Italian group that collapsed (Parmalat). Hence, the Italian administrator appointed to restructure the Italian group wished to subject the Irish company to Italian jurisdiction to facilitate the operation[254]. Creditors of this subsidiary, however, were reluctant to accept that. They feared for the consequences and could not be sure that their rights would be adequately safeguarded. They were concerned, for example, that the assets of the Irish subsidiary would be lumped together with those of the rest of the group[255]. They preferred to have control on the subsidiary's future thus tried to place its proceedings in Ireland. Eventually, two main parallel proceedings were opened.

Indeed the Irish court in its decision to approve the appointment of Irish provisional liquidators to the subsidiary[256] emphasized the Irish company's creditors' expectations and how they viewed the company's location. The court held that it was clearly Ireland in which the creditors expected a default to be handled as creditors were dealing with investments issued in Ireland and subject to Irish fiscal and regulatory provisions[257]. The Italian court, on the other hand, in its decision to open main proceedings in Italy (in relation to the same company)[258] seemed to have focused more on the entire group's operational structure and the Irish company's position within it. It pointed out the fact that the Irish company carried out activities instrumental to the Italian parent's group, that it was ancillary to the parent, that the parent guaranteed all transactions and that all operating and policy decisions were made from Italy[259] .

The Cayman Islands court's decision[260] also in a matter related to the Parmalat group[261] reflects a similar consideration of that of the Irish court. Cautious of not depriving creditors of the local subsidiary of their rights[262], the court refused to subject this company to the Italian administrator control, approving the appointment of separate representatives although conscious of the effect it might have on the cost-efficient operation of the whole process. The main reason for the court's decision was the fact that this was the wish of third party creditors (i.e., non-related creditors)- to have separate representatives and to conduct a local process- and because of severe

[253] See Eurofood IFSC Limited [2004] BCC 383.
[254] See *supra* note 105.
[255] See "Italian and Irish courts clash over Parmalat", GLOBALTURNAROUND, April 2004, issue 51, p. 3.
[256] Eurofood IFSC Limited [2004] BCC 383.
[257] Later on the Irish court also rejected the claim that main proceedings were opened in Italy stating that the appointment of provisional liquidators brought about the opening of main proceedings in Ireland thus the Italian order was given in a later stage. Moreover, it stated that no adequate notice was given to the company's creditors and to the Irish provisional liquidator on the Italian hearing (see further *supra* note 105),
[258] Eurofood IFSC, Re (Trib (I) 19 February 2004 [2004] I.L.Pr.14.
[259] *Id*. The battle is still ongoing (see *supra* note 105).
[260] *Supra* note 83.
[261] See *supra* notes 102-107.
[262] See The Cayman Islands' court decision (*supra* note 83), p. 8-12, 21- 23.

concerns about the administrator's ability to act in the interest of the subsidiaries' stakeholders[263].

Indeed, the way the Parmalat's administration was being handled has been criticized of being too nationalized, focusing on seeking 'an Italian solution', lacking a sufficient international perspective[264]. Creditor groups involved in the Parmalat process 'raised eyebrows' with regard to the sort of representation provided for such a large scale, international case[265]. However, as was indicated previously[266], such solution as was chosen by the Cayman Islands' court (segregation in handling the group's process) possessed a threat on the chances to engineer a global rescue plan and in any case has probably increased costs and complicated the proceedings. Also, it seems that the court although stating that it was mainly concerned with the creditors' wishes, in fact considered only part of the interests involved, when looking at the case on a more global level[267]. It seems that it did not appreciate the fact that creditors who were not present at court and may have belonged to other members of the group may have had an interest in promoting a centrally based more efficient process, supervised by a single administration.

In the *Daisytek* case[268], an entire group (the European part) was placed under administration in one single place; however this was involved with much contest from the part of the 'local' subsidiaries. There was a strong debate regarding the reasoning given by the English court when it opened the case against each member of the group, and with respect to the representation of the subsidiaries in this process[269]. It seems that a practical solution was imposed but with much confusion and discontent on the part of foreign members of the group[270].

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[263] In other MCG cases, in which the issue was the need to replace appointees because of potential for a conflict of interest, courts were reluctant to solve the problem fearing from the additional expenses and delay involved in changing administrators or liquidators. Thus, for instance, in the case of Re Arrows Ltd ([1992] BCC 121) provisional liquidators had been appointed and one of them, together with another partner from his firm, were appointed by the court as receivers to a number of other companies controlled by persons associated with the controlling shareholder in Arrows. The affairs of all companies were intermingled. Whilst there was clearly potential for a conflict of interest, the court refused to discharge the provisional liquidators and appoint others in their place. The judge took the view that the introduction of new practitioners would entail additional expense and delay and that conflict could be dealt on directions at a later date when it might be sufficient if the receivers took independent legal advice (see Hamish Anderson, "Insolvency Focus", Law Society's Guardian Gazzete, Vol 89 No 30, p. 28, 29 (1992)).

[264] *See* GLOBALTURNAROUND, January 2004, issue 48, p. 3; GLOBALTURNAROUND, February 2004, issue 49, p.4.

[265] *Id*.

[266] See *supra* section 3.1.3.7.

[267] The court considered the position of the Noteholders of the three Cayman Islands subsidiaries at stake (Parmalat Capital Finance Limited, Food Holdings Limited and Dairy Holdings Limited), while giving less weight to the views of related company creditors (see The Cayman Islands court's decision (*supra* note 83), p. 15). It seems that it does not took into account, though, potential views of other external creditors of other members of the group.

[268] *In re* Daisytek- ISA Ltd [2003] BCC 562 (16 May 2003, Chancery Division, Leeds D.R.).

[269] See C. G. Paulos, "Zustandigkeitsfragen nach der Europaischen Insolvenzverodnung" International Insolvency Institute- www.iiiglobal.org; Also see Bob Wessels, "International Jurisdiction to Open Insolvency Proceedings in Europe, In Particular Against (Groups of) Companies" Working Papers Series, Institute for Law and Finance, Johann Wolfgang Goethe University, http://www.iiiglobal.org/country/european_union/InternJurisdictionCompanies.pdf.

[270] However, progress in this regard has been made when the Munich Court in first instance decided in another case to place insolvency proceedings against an Austrian subsidiary in Germany (where the

Looking at the reasoning of the English court's decision it seems that creditors' expectations with regard to the local subsidiaries' place of main interests were considered[271]. Furthermore, prima facie the decision was grounded on finding COMI separately for each subsidiary[272]. Nevertheless, it appears that the decision was much influenced by the group situation. The court looked at the group's operational structure, and the way it was managed[273]. It also seems that the English administrator was mainly focused on devising an effective solution to the Pan-European group[274]. The French and German courts in first instances, on the other hand, considered the respective companies as locally situated, even though they were controlled by a parent company in the UK[275]. It seems that an approach that would expressly address the situation of a group will make this issue much clearer, and enable the court to give its decision in a much more straight-forward manner.

Ultimately, the fact that a de facto joint administration was placed in the UK with no clear guidelines on what this exactly meant also contained a potential danger of prejudicing creditors' rights, for example in progressing from a parallel administration to a sort of consolidation.

4.1.5. Protecting creditors and meeting legitimate expectations through the use of a proper global approach

A fair system should therefore be cautious not to neglect creditors' rights when trying to devise a suitable solution for the handling of the MCG's insolvency. It should take into account creditors' wishes and expectations during the various steps of the group's insolvency process. The system should also clearly express its goals and the limits to its application.

A global approach should first provide means for effectively handling the MCG process, and at the same time take into account creditors' expectations. For this purpose, it should examine how creditors of the entities at stake dealt with the group and what could have been expected in terms of the group's administration in the case of insolvency. If indeed creditors of a particular entity dealt with it on an entirely separate basis it should be possible to have local main proceedings against it. Yet, even if main proceedings against a member are opened in a separate location, it should still be possible to subject it to a common control[276]. If, on the other hand, it can be concluded that creditors could have ascertained that the MCG was handled as

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parent company was situated). The Munich court found that all the headquarters functions of the Austrian subsidiary were carried out at the premises of the parent in Germany. The court also expressly followed the decision of the English court in Daisytek, and in that contributed to the development of a consistent EU-wide interpertation of the EU Regulation (see Amtsgericht (Munich) (Hettlage-Austria) (Unreported, May 4, 2004) (Germany); G. Moss, "Daisytek followed in New German Case**",** Insolv. Int. 2004, 17(10), 141-142).

[271] See *In re* Daisytek- ISA Ltd, and others [2003] BCC 562 (16 May 2003, Chancery Division, Leeds D.R.), at p. 7-8.

[272] *Id*, at p. 5-8.

[273] See *supra* note 120.

[274] See *supra* note 119 and accompanied text.

[275] *In re* Daisytek ISA Ltd (Tribunal de Commerce, Cergy-Pontoise, 1 July 2003); In re Daisytek ISA Ltd (Dusseldorf County Court, 19 May 2003; 10 July, 2003).

[276] As was previously suggested (see *supra* section 3.1.3.8).

such and that it was ultimately managed from one particular location then the proceedings should be centralized, at least according to the creditors' perspective issue (as was mentioned earlier, this aspect should add to other relevant goals such as the cost-efficiency of the proceedings). A global approach should explicitly enable the consideration of the 'group scenario' and the way the creditors dealt with it, so as to provide a solution that will serve creditors in general.

In addition, in order to diminish the problem of creditors' difficulties in ascertaining which corporate entity they were dealing with and where was its proper location (for the purpose of insolvency), a global approach should set up rules for transparent representation of a company's centre of main interests and its relationship with the rest of the group. Namely, there should be an explicit reference within the company's documents as to whether it is a company which is integrated with other affiliates and (if indeed this is the case) where the centre of main interests of the MCG is located (that is, the place of main decision making[277]). This should include a positive duty cast on each company (which is a member of an MCG) to proclaim this on its business documents. Furthermore, the company's auditors may be asked to validate the accuracy of those representations on an annual basis, and report whether indeed it matches the way the business is operating. Such representations can be also included in various transactions' documents in which the company is involved[278]. It may also incorporate statements and prohibitions on any actions taken by the company or its affiliates which may result in the alteration of the above location to another jurisdiction or the position of the company within the group. This will help in robustly protecting creditors and in avoiding the potential gap between 'impression' and 'reality' of the companies' operations and their effects on jurisdiction matters.

Furthermore, a global approach should ensure that courts will be presented with the entire picture when considering the path an MCG insolvency process should take or with regard to other matters pertaining to the insolvency (this may include the decision on the location of proceedings, the administration and supervision over the process or the decision on any sort of consolidation to be imposed, and so on). The court should be able to take into account interests of all creditors relevant to the process, appreciating the significant consequences of particular decisions on creditors' rights[279]. This should include foreign creditors, as well as creditors of affiliates who are relevant to the process (in the sense that they may be integrated within the group or have other claims that should be considered[280]) (hereinafter referred to as "relevant affiliates").

For that purpose, courts and administrators should be responsible for notifying creditors and other administrators of relevant affiliates about the opening of

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[277] See *supra* section 3.1.3.8.

[278] For instance, in structured finance transactions involving special purpose vehicles (SPVs) (see *GLOBALTURNAROUND*, "Europe leads world in Forum Shopping", June 2003, issue 41, p. 2; see further on the issue of SPVs in the context of abuse within the MCG in *infra* section 4.2.4.3).

[279] See the case of TXU in which Mr Registrar Baister considered the possibility that there would be cases where the court would require evidence detailing extensively the circumstances in which the jurisdiction (in that case- the UK) has come to be or is said to be the centre of main interests of a foreign company in order to avoid prejudice of creditors' rights (Re TXU Europe German Finance BV (Unreported, October 29, 2004) (Ch D); See also G. Moss, "Creditors voluntary liquidation for foreign registered companies" Insol. Int. 2005, 18(1), 12-13).

[280] Such as claims pertaining to group liability issues (see *infra* section 4.2.4).

proceedings against a particular member within the group and of any relevant court hearings and orders[281]. The parties opening the case should provide full information and evidence in respect of the MCG scenario, its way of operation and the financial status of other relevant affiliates. Information should also include various matters pertaining to the insolvency that may affect other affiliates, such as decisions on the location of the proceedings and hearings that are going to take place regarding the application of a pooling or a contribution mechanism[282]. Creditors of relevant affiliates should also get access to proceedings being located in a foreign country and get equal treatment in terms of lodging claims to a joint administrator[283] and voting on a global plan or other sort of insolvency operation (if indeed any sort of joint administration was actually applied).

Bearing in mind the complex scenario of insolvency within an MCG, it should be provided within a global approach that creditors' wishes should be considered even if they are not physically present. The benefits or possible unfairness should be examined with as much consideration as possible of the creditors in general.

