WAKING FROM THE JURISDICTIONAL NIGHTMARE OF MULTINATIONAL DEFAULT: THE EUROPEAN COUNCIL REGULATION ON INSOLVENCY PROCEEDINGS

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> Not infrequently the overall result of a multinational default is significantly inconsistent with the declared policies of virtually every nation with a plausible interest in the affairs of the multinational [corporation]. Losses are distributed in ways that would be considered unfair under the domestic laws of most involved countries, and inconsistent adjudications of similar cases are commonplace. This disgraceful state of affairs continues in the face of nearly unanimous agreement across the world that the financial difficulties of a multinational [corporation] should be resolved in one central forum, the "universalist" principle.[1]
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> - *Jay Lawrence Westbrook*

I. INTRODUCTION

When Swissair[2] filed for bankruptcy protection from its creditors on October 2, 2001,[3] the entire international community went into economic turmoil. Shortly after Swissair declared bankruptcy, the Belgian national airline Sabena and several other smaller airlines, mostly owned by Swissair, subsequently had to

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1. Jay Lawrence Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L.J. 457, 461 (1991).

2. Swissair was founded in 1931 through the merger of Balair and Ad Astra. Swissair established itself as one of Europe's most prestigious airlines and acquired stakes in several national and regional airlines, such as Belgian's Sabena, Ukraine International Airlines, Austrian Airlines, Poland's LOT, and South African Airlines. Swissair's safety record was impeccable until, in 1998, it suffered the worst aviation disaster in Swiss history when one of its MD-11s crashed off Nova Scotia's coast, killing all passengers and crew members aboard. In addition to the events of September 11, 2001, this catastrophe is often identified as the main reason for Swissair's demise. *See generally* Bob Trevelyan, *Swissair: Proud Past, Grim Future*, BBC NEWS, Oct. 2, 2001.

3. *See Much of Swissair Seeks Bankruptcy*, N.Y. TIMES, Oct. 2, 2001; *see also Chronicle of Main Events Leading Up to Swissair Crisis*, AGENCE FRANCE-PRESSE, Oct. 3, 2001, at 2, *available at* 2001 WL 25027815.

do so as well.[4] However, of more concern was the recourse that hundreds of creditors worldwide had against Swissair and the law governing the distribution of remaining assets. The situation was aggravated by Swissair's decision that certain branches of its enterprise should be submitted for liquidation while others, such as flight services, should be submitted for reorganization proceedings.[5]

One day before filing for reorganization proceedings, Swissair, through its holding group, sold the majority shares of its subsidiary Crossair to two Swiss banks. Crossair was determined to carry on the flight services previously conducted by Swissair until creditors approved a reorganization plan. This business transaction almost caused several foreign banks,[6] all creditors of Swissair, to file a suit against the two Swiss banks in Switzerland. The foreign banks claimed that the sale of shares constituted a preferential transfer under Swiss bankruptcy law and should be declared void.[7] Not only did Swissair need to protect itself from possible lawsuits due to the pre-bankruptcy transfer of assets, but it also needed to protect its assets from the seizure of creditors in foreign countries.[8]

Although the creditors eventually approved a reorganization plan,[9] the uncertainty that pervaded the liquidation and reorganization proceedings reemphasized the inability of the international community to effectively

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4. *Belgian Airline Goes Bankrupt as Passenger Numbers Drop*, WINNIPEG FREE PRESS, Oct. 4, 2001, at 1, *available at* 2001 WL 27763708.

5. *Much of Swissair Seeks Bankruptcy*, *supra* note 3.

6. A group of more than 60 banks, including some of Europe's largest institutions, were preparing a multi-billion dollar legal action against UBS and Credit Suisse, Switzerland's two largest banks, over their controversial restructuring of Swissair. The banks, including Deutsche Bank, Commerzbank, Citibank and Hypovereinsbank, are owed about nine billion dollars, which they lent to Swissair during its disastrous expansion phase from 1999-2001. The banks were furious that they were not consulted by UBS and Credit Suisse, Swissair's main commercial banks, about the restructuring plan, and suspected that the two Swiss institutions profited unfairly ahead of the rest of Swissair's creditors as a result of the deal. Grant Ringshaw & Damian Reece, *Swissair Creditors to Sue Banks*, THE TELEGRAPH, July 10, 2001, *at* http://www.telegraph.co.uk.

7. Charles Pretzlik & Claudia Wanner, *Swissair-Krise: Credit Suisse und UBS Laufen Kunden Davon*, FIN. TIMES DEUTSCHLAND (Germany), Oct. 8, 2001, *available at* http://www.ftd.de.

8. Swissair filed a petition with the U.S. Bankruptcy Court in Manhattan to recognize the Swiss stay order and to grant protection of its assets from United States creditors. The United States Court eventually granted the request on October 11, 2001. *See generally Swissair Asks Judge for U.S. Protection*, THE RECORD, Oct. 10, 2001, *available at* 2001 WL 5272176; *Swissair Gets Protection from North American Creditors*, AIRLINE INDUSTRY INFO., Oct. 12, 2001, at 1, *available at* 2001 WL 3342326.

9. *See New Swissair to be Simply "Swiss,"* BBC NEWS (Europe), Jan. 31, 2002, *available at* http://news.bbc.co.uk (describing the multi-million dollar rescue package for a new national airline created by the Swiss government, banks, and various private parties).

coordinate cross-border insolvencies.[10] Uncoordinated concurrent insolvency proceedings make an effective reorganization of a multinational corporation impossible because separate multiple judgments will lead to the dismemberment of the debtor's estate.[11] The failure of the international community to agree upon a binding uniform set of rules is a major factor contributing to the insufficiency of guidelines in cases of cross-border insolvency.[12] Moreover, regional and bilateral agreements either lack cooperation by Member States or the necessary scope. Thus, they inevitably fall short of their intended purpose.[13]

The lack of an international insolvency framework forces multinational businesses to look at domestic laws for guidance.[14] However, domestic insolvency laws in European countries significantly differ from each other by either being pro-debtor or pro-creditor oriented.[15] As Professor Ian Fletcher notes, the substantive differences in domestic insolvency laws have precluded the development of a uniform approach to multinational default. "The ensuing diversity [of domestic European laws] has been unusually intense, even by the standards of private international law, with the result that the quest for unifying principles has so far proved to be elusive."[16] The reconciliation of domestic insolvency laws is made more difficult because a country's approach to insolvency is often rooted in that country's particular societal values and public policies.[17] Thus, domestic courts in many countries, including the United States,

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10. SAMUEL L. BUFFORD ET AL., FEDERAL JUDICIAL CENTER, INTERNATIONAL INSOLVENCY 1 (2001) (stating that "one of the most noteworthy features of international bankruptcy law is the lack of legal structures, either formal or informal, to deal with an insolvency that crosses national borders.").

11. *See generally id*. (discussing various attempts at a universality approach to transnational insolvency issues).

12. *See generally* David H. Culmer, *The Cross-Border Insolvency Concordat and Customary International Law: Is It Ripe Yet?*, 14 CONN. J. INT'L L. 563, 575 (1999).

13. *See* Timothy E. Powers et al., *The Model International Insolvency Co-Operation Act, in* CURRENT ISSUES IN CROSS-BORDER INSOLVENCY AND REORGANISATIONS 233, 234-35 (E. Bruce Leonard & Christopher W. Besant eds., 1994); s*ee also* IAN F. FLETCHER, INSOLVENCY IN PRIVATE INTERNATIONAL LAW 7 (1999) [hereinafter FLETCHER, PRIVATE INTERNATIONAL LAW].

14. *See* Ian F. Fletcher & Hamish Anderson, *The Insolvency Issues, in* CROSS-BORDER SECURITY AND INSOLVENCY 257, 262 (Michael Bridge & Robert Stevens eds., 2001) [hereinafter Fletcher, *The Insolvency Issues*].

15. *See* FLETCHER, PRIVATE INTERNATIONAL LAW, *supra* note 13, at 4-5.

16. *Id*. at 10.

17. CARL FELSENFELD, FELSENFELD ON INTERNATIONAL INSOLVENCY 1-9 (2000); *see* BUFFORD, *supra* note 10, at 3 (stating that "the legal rules governing insolvency law and practice are rooted deeply in the legal traditions of individual countries. In part this arises because insolvency law preempts and supersedes many rules of both substantive and procedural law. Moreover, the importance of national economic interests varies from country to country.").

are hesitant to defer jurisdiction to the court of another country that has a completely adversary set of guidelines in place.[18]

During the discussion of national bankruptcy laws and international approaches to cross-border insolvencies, this Note will focus on liquidation and reorganization[19] as the available proceedings in an insolvency case affecting multinational corporations. Furthermore, for the purposes of this Note, insolvency occurs when a business is unable to pay its debts as they become due.[20]

On May 29, 2000, in its first attempt after the failure of the European Community Convention on Insolvency Proceedings (Insolvency Convention) in 1996, the European Union (EU) adopted the European Council Regulation 1346 on Insolvency Proceedings (EC Regulation).[21] The regulation will be directly applicable to all Member States[22] of the EU except for Denmark. The European Council used its new legislative powers provided by the Treaty of Amsterdam in 1997[23] to implement this insolvency regulation.[24] Considering that the adoption

18. Under Section 304(c) of the United States Bankruptcy Code, a U.S. Bankruptcy Court will recognize a foreign proceeding if that proceeding is substantially in accordance with the U.S. Bankruptcy Code; under Article 166 of the Swiss Federal Statute on Private International Law, Swiss bankruptcy courts will recognize only those foreign proceedings which do not conflict with Swiss public policy. NEIL COOPER & REBECCA JARVIS, RECOGNITION AND ENFORCEMENT OF CROSS-BORDER INSOLVENCY (1996).

19. BLACK'S LAW DICTIONARY 931, 1298 (6th ed. 1990) (defining liquidation as the settling of finances of a business or individual, usually by liquidating (turning to cash) all assets for distribution to creditors, heirs, etc; and defining reorganization as the act or process of organizing again or anew and usually involves the preparation of a plan of reorganization by the bankruptcy trustee, the submission thereof to the court, and, after a hearing, the determination of feasibility of such a plan).

20. *See* VESNA LAZIC, INSOLVENCY PROCEEDINGS AND COMMERCIAL ARBITRATION 13 (1998); *see also* Joren de Wachter, *General Report*, *in* RESCUE OF COMPANIES 5 (Winfried F. Schmitz, et al. eds., 1998).

21. Council Regulation 1346/2000 on Insolvency Proceedings, 2000 O.J. (L 160) 1-3 [hereinafter EC Regulation] (applicable to all Member States of the European Union, except Denmark).

22. There are currently 15 Member States: Ireland, Great Britain, France, Portugal, Spain, Germany, Austria, The Netherlands, Finland, Sweden, Italy, Greece, Denmark, Belgium, and Luxembourg.

23. TREATY OF AMSTERDAM AMENDING THE TREATY ON EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITY AND CERTAIN RELATED ACTS, Oct. 2, 1997, O.J. (C 340) 1 (1997) [hereinafter TREATY OF AMSTERDAM].

24. The three key players in the European Union legislative process are the European Council, the European Commission, and the European Parliament. The European Council is the European Union's main decision-making institution and final legislative authority. The Treaty Establishing the European Community provided that the European Council is the Community's legislative body, but it must exercise this legislative power in co-decision with the European Parliament on a variety of issues. The Treaty of Maastricht defined the Council's legislative powers by creating three "pillars." The legislative process regarding any subject matter covered under the first pillar, i.e., agriculture or energy, is initiated by a

of the United Nations Commission for International Trade Law Model Law on Cross-Border Insolvency (UNCITRAL Model Law) by a significant number of European countries will probably take several more years, the EC Regulation could create the much-needed certainty for investors in European businesses by establishing this uniform insolvency framework. This Note argues that the EC Regulation is the most workable solution to the dilemma of uncertainty in international insolvency law, because the regulation is binding on all Member States and the European Council has the legislative competence to enforce the regulation. Additionally, the European Council does not need to rely on intergovernmental cooperation.[25] The successful implementation of the EC Regulation will bolster support within the international community for the development of similar conflict-of-law rules regarding cross-border insolvencies with universal, not merely regional, effect.

Part II of this Note discusses the basic jurisdictional conflicts underlying cross-border insolvency proceedings. Part III discusses the principles of international insolvency law in terms of territoriality, universality, and modified universality. Part IV analyzes the treatment of cross-border insolvencies under national bankruptcy laws and the relevant laws of several European countries and the United States. Part V discusses current principles of cooperation between bankruptcy courts in cross-border insolvency cases as well as previous international attempts to establish regional and global solutions to the problem of

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proposal of the European Commission. The European Council can either adopt, amend, or ignore the proposal. The second and third pillar address the areas of common foreign policy and security, for which the European Council promotes initiatives and acts as the decision-maker at the same time. The division of policy areas into three pillars also determines the number of votes required for the adoption of a proposal or initiative. For most of the areas included in the first pillar, a qualified majority in the European Council is necessary. Currently, sixty-two out of the eighty-seven possible votes must be cast in favor of a proposal to constitute a qualified majority. The areas of the first pillar that do require a unanimous vote include taxation, industry, culture, regional funds, and social funds. The areas of the second and third pillar are all subject to unanimity, the only exception being the implementation of a joint action. *Key Players in the EU Legislative Process,* EUROPEAN UNION ONLINE, EUR-LEX, *at* http://www.europa.eu.int/eur-lex/en/about/pap/process_and_players3.html (last visited Nov. 12, 2002).

Although the Treaty of Maastricht established judicial cooperation, this judicial cooperation was made dependent on the conclusion of interstate treaties, requiring the signature of each Member State. Interstate cooperation was included in the third pillar. The Treaty of Amsterdam expanded the power of the legislative body of the European Union by transferring the area of judicial cooperation among Member States from the third pillar to the first pillar. As a result, the implementation of legislation regarding judicial cooperation will be possible by a qualified majority. *See* Dr. Wolfgang Lueke, *The New European Law on International Insolvencies: A German Perspective*, 17 BANKR. DEV. J. 369 (2001); *see also* RALPH H. FOLSOM, EUROPEAN UNION LAW 49-52 (3d ed. 1999).

25. *See* Lueke, *supra* note 24, at 369 (discussing the differences between the failed European Community Convention on Insolvency of 1996 and the new EU regulation).

cross-border insolvency. Part VI specifically addresses the provisions of the EC Regulation and examines its ability to provide an effective remedy in complex cross-border insolvencies between members of the EU. Finally, Part VII concludes that the EC Regulation is a valuable guideline and the most viable solution for developing a universal standard for cross-border insolvency proceedings.

II. SOURCES OF JURISDICTION IN INSOLVENCY LAW

The following scenario is the basis for the discussion of sources of jurisdiction in this section: A multinational corporation incorporated under the laws of the state of Delaware in the United States with its principal place of business in Great Britain entered into a contract with a small German corporation, incorporated under the laws of Germany. Due to convenience, the two parties sign the contract at a resort hotel in St. Moritz, Switzerland. The German corporation has assets in France and the United States.

