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Love Hertz: Corporate Groups and Insolvency Forum Selection

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Love *Hertz*: Corporate Groups and Insolvency Forum Selection

JOHN A. E. POTTOW*

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INTRODUCTION

One of the most intractable problems of modern cross-border insolvency proceedings is how to deal with corporate groups.¹ Of course, that is a happy problem, because it means that the field of cross-border insolvency, scarcely imaginable as a functional concept less than a generation ago, is now tackling “2.0” problems (or, if one counts the EU Recast as “NextGen,” 3.0 problems)² of greater sophistication, such as the efficient and fair resolution of corporate conglomerates. While the path-breaking UNCITRAL Model Law on Cross-Border Insolvency (MLCBI) sets out a helpful regime,³ it is to a certain extent premised upon

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1. See generally U.N. COMM’N ON INT’L TRADE LAW, UNCITRAL LEGISLATIVE GUIDE ON INSOLVENCY LAW PART THREE: TREATMENT OF ENTERPRISE GROUPS IN INSOLVENCY para. 1, E.12.V.16 (2012) [hereinafter UNCITRAL ENTERPRISE GROUP INSOLVENCY LEGISLATIVE GUIDE] (“Part three focuses on the treatment of enterprise groups in insolvency.”).

2. Regulation (EU) No. 2015/848, 2015 O.J. (L 141) 19 [hereinafter Recast Insolvency Regulation]; Council Regulation (EC) No. 1346/2000, 2000 O.J. (L 160) 1.

3. U.N. COMM’N ON INT’L TRADE LAW, UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION, E.14.V.2 (2014) [hereinafter MLCBI].

the single-entity model of corporate organization, which bears demoralizingly little resemblance to reality.⁴

The fact that the international community did not have a full-fledged corporate group resolution system did not stop corporate groups from suffering financial distress. As has always been the case, money and lawyers found a way.⁵ And certainly there were attempts to roll out the UNCITRAL model to corporate groups, at least with the prescriptive but generalized recommendations of Part III of the UNCITRAL Legislative Guide on Insolvency.⁶ So, too, has the EU taken steps to build out its Insolvency Regulation with provisions facilitating cooperation between multiple related corporate debtors.⁷ But matters kicked into higher gear just a year before the onslaught of the COVID-19 pandemic with the finalization of the UNCITRAL Model Law on Enterprise Group Insolvency (Groups Law), a model law on corporate groups, which was UNCITRAL's more forceful, albeit characteristically modest, foray into wrestling with enterprise group insolvency.⁸ Although this instrument has yet to be rolled out with any meaningful breadth, it is timely to beta-test the model law against current high-profile business reorganizations to see how it would facilitate (or stymie, or fail to affect) those efforts were it to be applied.

But first, an underlying question deserves some reflection: why are corporate groups so hard to grapple with in insolvency? The answer is not just about complexity of interconnected financial affairs, as it is in the domestic sphere,⁹ although to be sure that is a necessary element of the puzzle. Rather, I suggest the issue stems, at least in part, both from the problem of applicable law (with some sub rosa territorialism) and from the nettlesome involvement of human beings in the affairs of the business enterprise. Both these factors lead to territorialist retrenchment from the universalist promises of the UNCITRAL project.¹⁰ In other words, in a world where universalism is a delicate ideal, with numerous possibilities for subversion by

4. See, e.g., *In re Latam Airlines Grp. S. A.*, 620 B.R. 722 (Bankr. S.D.N.Y. 2020) (typical cross-border filing seething with corporate subsidiaries).

5. See, e.g., *In re CDS U.S. Holdings, Inc.*, Case 20-11719 (Bankr. D. Del. July 2, 2020) (U.S. Chapter 15 proceeding corresponding with Canadian CCAA proceeding for parent, Cirque du Soleil Canada Inc.).

6. UNCITRAL ENTERPRISE GROUP INSOLVENCY LEGISLATIVE GUIDE, *supra* note 1, at 2.

7. Recast Insolvency Regulation, *supra* note 2, at 49–50.

8. U.N. COMM'N ON INT'L TRADE LAW, UNCITRAL MODEL LAW ON ENTERPRISE GROUP INSOLVENCY WITH GUIDE TO ENACTMENT pt. 1, E.20.V.3 (2020) [hereinafter GROUPS LAW]; U.N. COMM'N ON INT'L TRADE LAW, UNCITRAL MODEL LAW ON ENTERPRISE GROUP INSOLVENCY WITH GUIDE TO ENACTMENT pt. 2, E.20.V.3 (2020) [hereinafter GTE OF GROUPS LAW].

9. The bankruptcy doctrine of substantive consolidation wrestles with the thorny issue of when to treat the assets (and debts) of related debtors as one combined mass for distribution purposes. 2 COLLIER ON BANKRUPTCY para. 105.09 (Richard Levin & Henry J. Sommer eds., 16th ed. 2009). It contrasts with mere procedural consolidation, which combines affiliated bankruptcy petitions but otherwise keeps the assets partitioned by corporate entity. *Id.* (“The most common consolidation is for administrative purposes. This type of ‘joint administration’ is designed in large part to promote procedural convenience and obtain cost efficiencies which do not affect the substantive rights of claimants of the respective debtor estates.”). Substantive consolidation is routinely characterized as an extraordinary remedy. *In re Owens Corning*, 419 F.3d 195, 208 (3d Cir. 2005) (“[T]here appears nearly unanimous consensus that it is a remedy to be used ‘sparingly.’”). The courts in *Nortel*, which combined substantial international assets in the final distribution, felt need to insist they were not substantively consolidating. *In re Nortel Networks Inc.*, 2011 WL 4831218, at *6 (Bankr. D. Del. July 11, 2011) (“The conveyance of the Purchased Assets pursuant to the Transactions does not amount to a consolidation, merger or de facto merger of the Purchaser and the Debtors and/or Debtors’ estates, there is not substantial continuity between the Purchaser and the Debtors, there is no continuity of enterprise between the Debtors and the Purchaser, the Purchaser is not a mere continuation of the Debtors or the Debtors’ estates, and the Purchaser does not constitute a successor to the Debtors or the Debtors’ estates.”).

10. John A. E. Pottow, *Procedural Incrementalism: A Model for International Bankruptcy*, 45 VA. J. INT'L L. 935, 939 (2005) (arguing that UNCITRAL MLCBI is mostly universalist with some territorialist retrenchment).

its opponents and skeptics, the complexity of the average international enterprise provides cover for those territorialist impulses to burrow and take root through the celebration of the individual corporate form of each individual corporate subsidiary, regardless of the actual, objective level of financial and operational interconnectedness.¹¹

This article focuses scrutiny on an important cross-border insolvency development, the *Hertz* proceedings in the United States and in Europe,¹² to analyze how commonplace corporate group structure possibly enables this territorialist retrenchment and hampers a single, worldwide, universalist resolution of financial distress. It then addresses the UNCITRAL Groups Law to see what change (if any) might have been visited upon that outcome in the hypothetical world of its adoption. (Along the way, the reader will not be spared normative critique.) In doing so, this article seeks to consider the role corporate form plays in the system—and ongoing international market—for corporate reorganization.

I. HERTZ

A. Overview & Theoretical Context

Everyone knows Hertz, although not everyone knows it gobbled up Dollar, Thrifty, and other brands whose names remain intact perhaps to stoke the illusion of market competition.¹³ Hertz found itself highly leveraged at the unfortunate timing of the collapse of the travel market with the global pandemic.¹⁴ There is no question it had worldwide operations, just as there was no question that the enterprise contained both centripetal and centrifugal forces influencing the scope of insolvency resolution.¹⁵ Specifically, Hertz was not organized as one massive Delaware corporation, but rather under the more common American structure of the corporate Delaware parent (or parents) begetting various European subsidiaries, complete with special purpose financing vehicles and the like.¹⁶ Thus, were Hertz just in a world strictly dominated by the MLCBI, there presumably might have been one main insolvency

11. Consider that even in *In re Nortel*, the court effectively pooled the global assets and yet still insisted on clinging to the corporate form: “[T]he evidence establishes that the Nortel affiliates respected corporate formalities and did not commingle their distinct assets or liabilities. Given that Nortel respected and maintained corporate separateness among its distinct legal entities both before and during its insolvency, substantive consolidation cannot be applied in this case.” *In re Nortel Networks Inc.*, 532 B.R. 494, 557 (Bankr. D. Del. 2015).

12. *In re The Hertz Corp.*, No. 20-11218 (May 22, 2020); *In re Hertz Global Holdings, Inc.*, No. 20-11219 (May 22, 2020); *In re Hertz U.K. Receivables Ltd.*, No. 20-13178 (Dec. 22, 2020).

13. See, e.g., Press Release, *Hertz Completes Acquisition of Dollar Thrifty*, HERTZ GLOBAL HOLDINGS, INC. (Nov. 20, 2012), <https://ir.hertz.com/press-releases?item=416>.

14. Robert Ferris, *Why Hertz Landed in Bankruptcy Court When Its Rival Didn't*, CNBC, Aug. 17, 2020, <https://www.cnbc.com/2020/08/17/why-hertz-landed-in-bankruptcy-court-when-its-rivals-didnt.html>; Alexander Gladstone & Cara Lombardo, *Hertz Tries to Avoid Bankruptcy as Pandemic Curbs Car Rentals*, WALL ST. J., Apr. 30, 2020, <https://www.wsj.com/articles/hertz-misses-lease-payment-prepares-for-potential-bankruptcy-11588172258>.

15. See discussion *infra* Section II(B) UNCITRAL Groups Law: What Could Have Happened. Comprehensive resolution of the case appeared to be on Hertz's mind. For example, the company argued in its Chapter 15 petition that to effectuate its scheme of arrangement, perhaps global releases were necessary. Chapter 15 Petition for Recognition of a Foreign Proceeding, *In re Hertz U.K. Receivables Ltd.*, No. 20-13178 para. 48 (Bankr. D. Del. Dec. 22, 2020) [hereinafter Chapter 15 Petition]; cf. *In re Metcalfe & Mansfield Alt. Invs.*, 421 B.R. 685, 698 (Bankr. S.D.N.Y. 2010) (enforcing in Chapter 15 third-party releases from Canadian proceeding that may not have been enforceable in purely domestic proceeding).

16. See, e.g., Declaration of Samuel P. Hershey, *In re Hertz U.K. Receivables Ltd.*, No. 20-13178 at Ex. A-1 (Bankr. D. Del. Dec. 22, 2020) (providing an organizational chart of Hertz Global Holdings, Inc.).

proceeding housed in Delaware,¹⁷ or even a handful of insolvency proceedings in each COMI of the various subsidiaries (mindful of course that some consolidation could be possible, *à la Daisytek*, for mere letterbox subsidiaries).¹⁸ To be sure, the MLCBI “coordination” provisions would have allowed courts of the various COMI jurisdictions to coordinate their potentially parallel proceedings,¹⁹ but nothing more formalized than that for corporate integration exists within the pre-existing international framework.

Pulling the enterprise together more centrally than its corporate web suggested was the reality that different parts of the business would stand or fall together. As explained in its filings, Hertz had over 10,000 locations across North America, Europe, Latin America, Africa, Asia, Australia, the Caribbean, the Middle East, and New Zealand, seamlessly integrated to “help its customers move about and explore” anywhere on the globe.²⁰ Thus, coherent resolution of the behemoth cried out for centralized, worldwide administration of a restructuring plan. There was apparently not enough *Daisytek*-cover, however, to situate the Eurosubs’ COMIs in the United States (i.e., outside their registered offices) to enable an easy global Chapter 11, and so any Chapter 11-exclusive solution would require either conceding the Eurosubs were in non-main proceedings in the United States, with all the consolidation that might require,²¹ or having to leave them out of the process altogether.

Note the insidiousness of the corporate form here, or more precisely, the web of interconnected corporations.²² A COMI-situated Chapter 11 would have been easy were Hertz one enormous, seething Delaware corporation (albeit with far-flung rental fleet assets worldwide) supported by a collection of secondary proceedings as needed around the world to facilitate execution of that centralized administration in the happy idealized scenario envisioned by the MLCBI.²³ The reality, however, was a tangle of subs that made such a “mega-11” with one COMI impossible. For maximal relief, either the Eurosubs would have to have stayed out of insolvency altogether, or they would have had to open their own main proceedings in Europe. Absent some muscular conception of “Enterprise-COMI” (E-COMI), such Eurosub proceedings, if opened, would be near impossible to recognize as COMI’ed in the United States.²⁴

17. Under the Model Law, the COMI of each debtor is presumed to be its registered office. MLCBI, *supra* note 3, at 8. But that can always be rebutted by appropriate facts, such as the actual operation, etc. *Id.* at 8, 70; *see also In re Tri-Continental Exchange Ltd*, 349 B.R. 627, 634 (Bankr. E.D. Cal. 2006) (applying standard).

