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I. Introduction

The ongoing process of globalization has fostered a significant increase in international trade in goods and services, foreign direct investment, and global financial transactions. In addition, there has also been a significant increase in cross-border corporate insolvency matters involving multinational enterprises (MNEs) as both debtors and creditors. By and large, national insolvency laws, which vary considerably due to differing policies, substantive law, and procedures, have been ill equipped to handle such insolvency matters in an international setting based on transparency, fairness, and predictability. In order to address the various concerns that arise with a cross-border corporate insolvency, such as the applicable law, competent forum, and recognition and enforcement matters, responsible policy-makers and academics long have argued for the creation of some form of viable international insolvency approach or framework.

The debate over the appropriate policy underpinnings for such an approach or framework has revolved around what is often presented as an either-or spectrum of two ends comprised of (1) the theory of Universality that proposes a single court charged with implementing a single bankruptcy law to worldwide claimants and (2) the theory of Territoriality that is founded on the premise that each jurisdiction can only adjudicate the debtor's insolvency on a territorial basis and distribute local assets to local claimants. While these theories may prove helpful in grounding and sifting through the various policy approaches, the debate on their diametric opposition and concentration on theory has yielded little in the way of a practical solution.

To date, there is one unbinding international instrument that suggests an approach geared towards the recognition of foreign insolvency judgments and is based on moderate choice of forum provisions (and not on substantive law)—the UNCITRAL Model Law on Cross-

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Border Insolvency[1] (Model Law). Although the Model Law has a number of significant merits that could serve as a foundation for a more rational international corporate insolvency framework, the Model Law falls short of the broader expectations that a minimally acceptable international insolvency system should fulfill.

Recently, a significant regional insolvency arrangement, the European Union Council Regulation on Insolvency Proceedings[2] (Regulation), has been enacted. While the Regulation also includes choice of forum provisions with recognition and enforcement mechanisms, it provides for a more complete and predictable system in governing the insolvency of MNEs within the European Union (EU). As such, this article will argue that important lessons can be learned from the Regulation, and when combined with certain elements from a revamped Model Law approach, an improved international insolvency framework may be found.

The Regulation may be the result of closer legal, judicial, and market integration among EU member states,[3] and as a result the overall European insolvency regime may not be suitable to implement elsewhere in its entirety. But there are nonetheless some useful approaches that could be transmitted to the Model Law, thereby making the Model Law more responsive to the demands of domestic social policies, creditors, debtors, and the insolvent MNE's stakeholders in general. Although some authors have argued the Regulation offers little to base an international insolvency system on beyond the boundaries of a relatively small community,[4] the Regulation addresses the same issues and concerns as those treated under the Model Law in a more complete manner.

For instance, the first set of issues the Regulation addresses is related to rather general, yet vital concerns such as creditors' rights, equity, fairness,[5] and expediency.[6] A perfect

1. Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law, G.A. Res. 52/158, U.N. Doc. A/RES/52/158 (Jan. 30, 1998) [hereinafter Model Law].

2. The EU legislation on cross-border insolvency was consolidated in a Council regulation. *See* Council Regulation 1346/2000, 2000 O.J. (L 160) (EC) (May 29, 2000), *available at* http://europa.eu.int/eur-lex/en [hereinafter Regulation]. The Regulation retrieves to a great extent the provisions of the non-ratified EU Insolvency Convention, in connection to which an official explanatory report was issued. Most of the comments and underlying policy considerations contained in that report remain valid to elucidate the purpose and objectives of the newly adopted Regulation. *See* MIGUEL VIRGOS & ETIENNE SCHMIT, REPORT ON THE CONVENTION ON INSOLVENCY PROCEEDINGS (May 3, 1996), *available at* http://aei.pitt.edu/archive/00000952/.

3. Such an achievement is often regarded as the result of the institutional infrastructure already present within the European Community. While mutual efforts of creating a common market, along with established and shared institutional traditions, have undoubtedly facilitated the adoption of the Regulation, one may ask, based on the European experience, what degree of legal and judicial integration is necessary to achieve such a compromise on a global level. Although treating such a question is beyond the scope of this article, this could be the basis of a further study in the area of cross-border insolvency.

4. *See* Ian F. Fletcher, *The European Union Convention on Insolvency Proceedings: An Overview and Comment, With U.S. Interest In Mind*, 23 BROOK. J. INT'L L. 25, 48 (1997) (arguing that the European Insolvency model anticipated by the adoption of the 1995 convention may not serve as a blueprint for other groupings of states). The author states that "[w]hat is considered to be almost a matter of necessity for such a closely coordinated and coalescent group of sovereign states as those comprising the EU may well seem totally impractical to states less deeply committed to the principles of supranational integration."

5. *See* Regulation, *supra* note 2, at art. 21 of Preamble ("[a] creditor should be able to keep what he has received in the course of insolvency proceedings but should be entitled only to participate in the distribution of total assets in other proceedings if creditors with the same standing have obtained the same proportion of their claims").

6. *See* Model Law, *supra* note 1. In a guide to enactment, the UNCITRAL commission stressed that one of

insolvency regime that entirely satisfies the claims of all parties involved does not exist, however, some systems are considered more predictable than others and can facilitate insolvency proceedings and meet the expectations of the parties to a greater extent than others. In this regard, the Regulation may be considered a breakthrough in terms of enhancing predictability, equality among creditors, and judicial cooperation.[7]

The second set of issues the Regulation deals with stems from traditional legal uncertainties and primarily pertains to the scope of the Regulation, the rules governing the choice of law and forum, and recognition and enforcement of foreign insolvency judgments.[8] Since the Regulation addresses these concerns in a comprehensive and clear manner, its study may suggest a number of improvements to the Model Law that increases the prospect of its adoption by a greater number of countries.[9] This, however, does not imply the replication of the Regulation, nor its projection onto the global level; rather the Regulation simply illustrates that despite significant differences between the domestic insolvency laws of EU member countries,[10] a binding and, most importantly, predictable regional insolvency system could be created.

In parallel, the Regulation fashions a realistic compromise between the Universality and the Territoriality theories of insolvency proceedings[11] through a simple conflict of laws approach, and not substantive insolvency laws. This compromise is something the international community has not yet achieved, not even through the Model Law whose provisions are wanting in many respects. As a result, the EU's insolvency regime may be thought of as a pilot system on cross-border insolvency that yields the advantages of both theoretical approaches. Such a pragmatic model could inspire the international community into upgrading the Model Law by including more effective and functional provisions with respect to the competent forum, applicable law, and recognition of foreign insolvency judgments. To this end, a thorough and comparative analysis of the Regulation and the Model Law

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the primary objectives of the Model Law is to increase expediency in the resolution of cross-border insolvency cases. United Nations Commission on International Trade Law, 1997 UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html [hereinafter Guide to Enactment].

7. Bob Wessels, *Primer on the New European Insolvency Framework*, 17-AUG AM. BANKR. INST. J. 12, 12 (1998) [hereinafter Wessels, *Primer*].

8. *See* Regulation, *supra* note 2, at art. 8 of Preamble.

9. Insofar as each country has no obligation to enact the Model Law, the Model Law's success or failure would greatly depend on the number of countries that have deliberately adopted it. In this regard, the UNCITRAL commission has made every effort to render the Model Law more appealing and flexible in order to accommodate domestic constraints in each country.

10. *See* Regulation, *supra* note 2, at art. 11 of Preamble (stipulating that because of the "widely differing substantive laws" between member states, the Regulation could not provide for a single set of universal proceedings).

> Why didn't Europe devise a single exclusive universal form of insolvency proceedings for the whole of the community? The answer is this: diversity. It was considered too difficult to implement a universal proceeding without modifying, by the application of the law of any state of its opening of proceedings, pre-existing rights created before the insolvency under the different national laws of the member states.

Bob Wessels, *Principles of European Insolvency Law*, 22-SEP AM. BANKR. INST. J. 28, 28 (2003).

11. *See* Anne Nielsen et al., *The Cross-Border Insolvency Concordat: Principles to Facilitate the Resolution of International Insolvencies*, 70 AM. BANKR. L.J. 533, 534-35 (1996) (arguing Modified Universalism to be the most appropriate approach to combine the benefits resulting from both the Universalistic and Territorial theory while discarding many of their respective disadvantages).

could prove constructive and stimulating to the proponents of a more adequate global solution to a MNE's default.

The scope of this article, however, will focus on choice of forum provisions and their effects under both the Model Law and the Regulation. Although the EU Insolvency Convention was an important source of inspiration to the UNCITRAL working group,[12] and the Model Law and the Regulation follow the same standards in identifying the forum entitled to open insolvency proceedings against the multinational debtor,[13] their purpose, objectives, and effects greatly differ from each other. The first part of this article will highlight how the scope of main insolvency proceedings is much broader and uninhibited under the Regulation than it is under the Model Law. It will be examined whether the Model Law could follow the Regulation's approach by enabling the forum of main proceedings to have overall jurisdiction over the debtor's assets, including those located in jurisdictions where non-main proceedings cannot be initiated. This would prove more effective in creating a cheaper and more expedient process to administer the MNE debtor's estate, while increasing the chances of reorganizing the MNE debtor.

In contrast, domestic proceedings, whether known as secondary or non-main proceedings,[14] are more restricted under the Regulation. This provides more viable protection to domestic creditors by enabling the creditor to apply for specific types of relief in order to secure their credit. The second part of this article will therefore identify what the advantages are of such a restricted approach, and how the Model Law falls short of realizing these benefits by conferring an undefined reach to non-main proceedings. The last part of the article will study the most interesting aspect of the Regulation with respect to the relationship it establishes between main and secondary proceedings. Indeed, the primacy of main proceedings over secondary proceedings under the Regulation realizes some important advantages of the Universality theory. Although the Model Law modestly implies such a primacy, the ensuing benefits remain subject to the courts' discretion and are contingent upon whether an ad hoc understanding could be reached among the various courts involved in a cross-border insolvency case.

II. Main Proceedings and the Debtor's Centre of Main Interests

Rather than engaging in a lengthy discussion on the most appropriate criteria to be used to determine a debtor's home country, the Regulation has established a rebuttable presumption as to where the home country is located, thus giving courts the upper hand in deciding difficult cases. Indeed, the debtor's center of main interests, which is usually synonymous with the debtor's home country, is presumably the place where that debtor is registered. After all, the determination of the debtor's home country seems more a question

12. It should be noted that the Regulation contains the same provisions of the EU Insolvency Convention of 1995 that was not ratified. *See* Andre J. Berends, *The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview*, 6 TUL. J. INT'L & COMP. L. 309, 320 (1998).

13. The Model Law, however, is only concerned with recognition matters, and not with the determination of criteria allowing a given forum to open insolvency proceedings against the debtor.

14. *Compare* Model Law, *supra* note 1, at art. 2(c) (using the term "non-main proceeding" to denote that no hierarchy between the scope of such proceedings and main proceedings exists) *with* Regulation, *supra* note 2 (using the terms main and secondary proceedings, with the meaning of secondary proceedings being limited to the territory of opening and only consisting of winding up proceedings).

of fact that courts should have the final word in deciding by considering the circumstances surrounding each case.

In reality, this presumption only reverses the burden of proof and gives a procedural boost to creditors who have taken into account the laws of the forum where the debtor is registered.[15] Therefore, the first part of this section will study the definition and purpose of the debtor's home country as spelled out under the Regulation. Although the Model Law follows the definition of the debtor's center of main interests contained in the Regulation, the second part of this section will explore how the concept of the debtor's center of main interests fulfills a more significantly restricted purpose under the Model Law than it does under the Regulation. The third part of this section will highlight how the Regulation achieves a high degree of predictability and unity with respect to the scope of main proceedings. The final part of this section will explain the underlying policy choices that led each instrument to follow a different approach and whether a change in Model Law policy is desirable.

A. The EU Regulation

In order to achieve a substantive degree of unity in insolvency proceedings, the Regulation prescribes an innovative methodology to determine the forum that is entitled to decide the debtor's insolvency within the EU. Pursuant to article 3(1) of the Regulation, there is a single forum that has exclusive jurisdiction over the entirety of the debtor's estate.[16] Such proceedings, known as the main proceedings, take place where the debtor has the center of its main interests. While the Regulation does not give a rigid definition of this center, it provides for certain guidelines in order to determine where that center is located with substantial certainty. Indeed, article 3(1) establishes a rebuttable presumption according to which the center of main interests is located at the "place of the registered office."[17] This indication would, in most cases, prove useful to decide where the main proceedings could be opened.

Although this criterion fails to give clearer guidelines in cases where the debtor has registered several of its offices, the preamble of the Regulation, which should be construed as a complementary instrument to the Regulation and thus binding[18] upon member states, provides further guidance regarding the interpretation of the debtor's center of main interest. It stipulates in article 13 that this center is presumed to be the place "where the debtor conducts the administration of his interests on a regular basis and therefore ascertainable by third parties."[19]

15. This presumption applies in the case of an adjusting creditor who has measured risk taking before entering into a transaction with the multinational debtor.

16. Regulation, *supra* note 2, at art. 3.1.

17. *Id.*

18. In this regard, it is important to mention that traditionally common and civil law countries perceive the preamble differently. Generally, this preamble has an executory force in civil law countries while providing for mere non-binding guidelines to common law courts. *See* Ian F. Fletcher, *The European Union Convention on Insolvency Proceedings: Choice-of-Law Provisions*, 33 Tex. Int'l L.J. 119, 119-20 (1998) [hereinafter Fletcher, *Choice-of-Law Provisions*].