The most immediate task following a multinational default is to determine which country actually has jurisdiction over the insolvency proceeding.[26] There are four different sources of jurisdiction: the law of the creditor's country of residence (*lex domicilii*), the law of the debtor's country of residence (*lex domicilii*), the law of the country where the transaction occurred (*lex loci contractus*), and the law of the country with subject-matter jurisdiction over the assets (*lex situs*).[27] Returning to the example above, bankruptcy courts in the United States, France, Germany, and Switzerland would have jurisdiction over the insolvency proceedings. The possibility also exists that a fifth source of jurisdiction comes into play in this context, which would grant jurisdiction to the country where the insolvency proceedings occur (*lex concursus*).[28] However, the country with *lex concursus* jurisdiction is very likely to have jurisdiction under any of the other four sources of jurisdiction.[29]

Considering the fact that domestic insolvency laws differ significantly, especially in the context of rules regarding the avoidance of preferential transfers,[30] choice of forum could determine whether the American corporation would be able to collect the German corporation's debt.[31] The question of where the corporation is domiciled is complex because some jurisdictions allow a corporation to have more than one domicile by giving the corporation the opportunity to re-incorporate in another state.[32] Re-incorporation in another state

26. Fletcher, *The Insolvency Issues, supra* note 14, at 261.
27. *Id.* at 258-59.
28. *Id.* at 259.
29. *Id*.
30. *Id.* at 260.
31. *Id*.
32. *See* FLETCHER, PRIVATE INTERNATIONAL LAW, *supra* note 13, at 120.

extends the list of countries with jurisdiction over the debtor corporation's insolvency proceeding. The lack of a uniform insolvency framework promotes forum-shopping on behalf of the debtor who can select the most favorable forum available under different jurisdictions' laws.

The choice of forum will also determine the availability of secondary or ancillary proceedings for the creditor because the country with jurisdiction over the main proceeding might not recognize such proceedings.[33] While ancillary insolvency proceedings are subordinate to the primary insolvency proceeding[34] and function in support of the primary proceeding,[35] secondary proceedings are treated as if the primary proceeding had not been filed because secondary proceedings can by themselves reorganize and liquidate the debtor.[36]

Reconsidering the example of the American corporation, the American creditor could open a secondary bankruptcy proceeding in the United States if the German corporation had assets and filed an insolvency proceeding in Germany. However, whether German courts recognize judgments issued by or deferring jurisdiction to a U.S. bankruptcy court depends upon the principle of insolvency law used by Germany.

III. PRINCIPLES OF INTERNATIONAL INSOLVENCY LAW

In the absence of a substantive international insolvency law framework, the focus of international bankruptcy jurisprudence has long been on the choice of forum.[37] The choice of forum and the choice of law are intertwined in the area of international insolvency, because no court will conduct bankruptcy proceedings pursuant to the laws of another jurisdiction.[38] Whether a jurisdiction follows a particular principle will determine if a cross-border insolvency should be administered in a single forum or multiple fora. Thus, the principles of international insolvency law are not only outcome-determinative as to forum-selection, but they are outcome-determinative regarding the selection of applicable law.

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33. *See* Fletcher, *The Insolvency Issues*, *supra* note 14, at 263-64.

34. *See* FELSENFELD, *supra* note 17, at 4-1.

35. *See* Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 CORNELL L. REV. 696, 732 (1999).

36. *See id.*

37. Hannah L. Buxbaum, *Rethinking International Insolvency: The Neglected Role of Choiceof Law Rules and Theory*, 36 STAN. J. INT'L. L. 23, 30 (2000).

38. *Id*.

A. Territoriality Principle

The territoriality principle does not recognize the extraterritorial effect of a foreign court's judgment,[39] but rather it advocates that the "law of any country is applicable only to assets or persons physically subject to that [country's] law."[40] The underlying purpose contemplated by the principle is that the seizure of the debtor's assets located within the borders of a country benefits domestic creditors regardless of whether a parallel foreign proceeding exists.[41] The territoriality approach is often referred to as the "grab rule"[42] because the local court takes the assets located in its geographic jurisdiction and distributes them only to those creditors who come to the court to present their claims.[43]

The Netherlands is a good example of a jurisdiction that predominantly adheres to the territoriality principle because assets located in that country will not be transferred to a foreign jurisdiction even if a foreign forum formally requests a Dutch court or administrator to do so.[44] Furthermore, the initiation of a foreign insolvency proceeding does not prevent the attachment of the debtor's assets located in the Netherlands, and a Dutch court may declare a debtor insolvent in the Netherlands despite the existence of an insolvency proceeding abroad.[45]

There are several disadvantages to the territorial approach. First, foreign creditors are not treated as fairly as local creditors because in most cases they are being given late notice of the initiation of insolvency proceedings abroad. Foreign creditors also often have difficulty informing the foreign court of the existence of their claims.[46] Second, the territoriality principle might lead to inconsistent and sometimes inequitable results for creditors of the same estate because different jurisdictions have different avoidance and priority rules.[47] Third, a debtor may

39. FLETCHER, PRIVATE INTERNATIONAL LAW, *supra* note 13, at 11.

40. FELSENFELD, *supra* note 17, at 1-25 (stating that if a debtor has assets in more than one state, there will be, under the territoriality principle, more than one legal proceeding to deal with them).

41. BUFFORD, *supra* note 10, at 3-4 ("Territoriality takes the pessimistic view that local claimants ultimately will not receive their fair share of the assets in a foreign insolvency."); Jay Lawrence Westbrook, *Multinational Enterprises in General Default: Chapter 15, the ALI Principles, and the EU Insolvency Regulation*, 76 AM. BANKR. L.J. 1, 5 (2002).

42. FELSENFELD, *supra* note 17, at 1-27.

43. *Id*.

44. COOPER & JARVIS, *supra* note 18, at 81.

45. *Id*.

46. *Report of the National Bankruptcy Review Commission*, U.S. GOV'T PRINTING OFF., 353 (Oct. 20, 1997), *reprinted in* 15 COLLIER ON BANKRUPTCY 358 (1996).

47. *Id.*; Paul Omar, *International Insolvency Co-Operation: The UNCITRAL Model Law*, MALAYAN L.J. ONLINE (May 2000) *at* http://www.mlj.com.my/articles/P.Omar1.htm (last visited Nov. 12, 2002) (pointing out that at a more substantive level, differing priority rules in each country will affect the overall distribution of dividends and surplus assets to creditors).

elect to transfer local assets to another jurisdiction to favor creditors located there. Considering the difficulties inherent in a local creditor's entrance into another country's jurisdiction to protect their interests, such preferential transfers might prevent local creditors from receiving any share of the debtor's assets.[48] Finally, each jurisdiction under the territorial approach will seek the best possible outcome for local creditors, and this inevitably creates a conflict of interest with the claims of foreign creditors.[49]

B. The Universality Principle

Under the universality principle, a single forum administers all the debtor's assets and makes distributions to creditors, wherever they are located and in accordance with the forum state's substantive bankruptcy laws.[50] The single forum is typically the court with principal jurisdiction over the debtor and may be the country in which the debtor is incorporated, the country in which the debtor is headquartered, or the country in which the debtor has the bulk of its operations or assets.[51] All other jurisdictions are obligated to assist the court with principal jurisdiction and to recognize and enforce its orders.[52] Contrary to the territoriality principle, the universality approach distinguishes between main insolvency proceedings and secondary insolvency proceedings.[53] These ancillary or local proceedings are auxiliary in nature and designed to assist the main proceeding in administering the assets, i.e., by turning over local assets to the main proceeding.[54]

The advantage of the universality principle is that all assets are administered and distributed by a single forum, thereby preventing unequal treatment of similarly situated classes of creditors (*par conditio creditorium*) and

48. FELSENFELD, *supra* note 17, at 1-27 (arguing that in addition to the disadvantage of being unfamiliar with the foreign legal system and rules, the foreign creditor will incur significant expenses by having to litigate in another jurisdiction).

49. *Id.*

50. Buxbaum, *supra* note 37, at 26.

51. LoPucki, *supra* note 35, at 704.

52. *Id*. at 705.

53. Philippe Woodland, *The Proposed European Community Insolvency Convention, in* CURRENT ISSUES IN CROSS-BORDER INSOLVENCY AND REORGANISATIONS 6 (E. Bruce Leonard & Christopher W. Besant eds., 1994).

54. In each of the ancillary proceedings, the foreign state's court gives effect to the declaration of bankruptcy in the main proceeding, recognizes the claims of the trustee, orders the turnover of all local assets to the main proceeding, and applies the substantive laws of the country in which the main proceeding is being administered. Claudia Tobler, Note, *Managing Failure in the New Global Economy: The U.N.C.I.T.R.A.L. Model Law on Cross-Border Insolvency*, 22 B.C. INT'L & COMP. L. REV. 383, 400 (1999).

reducing the strategic importance of preferential transfers across borders.[55] However, the universality principle also has several flaws. First, the country with jurisdiction over the main proceeding will not be able to ensure the enforcement of its orders abroad by unilaterally embracing the universality principle.[56] A foreign court's order will only enjoy full effect abroad if the other jurisdictions also recognize the principle.[57] Second, problems always arise when foreign law dictates the resolution of domestic affairs, such as the distribution of local assets. Unless the substantive laws of the jurisdictions involved are largely identical, effective recognition of the application and enforcement of laws in another legal system is highly unlikely,[58] especially where the application of foreign law would be contrary to domestic public policy.[59]

C. Modified Universalism

While both the universality and the territoriality principles have almost never been unequivocally implemented in their pure form,[60] many domestic courts have consistently applied the principle of modified universalism in cross-border insolvencies.[61] Under modified universalism, the forum hosting the primary proceeding, while seeking to achieve the broadest extraterritorial effect possible of its orders, leaves open the possibility of cooperation with secondary proceedings commenced in another jurisdiction.[62] In other words, the court with jurisdiction over the main proceeding will seek the assistance of the jurisdiction where the debtor's assets are located, sometimes insisting that its own substantive insolvency rules should be applied in the foreign court's proceedings.[63]

When a debtor files for bankruptcy, the court appoints a representative[64] authorized to seize and manage the debtor's assets located both in the home

55. Lore Unt, *International Relations and International Insolvency Cooperation: Liberalism, Institutionalism, and Transnational Legal Dialogue*, 28 LAW & POL'Y INT'L BUS. 1037, 1044 (1997).

56. Andre J. Berends, *The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview,* 6 TUL. J. INT'L COMP. L. 309, 313 (1998).

57. Omar, *supra* note 47; Tobler, *supra* note 54, at 400.

58. Buxbaum, *supra* note 37, at 55-56.

59. FELSENFELD, *supra* note 17, at 1-28.

60. *Id*. at 1-26.

61. LoPucki, *supra* note 35, at 725.

62. Kent Anderson, *The Cross-Border Insolvency Paradigm: A Defense of the Modified Universal Approach Considering the Japanese Experience*, 21 U. PA. J. INT'L ECON. L. 679, 690 (2000).

63. FELSENFELD, *supra* note 17, at 1-33.

64. Depending on a country's bankruptcy laws and the purpose of the bankruptcy proceeding, the representative will either be the debtor-in-possession or a trustee. For example, under U.S. bankruptcy laws, if the foreign representative commences a voluntary or involuntary petition under Chapter 11, the debtor will probably be able to retain control

jurisdiction and in foreign jurisdictions.[65] However, if local authorities have already seized the debtor's assets abroad, the representative must ask for the assistance of foreign local authorities to obtain these assets.[66] Contrary to pure universalism, the modified form makes cooperation between primary and secondary proceedings discretionary. Therefore, courts with jurisdiction over secondary proceedings can better ensure that local creditors will not be unfairly treated under foreign insolvency laws and proceedings.[67]

The United States Bankruptcy Code follows the modified universalism approach in Section 304 with regard to providing assistance to foreign representatives and to cooperation with foreign insolvency proceedings.[68] Section 304(a) authorizes the foreign representative to initiate ancillary insolvency proceedings before U.S. bankruptcy courts.[69] In order to determine whether to recognize the judgment of the foreign proceeding, the U.S. bankruptcy court will use certain criteria set forth in Section 304(c). Some of the criteria are comity, prevention of preferences and fraudulent transfers, equal treatment of all creditors, and distribution essentially in accordance with the corresponding provisions of the U.S. Bankruptcy Code.[70]

IV. TREATMENT OF CROSS-BORDER INSOLVENCIES UNDER NATIONAL BANKRUPTCY LAWS

If bilateral or regional treaties providing conflict-of-law rules do not apply to a cross-border insolvency, then the national bankruptcy laws of the jurisdictions involved will determine the administration of the debtor's assets. Most national bankruptcy laws address the issue of cross-border insolvencies in the context of the treatment of foreign debtors and creditors.[71] Specifically, the laws address the status of foreign representatives, participation of foreign creditors

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of the case as debtor-in-possession, unless an examiner or trustee is appointed. If, however, a Chapter 7 liquidation case is commenced, either by voluntary or involuntary petition, then the foreign representative is going to be replaced by a trustee appointed by the Office of the United States Trustee. Shinichiro Abe, *Recent Developments of Insolvency Laws and Cross-Border Practices in the United States and Japan*, 10 AM. BANKR. INST. L. REV. 47, 72 (2002).

65. LoPucki, *supra* note 35, at 725-26.

66. *Id.* at 726.

67. *Id*. at 728.

68. *Id*. at 726.

69. 11 U.S.C. § 304 (2000).

70. COOPER & JARVIS, *supra* note 18, at 128.

71. COLLIER INT'L BUS. INSOLVENCY GUIDE § 12.02 (Matthew Bender & Co. 2001) (stating that national bankruptcy laws address the status of foreign representatives, participation of foreign creditors in domestic proceedings, and recognition of foreign proceedings).

in domestic proceedings, and recognition of foreign proceedings.[72] Furthermore, decisions by domestic courts provide valuable guidance as to the circumstances under which the principles of comity and reciprocity will be applied to foreign proceedings.[73] The following discussion focuses on the different treatment of cross-border insolvencies under the national bankruptcy laws of eight countries.

A. Spain

Spain has not yet implemented direct legislation addressing the issue of cross-border insolvency.[74] The Spanish Civil Procedural Act of 1881 (*Ley de Enjuiciamiento Civil*) provides guidance regarding the recognition of foreign judgments.[75] Although Spain entered into several multilateral and bilateral treaties regarding the enforcement of foreign judgments, none of these treaties expressly deals with the issue of cross-border insolvencies.[76] In the absence of applicable treaties, Spanish courts will recognize a foreign judgment where reciprocity exists between Spain and the foreign jurisdiction.[77] If there are no judicial precedents in the foreign jurisdiction regarding the enforcement of a Spanish judgment, the Spanish courts might nevertheless give the foreign judgment full effect where the foreign judgment satisfies certain criteria.[78] A foreign administrator or foreign creditor is entitled to commence an insolvency proceeding in Spain.[79] Even though a foreign company is incorporated under

72. *Id*.

73. *See* FELSENFELD, *supra* note 17, at 1-58; BLACK'S LAW DICTIONARY, *supra* note 19, at 267, 1270 (defining "judicial comity" as the principle where courts of one state or jurisdiction will give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of deference and respect; and defining "reciprocity" as the relation existing between two states when each of them gives the subjects of the other certain privileges, on the condition that its own subjects shall enjoy similar privileges at the hands of the latter state).

74. COLLIER, *supra* note 71, § 40.06(2) (explaining that the Spanish Justice Department is currently in the process of drafting insolvency legislation that will include provisions on cross-border insolvencies based on the UNCITRAL Model Law).

75. *Id*. § 40.06(1).

76. *Id*.

77. LEY DE ENJUICIAMIENTO CIVIL [L.E.CIV] § 951 (1881) (Spain). Section 952 provides that in order to be enforced under the principle of reciprocity, a foreign judgment must meet the following criteria: 1) it must be a final judgment in an action in personam; 2) it must not be a default judgment; 3) the judgment must be based on an obligation that is enforceable in Spain; and 4) it must fulfill the Spanish requirements for authenticity. L.E.CIV § 952.; *see also* COOPER & JARVIS, *supra* note 18, at 113.

78. The criteria listed in Section 952 also apply to the recognition of such a judgment. COLLIER, *supra* note 71, § 40.06(1) (the Spanish Supreme Court has jurisdiction over the recognition of foreign judgments and its findings are unappealable).