18. *See, e.g., In re Daisytek-ISA Ltd.* [2003] B.C.C. 562 (U.K.) (recognizing U.K. COMI of non-U.K.-incorporated corporate debtors, including French-registered subsidiary). Cases under the MLCBI’s recognition provisions have routinely found foreign COMIs for debtors whose registered offices are in the recognizing jurisdiction where the objective evidence suggests a divergence between actual operations and place of legal registration, especially with corporate affiliates. *E.g., In re Gandi Innovations Holdings, LLC*, 2009 Bankr. LEXIS 2751 (Bankr. W.D. Tex. 2009) (recognizing Canadian foreign main proceedings of both U.S. and Canadian debtors); *In re Mass. Elephant & Castle Grp. Inc.*, 2011 ONSC 4201 (Superior Court of Justice, Ontario) (recognizing U.S. Chapter 11 of both Canadian and U.S. corporations as foreign main proceedings).

19. MLCBI, *supra* note 3, art. 29 (demonstrating how the MLCBI “coordination” provisions function).

20. Debtors’ Motion for Entry of Interim and Final Orders, *In re Hertz Corp.*, No. 20-11218, para. 8 (Bankr. D. Del. May 24, 2020).

21. *See* Chapter 15 Petition, *supra* note 15 (discussing how Hertz U.K. Receivables Ltd had a sole director based in U.K. and no other connection beyond share ownership to United States).

22. *See* Richard Squire, *Strategic Liability in the Corporate Group*, 78 U. CHI. L. REV. 605, 606, n.1 (2011) (discussing important numerical figures related to U.S. public companies’ subsidiaries); Declaration of Samuel P. Hershey, *supra* note 16.

23. *See* MLCBI, *supra* note 3, art. 21 (demonstrating the happy, idealized scenario envisioned by the MLCBI).

24. *See* Ilya Kokorin, Stephen Madaus, & Irit Mevorach, *Global Competition in Cross-Border Restructuring and Recognition of Centralized Group Solutions*, 56 TEX. INT. L. J. 109, 117-20 (2021) [hereinafter Kokorin, Madaus, & Mevorach]; *see* UNCITRAL ENTERPRISE GROUP INSOLVENCY LEGISLATIVE GUIDE, *supra* note 1, at 85

Thus, the tension of the multi-corporate conglomerate rears its head, at least under current doctrine. That is, an economic desire to pull all the insolvency work into one forum of an interconnected global enterprise centripetally conflicts with an inability to do that coherently in a COMI-focused world that fetishizes the corporate form centrifugally. To be sure, “COMI-focused” does not mean “subsidiary-beholden.” As just mentioned, if the concept of COMI were to be developed in the design of an international corporate group regime—say, into designation of an E-COMI of the whole worldwide enterprise—then the exercise would be much simpler doctrinally. Hertz’s E-COMI would be the United States,²⁵ which could shepherd the reorganization in some uber-universalist proceeding. But that level of international cooperation is a bit far off; indeed, many debate whether it is even desirable.²⁶

This brings us to the human element foreshadowed above. Even with a plausible basis to assert jurisdiction over a Eurosub in the United States,²⁷ it would require that the directors of the Eurosubs be willing to file that Chapter 11 proceeding. Yet, as rich comparative work has now made clear, many insolvency systems do not champion filing.²⁸ Indeed, filing insolvency exposes directors to potential liability and other adverse consequences under their local laws that may understandably make the directors deeply hesitant to engage voluntarily in a U.S. Chapter 11 proceeding.²⁹ This is especially so in systems where insolvency proceedings require, well, insolvency. Unlike the United States, which has no insolvency trigger required for filing (though it does have good-faith screens and other such gatekeepers)³⁰ many systems only allow use of their insolvency regimes upon debtor insolvency.³¹ For example, consider the plight of the directors of a German subsidiary where

(explaining that “there has been considerable discussion in recent times as to what might form the basis of a legal regime to address the cross-border insolvency of enterprise groups. Some suggestions have included adapting the concept of ‘centre of main interests’ as it applies to an individual debtor to the situation of an enterprise group, enabling all proceedings with respect to group members to be commenced in, and administered from, a single centre through one court and subject to a single governing law [Enterprise-COMI, or E-COMI]. Another suggestion has been to identify a coordination centre for the group, which might be determined by reference to the location of the parent of the group or to permit group members to apply for insolvency in the State in which proceedings have commenced with respect to the insolvent parent of the group.”).

25. See Chapter 15 Petition, *supra* note 15 (recounting centrality of U.S. connections, including ultimate parent’s Delaware connection).

26. Compare Samuel Bufford, *Coordination of Insolvency Cases for International Enterprise Groups: A Proposal*, PENN STATE LAW RESEARCH PAPER No. 1-2014 (2014) (arguing in favor of E-COMI) with Edward J. Janger, *Virtual Territoriality*, 48 COLUM.J. TRANSNAT’L L. 401 (2010) (doubting the utility of full-throated centralization through COMI).

27. Absent a *Daisytek* pragmatic application of jurisdiction/forum-shopping sleight of hand, that tangential proceeding would likely be exercising non-MLCBI jurisdiction. See MLCBI, *supra* note 3, art. 17, para. 2(b) (stating that the MLCBI requires at very least an “establishment” to qualify for recognition as non-main proceeding). Compare 11 U.S.C. §§ 1502, 1515–1517 (implementing MLCBI requirements for recognition of foreign proceeding), with 11 U.S.C. §§ 109(a), 1121(a) (allowing U.S. domestic proceedings to open for anyone with residence, domicile, place of business, or property in the United States).

28. See JAY LAWRENCE WESTBROOK ET AL., *A GLOBAL VIEW OF BUSINESS INSOLVENCY SYSTEMS*, 66 (The World Bank, 2010) (explaining how some systems require filing for insolvency proceedings, while others do not).

29. See UNTERNEHMENSREORGANISATIONSGESETZ [URG] [BUSINESS REORGANIZATION ACT] [BGBL] No. 114/1997, § 22, para. 1 (Act No. 114/1997) (Austria) (imposing liability on directors if they have received report from company’s auditor stating that equity ratio is less than 8% and notional debt repayment period exceeds fifteen years without immediately filing for reorganization proceedings or properly continuing them).

30. 11 U.S.C. § 1129(a)(3); *In re SGL Carbon Corp.*, 200 F.3d 154 (3d Cir. 1999) (holding that “Chapter 11 petition is subject to dismissal for ‘cause’ under 11 U.S.C. § 1112(b) unless it is filed in good faith.”).

31. See BAKER MCKENZIE, *GLOBAL RESTRUCTURING & INSOLVENCY GUIDE* 328 (2016), <https://www.bakermckenzie.com/-/media/files/expertise/banking->

the U.S. parent wants to participate in a Chapter 11 (or “mega-11” under a hypothetical E-COMI regime). If the directors file a Chapter 11 as the subsidiary, proudly pointing to their lawyer’s retainer account in New York as their jurisdictional hook, they may be committing an act that would require them to open much-less-desirable proceedings in their COMI jurisdiction of Germany as well.³² This act may carry liability for directors for failing to file within the appropriate time frame while insolvent.³³ If they do not, consider that they may face personal liability for wrongful trading—a situation relished by few directors.³⁴

What should be done when coherent reorganization impulses push for a centralized proceeding, but the corporate structure results in a discrete European subsidiary controlled by individuals who fear filing their affiliate for a U.S. Chapter 11?³⁵ The answer is to file the parent in Chapter 11, file whatever offspring necessary in Europe (leaving the rest out altogether),³⁶ and synthetically consolidate as much as possible. That common outcome is precisely what Hertz initially did.³⁷ True procedural consolidation was not possible, as there were not two Chapter 11s to consolidate, so instead the cross-border proceedings could at least be coordinated under the MLCBI, with copious communication.³⁸ Scholars, such as Korokin, Madaus and Mevorach, would situate this on at least Level 3—appointment of the same insolvency practitioner in separate proceedings—of their eight-level scale ranking international insolvency cooperation.³⁹

The story does not end there, however, because Europe is Europe (jokes over Brexit notwithstanding). The EU benefits from the binding EU Insolvency Regulation (as recast), so it does not have the same vagaries of enforcement that plague pure cross-border proceedings under the MLCBI.⁴⁰ True, local secondary proceedings and the like can always be opened,⁴¹ but pound for pound, the force of an order entered into in a German insolvency proceeding likely has more enforcement ease in France than in Canada.⁴² In addition, the existence of

finance/bk_globalrestructuringinsolvencyguide_20170307.pdf?la=en (explaining that Polish courts require debtor to be insolvent); see *Insolvenzordnung* [InsO] [Insolvency Act], Dec. 20, 2011, BGBl I at 2854, § 18 (Ger.).

32. See *In re Berau Capital Resources Pte Ltd.*, 540 B.R. 80 (Bankr. S.D.N.Y. 2015) (holding that foreign debtor was eligible to be debtor under section 109 of Bankruptcy Code because of interest in its U.S. counsel’s retainer account).

33. See *Insolvenzordnung* [InsO] [Insolvency Act], Dec. 20, 2011, BGBl I at § 15(a) (Ger.) (highlighting directors’ duty to file).

34. See *Insolvency Act 1986*, c. 45, § 214 (Eng.).

35. See U.N. COMM’N ON INT’L TRADE LAW, LEGISLATIVE GUIDE ON INSOLVENCY LAW PART FOUR: DIRECTORS’ OBLIGATIONS IN THE PERIOD APPROACHING INSOLVENCY (2d ed. 2020) (demonstrating that UNCITRAL has gone to some efforts to consider insolvency-related fiduciary duties of corporate affiliate directors).

36. Hon. Allan Gropper, *United States Approaches to the Insolvency of Enterprise Groups*, 4/2015 INT’L INSOLVENCY L. REV. 364, 369 nn.20–21 (2015).

37. See *In re The Hertz Corp.*, No. 20-11218 (May 22, 2020); *In re Hertz Global Holdings, Inc.*, No. 20-11219 (May 22, 2020); *In re Hertz U.K. Receivables Ltd.*, No. 20-13178 (Dec. 22, 2020).

38. See Korokin, Madaus, & Mevorach, *supra* note 24.

39. Korokin, Madaus, & Mevorach, *supra* note 24, at 114-15 (classifying the levels of centralization for group restructuring on a scale ranging from utterly unconnected (Level 8) to purely universal (Level 1)).

40. See Consolidated Version of the Treaty on the Functioning of the European Union art. 288, Oct. 26, 2012, 2012 O.J. (C 326) 1 (“To exercise the Union’s competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions. A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.”).

41. MLCBI, *supra* note 3, art. 28 (“After recognition of a foreign main proceeding, a proceeding under [identify laws of the enacting State relating to insolvency] may be commenced . . .”) (emphasis in original).

42. See Recast Insolvency Regulation, *supra* note 2, at 19 (discussing enforcement of EU insolvency proceedings).

increasingly popular “scheme” proceedings, which allow some participants to sit out insolvency altogether,⁴³ suggests that the universalist benefits of centralized administration may be more easily achieved within Europe than outside the continent. Indeed, if intra-European enforcement is easier, and one can file a scheme somewhere in Europe that will not upset the local directors, then one may not even need to file all the European subsidiaries to achieve a continent-wide solution.⁴⁴ Building on this observation leads one to conclude that forum shopping may be more rampant within the European Union than outside it, as both the enforcement certainty payoff is higher and the content of substantive insolvency law (existence of scheme regimes) creates more bang for the shopping buck.⁴⁵

One benefit to forum shopping is centralized management. But the primary benefit is likely the traditional choice of law motivation: namely, the application of congenial substantive law.⁴⁶ There is no need to engage the well-rehearsed debate on whether jurisdictional competition is a race to the top or a race to the bottom.⁴⁷ Suffice it to say, even the most hardened bankruptcy-world cynic would concede that there are some situations in which insolvency forum shopping is beneficial.⁴⁸ An easy example would be the situation of a debtor with going-concern value seeking to reorganize but mired in a system that is liquidation-based with an unmodernized bankruptcy law. Such a debtor’s relocation to a more modernized bankruptcy jurisdiction would avoid the base redistributive impulses one worries

43. See Companies Act, §§ 895–901, Part 26 CURRENT LAW, 2006 (Eng.) (promulgating “scheme of arrangement” whereby creditors, through super-majority vote, can compromise debt and impose haircut through court sanctioning upon dissenting holdout creditors without requirement of comprehensive creditor proceeding, such as bankruptcy). See *Re DTEK Finance Plc* [2017] BCC 165 and [2016] EWHC 3563 (Ch) (showing scheme can leave whole classes of creditors, and equity holders, unaffected); see also *Re Metinvest BV* [2016] EWHC 79 (Ch) at [32]; Kokorin, Madaus, & Mevorach, *supra* note 24, at 126 (explaining while scheme is generally not recognized as insolvency procedure under EU Insolvency Regulation, it enjoys similar continent-wide effect through Brussels I [Convention] as a “civil and commercial judgment” entitled to intra-European recognition).