19. Regulation, *supra* note 2, at art. 13 of Preamble.

This rather flexible approach of defining an important concept can clearly be open to criticism.[20] According to some scholars,[21] the indeterminacy of the debtor's center of main interests could affect the predictability necessary in insolvency proceedings.[22] Although the registered office of the debtor is easily identifiable, it is argued that the language of the Regulation may encourage creditors to reverse this presumption to their advantage. A given class of creditors might benefit from privileged priority claims under the rules of the forum they seek to establish as the debtor's center of main interest. To achieve this, those creditors may try to establish the fictiveness of the place of registration, thereby extending the process and increasing costs. If these creditors were to succeed in assigning the jurisdictional competence to another forum,[23] less sophisticated creditors may face a less favorable insolvency regime. This could create a certain inequality among creditors, especially when there has been reliance on the debtor's place of registration as indicated by the Regulation.

Despite these criticisms, the flexible definition of the debtor's center of main interests can be advantageous, if not necessary. Indeed, fourteen member countries ratified the Regulation,[24] each with its own domestic insolvency laws and differing underlying policies. These differences translate into diverse legal principles, objectives, and purposes that domestic insolvency proceedings[25] seek to achieve. A flexible definition of the debtor's center of main interests presents the advantage of coping more easily with the requirements of each jurisdiction's domestic insolvency law. The flexible definition can also further facilitate the implementation of the Regulation between member states without the need to amend domestic laws.

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20. *See* James H.M. Sprayregen et. al., Moderated Discussion at the American Bankruptcy Institue Spring Meeting [041802 ABI-CLE 287], *International Issues: Are You Ready for the New European Union Regulations?* (April 18-21, 2002) (arguing that the "EU Insolvency Regulation leaves many questions unanswered, and itself gives rise to many questions and uncertainties").

21. *Id.*

22. Jack Weinberg, *What Are U.S. Creditors' Rights?*, 20 No. 7 BANKR. STRATEGIST 3 (2003) (arguing that the 1995 European convention on insolvency proceedings that contains the same provisions as the EU Regulation to determine the debtor's center of interest,

> failed because it did not provide sufficient predictability to creditors attempting to determine which of the jurisdictions involved in a cross-border bankruptcy will be the forum for the main proceeding. Obviously, that inability was critical because creditors could not predict which state's laws would govern their claims).

23. Forum shopping is argued to present a high risk under the Regulation. A recent decision by the French Court of Appeals of Versailles testifies to that risk. *See* Re ISA Daisytek SAS, Cour d'appel [CA] [regional court of appeal] Versailles (Sept. 4, 2003), *available at* http://www.iiiglobal.org/country/european_union.html. *See also* Roland Montfort, *European Law on Cross-Border Insolvencies: Status of French Practice after the E.U. Regulation*, 23-APR AM. BANKR. INST. J. 28, 73 (2004) (arguing that the court of appeals' decision in Re ISA Daisytek SAS may be considered as a

> confirmation of possible dangers, including the risks of forum and/or law shopping toward the member state whose insolvency laws would be more favorable to specific interests. It is likely that the trend of forum and law shopping when applied to insolvency cases will become even stronger when the E.U. Regulation on the European Company becomes effective in October 2004).

24. *See* Regulation, *supra* note 2. All European countries ratified the Regulation except Denmark.

25. These differences are such that the Regulation does not even define the meaning of insolvency proceedings. Each member state is bound by its own insolvency laws and by the definitions contained therein. But the Regulation lists in annex A, for each country, what insolvency proceedings are according to the various domestic laws of member states. *See id.* at art. 9 of Preamble.

On the other hand, the presumed location of the debtor's center of main interests could enable domestic courts to handle situations where the registered office is not relevant, or when creditors have relied on a fictive and misleading center, irrespective of the debtor's good faith. Indeed, the Regulation affords creditors the right to claim that the debtor has conducted its business from a place other than its registered office. While the exercise of this option may require the presentation of probative evidence in each case, it is feasible to establish that although registered, a given office was not primary, or the managerial and administrative decisions of the debtor were regularly taken from another location.

It seems more difficult however, to tie such activities to the perception of third parties. Indeed, the preamble of the Regulation indicates that such a center should, in part, be "ascertained by third parties"[26] in order to confer jurisdictional competence to the forum where this center is located. In this regard, the Regulation appears to operate on two different levels. The protection of third parties would require the application of a standard test[27] to determine what these third parties believed, or had reason to believe, when they entered into a business relationship with the debtor. When the third party at issue is an individual (with neither professional qualification nor expertise), this test is likely to be less stringent since no special knowledge is required from that individual. The situation may be different when the third party is a corporation that has carefully studied the transaction with the debtor.

This distinction may be useful to analyze proposals suggesting that an international insolvency regime should only apply to resolve insolvency cases between large MNEs and sophisticated creditors. This system would entail the possibility of deference and asset transfers from one forum to another. Individuals and non-incorporated entities would remain under the protective umbrella of domestic laws and would seek recovery of their credit from the debtor's assets that are located in that same jurisdiction. Rather than explicitly limiting its scope of application in such a manner, the Regulation leaves the appreciation of facts to the court(s) of opening,[28] and allows the court to draw circumstantial conclusions on an ad hoc basis[29] in order to determine the intentions of the parties. It is likely that these domestic courts will de facto treat individuals and corporations (sophisticated creditors) differently, thus recognizing that each is held to a distinct standard of knowledge and expertise.

B. The Model Law

The Model Law uses the concept of the debtor's center of main interest to determine, in the case of multiple proceedings, which forum is the main forum.[30] This step is essential

26. *Id.* at art. 13 of Preamble.

27. *See* Montfort, *supra* note 23 (arguing that the decision in Re ISA Daisytek SAS is "a correct application of certain provisions contained in the Regulation allowing a court to use a reality test to determine the localization of the center of a debtor's main interests"). The issue remains however, whether courts will deduct third parties' perception in light of their status as sophisticated or non-sophisticated creditors.

28. While the EU convention remains silent on many aspects of its implementation, it would be reasonable to deduce that domestic courts will implement the Regulation consistently with its intended effects. *See* Wessels, *Primer*, *supra* note 7, at 13 (arguing that where governments fail, judges play a major role in cross-border insolvency cases as "deputy-legislators").

29. Furthermore, the European Court of Justice (ECJ) and its broad powers of interpretation support this pragmatic approach. Indeed, the ECJ encourages deference from domestic courts whenever there are uncertainties regarding the implementation of a European legislation.

30. Model Law, *supra* note 1, at art. 2.

to foresee effects that the opening and recognition of main proceedings would produce in the enacting state. The following sections will respectively explore the implementation of this concept under the Model Law and highlight the effects that ensue from the recognition of foreign main proceedings in the enacting forum.

1. *Defining the Center of Main Interests*

As mentioned above, the EU Insolvency Convention was an important source of inspiration to the UNICTRAL Working Group.[31] As a result, the Model Law also recognizes the competent forum to open main insolvency proceedings as the place where the debtor has the "center of its main interests."[32] The Model Law working group, unable to find a better definition,[33] presumed this center to also be the place of registration (i.e., the place of incorporation).[34]

The concept of the center of main interests was discussed at length amongst the various representatives of the working group.[35] As each law has a different approach in identifying the home country of the debtor, opting for a flexible definition, such as the center of main interests, which is presumably the place of registration, was the most effective approach. As is the case under the Regulation, this approach could prevent fictive registrations in a tax haven or in jurisdictions where insolvency laws would be more favorable to the debtor and to the protection of its estate.

It is noteworthy to mention that there were other proposals during the negotiation phase so as to include more than one criterion in defining the debtor's home country. Such proposals were bound to fail since the aim of the Model Law is to recognize only one forum entitled to instigate main proceedings against the debtor.[36] With more than one criterion to confer such a jurisdiction over the debtor's estate, the courts of the enacting state of the Model Law could face a situation where more than one foreign forum may present a legitimate claim to be recognized as the main forum. The advantage for forums to present such a claim is that the recognition of foreign main proceedings entails certain types of automatic relief within the enacting forum.

Given the professional and geographic diversity of the drafters of the Model Law, representatives were well aware that in each forum various insolvency and domestic laws exist—such as trade or commercial law—which may impact the insolvency of corporate entities.[37] Therefore, the Model Law does not refer to main foreign insolvency proceedings; rather, it simply refers to foreign proceedings, whether compulsory or voluntary,[38] in which creditors are collectively involved in reorganizing or liquidating the debtor's business.[39] In other

31. *See* Berends, *supra* note 12, at 320.
32. Model Law, *supra* note 1, at art. 17(2)(a).
33. Berends, *supra* note 12, at 330.
34. Model Law, *supra* note 1, at art. 16.
35. Berends, *supra* note 12, at 330; *see also* U.N. Comm'n on Int'l Trade Law, Report of the Working Group on Insolvency Law on the Work of the Eighteenth Session, 5, U.N. Doc. A/CN.9/419 (Dec. 1, 1995); U.N. Comm'n on Int'l Trade Law, Report of the Working Group on Insolvency Law on the Work of the Nineteenth Session, 5, U.N. Doc. A/CN.9/422 (Apr. 25, 1996); U.N. Comm'n on Int'l Trade Law, Report of the Working Group on Insolvency Law on the Work of Its Twentieth Session, 5, U.N. Doc. A/CN.9/433 (Oct, 24, 1996).
36. *See* Berends, *supra* note 12, at 330.
37. *Id.*
38. *See* Guide to Enactment, *supra* note 6, at 22.
39. *Id.*

words, it is not relevant whether the foreign law recognizes the foreign proceedings as insolvency proceedings. The Model Law approach is mindful in this regard because it has opted for an all-inclusive terminology so as to extend its provisions of recognition to instances where the foreign proceedings would not qualify as insolvency proceedings pursuant to the law of the recognizing forum.

Although the test to determine the debtor's home country and the forum entitled to open main proceedings is identical under the Regulation and the Model Law, there is a fundamental difference regarding the scope and objectives of these two instruments.

2. *Effects of Recognition*

The core aspect of the Model Law is the effect foreign proceedings produce on the domestic level once they are recognized by the enacting state.[40] According to article 20 of the Model Law, the enacting state—through its judiciaries or any other administrative entity that is in charge of adjudicating corporate insolvencies—is bound to attach certain effects to the recognition of foreign main proceedings.[41] These effects translate into certain types of relief, such as a moratorium against creditors, a stay of the pending proceedings, or enforcement against the debtor and a suspension of the right to transfer the debtor's assets from the enacting forum to another.[42] Although the Model Law suggests that these types of relief should be automatically granted to the foreign representative upon recognition, it acknowledges that the intervention of the court is sometimes, if not often, necessary to enable foreign insolvency proceedings to produce these effects on the domestic level.[43] Thus, the Model Law, though by its nature lacking the necessary binding powers, seeks to encourage enacting states' courts to implement the provisions of article 20.

Although a uniform implementation of article 20 would enhance cooperation among forums involved to resolve the insolvency of a MNE debtor, there are a number of exceptions within the same article that give considerable leeway to domestic courts.[44] Indeed, the effects of recognition sought under the Model Law may be modified or terminated pursuant to the laws of the enacting state. Such domestic laws, whether related to insolvency or not, may empower domestic courts to considerably limit the intended reach of foreign main proceedings. This situation is likely to arise if domestic creditors are unable to collect on their claims[45] as a result of the relief automatically granted to the foreign representative.

The protection of domestic creditors is a key policy matter that often dictates the extent of domestic courts' cooperation with foreign courts and whether foreign proceedings will be permitted to produce domestic effects. Article 20(4) allows further limitations on the relief granted upon recognition.[46] In this article, the Model Law stipulates that the recog-

40. "In the absence of evidence to the contrary, recognition of a foreign main proceeding is . . . proof that the debtor is insolvent." Model Law, *supra* note 1, at art. 31.

41. *Id.* at art. 20.

42. For a complete list of relief available upon recognition of foreign main proceedings, *see* article 20 of the Model Law. Also, it should be noted that the Model Law does not prevent the enacting forum from availing further types of relief to foreign creditors if the law of the enacting forum so permits. *Id.*

43. *See* Guide to Enactment, *supra* note 6, at 24.

44. Model Law, *supra* note 1, at art. 20.

45. As seen under article 20, there could be, in theory, instances where the recognition of foreign main proceedings entails the issuance of a stay of execution against the debtor's assets, thereby preventing domestic creditors in the enacting state to collect on their claims. *Id.*

46. *Id.* at art. 20(4).

nition of foreign main proceedings shall have no effect on the right to commence proceedings under the laws of the enacting states.[47] Thus, the actual reach of a moratorium against creditors in the enacting state becomes questionable if domestic creditors are granted a right to initiate legal process against the debtor after recognition of foreign main proceedings.

In addition to the automatic relief mentioned above, the foreign representative may seek further types of relief in the enacting states, such as the entrustment of the administration of the debtor's assets with the foreign representative or with another person designated by the court.[48] Although article 21 of the Model Law contains a non-exhaustive list of relief available to the foreign representative, the court of the enacting state has discretion over granting specific relief required by the foreign representative, even after recognition of the foreign main proceedings.[49] So despite the Model Law's inclusion of an arsenal of tools that should ensure a higher degree of cooperation between the enacting forum and the foreign representative, a complete and faithful implementation of the Model Law remains primarily subject to the discretion of domestic courts.