79. *See* COOPER & JARVIS, *supra* note 18, at 114.

foreign law and has its main place of business abroad, a Spanish court can still declare the foreign company insolvent if the company has assets in Spain.[80]

B. Switzerland

Switzerland's insolvency law is based on the modified universality approach and emphasizes judicial assistance.[81] The relevant provisions regarding the recognition and enforcement of foreign bankruptcies are not contained in Switzerland's Bankruptcy Act, but they are located in its Federal Act on Private International Law (PILA).[82] Like Spain, Switzerland makes the recognition of foreign judgments largely dependent upon the foreign jurisdiction's reciprocal recognition and enforcement of Swiss orders.[83] In the context of reciprocity, Swiss law makes the distinction between full reciprocity and partial reciprocity,[84] the latter of which describes the Swiss relationship with the United States.[85]

In the absence of a full reciprocal relationship between Switzerland and the foreign jurisdiction, Swiss courts still recognize and enforce a foreign judgment if it satisfies the three requirements specified under Article 166 of the PILA.[86] First, the foreign judgment must have been rendered in the debtor's

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80. *See id.* at 115 (describing a case in which a Spanish court determined that a company incorporated under Belgian law and with its registered office in Brussels was subject to a Spanish court's declaration of insolvency because the company owned several mines in Spain).

81. *See* COOPER & JARVIS, *supra* note 18, at 123.

82. The PILA embodies most of Switzerland's conflict of laws provisions in Articles 166 through 175. *Transnational Bankruptcy: Switzerland's Position*, INTERNATIONAL LAW OFFICE, *at* http://www.internationallawoffice.com/ ld.cfm?Newsletters__Ref=544 (last visited Nov. 12, 2002) [hereinafter *Transnational Bankruptcy*].

83. While the PILA abolished the prerequisite of reciprocity in the case of foreign judgments in commercial matters, Swiss courts have upheld the reciprocity requirement for the recognition of foreign bankruptcy judgments. *Reciprocity in Transnational Bankruptcies*, INTERNATIONAL LAW OFFICE, *at* http://www.internationallawoffice.com/ ld.cfm?Newsletters__Ref=2514 (last visited July 22, 2001) [hereinafter *Reciprocity*].

84. Swiss courts will extend full reciprocity to Belgium, Germany, France, Luxembourg, and possibly to Greece, Italy, and Spain; partial reciprocity will be given to the United Kingdom, Canada, the United States, and Australia; no reciprocity will be given to judgments by courts from the Netherlands, Portugal, Japan, Denmark, Finland, Sweden, Norway, Austria, and Liechtenstein. Full reciprocal treatment means that a foreign court's judgment is immediately recognized by the Swiss court without any additional formalities. Partial reciprocal treatment of a foreign judgment means that recognition might occur if additional requirements set forth under Swiss law are met. *See* COOPER & JARVIS, *supra* note 18, at 123.

85. *Id.*

86. *Transnational Bankruptcy*, *supra* note 82.

country of residence or principal office.[87] Second, the foreign judgment must be compatible with Swiss public policy.[88] Third, the debtor must have assets located in Switzerland.[89] The foreign representative or any bankruptcy creditor may file an application for the recognition of a foreign proceeding.[90] While insolvency proceedings may be initiated by foreign representatives in Switzerland, Swiss authorities conduct the proceedings and Swiss law governs them.[91] Once a foreign judgment is recognized, the assets of the foreign debtor are subject to the restrictions just as if a Swiss bankruptcy proceeding had commenced.[92]

The Swiss Supreme Court recently held that, in certain circumstances, a foreign judgment could be recognized even in the absence of reciprocity between Switzerland and the other country.[93] First, the court held that when the foreign insolvent company cooperated, there was no reason why assets should not be repatriated.[94] Second, the court stated that when the management of an insolvent company still acts on behalf of the bankrupt company for the purposes of liquidation, the bankruptcy estate should be able to repatriate the funds located in Switzerland.[95]

Although countries make the existence of a reciprocal relationship with the foreign jurisdiction mandatory for purposes of recognizing that jurisdiction's insolvency judgments, this requirement is generally not strictly enforced.[96] Instead, national courts often defer actions and recognize foreign claims and rights if there is a reasonable level of comparability or cooperation between their judicial systems.[97]

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87. PILA provides that a corporation's principal office is determined by the articles of incorporation. Absent such a provision in the articles of incorporation, the principal office is presumed to be the place from which the corporation is actually governed. *Id*.

88. *Id*. (stating that reasons for non-recognition under this provision would be improper service of process upon the defendant, violations of Swiss procedural law, and existing litigation between the same parties on the same subject matter in Switzerland or in a third country).

89. *Id*.

90. *Id*. (stating that to protect the interests of the creditors and the debtor, the decision of the Swiss court granting or denying the recognition of a foreign judgment is appealable).

91. COOPER & JARVIS, *supra* note 18, at 123.

92. *Transnational Bankruptcy*, *supra* note 82 (stating that after recognition of the foreign judgment, the debtor will no longer be able to dispose of his assets located in Switzerland).

93. In this case, a bankrupt Austrian company had a bank account in Switzerland. The Austrian administrator petitioned the Swiss court for recognition of the Austrian judgment in order to obtain the assets of the bank account although Switzerland does not extend any reciprocity to Austrian judgments. *Reciprocity*, *supra* note 83.

94. Reparation in this context means the return of the debtor's local assets to the authorities of the country with principal jurisdiction over the debtor. *Id*.

95. *Id*.

96. FELSENFELD, *supra* note 17, at 1-62.

97. *Id*.

C. United States

As already mentioned above, U.S. courts follow the modified universality approach, which favors the collection and distribution of the debtor's assets on a worldwide basis, but at the same time acknowledges the need to protect local creditors from prejudice and possible unfairness in a foreign proceeding.[98] U.S. bankruptcy laws and judicial decisions provide for three possible procedures to resolve cross-border insolvencies. First, foreign representatives[99] can file a request for ancillary proceedings under the U.S. Bankruptcy Code.[100] Second, U.S. bankruptcy courts can defer jurisdiction over the insolvency proceedings to foreign courts based on the principle of comity.[101] Finally, the U.S. and foreign courts can establish protocols of cooperation, which set forth the applicable law governing certain aspects of cross-border insolvencies.[102]

The main reason to provide for ancillary[103] or foreign proceedings in the United States is to prevent the dismantling of the foreign estate by American creditors.[104] In order for the foreign representative to file a petition under Section 304 to administer assets located in the United States, U.S. courts only require that

98. Buxbaum, *supra* note 37, at 27.

99. In the last few years, the use of foreign representatives has filled the void of international insolvency laws. The landmark example with regard to global use of foreign representatives is the Singer insolvency, which involved a company with business operations in 150 countries. While a meltdown was expected, one year after the filing of Chapter 11 bankruptcy in the United States, the company had been reorganized and was revitalized. The United States bankruptcy court appointed several foreign representatives who either acted on behalf of the estate as debtors-in-possession or, in countries that were suspicious of the debtor-in-possession management, as the debtor's representative working in conjunction with foreign administrators to coordinate a consistent approach to the overall corporate group. *See* Evan D. Flaschen et al., *Foreign Representatives in U.S. Chapter 11 Cases: Filling the Void in Law of Multinational Insolvencies*, 17 CONN. J. INT'L. L. 3 (2001).

100. 11 U.S.C. § 304 (2000).

101. BUFFORD, *supra* note 10, at 36-43.

102. Evan D. Flaschen & Ronald J. Silverman, *Cross-Border Insolvency Cooperation Protocols*, 33 TEX. INT'L. L.J. 587, 589 (1998).

103. BLACK'S LAW DICTIONARY, *supra* note 19, at 86 (defining an ancillary proceeding as one growing out of or auxiliary to another action or suit, or which is subordinate to or in aid of a primary action, either at law or in equity).

104. Unlike the situation in which courts apply the principle of comity, the foreign court's insolvency laws need not be essentially similar to the provisions of the United States Bankruptcy Code. Furthermore, an ancillary proceeding is still proper even though the debtor would not satisfy the requirements to commence a full Chapter 11 bankruptcy proceeding in the United States bankruptcy courts. *See* Armco, Inc. v. N. Atl. Ins. Co. (*In re* Bird), 229 B.R. 90, 94 (Bankr. S.D.N.Y. 1999); s*ee also* BUFFORD, *supra* note 10, at 27.

the foreign proceeding complies with principles of fundamental fairness[105] and that the debtor was entitled under the foreign bankruptcy laws to commence insolvency proceedings.[106] After the opening of an ancillary proceeding, there is no automatic stay of creditor collection activities.[107] However, the United States court may issue an injunction with the same effects as a stay order.[108] Besides injunctive relief, the United States court may also order the turnover of property of the foreign estate located in the United States to the foreign representative.[109] The turnover of property depends upon the ability of the court in the foreign proceeding to administer these assets, and this will be determined by the laws of the country conducting the main proceeding.[110] The judgments of the ancillary proceeding only affect assets located within the United States.[111]

In the United States, sufficient case law indicates that American courts will extend comity under traditional doctrines of conflict of laws if the foreign jurisdiction's insolvency laws are similar to those in the U.S. Bankruptcy Code.[112] However, in *Overseas Inn, S.A. P.A. v. U.S.*,[113] the Fifth Circuit Court of Appeals denied enforcement of a foreign bankruptcy proceeding. In *Overseas Inn,* the Internal Revenue Service targeted a Luxembourg corporation for unpaid taxes.[114] Under U.S. bankruptcy laws, the Internal Revenue Service has priority over all other creditors.[115] Under Luxembourg insolvency law, the Internal Revenue Service is treated like any other general creditor.[116] The Luxembourg corporation obtained a decree from a local court and petitioned the U.S. courts to recognize the decree by applying the doctrine of comity.[117] However, the Fifth Circuit Court of Appeals rejected the petition. The court reasoned that only the recognition of foreign judgments or claims in a foreign bankruptcy proceeding would have

105. *See* Interpool, Ltd. v. Certain Freights, 102 B.R. 373, 377 (D.N.J. 1988); *see also* BUFFORD, *supra* note 10, at 28.

106. *See In re* Brierley, 145 B.R. 151, 167 (Bankr. S.D.N.Y. 1992).

107. BUFFORD, *supra* note 10, at 31.

108. 11 U.S.C. § 304(b)(1) (2000).

109. *Id*.

110. *See In re* Toga Mfg., Ltd., 28 B.R. 165, 167 (Bankr. E.D. Mich. 1983).

111. BUFFORD, *supra* note 10, at 29.

112. *See* Cunard S.S. C. v. Salen Reefer Servs. AB, 773 F.2d 452, 459-60 (2d Cir. 1985) (finding Swedish bankruptcy law sufficiently comparable to that of the United States so that comity could be extended); *see also* Allstate Life Ins. Co. v. Linter Group, 994 F.2d 996 (2d Cir. 1993) (noting differences between Australian bankruptcy law and that of the United States but not finding them sufficient to deny comity); Lindner Fund v. Polly Peck Int'l. PLC, 143 B.R. 807 (Bankr. S.D.N.Y. 1992) (holding that in the U.S., there is a presumption that foreign bankruptcy proceedings are fair and comport with American notions of due process).

113. 911 F.2d 1146 (5th Cir. 1990).

114. *Id*. at 1147.

115. FELSENFELD, *supra* note 17, at 1-85.

116. *Overseas Inn*, 911 F.2d at 1149.

117. *Id.* at 1148.

statutory support. However, it further reasoned that a foreign decree was in a legal vacuum and was not covered by any statute or rule of common law.[118]

A recent decision by the Ninth Circuit Court of Appeals suggests that U.S. courts may recognize a foreign judgment if debtors did not allege that the foreign proceedings failed to meet the requirements under Section 98 of the Restatement of Conflict of Laws.[119] Among these requirements are the opportunity for a full and fair trial, a court competent of jurisdiction, regular proceedings, due citation or voluntary appearance of the defendant, and lack of bias, prejudice, or fraud.[120] In *Society of Lloyd's v. Ashenden,*[121] the Seventh Circuit Court of Appeals applied the "compatibility" standard in order to determine whether a judgment by an English court could be enforced. The debtor argued that the English judgment denied him due process of law. Furthermore, he argued that the judgment could not be enforced under the Illinois Uniform Foreign-Judgments Recognition Act (UMFJRA).[122]

However, the Court in *Society of Lloyd's* recognized the English judgment for two reasons. First, the UFMJRA only requires that a foreign proceeding be fundamentally fair and not offensive to basic fairness.[123] Second, and more important, the English system is compatible with the requirements of due process.[124] While the theoretical compatibility of the legal systems in the United States and foreign jurisdictions will make it likely that U.S. courts will recognize and enforce judgments of courts in those foreign jurisdictions, the U.S. courts will take the totality of the circumstances of the foreign system into consideration.[125] A U.S. court will not, for example, enforce a foreign judgment issued by a court that uses identical proceedings on paper if political instability will make it highly likely that these procedural safeguards of fairness will not be observed.[126]

The main purpose of protocols[127] is to set forth procedural and substantive elements of law according to which a cross-border insolvency should

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118. *Id*. at 1149.

119. *In re* Hashim, 213 F.3d 1169, 1171-72 (9th Cir. 2000).

120. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 cmt. c (1971).

121. Soc'y of Lloyd's v. Ashenden, 233 F.3d 473, 477 (7th Cir. 2000).

122. *Id*. at 476.

123. *Id*. at 477.

124. *Id.* at 476-77.

125. Anthony M. Vaddallo, et al., *Cross-Border Insolvency and Structural Reform in a Global Economy*, 35 INT'L. LAW. 449, 452-53 (2001).

126. *See* Bridgeway Corp. v. Citibank, 201 F.3d 134 (2d Cir. 2000) (holding that while in theory Liberia had a system inherited by the United States, the fact that this judicial system broke down during the civil war raised doubt about the possibility that proper procedural safeguards would be ensured and, therefore, the judgment of a Liberian court was not enforceable); *see also* Vassallo, *supra* note 125.

127. The American Law Institute provides for the use of cooperation protocols in its Principles of Cooperation in Transnational Insolvency Cases among Members of the North American Free Trade Agreement. The administrators in parallel cases should cooperate in

be governed.[128] Protocols are necessary if two main proceedings are conducted concurrently in two different countries and they affect the same parties.[129] Furthermore, cooperation protocols provide for more efficient insolvency proceedings because from the outset, possible sources of dispute shall be negotiated. Moreover, the use of cooperation protocols eliminates overlapping proceedings as a result.[130] Protocols can focus either on the cooperation between the foreign administrators, or they can pertain directly to the communications between the foreign courts.[131] While protocols of cooperation in cross-border insolvencies are more likely to be used if the countries involved share the same legal system,[132] protocols have been used between courts from common law and civil law jurisdictions.[133] Especially where deferral of jurisdiction is inapplicable, the drafting of a cooperation protocol will likely guarantee fair and equal treatment of foreign creditors.[134]

D. France

France does not have a separate statutory framework addressing cross-border insolvencies. Thus, French courts will either use applicable bilateral or multilateral treaties or general principles of French law to resolve jurisdictional conflicts with foreign courts.[135] Contrary to the United States, French case law suggests that French courts will predominantly apply the territoriality principle in

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all aspects of the case. Such cooperation is best arranged by an agreement or protocol that establishes decision-making procedures. A protocol for cooperation should, at a minimum, include provisions for coordinated court approval of decisions and actions when required and for communication with creditors as required under each applicable law. BUFFORD, *supra* note 10, at 73.

128. Flaschen & Silverman, *supra* note 102, at 589.

129. *Id*. at 590.

130. *Id*.

131. *Id*. at 591, 598-99.

132. E. Bruce Leonard, *The Way Ahead: Protocols in International Insolvency Cases*, 17 AM. BANKR. INST. J. 12 (1999) (mentioning the cross-border insolvency protocol between the United States and the United Kingdom in *In re Maxwell Communication* and the cross-border insolvency protocol in *In re Solv-Ex Corporation* between the Alberta Court of Queen's bench and the U.S. Bankruptcy Court for the District of New Mexico).