44. The sneakiness of this approach involves a legal arbitrage where although the U.K. scheme of arrangement is deliberately excluded from the scope of the EU Insolvency Regulation, see Peter Mankowski, *The European World of Insolvency Tourism: Renewed, But Still Brave?*, 64 *Neth. Int. L. R.* 95, 106 (2017), it still earns intra-European judgment enforcement under Brussels I-bis, *Re DTEK Finance Plc* [2017] BCC 165 and [2016] EWHC 3563 (Ch). See also *Re Metinvest BV* [2016] EWHC 79 (Ch) at [32]; Kokorin, Madaus, & Mevorach, *supra* note 24, at 126.

45. John A. E. Pottow, *The Myth (and Realities) of Forum Shopping in Transnational Insolvency*, 32 *BROOKLYN J. INT’L L.* 785, 788 (2007) [hereinafter *Forum Shopping in Transnational Insolvency*] (“This is due to the straightforward but nevertheless important point that predictability is a necessary prerequisite to forum shopping.”).

46. Above I suggested the quest for congenial law is the primary thrust of forum shopping, but that may be broken down into substantive law and procedural law, a point helpfully probed in Professors Janger and Madaus’s recent offering on this debate. Edward J. Janger & Stephan Madaus, *Value Tracing and Priority in Cross-Border Group Bankruptcies: Solving the Nortel Problem from the Bottom Up*, 27 *U. Miami Int’l & Comp. L.* (2020). Indeed, I would agree and go even further in this taxonomy and add for consideration “peri-legal” considerations, such as the general judicial competence of the jurisdiction irrespective of its substantive law, or even the generosity (or wise parsimony) of its juries.

47. See, e.g., Daniel J.H. Greenwood, *Democracy and Delaware: The Mysterious Race to the Bottom/Top*, 23 *YALE L. POL’Y REV.* 381, 387 (2005) (discussing Delaware’s competition with New Jersey to become preferred location for corporations); Wolf-Georg Ringe, *Forum Shopping under the EU Insolvency Regulation*, *Univ. of Oxford, Legal Research Paper No 33/2008 2*, 19 (2008) (demonstrating this phenomenon is similarly present in international insolvency).

48. Many have discussed the pros and cons of international forum shopping in bankruptcy. For European thoughts, compare, e.g., Wolf-Georg Ringe *Insolvency Forum Shopping, Revisited*, 2017 *HAMBURG L. REV.* 38, 38–51 with Georg Friedrich Schlaefer, *Forum Shopping under the Regime of the European Insolvency Regulation 7–17* (*Int. Insolvency Inst.*) (unpublished working paper) (2010).

about with case-placers situating their filings in jurisdictions that help the haves at the expense of the absentee have-nots.

The aforementioned dynamics lead to a curious and possibly unstable equilibrium regarding the market for cross-border corporate reorganization that depends upon the level of regionality at play: a wholly European affair may have heightened stakes and incentives for forum shopping, whereas a fully global one may have muted (but still extant) forces at play. One imagines that there are fewer messy situations of parallel cross-border proceedings that can only rely on the coordination and cooperation procedures of the MLCBI within Europe than when the corporate actors span oceans, as with *Hertz*. Of course, the effort that jurisdictions seeking to gain market share put towards attracting case-placers might be undifferentiated—the British Scheme Siren sings just as loudly to the Canadians as to the Spaniards—but the impact might be stronger within the EU. Thus, as an empirical matter, one predicts more forum shopping, and perhaps simultaneously, more COMI-movement, within the EU.⁴⁹

One primarily shops a putative cross-border corporate insolvency filing through the doctrinal lynchpin of COMI. “COMI-migration” is nothing new, and indeed, within Europe there are unabashed tutorials on how to execute it effectively.⁵⁰ In Europe, a corporate group can get both EU-wide recognition of its reorganization under the EU Recast and somewhat readily resituate, through COMI-migration, the location of the “anchor” debtor (or creditor) to the most attractive venue, albeit now requiring a respectable interval before filing.⁵¹ That one-two combination sounds like a recipe for how to shop fora for a corporate group. Indeed, sometimes you do not even need to move the COMI, just shuffle the debt.⁵² Consideration of the foregoing theoretical observations naturally concludes with the question: is this what *Hertz* did in Europe as a Euro-specific strategy within its larger global plan that had to wrestle with the centripetal and centrifugal forces described above? (Spoiler: yes.)

49. U.K. schemes do not even require COMI of the debtor, of course, just “sufficient connection,” *Re Drax Holdings Ltd*, [2004] 1 WLR 1049, which is why I hedge that COMI movement is likely but not required. On the ease of establishing “sufficient connection,” see Kokorin, Madaus, & Mevorach, *supra* note 24, at 129 (“[M]ore recent cases have confirmed that, in principle, the domicile of a single creditor in the court’s jurisdiction suffices to approve a scheme affecting foreign creditors.”).

Among the criteria which were found to be enough to establish a sufficient connection to sanction a scheme are: English law governed debt of key finance contracts and principal activity of the debtor in England; English law governed contracts; English domicile of creditors holding >50% by value of claims; choice of English law and jurisdiction of English courts in the facilities agreement; purposeful alteration of the governing law and the jurisdiction clause in contracts to English law and English courts; and movement of operations to England and domicile of 18% of the scheme creditors in England.

Id. at 123.

50. See, e.g., *Hellas Telecommunications (Luxembourg) II SCA* [2009] EWHC 3199 (Ch); see also Anna Kaczor, *Moving a Company’s COMI to achieve a restructuring: factors for consideration*, 83 *Amicus Curiae* 13, 13–14 (2010) (noting that “COMI-migration” is commonly done through changes of registered office).

51. On the respectable interval, see Recast Insolvency Regulation, *supra* note 2, art. 3 para. 1 (“[The presumption that the place of a registered office is the COMI] shall only apply if the registered office has not been moved to another Member State within the 3-month period prior to the request for the opening of insolvency proceedings.”).

52. See sources cited, *supra* note 49; see also *In re Apcoa Parking Holdings GmbH and Others* [2014] EWHC 1867 (Ch) (allowing creditors from companies with different COMIs to convene in United Kingdom to restructure sanctioned debt schemes); *In re Algeco Scotsman PIK S.A.* [2017] EWHC 2236 (Ch) (finding sufficient connection to substantiate COMI-shift based on creditor vote changing governing law and jurisdiction clauses of loan facility from New York to England).

B. What Happened

Just as predicted, albeit with some new bells and whistles, Hertz filed a Chapter 11 in the United States and COMI-shopped its primary Eurosub into the United Kingdom. More specifically, Hertz initially wanted to run a U.K.-centered refinancing of the European subsidiaries using the ever-popular U.K. scheme of arrangement.⁵³ This Euro-proceeding was purported to be limited to the European (and other) subsidiaries. But the COMI-migration was slightly more complicated than simply re-incorporating and transferring assets to England because the relevant subsidiary, Hertz Holdings Netherlands B.V., was already on the hook for issuing hundreds of millions of Euros in debt—*they* were the ones who needed to do the working out with creditors, not the U.K. subsidiary.⁵⁴ Yet because the Netherlands did not yet have a scheme of arrangement law that Hertz wanted to use to guide its reorganization,⁵⁵ Hertz faced the dilemma of how to run an EU-wide U.K. scheme when the primary debtor was in the Netherlands.

The solution was rather ingenious (as one might expect when guided by lawyers that a company of this size could afford). By way of background, Hertz was already in severe financial distress well before its ultimate scheme was filed in the United Kingdom. Indeed, it had already bargained once through a short-term “consent solicitation” with its debt holders to stave off default.⁵⁶ The requisite majorities consented and forestalled Hertz’s filing.⁵⁷ In a typical consent bargaining, the focus is on the hard-fought concessions: how much principal will be removed, or how far into the future can the debtor stretch the recapitalized payments? Here, however, the consent solicitations (at least the second one; there were two) achieved an equally if not more important function: “functionally” shifting the COMI of the relevant European assets (or, more accurately, the relevant European debt) from the Netherlands to the United Kingdom.⁵⁸

53. And not just European—the Australian subsidiary was parented by the Dutch entity. Declaration of Samuel P. Hershey, *In re Hertz U.K. Receivables Ltd.*, No. 20-13178 at Ex. A-1, A-2 (Bankr. D. Del. Dec. 22, 2020).

54. See Petitioner’s Declaration and Verified Petition for Recognition of Foreign Main Proceeding para. 26, *In re Hertz U.K. Receivables Ltd.*, No. 20-13178 (Bankr. D. Del. Dec. 22, 2020) [hereinafter Petitioner’s U.K. Declaration] (“As a result of the waivers [of default obtained through consent solicitation], the [Hertz U.K. Receivables Ltd.] and the other non-U.S. obligors on the Existing Notes did not commence Chapter 11 Proceedings, nor was there a need for them to apply for any equivalent local insolvency proceedings or relief. Instead, obtaining the waivers has enabled Hertz Europe to engage in strategic discussions with [creditors] with the aim of restructuring Hertz Europe’s financial obligations under the [notes due 2021 and 2023] and the Facilities, and obtaining certain new money financing to assist with the re-fleeting needs of its European business.”).

55. See Wet homologatie onderhands akkoord 2020, Stb. 2020 (Neth) [hereinafter WHOA].

56. See Petitioner’s U.K. Declaration, *supra* note 54; Hertz Holdings Neth. B.V., Announces Receipt of Required Consents to Consent Solicitation (Sept. 30, 2020).

57. Hertz Holdings Neth. B.V., Announces Receipt of Required Consents to Consent Solicitation (Sept. 30, 2020) (announcing receipt of consents from 70.88% in aggregate principal of 2023 notes and 53.06% of 2021 notes, satisfying requirements); see also Petitioner’s U.K. Declaration, *supra* note 54, para. 37 (explaining that U.K. scheme is approved “if it is supported by a simple majority (by number) of the creditors present and voting (in person or by proxy) and representing at least 75% by value (i.e., amount of the claims) of votes of the scheme creditors”).

58. On May 15, 2020, Hertz Holdings Netherlands B.V. announced a solicitation of consents to waive provisions which would have triggered a default when Hertz Global Holdings, Inc. and The Hertz Corporation filed for bankruptcy in Delaware. This waiver was meant to buy time for the European Hertz entity to negotiate with creditors to restructure its financial obligations outside an insolvency proceeding. See Petitioner’s U.K. Declaration, *supra* note 54, para. 31; Hertz Holdings Neth. B.V. Consent Solicitation (May 22, 2020) (“Hertz Holdings Netherlands B.V. [] has issued a request for consent from holders of its 2021 and 2023 bonds to approve

The *jurisdiction shift* of the financial debt (the term I offer as a helpful but not dispositive doctrinal antecedent to forum shopping) was accomplished by tucking two terms into the consent solicitations that may have otherwise passed as unremarkable. First, the governing law terms of the indenture were changed from New York law to U.K. law.⁵⁹ One questions whether many, if any, solicited creditors even cared about this development in contrast to the presumably more salient terms on haircuts and extensions. Second, which presumably would only delight creditors, the pre-existing U.K. subsidiary—whose function was apparently to buy the various affiliate receivables and distribute the proceeds—was tagged to “co-issue” the (restructured) debt.⁶⁰ It should be noted that these consented-to concessions to waive default were short-term and not earth-shattering. Rather, they were to prevent the Chapter 11 filings in Delaware from automatically accelerating the European notes and to buy time for the European business to engage in strategic negotiations with its creditors apart from the U.S. proceedings.⁶¹ As mentioned, adding a co-obligor would hardly raise any anxiety for a creditor—quite the contrary. Tucking these seemingly workaday terms into the refinancing had the effect of shifting COMI—or more precisely, leaving COMI intact for two corporate affiliates, while shifting the *bankruptcy relevance* of the dominant entity from the Dutch subsidiary to the U.K. one (i.e., jurisdiction shift). In other words, it was not so much a “COMI-shift” as it was a “debt-shift,” enabled by the interconnection of shareholder-controlled affiliates that were able to effectuate the co-issuance (or, as the less charitable might say, perpetrate the transaction at undervalue).⁶²

Shifting the debt into the U.K. subsidiary set the stage to file the U.K. scheme of arrangement. After all, unlike a traditional cross-border insolvency proceeding, which typically looks at the locations of the various assets and operations in ascertaining the debtor’s COMI, the light-form work of a scheme recapitalizes the financial debt but leaves the rest of the obligations and operations (e.g., the trade creditors) untouched.⁶³ British judges require only a “sufficient connection” to the debtor to don their wigs.⁶⁴ Add to this the *Gibbs* rule, under which British debt adjustment “must” be done in English courts,⁶⁵ and the decision to file the scheme in the United Kingdom was over-determined. Thus, to deal with its European

the temporary waiver of certain bond provisions in order to ensure there is no automatic acceleration of the bonds if certain events were to occur in relation to The Hertz Corporation and Hertz Global Holdings, Inc. (and certain related entities).”). Hertz Holdings Netherlands B.V. received the required consents. Hertz Holdings Neth. B.V., Announces Receipt of Required Consents to Consent Solicitation (Sept. 30, 2020). On November 30, 2020, Hertz Holdings Netherlands B.V. announced a second consent solicitation regarding the same notes, which sought to change the governing law of the indentures and notes from New York to the United Kingdom and provide for the accession of Hertz U.K. Receivables Ltd as a co-issuer in respect of the notes. Hertz U.K. Receivables Ltd became a co-issuer of the notes and the governing law was changed on December 9, 2020, following receipt of the required consents. Hertz Holdings Netherlands B.V. Consent Solicitation (Nov. 30, 2020); Petitioner’s U.K. Declaration, *supra* note 54, at 6 n.10.