While it is true that the Model Law is not binding and was not intended to compel enacting states to follow a certain course of action, the possible limitations to the effects of recognition constitute a major impediment to improving coordination among courts and empowering the foreign representative. Perhaps the UNCITRAL working group was too eager to see the Model Law adopted by a large number of countries,[50] and to achieve this has included certain provisions that hinder the very purpose of the Model Law and leave the discretion of domestic courts intact at the expense of cooperation. Compared with the Regulation, the provisions of the Model Law lack decisiveness, regardless of the unbinding nature of the instrument as a whole. While textual differences between the Model Law and the Regulation may be the easiest to discern, other subtle differences between these two instruments' overall approach are more substantial. The following section will highlight how the approach of the Regulation is fundamentally different and more effective than that of the Model Law.

C. The Model Law's Passive Approach

The concept of the debtor's center of main interests, as discussed above, has resolved a significant problem with respect to the insolvency process of MNEs. The Model Law and the Regulation both apply this concept though main proceedings under each instrument fulfill different roles.

Indeed, the Regulation takes a pro-active role in main proceedings and directly defines the prerogatives of the main forum.[51] Most importantly, the main forum has power over the debtor's assets, wherever located, and can demand that other foreign courts within the EU defer and transfer the debtors' assets that are located within their respective jurisdiction.[52] Although such powers may be curtailed when the debtor possesses an establishment

47. *Id.* at art. 20.

48. *Id.* at art. 21(1)(e).

49. *Id.* at art. 21(1)(g).

50. One such presumption may be implied from the limited objective of the Model Law combined with an overly permissive language.

51. Regulation, *supra* note 2, at art. 4.

52. *Id.* at art. 4(2)(b).

in other forums, they are nonetheless significant because, by definition, they were intended to have a universal reach over the debtor's estate.[53]

In contrast, the Model Law has adopted a passive view of main proceedings, where the identification of the main proceedings is only relevant for recognition purposes and the resulting effects may be subject to numerous restrictions by either the enacting forum or pursuant to the forum state's law.[54] The main forum under the Model Law was not intended to have overall jurisdiction over the debtor's assets, not even when such assets are located in a forum where the debtor has no establishment.[55]

In addition, recognition under the Model Law does not refer to the recognition of a foreign insolvency judgment that could produce some effects on the debtor's assets located in the enacting state.[56] Rather, recognition simply means that main foreign proceedings are acknowledged and it is at the discretion of the courts of the enacting state to grant relief to the foreign representative, provided that the Model Law was not modified from its original version and was enacted in that version. In this regard, it is evident that under the Regulation a foreign liquidator, and even more so a liquidator designated in the course of main proceedings, can rarely be denied the relief sought before foreign courts.[57] This is because the Regulation, unlike the Model Law, is not crippled with substantive exceptions regarding the mandatory extent of cooperation and coordination between courts. Whenever multiple insolvency proceedings are initiated against the same debtor within the EU, they automatically produce certain restraining effects on each other, without being subject to the discretion of the various courts involved or their applicable laws.[58]

Since the Model Law is geared solely towards recognition, or more precisely towards the acknowledgment of foreign proceedings (that may or may not entail the granting of provisional relief to the foreign representative), the Model Law contains no explicit provisions on the extent of powers available to the enacting forum when the enacting forum is, in fact, the main forum. The Model Law actually advises the enacting state to follow a cooperative course of action when a foreign representative presents an application for recognition.[59] But the Model Law does not inform the enacting forum how its own demand for recognition will be dealt with in other forums and what effects the opening of proceedings in the enacting state may produce elsewhere. These questions cannot be answered with any certainty under the Model Law because each case will have its own unique circumstances, including variability in the degree of cooperation in the recognizing forum and in the accommodative nature of the relevant foreign domestic law. These provisions of the Model Law stand in stark contrast to the Regulation, where the prerogatives of the main forum are well defined and the effects of main proceedings in other jurisdictions are known in

53. Jay Lawrence Westbrook, *Multinational Enterprises In General Default: Chapter 15, The ALI Principles, and The EU Insolvency Regulation*, 76 AM. BANKR. L.J. 1, 34 (2002) [hereinafter Westbrook, *Multinational Enterprises*].

54. Model Law, *supra* note 1, at art. 20(2).

55. *Id.*

56. There is a distinction between the recognition of a foreign insolvency judgment on the merits (where the recognizing forum would enforce a foreign court's decision on its territory) and the recognition of foreign insolvency proceedings (where the recognizing forum may or may not allow such foreign proceedings to produce certain effects in its territory). The Model Law is only concerned with the second type of recognition.

57. Regulation, *supra* note 2, at art. 18(1).

58. *Id.* at art. 4(2)(b).

59. Model Law, *supra* note 1, at art 30.

advance.[60] It is apparent that under the Regulation, predictability is much higher than under the Model Law. Yet the Regulation did not create any substantive insolvency law, but rather simply opted for unequivocal language with respect to the relationship between main and secondary proceedings.

As a result of the Model Law's passive approach, a number of issues, most importantly the issue of cooperation, are largely subject to the discretion of the court in the enacting state.[61] In fact, one may further reflect on the degree of cooperation among courts in the absence of the Model Law. As mentioned earlier, cooperation between courts located in different jurisdictions is almost always contingent upon the satisfaction of domestic creditors.[62] This premise has not changed under the Model Law, pursuant to which domestic courts dispose of a number of provisions that not only allow them to modify or terminate the relief granted to the foreign representative, but also to deny such relief in the first place. The last decade has seen a shift towards more cooperation between courts, rather than conflict, in resolving significant cross-border insolvency cases,[63] so one may question how the Model Law, enacted almost a decade ago, furthers this growing trend of cooperation and coordination among several sets of proceedings.

Undoubtedly, the Model Law remains a good initiative. It provides for some guidelines on cooperation and it assists domestic legislation in coping with the very nature of transnational insolvencies.[64] But the relatively recent enactment of the Regulation sheds light on the major shortcomings of the Model Law, especially with respect to the considerable leverage the Model Law extends to domestic courts in their decision to cooperate with a foreign representative.

It can be argued that the provisions of the Regulation, which are narrower than those of the Model Law, were the result of close economic and legal integration among EU member states.[65] While this may be partially true, the Model Law, unlike an international treaty, was not intended to be binding on its signatories. Thus, one may inquire why the UNCITRAL working group did not issue more compelling cooperation rules containing fewer exceptions, and conferring broader powers to the main forum. Either way, the Model Law's lack of a binding nature would have enabled each enacting state to waive any provisions deemed too prescriptive or far-reaching. If the Model Law was more restrictive, it might have

60. Regulation, *supra* note 2, at art 4(2)(b).

61. Model Law, *supra* note 1, at art. 27.

62. *See* Lore Unt, *International Relations and International Insolvency Cooperation: Liberalism, Institutionalism, and Transnational Legal Dialogue*, 28 Law & Pol'y Int'l Bus. 1037 (1997). *See also* Kurt H. Nadelmann, *International Bankruptcy Law: Its Present Status*, 5 U. Toronto L.J. 324, 351 (1944).

63. *See* Alan Reed, *A New Model of Jurisdictional Propriety for Anglo-American Foreign Judgment Recognition and Enforcement: Something Old, Something Borrowed, Something New?*, 25 Loy. L.A. Int'l. & Comp. L. Rev. 243, 243-47 (2003). On the increasing use of protocols, especially among common law jurisdictions, to overcome difficulties of cooperation in cross-border insolvency cases, *see* Derrick C. Tay & Orestes Pasparakis, Insolvencies without Frontiers: The Emergence of the Cross-Border Protocol (Insolvency Institute of Canada 1999), *available at* http://www.globalinsolvency.com/insol/intinsolvencies/crossborder/inswofrontiers.pdf. *See also In re* Maxwell Communc'n Corp., 170 B.R. 800 (Bankr. S.D.N.Y. 1994), *aff'd*, 186 B.R. 807 (S.D.N.Y. 1995), *aff'd* 93 F.3d 1036 (2d Cir. 1996) (cooperation efforts led to the first coordinated liquidation of a multinational debtor).

64. *See* Guide to Enactment, *supra* note 6, at 19.

65. Most importantly, the Regulation, as much as any European legislation, has the necessary binding power to compel member states to abide by its provisions. But despite this binding character, it took well over forty years to agree on a suitable insolvency framework within the EU community.

seemed less appealing to some countries, but a narrower and more compelling approach might have created a more complete and adequate international instrument to resolve cross-border insolvency matters. The only flaw of this instrument would be the lack of binding power, and not its permissive language as is currently the case.

D. Underlying Policy Choices

Projecting the success or the failure of the Model Law in the next decade is a difficult task and it is beyond the scope of this work. But an awareness of the policies underlying the Model Law and the intent of its drafters may help develop an understanding of how this nonbinding instrument may be improved in the future, and whether regional insolvency arrangements,[66] such as the EU Regulation, may have any impact on its maturity.

In many respects, the Model Law is the result of a pragmatic and truly international effort to address the issues that arise from the insolvency of MNEs. Many countries and international organizations,[67] either in their capacity of participant or observer, have contributed to the issuance of the Model Law. Insolvency experts—judges and practitioners from all over the globe—have provided insightful comments on the Model Law during various working sessions that led to its final version.[68] Because these global efforts in the area of cross-border insolvency were considered a priority in the mid-1990s, a substantial amount of pressure was put on the participants to create acceptable international guidelines capable of fostering cooperation between courts involved in cross-border insolvency cases.[69] This mounting pressure first arose in the course of the initial discussions regarding the form these international efforts should take and culminated in a choice between a convention and a model law. By opting for a model law, the threshold of expectations and commitments was significantly lowered, thereby placing the Model Law on a fast track for approval.[70]

In the substantive provisions of the Model Law, the working group made a clear policy choice based on the treatment of specific issues, within which modest contributions were originally sought.[71] This low profile approach had a number of merits. First, it encouraged a large number of countries to participate in the elaboration of the Model Law.[72] In fact, if

66. Although this analysis only covers the Regulation and its potential contributions to the Model Law, other regional insolvency instruments may be the subject of further studies, such as "the European Convention on Certain International Aspects of Bankruptcy (1990), the Montevideo treaties on international commercial law (1889 and 1940), the Convention regarding Bankruptcy between Nordic States (1933) and the Convention on Private International Law (Bustamante Code) (1928)." Guide to Enactment, *supra* note 6, at 22.

67. Recently, the area of insolvency, including its potential cross-border implications, has gained the attention of international organizations such as the World Bank and the International Monetary Fund. *See* The World Bank, Principles and Guidelines for Effective Insolvency and Creditor Rights System (April 2001), *available at* www.worldbank.org/ifa/rosc_icr.html.

68. *See* Guide to Enactment, *supra* note 6, at 17-18.

69. *See* E.B. Leonard & Melvin C. Zwaig, *Developments and Trends in United States/Canada Cross-Border Reorganizations*, 9 J. Bankr. L. & Prac. 343, 347-48 (2001).

70. *Id. See also* Cross-border Insolvency: Note by the Secretariat, [1993] 24 Y.B. Int'l Comm'n 248, U.N. Doc. A/CN.9/378/Add.4. For a preliminary study to assess the desirability of a cross-border insolvency framework, *see* U.N. Comm'n on Int'l Trade Law, Possible Future Work: Cross-Border Insolvency, U.N. Doc. A/CN.9/378/Add.4 (June 23, 1993).

71. Leonard & Zwaig, *supra* note 69, at 347-48.

72. *Id.*

the Model Law had been intended to be a binding convention among the participants, the negotiation process would have been longer and certainly more complex.[73] Second, the modest aim of the UNCITRAL working group made the Model Law more defensible and has allowed such an instrument to create its own anchor in the realm of cross-border insolvency. Today, the Model Law remains an important tool for anyone interested in the subject matter.

Despite its merits and the head start it had when it was issued in 1997, the Model Law may now seem outdated and incomplete. As international trade and investment are increasing in magnitude and complexity, the limited approach and objectives of the Model Law have progressively proved inadequate.[74] Furthermore, the issuance of the Regulation has demonstrated that more effective methods of cooperation are possible, even among countries that have significant differences in their domestic insolvency laws. The Regulation is more complete because it deals with the majority of problems that arise from the insolvency of MNEs without creating substantial insolvency rules. Most importantly, the attributes of integration between EU member states should not be overblown. In fact, if this integration were the only reason that the Regulation was enacted, it would not be possible to explain the long process and the several failed attempts that finally led to its issuance.

In light of the above, it could be argued that the Model Law was intended to be a mere stepping stone that would subsequently be subject to further amendments and improvements. Many scholars share this view and contend that the Model Law may further mature and more effectively and completely address the issues that arise from the insolvency of MNEs.[75] In order for that to happen, it is necessary that the international community draw some lessons from the Regulation that establishes the first regional and binding insolvency arrangement with the explicit remit of increasing predictability and equality among creditors. Perhaps the first lesson from the Regulation is that the main forum should be conferred broader and more assertive powers. This would endow cross-border insolvency proceedings with Universalistic traits, thus reaping the chief advantages offered by this theory. Moreover, it is essential to reduce the permitted exceptions to the effects of recognition under the Model Law in order to ensure uniformity of application and result in a higher degree of predictability. In other words, the enacting and recognizing forum should no longer be in a position to restrict the reach of foreign main proceedings and to condition the mandatory effects of such proceedings to the satisfaction of its domestic creditors.