133. *Id*. (mentioning the cross-border liquidation protocol in *In re AIOC Corporation and AIOC Resources AG* between the United States and Switzerland). *See also* Flaschen & Silverman, *supra* note 102, at 599 (asserting that if two countries with a common legal tradition are involved, the protocol is more likely to include clear substantive rules, while protocols between civil and common law countries tend to focus more on procedural rules).

134. *See* Flaschen & Silverman, *supra* note 102, at 600.

135. COLLIER, *supra* note 71, § 22.08(1) (France is a party to several bilateral and multilateral treaties that deal with the enforcement of foreign judgments, the most important being the 1968 Brussels Convention).

cross-border insolvencies.[136] In applying the territoriality principle, French courts are able to commence bankruptcy proceedings against foreign debtors doing business in France.[137] Several decisions suggest that French courts even have jurisdiction to commence bankruptcy proceedings against foreign debtors, regardless of whether the debtors are domiciled or conduct continuous activities in France, where the dispute involves a French citizen.[138]

The *BCCI* insolvency is an exemplary case in which a French court applied the territorial approach.[139] In this case, BCCI Overseas Ltd., a company registered in the Cayman Islands, had a French branch in Paris against which the Paris Tribunal of Commerce commenced a bankruptcy proceeding.[140] The liquidators of BCCI Overseas Ltd. challenged the judgment of the Tribunal, *inter alia*, on grounds that the Paris court lacked jurisdiction and that the order of the Cayman Islands bankruptcy should universally apply.[141] The reason for those challenges was to avoid commencement of multiple bankruptcy proceedings in each country where the company had branches or assets.[142] The *Cour de Cassation*[143] reasoned that the judgment of the Cayman Islands bankruptcy court could not be directly recognized in France because no request for an exequatur[144] had been made.[145] Furthermore, the *Cour de Cassation* specifically held that French courts have jurisdiction to open secondary bankruptcy proceedings against branches of foreign companies located in France regardless of their size. French courts may also consider these branches as separate entities from any other branches.[146]

French courts recognize the universality aspect of insolvency proceedings by providing that proceedings commenced against a person or business registered or domiciled in France shall have extraterritorial effect.[147]

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136. *Id*. *See also* Laurent Gaillot, *Effects of Foreign Bankruptcy Judgments and Powers of Foreign Receivers – A French Perspective, in* CURRENT ISSUES IN CROSS-BORDER INSOLVENCY AND REORGANISATIONS 246 (E. Bruce Leonard & Christopher W. Besant eds., 1994).

137. COLLIER, *supra* note 71, § 22.08(1) (asserting that generally the requirement for "doing business" will be met if the debtor either has its registered office in France or undertakes its principal activity there; however, sometimes courts will find the existence of a branch or the center of activity in France a sufficient basis for jurisdiction).

138. *Id*.

139. Gaillot, *supra* note 136, at 250.

140. *Id*.

141. *Id*.

142. *Id*.

143. The Cour de Cassation is the French Supreme Court.

144. Gaillot, *supra* note 136, at 251.

145. *Id*.

146. *Insolvency-France: Spotlight on Transnational Bankruptcy*, INT'L LAW OFFICE, *at* http://www.internationallawoffice.com/ld.cfm?Newsletters__Ref=2140 (last visited November 9, 2001) [hereinafter *Insolvency-France*].

147. *Id*.

Furthermore, a foreign administrator seeking to enforce a foreign judgment may petition the *Tribunal de Grande Instance*[148] to issue an order recognizing the foreign judgment and give this decision the same authority as a French judgment.[149]

Article 2123 of the French Civil Code sets forth the factors that French courts consider in determining whether to permit a request for recognition of a foreign judgment: 1) French courts cannot have exclusive jurisdiction because of conflict-of-jurisdiction rules; 2) French courts must find the jurisdiction asserted by the applicant acceptable; 3) the choice of foreign court must not be fraudulent; 4) the foreign court must be competent to make the bankruptcy order; 5) the foreign judgment must not be fraudulent; and 6) the judgment must not contradict French public policy.[150] If a foreign creditor fails to file a request for an exequatur, the foreign judgment will have no effect on the debtor's assets located in France because France is not a party to multilateral treaties.[151] Rather, France only has entered into bilateral international bankruptcy treaties with Belgium, Italy, Monaco, and Austria.[152] These bilateral treaties provide that the courts of each country where the debtor has a registered business will have jurisdiction over the insolvency proceedings. Moreover, the courts' judgments will be enforced in the other country party to the treaty.[153] Although the foreign creditor still must request an exequatur in France, this process is facilitated by a bilateral treaty.[154]

The necessity of acquiring an exequatur in France raises the important question of whether only a final judgment can be enforced or whether other preliminary measures may be taken by the foreign court and be enforced in France.[155] In other words, the question becomes whether a French citizen can collect money from the assets of an American business debtor located in France while a bankruptcy proceeding is pending in the United States. In *Klėber*, the *Cour de Cassation* answered this question. The court held that foreign bankruptcy proceedings take effect not only from the moment an exequatur order has been issued in France but also from the date of the foreign bankruptcy order.[156]

148. *Id.* Tribunal de Grande Instance means "court of first instance" or trial court.

149. *See* COLLIER, note 71, § 22.08(3).

150. This standard was set forth by the *Cour de Cassation* in Münzer in 1964. COOPER & JARVIS, *supra* note 18, at 37; s*ee also Insolvency-France*, *supra* note 146.

151. COLLIER, *supra* note 71, § 22.08(3).

152. Gaillot, *supra* note 136, at 256.

153. COOPER & JARVIS, *supra* note 18, at 38.

154. *Id*.

155. Such preliminary orders include the issuance of a stay order by the court, which prevents the debtor from disposing of his assets.

156. *Insolvency-France*, *supra* note 146.

E. England and Wales

Similar to France, British statutory law does not specifically address the issue of cross-border insolvency. Therefore, British courts have developed certain standards in their decisions regarding the recognition and enforcement of foreign bankruptcy judgments.[157] British courts generally adhere to the principle of cooperation and provide foreign creditors with access to the debtor's assets located in England and Wales. Furthermore, British courts recognize judgments by foreign courts.[158] A British court will generally enforce orders by foreign bankruptcy courts against an insolvent company if the foreign court sits in the company's country of registration. [159] However, the debtor's assets located in England or Wales will not automatically be turned over to the foreign representative.[160] Instead, the foreign administrator must file a petition for an order empowering him to seize and realize the debtor's assets located in England or Wales. Such a petition will only be granted if the court determines that such an order would not adversely affect local creditors.[161]

The existence of a foreign insolvency proceeding does not bar an English court or creditor from initiating a separate proceeding. British courts have discretion to decide whether it is in the interest of justice to allow such an ancillary proceeding.[162] The court will determine that it has jurisdiction over a business debtor if: 1) the debtor is either domiciled or registered in England or Wales at the time of the petition for an ancillary proceeding; 2) the debtor is personally present in England or Wales at the time of the petition; or 3) the debtor habitually resided or carried on business in England or Wales three years prior to the time of the petition.[163]

Although Section 216 of the Insolvency Act provides for assistance only to certain jurisdictions,[164] not including the United States, the cooperation of a British court with the Bankruptcy Court of the Southern District of New York in the *Maxwell*[165] insolvency implies that courts can extend the statutory provision

157. COLLIER, *supra* note 71, § 21.06(1)(a).

158. COOPER & JARVIS, *supra* note 18, at 31; s*ee also* Felixstowe Dock & Ry. Co. v. United States Lines, Inc., [1989] Q.B. 360 (Eng.); Banque Indosuez S.A. v. Ferromet Res. Inc., [1993] B.C.L.C. 112 (Butterworths Company Law Cases at LEXIS).

159. COOPER & JARVIS, *supra* note 18, at 34.

160. *Id*.

161. *Id.*

162. *Id*. at 31.

163. *Id*.

164. The jurisdictions include Anguilla, Australia, The Bahamas, Bermuda, Botswana, Brunei Darussalam, Canada, Cayman Islands, Falkland Islands, Gibraltar, Hong Kong, Ireland, Malaysia, Montserrat, New Zealand, St. Helena, South Africa, Turks and Caicos Islands, Tuvalu, and the Virgin Islands.

165. Maxwell Communication Corporation was an English corporation that controlled more than 400 corporations worldwide. Approximately 75% of the Maxwell group's assets–between $700 million and $1 billion in overall value–were located in the United

beyond the mentioned jurisdictions.[166] One reason for this cooperation, however, was the unlikely occurrence that two insolvency proceedings against the same company commenced at the same time and neither insolvency proceeding was considered subordinate or ancillary to the other. Further, both the American and English court had primary jurisdiction.[167] Both judicial systems in *Maxwell* acknowledged that the proceedings would be better served if foreign administrators controlled the debtor's assets in both England and the United States. This common approach provided a better structure for the insolvency proceedings.[168]

F. Germany

The German Federal Court of Justice (*Bundesgerichtshof*) has made it clear that bankruptcy orders by German courts are to be given universal effect, and that German administrators can enforce these orders abroad.[169] Although Germany applies the universality principle regarding the recognition of foreign judgments, there are limits to how much effect foreign judgments will be given by German courts.[170] The most important factor that German courts consider is

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States. The first petition was filed in the U.S. bankruptcy court under Chapter 11 based on Section 109 of the Bankruptcy Code, which provides that an American bankruptcy court has jurisdiction if assets are located within the U.S. territory. At the time of this filing, English creditors who were pursuing collection proceedings for assets located in England realized that they needed to seek relief under English law. The cooperation was also very interesting considering the fact that the United States Bankruptcy Code and the British Insolvency Act of 1986 differ significantly in their approaches concerning preferential transfers. FELSENFELD, *supra* note 17, at 6-15.

166. COLLIER, *supra* note 71, § 21.06(4).

167. FELSENFELD, *supra* note 17, at 6-15.

168. *Id*. at 6-15- to -16.

169. *Insolvency–Germany: Overview*, INT'L LAW OFFICE, July 2002, *at* http://www.internationallawoffice.com/overview.cfm?country=Germany&workareas=Insolvency (last visited Nov. 23, 2002) (stating that the universality approach will only work if the foreign country recognizes the German jurisdiction and enforces the judgments of German courts).

170. COLLIER, *supra* note 71, § 23.07(2). *See also* Insolvenzordung, Artikel 35 (1999). In a pivotal decision in 1985, the German Court of Justice (Bundesgerichtshof) established that German courts will recognize a Swiss bankruptcy court order if the following criteria are met: 1) the foreign proceeding is a real civil bankruptcy proceeding, not an administrative procedure, and is aimed at the distribution of the debtor's assets among the creditors; 2) the Swiss court issuing the order must have jurisdiction analogous to that granted to German district courts in whose district the debtor has its business establishment; 3) the foreign decree must be valid under its own law and essentially consistent with German law; 4) the foreign order cannot conflict with fundamental German law, meaning that debtors must be given the right to be heard and the right to due process; and 5) the foreign decree must contemplate that it will be enforced internationally (this

whether the foreign judgment substantially comports with German insolvency proceedings. German courts take particular notice of whether creditors will be satisfied equally and in an order similarly proscribed by German law.[171]

For example, if an American bankruptcy court commences a bankruptcy proceeding, German courts will treat this proceeding as if it had been commenced in Germany.[172] However, the enforcement of a foreign stay order against possible proceedings commenced by German creditors is more complicated, unless the capacity to sue and be sued on behalf of the estate in the United States rests with the trustee in bankruptcy and no longer with the debtor.[173] The interpretation of matters, such as whether the foreign administrator has standing to sue or whether the trustee can avoid a transaction or preferential transfer, is determined in accordance with the law of the country in which insolvency proceedings have been commenced, unless a transaction was performed under German law and application of the foreign law would compromise the German avoidance laws.[174]

Although this discussion of the German treatment of cross-border insolvencies suggests that Germany applies the universality approach, this observation is only partially true. Article 102 of the German Introductory Law to the Insolvency Act provides that despite the existence of a foreign bankruptcy proceeding, German creditors can initiate a separate proceeding in Germany.[175] The judgment would only extend to the debtor's assets located in Germany.[176] Although the Introductory Law to the Insolvency Act does not specifically address this issue, the separate German proceeding would supersede a foreign proceeding regarding the debtor's assets located in Germany.[177] However, a separate German insolvency proceeding does not preclude the German administrator and insolvency court from cooperating with foreign counterparts.[178] Furthermore, even if a foreign proceeding has been initiated, a foreign representative cannot

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implies that Germany will only enforce an order from a court situated in a country that applies the universality principle). FELSENFELD, *supra* note 17, at 1-87 to -88.

171. COLLIER, *supra* note 71, § 23.07(3).

172. *Id*. § 23.07(4).

173. *Id*.

174. *Id*.

175. Einführungsgesetz zur Insolvenzordnung (EGInsO) art. 102.

176. The German insolvency proceeding will not be treated as an ancillary proceeding and is not affected by the judgment of the foreign court. The German insolvency proceeding is resolved in accordance with the German Insolvency Code. As a result, foreign law will seldom be applied with respect to assets in Germany because German creditors prefer to participate in a proceeding governed by German law. This clearly suggests that this part of the German treatment of cross-border insolvency is influenced by the territorial approach. COLLIER, *supra* note 71, § 23.07(6); COOPER & JARVIS, *supra* note 18, at 43.

177. Alexander Trunk, *German International Insolvency Law Under the New Insolvency Code, in* LEGAL ASPECTS OF GLOBALIZATION 193-94 (Jürgen Basedow & Toshiyuki Kono eds., 2000).

178. *Id*. at 194.

commence an insolvency proceeding in Germany. Rather, only a foreign or German creditor can commence such a proceeding.[179]

G. The Netherlands

Dutch insolvency law is peculiar because, on the one hand, it provides that insolvency judgments by Dutch courts must be given universal effect. On the other hand, Dutch courts refuse to recognize foreign judgments and refuse to apply foreign law to resolve insolvencies involving assets located in the Netherlands.[180] Thus, if an American debtor has a branch in the Netherlands, a bankruptcy proceeding initiated in the United States would have no effect on the debtor's assets located in the Netherlands. Furthermore, the debtor's assets may be subject to a separate and independent proceeding by a Dutch court that is intended to have universal effect.[181] In other words, Dutch creditors can have their claims enforced regarding assets located in the United States.[182] Although in 1917 the Dutch Supreme Court held that no foreign judgment would be enforced requiring execution, Dutch law did allow a foreign administrator to represent a bankrupt debtor if the laws of the foreign administrator's country provided for such representation.[183]

Foreign creditors are unable to contest transactions that occurred prior to the commencement of bankruptcy proceedings in the Netherlands through a foreign representative under bankruptcy laws. Foreign creditors lack standing to contest these transactions under the Dutch avoidance rules.[184] However, there are two remedies to this problem. First, foreign administrators could try to void a preferential transfer under non-bankruptcy laws if the Dutch court determined that such a decision would not jeopardize the interests of foreign creditors in the Netherlands.[185] Second, cooperation among the bankruptcy judges and the estate

179. COOPER & JARVIS, *supra* note 18, at 43 (stating that a foreign creditor does not have to prove again that the debtor is insolvent and the German court will recognize the insolvency solely on the basis that a foreign insolvency proceeding has been commenced).

180. *Id.* at 81; *see* COLLIER, *supra* note 71, § 33.08(1) (identifying two instances in which foreign law will have an effect on a Dutch insolvency proceeding: first, if a Dutch bankruptcy trustee wants to bring foreign assets into the bankruptcy estate, he has to follow the rules of the jurisdiction where the debtor's assets are located; second, since Belgium and the Netherlands have signed a bilateral bankruptcy treaty, Dutch courts have to recognize and enforce the judgments by Belgian courts).