59. Petitioner’s U.K. Declaration, *supra* note 54, at 6 n.10.

60. *See id.*

61. Hertz Holdings Netherlands B.V. Consent Solicitation (May 22, 2020); Petitioner’s U.K. Declaration, *supra* note 54.

62. *See generally* Insolvency Act 1986, c. 45 § 238(5) (Eng.).

63. *Id.*; Irit Mevorach & Adrian Walters, *The Characterization of Pre-insolvency Proceedings in Private International Law*, 21 EU. BUS. ORG. L. REV. 855, 864 (2020) (referring to such light-form work as “skinny”).

64. Kokorin, Madaus, & Mevorach, *supra* note 24, at 123.

65. *Anthony Gibbs and Sons v La Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399 (Eng.) (explaining that infamous *Gibbs* rule requires adjustment of U.K. debt to occur in U.K. court, thus refusing to recognize foreign bankruptcies’ effects on British debt); *Bakhshiyeva v Sberbank of Russia* [2018] EWHC (Ch) 59 (Eng.) (affirming *Gibbs*); *see also Pacific Andes Resources Development Ltd* [2016] SGHC 210 (Singapore) (criticizing *Gibbs*, demonstrating that it has come under unrelenting attack, both at home and abroad).

financing woes, Hertz established a “sufficient connection” to England by obtaining debt co-issuance, thereby effectively manufacturing international jurisdiction.

One problem remained, however—a possibly ironic twist given the conjectured desire to avoid an overarching U.S. Chapter 11 proceeding. The U.K. (née Dutch) debt to the European bondholders was guaranteed by inter-corporate affiliates located in the United States, who themselves were already subject to Chapter 11 proceedings.⁶⁶ It is unclear if a U.K. court would have jurisdiction to compromise the debts of the non-scheme-filing U.S. guarantors of the European debt in the way Hertz wanted. To be sure, the United Kingdom takes a robust approach to the permissibility of third-party releases,⁶⁷ but here the guarantors wanted not release but transformation of their debt. This posture may be common in the corporate conglomerate cross-border guaranty setting. Unlike the “mere” D&O third-party release granted as a matter of course in many corporate reorganizations,⁶⁸ Hertz wanted to decouple entirely the U.S. affiliate-guarantors, who had assets that the Eurocreditors were unlikely to relinquish willingly.⁶⁹ Moreover, Hertz wanted not only to write down/off the debt of the guarantors, but also monetize (via auction) the claims held by the bondholders against those guarantors to buy them off, thus enabling a clean European recapitalization. Ordering the U.S. auction of guarantees payable by non-scheme-filing U.S. affiliates would presumably be a jurisdictional bridge too far for the U.K. court. While the United Kingdom rarely blanches from outwardly extending the reach of its insolvency laws,⁷⁰ one assumes its resolve would falter at demanding an auction of debt in another country owed by a non-debtor to the U.K. proceedings.

Once again basking in the complexities of its corporate form, Hertz then turned to the MLCBI to achieve the benefits of implementing these non-European aspects of its European subproceeding (sub to the main U.S. Chapter 11). Specifically, it put in the vote to creditors on the scheme a plan to “sever” or “bifurcate” the U.S. affiliate-guarantors’ obligations on the bonds and distribute to each bondholder a proportionate general unsecured claim in that affiliate-guarantor’s U.S. Chapter 11.⁷¹ Hertz then wanted to sell those severed and transformed claims in a U.S. auction, with the proceeds earmarked for the European creditors holding the predicating guarantees.⁷² In other words, what Hertz really wanted to do was monetize the guarantees and account for their proceeds within the financial plan of the scheme concessions. In exchange for their guarantees on the European debt subject to the scheme, the European bondholders would combine a *fixed* (discounted) return on the exchange under the scheme for the primary debt, *à la* another consent solicitation, plus a *variable* return that depended upon the success of the auction on account of their guarantees against the U.S. secondary obligors.⁷³

66. Petitioner’s U.K. Declaration, *supra* note 54, para. 6.

67. Kokorin, Madaus, & Mevorach, *supra* note 24, at 125.

68. Ralph Brubaker, *Bankruptcy Injunctions and Complex Litigation: A Critical Reappraisal of Non-Debtor Releases in Chapter 11 Reorganizations*, 1997 U. ILL. L. REV. 959, 961 (1997).

69. The specific plan under the scheme was to monetize the guarantee claims by “bifurcating” them from their underlying primary obligations, forcing collection on the primary claims to be nominally limited to the EU scheme and then treating the separate, bifurcated guarantee claims as untethered (general unsecured) claims against the guarantors to process in their Chapter 11 bankruptcies in the United States, with the added flourish of selling those claims at a court-approved auction within the 11. Petitioner’s U.K. Declaration, *supra* note 54, at 9.

70. See *Anthony Gibbs and Sons* (1890) 25 QBD 399 (Eng); *Rubin v. Eurofinance SA* [2013] 1 AC 236.

71. Petitioner’s U.K. Declaration, *supra* note 54, para. 46.

72. *Id.* at 2–3.

73. *Id.* n.10, paras. 43–46.

This cross-border plan meant that the U.K. court could not act alone. So Hertz now *finally* had to use a traditional MLCBI proceeding designed to implement the cross-border execution aspect of the scheme (namely, the U.S. guarantor's "severance" from the principal Eurodebt). To this end, Hertz U.K. Receivables Ltd filed a Chapter 15 petition in Delaware to request recognition and relief of its U.K. scheme as a foreign main proceeding of the U.K. subsidiary, seeking its enforcement in the United States as relief under the MLCBI.⁷⁴ Thus, the very proceeding that likely started in part animated by a *disinclination* of the European directors to join their companies in a U.S. Chapter 11 of maximal universalist scope found itself required to initiate MLCBI U.S. bankruptcy litigation through Chapter 15! The reason for this was that Hertz, a typical commercial actor with a complex corporate group structure, could not neatly divide its U.K., let alone European, components into crisply isolated silos. Rather, the specter of inter-corporate guarantees made it unduly challenging to have comprehensive resolution involving debt monetization within one proceeding.⁷⁵

Accordingly, in an ideal universalist world, what might have started out with one large Chapter 11 E-COMI filing (effectuated plausibly by multiple subsidiary COMIs and, as necessary, non-COMI filings by Chapter 11s) quickly turned into a two-jurisdiction filing of *quasi-parallel proceedings* ("quasi" because it was not the same debtor, as in the classical MLCBI conception of parallel proceedings).⁷⁶ Quasi-parallel proceedings might be thought of as the international analogue of filings that would be ripe for procedural consolidation were they purely domestic.⁷⁷ But quasi-parallel proceedings were not enough, due to corporate interconnectedness of debt that required refinancing; as a result, Hertz needed a third proceeding to implement the "extraterritorial" aspects of the European branch of those quasi-parallel proceedings.⁷⁸ This complexity resulted in the tangled outcome that only the bankruptcy world could love: a U.S. Chapter 11 proceeding sitting alongside a U.S. Chapter 15 proceeding.⁷⁹ While this is not unprecedented,⁸⁰ it is far from elegant. (True, both the Chapter 11 proceedings and the Chapter 15 proceeding were pending before the same court and presumably could have been procedurally consolidated given the U.S. bank account, but that did not happen.)⁸¹

The formal distinction between the U.S. Chapter 11 and the Chapter 15 combined with the timing of the U.K. scheme to lead to a curious legal posture of the relief requested within both cases. Under the scheme, Hertz sought to bifurcate (and substitute) guarantee claims that the Eurodebtor's creditors had against non-scheme U.S. affiliates,⁸² which only the Chapter

74. 11 U.S.C. § 1521 (2005); Chapter 15 Petition, *supra* note 15; Petitioner's U.K. Declaration, *supra* note 54, para. 49; see MLCBI, *supra* note 3, Ch. III, arts. 15–17 (detailing process of applying for recognition of foreign proceeding, seeking relief, and criteria therefor).

75. Clarissa Hawes, *Breaking: Car rental giant Hertz files for Chapter 11 bankruptcy protection*, FREIGHTWAVES (May 23, 2020), <https://www.freightwaves.com/news/car-rental-giant-hertz-files-for-Chapter-11-bankruptcy-protection>.

76. MLCBI, *supra* note 3, pt. 1, ch. V, art. 29 (detailing coordination required under such single-debtor concurrent proceedings); see also *id.*, pt. 2, ch. V, art. 29 (providing remarks on Article 29).

77. See Fed. R. Bankr. P. 1015 (detailing U.S. procedure for consolidation or joint administration of bankruptcy cases).

78. Voluntary Petition for Non-Individuals Filing for Bankruptcy, *In re Hertz Corp.*, No. 20-11218 (Bankr. D. Del. May 22, 2020) [hereinafter Chapter 11 Petition]; Chapter 15 Petition, *supra* note 15.

79. *Id.*

80. See, e.g., *In re Nat'l Bank of Anguilla (Private Banking Tr.) Ltd.*, 580 B.R. 64, 75–76, 102–03 (Bankr. S.D.N.Y. 2018) (containing parallel Chapter 15 and Chapter 11 filings that were both later stayed on *forum non conveniens* and international comity grounds).

81. See Petitioner's U.K. Declaration, *supra* note 54; Chapter 11 Petition, *supra* note 78.

82. Petitioner's U.K. Declaration, *supra* note 54, para. 30.

11 court could do.⁸³ Accordingly, the terms of the scheme voted on by the Eurocreditors (approved by 99%) could not on its own guarantee such relief.⁸⁴ The scheme could only guarantee that the Euroadministrators would promptly *seek* relief from the U.S. courts that those courts had no sovereign obligation to confer: “the Scheme will . . . provide the Scheme Creditors’ consent for the Chapter 11 Debtors to *seek entry of* the Bifurcation Order from this Court in the Chapter 11 Proceedings.”⁸⁵

The thick irony of this procedural posture was that the justification of such relief proffered to the U.S. court in relation to the nominally distinct corporate affiliate’s scheme of arrangement was premised upon the deep intertwinement of the operations of the worldwide enterprise. For example, in arguing for the necessity of granting the bifurcation/auction relief requested by the U.K. debtor, Hertz argued that failure to implement the scheme would result in the collapse of the European business and liquidation of their assets. The peril to “main” Hertz resulted in the following hand-wringing:

[T]he New Money Financing is necessary for Hertz Europe to continue operations[;] the Chapter 15 Debtor and Hertz Europe would be exposed to irreparable injury for which there is no adequate remedy at law in the absence of a permanent injunction.⁸⁶

[I]n the absence of alternative funding, the Hertz Europe companies may have to file for insolvency or bankruptcy proceedings in their relevant jurisdictions, which would be value-destructive for not only the international segment but the group as a whole.⁸⁷

A liquidation of the European business would, moreover, dramatically decrease the Debtors’ revenue from European franchise and other fees payable to the Debtors as well as from corporate customers and European travelers to the United States, resulting in hundreds of millions of [d]ollars in losses.⁸⁸

It is not surprising the U.K. scheme hit some snags. There are risks when the presiding court cannot offer relief, and the debtors can only “[seek] permission” from another court.⁸⁹

83. Debtors’ Mot. for Entry of an Order (I) Authorizing and Approving the Debtors’ Entry Into, and Performance Under, European Settlement and Restructuring Embodied in Noteholder Lock-up Agreement: (A) Settling Guarantee Claims, (B) Allowing Replacement U.S. Unsecured Claims, (C) Providing for the Issuance of Non-Contingent Debt Instrument, (D) Authorizing Sale of Replacement U.S. Unsecured Claims Pursuant to Sale Procedures, Including Authorizing Hertz Global Holdings, Inc. to Act as Agent to Market and Sell Such Claims and the Appointment of Moelis & Company LLC to Act as The Intermediary in Connection Therewith, (E) Authorizing Hertz System Inc. to Enter Into or Amend Certain Intellectual Property and License and Sublicense Agreements, and (F) Modifying Automatic Stay with Respect to European Noteholder Lock-Up Agreement and (II) Granting Related Relief, *In re Hertz Corp.*, No. 20-11218 (Bankr. D. Del. Dec. 23, 2020) [hereinafter Motion for Enactment of Scheme]; *see also* Petitioner’s U.K. Declaration, *supra* note 54, n.19 (noting that bifurcation motion had been filed in Chapter 11 proceeding).