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73. *See* Berends, *supra* note 12, at 319.

74. *See* Jay Lawrence Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276, 2280 (2000) (arguing that while the Model Law may improve cooperation to reorganize MNEs, it is "frustrating efforts to engage in manipulation of assets and other fraudulent activity") [hereinafter Westbrook, *Global Solution*]. For a comprehensive critique of the Model Law and any other insolvency system implicating the application of Universalistic precepts, *see* Lynn M. LoPucki, *The Trojan Horse in UNCITRAL*, BCD NEWS AND COMMENT, Mar. 30, 1999, at A5.

75. *See* Jay Lawrence Westbrook, *Universal Priorities*, 33 TEX. INT'L L.J. 27, 28 (1998) [hereinafter Westbrook, *Universal Priorities*]; Peter J. Murphy, *Why Won't The Leaders Lead? The Need for National Governments to Replace Academics and Practitioners in the Effort to Reform the Muddled World of International Insolvency*, 34 U. MIAMI INTER-AM. L. REV. 121, 128 (2002) (arguing that the international community should look ahead to increase cooperation through the ratification of a treaty and stressing that the Model Law does not address "the substantive differences in national insolvency laws and procedures"); *see also Brian M. Devling, The Continuing Vitality of the Territorial Approach to Cross-Border Insolvency*, 70 UMKC L. REV. 435, 450-51 (2001) (arguing that chapter 15 of the U.S. Bankruptcy code, which adopts the Model Law, is full of escape hatches that may hinder the objective of achieving cooperation chiefly founded on the precepts of Universalism).

It is hoped that the purpose and scope of main proceedings under the Model Law would be amended so that the main foreign representative is empowered to preserve the rights of creditors. But such an improvement may require the main forum to assert extra-territorial powers in order to administer debtor's assets located in other jurisdictions. Because this approach may constitute a foreseeable threat to domestic creditors in the enacting and recognizing state, special attention should be given to the choice of law provisions that are capable of creating a minimum threshold of protection to at least certain categories of domestic creditors. This is precisely the system established by the Regulation, which may suggest further studies on the development of choice of law provisions under the Model Law.

From a regional perspective, the Regulation has effectively resolved the issues that arise from the determination of the debtor's home country. It has met the demand for flexible yet predictable criteria by presuming that the place of registration of the debtor's business is the debtor's center of main interests. Thus, the novelty of the Regulation is less the choice of the approach to follow, but rather the powers extended to the main forum and its ability to administer the debtor's assets, wherever those assets are located. Also, by not imposing a strict application of this methodology, domestic courts are able to settle a handful of cases where the center of main interests is not located in the place of incorporation. This would considerably reduce deceptive practices where a corporate debtor willingly incorporates in a jurisdiction whose insolvency laws are more favorable[76] and would facilitate the shielding of assets from the reach of foreign creditors.[77]

This being said, the only advantage the Regulation may have over the Model Law is the experience of the European community regarding the subject matter. Indeed, by the time the Regulation was issued, three texts had already been elaborated, discussed, argued, and criticized among member countries. Such a unique experience has facilitated the creation of an almost "flawless" cross-border insolvency regime[78] four decades after the first attempts. This regime includes the accommodating concept of the debtor's center of main

76. A strict definition of the debtor's center of main interests as the place of registration would have allowed and encouraged such deceptive practices.

77. Manfred Balz, *The European Union Convention on Insolvency Proceedings*, 70 AM. BANKR. L.J. 485, 507 (1996) (arguing that "[b]y focusing on insolvency related issues where no community-wide single conflicts approach can be found, the Convention produces legal certainty" and adding that the process set forth by the convention would reduce the incentives for forum shopping). Nonetheless, this opinion is not shared among scholars. *See* Nielsen et al., *supra* note 11, at 552 (arguing that "[t]he EU Convention may encourage forum shopping by a debtor to select a contracting state to be the plenary proceeding, if the debtor considers that the laws of that State are favorable to debtors"). This uncertainty is reflected in an early case that arose from the insolvency of Enron. As a result of an order issued by an English court recognizing its primary competence to adjudicate the insolvency of the debtor (an Enron subsidiary), a French court refused the opening of main insolvency proceedings requested by that debtor, who was operating in Spain but effectively headquartered in England. The effectiveness of the Regulation to prevent forum shopping will greatly depend on domestic courts. Domestic courts will serve as guardians of the Regulation and should ensure its proper implementation so as to prevent forum shopping. *See* Montfort, *supra* note 23, at 72-73; *see also* E. Bruce Leonard, *The International Year in Review*, 22-JAN AM. BANKR. INST. J. 22, 22 (2004).

78. "Although the EU Insolvency Regulation bears some uncertainties and leaves some issues unresolved, its result fills an embarrassing 40-year-old blind spot in the broader framework of EU civil and insolvency law, and for that reason only, it should be welcomed." *See* Bob Wessels, *European Union Regulation on Insolvency Proceedings*, 20-NOV.AM. BANKR. INST. J. 24, 31 (2001) [hereinafter Wessels, *European Union*].

interests, broad and unequivocal main insolvency proceedings, and most noteworthy, limited secondary, or ancillary,[79] proceedings where the debtor has an establishment.

III. Domestic Proceedings

Given that a purely Universalistic insolvency regime was not feasible in the EU, not even between countries committed to a high level of integration, the Regulation allows the opening of secondary proceedings before any forum where the debtor has an establishment. The process of opening such secondary proceedings and their purpose and benefits will be examined in the first part of this section. As much as the Model Law has borrowed the concept of the debtor's center of main interests from the EU insolvency convention, it has also resorted to use the concept of establishment as elaborated under the EU insolvency system. The second part of this section will attempt to demonstrate that despite using the same concepts as the Regulation, the Model Law fails to achieve the same objectives set forth by the Regulation, especially regarding the protection of domestic creditors. Finally, it will be examined whether a restriction on the scope of non-main proceedings under the Model Law could help achieve greater protection of domestic creditors, thereby fostering cooperation among the various courts involved in the insolvency process of the same MNE debtor.

A. Secondary Proceedings under the Regulation

Before examining the conditions imposed by the Regulation for the opening of secondary proceedings and their scope, one must first establish how the European system is inherently different from previous proposals that suggest either the application of Universalism or Cooperative Territoriality on a global level. Therefore, the following section will explore the rationale underlying the opening of secondary proceedings under the Regulation.

1. *Retrieving the Benefits of Territoriality*

Despite a Universal approach clearly spelled out in the preamble,[80] the Regulation establishes an overall insolvency process that encompasses strong elements of Territoriality. While the Regulation empowers a specific court to open the main proceedings, thus conferring to that forum exclusive and general competence over the debtor's assets, it also allows the opening of secondary proceedings in other jurisdictions against the same debtor. The Regulation captures the essence of Universalism by allowing only one court to administer the debtor's assets, wherever those assets may be located. Indeed, the Regulation is simply a medium whereby the objectives of Universalism find a regional implementation. But while pure Universalism advocates the opening of one set of proceedings in a single forum and forbids the opening of secondary proceedings in other forums,[81] the Regulation

79. *See* Westbrook, *Global Solution*, *supra* note 74, at 2323. Ancillary proceedings describe limited insolvency proceedings, which aim at aiding the main proceedings. These limited proceedings are also referred to as secondary proceedings.

80. Regulation, *supra* note 2, at art. 12.

81. Under pure Universalism, jurisdictions where the debtor has assets are compelled to cooperate, provide assistance, and defer to the forum where main proceedings are held. Consequently, assets are transferred from one forum to the other. Such transfers would be harmful to certain categories of creditors. Pure Universalism also entails the election of a representative in the foreign proceedings and the issuance of a moratorium against all creditors in other forums. *See* Jay M. Goffman & Evan A. Michael, Amer. Bankr. Inst. Annual Conference [050503 ABI-CLE 11], *Navigating Through a Multinational Restructuring: Cross-border Insolvencies, Proceedings, and Workouts: A Comparative Examination of Insolvency Laws of Industrialized Countries* (March 2003).

allows the opening of secondary proceedings alongside main proceedings and therefore does not faithfully adhere to a purely Universalistic model. The Regulation's approach to insolvency within the EU cannot be reconciled with Cooperative Territoriality, where no main proceedings take place. Under a Cooperative Territoriality approach, insolvency proceedings may be initiated against the debtor on a strictly territorial basis.[82] The term "cooperative" refers to the discretion of courts to cooperate on an ad hoc basis by sharing information and transferring assets when there is a surplus.[83] This situation rarely occurs because the claims of the domestic creditors are seldom fully satisfied. Clearly, the European model does not follow either system.

The explanation for such a hybrid approach is simple. Building a purely Universalistic regime within the EU was not feasible because of substantial differences between the various domestic insolvency laws.[84] Consequently, it was necessary to provide a margin of security to local creditors who may find their preferential rights affected under the main proceedings held before another forum.

Because Universalism is often criticized as negatively affecting the rights of small domestic creditors who do not necessarily have the means to effectively protect themselves against the default of their debtor,[85] the opening of limited secondary proceedings, as permitted under the Regulation, offers domestic creditors an appealing alternative to avoid lengthy and complex main proceedings where their priority claims might be affected. Thus, the opening of such secondary proceedings would at least enable domestic creditors to hold on to the debtor's assets as security until the main proceedings, held before another forum, come to an end. Used as a preservation tool, secondary proceedings would deter the debtor from transferring assets to more favorable jurisdictions within the EU, or in the worst-case scenario, outside the European community and beyond the reach of European courts.[86] These explanations provide strong justifications for the opening of secondary proceedings. These justifications are the reasoning behind the provisions in the Regulation that permit the opening of such secondary proceedings, either before or after the opening of main proceedings.

2. *The Presence of an Establishment*

According to article 2 of the Regulation, secondary proceedings may be opened in forums where the debtor possesses an establishment.[87] The notion of establishment may be construed broadly because the Regulation does not give further guidance as to what constitutes

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

83. In this respect, the Regulation goes beyond the courtesy provided for under the rules of international comity. Pursuant to article 35 of the Regulation, the court opening secondary proceedings is compelled to transfer local assets when local creditors are satisfied. This approach was not adopted on the international or regional level. In contrast, the Model Law does not demand the transfer of assets even after the satisfaction of domestic creditors.

84. Regulation, *supra* note 2, at art. 11.

85. On the critical position of non-adjusting creditors under Universalism, *see* Lucian A. Bebchuk & Jesse M. Fried, *The Uneasy Case for the Priority of Secured Claims in Bankruptcy*, 105 YALE L.J. 857, 864 (1996).

86. A mere transfer of assets outside the community does not prevent the application of the Regulation. Assets located outside the European Union may be governed by the Regulation so long as the debtor's center of main interest is located in a member country of the EU. Although the Regulation thereby receives a broad scope of application, European courts may be unable to retrieve assets located outside the community, even if these assets were fraudulently transferred overseas.

87. Regulation, *supra* note 2, at art. 12 of Preamble.

an establishment, and whether such an establishment must enjoy a legal personality. Conversely, the issue becomes relevant in a case where the debtor has effectively registered several of its offices. In such a case, determining whether a debtor has an establishment or not may be difficult because of the lack of guidance in the Regulation. For the most part, an establishment, as the term is commonly used, can be a branch, a representative office, or simply a building carrying the debtor's name and engaging in limited non-transitory commercial activities.[88]

Where the possibility to cross-file a claim is available to creditors, the opening of secondary proceedings in a secondary forum will be an attractive option only in cases where the debtor has valuable assets in the secondary forum. These secondary proceedings are limited in scope to the assets located in that jurisdiction and, pursuant to article 3 of the Regulation, can only be winding up proceedings. Secondary proceedings cannot administer the entirety of the debtor's estate or attempt a reorganization of the debtor's business. Although domestic creditors' rights seem vested to seize the debtor's assets located in their jurisdiction (subject to the presence of an establishment), there are two important limitations to this principle.

The first limitation on domestic creditors stems from the ability of the liquidator in the main proceedings to order preservation measures against the debtor's assets located in another jurisdiction where the debtor may have an establishment.[89] These preservation measures supersede domestic creditor's rights to carry on with the winding up proceedings against the debtor's estate. The second limitation pertains to the timing of the opening of secondary proceedings. Article 4 of the Regulation provides for only one situation where the opening of secondary proceedings can take place before the instigation of main proceedings. This situation arises where the law in force at the debtor's center of main interests does not allow the opening of insolvency proceedings against that debtor.[90] In such a case, only domestic creditors who reside in the same jurisdiction where the debtor has an establishment could exercise the right to open proceedings. In principle, non-resident creditors cannot bring an action against the debtor unless their claims arise from the operation of the establishment located in the secondary forum.