181. Dutch law does not provide for ancillary proceedings.

182. COOPER & JARVIS, *supra* note 18, at 81.

183. *Id*. at 82.

184. *Id*. at 83.

185. *Id.*

administrators might lead to a compromise and to an equitable solution to the cross-border insolvency dispute.[186]

H. Denmark

As a signatory to the Nordic Bankruptcy Convention, Denmark is obliged to recognize and enforce judgments issued by the court of a Member State with respect to the foreign debtor's assets located in Denmark.[187] The examination of Danish bankruptcy laws concerning the recognition of foreign judgments is very important, considering that Denmark decided not to become part of the EC Regulation. However, Denmark is expected to implement the regulation's provisions through bilateral treaties.[188]

Generally, Danish courts will not recognize a foreign insolvency order. Thus, the courts will not allow foreign law to govern the distribution of a debtor's assets located in Denmark.[189] The foreign proceeding does not prevent the commencement of a separate Danish insolvency proceeding. Rather, it only guarantees the foreign administrator of the bankruptcy estate the legal capacity to become a party to the Danish litigation.[190] While Danish courts will not directly recognize a foreign judgment, the foreign administrator may ask for assistance in obtaining the debtor's assets in Denmark, even though such assistance will not constitute a stay order and individual Danish creditors are still entitled to take possession of the assets themselves.[191] A foreign judgment will have such indirect effects in Denmark only if it does not conflict with *ordre public* and it complies with basic principles of Danish law.[192]

186. COLLIER, *supra* note 71, § 33.08(2).

187. FLETCHER, PRIVATE INTERNATIONAL LAW, *supra* note 13, at 237-40 (indicating that the Member States are Denmark, Finland, Iceland, Norway, and Sweden).

188. COLLIER, *supra* note 71, § 43.02(3).

189. COLLIER, *supra* note 71, § 20.06(2); COOPER & JARVIS, *supra* note 18, at 25.

190. COLLIER, *supra* note 71, § 20.06(2).

191. *Id*. (stating that it is unlikely that the foreign trustee personally will initiate the Danish proceedings but rather a Danish counsel on the foreign estate's behalf. The foreign estate can only take possession of the assets in Denmark that have not been claimed by individual Danish creditors at the time of the commencement of the proceeding. But even if the foreign estate takes possession of these assets, it cannot prevent other Danish creditors from opening proceedings with regard to the same assets).

192. *Id*.

V. INTERNATIONAL APPROACHES TO CROSS-BORDER INSOLVENCIES

As the differences in the treatment of cross-border insolvencies under national bankruptcy laws indicate, it might take the international community a long time to establish a uniform substantive international bankruptcy law. Such an endeavor is difficult because national bankruptcy laws reflect cultural values and are designed according to their respective national markets. So far, the only effective international cross-border insolvency regulations have been bilateral or regional agreements between neighboring states and regional partners who share the same internal market and societal values. While the UNCITRAL Model Law on Cross-Border Insolvency has the potential to serve as the first truly international insolvency regulation, it also has several shortcomings. The Model Law's incorporation into national bankruptcy laws is discretionary and its focus is solely on judicial cooperation.[193] Section V will analyze the UNCITRAL Model Law, as well as three regional agreements regarding the treatment of cross-border insolvencies.

A. Convention on Private International Law

Title IX of the Convention on Private International Law,[194] also referred to as the Havana Convention, entered into force in November 1928 as a complex agreement dealing with cross-border insolvencies among fifteen Latin American countries.[195] The Havana Convention established that if it is clearly determinable that the debtor is the civil or commercial resident of one contracting state only, the courts within that contracting state shall conduct the only proceeding regarding

193. The governments of Japan, Mexico, South Africa, and Eritrea have already provided for its adoption in their national bankruptcy laws. The government of New Zealand is currently considering such an implementation, and both houses of the United States Congress are currently deliberating the implementation of Chapter 15 of the Bankruptcy Code, which closely resembles the provisions in the UNCITRAL Model Law. *See* Jay Lawrence Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276, 2279 (2000). *See generally* Insolvency Bill [H.L.] (2000), *available at* http://www.parliament.the-stationery-office.co.uk/pa/cm199900/cmbills/179/2000179.htm; Bankruptcy Reform Act of 1999, H.R. 833, 106th Congress (1999); Mike Ross, *Insolvency Law Will Help Investors*, NAT'L BUS. REV., Feb. 18, 1999, *available at* 1999 WL 12335944.

194. Convention de Droit International Privé signée à La Havane [Convention on Private International Law], Feb. 20, 1928 [hereinafter Havana Convention]. The following parties have signed and ratified the Convention: Bolivia, Brazil, Costa Rica, Cuba, Chile, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru, Dominican Republic, and Venezuela. *See* FLETCHER, PRIVATE INTERNATIONAL LAW, *supra* note 13, at 232 n.21.

195. FLETCHER, PRIVATE INTERNATIONAL LAW, *supra* note 13, at 232.

the debtor's assets and shall have the authority to issue suspension of payments.[196] If the debtor has more than one residency or business establishment, creditors located in other contracting states where these establishments are located can initiate insolvency proceedings.[197] However, these business establishments in other contracting states must be economically separate.[198] The mere existence of assets in another country will not be enough to allow commencement of a second proceeding in that state.[199]

Consequently, the Havana Convention does not provide for a pure universality principle, where one proceeding controls all assets of the debtor. Rather, it provides for separate, parallel insolvency proceedings.[200] These parallel insolvency proceedings are independent and not designed to support the primary insolvency proceedings.[201] If the debtor has business establishments in only one state, the Havana Convention provides for a sweeping extraterritorial effect of the insolvency proceeding.[202] First, the courts in other contracting states must recognize and enforce judgments made by the court with exclusive jurisdiction.[203] Second, once the court makes the judgment, the issue is precluded by *res judicata* and cannot be decided again by courts in other contracting states.[204]

The effect of the insolvency proceeding is not limited to the recognition and enforcement of the judgment, but it also extends to the trustee's functions and duties.[205] The trustee of the bankruptcy estate does not require permission from local courts to perform duties, such as the collection of assets or the management of business operations in the territory of other states, conferred upon him under the law of the other contracting state.[206] Where only one insolvency proceeding exists, the contracting state's law where the debtor filed for bankruptcy determines the distribution of the estate. The law of the contracting state governs, even if assets are located in other contracting states and local creditors in these states suffer negative consequences.[207]

While such a centralized power structure is desirable for the reorganization of businesses, the universalist approach taken by the Havana Convention has several disadvantages. First, the Havana Convention ignores the possibility that the avoidance rules of two contracting states may conflict with one

196. Havana Convention, *supra* note 194, art. 414.
197. *Id*. art. 415.
198. FLETCHER, PRIVATE INTERNATIONAL LAW, *supra* note 13, at 233-34.
199. *Id*. at 233.
200. *Id.*
201. *Id*.
202. *Id*. at 234.
203. *Id*.
204. Havana Convention, *supra* note 194, arts. 416, 417.
205. FLETCHER, PRIVATE INTERNATIONAL LAW, *supra* note 13, at 234.
206. Havana Convention, *supra* note 194, arts. 418, 419.
207. FLETCHER, PRIVATE INTERNATIONAL LAW, *supra* note 13, at 235-36.

another.[208] For example, a transfer made by a Chilean debtor before declaration of bankruptcy with a Bolivian firm in Bolivia was in accordance with local laws. However, under Chilean law, which would control the insolvency proceeding because the debtor has his commercial domicile there, this transfer is fraudulent and void. Therefore, good faith transfers in accordance with local laws might be punished by a grant of sweeping powers to courts. Second, the Havana Convention does not specifically deal with which protective measures should be in place for foreign creditors when unitary insolvency proceedings are mandated.[209] Not only will foreign creditors incur the costs of litigation in a another jurisdiction, but the creditors will also be subject to the local court bias favoring the interests of local creditors. Third, when plural proceedings are appropriate, the Havana Convention does not state how the judges of the different proceedings should cooperate with one another.[210] Thus, the institution of plural proceedings leads to chaos because the various foreign courts adjudicating the multinational default will refuse to implement other courts' orders, since these orders would also affect assets over which the courts adjudicate.

B. The Nordic Bankruptcy Convention of 1933

The Nordic Bankruptcy Convention[211] (Nordic Convention) entered into force in November 1933, and provided regulations regarding cross-border insolvencies among the five Member States.[212] Although not explicitly stated in the Nordic Convention, a Member State's courts may exercise jurisdiction over an insolvency proceeding if the debtor is domiciled within that state.[213] However, since the Convention does not specifically limit Member States' courts to the initiation of insolvency proceedings only when the debtor is domiciled within the state, the Member States' courts can invoke other sources of jurisdiction in order to institute insolvency proceedings against the debtor.[214] There is no language in the Convention that would divest a court of the ability to exercise jurisdiction over a non-domiciliary insolvency proceeding.[215] However, the courts of other Member States are not obliged to recognize the judgment of such a proceeding

208. *Id*. at 236.

209. *Id.*

210. *Id*.

211. Convention Relative aux Faillites [Convention Regarding Bankruptcy], Nov. 7, 1933 [hereinafter Nordic Convention].

212. The five Member States are Iceland, Norway, Sweden, Finland, and Denmark.

213. FLETCHER, PRIVATE INTERNATIONAL LAW, *supra* note 13, at 238. *See generally* Michael Bogdan, *International Bankruptcy Law in Scandinavia*, 34 I.C.L.Q. 49 (1985) (defining the domicile of a business as the place of incorporation or principal place of business).

214. FLETCHER, PRIVATE INTERNATIONAL LAW, *supra* note 13, at 238.

215. *Id*. at 239.

and can instead institute their own insolvency proceeding pertaining to the same debtor.[216]

Although the convention makes the recognition of a non-domiciliary insolvency proceeding discretionary, it remains unclear whether a non-domiciliary insolvency proceeding could be subsequently stayed if a Member State's court initiated a domiciliary insolvency proceeding. The judgments issued by courts exercising domiciliary jurisdiction are given extraterritorial effect in the same manner as in the Havana Convention.[217] For example, the judgment of an insolvency proceeding in Iceland regarding the assets of the debtor located in Sweden must be recognized and enforced in Sweden. In addition, the substantive law of the state in which the debtor has been declared bankrupt (*lex concursus*) applies with respect to all relevant issues, such as the allocation of assets and the administration of the debtor's transactions.[218] However, in Article 1, Paragraph 3, the Nordic Convention mandates application of *lex situs* in order to determine whether the debtor will be able to retain property that was transferred into the jurisdiction of the Member State before the debtor declared bankruptcy.[219]

The Nordic Convention is a good example of the modified universalism approach, because it provides for the application of both *lex concursus* and *lex situs*. In the same manner as Article 1 of the Convention sets forth the instances in which *lex concursus* should apply, Articles 4, 5, and 6 regulate when the law of the state where certain property is located should control.[220] The automatic and immediate effects of an insolvency judgment on other contracting states make an adequate notification process necessary. Therefore, if property belonging to the bankruptcy estate is present in other states, the responsible bankruptcy officials must make an announcement in an official journal regarding the bankruptcy

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216. Article 13 of the Nordic Convention provides that "[i]f in an adjudication in bankruptcy the court proposes to base its jurisdiction on a fact unconnected with the residence of a bankrupt individual or with the registered offices of a company, association or foundation which has been declared bankrupt. . . . [T]he present Convention shall not apply to the bankruptcy in question." Nordic Convention, *supra* note 211, art. 13.

217. Nordic Convention, *supra* note 211, art. 1 (stating "a declaration of bankruptcy in any of the contracting states shall also apply to the bankrupt's property in the territory of the other states.").

218. *Id*.

219. *Id*. art. 1, para. 3 (stating "such of the bankrupt's property as, under the law of the country in which it is situated, is not liable for seizure for any claim shall not be included in the assets.").

220. Article 4 provides that the test of whether the transfer of rights by the debtor before the bankruptcy proceeding constituted a fraudulent transfer should be determined under *lex situs*; under Article 5, questions regarding ships and aircrafts should be decided by the laws of the state in which they are registered; Article 5 also states that measures of execution undertaken by the debtor before or contemporaneous with the bankruptcy proceeding should be dealt with in accordance with the laws of the state where the execution took place; finally, Article 6 provides that the sale of property forming a part of the bankruptcy estate should be conducted under *lex situs*. *Id*. arts. 4-6.

proceeding. They must also take all necessary steps in accordance with the law of the state where the property is located.[221] Furthermore, as soon as the creditors become known, the bankruptcy officials must notify them about the proceeding, regardless of where these creditors are located.[222]

Unlike the Havana Convention, the Nordic Convention does not grant sweeping collection powers to the appointed trustee or to the exequatur in accordance with the laws of the state where the debtor was declared bankrupt. Rather, these powers must be kept in accordance with the laws of the state where the property sought to be collected is situated.[223] Article 1 of the Convention sets forth the subject matter controlled by *lex concursus*, i.e., the determination of the order of creditors and the treatment of preferential claims. The Convention provides for the creation of a pool of all claims and a subsequent determination on an equal basis which claims are preferential and which are superior to others.

However, Article 7 provides an interesting exception to Article 1. Article 7 states that in some cases, the nature of the claim must be decided applying *lex situs*.[224] For example, if under the laws of Norway, a creditor has a preferential claim against a bank account located in Norway, this creditor would still have a preferential claim under the Nordic Convention. This is the case even if the laws of the state where the bankruptcy proceeding took place did not recognize the creditor's claim as preferential.[225] Article 8 clarifies the applicable law by stating that a debtor's claim in another contracting state will be situated in the state where the debtor has declared bankruptcy.[226]

The Nordic Convention also provides for the recognition and enforcement of compositions of creditors.[227] A composition of creditors is an agreement by the creditors and the debtor that the creditors will accept a lesser amount than they actually deserve in complete satisfaction of the debt due to them.[228] Judicial decisions confirming a composition in any Member State, regardless of whether property of the bankruptcy estate is located there, shall

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221. *See* FLETCHER, PRIVATE INTERNATIONAL LAW, *supra* note 13, at 241.

222. Nordic Convention, *supra* note 211, art. 2.

223. *Id*. art. 3, para. 2.

224. *Id*. art. 7.

225. Article 7 also provides that fiscal dues and other public dues owed to the state constitute sub-claims because the claims by a foreign sovereign are not recognized by the *lex concursus*. Obviously, no state will be inclined to collect the taxes of another country. Furthermore, Article 7 removes the determination of preferential status of lessors of property located in a Member State from the domain of *lex concursus* and states that this decision has to be made under *lex situs*. *Id*. para. 1.

226. *Id*. art. 8 (stating "any claim possessed by the bankrupt shall be regarded as situated in the State in which bankruptcy is declared. If the claim is attested by a promissory note or other document the production of which is necessary in order to obtain payment, it is nevertheless considered as situate in the same State as the document in question.").

227. *See* FLETCHER, PRIVATE INTERNATIONAL LAW, *supra* note 13, at 244.