In this process of evaluating creditors' wishes, a fair balance should be made between the various interests. The nature of claims is also relevant, namely whether third party creditors' wishes are at stake or those of creditors who are also shareholders or connected to the former management of the company, embracing the idea that related creditors should be entitled to less weight in the overall equation[284].

Finally, a global system should provide rules to ensure the objectivity of the administration supervising a group's process and its capability to represent a variety of interests relevant in the case of MCG. In this respect, an international firm with an international perspective may be more adequate to deal with MCG cases (than a nationally oriented administrator), especially those involving large groups operating across the globe. Clearly, when the case involves separate entities that operated in different states with foreign creditors at stake, problems of potential conflicts of interest and inadequate representation of creditors may augment.

4.2. The right of equal distribution applied to the case of MCG

4.2.1. Securing the right of equal distribution during a joint administration of MCG's insolvency

A global approach should ensure that the right of equal distribution will not be prejudiced in the course of unifying the insolvency process of an integrated MCG[285].

[281] Similar to the provisions in the EU Regulation with regard to foreign creditors of a single debtor (see Articles 40-42 of the EU Regulation (*supra* note 5)), in the Model Law (*supra* note10) (see Article 12) or in the ALI Principles (*supra* note 6) (see Procedural Principles 13 and 16).
[282] See *supra* section 3.3 and *infra* section 4.2.4.
[283] Similar to the provision in the EU Regulation with regard to foreign creditors of a single debtor (see Article 39 of the EU Regulation (*supra* note5)), in the Model Law (*supra* note 10) (see Article 11) or in the ALI Principles (*supra* note 6) (see Procedural Principle 13).
[284] This was also the view expressed by the Cayman Islands' court considering Parmalat's members' wishes presented to it with regard to the appointment of provisional liquidators to the subsidiaries in the Cayman Islands (see the Cayman Islands' court's decision (*supra* note 83), p. 9-10).
[285] See *supra* sections 3.1.3.4- 3.1.3.8, 3.1.4.3-3.1.4.4.

As aforesaid, similarly situated creditors deserve equal portions of the insolvent estate. When the MCG is comprised of separated identified legal entities then proceeds from assets or dividends may be distributed separately to each company's own creditors according to the plan of each company within the group. If a global system cannot guarantee this it might be counted as disadvantageous and unfair. It is of course fundamental to the success of the insolvency regime that creditors should not be harmed because the estate is handled efficiently but globally.

When an MCG was not operated or regarded as a 'de facto' one entity there is no justification to lump together assets and debts in any way and disregard the corporate form. Nevertheless, such MCG could still be integrated with the different entities, and although operating separately, comprise altogether a single business. In this case, we have suggested previously in respect of economic efficiency, that the estate should not be mixed in the course of insolvency. Rather it should be jointly administered to achieve better results in terms of revenues and costs. This scenario postulates a risk to creditors' rights. It is absolutely necessary that fairness to creditors will be maintained and that the insolvency regime will be handled prudentially. Specifically it should avoid the 'slippery slope' from a joint administration to an actual pooling of assets and debts regime which will result in harming both the idea of the corporate form and the goal of preserving creditor's rights. As the corporate form was not ignored, creditors' rights should not be prejudiced or redistributed.

Hence, the insolvency regime should pay attention to creditors of specific entities and compensate them if its decisions (which are made for the benefit of the whole group) harm them in anyway. For instance, if a joint sale is the course in which a certain insolvency regime has chosen to go along, but this will certainly reduce the gain a specific company (and its creditors) could have had through a local separate sale, they should be compensated accordingly[286].

Notwithstanding the above, it should be understood that when applying an idea of international jurisdiction and applicable law as means of devising a global and efficient solution[287] some degree of alteration in the right of equal distribution may occur. Since presently there is no prospect of achieving unification of domestic insolvency laws[288] the application of a particular legal regime on the entire estate will undoubtedly affect legal rights of certain creditors. For instance, the ranking of a particular debt may be different. Thus, the relevant creditor may gain a lower (or higher) recovery from the estate of the company with which it dealt compared to what it would have gained under a 'separable' approach. This outcome diminishes with the option of having local proceedings for local subsidiaries in the relevant circumstances (as suggested above[289]) or alternatively by using the mechanism of secondary (or non-

[286] The ALI Principles (*supra* note 6) (at p. 81) give an example of a subsidiary that holds domestic intellectual property and is offered a higher sum of money by a local competitor than it would have gained in a package sale, even though the global deal is better for the group as a whole. It is stated there that if the court is to decide that the local sale should be refused in favour of the overall package sale, it must protect the specific interests of the subsidiary.

[287] As was above suggested (see *supra* sections 3.1.3.6- 3.1.3.8).

[288] See I.F.Fletcher, "The European Union Regulation on Insolvency Proceedings" [2003] INSOL INTERNATIONAL CROSS-BORDER INSOLVENCY A Guide to Recognition and Enforcemnt, 15, 30.

[289] See *supra* sections 3.1.3.8 and 4.1.5.

main) proceedings that can be opened concurrently against the same entity[290]. In any case, in determining the proper place to handle the MCG insolvency or the proceedings of any of its members, courts should take into account the severe effect such decision may have on creditors' distribution rights (of any of the affiliates involved). And, if there is a potential prejudice of rights, a careful examination of the facts should be done to ensure that the proceedings were not placed at a certain place as a consequence of mere forum shopping[291].

4.2.2. Dealing with prejudice of creditors' rights in the strongly integrated MCG scenario

4.2.2.1. The scenario

In some cases the MCG estate is integrated to such a degree that the separate businesses comprising the group are untraceable or that they are all highly interdependent. We have previously suggested[292] that the strong integration between the entities may demand the application of an interventionist approach (lumping all companies together) to achieve economically efficient results.

4.2.2.2. The fairness issue

In principle, fairness will demand for a similar solution. The equal distribution in the course of the MCG insolvency will in fact mean ignoring the corporate form and distributing dividends to creditors as if were all belonged to one single entity. Even if the entanglement was not a result of strategic planning purposely designed to deceive creditors, but rather a result of negligent management or a de facto operation in which the affairs of the components were mixed to a significant extent creating in effect a single estate, the fact of the matter is that equality will not be fulfilled if certain creditors will be left to recover from the weaker entities.

If the estate will not be distributed jointly, the result will be somewhat arbitrary as certain creditors will be left with lower returns than others. This would be most likely as a consequence of the shuttling of assets or the effect the collapse of one entity will have on the other.

Nonetheless, there may be circumstances in which creditors may claim that they would have gained more in a separate distribution rather than under a pooling mechanism. This would be the case if it would be possible to show that particular assets of the estate could indeed be traced to a specific member of the group, although in general the assets are intermingled. Another possibility could be that creditors'

[290] As provided in existing models for cross-border insolvencies of single debtors (*supra* notes 28and 29).
[291] See the case of TXU. Mr Registrar Baister pointed out the need in certain circumstances to require further evidence dealing with the question of the insolvency location and its effect on creditors' rights, for example whether any apparent forum shopping could undermine preferential rights of employees or some other class of creditors (*supra* note 279).
[292] See *supra* section 3.3.

claims are identified as belonging to a particular member of the group (although other claims are untraceable). If the recovery from this particular company separated from the group will be higher it may be claimed unfair to jointly distribute the entire group's estate. Similarly, with regard to inter-group claims, if there is evidence that in spite of the commingled way of affairs an explicit value could be ascribed to a particular claim it might not be fair to the particular creditor to pool all assets and debts together. A global approach should take into account this potential downside and provide responses as to how to deal with such situations.

4.2.2.3. Examples on the international level

Examples for the potentially unfair application of substantive consolidation in highly integrated MCGs could be demonstrated in the cases of *Bramalea*[293] and *BCCI*[294] (introduced previously in this work to demonstrate the application of substantive consolidation or a pooling mechanism in cases of strongly integrated MCGs for practical economic reasons). It has been argued[295] with regard to the Bramalea group that the application of substantive consolidation in that case, allegedly because of the integration of the group and inter- dependence between the companies[296], in fact deprived certain creditors' rights. There, a Canadian court consolidated the entire group into a single estate including US subsidiaries. Consequently, as was argued, US lenders that initially were exposed to certain US subsidiaries found themselves, in the course of the joint insolvency, with exposures to the Bramalea group as a whole[297]. This alleged unfairness was emphasized since, based on a balance sheet analysis, some of the subsidiaries were arguably not insolvent[298].

In the case of *BCCI*, solvent companies were included in the pooling of assets imposed on the entire group[299]. As explained earlier[300], the parties in that case improvised a sort of consolidation inter alia for the sake of convenience, in order to avoid massive costs and increase return to creditors. All in all, the outcome was certainly a success in terms of return[301]. Nonetheless, it is questionable whether it was indeed fair to all the components that were part of this process and that participated in the pool. At least theoretically, it might be that for certain creditors, especially those that could have been identified as related to initially solvent members a better solution was to have a separate insolvency process. Such creditors might have gained (for instance) 100% of their debt instead of 70%.

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[293] See *supra* note 203.
[294] See *supra* note 199.
[295] See Lynn M. LoPucki, "Cooperation in International Bankruptcy: A Post-Universalist Approach" [1999] 84 Cornell L. Rev. 696, 719.
[296] See *supra* sections 3.3.2 and 3.3.5.
[297] See Mike Sigal ET AL., "The Law and Practice of International Insolvencies, Including A Draft Cross-Border Insolvency Concordat" [1994] 95; Lynn M. LoPucki, "Cooperation in International Bankruptcy: A Post-Universalist Approach" [1999] 84 Cornell L. Rev. 696, 719.
[298] See *supra* section 3.3.2.
[299] See *supra* section 3.3.2.
[300] See *supra* section 3.3.5.
[301] See *supra* section 3.3.5.

4.2.2.4. The inability to ascertain separate claims and separate status of MCG members

It seems that if the situation is of a complete intertwined scenario in which assets and debts cannot be readily ascertained or if the companies were indeed highly inter dependant so that it is difficult to ascertain the true financial position of each component then imposing a pooling concept would be favorable. It is true that a creditor may still claim that it was not aware of the intermingling way of affairs. It established credit to a certain company after due diligence and only now it finds out that its true risk has to be measured by reference to the financial health of the group as a whole. This would be even more pronounced if its claim is allegedly belonging to a solvent entity that was put under the pooling proceedings. However, if the assets are now in fact intermingled then it would be difficult in any case to actually predict what option will gain more for the creditor. In this scenario it is impossible to determine which assets and debts belong to which company including the magnitude of inter company claims, so it will also be impossible to estimate with any degree of certainty the percentage distributions in each of the insolvency proceedings (of the companies comprising the group) in the absence of substantive consolidation. In addition, if the company is allegedly solvent but in fact is highly dependant on other insolvent components then the apparent worth of its assets may be unrealistic and the whole picture is actually unstable and about to change soon after the collapse of the group. Therefore, as a starting point, a pooling mechanism (as was suggested in the previous chapter[302]) would be the most adequate solution here in order to promote both a fair and efficient result. Yet, it should be examined whether indeed each of the relevant components is highly integrated with the rest in a way that makes it significantly problematic to claim to be prejudiced by a consolidation.

Indeed, in BCCI, the businesses were so intermingled that a creditor could not actually show that a certain company was by all means solvent or that he would indeed gain more in a separate distribution. A prerequisite to have such a claim would have been to conduct a long and expensive process of entangling the assets and debts to actually ascertain which assets and liabilities belonged to which component. Therefore, the representatives in this case concluded that a pooling concept was essential also in order to ensure an equal treatment to the creditors as a whole[303].

In Bramalea, the group took the position that the viability of the subsidiaries could not be sustained without Bramalea's support[304] and the court accepted Bramalea's contention that it was, by and large, a single integrated business[305]. The idea was to

[302] See *supra* sections 3.3.6- 3.3.7.

[303] See In re Bank of Credit and commerce International S.A. (District Court of Luxemburg, 3 January, 1992). The court indicated that the supervisory commisioner "is of the opinion that it is essential in order to ensure an equal treatment to all creditors of the group to coordinate the liquidation operations by means of cooperation agreements to be concluded with the liquidators of the different foreign entities, subsidiaries and branches, with a view to create a common pot and a common administration (Pooling Agreement) of all assets realised or to be realised by the different entities, in order to guarantee an equal distribution to creditors of those entities".

[304] See *supra* section 3.3.2.

[305] See *supra* section 3.3.5; Also, eventually the creditors supported the plan and it was not contested in court (see Jacob S. Ziegel, "Corporate Groups and Crossborder Insolvencies: A Canada- United States Perspective" [2002] 7 Fordham J. Corp. & Fin. L. 367, 384-385).

include all integrated parts of the group in the consolidation because they were highly inter- dependant and as a practical necessity in the situation[306].