Despite complex procedural rules, the Regulation has shrewdly allowed the opening of secondary proceedings. In practice, this right may rarely be exercised due to the absence of an establishment that belongs to the debtor, lack of valuable assets, or simply as a result of the preservation measures exercised by the liquidator in the main proceedings. Yet the possibility of limited secondary proceedings was believed to be an important element to the issuance and adoption of the Regulation. Without such a right, a number of states may have been reluctant to ratify the Regulation, due to a fear of a complete inability to protect their domestic creditors.[91] This is particularly true when one considers the reasons behind the failure of the 1982 text elaborated between the European Economic Community member

88. *See* Fletcher, *Choice-of-Law Provisions*, *supra* note 18, at 137.

89. Regulation, *supra* note 2, at art. 16.

90. This provision signifies an important digression from a purely Universalistic regime. Allowing the opening of secondary proceedings at that particular time also reveals that prudential measures are necessary for the entire system to function properly, given the substantive differences between domestic insolvency laws.

91. Leonard & Zwaig, *supra* note 69, at 345-46 (arguing that generally countries are reluctant to cooperate in cross-border insolvency cases in order to protect their local creditors and adding that the existence of a primary/secondary scheme of proceedings may considerably reduce the risk of forfeiture to local creditors).

states. The 1982 insolvency proposal prescribed the holding of main proceedings that had a universal reach beyond the boundaries of the community. Domestic creditors under the 1982 proposal had no right to commence secondary proceedings and national courts in the EU were compelled to cooperate with and defer to the court conducting main proceedings.[92] Not surprisingly, this proposal was faced with strong opposition by several countries, thus leading to its abandonment. As a practical matter, it will always be difficult, if not impossible, to satisfy small domestic creditors' claims to a full extent when it comes to the insolvency of large MNEs. Providing a protective option to these creditors would, in many cases, overcome the reluctance of governments to abide by a binding cross-border insolvency arrangement. Under the Regulation, secondary proceedings might seldom be initiated, yet the psychological effects that resulted for providing for them were necessary to reach a consensus built upon an original combination of Territoriality and Universalism.

B. Non-main Proceedings Under the Model Law

Similarly, the Model Law recognizes the opening of domestic insolvency proceedings, known as foreign non-main proceedings, in a forum where the debtor possesses an establishment. The definition of establishment is very similar, if not identical, to the definition used in the Regulation.[93]

Although the notion of an establishment under the Model Law was borrowed from the EU convention,[94] there are some fundamental differences between the Regulation and the Model Law in this regard. First, as is the case for main proceedings, non-main proceedings are only relevant for their recognition by the enacting forum. As a result, the Model Law does not define the scope of competence of non-main courts. The absence of a clear scope makes it far less compelling for the recognizing (enacting) state to give effect to such non-main proceedings upon their recognition. While the Model Law simply encourages the enacting forum to recognize non-main proceedings and to grant the non-main representative the relief sought, the enacting forum may still enjoy a considerable amount of discretion when deciding whether or not it would follow a cooperative course of action.

Secondly, the scope of non-main proceedings under the Model Law can address any type of action initiated against the debtor, whether it is a liquidation or a reorganization of the debtor's business. As discussed above, the Regulation provides only for limited secondary proceedings, intended to be territorial in scope and restricted to winding-up proceedings. Needless to say, in this regard, the Regulation achieves a more Universalistic approach to the overall insolvency process of the debtor and increases the chances for a possible reorganization.[95] Indeed, because main proceedings under the Regulation are endowed with primacy over secondary proceedings, secondary courts are bound to abide by the findings

92. *See* Richard A. Gitlin & Evan D. Flaschen, *The International Void in The Law of Multinational Bankruptcies*, 42 Bus. Law. 307, 312 (1987) (arguing that the 1980 draft proposes that original bankruptcy jurisdiction be exercised only by the courts of the state where the debtor's center of administration is located); *see also* Fletcher, *Choice-of-Law Provisions*, *supra* note 18, at 124 (arguing that "the EU Convention has avoided the twin errors that gave rise to the fatal flaws and inconsistencies for which the earlier versions of the Convention were so notorious, namely of aspiring to unattainable levels of doctrinal purity while simultaneously seeking to appease basic, national instincts among its own participants").

93. Model Law, *supra* note 1, at art. 2(f) (defining establishment).

94. *See* Berends, *supra* note 12, at 324.

95. *See* Westbrook, *Global Solution*, *supra* note 74, at 2291-92.

of the main court. Therefore, when the debtor possesses an establishment and assets in secondary jurisdictions, and the main court finds that these assets are important to achieve the reorganization of the debtor, secondary courts must cooperate with the main court and could be required to transfer these domestically located assets if and when the need arises. In contrast, under the Model Law, main proceedings do not supersede, either materially or territorially, the scope of non-main proceedings, and the non-main forum has no obligation to wait for and comply with the decision of the main forum. Consequently, reorganization can be a difficult process if the debtor's assets that are located in the non-main forum are essential to the reorganization process of that debtor.

Finally, the very term "non-main proceedings," as used by the UNCITRAL working group, testifies to the independence of such proceedings *vis-à-vis* main proceedings. The opening of main-proceedings is not necessary for creditors to initiate non-main proceedings. Under the Regulation, the opening of secondary proceedings prior to the opening of main proceedings is restricted to very specific instances. This restriction ensures a greater degree of coordination between the courts involved to resolve the insolvency of the same MNE debtor and limits the possibility of multiple proceedings against the same debtor.

These differences adversely affect the value of the Model Law in establishing a uniform and predictable regime that fosters increased coordination and cooperation among courts. Other issues also render the Model Law lacking in relation to the Regulation in terms of predictability and equality. The first issue pertains to the location of the debtor's assets. Under the Model Law, any forum, even one in which the debtor possesses only assets, is not prohibited from initiating insolvency proceedings against that debtor. Another remarkable divergence between the Regulation and the Model Law stems from the type of relief and the objectives of relief available to the non-main foreign representative.

1. *Presence of Assets*

Whereas the Model Law encourages the enacting forum to recognize and give effect to the opening of foreign non-main proceedings, no provision addresses the effect that the opening of asset-based[96] proceedings should produce in the enacting forum.

During the discussions in the working sessions leading to the Model Law, heated opposition arose between the proponents of a broad definition and purpose to the notion of establishment, who argued that the term should include the emplacement of assets, and those who advocated a more restrictive definition inspired by the EU convention.[97] It has been argued that a strict adherence to the EU convention and to the specific purpose of the notion of establishment[98] would be unworkable on a global level. Indeed, under the EU insolvency regime, only the presence of an establishment allows the opening of secondary insolvency proceedings against the debtor. The presence of assets cannot confer a proper basis of jurisdiction to the forum where such assets are located. While this EU approach is more cost effective and avoids the multiplicity of proceedings against the same debtor, it was argued during the course of elaboration of the Model Law that this approach would

96. Asset-based proceedings are proceedings instigated in a forum where the debtor possesses neither the center of its main interest nor an establishment. Such proceedings are initiated on the basis of the presence of assets in the forum of opening. Under the Model Law, these proceedings do not qualify as main or non-main proceedings.

97. *See* Fletcher, *Choice-of-Law Provisions*, *supra* note 18, at 137.

98. *Id.* This is a place where the debtor conducts its business by using labor and capital.

entail a significant curtailment of states' sovereignty because jurisdictions where the debtor possesses only assets would be prevented from opening insolvency proceedings against that debtor.

In order to overcome this problem under the Model Law, and because the approach of the Model Law is geared towards recognition rather than determining the criteria that would allow a given court to open insolvency proceedings against the debtor, the UNCITRAL working group reached a compromise and spelled out the effects that result from the presence of an establishment and those effects that derive from the mere presence of assets in the opening forum. It was decided that only the presence of an establishment would enable the foreign proceedings to be conferred the status of foreign non-main proceedings and hence, the non-main representative may demand recognition and relief before the enacting forum. In contrast, it has been stressed by the Model Law Guide to Enactment that the mere presence of assets in any given jurisdiction would not prevent courts from opening full-fledged insolvency proceedings against the debtor.[99] But such proceedings will not be conferred the status of foreign non-main proceedings, and as a result, the foreign representative cannot apply for their recognition before the enacting forum.

Although this compromise may have seemed necessary in order to avoid longer and inconclusive discussions on this matter, it emphasizes an important shortfall of the overall approach contained in the Model Law. By solely focusing on the issue of recognition, the Model Law, unlike the Regulation, fails to provide assertive rules with respect to the conditions for the opening of insolvency proceedings against a MNE debtor. The mere presence of assets in a given jurisdiction under the Model Law constitutes an acceptable criterion to open insolvency proceedings against the debtor. This is a simple application of the grab rule, which has often been accused of increasing inequality among otherwise similarly situated creditors. In addition, such asset-based proceedings would not be recognized under the Model Law, which creates no rules to ensure cooperation among courts when such proceedings are initiated against the debtor. Therefore, it is difficult to comprehend how the Model Law ensures cooperation among courts in these instances.

Because it can be fairly argued that the EU assertive approach was impractical under the Model Law, the Model Law perhaps should have allowed full recognition to the opening of insolvency proceedings based on the mere presence of assets. After all, the objective of the Model Law was to foster cooperation among courts and not to create certain criteria that would allow courts to open insolvency proceedings against the debtor. Furthermore, by allowing full recognition of such proceedings, a portion of the debtor's estate is not entirely sheltered from the insolvency processes conducted by the main and non-main forums. Under the current Model Law, a forum where the debtor possesses only assets may find it advantageous to not submit to or cooperate with main and non-main proceedings, especially when the assets have a significant value. This would entitle such a forum to liquidate the debtor's assets on a purely territorial basis and distribute the proceeds to domestic creditors.

2. *Provisional Relief*

Under the Regulation, domestic creditors in secondary proceedings may resort to specific relief in order to preserve their rights *vis-à-vis* the main liquidator and against creditors

99. These proceedings will be limited to the assets of the debtor located in the state of opening. *See* Guide to Enactment, *supra* note 6, at 73, 128.

located in other jurisdictions. Domestic creditors are thus ensured equal treatment in the course of main proceedings and the main liquidator is obliged to accommodate the demands of domestic creditors in secondary proceedings.[100]

Although the issue of provisional relief and the conditions of granting provisional relief to the foreign representative is central under the Model Law, there is a substantial amount of ambiguity as to the nature of the relief that can be granted to the non-main representative and the limits that may apply to such relief. First, the Model Law does not specify whether the provisional relief available is of a collective or individual nature.[101] Collective relief, such as a moratorium against all creditors, can only be granted upon the recognition of foreign proceedings and could act as a deterrent to other creditors from pursuing their claims against the debtor.[102] In contrast, provisional individual relief would only attach to specific assets, thereby ensuring that foreign creditors preserve their rights without freezing the continuance of proceedings before the enacting forum.[103] Whereas the Regulation has provided for specific individual relief to the secondary liquidator, the UNCITRAL working group has left the type of relief available to be decided by each forum pursuant to the forum's laws and procedures. This, in turn, does not endow recognition with uniform effect and non-main representatives may seldom know in advance what consequences the recognition of non-main proceedings could produce in the enacting forum.

Secondly, as much as the automatic relief available to domestic creditors under the Model Law can be subject to modification or termination, provisional relief does not create any vested rights for foreign representatives. Whereas the relief under the Regulation represents an essential tool that is hardly challengeable by ensuring that domestic creditors are not disadvantaged under the main proceedings, the Model Law does not provide for any definite reach resulting from the provisional relief that could be granted to the foreign non-main representative. Indeed, article 19 of the Model Law stipulates a series of measures the enacting forum may undertake, pending the recognition of foreign proceedings, in order "to protect the assets of the debtor or the interests of creditors."[104] While such measures could, in many cases, prevent fraud and the displacement of assets from one jurisdiction to another, article 22 of the Model Law gives the enacting forum the authority to either subject the grant of the provisional relief to any additional condition its deems appropriate (article 22(2)) or to terminate the provisional relief in its sole discretion (article 22(3)).[105]

In light of the above, it is understood that the UNCITRAL working group intended to endow the foreign non-main proceedings with a variety of tools to ensure the protection

100. *See* Regulation, *supra* note 2, at art. 18(2); *see also* Murphy, *supra* note 75, at 139.

101. *See* Berends, *supra* note 12, at 358.

102. *Id.*

103. The Regulation affords this type of relief to the secondary liquidator who, among other prerogatives, may demand the transfer of assets that were fraudulently removed from the secondary forum. *See* Regulation, *supra* note 2, at art. 18(2).

104. *See* Model Law, *supra* note 1, at art. 19.

105. Additionally, pursuant to article 22(1) of the Model Law, the modification or termination of the relief granted must be satisfactory to the court of opening with respect to the right of "creditors and other interested persons." Model Law, *supra* note 1, at art. 22(1). Since the interests of domestic creditors traditionally conflict with the interests of foreign creditors, the court of opening would systematically amend or terminate the provisional relief granted to the foreign representative if such a modification or termination would serve better the interests of its domestic creditors. In contrast, the Regulation does not allow the court of main proceedings to terminate relief granted to the foreign liquidator unless there are compelling public policy grounds to do so. *See* Regulation, *supra* note 2, at art. 22.

of domestic creditors. But the Model Law fails to provide for any certainty and compulsory reach for such provisional measures (that had an original purpose of increasing protection to creditors and fostering cooperation among the various courts involved in the proceedings of the debtor's insolvency). In contrast, despite the fact that the Regulation enables the foreign liquidator to apply for a specific type of relief as a measure of preservation, the reach of the relief can hardly be disputed, amended, or to an even lesser extent, terminated under the sole discretion of the main forum. Thus, instead of leaving this issue to be governed by each forum and subject to the discretion of the recognizing court, the Model Law could have achieved more uniformity and certainty by restricting the type of relief available to the non-main foreign representative, while ensuring that the conditions to grant such relief are homogenous and independent of the discretion of each forum.