228. BLACK'S LAW DICTIONARY, *supra* note 19, at 286.

apply in all other contracting states.[229] Compositions of creditors not only receive the same universal effect as they do in insolvency proceedings, but compositions of creditors in the debtor's domiciliary state also prevent another jurisdiction from declaring the debtor bankrupt and from allowing another composition of creditors there.[230]

C. UNCITRAL Model Law on Cross-Border Insolvency[231]

The Herstatt insolvency was a motivating factor behind many initiatives to establish common global rules regarding cross-border insolvencies because it brought to light the absence of an appropriate measure to coordinate multinational default.[232] Herstatt was a large German bank headquartered in Cologne, Germany with branches worldwide.[233] Following the oil crisis and its effects on the international balance of payments, Herstatt suffered severe losses and eventually became insolvent.[234] In accordance with German insolvency law, the German court declared Herstatt insolvent and appointed a liquidator to stop all payments and close the bank.[235] Herstatt's clearing bank in New York froze the Herstatt account and only accepted payments that benefited Herstatt but did not allow any outgoing counterpayments.[236] Within days of the order declaring Herstatt insolvent, creditors in New York tried to attach Herstatt's frozen accounts.[237]

New York state and federal courts allowed the attachment, and the accounts of Herstatt in New York were emptied by the creditors in New York.[238] The concern of the American creditors must have been the uncertainty of the status that a German court would grant them, because it became clear that a German court would be the proper forum to conduct the insolvency proceedings.[239] The issue of whether a United States bankruptcy court had jurisdiction over the assets of a foreign bank never had to be decided because the American creditors reached a consensual agreement.[240] This was mainly because all parties agreed that the existing legal procedures in place were unsuitable for

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229. Nordic Convention, *supra* note 211, art. 10, para. 2.

230. *Id*. art. 15.

231. *Report of the United Nations Commission on International Trade Law*, U.N. GAOR, 52d Sess., Supp. No. 17, U.N. Doc. A/52/17 (1997), 36 I.L.M. 1386 (1997) [hereinafter UNCITRAL Model Law].

232. FELSENFELD, *supra* note 17, at 6-1.

233. *Id*. at 6-2.

234. *Id*.

235. *Id*.

236. *Id*.

237. *Id*.

238. *Id*.

239. *Id*. at 6-2 to -3.

240. *Id*. at 6-4.

such a complex cross-border insolvency.[241] This scenario demonstrated the lack of proper procedures regarding cross-border insolvencies on a national and international level. The United States legislature responded quickly by passing Section 304 and amending the United States Bankruptcy Code.[242] However, the response on the international level was much slower.

The international community realized that to maintain the current state of affairs regarding multinational default would eventually lead to chaos because no measure of cooperation among courts of different states had been provided. After a series of discussions among practitioners at international insolvency institutes and Committee J of the International Bar Association, the International Bar Association eventually drafted the Model International Insolvency Cooperation Act (MICA) in 1988.[243] MICA predominantly addresses the coordination of ancillary proceedings and would, if adopted, override national provisions such as Section 304 of the United States Bankruptcy Code or Section 426 of the United Kingdom Insolvency Code.[244]

Until today, MICA has not been adopted or seriously considered by governments around the world. The obvious reason is that only several years after MICA, UNCITRAL came forward with its own approach. As an organ of the United Nations, the attention of the international community shifted away from MICA and to the UNCITRAL Model Law. Another possible reason for the failure to adopt MICA is that the provisions of the MICA on ancillary proceedings were too similar to bankruptcy proceedings filed under Chapter 11 of the U.S. Bankruptcy Code in that the management of a bankrupt business can remain in control of the bankruptcy proceeding.[245] The idea of a subjective administrator did not fare well with most civil and common law countries. Most European countries, for example, take great value in appointing independent administrators for the reorganization or liquidation of a company.[246]

In 1995, after investigating the issue of cross-border insolvency for two years, UNCITRAL established an intergovernmental working group to prepare a draft dealing with judicial cooperation and multinational default.[247] This working

241. A plan of liquidation was eventually drafted in Germany under which a German bank would receive less than their counterparts in other countries. The plan was approved by German creditors and the plan provided also that American creditors will be paid out of the New York accounts and do not have to file claims in Germany. *Id.*

242. Flaschen, *supra* note 99, at 5.

243. *See* Powers, *supra* note 13, at 233.

244. *See* FELSENFELD, *supra* note 17, at 5-65.

245. FLETCHER, PRIVATE INTERNATIONAL LAW, *supra* note 13, at 325.

246. *Id*. at 325-26 n.4; *see also* Flaschen, *supra* note 99, at 7-9 (discussing this problem between the courts in the United Kingdom and the United States in the context of the *Maxwell* insolvency proceedings).

247. Junichi Matsushita, *UNCITRAL Model Law and the Comprehensive Reform of Japanese Insolvency Laws, in* LEGAL ASPECTS OF GLOBALIZATION: CONFLICT OF LAWS,

group also included non-governmental representatives from international institutions such as the International Association of Insolvency Practitioners.[248] During the thirtieth session of the Commission in Vienna in 1997, the draft submitted by the working group was amended and the Model Law was subsequently adopted on May 30, 1997.[249] Although an international regulation of cross-border insolvency may have been more appropriate because of its binding character, this binding character would also prolong the treaty ratification process immensely.

Model laws are implemented into the national legislation of each country and are not binding per se.[250] In contrast to the regional conventions discussed earlier, the Model Law does not provide guidelines pertaining to conflicts of laws. Rather, the Model Law deals only with judicial cooperation during ancillary proceedings once a primary proceeding has been started, particularly with the recognition of foreign judgments and orders.[251] The provisions of the Model Law can generally be grouped into four categories: 1) Access of Foreign Representatives and Creditors to Local Courts; 2) Recognition of a Foreign Proceeding and Relief; 3) Cooperation with Foreign Courts and Foreign Representatives; and 4) Concurrent Proceedings.[252]

The principle of recognition of foreign judgments is the cornerstone of the Model Law.[253] A distinction should be made between recognition of foreign secondary proceedings and foreign primary insolvency proceedings.[254] Under the Model Law, a foreign primary proceeding takes place in that state where the debtor has the center of its main interest.[255] However, no provision exists explicitly defining the criteria for determining the center of the main interest. Only Article 16(3) serves as a good guideline because it indicates that the debtor's place of incorporation will determine the center of main interest.[256]

INTERNET, CAPITAL MARKETS AND INSOLVENCY IN A GLOBAL ECONOMY 151 (Jürgen Basedow & Toshiyuki Kono eds., 2000).

248. FLETCHER, PRIVATE INTERNATIONAL LAW, *supra* note 13, at 325-30.

249. UNCITRAL Model Law, *supra* note 230, pt. 2(B), ¶¶ 221-22.

250. Matsushita, *supra* note 247, at 152.

251. Fletcher, *The Insolvency Issues*, *supra* note 13, at 285.

252. Matsushita, *supra* note 247, at 153-57; *see* FLETCHER, PRIVATE INTERNATIONAL LAW, *supra* note 13, at 330-33 (Prof. Fletcher, referring to the lack of provisions about conflicts of laws, states that the Model Law aims to achieve effectiveness through selectivity and considers the four cornerstones of the Model Law to be access, recognition, relief, and cooperation. Since there are no guidelines addressing conflicts of laws, the Model Law does not interfere with the rules of jurisdiction in insolvency matters. The application of the Model Law starts when jurisdiction has already been established in accordance with national laws.).

253. Matsushita, *supra* note 247, at 153-57.

254. UNCITRAL Model Law, *supra* note 231, art. 2(b)-(c).

255. *Id*. art. 2(b).

256. *Id*. art. 16(3).

The option to open a foreign secondary proceeding is available in jurisdictions where the debtor has an establishment.[257] Each country implementing the Model Law must recognize judgments either of foreign primary or the foreign secondary proceedings, unless such recognition would conflict with domestic public policy.[258] In addition, a foreign judgment will only be recognized if the foreign representative files a petition for recognition with the appropriate local court as set forth under Article 2(d).[259]

The distinction between a foreign main proceeding and a foreign non-main proceeding becomes important in the context of the effects of recognition. Once a local court recognizes a foreign main proceeding, this recognition carries with it an automatic stay of individual proceedings and an automatic suspension of the debtor's right to dispose of his assets.[260] There is no automatic stay and suspension effect in the case of a foreign non-main proceeding.[261] Furthermore, the local court has discretion to extend the scope beyond the stay and suspension realm in both foreign main and foreign non-main proceedings by allowing the foreign representative to administer the debtor's assets. The local court can also turn the local assets of the debtor over to the foreign proceeding.[262]

The recognition effects are important and far reaching, but the process of recognition by local courts of foreign proceedings can be a slow one. The Model Law provides interim relief in Article 19. Under this article, a foreign representative can petition for discretionary relief under the laws of the recognizing state from the time that the application for recognition is filed and until the time the application is decided.[263] In order to obtain interim relief, the foreign representative must show a sense of urgency about protecting the debtor's assets.[264]

The Model Law also vests considerable power in the foreign representative once the local court has recognized the foreign proceeding.[265] For example, the representative of a South African proceeding against a debtor company not only has the right to intervene in proceedings concerning the South African company in Germany, but it also has the right to initiate proceedings challenging the validity of allegedly fraudulent transfers in German courts.[266] The foreign representative would have access to local courts once the foreign proceeding was recognized. This could be the most potent weapon available to the foreign representative in preventing overzealous local creditors from attaching

257. *Id*. art. 2(c).
258. *Id*. art. 17(1).
259. *Id*. art. 2(d).
260. *Id*. arts. 20(1)-(3)(b), (c).
261. *See* FLETCHER, PRIVATE INTERNATIONAL LAW, *supra* note 13, at 341.
262. UNCITRAL Model Law, *supra* note 231, art. 21.
263. *Id*. art. 19.
264. *Id*.
265. *See* FLETCHER, PRIVATE INTERNATIONAL LAW, *supra* note 13, at 343-48.
266. UNCITRAL Model Law, *supra* note 231, arts. 24-25.

the debtor's assets because interim relief does not apply retroactively to prior executions between the debtor and creditors.[267]

In addition to the ability to challenge fraudulent transfers in foreign courts, Articles 9 and 11 of the Model Law allow a foreign representative access to local courts even in the absence of formal recognition by the local court of the foreign proceeding.[268] While foreign creditors are given national treatment under the Model Law and have the same rights as domestic creditors regarding the right to commence and participate in insolvency proceedings,[269] the Model Law does not affect the order of claims under national laws. Moreover, the Model Law does not mandate states to remove a special class ranking of foreign creditors. Therefore, there is concern of local bias by domestic courts. Foreign creditors must be individually notified about the initiation of a local insolvency proceeding and notification must be placed in a local publication. Mere notification in a local publication suffices for local creditors.[270]

The UNCITRAL Model Law also covers judicial cooperation between local courts, foreign courts, and foreign representatives.[271] Recognition of the foreign proceeding is not a prerequisite for compliance with the duty to cooperate to the maximum extent possible with foreign courts or foreign representatives set forth under Article 25.[272] However, considering the discretion that local courts enjoy in the determination of what is necessary under the circumstances, the meaning of the words "duty" and "shall" must be put in their proper context.

Judicial cooperation becomes more important in the case of concurrent insolvency proceedings. The Model Law does not restrict the opening of any subsequent local non-main proceedings, even after the foreign main proceeding has been initiated and recognized by the local court.[273] However, once the foreign main proceeding is recognized, a secondary proceeding can only be initiated by local courts if the debtor's assets are located within the jurisdiction.[274] A local court can bring other assets into its jurisdiction if the national law provides that these assets should be administered under the jurisdiction of the local court. Assets may also be included when it is necessary to ensure cooperation and coordination of the concurrent insolvency proceedings.[275] These requirements are important to prevent the national courts from giving their respective judgments universal effect.

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267. FLETCHER, PRIVATE INTERNATIONAL LAW, *supra* note 13, at 350.

268. UNCITRAL Model Law, *supra* note 231, arts. 9, 11.

269. *Id*. art. 13 (The only security net provided for foreign creditors is found in paragraph one, which states that foreign creditors should not be ranked lower than any general, non-preferential claim).

270. *Id*. art. 14.

271. Matsushita, *supra* note 247, at 156.

272. UNCITRAL Model Law, *supra* note 240, art. 25(1).

273. *Id*. art. 28.

274. *Id*.

275. FLETCHER, PRIVATE INTERNATIONAL LAW, *supra* note 13, at 357-58.

A second scenario addressed in the Model Law is the situation in which the local proceeding is already in progress when the foreign representative files a petition for recognition of a foreign main proceeding with the local court. The local court's power to grant relief cannot contradict the ongoing local proceeding.[276] Therefore, Article 20 of the Model Law would not apply to this scenario, and the local court would have the discretion to treat the foreign proceeding as main or non-main depending upon the compatibility of its decision with internal bankruptcy laws.[277]

The sovereignty of the states is fully respected by the Model Law even if the local proceeding commences after the initiation of the foreign main proceeding or the recognition of the foreign proceeding by the local court. Sovereignty is respected because the local court still has the opportunity to review the automatic stay following the recognition of the foreign proceeding if necessary and inconsistent with national law. The local court may have the right to modify the relief granted.[278] In the case of plural foreign concurrent insolvency proceedings, the local court determines which proceeding deserves foreign main proceeding status. The local court also decides which proceedings deserve preferential treatment and which are foreign non-main proceedings.[279] However, if the local court chooses only to grant the foreign proceedings in place of coordinated recognition, it can treat the foreign proceedings as foreign non-main proceedings. This treatment would not trigger an automatic stay and suspension of payments.

VI. THE EUROPEAN COUNCIL REGULATION ON INSOLVENCY PROCEEDINGS

Similar to the international community as a whole, the EU struggled to establish a uniform approach to cross-border insolvency between its Member States. Until the current regulation was adopted, the EU undertook several attempts to deal with the problems arising from cross-border insolvencies within its jurisdiction. An important initial step and valuable guideline for future agreements was the adoption of the Brussels Convention of 1968. The Brussels Convention dealt with the jurisdiction and recognition of foreign judgments in civil and commercial proceedings.[280] Based upon the general recognition of

276. UNCITRAL Model Law, *supra* note 240, art. 29(a)(i), (ii).

277. *Id*. art. 20.

278. *Id*. art. 29(b).

279. *Id*. art. 30.

280. Brussels Convention on Jurisdiction and Recognition of Judgments in Civil and Commercial Matters, J.O. L. 299/32 (1972), amended by O.J. L 304(77) (1978), amended by O.J. L 388(1) (1982), amended by O.J. L 285(1) (1989) (full text, English version at O.J. L 304(77) (1978); *see also* FOLSOM, *supra* note 24, at 120-30 ("[T]he 1968 Jurisdiction and Enforcement of Judgments Convention (Brussels Convention) regulates jurisdiction among

foreign judgments in civil matters and in accordance with the universality principle, experts aimed to establish the recognition and enforcement of bankruptcy judgments among Member States.[281]

However, as Prof. Felsenfeld noted, this attempt was thwarted by the differing national approaches among the Member States:

> Efforts were regularly made to establish a uniform, Community-wide set of rules under the principle of universality. Given, however, the diversity of laws in the European states dealing with such bankruptcy-related subjects as creditors' rights, mortgages and security interests, the priority of obligations, exemption rights and more, this was found to be an unacceptable approach since it involved all states abdicating their position in favor of the one state with jurisdiction. The states were unwilling to agree to this and the drafts were put aside.[282]

After this failed attempt, the Council of Europe,[283] which encompasses more European countries than the EU, drafted the European Bankruptcy Convention of Istanbul in 1990 (Istanbul Convention).[284] However, the Istanbul Convention never entered into force because it did not obtain the required three ratifications and only received seven signatures.[285] A parallel pending European treaty addressing cross-border insolvency was the main reason for the lack of

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the Member States and facilitates enforcement of civil and commercial judgments of the courts of the Member States in each others' courts. In other words, the Brussels Convention introduces 'full faith and credit' principles to Europe. . . . The Brussels Convention applies to all persons who are domiciled in a Member State even if they are not citizens thereof." However, Article 1(2) of the Convention expressly excluded insolvency proceedings because they were regarded as a special area requiring separate treatment).