4.2.2.5. National laws' approaches

National laws, under which substantive consolidation or pooling orders are available to domestic enterprises[307], suggest ways to deal with the problem of the different interests involved. Under the US bankruptcy regime, the courts may order for limited consolidation and may place conditions on the consolidation in order to protect the interests of specific creditors or to affect an equitable remedy. For instance, the courts may order that higher percentages will be distributed to creditors that are prejudiced by the consolidation compared with those that are not prejudiced, or that certain claims will be recovered of assets of certain entities[308]. However, partial consolidation is rare and considered impractical[309]. As mentioned previously, in most large chapter 11 cases the court confirms only a single plan covering all of the debtor entities[310]. The court strikes a balance and aims to reach an equitable result for the creditors as a whole[311]. Under the New Zealand regime, it is not entirely clear whether a pooling order will always mean a merge of all liabilities and inter-company debts or whether courts should apply a sort of partial consolidation due to fairness reasons[312]. It has been commented in this regard, that a pooling order should principally mean a merge of assets and liabilities. However, the court may place conditions on the order[313].

4.2.2.6. Addressing the issue within a global approach

A global approach should similarly adopt means to rightfully assess what would be most beneficial for the group as a whole if the ideal of "fairness" is to be attained. On the international level, it would be even more crucial to carefully consider any contest for consolidation and even in the absence of opposition to thoroughly examine whether consolidation will result in prejudice. It should be appreciated that consolidation may not only redistribute rights of creditors as a result of the pooling of all companies together, but also because the consolidation is being imposed by a particular court subjecting the entire estate to a specific legal regime. Moreover, as aforesaid[314], the ability to hear all creditors and to be aware of all potential objections is reduced. And here, it may influence substantial rights in the most direct way.

[306] See R. Gordon Marantz, "The Reorganization of a Complex Corporate Entity: The Bramalea Story" in Case Studies in Recent Canadian Insolvency Reorganizations 1, 6 (Jacob S. Ziegel ed., 1997).
[307] See *supra* section 3.3.4.
[308] See In Re Continental Vending Machine Co, 517 F 2d 997 (2nd Circ 1975); In Re Parkway Calabasas Ltd. 89 Bankr. 832 (Bankr. CD Cal. 1988); Blumberg, Bankruptcy, p. 406-408.
[309] See Blumberg, Bankruptcy (*supra* note 39), p. 408.
[310] *Supra* note 148.
[311] In re Snider Bros., Inc. 18 B.R. 230, 234 (Bankr. D. Mass. 1982); Chemical Bank N.Y. Trust Co. v. Kheel 369 F.2d 845, 847 (2d Cir. 1966).
[312] See In Re Dalhoff & King (1991) 5 NZCLC 66, 959; In Re Stewart Timber & Hardware Ltd (Whangarei) Ltd (in liq.) and Stewart Timber & Hardware Ltd (in liq.) (1991) 5 NZCLC 67, 137.
[313] By its power in section 271(2) of the New Zealand Companies Act, 1993. See Farrar, Corporate Governance (*supra* note 54), p. 247.
[314] See *supra* section 4.1.3.

Hence, a robust doctrine of substantive consolidation in which mingling of assets within a certain court's jurisdiction is employed "automatically" should be avoided, since it may eventually undermine the idea of fairness. Clearly, this approach should be carefully applied only to those cases to which it may be adequate.

Accordingly, when considering the application of a pooling mechanism to the case of MCG, all relevant interests should be taken into account. Decisions should not rely on ex-parte applications. Rather, the various stakeholders' wishes and the potential benefit or harm they may suffer should be considered. As aforesaid[315], this should be done even if certain stakeholders are not present and actually heard in a given application. As discussed with regard to the economic efficiency goal, a sort of partial consolidation can be applied in the sense that it would be possible to exclude certain companies from the consolidation or to pool only assets and not debts[316]. For instance, if evidence suggests that certain members are identifiable as well as their liabilities to creditors, then these companies should be able to be excluded from the pool. This is most pronounced in the case of solvent members (in cases where the solvency is 'genuine') in the sense that the business may be able to continue as a stand- alone one and creditors may recover all their debts in due course. It should be emphasized that those components that are not strongly integrated with the rest should not take part in the pool in the first place.

In other cases it should be permissible to compensate creditors that otherwise will be harmed in the course of the consolidation. For instance, certain claims could be paid although the company to which they relate is being consolidated (other conditions on the consolidation could also be applied). If the potential injustice is significantly lower comparing to the overwhelming advantage to the creditors in general a complete substantive consolidation could be justified. This way, an amount of flexibility can ensure that equity is done.

The result should be a balancing test as to whether the benefits of consolidation outweigh the harm that consolidation would cause to creditors. The balance may be between a specific creditor who wishes to recover from a specific asset and the rest of the stakeholders, or between two or more sets of creditors relating to different components within the group. It may also involve the striking of a balance between shareholders and creditors, if the former anticipate recovering from the insolvent estate, or if they have claims against other entities which they argue to be identifiable. In such circumstances, the rights of creditors should generally tend to weigh more heavily than those of shareholders[317].

In order to achieve a fair solution to the strongly integrated MCG, there is a necessity for global means that will ensure that the various interests pertaining to the case are taken into account and that a compatible solution is applied. Thus, a global model must provide predefined guidelines on the implementation of a pooling concept based on the above propositions. Such that will ascertain creditors' rights are not unjustifiably compromised. Without a set of accepted rules that accompanies the

315 See *supra* section 4.1.5.
316 See *supra* section 3.3.6.
317 It accords with the general view that the insolvency of companies increases the duty to creditors and the interests of the creditors in the company's assets increases to the detriment of the shareholders (see World Bank Principles (*supra* note 9), Principle 79, p. 27; Farrar, Corporate Governance (*supra* note 54), p. 250).

application of a pooling concept the outcome of any de facto or ad hoc solution could be such that may neglect, on the path to a compatible solution, certain 'voices'. These guidelines should be implemented by a specific court that supervises the case so that it is possible for a single body to see the entire picture and the different interests involved. Combined with the goal of achieving an economically efficient result[318] a single-supervised preferably centralized process for a strongly integrated MCG would benefit the creditors as a whole, providing an effective solution (to facilitate the engineering of a pooling mechanism and then the unitary distribution) that appreciates the various interests involved. The specific implementation of the global tools may vary from case to case with regard for instance to the necessity of applying a single law to the entire proceedings. This may be different in a complete pool as opposed to a sort of partial pool[319].

4.2.3. Creditors' expectations to recover from the single enterprise

4.2.3.1. The scenario

There are also circumstances in which creditors of any of the companies comprising a group might have had the belief that they have dealt with one single enterprise rather than with the individual members of the group. In some cases this belief was encouraged by those in control of the group, so that the creditors were misled to think they were dealing with a greater entity[320]. Thus, in the event of a general collapse within such group the question of whether to apply a pooling mechanism arises.

In this scenario, the various entities may have been strongly integrated and highly dependant operating veritably as a single entity, but it is also possible that in fact they have not been so inter-related. It may have been, for instance, that a certain component had identifiable separate business and was operating as a stand-alone component, however certain creditors (creditors of this components or creditors of other members of the group) were not aware of that and their impression was that the assets of this component were part of the entire estate. The focus here is on the creditors' reliance as the determinative factor and whether they can demonstrate that they have dealt with the various affiliates as a single enterprise or as one company (although, formally there is more than one entity).

Yet, applying a pooling mechanism in this scenario may be regarded as too interventionist, since the fact of the matter may be that the entities are separable and the corporate form was formalistically maintained. The question is, whether and to what extent a global approach should extend the joining of estate mechanisms to such circumstances. That is, whether such method is needed in order to enhance fairness on the international level and on what terms.

4.2.3.2. National laws' approaches

[318] See *supra* section 3.
[319] See *supra* section 3.3.7.
[320] See in *infra* section 4.2.4 an elaboration on the issue of abuse within the MCG.

Under 'pooling' or substantive consolidation regimes[321], courts are in a position to take into account a series of considerations in deciding whether to apply such mechanisms. These include factors pertaining to the creditors' reliance on a single unit. Under New Zealand pooling regime, one of the factors to be considered in deciding whether to make a pooling order is "the conduct of any of the companies towards the creditors of any of the other companies"[322]. Under the US bankruptcy regime, substantive consolidation may be allowed not only where the financial affairs and businesses of the debtors are commingled (so that all creditors will benefit from consolidation because untangling is either impossible or very costly as to consume the assets), but also in cases where creditors of affiliate companies have dealt with these entities as a single economic unit, and have not relied on their separate identities when extending credit[323]. The conclusive factor is fairness since substantive consolidation is an equitable tool[324].

4.2.3.3. The preferable approach for a global solution

Indeed, it appears that it will serve justice if the international system could meet creditors' expectations and enable them to recover their debts from the entire estate if they genuinely thought and led to believe they were dealing with the business as a whole. Furthermore, as was stated elsewhere[325], the lender's expectations are central to the calculation of interest rates and other terms of loans, and fulfilling those expectations is therefore important to the efficiency of credit markets.

Nevertheless, there are a number of problems in solely focusing on creditors' belief when determining whether to join the estates of two or more affiliates. These problems reflect on the ability of such approach to indeed promote the ideal of fairness of the creditors of the group as a whole. First of all, it is difficult to ascertain the credibility of individual creditors' claims which are subjective and relate to their viewpoint with regard to the group operation. Secondly, it often happens that some creditors would have dealt with the debtors as one economic unit, but others have not[326]. Indeed, certain creditors may claim the opposite argument that they made loans on the basis of the financial status of a separate entity, thus they expect to be able to look to the assets of the particular borrower for satisfaction of that loan. Such lenders structured their loans according to their expectations regarding that borrower and do not anticipate either having the assets of a more sound company available in the case of insolvency or having the creditors of a less sound debtor compete for the borrower's assets. The efficiency of credit markets mentioned above will be

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[321] See *supra* section 3.3.4.
[322] Section 272(2)(b) of the New Zealand Companies Act, 1993. This was interpreted as essentialy meaning the degree of confusion of the creditors of the companies as to which company they had been dealing with (see In Re Dalhoff & King Ltd (1991) 5 NZCLC 66 959).
[323] Soviero v Franklin National Bank 328 F. 2d. 446 (2nd circ. 1964).
[324] See *supra* note 311.
[325] In Re Augie (860 F. 2d. 515 (snd circ. 1988)).
[326] See Robert van Galen, "The European Insolvency Regulation and Groups of Companies" October 2003, http://www.iiiglobal.org/country/european_union/Cork_paper.pdf, arguing, with regard to European group of companies in default, that in the scenario of a single economic unit a substantive consolidation is not appropriate but rather filing separate suits, inter alia because of the conflicting views of creditors.

undermined by imposing substantive consolidation in circumstances in which creditors believed they were dealing with separate entities.

Indeed, the US experience demonstrates that where the creditors have relied on the separate credit standing of the group component with which they were dealing, and particularly where they were unaware that such component was affiliated with the corporate group, consolidation may be refused where it would result in prejudice. Some of these decisions involve previously independent companies that were subsequently acquired by the group and continued as subsidiaries, usually with the same management, particularly when it continues to conduct its previous business in much the same way[327]. One of the ways to reconcile the problem of contradicting claims with regard to the way the corporate group was operated and the different expectation of creditors is the use of partial consolidation mentioned above. However, as aforesaid, the actual use of partial consolidation is rare[328].

It has been rightfully argued elsewhere[329] that an inherent problem to the dealing with insolvencies within corporate groups is the diversity of creditors' interests with regard to the distribution of the group's estate. The exemplary case is where one component has sufficient assets to cover its debts while the debts of the other component vastly exceed its assets. In this case it is obvious that the latter company's creditors would wish to lump all assets and claims together whereas the former company's creditors would prefer to maintain the legal separation between the related companies. Yet, this problem is reduced when substantive consolidation is grounded on 'objective' elements pertaining to the group, such as the way the enterprise was structured and operated. As explained above, when the MCG was actually strongly integrated the viability of one component is dependant on the other affiliates and vice versa, and the benefits for creditors from recovering their debts from a particular company are obscure.

The outcome is certainly more prone to injustice when a pooling order is based on creditors' subjective beliefs. It is then more difficult to determine which interests will outweigh the others and what would count as an equitable result. As mentioned earlier, this problem arises within national regimes; however, it becomes more pronounced on the international level, where competing legal systems are involved in the case and creditors are situated and had dealings with the group's entities in different countries and under different laws. In this case it is even harder to compound all interests together and reach the appropriate balance.