84. *Approval of the Scheme by Scheme Creditors*, (Jan. 18, 2021) <https://www.lucid-is.com/hertz/> (announcing that of the 88.5% by total value creditors present for the proxy vote, 99.24% by number and 99.98% by value approve the Scheme).

85. Petitioner’s U.K. Declaration, *supra* note 54, para. 40 (emphasis added).

86. *Id.* para. 85.

87. *Id.* para. 76.

88. Motion for Enactment of Scheme, *supra* note 83, para. 57.

89. Petitioner’s U.K. Declaration, *supra* note 54, para. 33.

Disappointing surely many, the U.S. Trustee's office filed a pointed objection in the U.S. Hertz Chapter 11, objecting to the scheme administrator's request to compromise the U.S. debtors' guarantee claims against the Eurosubs.⁹⁰ The specific grounds for the protestations fell into two categories. First, the U.S. Trustee alleged the proposed distribution was unfair—and thus incapable of satisfying the Rule 9019 requirements on the approval of settlements—because the existing noteholders from the Dutch Hertz entity (HHN) could have ended up being compensated in an amount greater than payment in full, which would have resulted in inequality of distribution among creditors.⁹¹ Second, the U.S. Trustee asserted process and conflicts-based objections specifically targeted at the financial advisors of the Chapter 11 debtors, because the proposal envisioned that the same investment bank, Moelis, that advised the debtor was to work as the issuing underwriter of the general unsecured claims to be auctioned in New York on account of the former guarantors of the Eurodebt.⁹² Although Moelis insisted that it would be acting in a “purely ministerial” capacity as “agents” for the auction,⁹³ the U.S. Trustee complained that financial advisers serving the debtor and a constituency of its guarantee-claim creditors at the same time—seeking compensation for both, of course—raised inherent conflict of interest issues.⁹⁴ But there was also a broader theme to the U.S. Trustee's objection, perhaps emphasizing the “U.S.” in its title. Notwithstanding Hertz's need for a globally coherent resolution to the financial distress and restructuring, the U.S. Trustee's filing focused almost exclusively on the U.S. estates, treating them as unrelated and indifferent to the European scheme-participating entities.⁹⁵ So, for example, in response to Hertz's insistence that the auction was essential to get buy-in for the scheme of arrangement over in England and that the failure of the scheme would likely result in the liquidation of the European branches, the U.S. Trustee's reaction was a resounding “who cares?”:

90. Objection of the United States Trustee to Debtors' Motion for Entry of an Order (I) Authorizing and Approving the Debtors' Entry Into, and Performance Under, European Settlement and Restructuring Embodied in Noteholder Lock-up Agreement: (A) Settling Guarantee Claims, (B) Allowing Replacement U.S. Unsecured Claims, (C) Providing for the Issuance of Non-Contingent Debt Instrument, (D) Authorizing Sale of Replacement U.S. Unsecured Claims Pursuant to Sale Procedures, Including Authorizing Hertz Global Holdings, Inc. to Act as Agent to Market and Sell Such Claims and the Appointment of Moelis & Company LLC to Act as The Intermediary in Connection Therewith, (E) Authorizing Hertz System Inc. to Enter Into or Amend Certain Intellectual Property and License and Sublicense Agreements, and (F) Modifying Automatic Stay with Respect to European Noteholder Lock-Up Agreement and (II) Granting Related Relief, *In re Hertz Corp.*, at 1 (Bankr. D. Del. Jan. 14, 2021) (Case No. 20-11218) [hereinafter Trustee Objection].

91. *Id.* at 8–9, paras. 19, 22; *see also* Fed. R. Bankr. P. 9019(a) (stating “the court may approve a compromise or settlement”); *In re Marvel Entm't Grp., Inc.*, 222 B.R. 243, 249 (D. Del. 1998) (clarifying that “compromise” Federal Rule of Bankruptcy Procedure 9019(a) refers to should be “fair, reasonable, and in the interest of the estate”) (quoting *In re Louise's Inc.*, 211 B.R. 798, 801 (D. Del. 1997)).

92. Trustee Objection, *supra* note 90, at 11–12, paras. 28–31 (objecting that if Moelis were retained to sell debt securities related to the Replacement U.S. Unsecured Claims, it would be acting in interest of existing noteholders, not debtors).

93. Motion for Enactment of Scheme, *supra* note 83 at 10, para. 14 (protesting that Moelis would merely “act as the Intermediary to assist HGH in conducting the Auction”).

94. Trustee Objection, *supra* note 90, at 12–13, paras. 33–35 (calling out Moelis's lack of disclosure of potential conflicts of interests). The U.S. Trustees are doubtless on heightened alert to conflicts issues given recent high-profile events. *See, e.g.*, Tom Corrigan, *McKinsey Forgoes \$8 Million in Bankruptcy Fees Under Government Settlement*, WALL ST. J. (Dec. 3, 2020, 5:25 PM), <https://www.wsj.com/articles/mckinsey-forgoes-8-million-in-bankruptcy-fees-under-government-settlement-11607034334> (describing McKinsey & Company's settlement with U.S. Trustee related to its conflict-of-interest disclosure practices that resulted in McKinsey forfeiting \$8 million in legal fees associated with *Westmoreland Coal* case).

95. *See generally* Trustee Objection, *supra* note 90.

The legal and factual support presented by the Debtors fails to prove that the cost of the proposed transactions to the Chapter 11 estates (well over \$800 million) is less than the impact of a European liquidation. Further, there is no guarantee that the refinancing of the Existing HHN Notes and the HIL Loan will prevent a possible European liquidation.⁹⁶

Although the MLCBI has lofty precatory exhortations about the need to preserve full employment in its Preamble,⁹⁷ the U.S. Trustee noted in conceptual rebuttal that European liquidation (and concomitant job loss) might well bring in more for the U.S. estates of the specific debtors within the U.S. Chapter 11 proceedings.⁹⁸ Thus, Hertz U.K.’s creditors did not register for the U.S. Trustee – even if on a consolidated global basis, the destruction of going concern value within Europe would impose a deadweight social loss. This is perhaps an expected consequence of Hertz’s deliberately siloed approach to the cross-border plan that consciously avoided the full centralization of filing all debtors in the United States as a “mega-11.” This approach was exacerbated, or at the very least enabled, by the decision to constitute Hertz as an amalgam of individual corporate entities: the complexity of the corporate web stymied efficient reorganization.⁹⁹

What is one to make of the Hertz predicament? Given the enthusiastic percentages of approving creditors, it would be hard to assume matters would end poorly.¹⁰⁰ (Spoilers: they did not. The final outcome of the Hertz proceedings is set out in the margin.)¹⁰¹ But that sunny

96. *Id.* at 9–10, para. 24.

97. MLCBI, *supra* note 3 at Preamble (e) (listing one objective of MLCBI as “facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment”).

98. *See* Trustee Objection, *supra* note 90, at 9–10, paras. 24–27 (arguing need to “examine the burden” on Chapter 11 estates to gauge whether proposed transactions preventing European liquidations are appropriate).

99. Consider, with regard to “silofication,” this comment on the Groups Law’s article 27(1), which requires adequate protection of creditors: “paragraph 1 makes it clear that the reference to creditors is to the creditors of those enterprise group members participating in the planning proceeding; it does not refer to the interests of creditors of the enterprise group generally or to creditors of enterprise group members not involved in the planning proceeding.” GROUPS LAW, *supra* note 8, para. 189; *see also* GROUPS LAW, *supra* note 8, at Preamble (g) (promoting “[a]dequate protection of the interests of the creditors of each enterprise group member participating in a group insolvency solution and of other interested persons”) (emphasis added).

100. *See Approval of the Scheme by Scheme Creditors*, *supra* note 84, at 1 (Jan. 18, 2021), <https://www.lucid-is.com/hertz/> (showing over 99% creditor support by vote and value). *But cf.* Hertz U.K. Receivables Ltd, *Announcement of New Court Hearing Date* (Feb. 16, 2021) (rescheduling date of sanction hearing to occur after bifurcation motion hearing, agreement on which is required for Scheme to function); *Announcement of Deferral of Sanction Hearing* (Mar. 8, 2021) (deferring sanction hearing to “ensure that the Scheme is aligned with the terms of the Plan of Reorganisation and the wider restructuring of the Hertz group”).

101. The actual outcome of the case turned on the happy emergence from the woodwork of rival plan “sponsors” who drove up the purchase price of the assets sufficiently that unsecured creditors ended up being paid in full; even equity received a sizable distribution. Accordingly, the kerfuffle over the Eurosub bond guarantees (and their bifurcation and auction) was able to be sidestepped altogether when the contentious bonds could simply be redeemed at full value with the proceeds of the successful suitor’s investment. *See* Fourth Modified Second Amended Joint Chapter 11 Plan of Reorganization of the Hertz Corporation and Its Debtor Affiliates, *In re* Hertz Corp., No. 20-11218 (Bankr. D. Del. Apr 22, 2021); Motion for Entry of an Order (I) Approving the Withdrawal of the Petitioner’s Declaration and Verified Petition for Recognition of Foreign Main Proceeding and Motion for Order Granting Full Force and Effect to English Scheme, (II) Dismissing the Chapter 15 Case, and (III) Granting Related Relief, *In re* Hertz U.K. Receivables Ltd, No. 20-13178 (Bankr. D. Del. Apr 13, 2021); Notice of Discontinuance, *In re* Hertz UK Receivables Ltd, (Apr. 1, 2021) <https://www.lucid-is.com/hertz/> (*cited in* Motion for Entry of an Order (I) Approving the Withdrawal of the Petitioner’s Declaration and Verified Petition for Recognition of Foreign Main Proceeding and Motion for Order Granting Full Force and Effect to English Scheme, (II) Dismissing the Chapter 15 Case, and (III) Granting Related Relief, *In re* Hertz U.K. Receivables Ltd, No. 20-

prediction in no way escapes the fact that the uncertainty and somewhat disjointed approach to the process revealed some friction in the joints and necessary costs in the implementation. Easier solutions would have plausibly been obtained were Hertz simply one massive U.S. corporation, although myriad tax and other legal/business reasons overdetermined the rejection of that organizational possibility. Additionally, a mega-MLCBI proceeding premised upon determining an international enterprise's E-COMI of the whole empire would have corralled all the actors into the United States, but, again, the delicate incremental path of the MLCBI suggests consensus on such a cross-border regime is a fair way off.¹⁰²

But all hope is not lost for the next "Hertz" comprising international corporate groups. The still hot-off-the-presses Groups Law is supposed to provide greater coherence and certainty to cross-border restructurings of this size and complexity.¹⁰³ Will it? (Non-spoilers: it may.) To assess, this article now turns to examining how that law, assuming enactment by the relevant jurisdictions in this case, would have helped matters for Hertz.

II. UNCITRAL GROUPS LAW

A. Overview & Theoretical Context

Somewhat likeminded to the MLCBI, the Groups Law purports to focus on issues of coordination and cooperation rather than bite off anything as meaty as substantive harmonization.¹⁰⁴ But also like the MLCBI, the Groups Law nudges parties and states toward the centralization and jurisdictional hierarchy that is the hallmark of universalism.¹⁰⁵ Nevertheless, from the outset, it should be acknowledged that the Groups Law takes the corporate form seriously. (This attitude may or may not be warranted in cross-border insolvency.)¹⁰⁶ For example, the instrument eschews a presumptive attempt to consolidate all actors within the group toward a mega-proceeding at the E-COMI.¹⁰⁷

The primary innovation of the Groups Law is the ability to designate an insolvency "Planning Proceeding,"¹⁰⁸ which is to be shepherded by a "Group Representative."¹⁰⁹ The anticipation (but not requirement) of the Planning Proceeding is to develop a "Group

13178 (Bankr. D. Del. Apr 13, 2021)).

102. John A. E. Pottow, *Beyond Carve-Outs and Toward Reliance: A Normative Framework for Cross-Border Insolvency Choice of Law*, 9 BROOK. J. CORP. FIN. & COM. L. 197, 197–200 (2014) (noting that although universalism is becoming more widely accepted, many approaches to regulating cross-border insolvency build upon "modified universalism," which retains remnants of territorialist "give-backs").