281. FLETCHER, PRIVATE INTERNATIONAL LAW, *supra* note 13, at 251.

282. FELSENFELD, *supra* note 17, at 5-5.

283. The Council of Europe should not be confused with the European Council. The Treaty of London established the Council of Europe on May 5, 1949 with 10 initial signatories as an independent intergovernmental organization aimed at seeking solutions to problems facing the European society. Currently, the Council of Europe consists of forty-four Member States and special guests to the Parliamentary Assembly. Any European state can become a Member State of the Council of Europe provided it accepts the principle of the rule of law and guarantees human rights and fundamental freedoms. *See generally* Council of Europe, *at* http://www.coe.int/portalT.asp (last visited Mar. 29, 2002). The European Council, on the other hand, constitutes the legislative body of the European Union together with the European Commission and only Member States of the European Union have a seat in the Council. *See* FOLSOM, *supra* note 24, at 34-35.

284. European Convention on Certain International Aspects of Bankruptcy, Istanbul, *opened for signature* June 5, 1990, Europ. T.S. No. 36, 30 I.L.M. 165 (1991).

285. FLETCHER, PRIVATE INTERNATIONAL LAW, *supra* note 13, at 321-22.

enthusiasm for the Istanbul Convention. Enthusiasm for the Istanbul Convention abated when the European Community began working on its draft of what eventually would become the 1995 Insolvency Convention.[286] All fifteen Member States had already preliminarily approved the Insolvency Convention.[287]

Learning a lesson from the failed Istanbul Convention, the drafters of the Insolvency Convention attempted to circumvent the necessity of unanimous ratification in order for the Insolvency Convention to enter into force.[288] However, the European Community subsequently decided against this strategy and the Insolvency Convention was subject to the ratification by all fifteen Member States.[289] The drafters of the Insolvency Convention were aware that an effective agreement on cross-border insolvency must provide guidelines for potential conflicts of laws.

The representatives of fourteen out of the fifteen Member States signed the final draft of the Insolvency Convention and the United Kingdom was the only state in the Community to abstain.[290] Commentators have suggested that the United Kingdom's refusal to sign the Insolvency Convention was a reprisal action against the other members of the Community who voted in favor of an export ban of British beef as a preventative measure against the spread of the "Mad Cow" disease from England to other European countries.[291]

The EC Regulation incorporates many of the provisions of the failed Insolvency Convention. The purpose of the EC Regulation was to provide an efficient system of legal cooperation between Member States regarding cross-border insolvencies.[292] The regulation deals with three major subject areas of cross-border insolvency: 1) the jurisdiction for the opening of proceedings and the issuing of binding judgments; 2) the recognition of such judgments; and 3) the determination of the applicable law if more than one country has jurisdiction over the insolvency proceeding.[293]

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286. *Id.* at 321.

287. FELSENFELD, *supra* note 17, at 5-4.

288. This device included the deletion of any reference within the Convention to Article 220 of the Treaty of Rome and the adoption of two protocols giving the European Court of Justice the power to interpret the EC Convention. *Id*. at 5-7.

289. *Id*.

290. No state has ever formally ratified the Convention. *Id*. at 5-16

291. FLETCHER, PRIVATE INTERNATIONAL LAW, *supra* note 13, at 298-99 (A different explanation is the strenuous relationship between the United Kingdom and Spain with regard to the possession of Gibraltar. Recent EU legislation, if determined to be applicable to Gibraltar, would erode British sovereignty and compromise British possession of Gibraltar in favor of Spain.).

292. EC Regulation, *supra* note 21, pmbl., ¶ 2.

293. BUFFORD, *supra* note 10, at 76-77.

A. Scope of Application of the EC Regulation

The EC Regulation implements Article 65 of the European Union Treaty, providing for the judicial cooperation in civil and commercial matters among Member States of the EU in order to promote the effectiveness of the European internal market.[294] In particular, Article 65 mandates that the national laws of the Member States regarding conflicts of laws[295] and jurisdiction[296] are compatible with each other. Rather than providing a definition of the term "insolvency" and making the regulation applicable only to proceedings which fall under this definition, the EC Regulation extends to a variety of insolvency proceedings listed in Annex A.[297] For instance, the EC Regulation extends to unitary rehabilitation under German law, the French *redressement judiciaire*, or the Dutch *surseance van betaling*.[298]

The EC Regulation applies generally and binds all EU Member States without the need for implementation of national laws.[299] However, the provisions of the EC Regulation will not bind Denmark, which exercised its right to opt out of the legislation.[300] Regarding creditors and assets located in non-Member

294. TREATY OF AMSTERDAM, art. 65; *see also* EC Regulation, *supra* note 21, pmbl., ¶ 2 (noting that Regulations and Directives are considered secondary sources of Community law because their authority derives from the provisions of the founding Treaties); FOLSOM, *supra* note 24, at 407.

295. By including conflict-of-law rules (also referred to as private international law), the EC Regulation goes beyond the scope of the Brussels Convention. Bob Wessels, *European Union Regulation on Insolvency Proceedings*, 20 AM. BANKR. INST. J. 24, 24 (2001).

296. TREATY OF AMSTERDAM, art. 65(b).

297. EC Regulation, *supra* note 21, art. 2(a), annex A.

298. *Redressement judiciaire* means judicial reorganization. The French court will adopt a reorganization plan if it deems the debtor's financial, economic, and employment situation worthy of rehabilitation. *Surseance van betaling* is the Dutch Reorganization procedure, under which a debtor that anticipates not being able to timely pay its debts may file a petition with the district court to institute a reorganization procedure. BUFFORD, *supra* note 10, at 76; s*ee also* COLLIER, *supra* note 71, §§ 22.05(4)(b), 33.05(1).

299. TREATY OF AMSTERDAM, art. 249. *see* THE EUROPEAN UNION ONLINE, *available at* http://europa.eu.int/eur-lex/en/about/pap/process_and_players2.html#2 (last visited Nov. 23, 2002) (providing a general discussion of the legislative process within the European Union); *see also* FOLSOM, *supra* note 24, at 37-9 (stating that regulations adopted by the European Union are similar to administrative regulations in North America); K.P.E. LASOK & D. LASOK, LAW AND INSTITUTIONS OF THE EUROPEAN UNION 137-38 (7th ed. 2001) (explaining that regulations have a mandatory effect and bind the states with the force of law in their territories; also pointing out that for practical reasons, a regulation may have to be implemented in the terms of domestic law if that law is not incompatible with the terms of the regulation).

300. Denmark, Ireland, and Great Britain retained opt-in and opt-out provisions, which were implemented by protocols in the Treaty establishing the European Community. These provisions were initially drafted in order to achieve the ratification of the Treaty of

States, the EC Regulation applies the territoriality principle. Therefore, the EC Regulation confines its scope to insolvencies within the territory of the Member States.[301]

The following hypothetical serves as an illustration. A French company headquartered in Paris also has offices in Munich and Amsterdam. The French company gives a promissory note to an American company in exchange for the sale of certain goods. The French company becomes insolvent, and an insolvency proceeding commences in France. The issue becomes whether the American creditor can open secondary proceedings in the Netherlands and Germany or whether the creditor has to participate in the French main proceeding. The provisions of the regulation do not apply to this scenario and the American creditor probably must look for other guidelines, such as the opening of an involuntary bankruptcy proceedings and the subsequent appointment of a foreign representative to open an ancillary proceeding in France.

The above-mentioned hypothetical would especially lead to serious problems if the American company had its center of main interest in a EU Member State. The likely consequences of such a scenario are that the American company would be subjected to the Member State's laws, unless the American creditor filed an involuntary bankruptcy proceeding in the United States. Cross-border insolvencies involving companies and assets outside the EU must be solved by current international approaches to multinational default. For example, they can be solved through the use of protocols and foreign representatives. However, the EC Regulation can have extraterritorial application where a company registered in a third-party state becomes so closely linked to a Member State that the company's office in that Member State constitutes its center of main interest.[302] Treatment under the EC Regulation might even be desirable for a non-Member State company, which has assets but no establishments located in several Member States of the EU. A stay order entered by the court in the main proceeding protects its assets from seizure in all other Member States.

Maastricht, the purpose of which was to achieve a common foreign and security policy and cooperation regarding justice and home affairs, by these three countries. In an initial referendum before the opt-out provisions were drafted, the Danish people rejected the ratification of the Treaty of Maastricht. Similarly, an Irish referendum barely approved the ratification of the Maastricht Treaty. Under the opt-out provisions, the United Kingdom for example could opt-out of legislation regarding the Social Protocol, the Single Currency, and the Schengen Accord. Denmark could opt-out of legislation regarding the Schengen Accord, Single Currency, Defense, Justice and Home Affairs, and European Citizenship. The opt-out provisions also apply to the amendments made through the Treaty of Amsterdam, particularly with regard to regulations adopted under the increased legislative powers of the European Council. Ireland and Great Britain decided to adopt the EC Regulation. FOLSOM, *supra* note 24, at 26-30.

301. Christoph Paulus, *The EU Insolvency Regulation*, *at* http://www.insol-europe.org/publications/ROM-INSOL.confpapers.pdf (last visited Feb. 17, 2002).

302. COLLIER, *supra* note 71, § 43.01(6).

The scope of the regulation is not only limited in its geographical reach, but it is also limited in terms of which parties are subject to its provisions. Article 1(2) of the EC Regulation provides that the regulation shall not apply to "insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings which provide services involving the holding of funds or securities for third parties, or to collective investment undertakings."[303] This limitation is significant because credit institutions and insurance undertakings usually play an important part in transnational insolvency proceedings.[304] However, the European Council has, since the adoption of the EC Regulation, issued two directives[305] dealing with the reorganization and winding up of insurance undertakings[306] and credit institutions.[307] Once implemented into the

303. EC Regulation, *supra* note 21, art. 1(2).

304. Lueke, *supra* note 24, at 376.

305. Most legislation by the European Council is conducted in the form of directives. "A directive establishes regional policy. It is then left to the Member States to implement the directive in whatever way is appropriate to their national legal system. This may require a new statute . . . an administrative act or even a constitutional amendment." A directive is only binding to the result to be achieved, but the method and form to achieve this goal is in the discretion of the governments of the Member States. FOLSOM, *supra* note 24, at 35-36.

306. The Member States must implement national laws harmonizing the operation of insolvency proceedings regarding insurance undertakings by April 2003. Under the current legal regime, an insurance undertaking will be subject to possible insolvency proceedings in each Member State where the company is represented and these insolvency proceedings will be governed by local law. For example, the voidability of transfers, the treatment of claims, and the distribution of assets are all governed by the law of the home Member State. The directive, which does not apply to reinsurance companies, provides for only a single set of winding up procedures or reorganization measures under the local laws of the insurance company's home Member State (Article 4(1)). The result of the single proceeding will be effective in all Member States under a mutual recognition system (Article 4(3)). No additional proceedings with respect to the insurance company can be brought elsewhere. The directives provide only for a few exceptions (Articles 19-26) in which the governing law will not be that of the of the insurance company's home Member State. Therefore, certain contracts and rights, including employment rights and rights in rem, will be determined by their governing law, if different from the law of the home Member State (Article 9). The directive also contains a very important provision that life insurance companies cannot be wound up voluntarily. Council Directive 2001/17/EC, 2001 O.J. (L 110) 28, 28l; *see also EU Directive on Reorganisation and Winding Up*, INS. REINSURANCE NEWS (Freshfields, Bruckhaus & Deringer), June 2001 (on file with Arizona Journal of International and Comparative Law.)

307. The Member States are required to draft national legislation implementing the provisions of the directive by May 5, 2004. The directive applies to undertakings whose business is to receive deposits or other payable forms from the public and to grant credits. The directive does not apply to the central banks of the Member States. Similar to insurance undertakings, the current status of the law provides for separate insolvency proceedings in each Member State in which the credit institution has branches or is otherwise represented. The directive provides for a single winding up or reorganization

national laws of the Member States in 2003 and 2004 respectively, these directives will supplement and broaden the scope of the EC Regulation. An important aspect is the relationship of the EC Regulation with previously ratified regional and bilateral treaties involving EU Member States.

Article 44 addresses this problem by providing that the EC Regulation replaces prior regional and bilateral agreements regarding the provisions mentioned therein.[308] Article 44 particularly affects the Nordic Convention, nine bilateral agreements between Member States, and the European Convention on Certain International Aspects of Bankruptcy.[309] The regulation will not have any retroactive effect,[310] and it will therefore not apply to obligations of a Member State arising under a convention or agreement entered into before the regulation entered into force.[311]

B. Jurisdiction and Choice-of-Law Rules

The EC Regulation is not designed to create a uniform set of substantive bankruptcy laws among the Member States. Rather, it is designed to introduce common conflict-of-law rules that provide certainty to multinational corporations regarding the applicable law in insolvency proceedings.[312] The provisions in the regulation pertaining to the determination of which Member States' courts will have jurisdiction over an insolvency proceeding combine elements of both the

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proceeding in the Member State where the credit institution has its headquarters (Article 3(1)). The judgment by the court of the home Member State must be recognized in all Member States where the credit institution has offices and branches (Article 3(2)). The directive also has application to credit institutions in non-Member States if these credit institutions have agencies or branches in at least two Member States (Article 8). Once insolvency proceedings have commenced in the home Member State, the authorization of the credit institution will be withdrawn (Article 12). Furthermore, while most aspects of the proceeding will be governed by the home Member State's laws, i.e. set-off, voidable transaction, and treatment of claims (Article 10), certain contracts and rights, such as employment rights and reservation of title, are dealt with in accordance with the law that governs them (Articles 20-27). Council Directive No. 2001/24/EC, 2001 O.J. (L 125) 15, 15. *See also* RESTRUCTURING INSOLVENCY BULL., (Freshfields, Bruckhaus & Deringer) Summer 2001, *at* http://www.freshfields.com/practice/finance/publications (last visited Nov. 12, 2002).

308. EC Regulation, *supra* note 21, art. 44(1).

309. *See id*. (a)-(k).

310. *Id*. art. 44(2).

311. *Id*. art. 44(3).

312. *The EU Regulation on Insolvency Proceedings*, (Freshfields, Bruckhaus & Deringer) *at* http://www.freshfields.com/practice/finance/publications/pdfs/2845.pdf (last visited Feb. 17, 2002) [hereinafter *Insolvency Proceedings*].

territoriality and universality principle.[313] The following hypothetical helps to illustrate the choice of law rules set forth under the EC Regulation.

A German company, headquartered in Munich, is in the business of manufacturing sports apparel, mainly replica soccer jerseys of national teams and European club teams. The company also has a manufacturing plant in Leeds, England and owns a bank account with the Bank National de Paris in Paris. It frequently uses this bank in business transactions. Furthermore, the German company has a subsidiary in Utrecht, Netherlands. After several months of lagging sales, the German company is unable to pay its debts and is planning to initiate a liquidation proceeding in a German court within several weeks.

The EC Regulation takes a universal approach to insolvency proceedings in that it gives jurisdiction to open the main proceedings to the Member State where the debtor has its center of main interests.[314] The main proceeding will have universal effect regarding any assets of the debtor, no matter where they are located, with the exception of assets located in jurisdictions of where secondary proceedings have commenced.[315] While there is a presumption that the place where the corporation is registered will constitute the center of main interests, a showing that the corporation conducts the administration of its interests on a regular business in another Member State and is recognized to do so by third parties can defeat this presumption.[316] The governing law, applicable throughout the EU for main insolvency proceedings, will be the law of the Member State where such proceedings commence and will cover such aspects as set-off, proof of debts, the powers of the liquidators, and the distribution of assets.[317]

The determination of where the main proceeding will commence is the crucial stage during the insolvency process for a multinational company. The EC Regulation's choice-of-law rules regarding main and secondary insolvency proceedings provide certainty to transactions that are made complicated through the differences in national laws.[318] Clarity as to which Member State's insolvency

313. *See* Bufford, *supra* note 10, at 77; *see also* Paulus, *supra* note 301, at 2 (considering the ideal regulation to provide for unitary, universalistic proceeding, automatic recognition, and the applicability of the *lex fori concursus*).