Notwithstanding the above, creditors' expectations should not be forsaken in the course of determining the proper way to handle the MCG insolvency. The creditors' beliefs must be a relevant factor in this respect in order to fulfill the idea of fairness and the efficiency of credit markets on the international arena. A global approach that adopts a mechanism of pooling orders is suited to appreciate creditor's expectations in this regard and provide such an interventionist solution in the proper cases. A global approach should adopt the principle idea of imposing a pooling concept not only in

[327] See Flora Mir Candy Corp. 432 F. 2d. (snd circ. 1970); Blumberg, Bankruptcy (*supra* note 39), p. 434-435.
[328] *Supra* note 309.
[329] See Robert K. Rasmussen, "The Problem of Corporate Groups, a Comment on Professor Ziegel" [2002] 7 Fordham J. Corp. & Fin. L. 395, 396.

situations in which it is not economically efficient to separate between the entities and it is most practical to have a consolidation, but also in those scenarios where it is clearly unfair that creditors will be left to recover from the particular component alone. Yet, the application of this idea on the global scenario should be done cautiously. On the international level it is significantly difficult to evaluate creditors' subjective beliefs with regard to the way a multinational operation was conducted. Therefore, the test should be more objective and reflect a composition of facts. Hence, creditors' beliefs may aid the final determination of whether consolidation is warranted, but will not be a conclusive factor. It may reinforce the need for a pooling order in the case of strongly integrated MCG where there was high level of inter-dependence and intermingling of assets and debts, or it may reveal a situation where the group actually misled creditors to think that they would be able to recover from a financially stronger entity. The latter scenario will be discussed in more details in the next section.

4.2.4. Abuse and unfair behaviour within the MCG and the event of insolvency

4.2.4.1. Introduction

In order to ensure the equality in the distribution of the MCG's members' estates there should be a way to evaluate and provide sufficient responses in the course of the international insolvency with regard to harmful actions made by affiliates or by other parties. This would be specifically relevant when affiliates or parties exerted their control over the group or their influence upon its affairs to abuse the corporate form or to unfairly defeat the interests of creditors. In such cases, where the privilege of incorporation was abused, a strict adherence to the limited liability doctrine would be deemed unfit. Similarly, a strict territorial approach in which each member of the group is treated separately within its own country offers little remedy in these situations. Conversely, a global approach will be much more suited here, as most importantly it will be able to link (for substantive purposes) between insolvent members and other affiliates for the purpose of increasing the estate of the failing companies available for distribution.

4.2.4.2. The actors and scenarios of the corporate group abuse

The basic scenario here is of a failing debtor company which is a component of an MCG. Critically, an affiliate or another party acted in a way that tampered with the debtor company business, which makes it only fair for it to bear some responsibility to the debtor's debts (hereinafter referred to as a "contributory party") hence the need for a substantial linkage between the debtor and the affiliate companies. Usually, the contributory party (typically a parent company[330]), which may be solvent, acted in

[330] Usually the immediate holding company, dependant on the way the group was operated and which was the entity that misbehaved. More often it will be the immediate holding company that exercised its control over the subsidiary, or otherwise was closely integrated with the subsidiary comprising together a single unit. Responsibility should be imposed on the entity that was actually acting in abuse or unfairness towards the other entity. This will also usually reflect the realities of he commercial division

abuse of the debtor, often by exploiting its control over the latter (in a manner as will be delineated herewith) resulting with the debtor's insolvency. For this respect it could either fully or partly own a subsidiary[331]. However, the contributory party could take the form of another type of related company (other than a parent company) that had similar influence on the company's affairs and is morally responsible for its condition (at least to some extent)[332]. Although our discussion will be focused on abuse within the group conducted by affiliated companies, abuse may also be perpetrated by a creditor which had significant influence on the business and acted in abuse[333] (typically while cooperating with another controlling affiliate) or alternatively, by the group's officials or individual shareholders[334] who breached their duties. However, the position of such parties is not within the scope of this work. Furthermore, the contributing party may still be exposed to liability with regard to its behaviour towards the debtor even when it entered insolvency as well.

Pursuant to an event of assets' manipulation another type of linkage may be required in order to ensure an equal treatment of creditors. That is, a linkage between the debtor and another affiliate (not the contributory party) to whom assets were diverted. This affiliate may or may not be solvent and may or may not be economically separate from the debtor (for instance, it could be conducting a different sort of business than that of the debtor's or the rest of the group). In fact, it may even belong to a different group with a common shareholder controlling both separate businesses (hereinafter referred to as a "remote affiliate").

In particular there are various scenarios and circumstances of corporate group behaviour that should result with at least some extent of disregard of the corporate

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within the group and the enterprise notion of liability (see Muscat, The Liability (*supra* note 65), p. 443-444).

331 In principle, whether the subsidiary is partly or fully owned is irrelevant to the liability question, which deals with the actual exercise of control over a subsidiary in an abusive way. However, complete ownership may suggest a higher risk of abusive control. In any case, courts are able to use their discretion to determine on the level of responsibility (and accordingly on the compatibel remedy, as will be discussed below) to be imposed on the contributory entity according to its actual contribution to the debtor's situation (see Blumberg, The Multinational challenge (*supra* note 47), p. 142-143; Muscat, The Liability (*supra* note 65), p. 444-445, 462-463).

332 Such as a sister company or a controlling entity linked to the comapny by contract. As explained earlier in this work (see *supra* note 72) a global approach should not limit itself to the scenario of equity based 'hierarchical' group involving parent-subsidiary relationship. In fact, enterprises comprised of entities linked by contract may display similar systems of managerial control. Although the contract may include risk-shifting clauses in the form of exemptions of liability for the controlling entity, the issue of whether the 'contractual veil' should be lifted in cases where control was excersiced in an abusive way arises (see on the issue of group liability in network enterprises: Muchlinski, Multinational Enterprises (*supra* note 38), p. 327, 330; G. Teubner, "Unitas multiplex: corporate Governance in group enterprises" in *Regulating Corporate Groups in Europe* 67, 87-92 (D. Sugarman and G. Teubner eds., 1990)).

333 See Lundgren, "Liability of a creditor in a control relationship with its debtor" [1984] 67 Marq. L. Rev. 523; K. Hofstetter, "Multinational Enterprise Parent Liability: Efficient Legal Regimes in a World Market Environment" [1990] 15 North Carolina J. of Int. Law and Comm. Reg. 299; Also see Robert K. Rasmussen, "The Problem of Corporate Groups, A Comment on Professor Ziegel" [2002] 7 Fordham J. Corp. & Fin. L. 395, 397, asserting that sophisticated creditors are well aware of managerial decisions concerning the structuring of the group and the allocation of assets when they extend credit.

334 Generally, in the case of the individual shareholders a strict adherence to the limited liability concept should be kept since it is the essential advantage and purpose of the principle of limited liability- to safeguard "natural" persons (see Muscat, The Liability (*supra* note 65), p. 194-195).

form, in the sense that the contributory party or the remote affiliate should take part in the debtors' insolvency.

Imposing liability upon shareholders in exceptional scenarios of abuse represents a broad approach of existing laws[335]. Even in 'traditional' legal regimes, wedded to the entity doctrine[336] and the strict application of *Salomon*[337], the corporate form can be ignored. For instance, in cases in which the corporate personality is deliberately used as a cover for fraud or improper conduct[338] or where a company is a mere façade concealing the true facts[339] corporate form may be disregarded. In other words, most legal systems will enable imposition of liability upon a shareholder in some (even if rare) circumstances.

However, as was suggested elsewhere[340], traditional legal concepts fail to adequately deal with the complexities of the corporate group phenomenon and with the need to protect the legitimate interests of outside creditors. The exceptions to the concepts of separate personality and limited liability provided by the English law, for instance[341], are too narrow and too ill-defined to sufficiently remedy situations of unfairness and abuse[342]. There are other scenarios of corporate group behaviour that should demand the imposition of liability and the linkage between the relevant affiliates to best implement equitable objectives which are in the core of insolvency law[343]. Indeed, as will be discussed hereafter[344], several legal regimes have developed more comprehensive approaches to address issues of inter-group liability.

335 By way of using the Anglo-American doctrine of 'lifting the corporate veil' or through concepts such as fraudulent corporate simulation, abuse of corporate personality, *actio Pauliana* (giving creditors powers over debtors who act in a manner prejudicial to the creditors' rights of execution) and *'abuse de droit'* (See Donson, ""Liefting the veil" in four countries: the law of Argentina, England, France and the United States" [1986] 35 ICLQ 839; Muchlinski, Multinational Enterprises (*supra* note 38), p. 330 (explaining that the broad approach of existing laws is to provide ad hoc exceptions to the limited liability concept, which deal with individual abuses); K. Hofstetter, "Multinational Enterprise Parent Liability: Efficient Legal Regimes in a World Market Environment" [1990] 15 North Carolina J. of Int'l Law and Comm. Reg. 299, 313-314 (showing that in practically all intenational jurisdicions the abuse of a corporate entity by shareholders is recognized as a reason to disregard the corporate veil); Blumberg, Bankruptcy (*supra* note 39), chap. 17 (reviewing the approaches of various legal systems with respect to the liability of a parent corporation for the obligations of an insolvent subsidiary); OECD comparative findings (*supra* note 38), p. 8; Richard D. Kauzlarich, "The review of the 1976 OECD declaration on international investment and multinational enterprises" [1980-1981] 30 Am. U.L. Rev. 1009, 1021 (explaining with regard to the OECD comparative findings that OECD countries accept certain fairly consistent but limited exceptions to the limited liability concept).

336 Such as the English corporate regime. For a review of other legal approaches that enphsize entity law see Blumberg, Bankruptcy (*supra* note 39), chap. 17.

337 Salomon v Salomon and Co. Ltd [1897] AC 22.

338 Re a Company [1985] BCLC 333 (C.A.); Creasey v. Breachwood Motors Ltd. [1992] BCC 638.

339 Adams v. Cape Industries plc [1990] BCLC 479 (C.A.).

340 See Muscat, The Liability (*supra* note 65), p. 35, 38 (reviewing the calls for reforms with respect to the problem of inter-corporate liability); Blumberg, Bankruptcy (*supra* note 39), p. 6-8.

341 Among these principles are also the doctrines of agency and estoppel. In addition, liability can be imposed in cases of wrongful trading on directors and "shadow" directors (Insolvency Act 1986, s. 214; see also Muscat, The Liability (*supra* note 65), p. 211-218).

342 See Muscat, The Liability (*supra* note 65), p. 112, 138.

343 See *supra* section 2.

344 See *infra* section 4.2.4.4.

Dr. Muscat in his extensive analysis of the phenomenon of abuse[345] describes 4 main categories of corporate abuse and their characteristics[346]. We will adopt these categories in our discussion as well. They are comprised of well-defined circumstances of corporate groups' conduct which may prejudice the interests of external creditors or otherwise constitute an abuse of the corporate form. They embrace the notion that in some circumstances "entity law" should give way to "enterprise" analysis, although the principle of limited liability continues to be a fundamental concept of company law[347]. These practices occur and are relevant to both domestic corporate groups and transnational groups[348]. For the purpose of his proposal Dr. Muscat uses a definition according to which a 'group' is a holding company together with its subsidiaries[349]. However, it would be possible to extend the definition to include other types of MCGs in which a controlling party exercised control in an abusive way[350].

First such category is the subservient subsidiary[351], which entails the scenario of a subsidiary that is not allowed to act as an independent profit centre. This typically happens when a parent corporation dominates the subsidiary while the affairs of the latter are conducted by and in the interest of the parent or of the group as a whole. This may lead to group profit maximization, transfer pricing, diversion of corporate opportunities, and manipulation of assets or shell subsidiaries. Manipulation of assets (which is one of the critical aspects of abuse pertaining to our discussion) may take the form of commingling of assets, movement of funds, draining of assets, financial support of the group and generally the operation of the subsidiary without a profit motive.

A second category is that of the undercapitalized subsidiary situation[352]. In this case, the subsidiary is inadequately financed since the holding company fails to provide it with the reasonably required financing to enable it to undertake the business activity for which it was incorporated. As a result, the subsidiary is almost certainly doomed to failure and the risk is shifted to the creditors.

A third category involves the integrated economic enterprise[353]. In this scenario a unitary enterprise is artificially fragmented (for no functional reason) into several entities with the sole aim of insulating the enterprise from potential claims. In such

[345] See Muscat, the Liability (*supra* note 65), p. 298-305; 363-390; 413-415; 433-436.
[346] *Id*, chap. 5, 6, 7 and 8. Also see Farrar, Corporate Governance (*supra* note 54), p. 233-234; J. Landers, "A Unified Approach to Parent, subsidiary and Affiliated Questions in Bankruptcy" [1975] 42 U Chi L Rev 589; R. Posner, "The Legal Rights of Creditors of Affiliated corporations: An Economic Approach" [1976] 43 U Chi L Rev 499; R. Posner, "Another Word on Parents, Subsidiaries and Affiliates in Bankruptcy" [1976] 43 U Chi L Rev 572 (Landers identifies the dangers faced by creditors of a multicorporate enterprise to which law and economics fail to provide practical solutions) (the Landers-Posner debate regarding abuse and unfairness in the context of corporate groups is conveniently summarized in Muscat, The liability (*supra* note 65), p. 99-100).
[347] Muscat, The Liability (*supra* note 65), p. 35.
[348] *Id.*, p. 98.
[349] *Id.*, p. 442-443.
[350] See *supra* note 332.
[351] Muscat, The Liability (*supra* note 65), chap. 5.
[352] *Id*, chap. 6.
[353] *Id*, chap. 7.

circumstances this may amount to abusive integration and a manipulation of the privilege of incorporation[354].