C. Protecting Domestic Creditors

Perhaps one of the most significant contributions of the Regulation is the protection afforded to domestic creditors in secondary proceedings. Such a high level of protection, however, is not surprising in light of the previous tentative conventions on insolvency proceedings among EU member states. Indeed, European countries learned from their various experiences that the success of any EU arrangement on cross-border insolvency would always be contingent on the satisfaction in each forum on the treatment of its domestic creditors. This equality of treatment was ensured under the Regulation through unequivocal language and the few exceptions with respect to the power of the secondary liquidator and the preservation measures that the secondary liquidator can undertake for the benefit of domestic creditors. In other words, while the Regulation establishes an insolvency regime conditioned on strong elements of Territoriality and embodied in the form of secondary proceedings, it does not create secondary creditors whose priority claims are affected by the opening of main proceedings.[106] By the same token, the protection of domestic creditors, achieved through a consistent choice of forum and special choice of law provisions, was conducive to a political compromise pursuant to which the forum of opening of main proceedings could assert extra-territorial powers over the debtor's assets located in other jurisdictions where the debtor has no establishment.

Although the protection of domestic creditors has long been an impediment to the creation of a global cross-border insolvency system, the provisions of the Model Law seem to marginalize this issue. The non-main representative under the Model Law disposes of unrestricted powers[107] (in comparison with a secondary liquidator under the Regulation) and may apply for recognition and for relief before the enacting forum. But the acts of the non-main representative under the Model Law are associated with lesser certainty than those of the secondary liquidator under the Regulation. Even where the Model Law is adopted in its entirety and is not modified from its original version, the acts of the non-main representative remain subject to the scrutiny and discretion of the recognizing forum. Therefore,

106. This is true so long as the secondary court would apply its own domestic law along with its home priority ranking to liquidate the debtor's assets domestically located and to distribute the proceeds resulting therefrom.

107. These powers are unrestricted to the extent that they are not defined. Unlike the Regulation, there are no provisions under the Model Law that stipulate what kind of actions the non-main representative may or may not undertake, whether in the course of main or non-main proceedings.

under the Model Law, domestic creditors have less protection, cross-border insolvency proceedings are less predictable, and there is less cooperation between courts.

The Model Law does not achieve a political compromise that ensures that main and non-main proceedings have their respective scopes without overlapping, nor does it achieve an acceptable margin of security for domestic creditors. Additionally, because of the limited objectives of the Model Law and its sole dedication to recognition matters, forums where the debtor has only assets are not prevented from opening insolvency proceedings against the debtor. When such proceedings are banned from recognition, creditors may likely be subject to a significantly different treatment from one forum to another.

Although the debate between pure Universality and pure Territoriality is moot, the EU experience has shown that an effective combination of these theories can offer higher predictability and equality among creditors, irrespective of their location. In this respect and as argued by Professor Westbrook, the Regulation may seem "breathtakingly Universal"[108] when there are no secondary proceedings initiated against the debtor. But when secondary proceedings are initiated, the Regulation manages to extract the benefits of each theory to the advantage of creditors, whether sophisticated or not. In contrast, the Model Law does not exploit the advantages of either theory, whether or not non-main proceedings are initiated against the debtor. Therefore, certain adjustments to the scope of non-main proceedings under the Model Law would be desirable. One such improvement that could be learned from the Regulation is that, through the empowerment of the non-main representative, non-main proceedings could be tailored to satisfy domestic creditors' needs. In fact, such an empowerment can only take place if the Model Law endows the non-main representative with specific preservation tools and incontestable prerogatives, which could be used before the main forum without challenge. Achieving this, however, may require that the Model Law shifts its basic approach, from an approach geared towards recognition to one aiming to establish a direct relationship between main and secondary proceedings.[109]

IV. Primacy of Main Proceedings

A recurring theme of the Regulation is the primacy of main proceedings over secondary proceedings. The first part of the following section will identify how such a primacy was achieved and what benefits may result therefrom. The second part will study the level of primacy between main and non-main proceedings established under the Model Law. Based on international experience in cross-border insolvency matters, it will be examined whether the Model Law may be conducive to an unconditional and universal degree of primacy, thereby increasing predictability and cooperation among courts.

A. The EU Context

One of the lessons to be learned from the European insolvency regime and from international experience is that the initiation of multiple proceedings against the same debtor is not adequate to create a viable and coordinated system to resolve the insolvency of large

108. *See* Westbrook, *Multinational Enterprises*, *supra* note 53, at 34.

109. So far the Model Law has established an indirect relationship channeled through the enacting state, which has fulfilled the role of a buffer between main and non-main proceedings.

MNEs.[110] Indeed, in addition to allowing the opening of several sets of proceedings, the EU Regulation establishes a number of ground rules to govern the relationship between these proceedings. In order to achieve the advantages conferred by Universalism, and to overcome the traditional territorial approach, the Regulation has given broader scope, reach and hierarchic superiority to main proceedings. This spirit is reflected in a series of actions only the court of main proceedings can take[111] and in the limitations imposed on the court of secondary proceedings.[112]

Initially, the objectives of the Regulation were to limit the settlement of insolvency cases to one forum that has the authority to open main proceedings. Because such a system is not feasible on the regional level, and far less so on a global level,[113] the drafters of the Regulation had to contemplate the opening of secondary proceedings that would have a limited scope. Secondary proceedings may be thought of as a political compromise necessary to reach a regional insolvency arrangement. This rationale is implicitly expressed throughout the Regulation by the presence of a considerable number of provisions limiting the prerogatives of the courts in secondary proceedings.

For example, the preamble of the Regulation restricts the opening of secondary proceedings to what is "absolutely necessary"[114] when such proceedings are initiated prior to the opening of main proceedings. As a result, the primacy of main proceedings has given the Regulation a rather Universal character. Two subsequent sections will analyze this primacy. The first section will envisage the role of the liquidator under each set of proceedings. The second section will explore the limits imposed on secondary proceedings and other forums regarding their right to refuse recognition on the grounds of public policy. Although the issues pertaining to recognition and enforcement will be studied separately, it is appropriate to tackle the Regulation's restrictive definition of the concept of public policy in the context of judicial powers.

1. *Role of the Liquidator*

Traditionally, the liquidator must act in the best interests of the creditors. In the domestic context, this requires a thorough understanding of the needs and entitlements of the creditors, employees, holders, and other parties, and how best to achieve the realization of the debtor's assets to match those entitlements. To achieve these objectives, the liquidator

110. Current practices in cross-border insolvency have proved ineffective although the grab rule encourages the opening of multiple proceedings against the same debtor. The opening of concurrent proceedings is not by itself a solution to the transactional insolvency dilemma. *See, e.g.*, Model Law, *supra* note 1, at art. 28. The Model law explicitly allows the opening of multiple proceedings against the same debtor so long as countries comply with guidelines for cooperation. The modalities of concurrent proceedings under the Model Law are studied below.

111. The court of opening of main proceedings is endowed with broader powers than courts of secondary proceedings. These powers are either expressed materially (different types of actions that could be exercised in the main proceedings) or territorially (these actions encompass the entirety of the debtor's assets located inside or outside the forum of opening).

112. Conversely, limitations on secondary proceedings entail territorial insolvency proceedings that can only liquidate the debtor's assets located in that jurisdiction. In the alternative, secondary proceedings may entail preservation measures on local assets subject to the broader powers of the court in main proceedings.

113. On the political impracticability of Universalism, *see* Frederick Tung, *Skepticism about Universalism: International Bankruptcy and International Relations*, (Berkeley Program in Law & Economics, Working Paper Series, Paper 43, 2002), *available at* http://repositories.cdlib.org/blewp/43.

114. *See* Regulation, *supra* note 2, at art. 17 of Preamble.

guards against the premature dismemberment of the debtor's business and endeavors to preserve the assets within the reach of the court that appointed him or her. When the debtor is a MNE with assets dispersed across the globe, it is crucial that the liquidator has adequate powers and means to preserve these assets.[115]

It is not surprising that the first article of the Regulation explicitly mentions the presence of the liquidator. The presence of the liquidator is one of two necessary conditions for the Regulation to apply. For instance, annex C of the Regulation lists, by country, all the possible denominations of the liquidator under the various insolvency laws. Because of the numerous provisions that deal with the role of the liquidator, it seems that the drafters of the Regulation dedicated much attention to the liquidator's tasks and powers.

Liquidators play an important role in insolvency proceedings, especially when cross-border implications arise. The duties to provide information and to liaise among several courts make the tasks of the liquidator burdensome and difficult.[116] In the EU context, the powers of the liquidator seem to mirror those of the court where the liquidator was appointed. The fact that the main liquidator is conferred broader powers than those conferred to his counterpart in secondary proceedings illustrates the theme of primacy of main proceedings over secondary proceedings. It is also a way to ascertain the recurrent Universal character of the Regulation. Such an unequal distribution of powers ensures that there is a single set of proceedings that shall have overall jurisdiction over the debtor's assets and that there is only one person that should be able to dispose of the debtor's estate, wherever located.

Aside from the general duty to cooperate and to provide information when requested, article 18 of the Regulation defines the role of the liquidator, either in main or secondary proceedings. In main proceedings, pursuant to article 18(1), the liquidator enjoys "all the powers conferred on him by the law of the State of the opening of proceedings in another Member State."[117] Despite the special attention given to the liquidator and his role, the Regulation does not enunciate the prerogatives the main liquidator may dispose of to complete his task. Instead, the Regulation defers to the law governing the main proceedings so as to determine what the functions of the liquidator are[118] and how his duties and limitations should be determined.[119] This simply shows that the court of main proceedings may,

115. On the different tasks of the liquidator on the domestic level, *see* Francine L. Semaya & Cozen O'Connor, *Insurance Insolvencies: Has the Current Cycle Peaked?*, 854 PLI/COMM 111, 132-34 (2003); Roger Enock & Geoff Nicholas, *London: The Company Market and Insolvency: Schemes of Arrangement; Section 304; The Policyholders Protection Board*, 735 PLI/COMM 71, 95 (1996); Leslie H. Miles, Jr. & Robert F. Feidler, *Choosing a Liquidator and Negotiating the Fees*, 16-SEP AM. BANKR. INST. J. 26, 26 (1997). But the liquidator's responsibilities are extended and become more complex in cross-border insolvency cases. *See, e.g.*, Arnold M. Quittner, *Maxwell Communications and Cross-Border Insolvency Issues*, 752 PLI/COMM 647, 658-60 (1997).

116. *See* Quittner, *supra* note 115, at 659.

117. Regulation, *supra* note 2, at art. 18(1).

118. *See* Wessels, *European Union*, *supra* note 78, at 31 (arguing that under the EU Regulation, "a liquidator may automatically exercise all powers conferred on him by the member state's lex concursus . . ."). This provision, like many others, was inherited from the 1995 EU Convention on Insolvency Proceedings. *See* Fletcher, *Choice-of-Law Provisions*, *supra* note 18, at 134 (asserting that "[a]rticle 4(2)(e) of the EU Convention affirms the basic principle that it is for the lex concursus to determine the extent of the liquidator's powers in relation to current contracts").

119. *See* Wessels, *European Union*, *supra* note 78, at 31. This approach may seem surprising, especially when these provisions are designed to handle such a complex process involving multiple courts and proceedings. Indeed, a greater need for precision is often expected when it comes to cross-border issues.

through the liquidator it appoints, exercise extra-territorial powers to administer the debtor's assets located in other jurisdictions. In many respects, the Regulation has left enough room for the main forum to define the boundaries of its own judicial powers. While some commentators have criticized such an extra-territorial reach, the broad powers of the main forum resulting from the Regulation's flexible approach have rendered the Regulation more appealing and effective in many ways.[120]

In turn, the primacy of main proceedings over secondary proceedings seems sufficient to prevent, or at least to limit, future conflicts between liquidators respectively designated in each set of proceedings. Also, it should be noted that the role of the liquidator in the main proceedings is not limitless. Article 18 of the Regulation confines these powers when prior preventive measures were duly undertaken[121] before other forums. Additional restrictions to the liquidator's prerogatives derive from article 18(3), where in the course of his duties, the liquidator is not entitled to use "coercive measures or the right to rule on legal proceedings or disputes."[122] Nonetheless, in general terms and under main proceedings, the liquidator has the power to remove the debtor's assets from one jurisdiction to another and similarly initiate any action in order to preserve creditor's rights.