103. Rep. of the U. N. Commission on International Trade Law, U.N. Doc. A/74/17 (July 8–19, 2019).

104. See GROUPS LAW, *supra* note 8, art. 1 (listing objectives of cooperation between courts and insolvency representatives of countries involved in case); see also GROUPS LAW, *supra* note 8, arts. 9–18 (constituting Chapter 2 of GROUPS LAW "Cooperation and coordination").

105. This has been predicted by prescient augurs. See John A. E. Pottow, *Procedural Incrementalism*, *supra* note 10, at 970–84 (showing how MLCBI primarily advances universalism's agenda through establishing jurisdictional hierarchy).

106. See, e.g., John A. E. Pottow, *Two Cheers for Universalism: Nortel's Nifty Novelty*, in ANNUAL REVIEW OF INSOLVENCY LAW 333, 359–61 (J. P. Sarra & B. Romaine, eds. 2015) (discussing empirical evidence offered at *Nortel* trial arguing that company's bond spreads did not depend on existence of cross-corporate guarantees, which, if true, might embarrass contention that lenders rely upon corporate form and guarantees in extending credit).

107. See GTE OF GROUPS LAW, *supra* note 8, para. 2 (noting that Planning Proceeding commencement location need only be where "at least one group member has the centre of its main interests (COMI)").

108. For the definition of "Planning Proceeding," see GROUPS LAW, *supra* note 8, art. 2, para. g.

109. For the definition of "Group Representative," see GROUPS LAW, *supra* note 8, art. 2, para. e.

Insolvency Solution.”¹¹⁰ These three central concepts are admittedly circular in nature, as a Group Representative is defined as someone “authorized to act as a representative of a planning proceeding,” and a Planning Proceeding is one where “[a] group representative has been appointed.”¹¹¹ The real doctrinal and conceptual work is thus being done by a Group Insolvency Solution (“GIS”), which is defined thus:

a proposal or set of proposals developed in a planning proceeding for the reorganization, sale or liquidation of some or all of the assets and operations of one or more enterprise group members, with the goal of protecting, preserving, realizing or enhancing the overall combined value of those enterprise group members.¹¹²

Five crucial attributes of the Groups Law for the present analysis reveal themselves by this design. First, there is an intentional flexibility in the eligibility of potential Planning Proceedings. There is no need to designate the E-COMI of the worldwide enterprise. Although there are important restrictions on which proceedings are eligible to be Planning Proceedings,¹¹³ the key point is that the Planning Proceeding can occur amongst any of several eligible jurisdictions.¹¹⁴ For example, applied to Hertz, presumably any of the United States, the Netherlands, or the United Kingdom could have convened a Planning Proceeding (and this is at a minimum—nothing in the Groups Law definition precludes the Canadian subsidiary from hosting the Planning Proceeding, for that matter).

Second, Planning Proceedings are premised upon modularity: there is no requirement that all members of the corporate group participate in the Proceeding; only “[o]ne or more” is needed.”¹¹⁵ Relatedly, UNCITRAL’s Guide to Enactment makes clear that there can be more than one Planning Proceeding.¹¹⁶ Thus, in the Hertz case, both the United States *and*

110. *Id.* art. 2, para. f; *see also* GTE OF GROUPS LAW, *supra* note 8, para. 35 (pronouncing law will “establish new mechanisms that can be used to foster the development and implementation of an insolvency solution for the enterprise group as a whole or for a part or parts of the group (a group insolvency solution) through a single insolvency proceeding (a planning proceeding)”).

111. GROUPS LAW, *supra* note 8, art. 2, para. e (defining “group representative”); GROUPS LAW, *supra* note 8, art. 2, para. g(iii) (defining “planning proceeding”); *see also* GTE OF GROUPS LAW, *supra* note 8, paras. 41, 44.

112. GROUPS LAW, *supra* note 8, art. 2, para. f (defining the term “group insolvency solution”):

“Group insolvency solution” is a new term and is intended to be a flexible concept. A group insolvency solution may be achieved in different ways, depending on the circumstances of the specific enterprise group, its structure, business model, degree and type of integration between enterprise group members and other factors. Such a solution could include the reorganization or sale as a going concern of the whole or part of the business or assets of one or more of the enterprise group members or a combination of liquidation and reorganization proceedings for different enterprise group members. The solution should seek to include measures that would, or would be likely to, either maintain or add value to the enterprise group as a whole or at least to the enterprise group members involved.

GTE OF GROUPS LAW, *supra* note 8, para. 42.

113. GROUPS LAW, *supra* note 8, art. 2, para. g(i) (listing requirements, including that at least one or more participating group members be in a main proceeding, that the main proceeding group member is integral to the GIS, and that a Group Representative be appointed); *see also* GTE OF GROUPS LAW, *supra* note 8, paras. 44–49 (explaining requirements in greater detail).

114. *See* GTE OF GROUPS LAW, *supra* note 8, para. 45 (observing that when “different plans are required for different parts of the enterprise group, more than one planning proceeding could be envisaged”).

115. GROUPS LAW, *supra* note 8, art. 2, para. g(i) (requiring “[o]ne or more” other main proceeding group members to be participating).

116. GTE OF GROUPS LAW, *supra* note 8, para. 45 (clarifying that “[i]t is not intended that there could be only

the United Kingdom could have convened Planning Proceedings. This is because the interrelated definition of the GIS permits design of a solution for only part of the international enterprise—multiple proceedings could develop multiple solutions.¹¹⁷ Thus, the law envisions not just flexibility but multiplicity.

Third, the law focuses attention on a new, central actor—the Group Representative. Once again, due to the modularity of the Groups Law, there can be more than one such actor, but what merits emphasis is that a single actor is given a special title to spearhead the coordinated effort.¹¹⁸ To be sure, insolvency professionals can wear several hats. So, for example, in a complicated liquidation, a U.S. Chapter 7 trustee could be both the officer under domestic law entitled to administer the insolvency estate (and hence be a potential “foreign representative” under the MLCBI) and be a Group Representative at the same time.¹¹⁹ Alternatively, legal systems intent on sharing the wealth from professional fees could have a different actor from the trustee be the Group Representative.¹²⁰

Fourth, COMI has not gone away. The Group Representative must stem from an insolvency proceeding—which will become the Planning Proceeding—that is opened in the COMI of one member of the corporate group. The law requires: “[T]he enterprise group member subject to the foreign planning proceeding has the centre of its main interests in the State in which that planning proceeding is taking place”¹²¹ Accordingly, in terms of the “market” for cross-border reorganization, a haven-flag jurisdiction could not just open itself up for parking a bank account and grounding a Planning Proceeding; the anchoring jurisdiction must house the COMI of one of the group members. Even more importantly, neither can case-planners simply incorporate a letterbox subsidiary in an attempt to manufacture COMI jurisdiction of an affiliate. The Groups Law made a nod toward E-COMI by requiring the Planning Proceeding to be located where the group member providing the requisite COMI is a “necessary and integral” part of the GIS.¹²² Notably (and unsurprisingly, for those steeped in this world), the characteristically prolix Guide to Enactment is relatively silent on the criteria for assessing necessity and integrity.¹²³ Needling over the lack of

one planning proceeding in an insolvency concerning an enterprise group”).

117. GROUPS LAW, *supra* note 8, art. 2, para. f (specifying that proposals can be “for the reorganization, sale or liquidation of some or all of the assets and operations of one or more enterprise group members”) (emphasis added); GTE OF GROUPS LAW, *supra* note 8, para. 42 (providing more detail on flexibility of term “group insolvency solution”).

118. GROUPS LAW, *supra* note 8, art. 19, para. 1 (noting that court may appoint a Group Representative who shall “seek to develop and implement a group insolvency solution”).

119. *Id.* art. 17 (providing that “[a] court may coordinate with other courts with respect to the appointment and recognition of a single or the same insolvency representative to administer and coordinate insolvency proceedings concerning members of the same enterprise group”).

120. GROUPS LAW, *supra* note 8, art. 17; *see also* GTE OF GROUPS LAW, *supra* note 8, paras. 49, 98–104 (discussing various possibilities).

121. GROUPS LAW, *supra* note 8, art. 21, para 3(c) (requiring Group Representative to provide statement to the effect that enterprise group member subject to foreign Planning Proceeding has COMI in jurisdiction in which that proceeding is taking place); GTE OF GROUPS LAW, *supra* note 8, para. 144 (clarifying that Article 21, paragraph 3(c) is in reference to Group Representative).

122. GROUPS LAW, *supra* note 8, art. 2, para g(ii) (requiring that “[t]he enterprise group member subject to the main proceeding is likely to be a necessary and integral participant in that group insolvency solution”).

123. GTE OF GROUPS LAW, *supra* note 8, para. 46 (conceding that “[n]o criteria are provided for determining whether an enterprise group member is likely to be a necessary and integral part of a group insolvency solution, as this will depend on several factors”); *cf. id.* (providing some factors, albeit limited ones, that might be considered, including “the structure of the enterprise group, the degree of integration between members, the group insolvency solution that is to be proposed, the members that will need to be included in that group insolvency solution *and so forth*”) (emphasis added). The general ability of the GTE of Groups Law to provide greater detail is due to the

guidance aside, the requirement is one that is likely to have real teeth in the face of concerns over rampant forum shopping; letterbox incorporations and fake affiliates are expressly targeted: “A main proceeding commenced with respect to an enterprise group member that would be peripheral to the development of a group insolvency solution cannot become a planning proceeding.”¹²⁴ Take that, “sufficient connection” schemes!¹²⁵

If all goes well, a Planning Proceeding is anticipated to produce a GIS, which is then put forward for approval by the creditors.¹²⁶ Here, a deliberate division between *planning* and *execution* arises with the structure of the Groups Law that emerges as its fifth key feature, with the execution provisions containing multiple tools previously unavailable to multinational enterprises.¹²⁷ While the tripartite innovation of Group Representative, Planning Proceeding, and GIS is important, the focus of those three is on the “front end” of a reorganization—the design of the actual plan. The second cluster of provisions of the Groups Law turns its attention to execution: what does it mean to have a GIS blessed in the Planning Proceeding?

To appreciate the significance of the execution-focused provisions of the Groups Law, one should start by reflecting on the inescapable constraint of sovereignty: a court in Country *A*, even if endowed with the heady title of Planning Proceeding, cannot order distribution of assets in Country *B*. The most it can do is enter an order and hope for the best when it comes time for enforcement of its orders in the courts of *B*. Indeed, this sovereign structure undergirds the MLCBI.¹²⁸ If one assumes that GISs will skew toward reorganization, then one must now take into account reorganization voting procedures for approval. Here, more so than with the MLCBI, the distinction between forum and governing law comes into sharp relief. Could a Planning Proceeding, necessarily accepting the participation of foreign corporate entities, conduct reorganization approval votes to comport with those ancillary jurisdictions’ bankruptcy laws within the confines of the primary forum?¹²⁹ The Groups Law

difference in length between the two documents. The Groups Law itself is seventeen pages long, while the GTE of Groups Law balloons to seventy-eight pages.

124. GTE OF GROUPS LAW, *supra* note 8, para. 46.

125. Without telling tales out of school, I can attest as a delegate that a palpable civil law/common law divide emerged regarding the attraction of a COMI requirement in general—and a “necessary and integral” predicate in particular—for Planning Proceedings during the deliberations of UNCITRAL’s Working Group V regarding the Groups Law.

126. Creditor approval is not always required for the GIS. *See* GROUPS LAW, *supra* note 8, art. 32(2) (containing optional provision under which if local creditor interests are deemed adequately protected, the Planning Proceeding court alone may approve those GIS portions without recourse to local court approval); *see also* GTE OF GROUPS LAW, *supra* note 8, paras. 28, 220 (dispelling implication of affirmative obligation to subject provisions of GIS to local approval by “allow[ing] a court to approve the relevant portion of a group insolvency solution, without submitting it to the applicable approval procedures under local law, if the court determined that creditors would be adequately protected”); *cf.* Recast Insolvency Regulation, *supra* note 2, art. 36, para. 5 (seeming to require local creditor vote on synthetic treatment matters). Note that culmination of a GIS is not required by a Planning Proceeding. *See* GTE OF GROUPS LAW, *supra* note 8, para. 105 (noting “the development of a group insolvency solution is only one possible result of participation”).

127. The Groups Law comprises two “parts.” “Part A: Core provisions,” includes key components to group insolvency, and “Part B: Supplemental provisions,” includes more extensive treatments of foreign creditor claims. *See* GTE OF GROUPS LAW, *supra* note 8, paras. 26–28 (describing contents of two parts in more detail).

128. MLCBI’s design envisions a foreign representative from an ancillary jurisdiction seeking “recognition” and “relief” as a supplicant, not a demander of right. E.g., MLCBI, *supra* note 3, art. 20.