The fourth category is the group persona situation[355], in which there is misrepresentation or holding out of a single entity, thus misleading creditors to believe they were dealing with a greater company. This may be done by indicating the subsidiary's membership of the group on its letter heading and advertising its membership on all documents and billings by showing a device or logo distinctive of the group[356]. These supposedly meaningless actions may in fact help the subsidiary to obtain substantial credit.

In these scenarios if the debtor becomes insolvent and goes into liquidation or reorganization, it seems unfair that the contributory party will decline all liability for its subsidiary's debts to external creditors. In other words, if the contributory party used the corporate form in a way detrimental to the debtor at hand than its creditors should not bare the outcome of such behaviour.

In addition, the group should not be able to enjoy the strength of a unified business in its 'good days' acting as if all the companies were fragments of a single entity and deny the connection between a fragment and the rest of the 'empire' in times of distress, leaving creditors of a certain component with no remedy or with less attractive assets[357]. A contributory party should bare consequences in such event, though, only if there is indeed an actual misrepresentation[358]. That is, where creditors were misled to think and relied upon the notion that they are dealing with the group as

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[354] It should be noted that where integration was not a planned strategy designed purposely to deceive creditors or to shield the group from potential claims, or where the commingling of assets mentioned in the 'first type' of abuse was a result of reckless management or did not amount to 'abuse' or a 'wrongful commingling' (see Muscat, The Liability (*supra* note 65), p. 291. Dr. Muscat suggests that wrongful commingling is commingling without proper record keeping), still as was seen previously (see *supra* section 3), there may be other justifications (other than the need to redress abuse and unfairness) that would suggest to link between the components of the group in their insolvencies at least to some extent, essentially related to the economic reality of the situation. Dependant mainly on the degree of integration, a suitable linkage (either procedural or substantive) may be applied for the purpose of benefiting the creditors generally by reducing significantly administrative costs and increasing revenues.

[355] Muscat, The Liability (*supra* note 65), chap. 8.

[356] See the example given in the Cork Report (Cork Report, Report of the Review Committee, Insolvency Law and Practice, Cmnd. 8558 (1982); hereinafter: the Cork Report), p. 435 with regard to the issue of making the parent liable to the subsidiary's external debts.

[357] In a similar way, the fundamental policy underlying the old "reputed ownership" clause (see s. 38(c) of the Bankruptcy Act, 1914), which provided that property belonging to another person (than the debtor) may be taken by the creditors, was to prevent the gaining of false credit by persons who conveyed the impression of wealth by means of property which they do not in fact own. This clause is no longer part of the English insolvency law and was criticized as 'verging upon the capricious', while its effectiveness was open to question. The outcome could have been quite devastating to the true owner who would have need to prove in the bankruptcy for the value of his lost property, along with the other ordinary creditors (see I.F.Fletcher, Law of Bankruptcy, 1st ed., 1978, at p. 168-175). In the case of a corporate group, however, the relationship between the debtor and its affiliate makes them 'closer' parties (compared to a debtor and a 'remote' true owner of the property) which reinforces the problem of reliance on the portrayed image of the debtor and justifies more strongly that the risk will be put on the affiliate and not on third party creditors.

[358] See Muscat, The Liability (*supra* note 65), p. 421-423. Dr. Muscat convincingly argues that liability should not be imposed merely because a 'group persona' policy is used as a marketing strategy. This by itself does not constitute prejudice to creditors. The participation of the debtor in a group persona can even strengthen its financial position if it is not abusively dominated or undercapitalized.

a separate entity or with an entity stronger than the debtor or otherwise if they were led to believe that the contributory party or another affiliate within the group will support the debtor financially.

A contributory party scenario could also elicit a highly unfair situation in which although this party was the cause for the failure of the debtor it could still have a claim (as other external creditors) from the estate of the insolvent company. For instance, a subsidiary may have been substantially relying on its parent who contributed significantly to its collapse and eventually will compete with other external creditors for the remains of the estate[359]. If anything, such a scenario should suggest the subordination of the parent to the claims of the subsidiary's creditors since the parent abused its dominant position[360].

Similarly, it would be highly unfair to leave creditors of a certain subsidiary with valueless or even completely "empty" estate as a result of assets' manipulations as described above. Assets manipulations can also be a result of fraud, diverting assets within or outside the group purposely to hide them from creditors.

There is another side to the coin, though, as creditors of the contributory party or the remote affiliate may have an opposite claim. That is, they may claim to have dealt with this particular component (the contributory party or the remote affiliate) relying on this company's separate assets when trading with it. They may reasonably argue that they should not be prejudiced because of that company's relationship with another company. Such prejudice may occur if that company will bear responsibility to the debtor's claims in any way that may threaten that company's insolvency (or if that company is already insolvent at the time when the question of responsibility arises). An approach that may demand from the company to bear any sort of consequences due to its relationship with the debtor may in effect penalize not only the holding company but its own creditors as well. These contradicting positions should be taken into account where searching a solution for corporate abuse and the protection of creditors' rights.

4.2.4.3. Examples of abuse within MCGs

On the international level, companies and assets manipulations within groups may be overwhelming. It is not the purpose of this work to demonstrate the magnitude and frequency of corporate group abuse on the international level. Rather, our focus is to establish a suitable global framework to deal with such scenarios when they actually occur. Nevertheless, it should be appreciated that abuse and fraud may be able to thrive when a complex and large corporation is at stake operating under different legal regimes. Those who orchestrate manipulations can have a multitude of options as they may make use of the corporate structure, the geographical separation, the various regimes available on the global arena and the difficulties inherent to international

[359] See the example given in the Cork Report (*supra* note 356, at p. 436). It is submitted there that a law which permits such an outcome is a defective law.
[360] See Jacob S. Ziegel, "Corporate Groups and Crossborder Insolvencies: A Canada- United States Perspective" [2002] 7 Fordham J. Corp. & Fin. L. 367, 370.

control of corporate behaviour in realizing their abuse[361]. Conversely, it has been argued that it is in fact the smaller groups that are more affected with manipulations, since they are less exposed to monitoring by markets and regulatory authorities than larger corporate groups[362]. In addition, there are various factors that tend to limit the risk of abusive behaviour on the part of transnational groups[363]. However, recent experience on the international level with high profile cases such as the collapse of U.S. telecom company *WorldCom*[364], the energy trading group *Enron*[365] and the Italian dairy group *Parmalat*[366] have undoubtedly highlighted the serious threat and risk to creditors dealing with transnational corporations. It seems that regardless of the issue of what type of corporate group is more prone to abuse, the effect of an incident of a multinational nature is immense: considerably large enterprises are affected; sophisticated and big creditors are involved; substantial difficulties in getting access to assets that were diverted into different legal regimes etc.

An earlier example of fraud in the context of the insolvency of an entire MCG is the case of *BCCI*[367]. There, the close integration[368] was part of a severe fraudulent behaviour by those who controlled the group. BCCI cloaked its fraud under the auspices of a large number of branch banks throughout the world. By exploiting the gaps in the regulatory regimes of its hosts, BCCI was able to escape regulation and elude authorities for decades[369]. Of the serious illegalities in which BCCI participated, the most significant was the formation of a "network" which involved an intricate money laundering arrangement[370]. When the group eventually collapsed, it was

[361] See Jay Lawrence Westbrook, "A Global Solution to Multinational Default" [2000] 98 Mich. L. Rev. 2276, 2313. Westbrook gives the example of fraud as one of the scenarios that occur in multinational groups leading to a complicated mass of assets and liabilities sprawled across borders, as opposed to a situation of a neat territorial division of assets and debts.

[362] Farrar, Corporate Governance (*supra* note 54), p. 36. Farrar notes though that there is inadequate empirical research being done on the causes of corporate collapse; Muscat, The Liability (*supra* note 65), p. 97-98.

[363] See Muchlinski, Mulinational Enterprises (*supra* note 38), p. 338. Muchlinski indicates that empricial evidence suggest that multinational enterprises are very unlikely to allow their subsidiaries to go bankrupt, and that the insolvency of an entire multinational enterprise is very unlikely; Muscat, The Liability (*supra* note 65), p. 98. Muscat claims that transnational groups are probably more cautious in their activities than domestic firms in order to avoid upsetting host countries. Such groups are viewed with great suspicion and are expected to adhere more closely to the rules of "good corporate citizenship". Also, a host country can sometimes put considerable pressure to bear on transnational groups to reverse the effects of abuses. With regard to the incidence of fraud, though, Muscat indicates that it is perhaps arguable that there is a greater need for wider powers to be granted to the authorities in their fight against corporate fraud (*Id*, at p. 63). Conversly, see Christopher Brown, "Report of the Board of Banking Supervision Inquiry into the Circumstances of the Collapse of Barings" J.I.B.L. 1995, 10(10), 446-452, commenting on the Barings Report, concluding that when institutions are trading globally, as was the case for Barings, rules become more difficult to implement and that if rules become more onerous in some jurisdictions it may deter business.

[364] Chapter 11 No. 02-13533 (AJG) (Bankr. S.D.N.Y.).

[365] Chapter 11 No. 01-16034 (AJG) (Bankr. S.D.N.Y.).

[366] See *supra* notes 102-107.

[367] *Supra* note 199. See also the cases of *Polly Peck International Plc* (Re A Company No. 009296 of 1990, 1992 BCC 510 (Ch. 1992)) and the case of *Maxwell* (*In re* Maxwell Communications Corp., [1993] 1 W.L.R. 1402 (Ch. 1993); 170 B.R. 800 (Bankr. S.D.N.Y. 1994)).

[368] As was discussed in *supra* section 3.3.

[369] See Thomas McInerney , "Towards the next stage in international banking regulation" [1994-1995] 7 DePaul Bus. L. J. 143, 144.

[370] BCCI laundered drug money by transferring funds to its affiliates in the United States, and transferring funds to Luxemburg, and eventually London, where it was dispatched to one of its affiliates in another country in the form of a certificate of deposit. In total, BCCI laundered $32 million

essential to find a way to fairly distribute the assets (that were available for distribution) amongst the creditors, taking into account the fact that assets were diverted and money was circulated prior to the insolvency amongst the different entities within the group.

In the recent case of *Parmalat*[371] the group executives were put under investigation for being accused of committing fraud, using a web of offshore holding companies and fictitious revenues to keep Parmalat's losses secret for a decade[372]. Companies' assets were allegedly dispersed among this network of shell companies around the world and to other subsidiaries of the Parmalat group. An example of such a "diversion"[373] is the funds allegedly diverted from Parmalat Finanziaria SpA to such outfits like Parmatour, the controlling family's tourism business. In addition, bank creditors of Parmalat are accused of allowing Parmalat to hide its losses and of being instrumental in helping Parmalat set up offshore vehicles[374].

This situation posed questions regarding the ability to reach hidden assets and the way Parmalat's creditors' claims will be treated. The accusations of fraud and abuse suggested uncertainty over the veracity and magnitude of inter-company claims, since fraudulent documents have been allegedly created and the reliability of the Parmalat group's accounting records and procedure was questionable[375]. Indeed, the Italian court, in adjudicating the validity of creditor claims against Parmalat, has excluded a substantial amount of creditors claims related to inter-company subordinated debt[376]. On the other hand, with regard to bank creditors' claims (who allegedly helped prolong the fraud) the Italian court took the approach that these creditors will have their claims honoured while damages suits and criminal investigations will take place on different tracks[377].

Other cases demonstrate the problem of using the MCG structure to divert assets in a way that is detrimental to certain creditors, but without necessarily committing fraud. For instance, as a way to raise cash and enhance credit, a company can transfer assets it owns to a subsidiary, most often a special purpose vehicle (hereinafter referred to as "SPV") which pays in turn to the company for the assets it receives, by selling bonds secured by the assets. This transaction (called a securitization transaction) enables a company in financial difficulties to isolate its more attractive assets thus get higher interest and raise capital. As a result, the SPV becomes a separate stand alone entity.

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through its U.S. branches (*Id*, at p. 144; Daniel M. Laifer, "Putting the Super Bank in the Supervision of International Banking- Post BCCI" [1992] 60 Fordham L. Rev. 467, 484).

[371] *Supra* notes 102-107.