Such extensive powers stand in stark contrast with the restricted prerogatives of the liquidator in secondary proceedings. Pursuant to article 18(2) of the Regulation, the secondary liquidator has the right to avert the assets that have been removed from one jurisdiction to another.[123] This liquidator has the privilege to do so either out of, or before the courts of, any other member state. Apart from the recognition of his status and access to EU courts, the liquidator plays a restricted, yet vital, role in secondary proceedings. But a mere obligation to alert and inform does not include any entitlement to remove assets, unlike his counterpart's prerogatives in the main proceedings. The same article of the Regulation grants the secondary liquidator the possibility to "bring an action to set aside" with no further details as regards the requirements of such an action.[124] Clearly, the Regulation has extensively curtailed the role of the liquidator in secondary proceedings. This constraint on a secondary proceeding liquidator reveals the limited impact intended to result from the opening of secondary proceedings and emphasizes that the main proceeding liquidator, along with the main court, will have an unchallenged upper hand in adjudicating the insolvency of the MNE debtor throughout the EU.

The relationship between liquidators in main and secondary proceedings embodies the very spirit of the Regulation. The primacy of main proceedings is an important aspect that may promote closer cooperation between foreign courts in cross-border insolvencies. It would, however, be incorrect to consider the EU regime as a purely Universalistic model. The possibility for secondary proceedings attests to the contrary. Yet the intended limited

120. "Flexibility in the rules appears to be indispensable in international bankruptcy. The situations which arise are so varied that any one rigid rule cannot solve all of them satisfactorily .... Neither the theory of territoriality nor the theory of ubiquity can cope adequately with the divergent situations." Kurt H. Nadelmann, *Solomons v. Ross and International Bankruptcy Law*, 9 MOD. L.R. 154, 167-68 (1946).

121. Article 18(1) prevents the liquidator from using the prerogatives conferred to him under the lex concursus "as long as no other insolvency proceedings have been opened there nor any preservation measure to the contrary has been taken there further to a request for the opening of insolvency proceedings in that State." Regulation, *supra* note 2, at art. 18(1).

122. *Id.* at art. 18(3).

123. *Id.* at art. 18(2).

124. *Id.*

effect of secondary proceedings reflected in their scope and supplemented by the restricted, no less definite, powers of the secondary liquidator renders the Regulation more identifiable to Universalism and thus more viable. The powers accorded to the court of main proceedings and to the main liquidator hardly seem challengeable, not even on public policy grounds.

2. *Limited "Public Policy" Concept*

Automatic recognition of foreign judgments is a landmark of the European Union. It first appeared in the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters[125] and has also been a long-standing tradition expressed in several legislative texts that are binding to all member states in the community.[126] With minor variations between the instruments that are built upon such a method for recognition, the general principle is that all judicial decisions rendered by the courts of one member state are automatically and unconditionally recognized within the territories of all other member sates.[127] This practice has so far helped achieve the objectives set in the Treaty Establishing the European Community (EEC Treaty) to create a common market with a certain degree of trust upon which participants can rely. But domestic courts can refuse the recognition of foreign judgments when the exequatur of these decisions is incompatible with the public policy of the recognizing forum.[128]

Although the concept of public policy is somewhat elusive and has never been defined,[129] it is the role of the recognizing court to assess whether a given foreign judgment constitutes a breach of this concept. Generally, violations of the principles or objectives pursued by the recognizing country's legislation are often construed to be against the public policy of that forum, hence recognition will not be granted. Regarding the implementation of automatic recognition of foreign judgments, some jurisdictions in the EU have used the public policy argument rather extensively. In France, for example, it was common practice that courts would find a violation of public policy or order when foreign courts decided a case in a different manner than French courts would.[130] But when courts follow such a chauvinistic approach, not only do they run the risk of seeing their own decisions unrecognized by other forums, they also breach their duties under the EEC Treaty and the Brussels Convention.[131]

125. *See* the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1990 O.J. (Annex) (C 189) 1 (the Brussels Convention). The Brussels Convention states that "[a] judgment given in a Contracting State shall be recogni[z]ed in the other Contracting States without any special procedure being required." *Id.* at art. 26.

126. *See* Convention on the Law Applicable to Contractual Obligations, 1980 O.J. (L 266) 1, art. 15 [hereinafter Rome Convention].

127. *See* Brussels Convention, *supra* note 125, at art. 26.

128. *See id.* at art. 27(1) (stating that "[a] judgment shall not be recognized if such recognition is contrary to public policy in the State in which recognition is sought").

129. Each jurisdiction has its own definition of public policy. Thus, there is no uniform public policy concept even between member states to the EU.

130. Under the French legal system, there are two public policy concepts. The first is known as *ordre publique national* and relates to purely domestic considerations, and is rarely waived by French courts. The second concept is known as *ordre publique international* and is more flexible since it applies when international aspects, such as an international contract or a tort occurring in a foreign jurisdiction, arise from the case at stake and produce some effects in France.

131. *See* Brussels Convention, *supra* note 125, at art. 29 (stating that "[u]nder no circumstances may a foreign judgment be reviewed as to its substance").

For many years, this weight of reciprocity combined with community obligations have functioned as deterrents to this practice and have in fact reduced the abusive use of the public policy exception.

Despite a reasonable use of this defense among EU member states, the Regulation found the necessity to restrictively define public policy so as to increase cooperation among EU courts in insolvency matters. According to article 26[132] of the Regulation, public policy is limited to the cases where "fundamental principles or the constitutional rights and liberties of the individual" are at stake.[133] In the majority of cases, courts will not be able to raise the exception of public policy against the recognition of insolvency proceedings or decisions rendered by the court of opening of main proceedings. Indeed, it seems difficult to stretch the definition of "fundamental" and "constitutional rights" to include the loss of a preferential right on the insolvency proceeds, or even an injunction to transfer assets from one jurisdiction to another, as long as foreign creditors have a right to lodge their claims before the court of main proceedings.

The drafters of the Regulation were aware of the sensitive character of insolvency proceedings and that courts may be willing to broadly resort to public policy defenses to protect their domestic creditors. Indeed, without such a narrow definition, domestic courts would have often resorted to the use of public policy arguments to refuse recognition of insolvency judgments that run against the interests of their domestic creditors. Article 26 completes the objectives of the Regulation to endow the court of opening of main proceedings with broad and universal powers.[134] The automatic recognition of insolvency judgments, along with the limited grounds for the recognizing state to refuse recognition achieves these objectives.

If the primacy of main proceedings could be effectively achieved within the EU, perhaps a similar hierarchic relationship between main and non-main proceedings could be more fully implemented under a revamped Model Law.

B. Channeling Primacy through the Model Law

Given the UNCITRAL working group was inspired by the EU convention, the theme of primacy has been spelled out in the Model Law. But the primacy of main proceedings over non-main proceedings is limited to recognition matters, and the enacting forum is exempt from complying with such a primacy, even when the debtor possesses only assets in the territory of that enacting state. The first part of the following section will study the provisions of the Model Law that seek to establish a certain primacy of main proceedings over non-main proceedings when concurrent and multiple proceedings are initiated against the debtor. The second part will demonstrate that there is a real potential to improve the provisions of the Model Law, thereby creating an unambiguous hierarchic rapport between the various courts involved in the insolvency of a MNE. This article will argue that courts around the world are familiar with the notion of primacy and that there is already a de facto primacy, based on the location of the debtor's assets in a given forum.

132. *See* Regulation, *supra* note 2, at art. 26.
133. *Id.*
134. *Id.*

1. *Concurrent and Multiple Proceedings*

While the Regulation creates a direct relationship between main and secondary forums and favors the primacy of main proceedings over secondary proceedings, the Model Law only establishes a limited relationship between the various forums involved in the resolution of a MNE's insolvency. In fact, the closest the Model Law has come to establishing a direct rapport between several sets of proceedings is through chapter five dealing with concurrent proceedings. Furthermore, the Model Law does not attempt to set up a full hierarchy between main and secondary proceedings.

According to article 28 of the Model Law, once the enacting forum has recognized foreign main proceedings, domestic proceedings may be initiated in the enacting forum only if the debtor possesses assets in that forum.[135] Such domestic proceedings are limited to the assets located in the enacting forum.[136] Surprisingly, the Model Law does not use the concept of establishment in the case of concurrent proceedings. This means that domestic proceedings (in the enacting forum) cannot be recognized as non-main proceedings or even recognized at all by other enacting states.[137] As discussed above, asset-based proceedings may, under the Model Law, be initiated against the debtor, though they cannot produce any effect in other jurisdiction because they cannot be recognized.

Although this may be viewed as an attempt to establish a certain primacy of main and non-main proceedings over asset-based proceedings, such an approach is not in line with the very spirit of the Model Law. If the objective of the Model Law was to increase cooperation and predictability, and because chapter five includes certain rules related to the opening of proceedings against the debtor,[138] the Model Law should have provided that asset-based proceedings cannot be initiated before the enacting forum, especially when the latter has already recognized foreign proceedings as main foreign proceedings. Since the concept of establishment was used in the Model Law for the purpose of recognition, article 28 should have extended the application of this concept, thereby imposing certain conditions on the enacting forum to open insolvency proceedings against the debtor. Such an inconsistent approach was highlighted in the Model Law guide to enactment, which provides that

> the enacting State would act in line with the philosophy of the Model Law if it enacts the article by replacing the words "only if the debtor has assets in this State," as they currently appear in article 28, with the words "only if the debtor has an establishment in this State."[139]

In addition to the Model Law's inconsistent approach in article 28, article 29 reiterates a strong hold of Territoriality and advocates the pre-eminence of domestic proceedings

135. Model Law, *supra* note 1, at art. 28.

136. *Id.*

137. The Guide to Enactment of the Model Law provides that this approach "would typically not be the most efficient way to protect the creditors, including local creditors." Guide to Enactment, *supra* note 6, at art. 28.

138. Although the Model Law has an overall approach geared towards recognition, chapter five comes into play when foreign proceedings have already been initiated and recognized (or on the verge of recognition) by the enacting forum. Therefore, chapter five provides for certain rules related to the possibility of opening insolvency proceedings against the debtor in light of the foreign proceedings already initiated before other forums. Model Law, *supra* note 1, at arts. 28-32.

139. Guide to Enactment, *supra* note 6, at art. 28.

over foreign proceedings, whether main or non-main.[140] First, article 29(a)(i) provides that once the proceedings are initiated before the enacting forum, any provisional relief based on the protection of foreign creditors,[141] along with any relief to the foreign non-main representative,[142] must be consistent with such proceedings, irrespective of whether or not the enacting forum is in actuality the debtor's center of main interest.[143] Hence, if the rights of foreign creditors were in jeopardy, the main or non-main representative would be denied relief based on urgency, such as preservation measures, if this relief would prevent domestic creditors in the enacting forum from liquidating the debtor's estate. Clearly, these provisions do not permit a high degree of coordination between the courts or, even less so, equality among creditors.

Furthermore, article 29(a)(ii) states that the provisions of article 20 shall not apply once proceedings are opened in the enacting forum and foreign main proceedings are pending for recognition before that forum.[144] Article 29(a)(ii) makes sense because article 20 may entail an automatic moratorium against creditors, which would result in the discontinuance of the proceedings in the enacting forum. The waiver afforded to the enacting forum regarding the application of article 20 as a whole indicates a major alienation and weakening of main proceedings. The debtor's center of main interest seems to lose its meaning and purpose every time concurrent proceedings are simultaneously initiated before both a foreign court and the enacting forum. Additionally, such a waiver to the application of article 20 places main and non-main proceedings on equal footing, if not giving a certain preeminence to foreign non-main proceedings so long as they are consistent with the proceedings in the enacting forum.[145]

In term, the effect of main and secondary proceedings and the relief that may be granted to foreign representatives will be determined within the confines of article 29(a)(i) and will be conditioned on the consistency of the provisional relief demanded with the proceedings in the enacting forum. The Model Law Guide to Enactment itself provides that the aim of article 29 was not to establish "a rigid hierarchy" between the proceedings because it would have prevented the courts from cooperating with each other.[146]

Despite the rather territorial and inconsistent articles 28 and 29, the idea of primacy of main proceedings over non-main proceedings was envisioned under the Model Law. In fact, the UNCITRAL working group has indeed attempted to remedy the territorial orientation of the Model Law and salvage its territorial approach through the provisions in article 30 which advocate a limited primacy of main proceedings over non-main proceedings. Article 30 stipulates, among other provisions, that upon recognition of foreign main proceedings by the enacting forum, the relief granted or to be granted by the enacting forum to foreign non-main representatives must be consistent with foreign main proceedings.[147] Certain prerogatives, such as the right to modify or even terminate any relief granted under article 19 and 21, are left to the enacting forum to ensure that non-main proceedings are consistent

140. Model Law, *supra* note 1, at art. 29.
141. *Id.* at art. 19.
142. *Id.* at art. 21.
143. *Id.* at art. 29(a)(i).
144. *Id.*
145. *Id.* at art. 29.
146. Guide to Enactment, *supra* note 6, at art. 29.
147. Model Law, *supra* note 1, at art. 30.

with main proceedings. Thus, the Model Law indirectly establishes the primacy of main proceedings only when there are no proceedings initiated before the enacting forum. When proceedings are opened before the enacting forum, articles 28 and 29 should apply.

It is somewhat unclear why the UNCITRAL working group decided to provide for the limited application of primacy of main proceedings to which the enacting forum would not be subject. Where proceedings are opened before the enacting forum, the Model Law may seem extraordinarily territorial because not only would the enacting forum be entitled to open proceedings on the basis of the presence of assets, but such a forum would also have very limited obligations *vis-à-vis* foreign courts and representatives, whether main or non-main. One plausible reason behind the exemption of the enacting forum from the provisions of article 30 is that the UNCITRAL working group wanted to issue an instrument that would attract states to adopt it. Had the Model Law provided that main proceedings prevail over non-main proceedings opened in the enacting forum, or that the enacting forum had no right to initiate proceedings against the debtor based solely on the presence of the debtor's assets on its territory, the Model Law would have been less appealing to states. In actuality, this eagerness to please may have skewed the objectives of the Model Law and prevented it from becoming a more effective international instrument.