129. *See generally* U.N. COMM’N ON INT’L TRADE LAW, UNCITRAL LEGISLATIVE GUIDE ON INSOLVENCY LAW, at 217–255, U.N. Sales No. E.05.V.10 (2005) (outlining factors to consider for approval of plan and noting various approaches).

provides for just such action to be taken, albeit with some reliance on optional provisions and with some limitation of scope. First, under Article 28, the Groups Law allows the Planning Proceeding in jurisdiction *A* to approve treatment of creditors and claims from jurisdiction *B*, provided those creditors and claims involve a group member that is participating in the Planning Proceeding.¹³⁰

A cognate provision, Article 29, allows a court in jurisdiction *B* to accept that determination and decline to open local proceedings.¹³¹ Unlike the EU Recast, which requires a cumbersome ratification vote in the ancillary courts,¹³² the Groups Law envisions the possibility that no such further vote will be necessary provided the local court approves the treatment (which requires the offering of an undertaking).¹³³ This so-called “synthetic” treatment of foreign claims within the main (likely Planning) proceeding is designed to dissuade the opening of secondary proceedings where the existence of those claims might otherwise trigger a local (secondary) filing.¹³⁴ This approach builds upon the EU Recast model.¹³⁵ Thus, the assurance of adequate protection of creditors can be functionally “upstreamed” to the Planning Proceeding, with the local court empowered in the ancillary jurisdiction to stay or terminate local proceedings if it thinks the Planning Proceeding court got it right. (An optional relief provision, Article 32, allows for this relief even in the absence of a main proceeding undertaking.)¹³⁶

Indeed, the Groups Law moves beyond the EU approach by allowing synthetic treatment of foreign claims not just to bypass secondary proceedings, but even to obviate the opening of *main* proceedings in the foreign jurisdiction, in the name of centralizing matters in the Planning Proceeding. This universalist incrementalism is deliberately designed to “take” the cooperative provisions of enforcement “a step further,”¹³⁷ with Articles 30 and 31 that match Articles 28 and 29. Note, however, these further provisions fall under the

130. GROUPS LAW, *supra* note 8, art. 28; *see also* GTE OF GROUPS LAW, *supra* note 8, paras. 200–207. “The purpose of these provisions is to minimize the commencement of non-main proceedings in that second State and to facilitate the centralized treatment of claims in an enterprise group insolvency.” *Id.* para. 200. Note that the text of Article 28 anticipates but does not require a Planning Proceeding. *Id.* para. 201.

131. GROUPS LAW, *supra* note 8, art. 29(b).

132. Recast Insolvency Regulation, *supra* note 2, art. 36, para. 5 (stating undertaking must be voted on for approval by local creditors in secondary proceeding).

133. *See* GROUPS LAW, *supra* note 8, art. 29; *see also* GTE OF GROUPS LAW, *supra* note 8, para. 208 (allowing “the court of the enacting State . . . to approve the treatment to be accorded in the (foreign) main proceeding”).

134. *See* GTE OF GROUPS LAW, *supra* note 8, paras. 196–97 (explaining the goal of “minimiz[ing] the need, or limit the circumstances in which it might be necessary, to commence a non-main proceeding”). For more background and exploration of synthetic proceedings, *see generally* John A. E. Pottow, *A New Role for Secondary Proceedings in International Bankruptcies*, 46 TEX. INT’L L. J. 579 (2011) (proposing concept of “synthetic proceedings”); Janger, *supra* note 26 (discussing analogous “virtual territorialist” proceedings with great sympathy); Christoph G. Paulus, *Europeanisation of the Member States’ Insolvency Laws*, 3 NIBLEJ 301, 309 (2015) (“synthetic secondary proceedings”).

135. Council Regulation (EU) 2015/848, art. 36; *see also* GTE OF GROUPS LAW, *supra* note 8, paras. 193–94 (describing treatment of synthetic non-main proceedings relative to that of main proceedings). On incrementalism within the EU approach, *see* Recast Insolvency Regulation, *supra* note 2, para. 1 (concluding “that the regulation is functioning well in general but that it would be desirable to improve the application of certain of its provisions in order to enhance the effective administration of cross-border insolvency proceedings”).

136. GROUPS LAW, *supra* note 8, art. 32 (enabling court of enacting State, following recognition of foreign Planning Proceeding, “to stay or decline to commence an insolvency proceeding” relating to enterprise group member participating in that Planning Proceeding). This relief is available provided that the enacting State court is satisfied that the interests of creditors of that participating enterprise group member are or will be adequately protected in the Planning Proceeding. *Id.*; *see also* GTE OF GROUPS LAW, *supra* note 8, paras. 218–20 (discussing this discretionary relief).

137. GTE OF GROUPS LAW, *supra* note 8, para. 211.

“optional” articles that some states not yet comfortable with this level of centralization may decline to enact.¹³⁸ Furthermore, the “additional relief” provision, Article 32, albeit housed in the optional articles, has more capacious language suggesting further deference to the Planning Proceeding.¹³⁹

This combination of planning provisions (the thrust) and execution provisions (the reach) of the Groups Law reveals an ambitious attempt to bring order to the unruly world of enterprise group insolvency. This is accomplished within the confines of respecting the corporate form, which is so important to jurisdictions that wince whenever the word “substantive” is uttered too close to “consolidation.”¹⁴⁰ But the question remains, to which it is finally time to turn: what (if anything) could this new legal instrument have done for Hertz?

B. What Could Have Happened

It is fair to conjecture that the Groups Law may have meaningfully facilitated Hertz’s reorganization, a “free fall” Chapter 11 where the debtor had to file before a coherent restructuring strategy had been settled upon.¹⁴¹ Recall that the European subsidiaries designed a plan that required the involvement of the U.S. affiliates even though the U.S. Chapter 11 proceedings did not include the European subsidiaries.¹⁴² Although presumably those plans were designed by the decisionmakers, they were not presented to one court (or a coordinated set of courts) in an orderly fashion. This confusion was underscored by the U.S. Trustee’s objection to the debt auction “requested” by participants in the U.K. scheme.¹⁴³ Had the New York Chapter 11 been designated a Planning Proceeding and the auction request presented ab initio there, then the U.S. Trustee could have participated in the discussion and raised concerns at that time that that relief was being designed as part of the plan. Thus, the objections would have been addressed in the *planning* stage, rather than responding ex post to a request from a foreign insolvency representative in accordance with an already-scheduled vote abroad.¹⁴⁴

Moreover, if the request for the claims bifurcation had come from an officially designated Group Representative, then presumably more credibility would have been

138. See GTE OF GROUPS LAW, *supra* note 8, para. 212 (discussing application of supplemental provisions). While the treatment of claims in a Planning Proceeding of an enterprise group member COMI’ed elsewhere might seem extraordinary, the sheer number of corporate entities within the typical cross-border enterprise does not make this possibility far-fetched. Cf. Pottow, *Two Cheers for Universalism*, *supra* note 106 (analyzing complex Nortel cases); *In re Nortel Networks, Inc.*, 532 BR 494 (Bankr. D. Del. 2015); *Re Nortel Networks Corp.*, 2015 ONSC 2987 (Ont. SCJ [Commercial List]).

139. See GROUPS LAW, *supra* note 8, art. 32 (permitting staying of main proceedings even without undertakings or fully synthetic treatment of claims).

140. See, e.g., Stefan Sax et al., *Substantive Consolidation and Other Aspects of Cross-Border Insolvencies of Groups of Companies*, INT’L INSOLVENCY INST. (Sept. 23, 2018) (discussing substantive consolidation); see also Pottow, *Procedural Incrementalism*, *supra* note 10, at 348 (noting courts’ “disinclinations toward substantive consolidation”).

141. See Clarissa Hawes, *Breaking: Car Rental Giant Hertz Files for Chapter 11 Bankruptcy Protection*, FREIGHTWAVES (May 23, 2020) <https://www.freightwaves.com/news/car-rental-giant-hertz-files-for-Chapter-11-bankruptcy-protection> (reporting that “Hertz had little choice but to enter a free-fall, Chapter 11 proceeding without sufficient time to plan”).

142. Chapter 11 Petition, *supra* note 78; Petitioners’ U.K. Declaration, *supra* note 54.

143. Trustee Objection, *supra* note 90, at 10.

144. Trustee Objection, *supra* note 90, at 3 (describing Chapter 15 proceeding and English Scheme already in motion).

accorded the assertion that the liquidation of the enterprise's European branch would spell disaster. It is one thing for Europeans to say that European operations are important; it is another, however, for the global insolvency professional, who takes a worldwide perspective, to say that European operations are important. More fundamentally, in a hypothetical world where the central proceeding emphasized the interconnectedness of the business, it would have been difficult for a U.S. Trustee to maintain its siloed mentality focusing exclusively on the U.S. Chapter 11 estate.¹⁴⁵

The preceding analysis assumes that the U.S. Chapter 11 would have been designated the Planning Proceeding under the structure of the Groups Law. Yet the law also would have permitted the two-track path Hertz initially followed; it could have done this by designating two Planning Proceedings: one in the United States and one in Europe. Recall that Planning Proceedings can be subsets of the overall affair. So, for example, if creditors did not want to engage in transoceanic travel, two different, though coordinated, Planning Proceedings could also have worked.¹⁴⁶ That said, the question remains regarding the comparative attractiveness of the United Kingdom to the Netherlands. Would the Groups Law have offered any help by designating, for example, the Netherlands as the jurisdiction for the Planning Proceeding, thereby obviating the need for the jurisdictional shift created by the consent solicitation? Here the answer must be more guarded. Under the EU Recast, a Dutch insolvency proceeding would have been recognized in the United Kingdom,¹⁴⁷ so they must have been motivated by "traditional" forum shopping impulses: a desire to use the congenial scheme mechanism as opposed to the (pre-scheme) Dutch restructuring provisions. Thus, while the Groups Law might have facilitated a one-step approach by centralizing matters in the United States, it is less clear that the two-step approach, envisioned by the Groups Law's provision for multiple Planning Proceedings, would have suppressed the urge to jurisdiction shift by transferring the Eurodebt from the Netherlands to the United Kingdom. (Of course, with the new Dutch scheme procedure, it is not clear how strong that inclination will henceforth remain.)¹⁴⁸

Centralization is not necessarily an unmitigated good. For example, one negative aspect of centralized resolution (which may well have been afoot in *Hertz*) is the aforementioned concern among directors in some jurisdictions that filing their entities in the United States may trigger obligations under domestic law to file locally or otherwise expose them to unwelcome legal obligations. On this specific point, however, there is one provision of the Groups Law that might be particularly helpful to assuage these concerns: the concept of "participating" in group planning.¹⁴⁹ Once an insolvency proceeding has begun in a specific State where a member has its COMI, "any other enterprise group member may *participate* in that insolvency proceeding for the purpose of facilitating cooperation and coordination under this Law, including developing and implementing a group insolvency solution."¹⁵⁰

145. A cognate idea is reflected in Article 26(2), which affords the Group Representative universal standing to argue to stop a renegade local proceeding in the name of the GIS. GROUPS LAW, *supra* note 8, art. 26.2; *see also* GTE OF GROUPS LAW, *supra* note 8, para. 188 (discussing this power).

146. *See* GTE OF GROUPS LAW, *supra* note 8, para. 45 (reminding that more than one Planning Proceeding may exist at a time); *see also id.*, paras. 2(a), 27, 33, 35 (providing framework for "[c]oordination and cooperation between courts, insolvency representatives and a group representative (where appointed), with respect to multiple insolvency proceedings concerning members of an enterprise group").

147. *See generally* Recast Insolvency Regulation, *supra* note 2 (requiring intra-EU recognition of insolvency proceedings).

148. *See* WHOA, *supra* note 55.

149. GROUPS LAW, *supra* note 8, art. 18; *see also* GTE OF GROUPS LAW, *supra* note 8, paras. 105–13 (explaining "participation").

150. GROUPS LAW, *supra* note 8, art. 18(1) (emphasis added).

Additionally, “[a]n enterprise group member that has the centre of its main interests in another State may *participate* in an insolvency proceeding” unless prohibited from doing so by a court in that other State.¹⁵¹ Participation by group members in the aforementioned proceeding is explicitly “voluntary,” and a “member may commence . . . or opt out . . . at any stage.”¹⁵² Participants have “the right to appear, make written submissions and be heard in that proceeding on matters affecting that enterprise group member’s interests and to take part in the development and implementation of a group insolvency solution.”¹⁵³

Similarly, but even lighter-touch than the U.S. concept of a limited appearance,¹⁵⁴ the Groups Law confirms that a member of the group has the right to participate in the group solution even if that enterprise is not in insolvency proceedings itself—indeed, even if not insolvent itself.¹⁵⁵ If this provision works as intended, it may well capture the best of both worlds: quasi-formal involvement in designing the restructuring plan without exposure to legal requirements triggered by a formal insolvency filing.¹⁵⁶

Now, before one gets carried away celebrating the grand success that the Groups Law might have showered upon Hertz, a sobering reminder may rain on that parade: planning is only half the design of the model law—recall that the second part devotes its attention to execution. Under those provisions, it is uncertain how much the Groups Law will bring to the table. As discussed above, the execution provisions contain two big innovations. First, they allow “upstream approval,” whereby a local court need not convene a whole new proceeding if the Planning Proceeding court already found that local creditors would be adequately protected (subject, of course, to any approval procedure in such circumstances mandated by local law).¹⁵⁷ More precisely, if so satisfied, the local court has the power to stay the opening of local proceedings and grant “any additional relief” to the Planning Proceeding (sought,

151. *Id.*, art. 18(2) (emphasis added).