[372] Eric Sylvers, "Milan prosecutors try again on Parmalat" New York Times, May 27, 2004; Emily Backus, "Judge seizes assets of ex-Parmalat chiefs" Financial Times, September 30, 2004; REUTERS**,** "Judge Ready to Start Parmalat Hearings", New York Times, October 3, 2004.

[373] Given by Parmalat's officers during interrogations (see The Associated Press, "Ex - Parmalat CFO Reportedly Blames Tanzi", New York Times, October 3, 2004).

[374] See A. Galloni and Carrick Mollenkamp "Ex-Parmalat Banker Says He Misapropriated $27 Million, International Insolvency", DOWJONES Newsletters, March 2, 2004, p. 5; "Report says banks helped Parmalat hide Fraud", Blumberg News, July 22, 2004.

[375] See ,for instance, The Cayman Islands' court's decision (*supra* note 83), p. 10 (the intra-group claims were regarded by the Cayman Islands' court as ureliable as a result of the alledged fraud).

[376] See Adrian Michaels, "Citigroup and BofA on verge of Bondi win", Financial Times, 17 December, 2004.

[377] *Id*.; Adrian Michaels, "BofA is set to rally Parmalat banks against Bondi lawsuits", Financial Times, 20 January 2005; Adrian Michaels, "Judge deals blow to BofA over Parmalat", Financial Times, 25 January 2005.

Indeed, many corporate groups use special purpose vehicles to issue bond, notes and other financial instruments in the global market for a variety of reasons; these range from taxation to insolvency remoteness issues[378]. This may indeed be legitimate[379], however in an asset securitization transaction if creditors are misled to believe that the assets that were diverted to the SPV are part of the entire estate on which they relied for its financial strength (not aware of the fact that all the 'good assets' were in fact removed) then it is not fair to leave these creditors with all the bad[380]. Indeed, other creditors (those who wish to recover separately from the SPV assets) may claim to have a legitimate transaction according to which they were assured that the SPV will stay out of any bankruptcy event, however an examination of their share in orchestrating the transaction or actual 'innocence' and the inter-relations among the SPV and the rest of the group may lead to the conclusion that separateness should be avoided for the purpose of ensuring fairness in distribution.

In the above examples the necessity to connect between the various components within the group in the course of an entire group's insolvency does not necessarily involve the perpetrator of the abuse (which may in fact be an individual). Yet, the remedy for this situation would still be a substantive linkage between the various components of the MCG although none was responsible for the abuse.

In other examples a particular contributory party (or the group as a whole) may have abused a foreign failing member and should therefore bear responsibility to its debts. This may involve a collapse of all relevant components or only that of the specific subsidiary (the failing debtor). An example for a total collapse could entail a parent situated in country X and a subsidiary in country Y for which the parent was deeply involved in obtaining credit. In the course of that the parent misrepresented the legal status of the subsidiary and its financial situation, misleading creditors to believe that they are dealing with a greater company, and that the subsidiary is actually an integral part of the parent. Following the group collapse, the parent, although insolvent, is in a

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[378] See Denis Petkovic, "(Case Comment) Piercing the Corporate Veil in Capital Markets Transactions", I.B.F.L. 1996, 15(4), 41-43, discussing the implication of the decision in Polly Peck International Plc (In administration) (No. 3), Re [1996] 1 B.C.L.C. 428 (Ch D) with regard inter alia to the use of SPVs by corporate groups; Robert K. Rasmussen, "The Problem of Corporate Groups, A Comment on Proffessor Ziegel" [2002] 7 Fordham J. Corp. & Fin. L. 395, 398, indicating implications of the use of SPVs on bankruptcies within corporate groups; For explanations of securitized tranactions including SPVs, see generally Steven Schwarcz, Structured Finance: A Guide to the Principles of Asset Securitization (2d ed. 1993); Steven Scharcz, "The Alchemy of Asset Securitization" [1994] 1 Stan. J. L. Bus. & Fin., 133, 135, 150-51; Calir Hill, "Securitization: A Low Cost Sweetener for Lemons" [1996] 74 Wash U. L.Q. 1061.

[379] In the case of Polly Peck International Plc (In Administration) (No. 3), Re [1996] 1 B.C.L.C. 428 (Ch D) the English court confirmed the respecting of the separate corporate personality of companies in the context of using SPVs and insolvency (where it was not a fraudulent transaction). In refusing to confuse the offshore special purpose vehicle with the parent company, the judge took into acount the commercial practice of using SPVs for this type of transaction (see Gabriel Moss, "(Case Comment) Recent Developments in Cross-Border Insolvency Issues" Insolv. Int. 1997, 10(8), 57-58; Denis Petkovic, "(Case Comment) Piercing the Corporate Veil in Capital Markets Transactions", I.B.F.L. 1996, 15(4), 41-43; Chizu Nakajima, "Lifting The Veil", Comp. Law. 1996, 17(6), 187-188).

[380] Thus, for instance, In re Buckhead America Corporation (161 B.R. 11 (Bankr. D. Del. 1993) ("Days Inn case") the court did not accept the claim that one of the entities comprising the group, a solvent SPV should stay out of a substantive consolidation order, reaching the conclusion that creditors were relying upon the unified assets of all of the debtors when doing business with each of the individual debtors (see further on the Days Inn case and on its implications on structured finance transactions in Jeffrey E. Bjork, "Notes & Comments, Seeking predictability in bankruptcy: an alternative to judicial recharacterization in structured financing" [1997-1998] 14 Bankr. Dev. J. 119).

better financial state than that of the subsidiary. A fair distribution in this case, would mean having the assets of the foreign parent available for distribution to the subsidiary's creditors as well. Yet, the fact that the group had dealings in more than one country would suggest that conflicting national insolvency rules may be involved, barricading any appropriate and effective solution to the matter.

Cases such as *Deltec*[381] demonstrate the problems that may arise when the collapse involves only the specific subsidiary of the MCG. It was claimed there that the entire multinational group (including U.S. and Canadian affiliates) should bear responsibility for the debts of the Argentinean subsidiary. The claim held suggested that the subsidiary's bankruptcy should also include the assets of the companies comprising the group, basing the conclusion on 'enterprise law' rationales. The Argentinean court concluded that the group was a "unified socio-economic entity" and referred generally to the abuses of multinational enterprises[382]. However, the legitimacy of the decision was highly debatable and it was commented elsewhere[383] that the case did not present simply a legal question, but rather grave national interests. This case shows the difficulties in giving effect to a conclusion that a certain affiliate located abroad is indeed responsible for creditors' losses as the enforceability of the local decisions in the foreign states was not trivial[384]. In addition, it demonstrates the problem of having conflicting laws, where one state presumes abuse while the other regards the decision as violating most basic notions of morality and fairness, and views it as possible "confiscation of property"[385].

4.2.4.4. National laws' approaches

National laws provide certain remedies to situations of corporate group abuse in the course of insolvency. It has been mentioned in the beginning of this discussion[386], that even in legal systems wedded to the strict application of the entity doctrine (e.g., the English legal regime) it is possible to use doctrines such as the 'wrongful trading' and 'shadow directors' in order to impose liability upon a group member as well as piercing the corporate veil in exceptional cases. However, English courts have resisted attempts to lift the veil and treat a closely integrated group of companies as a

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[381] Compania Swift de la Plata, S.A. Frigorifica s/convocatoria de acreedores, 19 J.A. 579, 151 La Ley 516 (1973) [hereinafter: the decision of the Argentinian court in Deltec]. The decision is translated in Gordon, "Argentine jurisprudence: The Parke Davis and Deltec cases" [1974] 6 Law. Am. 320; Also see the case of Bhopal (see the judgment of the High Court of Jablapur, on appeal from the order of the Bhopal District court (Union Carbide Corporation Gas Plant disaster at Bhopal India in December 1984 634 F. Supp 842 (SDNY 1986)); See also Symposium, [1985] 20 Tex. Int'l L.J. 267-340; K. Hofstetter, "Multinational Enterprise Parent Liability: Efficient Legal Regimes in a World Market Invoironment" [1990] 15 North Carolina J. of Int. Law and Comm. Reg. 299 (approaching the multinational enterpise parent liability topic exemplified by the Bophal case, from an efficient perspective); Muchlinski, "The Bhopal case: controlling ultrahazadous industrial activities undertaken by foreign investors", [1987] 50 MLR 545).

[382] The decision of the Argentinian court in Deltec (*Id*).

[383] See Blumberg, Bankruptcy (*supra* note 39), p. 664.

[384] After the Deletc decision, further litigation developed both in Argentina and in New York, involving inter alia questions of the enforceability in New York of the Argentine decree (see Blumberg, Bankruptcy (*supra* note 39), p. 667-668).

[385] Rosenn, "Expropriation in Argentina and Brazil: Theory and Practice" [1975] 15 Va. J. Int'l L. 277, 314.

[386] See *supra* section 4.2.4.2.

single economic unit on the basis of perceived injustice, and even emphasized the greater importance in respecting the separate legal existence of such companies once they became insolvent[387]. The Cork Committee recognized the potential for the abuse of the corporate group and observed that, even with the introduction of wrongful trading, the law would remain in unsatisfactory state[388].

More comprehensive solutions to the above scenarios may be found in the New Zealand and the American regimes mentioned previously in this paper. Under the reformed New Zealand law legislation it is possible to impose liability upon a related company for the debts of a company being wound up. This is done by using the 'contribution order' in circumstances of involvement or misconduct towards the debtor at stake. It is at the court's discretion to order that the related company pay the debtor's liquidator the whole or part of its debts when it is just and equitable to do so[389]. In the appropriate circumstances the assets and debts of a related company can be pooled together with the debtor, winding up both companies as if they were one[390]. Again, the court must consider whether the extension of the subsidiary's bankruptcy is just and equitable, and desirable for the protection of creditors.

There is no equivalent of contribution orders under American bankruptcy regime. However, substantive consolidation provided in the U.S. regime is also available between a debtor and a non-debtor[391]. Other remedies are available such as voidable preference provisions[392] and the doctrine of fraudulent transfers[393].

With regard to inter- company claims the American court is allowed to inquire into the conduct of the parties and the nature of the financial arrangement which gave rise to the debt and defer the debt to the claims of the external creditors. Such subordination of inter-company claims may be ordered in a wide variety of circumstances where equitable principles so require. In many cases fraud, mismanagement, or other wrongful conduct must be shown but a loan from an insider will be subordinated where it is properly categorized as a capital contribution[394].

4.2.4.5. The need to address the issue of abuse within a global approach

Evidently, unfairness and abuse may exist in the context of insolvencies within MCGs. As some of the affiliated companies are located in different states the

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[387] See Polly Peck International Plc (In Administration) (No. 3), Re [1996] 1 B.C.L.C. 428 (Ch D); Gabriel Moss, "(Case Comment) Recent Developments in Cross-Border Insolvency Issues",Insolv. Int. 1997, 10(8), 57-58; Denis Petkovic, "(Case Comment) Piercing the Corporate Veil in Capital Markets Transactions", I.B.F.L. 1996, 15(4), 41-43; Chizu Nakajima, "Lifting The Veil", Comp. Law. 1996, 17(6), 187-188).

[388] Chapter 51 of the Cork Report (*supra* note 356).

[389] See section 271(1)(a) of the New Zealand’s Companies Act 1993; See also: Farrar, Corporate Governance (*supra* note 54), p. 243-246.

[390] See *supra* note 210.

[391] See In re 1438 Meridian Place, N.W., Inc., 15 Bankr. 89 (Bankr. D.D.C. 1981); In re Crabtree 39 Bankr. 718 (Bankr. E.D. Tenn. 1984); Blumberg, Bankruptcy (*supra* note 39), p. 439-440.

[392] Blumberg, Bankruptcy (*supra* note 39), chap. 9.

[393] *Id*., chap. 7.

[394] *Id*., chap. 3.

conflicting laws and the jurisdiction issues undermine the ability to provide an adequate and just solution by putting additional barriers to getting access or to enforcing judgments against abusing affiliates[395].

In addition, in the case of assets manipulation within a global context, the ability to get hold of all the group's resources is jeopardized since assets are located in various states, with different approaches to the issue of separate personality and limited liability. This may lead as well, to prejudice of creditors dealing with the group and incapability to eventually distribute the MCG's assets equally amongst all parties involved. Indeed, in the case of BCCI (where money was circulated among the various entities), the elements of abuse and fraud led parties and courts to agree on a global concept of a joint pool of assets[396].

This vulnerability of the MCG to abuse and fraud and the additional inherent obstacles to the provision of remedy in these cases suggest that it is most desirable to bridge over gaps in national laws converging the wide differences in bankruptcy and company law regimes specifically with regard to the effect of a corporate group abuse in the event of insolvency. Furthermore, it would be beneficial to provide a solution and guidelines on the international level which would precipitate linking the fragments of the group that are spread between the states on national levels.