Although the Model Law borrows a number of important concepts from the Regulation, such as the debtor's center of main interests and the debtor's place of establishment, it employs these concepts in a different, less effective manner.[148] The Regulation uses these very concepts to create a hierarchic ranking between main and secondary proceedings, but the Model Law reverts back to the precepts of a longstanding and criticized purely territorial approach. This stance is surprising when one considers that a de facto hierarchic ranking and primacy among several sets of proceedings on the global level occurs frequently in cross-border insolvency cases.

2. *Prospects of Advocating Primacy*

The primacy of main proceedings in the EU context created a rather Universalistic approach to cross-border insolvency cases within the community. Comparing the EU approach to the prospects of advocating primacy of main proceedings over non-main proceedings under the Model Law may seem rather unrealistic in many respects.

Unlike most countries, EU member states previously abided by regional arrangements that contained provisions on the choice of law, forum, and automatic recognition of judgments.[149] Although the Regulation marks a clear distinction from previous instruments, EU member states were ready to move to the next stage with respect to judicial cooperation.[150] The acceptance of a regulation that prods the main forum to assert extra-territorial powers in the area of insolvency testifies to this readiness.[151] It could be argued that most countries

148. *Id.* at art. 28.

149. On the EU experience on cross-border insolvency matters, *see* Westbrook, *Multinational Enterprises*, *supra* note 53, at 8 (arguing that the issuance of the UNCITRAL model law was a great achievement, although unexpected by the international community and adding that such an achievement was possible because of the participation of EU delegates, who previously obtained a certain expertise in cross-border insolvency matters in the course of creating the EU Regulation).

150. *Id.*

151. The readiness will be demonstrated to a greater extent when secondary forums accept a curtailment in their right to initiate full-fledged insolvency proceedings against a MNE debtor that has an establishment on their territory or when secondary forums accept the primacy of main proceedings over their own proceedings.

in the world do not have the expertise necessary to engage in such a process, which requires a certain level of knowledge, familiarity with cross-border issues, and judicial integration. To the extent that situations of *lis pendens* are often difficult to resolve on a global level,[152] it would be equally difficult to expect that a forum would give priority to a foreign forum to settle the insolvency of a MNE debtor that has an establishment or assets in the territory of the first.

The Regulation gives certain autonomy to the courts in EU member states to implement its provisions. Although the Regulation provides guidelines for interpretation and construction, the EU insolvency regime could not have been created without the existence of a supreme court, the European Court of Justice, to supervise the implementation process and ensure the uniform application of insolvency principles. The absence of a similar supreme authority on the global level could render the adoption of a global instrument, such as an amended or improved Model Law, containing such progressive concepts, rather difficult.

Another impediment to the primacy of main insolvency proceedings on the global level is the risk of using public policy defenses to refuse recognition of foreign insolvency judgments. Despite the success of a limited definition of this concept in the EU context for recognition purposes, there is nothing to guarantee uniform interpretation of and compliance with the concept of public policy, should an international instrument stipulate similar provisions.[153] Under the Model Law, for instance, the UNCITRAL working group has only reiterated the public policy exception to recognition and cooperation, without providing for any restrictions. During the negotiation process of the Model Law, article 6[154] was discussed at length and it was agreed that the UNCITRAL working group cannot define this concept since each jurisdiction has its own definition. The Model Law has only attempted to restrict the interpretation and implementation of the public policy exception by stipulating in article 6 that the enacting forum may refuse to recognize foreign proceedings if and when this "would be manifestly contrary to the public policy" of the enacting state.[155]

Despite these critiques, it could be argued that a de facto primacy of insolvency proceedings often occurs in cross-border insolvency cases. The most common situation is where a MNE debtor possesses valuable assets in one jurisdiction, even without the presence of a registered office or establishments in that jurisdiction. Because the administration of those assets is important to the overall insolvency proceedings against that debtor, the forum where such assets are located would find itself in a privileged position compared to other forums, where the debtor may have minor or no assets at all. Indeed, when the debtor's assets that are located locally are insufficient to satisfy the claims of domestic creditors in

152. *See* BLACK'S LAW DICTIONARY 932 (6th ed. 1990) (definition of *lis pendens*); David M. Gersten, *The Doctrine of Lis Pendens: The Need For Balance*, 69 FLA. BAR J. 83 (1995); *and* Janice G. Levy, *Lis Pendens and Procedural Due Process: A Closer Look After Connecticut v. Doehr*, 51 MD. L. REV. 1054 (1992).

153. A first concern would be reasonably founded on the notable differences in implementation between developing and developed countries, where the former will more often invoke public policy exceptions to refuse the recognition of foreign insolvency judgments. *See* John K. Londot, *Handling Priority Rules Conflicts in International Bankruptcy: Assessing the International Bar Association's Concordat*, 13 BANKR. DEV. J. 163, 176-77 (1996). Public policy defenses are likely to be used more often in developing countries so as to protect domestic creditors from unfavorable foreign insolvency judgments. This argument should be understood in light of the potential disparity between developed and developing countries to be the forum of opening of main proceedings.

154. Model Law, *supra* note 1, at art. 6.

155. *Id.*

any given forum, a natural advantage arises to the benefit of the forum where the debtor's most significant and valuable assets are located. Because forums deprived of this advantage cannot administer the debtor's assets that are located overseas,[156] these forums are left no option but to hope that the "enriched jurisdiction"[157] will cooperate and possibly transfer any surplus from the proceeds of the debtor's liquidation. Although there is no international treaty to regulate the relationship between the various forums involved when such a situation arises, the presence of assets will automatically confer certain primacy and broader powers over the debtor's estate to the forum where they are located. For instance, decisions to reorganize or to liquidate will depend on the privileged forum's willingness to cooperate and to transfer assets when required.[158] When these situations take place, the attitude of courts will vary from one jurisdiction to another. Some courts would be recalcitrant to cooperate, while others will try to reach a compromise between all stakeholders in the proceedings. The primacy of a given set of proceedings on the global level is not a new situation. Albeit disorganized and unforeseeable[159] in comparison with the EU Regulation, courts around the globe have had opportunities to administer a MNE's large estate on a worldwide basis. It is doubtful that these courts will lack expertise if they obtain primacy in insolvency proceedings, and this primacy was executed in an organized and predetermined fashion.

A step closer to conferring global primacy to a given set of insolvency proceedings against a MNE debtor is the use of protocols between courts to settle the insolvency of large MNEs. These protocols are legal arrangements between forums to decide how assets in different countries will be dealt with.[160] Commonly, protocols determine how bankruptcy courts in those different jurisdictions will coordinate their actions. This coordination helps restructure businesses on an international scale and thus preserves the value of corporate assets for all investors, employees, or other stakeholders. The use of these protocols could also enable a more effective liquidation of the debtor's estate, hence achieving a higher degree

156. This is a straightforward consequence of state sovereignty, which has so far prevented the assertion by any given forum of extra-territorial judicial powers. To illustrate, *see* In the Matter of the Bankr. of Sefel Geophysical Ltd., [1988] 54 D.L.R. (4th) 117 (where the Canadian court limited the stay on the insolvency proceedings to assets located in Canada; to stay the proceedings as regards assets located overseas, creditors need to present their claim before the court where such assets are located).

157. This expression is borrowed from Professor Westbrook and refers to the forum where the debtor's valuable assets are located at the time insolvency proceedings are initiated against that debtor. *See* Westbrook, *Universal Priorities*, *supra* note 75, at 41.

158. This assumption stems naturally from the predominant state of Territoriality. Since courts are never compelled to transfer assets, the location of important assets in a given jurisdiction would prioritize the court's decision to cooperate or not.

> The insolvency laws of the world's constituent states lay claim to worldwide effectiveness over the debtor's assets, wherever they may be found (although such pretensions cannot be translated into concrete effect without the concurrence of the rules of private international law of the countries where the assets happen to be located).

Fletcher, *Choice-of-Law Provisions*, *supra* note 18, at 123.

159. This method is unforeseeable because the primacy of a given set of proceedings will depend on the location of the assets at the time of opening.

160. "[P]rotocols provide a case-specific structure to govern how parties to an international insolvency communicate, take actions and apply the procedural and substantive elements of law." Steven G. Golick, *What, How, Where, and When to File: Considerations and Implications in Cross-Border Insolvency Proceedings in Canada*, 12 J. BANKR. LAW & PRAC. 47 (2003).

of equality between creditors of equal standing. Although protocols in cross-border insolvency cases foster cooperation between courts, the negotiation process that determines each court's rights, duties, and prerogatives cannot be overlooked.[161] Such negotiations are not an equity-based process, because there is often one forum that has the upper hand in the insolvency proceedings. More likely than not, the forum with the advantage will be the forum that has the debtor's most valuable assets under its control.[162] The communication process between the courts, though channeled through the parties,[163] certainly makes the proceedings more civil and organized. But the assertion of jurisdiction and the prerogatives resulting thereof remain based on the same traditional criterion—the emplacement of the debtor's assets.

In contrast to the European model, the superiority of one forum over another is a common occurrence in cross-border insolvency cases. If courts have been technically and legally able to handle the administration of a MNE's estate under the present and somewhat disorganized system, there is no reason to believe that they will not be able to carry out the same tasks pursuant to an international arrangement embodied in a possible amendment to the Model Law. Based on such analysis, it may be realistic to believe that the primacy of insolvency proceedings can be formally established through the Model Law. Doing this would require abolishing the exemption of the enacting forum from the rule of primacy[164] and ensuring that non-main proceedings opened before the enacting forum are consistent with the relief granted to the foreign main representative. While such provisions would, in the majority of cases, be waived by enacting states, this approach provides for a pragmatic indication as to the extent countries would refute the principle of primacy and oppose restrictions on their prerogatives when the debtor holds its center of main interests in another jurisdiction. On the bright side, however, this approach will determine how far or close the international community is from establishing a global insolvency system that retrieves the basic advantages of Universality, without implementing a purely Universal approach.

V. Conclusion

Despite the striking similarities that exist between the Regulation and the Model Law on the concepts used to determine an acceptable basis of jurisdiction, the provisions of the

161. *Id.* (arguing that although Canada and the United States agreed on the ALI guidelines to facilitate cooperation and protocols in cross-border insolvency cases, these Guidelines "are not meant to be static, but are meant to be adapted and modified to fit the circumstances of individual cases . . ."). These arguments support that the conclusion that there is a bargaining process which leads to the creation of a protocol among courts.

162. *See Shinichiro Abe, Recent Developments of Insolvency Laws and Cross-Border Practices in The United States and Japan*, 10 AM. BANKR. INST. L. REV. 47, 81 (2002) (arguing that in negotiating a protocol on a given case, the court of ancillary proceedings may decide "to surrender the assets conditionally, it must negotiate an agreement with the court of the home country" so as to ensure that its domestic creditors are satisfied). The absence of a protocol, on the contrary, would entail total discretion of the forum where such assets are located to cooperate. If no agreement were reached among courts, these assets would be exclusively distributed among domestic creditors, thus perpetuating the overriding state of territoriality. *See* WILLIAM L. NORTON, JR., NORTON BANKRUPTCY LAW AND PRACTICE § 152:66 (2d ed. 1994).

163. *Id.*

164. The current version of the Model Law opts for a flexible criterion, which includes the mere presence of assets, to attribute jurisdiction to the enacting forum. As mentioned above, this has given many countries the incentives to adopt the Model Law. *See* Model Law, *supra* note 1, at arts. 28-29.

Model Law seem lacking when compared to those of the Regulation. Through its unequivocal language and regardless of its binding character, the Regulation has significantly increased predictability and equality among creditors located in different jurisdictions, which is something the Model Law has fallen short in achieving.

One of the more probable reasons why the UNCITRAL working group did not follow the approach of the Regulation to a greater extent was the mounting pressure to accommodate the different insolvency principles and policies in the majority of countries. Since it was unsure how the international community would react to the issuance of the Model Law, the working group made a conscious choice not to issue far reaching insolvency provisions and limited its objectives to the confines of uncertain cooperation and sporadic recognition of foreign insolvency proceedings.

Today, however, such parameters have considerably changed. A number of countries, including the United States, have implemented the Model Law[165] (at least partially) thereby giving a certain weight to the UNCITRAL initiative. Although it is hoped that more countries will adopt the Model Law in the near future, the pressures that previously arose from its potential failure and rejection have notably decreased. On the other hand, the Regulation, which was the main source of inspiration to the UNCITRAL working group, has demonstrated that the same concepts may be put to better and more effective use to address the insolvency of MNEs. The provisions governing the choice of forum under the Regulation are just one aspect of this more efficient approach. This being said, the choice of forum provisions under the Regulation could not have achieved this degree of predictability and protection to domestic creditors without the accompanying insightful and complementary choice of law provisions.

165. *See* Jay Lawrence Westbrook, *Chapter 15 at Last*, 79 AM. BANKR. L.J. 713, 720-21 (2005).