152. *Id.*, art. 18(3).

153. *Id.*, art. 18(4).

154. See 11 U.S.C. § 306 (allowing limited appearance by foreign representative in Chapter 15 without risk of representative subjecting itself to U.S. jurisdiction); see also GROUPS LAW, *supra* note 8, art. 18(4) (clarifying that “[t]he sole fact that an enterprise group member is participating in such a proceeding does not subject the enterprise group member to the jurisdiction of the courts of this State for any purpose unrelated to that participation”); see also GTE OF GROUPS LAW, *supra* note 8, paras. 108–12 (describing group member’s right to participate without submission to jurisdiction).

155. GTE OF GROUPS LAW, *supra* note 8, para. 111 (“The participation referred to in article 18 is intended to apply to all enterprise group members, irrespective of their financial status. Accordingly, it makes no distinction between an enterprise group member that might be subject to insolvency proceedings and an enterprise group member that is not, avoiding any distinction based upon financial status, such as between what might be described as an ‘insolvent’ or ‘solvent’ enterprise group member.”).

156. Of course, to get relief, the entity must file. See GROUPS LAW, *supra* note 8, art. 20(2) (“Relief under this article may not be granted with respect to the assets and operations located in this State of any enterprise group member participating in a planning proceeding if that enterprise group member is not subject to an insolvency proceeding, unless an insolvency proceeding was not commenced for the purpose of minimizing the commencement of insolvency proceedings in accordance with this Law.”); see also GROUPS LAW, *supra* note 8, art. 22(4), 24(3) (replicating Article 20(2) for foreign Planning Proceeding recognition); GTE OF GROUPS LAW, *supra* note 8, paras. 48, 112, 132–36, 164, 180 (clarifying that relief “may not be granted with respect to the assets and operations of an enterprise group member for which no insolvency proceeding has commenced, unless the reason for not commencing relates to the goal of minimizing commencement of insolvency proceedings under the Model Law”).

157. See GROUPS LAW, *supra* note 8, art. 28, 30 (clarifying that local courts do not need to get involved unless compelled by local requirements).

presumably, by the Group Representative).¹⁵⁸ In the supplemental provisions, the Groups Law goes even further and appears to allow the local court to dispense with those local procedures altogether.¹⁵⁹ Second, the execution provisions allow for synthetic treatment of local creditors within the Planning Proceedings as a justification to stay not just the opening of secondary proceedings,¹⁶⁰ but also main proceedings.¹⁶¹

Just how much additional relief will these executions provisions provide, especially for a cross-border insolvency plan that involves a scheme of arrangement? Consider that one of the central underlying features of a scheme of arrangement is to leave the trade debt alone, which of course effectively confers upon it 100% priority protection. This feature is similar to that offered by a synthetic proceeding, which is essentially a bribe to local creditors not to open secondary proceedings.¹⁶² Thus, it is not clear that synthetic secondaries, let alone the synthetic mains that are a primary (perhaps inordinate) focus of the execution provisions of the Groups Law, will have much role to play in a scheme-based cross-border insolvency regime. This scheme-focused observation may in turn raise doubt about how much bang for the buck the new law will actually bring, at least on the execution front in a scheme-rife cross-border world.

But synthetics are not the only relief focus of the Groups Law; there is also the upstream approval of the GIS. Thus, the U.S. court in the hypothetical mega-U.S. Planning Proceeding could have made an upstream finding that the interests of local creditors had been adequately protected under its approved plan.¹⁶³ While such a finding may have helped Hertz's reorganization, that conclusion delves into the realm of speculation.¹⁶⁴ Caution is needed in assessing the law's influence. Some tea leaves in the Groups Law suggest possible difficulties ahead. Namely, certain comments in the Guide to Enactment seem to endorse the silo-based focus of a best interests test, training the focus on each individual corporate entity, not the aggregate. For example, in elaborating on the adequate protection of creditors requirement of Article 27,¹⁶⁵ the Guide warns: "Paragraph 1 makes it clear that the reference to creditors is

158. GROUPS LAW, *supra* note 8, art. 20(f), 20(h), 29(b), 31(b); GTE OF GROUPS LAW, *supra* note 8, para. 124 (noting "the court, while granting, denying, modifying or terminating any relief, must be satisfied that the interests of creditors and other interested persons are adequately protected"); *see also id.*, para. 130 (explaining rationale for ability to stay proceedings).

159. GROUPS LAW, *supra* note 8, art. 32(1) ("If, upon recognition of a foreign planning proceeding, the court is satisfied that the interests of the creditors of affected enterprise group members would be adequately protected in that proceeding . . . the court . . . may stay or decline to commence an insolvency proceeding in this State."); *see also* GTE OF GROUPS LAW, *supra* note 8, paras. 217–19 (describing rationale and principles for additional relief).

160. GROUPS LAW, *supra* note 8, art. 29.

161. GROUPS LAW, *supra* note 8, art. 31; *see also* GTE OF GROUPS LAW, *supra* note 8, para. 216 (allowing "the court of the enacting State to approve the treatment to be afforded to the claims of local creditors in the foreign proceeding and to stay any main proceeding already commenced or decline to commence such a main proceeding"); *see generally Recast Insolvency Regulation*, art. 36 (synthetic secondary proceedings); Pottow, *A New Role*, *supra* note 135 (discussing same). Perhaps the next incremental step for the EU is to apply synthetic treatment toward main proceedings, although that would presumably require another Recast.

162. Pottow, *A New Role*, *supra* note 135, at 584–85 (demonstrating how synthetic procedures were once utilized to "buy[] off the Spaniards" who might have opened secondary proceedings regarding U.K. debtor).

163. GROUPS LAW, *supra* note 8, art. 32; *see also* GTE OF GROUPS LAW, *supra* note 8, paras. 211, 218–220 (noting that "the court itself can approve the group insolvency solution if it is satisfied that the interests of creditors of affected enterprise group members are or will be adequately protected in the group insolvency solution").

164. One way the Planning Proceeding could be helpful in the execution phase might be with an upfront determination that third-party releases will be essential for the reorganization contemplated by the GIS to work. *Cf.* Kokorin, Madaus, & Mevorach, *supra* note 24, at 139 (reporting that certain jurisdictions, such as England and more recently the Netherlands, permit third-party releases, at least in presence of sufficient justification).

165. GROUPS LAW, *supra* note 8, art. 27(1).

to the creditors of those enterprise group members participating in the planning proceeding; it does not refer to the interests of creditors of the enterprise group generally. . . .”¹⁶⁶ This perspective could embolden the U.S. Trustee’s parochialism, as seen in *Hertz*, although some scholars have muted those territorialist impulses by redirecting them toward the valuation spread available in a reorganization-versus-liquidation no-worse-off analysis.¹⁶⁷ Encouragingly, the following softening (unravelling?) appears nearby in the same discussion of the Guide:

Where the group insolvency solution affects or modifies an enterprise group member’s interests, it may be helpful to the approving court to consider the group insolvency solution in its entirety, rather than only the portion affecting the particular enterprise group member. That approach would provide the court with the overall context for resolving the enterprise group’s financial difficulties of which the particular enterprise group member is a part. It would also assist the court in assessing the potential success of the group insolvency solution, which may be relevant to a decision to stay or decline to commence a proceeding under article 29 or 31.¹⁶⁸

So, too, does the Guide offer a helpful anti-parochial discussion on “local creditors.”¹⁶⁹ Given the ambiguity regarding the Guide’s endorsement of “silofication,” and possibly misdirected focus on secondary proceedings, the safest overall conclusion appears to be that the benefits of the Groups Law for proceedings such as *Hertz* seem most saliently centered on planning and design. The execution benefits seem less certain.¹⁷⁰

On broader analysis, while the Groups Law seems a modest development of international commercial law concerning the treatment of corporate group insolvency, and while it shies away from bolder forms of corporate consolidation, such as those seemingly at work in the cross-border behemoth of *Nortel*,¹⁷¹ its potential impact should not be sold short. Indeed, its coordination and corraling attributes may well have helped facilitate a case like *Hertz*, perhaps preventing the embarrassing need of having potentially “dueling” Chapter 11s and 15s regarding the same global enterprise. Gauging the impact of its more contentious execution provisions on non-proceedings (that required optionality to be agreed upon as a model law under UNCITRAL’s consensus-based decision-making process)¹⁷² requires, as

166. GTE OF GROUPS LAW, *supra* note 8, para. 189.

167. *See, e.g.*, Edward J. Janger, *Silos: Establishing the Distributional Baseline in Cross-Border Bankruptcies*, 9 BROOK. J. CORP. FIN. & COM. L. 180 (2014).

168. GTE OF GROUPS LAW, *supra* note 8, para. 187.

169. *Id.* para. 191 (“In many cases, the affected creditors will be ‘local’ creditors. Nevertheless, in enacting article 27, it is not advisable to attempt to limit it to local creditors. . . . The general policy of the Model Law is that all creditors, wherever they might be considered to be located, should be treated fairly and as far as possible be accorded the same treatment.”).

170. The fact that many reorganizations are “prepackaged” does not necessarily diminish the utility of the GROUPS LAW here. Although the Planning Proceeding may be short in duration for prepacks, its benefit of galvanizing judicial imprimatur of approval should not be understated.

171. *See generally* Pottow, *Two Cheers for Universalism*, *supra* note 106 (analyzing *Nortel* cross-border cases).

172. *See, e.g.*, GROUPS LAW, *supra* note 8, art. 30–32 (promulgating “Part B: Supplemental provisions”); *see also Facts About UNCITRAL*, UNCITRAL (2004), <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral-leaflet-e.pdf> (noting Commission “decisions are taken by consensus, not by vote”); Susan Block-Lieb & Terence C. Halliday, *Harmonization and Modernization in UNCITRAL’s Legislative Guide on Insolvency Law*, 42 TEX. INT’L L.J. 475 (2007) (providing excellent analysis of UNCITRAL decision making); SUSAN BLOCK-LIEB & TERENCE C. HALLIDAY, *GLOBAL LAWMAKERS: INTERNATIONAL ORGANIZATIONS IN THE*

said, more caution; the international field will have to await further experience. One thing that is known is that the Hertzes of this world are not outliers, as *Nortel* demonstrates. The apparent hesitation of the European subsidiaries to be drawn into U.S. proceedings, the seeming inability to execute full relief within the confines of one specific proceeding (even one as august as an English scheme of arrangement), and the flexibility of allowing not just one—but possibly multiple—Planning Proceedings all suggest the Groups Law could become an attractive tool for international juggernauts facing financial distress.

Finally, as for the previously referenced market for corporate reorganization, the ultimate effect of this UNCITRAL innovation is similarly unclear. On the one hand, the benefits of having a Planning Proceeding as the nerve center of the cross-border dispute may place more figurative eggs in one basket, sharpening the elbows that compete for that coveted prize.¹⁷³ On the other hand, the intentional modularity of allowing multiple Planning Proceedings and permitting low-stakes “participation” but not formal appearance in the Planning Proceeding may allow and indeed encourage some relaxation of the primary centralization pull. If so, then that counter-force may in turn remove some eggs from the centralized basket and diminish forum shopping impulses concomitantly by sharing the wealth of the insolvency system.¹⁷⁴ Furthermore, the Group Law’s “necessary and integral” requirement may take the wind out of the sails of fora seeking to market themselves in the reorganization business,¹⁷⁵ further auguring decreased jurisdictional competition concerns. From this overall perspective, and considering its hypothetical deployment in *Hertz*, the Groups Law may well be a desirable middle ground that allows greater centralization of these cross-border disputes without committing whole hog to an E-COMI-based universalism and its godless substantive consolidation. That cautious step forward may be exactly what the international insolvency system needs—at least for now.

CRAFTING OF GLOBAL MARKETS (Cambridge Univ. Press 2017) (describing further UNCITRAL decision making).

173. See *Forum Shopping in Transnational Insolvency*, *supra* note 45, at 812 (noting how jurisdictions are able to compete by making their insolvency laws more attractive than those of other jurisdictions).

174. Cf. John A. E. Pottow, *New Approach to Executory Contracts*, 96 TEX. L. REV. 1437, 1455–66 (2018) (noting that payoff reduction reduces incentive to invest in legal characterization battles).

175. GROUPS LAW, *supra* note 8, art. 2(g)(ii).