Also, a global approach that can hold related companies responsible for the faults of others in the state of insolvency, may create an 'incentive' for MCGs to continuously monitor and supervise the activities of companies within the group, and to take early measures in the case of financial difficulties of one of its members[397]. Thus, it can reduce manipulations from an early stage of the distressed business. It should be provided though, alongside other guidelines and principles designed to enhance good behaviour within multinational enterprises (such as provided by the OECD[398]).

[395] Foreign courts may deny jurisdiction using doctrines such as the forum non convenience or the public interest factor, thus disallowing the choice of jurisdiction from claimants as weaker parties. In the Bhopal proceedings for instance the U.S courts dismissed the action against the parent company in the U.S. based on the doctrine of forum non convenience (In re Union Carbide Corporation Gas Plant disaster at Bhopal India in December 1984 634 F. Supp 842 (SDNY 1986); see also K. Hofstetter, "Multinational Enterprise Parent Liability: Efficient Legal Regimes in a world Market Environment" [1990] 15 North Carolina J. of Int'l Law and Comm. Reg. 299, using the Bhopal case to exemplify an efficient approach to the multinational enterprise parent liability topic); The forum non convenience doctrine was also used in the Cape plc cases, where the second Court of Appeal denied English jurisdiction against English-based parent companies on the grounds of forum non convenience, even though the South African litigation related to racially discriminatory laws (see P. Muchlinski, "Corporations in International Litigation: Problems of Jurisdiction and the United Kingdom Asbestos Cases" [2001] 50 ICLQ I). It should be noted that the issue of parent liability in the cases of Bhopal and Cape Plc did not arise within the context of the subsidiary's bankruptcy but rather as a result of a suit filed against both the subsidiary and the parent; See also Muchlinski, Multinational Enterprises (*supra* note 38), p. 338, explaining that the success of a creditor's claim against the foreign parent will hinge on the initial question of whether the latter is capable of being impleaded before the courts of the host state in insolvency proceedings. Furthermore, assuming that jurisdiction is obtained, the problems of proving parent liability under local law will pose significant obstacles to success.

[396] See *supra* section 3.3.5.

[397] *See* UNCITRAL Legislative Guide (*supra* note 29), p. 350.

[398] The OECD guidelines are recommendations jointly addressed by goverments to multinational enterprises. They provide principles and standards of good practice consistent with applicable laws. Observance of the guidelines by enterprises is voluntary and not legally enforceable (OECD Guidelines for Multinational Enterprises 27 June 2000 [http://www. oecd.org/daf/investment/guidelines/mnetext.htm]). The World Bank Guidlines on the Treatment of

Naturally, an insolvency regime will deal with the MCG behaviour only after the harm was done to make ex-post controls through liability rules and other mechanisms available on the international level to control corporate group behaviour.

Existing models to cross-border insolvencies do not deal with the issue of abuse and unfairness within MCGs. The EU Regulation was previously used to impose a de facto joint administration in cases where it seemed most practical and beneficial to do so[399]. However, the Regulation does not encompass any rules dealing with issues of corporate group abuse. The ALI Principles, although dealing with the case of NAFTA based corporate groups, left the issue of group liability beyond the scope of the Principles, since (as it was claimed there) these issues are for the most part not bankruptcy questions[400]. The UNCITRAL Legislative Guide[401] provides a review of possible approaches to the treatment of corporate groups. This is an important aspect of an international tool which may improve harmonization between national laws. In any case, the Guidelines do not provide recommendations regarding a preferable approach in this regard.

It is submitted that, the issue of corporate group abuse should indeed be addressed on the international level and within the scope of insolvency. Such mode of operation is a fundamental cornerstone for just and fair multinational insolvency regime. It would enable equitable consideration of the entire bulk of parties involved and their interests and will deter those in control of MCG from abusing or manipulating the corporate form. It is clearly one of the strengths a global approach may present, that it can better deal with strategic manipulation compared to a 'component' based approach that considers each component of the group separately, always 'dividing' the group between the countries within which they operate.

4.2.4.6. Adequate tools

To tackle the problem of protecting creditors affected from abuse within MCGs a global approach should embrace effective means that will enable the equal distribution of the group's assets in the event of insolvency. The combination of pooling mechanisms, contribution orders and the subordination doctrine can subserve this task in an effective way in the appropriate circumstances. As was suggested

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Foreign Direct Investment are aimed to set down emerging rather than settled standards, and, in the process, to emphasize what the World Bank Group sees as desirable practice in the field of direct foreign investments (The 1992 World Bank Guidlines; On these and on other initiatives see Muchlinski, Multinational enterprises (*supra* note 38), Chap. 16).

[399] See *supra* section 3.1.3.7.

[400] ALI Principles (*supra* note 6), p. 77. However, it is stated there that it may be argued that bankruptcy law should address these questions in the context of general default (asserting that this circumstance makes the issues rather different from the ordinary corporate context), but that such a substantive consideration exceeds the goals of the ALI Principles project at the present time. In addition, it should be noted that, the ALI Principles do provide means to get access to a manipulative affiliate (but does not provide tools or guidelines with regard to the substantive question of imposing liability). According to Procedural Principle 23 a subsidiary can file bankruptcy in the same jurisdiction as the parent company's bankruptcy, and have either procedural or substantive consolidation under applicable law, absent a proceedings involving the subsidiary in the country of its main interests (see *Id*, at p. 78).

[401] See *supra* note 29.

elsewhere[402], the contribution mechanism is the most effective one and may promote fair results in situations of abuse within a group in the course of insolvency. The rational here being that liability is not to be imposed directly towards the subsidiary's creditors and that creditors are not to be granted an independent cause of action. Rather, Liability should be imposed by paying of a contribution to the subsidiary's assets. This would reduce litigation and associated costs[403] and would eliminate entirely the risk of a double recovery[404]. Most notably, by avoiding separate action by individual creditors, the approach will help to maintain the fundamental goal with which we are concerned here- the principle of Pari Passu, and will preserve the procedural unity of liquidation proceedings and the collective regime of insolvency. The amount of contribution to be granted may differ according to the circumstances. That is, the degree of abuse performed by the contributory party and the effect this had on the financial condition of the subsidiary should be taken into account[405].

Notwithstanding the above, a contribution mechanism should be cautiously applied in a global approach. The fact that we deal with foreign entities may entail difficulties in obtaining all relevant information and more importantly clear and truthful account of the events that preceded the failure[406]. This is especially relevant with regard to the interests of creditors related to the contributory party. In addition, as the approach aims at applying to as many legal regimes as possible it should provide clear boundaries and safeguards for the implementation of such a mechanism. It should appreciate the fact that it is a matter of substantive law and that imposing liability on affiliates may be regarded as rather drastic. Accordingly, a global approach should adopt a set of clear and well defined guidelines to accompany a contribution tool. These guidelines may be counted as exceptions to the limited liability rule, in the context of insolvency within an MCG.

In this respect the guidelines provided in the New Zealand Companies Act[407] combined with more specified factors to determine the circumstances of abuse that would result with imposition of liability can delineate proper substantive group

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[402] Muscat, The Liabiliy (*supra* note 65), p. 302-303.

[403] See *supra* section 3.2.1.

[404] Otherwise, if the holding company's behaviour also constitutes a breach of duty to the creditors, both the creditors and the subsidiary may be able to sue (see Muscat, The Liability (*supra* note 65), p. 302).

[405] See *Id.*, p. 303-305, 389-390, 415, 435-436, explaining that liability need not necessarily be co-terminus with the subsidiary's inability to settle its debts. Accordingly, Muscat suggests in his proposal for reform to the English insolvency regime that courts will be given discretion to order the holding company to make such contribution, using the above factors and a rebutable presumption that insolvency is causally attributable to the abuse. The concept of giving discretion to courts in this regard goes along with the application of statutory provisions allowing English courts discretion when providing remedies in the course of insolvency, such as the fraudulent and wrongful trading provisions (*Id.*, note 2 p. 304); In addition, it accords with the way U.S. courts exercise discretion when they provide a remedy in the piercing the veil cases (*Id.*, note 1 p. 304), and with the New Zealand approach providing the contribution mechanism that may be applied in order to pay the whole or part of the debts of a related company, according to the courts' discretion (*Id.*, note 3 p. 304).

[406] See *supra* section 4.1.3.

[407] The wide discretion given to the court under section 271(1)(a) of the New Zealand's Companies Act 1993 to give a contribution order is tempered by four guidelines that the court is directed to take into account: the extent to which the related company took part in the management of the company in liquidation; the conduct of the related company towards the creditors of the company in liquidation and the extent to which the circumstances that gave rise to the liquidation of the company are attributable to the actions of the related company. Finally the court can consider any other matters as it thinks fit.

liability standards within an international approach. For that purpose, an integration of the factors extracted from the types of abuse we have considered above with the broader guidelines of the New Zealand's Act would be suitable. For instance, courts will be directed to take into account "the conduct of the related company towards the creditors of the company in liquidation"[408] but more specifically examine whether this took the form of contributory party that dominated a subservient subsidiary or misrepresentation and so on. That is, formulate the way the court will assess the conduct (or misconduct) of the related company[409]. This way, although the court will be given discretion to evaluate the circumstances and interests involved for the purpose of achieving an equitable result, it will be guided by specified factors, ultimately resulting with greater certainty.

Furthermore, in the context of abuse within the MCG, a global approach should also adopt the option of pooling assets and debts together (as was already suggested with regard to the strongly integrated case scenario[410]). Similarly, such a dramatic mechanism should be carefully applied. Clearly, the circumstances should be examined meticulously concluding whether a joint pool or otherwise contribution order is more suitable to address the abuse within the group, in the event of insolvency (of any part of the group). In essence, where the abuse involved the misrepresentation of the group as a single unit or the mismanagement of the group as an integrated entity (including for instance the circulation of money between affiliates) this should lead to a pooling order rather than contribution. It will then converge with the goal of economic efficiency as was discussed above[411]. It will both avoid high expenses of entangling a closely integrated scenario, and comply with creditors' expectations as they were led to believe they were giving credit to a single unit rather than a separate entity[412].

A relevant factor will also be whether the contributory party is insolvent. However, this should not be a decisive one[413]. It may be that at the particular time of opening insolvency proceedings against the subsidiary the contributory party is allegedly insolvent, however in fact the group was closely integrated and this affiliate is either deemed to fall into insolvency shortly or it might be that its insolvency cannot be ascertained. Hence, the approach should avoid a 'black or white' rule. It should relay on the situation. If it is a matter of a truly stable entity it might be inadequate to drag an affiliate into the insolvency, and then a contribution concept may be more adequate. Conversely, there may be cases in which it will be more adequate to order contribution where the contributory party is insolvent, since for instance the companies were not integrated or the contribution was only partial and there is no sense in pooling all proceedings together. In this case the debtor will compete in the liquidation of the affiliate claiming that the latter should be liable to pay any of its debts.

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[408] Guidline (b) in section 271(1)(a) of the New Zeland's Companies Act, 1993.

[409] See Muscat, The Liability (*supra* note 65), p. 304-305, 389-390, 415, 436 proposing the specific factors that can be used in exercising of the court's discretion.

[410] See *supra* sections 3.3.5- 3.3.7.

[411] See *supra* section 3.3.

[412] See *supra* section 4.2.3; *See* also Muscat, The Liability (*supra* note 65), p. 460-462.

[413] Conversly, Muscat argues that substantive consolidation would be proper only in the event of the insolvency of the holding company and should then only affect those affiliates which have become insolvent. As long as the holding company remains solvent, a rule regarding the holding company's liability should provide an adequate remedy (*Id*, at p. 462).

Another issue to consider is how to address the conflict of interests between creditors of the contributory party and the subsidiary. If the contributory party is insolvent or if a contribution order sought from the company threatens that company's solvency then the contribution order prejudices bona fide unsecured creditors. A similar question emerges with regard to a pooling order when certain creditors have dealt with the contributory party on a separate basis (as was previously discussed[414]). It has been argued[415] that it is more reasonable to prefer the equally "innocent" creditors of an abused subsidiary rather than the creditors of the defaulting affiliate. However, it is arguable whether the position of bona fide unsecured creditors of the affiliate should be undermined. It seems more adequate that these creditors' interests will be taken into account in a decision, striking the balance between the two sets of creditors who have dealt with two separate entities[416]. In this regard the integration between the companies, the way the affiliate was represented to its own creditors and their point of view will all be relevant factors. In certain circumstances a court can reach the conclusion that a separate claim against the affiliate rather than a contribution order or a pooling mechanism is more suitable. It may also be the case that the interests of the rest of the group's creditors (when there are other affiliates and creditors as well) would conclusively tilt the scale.

A pooling mechanism should be also apt to deal with the manipulations involving assets diversion or the use of affiliates to manipulate the group's financial resources, as it should be able to include remote affiliates as well. For instance, a finance unit, allegedly operationally separate from the group, but in fact an instrument for diverting assets may also be included in the pooling. Such an affiliate could be financially sound, even purposely structured to be 'insolvency remote' (for instance, an SPV to whom assets were shifted, while misleading creditors to believe the assets were part of the group's estate). However, the circumstances of the case should still be thoroughly examined and a proper balance should be struck between the interests of the insolvent group at stake and the interests of the operationally or insolvency remote affiliate and its creditors. If, for instance the creditors of the remote affiliate did not take part in the manipulation and were dealing with the affiliate separately from the group, or if the affiliate is solvent and has a separate business going on and critically the assets that were diverted can be reasonably identified, then presumably it will be more justified to file separate claims against such affiliates to recapture assets rather than throw all assets together.

Finally, the equitable subordination doctrine should also be available in the cross-border case involving a corporate group, modifying the pari passu principle to enable to defer a contributory party's claims (as long as there are such claims) to those of external creditors. Similarly to our previous discussions, it is suggested that clear guidelines will state the circumstances in which subordination should be imposed, based on the factors that were considered above.

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[414] See *supra* sections 4.2.2 and 4.2.3.
[415] See Muscat, The Liability (*supra* note 65), p. 457.
[416] See Farrar, Corporate Governance (*supra* note 54), p. 246-247 and the New Zealand's case laws cited there, clearly stating that such equities will have significant input to the court's decision to make an order but will not necessarily be decisive.

4.2.4.7. *The implementation of the tools in the international scenario*

As was suggested above[417], the implementation of a pooling mechanism in the international case will be most effective if the operation will be located in a single place, and if rules for international jurisdiction (adopting these notions from the EU Regulation, and extending them to the case of transnational groups), will be provided within a global model. A single court can be then authorized within such a global model to examine the facts and determine the appropriate solution for the case. It will be capable of encompassing all strongly integrated affiliates (as the basic ground for a pooling idea) in the insolvency and in a joint pool. In the scenario of abuse, the court which deals with the group's insolvency should be able to extend its jurisdiction over remote affiliates to the extent that such affiliates were involved in a manipulation scenario. The case will be held from a central base to avoid the high expenses that will be otherwise required for the implementation of close cooperation[418]. In certain circumstances local proceedings can take place, however, a suitable linkage to the supervisory court[419] should hold. If it is impossible to assert the place in which supervision should be held over the proceedings or otherwise if the parties could not agree on a single supervision, then close cooperation between courts and administrators should be applied[420].

Indeed, a pooling mechanism can be agreed upon in an ad-hoc initiative (such as was agreed and approved in the case of *BCCI*). However, as was discussed earlier[421], in a substantive consolidation case this will most probably involve high costs and will be prone to disagreement. Therefore, it was proposed that predefined modes for cooperation and coordination, accompanied by guidelines on the implementation of a pooling concept at the least (or as a second best tool) can simplify the process. In the scenarios of abuse, though, the difficulties in achieving a consensual agreement on a pool mechanism might be even more pronounced. Here, it may be that the entities' businesses can in fact be identified and thus addressed separately (so that it will not be a matter of impracticality that will drive the parties to agree on a 'single choice' solution, assumingly beneficial to all stakeholders). In considering the use of a pool very different interests may be involved, including completely opposite wishes on the part of creditors of separate companies. The need in such instances for one authorized body to be able to impose an adequate solution, while considering all relevant circumstances and balancing between the interests is clear[422].

In any case, in order to apply a 'complete' substantive consolidation any sort of cooperation will have to be supported by a specific authority playing a supervisory role. Furthermore, the entire proceedings would be put under a single law regime. This way, the companies will be treated as one unitary entity and consequently the distribution of dividends to all creditors will disregard their formal division between separate entities and different nations.

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[417] See *supra* section 3.3.7.
[418] See *supra* sections 3.1.3.6-3.1.3.8.
[419] See *supra* sections 3.1.3.8 and 4.1.5.
[420] See *supra* sections 3.1.3.6 and 3.3.7; As explained earlier (in *supra* section 3.3.7) such cooperation should encompass a mechanism (expressly predefined within a global model) for determining the distribution of proceeds.
[421] See *supra* section 3.3.7.
[422] See in this regard Jay Lawrence Westbrook, "A Global Solution to Multinational Default" [2000] 98 Mich. L. Rev. 2276, 2313-2314. Prof. Westbrook convincingly explains that universalism's single court and single law are transparently better suited to sorting out the liability of various elements in a worldwide corporate group in such circumstances.

The implementation of contribution and subordination mechanisms, in the scenario where the contributory party is solvent, does not involve means of coordination, since there is no administrator involved in the part of the contributory party (as it is not under insolvency proceedings). Rather, the court handling the insolvency case should be given the authority to give orders directed at the contributory affiliate, imposing either a contribution to the debtor (or debtors) debts or the subordination of the contributor's party's claims to those of external creditors. The notion of international jurisdiction (already proposed) would then be extended to provide that the court who handles the proceedings (those of the subsidiary or any part of the group that is jointly placed under insolvency) will be empowered to decide not only on the way to handle the proceedings but also on questions relating to the protection of creditors from other affiliates' manipulations. Judgments given in this respect should be then internationally recognized and enforceable in other states where the contributory parties are located. This concept will be rooted in a combination of two concepts. One is the above-mentioned idea of international jurisdiction applied to the case of insolvencies within MCGs (that is, having one particular court that is entitled to handle the insolvency proceedings of an MCG member or a group of members). The other is the idea that the court of a host country in which a subsidiary was located (here the subsidiary in insolvency or a number of subsidiaries subjected to a joint process) should be authorized to decide on the issue of an affiliate's liability for the subsidiary's debts[423]. As a result, the court handling the insolvency of the MCG (or of any member within it) should be given authority to handle all insolvency related matters, including group liability and subordination.

Preferably, however, the substantive rules that the court will apply will be those provided within the global model, and not the applicable law of a particular nation state. As a bankruptcy court, it would be the most capable of considering the insolvency goals (specifically here the promotion of fairness and the protection of creditors) using international standards and guidelines to impose an adequate solution to the multinational case. As a single court overseeing the entire group case it can best take into account all interests and objectives and apply the most adequate tool matched to the scenario.

5. Conclusion

5.1. A need for a comprehensive model

Major recent insolvency cases as well as advances in legal practice in the world demonstrate a strong trend towards a global approach to multinational enterprises. This trend was emphasized throughout our discussion as it was demonstrated that more often than not a global approach is indeed advantageous over a 'separate'

[423] See K. Hofstetter, "Multinational Enterprise Parent Liability: Efficient Legal Regimes in a World Market Environment" [1990] 15 North Carolina J. of Int'l. Law and Comm. Reg. 299, 327-328, claiming that efficiency calculus favors host country jurisdiction over both host country subsidiary and the multinational enterprise's parent company for matters of abuse. The host country courts have, inter alia, better access to evidence and witnesses with regard to the actions subject to adjudication (which primarily occur in the host county). It also allows a consolidation of the often similar liability actions brought against a subsidiary and its parent (see also *supra* note 129).

approach in guiding insolvencies within MCGs. Its major strength is its ability to reflect the MCG's economic truth prior to its insolvency. Thus, it holds the potential of being compatible with parties' expectations and to conclude with just and fair results. Furthermore, it was also demonstrated that a global approach can promote cost-efficiency as it enables (in the appropriate cases) office holders to administer the proceedings effectively, achieving optimum rescue plans, restructurings or sales of assets as well as eliminating costs of multiple filings and excessive litigation. However, a global approach's strength depends on its flexibility and its dynamic adaptation to the facts of the matter as "black and white" solutions to this kind of cases will undoubtedly result with conflicts and contradicting decisions. Notwithstanding the above, a global approach is still bound to pose some degree of threat to the fundamental concept of 'limited liability' and thus to entrepreneurial initiatives. Yet, this threat may actually be essentially diminished.

Consequently, when undertaking to construct a concrete model along the lines of a global approach one should be very prudent and rely heavily on the accumulative experience. As was apparent throughout the analysis, such a model should be committed to depicting as accurate an image as possible of the MCG at hand while appreciating the negative outcomes its application may bring about. It should seek to impose international rules only when it is absolutely needed while trying at the same time to reduce the harm it may cause to particular parties. Nevertheless, it is evident that a systematic and clear body of guidelines based on a global approach for handling insolvency within an MCG holds the promise of facilitating its course and assisting its positive conclusion

Although the study dealt 'serially' with the different insolvency goals, distinctively appreciating the benefits (or potential downsides) a global approach may have on each one, it is obvious that within an applicable model these goals need to be combined into appropriate guidelines to where and how global tools should be imposed. Such a model should embrace balancing mechanisms, so that deviation from one general rule should occur only where necessary to promote other compelling policies.

To achieve the main insolvency goals of an international system a global approach should encompass mechanisms that provide for close cooperation and coordination in the appropriate insolvency cases. Moreover, it should aspire to enable a centralized process for certain group insolvencies or at least a supervised proceedings for the entire integrated MCG. It should be able to give solutions to the various issues that arise during an insolvency process of an MCG including scenarios such as closely integrated groups and issues of abuse within the group. Means to consolidate proceedings of separate related entities, to subordinate certain claims, to impose liability on related companies and to reach assets that were diverted should be supplied to enable an efficient and just solution to a given case.

5.2. Reconciling between corporate form and a global approach

As was presented at the beginning of this paper, a global approach to MCGs' insolvencies entails an inherent conflict with the need to respect the corporate form. However, as was obvious from the discussion on the advantages and characteristics of a global approach, in many cases imposing global means will not have the 'veil lifted' in any significant sense. Often the MCG scenario will only demand a joint administration of a certain sort thus unifying the various entities' proceedings to provide for a global handling of the estate. However, this will still respect the distinctiveness between the assets and debts of each component and will secure creditors' distribution rights[424]. Hence, to a substantial degree, a global approach will not interfere significantly with the concept of the separate entity.

Only in the particular cases where the integration between the constituent companies was so strong, so that it is neither efficient nor fair to treat it separately, would a global approach become interventionist in the sense that it would provide for substantive consolidation of the separate estates. Even in this regard, it has been suggested that a distinction should be made between substantive consolidation (or a 'pooling concept') and 'piercing the veil' jurisprudence[425]. Truthfully, both undermine the legal structures that define the different entities. Nevertheless, substantive consolidation rests solely on functional factors related to implementation of the bankruptcy laws and follows from the economic truth of the specific case. It ignores corporate structures only due to their intermingled nature, and not because a specific fragment is regarded as a 'dummy' for its individual shareholders[426]. Substantive consolidation can therefore be regarded as less harmful and less threatening to the limited liability concept and the idea of preserving the corporate entity compared to a straight-forward 'piercing the veil'. Hence, it does hold the potential of being more appealing to nation states, notwithstanding the reluctance of certain jurisdictions to undermine the limited liability idea.

The most direct interference with the corporate personality idea will be in the cases where control over entities was abused, thus fairness will demand the imposition of group liability. In this regard, it has been suggested that global (interventionist) means will be applied only in exceptional cases of specific predefined types of misconduct towards entities (and creditors) within the group. It will be the exception rather than the rule, and it will demand a close inspection of the circumstances. It should be appreciated though that in the relevant scenarios, it will be indeed advantageous for the long run integrity and efficiency of an international insolvency system that courts (with international jurisdiction) will have the necessary means to give appropriate answers and remedies within the bankruptcy regime. It will supply a necessary strength to the proposition that the privilege of limited liability and companies' access to credit is matched by corresponding responsibilities. A well-designed and effective system of insolvency law will provide a valuable incentive for the maintenance of high standards of corporate governance, including the maintenance of financial discipline in the course of managing the company's affairs[427].

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[424] However, some degree of alteration in the right of equal ditribution may occur as a result of the application of a particular legal regime on the entire estate (see *supra section* 4.2.1).

[425] See Blumberg, Bankruptcy (*supra* note 39), p. 431; J.S. Gilbert, "substantive consolidation in bankruptcy: A Primer" (1990) 43 Val L.R. 205 at p. 218; Walkovsky v. Carlton 18 NY 2d. 414, 418-9 ("It is one thing to assert that a corporation is a fragment of a larger corporate combine which actually conducts the business. It is quite another to claim that the corporate is a 'dummy' for its individual shareholders who are in reality carrying on business in their personal capacities for purely personal rather that corporate ends.").

[426] See Walkovsky v. Carlton 18 NY 2d. 414, 418-9.

[427] See also Gordon Johnson, "Towards international standards on insolvency: the catalytic role of the World Bank", Law in transition, spring 2000 (http://www.ebrd.com/country/sector/law/insolve/standard/worldbk.pdf).