314. EC Regulation, *supra* note 21, art. 3(1).

315. FLETCHER, PRIVATE INTERNATIONAL LAW, *supra* note 13, at 11.

316. *Insolvency Proceedings*, *supra* note 312, at 5.

317. EC Regulation, *supra* note 21, art. 4(2)(a)-(m) (including 13 matters that are determined by the law of the main proceeding jurisdiction: against which debtors insolvency proceedings may be brought; which assets form part of the estate; powers of the debtor and the liquidator; conditions for set-offs; effects of insolvency proceedings on current contracts; effect of insolvency proceedings brought by individual creditors; rules regarding the admission and verification of claims; rules regarding the distribution of assets; conditions for closure of proceedings; creditors' rights after closure; and the rules relating to the avoidability of transfers detrimental to all creditors); *see also Insolvency Proceedings*, *supra* note 312, at 8; COLLIER, *supra* note 71, § 43.04(1).

318. COLLIER, *supra* note 71, § 43.04(1).

laws will apply is especially pivotal with respect to fraudulent transfers and the order of creditor claims.[319]

In the scenario involving the aforementioned insolvent German company, the voidability of pre-insolvency transfers could be determined under French, Dutch, German, or British insolvency laws. That could lead to conflicting results. If the German company decided, three months before the opening of an insolvency proceeding, to pay off certain debts owed to a supplier in the Netherlands, Dutch insolvency law prescribes that since the transaction was an obligatory transfer, the trustee of the insolvent estate must show the transaction was made as a result of conspiracy between the debtor and the creditor.[320] On the other hand, if the German company paid a supplier in England three months prior to the insolvency proceeding, an English court may declare null and void gratuitous transfers if they have been conducted up to two years prior to the commencement of the insolvency proceeding.[321] Furthermore, if the debtor were influenced by a desire to give preference to a creditor, such transfers would be void if they occurred up to six months prior to the commencement of the insolvency proceeding.[322]

The significantly different Dutch and English provisions regarding voidability of pre-insolvency transfers exemplify the importance of uniform choice-of-laws rules in the context of cross-border insolvency, because both creditors and debtors can better anticipate possible problems. Under the EC Regulation, the rules relating to the voidability of legal acts detrimental to all creditors are those of the state commencing the proceedings.[323] However, the party benefiting from an act detrimental to the interests of all creditors may challenge the decision to void a transfer on the basis that this transfer is subject to the laws of another Member State with jurisdiction over a non-main proceeding Member State, and the law of that state does not allow any means of challenging the validity of such a transfer.[324]

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319. For example, the order of claims differs significantly among Member States. While German insolvency law treats all unsecured creditors the same way by eliminating the availability of preferential claims, French insolvency law maintains an extensive range of claims that are accorded preferential treatment. *Id*.

320. Even if a court determined that the transaction was a non-obligatory transfer, the trustee of the estate still needs to show that both the debtor and the counter-party knew or should have known that the transaction would prejudice the rights of other creditors, unless the transfer took place one year before the insolvency proceeding constituting a "suspect" transfer, which is presumed void as matter of law. *Id*. § 33.04(7)(a).

321. *Id*. § 21.04(9)(b)(i).

322. *Id*. § 21.04(9)(b)(ii).

323. In the scenario discussed, the main proceeding would be held in Germany and two secondary proceedings would be held in the Netherlands and England because the German debtor had establishments there. Since it is very doubtful that the bank account in France would qualify as an establishment under the regulation, there can be no secondary insolvency proceeding in France. EC Regulation, *supra* note 21, art. 4(2)(m).

324. *Id.* art. 13; Lueke, *supra* note 24, at 394.

The opening of main and secondary insolvency proceedings will not affect rights *in rem* of creditors or third parties in respect of debtor's assets situated within another Member State and *lex situs* continues to be the applicable law. The EC Regulation similarly provides for different approaches to the determination of the applicable law regarding rights under contract of employment, some set-off rights, and reservation to title clauses.[325] The main insolvency proceeding can either be in the form of a winding up proceeding or a reorganization proceeding.[326] The universal effect of a main proceeding will only be limited when secondary proceedings commence in another Member State.[327]

Courts in Member States have jurisdiction over secondary proceedings if the debtor has an establishment in that Member State and jurisdiction can only be exercised over the debtor's assets situated in the territory of that state.[328] A secondary insolvency proceeding will only have extraterritorial effect on those creditors with assets situated in other Member States who have consented to be subjected to the secondary insolvency proceeding.[329] A significant restriction imposed on secondary proceedings is that they must provide for the winding up of the estate and their purpose cannot be the rehabilitation of the debtor's business.[330] To allow filing of secondary proceedings for the purpose of rehabilitating a branch of the main company would severely restrict the functionality of the main proceeding. The winding up of the branch in another Member State would

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325. For the purposes of determining *lex situs*, the applicable law regarding tangible property will be the law of the location of the assets, in the case of registered property the law of the location of the asset register, and in the case of claims the law of the country where the obligor has its center of main interest. *See* EC Regulation, *supra* note 21, arts. 5-15 (discussing exceptions in which *lex concursus* is not the applicable law: third parties' rights *in rem*; right of creditors to demand set-off; reservation of title; contracts relating to immoveable property; payment systems and financial markets; contracts of employment; effects of rights subject to registration; community patents and trademarks; and protection of third-party purchasers). Regarding set-off, the EC Regulation specifically provides that the opening of either main or secondary proceedings does not affect the rights of creditors to demand set-off of claims where such set-off is permitted by the law applicable to the insolvent debtor's claims. *See* COLLIER, *supra* note 71, § 43.04(2); Freshfields, *supra* note, 312, at 5.

326. Winding up proceedings are defined under Article 2(c) of the EC Insolvency Regulation to mean "insolvency proceedings within the meaning of point (a) realizing the assets of the debtor, including where the proceedings have been closed by a composition or other measure terminating the insolvency, or closed by reason of the insufficiency of the assets."

327. *See* EC Regulation, *supra* note 21, art. 27.

328. *See id*. art. 3(2) (defining "establishment" in Article 2(h) to mean "any place of operations where the debtors carry out a non-transitory economic activity with human means and goods.").

329. *See Insolvency Proceedings*, *supra* note 312, at 11.

330. *See* EC Regulation, *supra* note 21, art. 27.

necessarily provide crucial funds for the debtor's rehabilitation in the main proceeding.[331]

Secondary proceedings can commence either at the request of the appointed liquidator of the main proceeding or by any other person empowered to request the commencement of insolvency proceedings under the law of the Member State in which the commencement of the secondary proceeding is sought.[332] While the possibility of parallel insolvency proceedings weakens the efficiency of the main proceeding, the EC Regulation vests considerable powers in the liquidator[333] appointed to the main proceeding.

The liquidator has the right to propose any measure other than liquidation, such as a rescue plan, composition, or the closure of a secondary proceeding.[334] Only with the consent of the liquidator of the main proceeding is the closure of secondary proceedings possible.[335] An insolvency proceeding under the regulation can only rise to the status of a main insolvency proceeding if the debtor's center of main interest is located within the court's jurisdiction. The chronological order of the proceedings does not determine whether a proceeding is primary or secondary. Thus, any independent territorial insolvency proceeding opened before the main proceeding will be converted into a secondary proceeding if this is deemed necessary to protect the creditor's interest in the main proceeding.[336]

However, the EC Regulation provides for the possibility that a secondary proceeding might be treated as a main proceeding. Such a primary territorial proceeding may only commence under two circumstances. First, if it is impossible to open the main proceeding because of conditions laid down in the law of the Member State where the debtor's center of main interest is located.[337] Second, a creditor can open primary territorial proceedings if his domicile, habitual residence, or registered office is in the Member State in which the debtor

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331. Lueke, *supra* note 24, at 395-98.

332. EC Regulation, *supra* note 21, art. 29.

333. Liquidator is defined under Article 2(b) to mean "any person or body whose function is to administer or liquidate assets of which the debtor has been divested or to supervise the administration of his affairs." *See also* Lueke, *supra* note 24, at 377 (explaining that a liquidator is different from an Exequatur (in France); the latter does not conduct an insolvency proceeding, but is merely part of a formal procedure in order to obtain recognition of a foreign proceeding in another country.).

334. EC Regulation, *supra* note 21, art. 34(1).

335. *Id*. A closure of a secondary proceeding without the consent of the liquidator of the main proceeding is only possible where such a closure would not affect the financial interests of the creditors participating in the main proceeding.

336. EC Regulation, *supra* note 21, art. 36.

337. *Id*. art. 3(4)(a); *see also* Collier, *supra* note 71, § 43.03(2) (stating if, for example, the criteria for opening insolvency proceedings under the domestic law of the center of main interest, e.g., minimum indebtedness, etc., cannot be satisfied).

has its establishment or if the creditor's claims arose under the operation of that establishment.[338]

C. Recognition of Foreign Proceedings

As soon as a national court conducting a main or secondary insolvency proceeding issues a judgment, it will be recognized automatically in all Member States. The foreign representative does not need a formal application for recognition.[339] The decision of the court conducting the main proceeding can only be challenged on two grounds: 1) if the decision is contrary to the public policy of the recognizing state; or 2) if a secondary proceeding has commenced in the recognizing state.[340] It is difficult to challenge a decision on public policy grounds. Such a challenge usually requires a showing that fundamental principles of constitutional rights, such as the right to a fair trial, have been violated.[341] If a secondary proceeding commences in another Member State, the applicable law of that Member State will regulate the debtor's assets located within its jurisdiction. The Member State in which the main proceeding has commenced may not challenge the effects of these secondary proceedings.[342] Furthermore, the court in which a secondary insolvency proceeding is filed may not tailor its proceedings in a way that is inconsistent with the laws of the Member State where the court has opened a main insolvency proceeding.[343]

The liquidator appointed by the court with jurisdiction over either the main or secondary proceeding may exercise

> all the powers conferred on him by the law of the State of the opening of proceedings in another Member State, 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.[344]

338. EC Regulation, *supra* note 21, art. 3(4)(b).

339. *Id*. arts. 16(1), 17(1) (Article 17(1) provides that the recognition shall occur "with no further formalities" and that the judgment of the foreign court shall "produce the same effects in any other Member State as under the law of the State of the opening of proceedings.").

340. *Id*. art. 26; Lueke, *supra* note 24, at 378.

341. Lueke, *supra* note 24, at 378.

342. EC Regulation, *supra* note 21, art. 17(2).

343. BUFFORD, *supra* note 10, at 81; *see also* Manfred Balz, *The European Union Convention on Insolvency Proceedings*, 70 AM. BANKR. L.J. 485, 486 (1996).

344. EC Regulation, *supra* note 21, art. 18(1).

These powers are specifically tailored to allow the liquidator to seize assets located in another Member State in order to integrate the assets into the estate subject to the main insolvency proceeding.[345] However, the liquidator, while exercising his powers, must comply with the laws of the Member State where the assets are located.[346]

D. Coordination of Concurrent Proceedings

The final important aspect of the EC Regulation is the coordination of concurrent main and secondary proceedings. While secondary insolvency proceedings need to be winding up proceedings, the EC Regulation does not specifically exclude the possibility that the secondary proceedings can also be restructuring proceedings. Additionally, the liquidator of the main proceeding has considerable powers to participate in the secondary proceeding; during the course of the secondary proceeding, he has the obligation to lodge claims that have already been filed in the main proceeding. This is the case unless such an action would not serve creditors' interests in the main proceeding. The liquidator must also consent to the closure of a secondary insolvency proceeding.[347]

Furthermore, after a judgment has been rendered and the creditors' claims have been satisfied with the debtor's local assets, if there is a surplus remaining, the liquidator of the secondary proceeding must transfer the surplus to the liquidator of the main proceeding.[348] In the main proceedings, one of the creditors' primary concerns is the possibility that after the proceeding has commenced, creditors in other Member States will attempt to attach the debtor's assets where either no insolvency proceeding or a secondary insolvency proceeding has been established.

The EC Regulation adequately deals with this *Singer* scenario[349] in two ways. First, since the commencement of a main insolvency proceeding receives

345. *Id*.

346. *Id*. art. 18(3).

347. *Id*. art. 32(2).

348. *Id*. art. 35.

349. The Singer Company had a vast network of subsidiaries and licensed distributors in more than 150 countries. In 1999, Singer prepared for the commencement of Chapter 11 reorganization proceedings in the United States. Without prior notice or consultation, one of its largest subsidiaries in Germany, G.M. Pfaff AG, filed for an insolvency proceeding in Germany. The filing triggered the default of several other subsidiaries of Singer, forcing Singer to file for protection from creditors in a U.S. bankruptcy court. Realizing that further local insolvency proceedings would make it impossible to conduct an effective reorganization of the company, Singer proposed that two of its international counsels be appointed by the court to act as foreign representatives. The main task of the representatives was to prevent local creditors from attacking Singer's local assets in order to gain more favorable treatment. The foreign representatives succeeded in their endeavor mainly because they were able to persuade local creditors that a coordinated international

automatic recognition, there is also an automatic stay of debtor's transfers in other member-state jurisdictions.[350] Second, if a secondary proceeding has been established, the liquidator of the main proceeding is entitled under Article 33(1) to request a stay of the liquidation process in the secondary proceeding. The liquidator can request a stay only if the continued liquidation would be contrary to the interests of the creditors in the main proceeding.[351]

While the ability of the liquidator in the main proceeding to request an automatic stay is important to relieve some of the concerns regarding concurrent insolvency proceedings, more is necessary to ensure a smooth coexistence of main and secondary insolvency proceedings. Liquidators of the main and secondary proceedings are obliged to cooperate with each other.[352] This mandated cooperation is a very important step but will only partially resolve the inherent difficulties in the coordination of concurrent insolvency proceedings.[353] The compliance with the duty to cooperate is difficult to monitor, especially in the absence of an exact definition of "failure to cooperate." Furthermore, the supervising court is only empowered to analyze the compliance with the duty to cooperate in accordance with the rules and regulations of its respective domestic law and not the law of the Member State with jurisdiction over the secondary proceeding.[354] An effective supervisory action is only likely in the instances where the liquidator's failure to cooperate causes injury to the estate located within its jurisdiction.[355]

VII. CONCLUSION

The EC Regulation, which entered into force on May 31, 2002, provides the most comprehensive international approach to address the issue of cross-border insolvency to date. Unlike other regional insolvency agreements and the UNCITRAL Model Law, the drafters of the EC Regulation were able to incorporate a complex set of conflict-of-law rules, which properly resolves which country has jurisdiction over primary and secondary proceedings. Furthermore,

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reorganization of the company would be in their best interest. The result was that out of 150 possible countries, insolvency proceedings were only needed in four – in addition to the U.S. proceeding, Australia, Austria, Brazil, and Germany. Flaschen, *supra* note 99, at 118-19.

350. EC Regulation, *supra* note 21, art. 17(1).

351. *Id*. art 33(1) (explaining that during the stay, the interests of the creditors in the secondary proceedings are to be guaranteed by suitable measures).

352. *Id*. art. 31(2).

353. *See* ANDREAS SPAHLINGER, SEKUNDÄRE INSOLVENZVERFAHREN BEI GRENZÜBERSCHREITENDEN INSOLVENZEN (Secondary Proceedings in Cross-Border Insolvencies) 185 (1998).

354. *See* Lueke, *supra* note 24, at 400.

355. *See* EC Regulation, *supra* note 21, art. 31(1).

the EC Regulation provides a uniform procedure for the recognition of foreign judgments, thereby eradicating potential inconsistent judgments by different courts with regard to the same assets. Such inconsistent, and often inequitable, judgments were quite common when each country applied its own bankruptcy laws to cross-border insolvencies involving multiple proceedings. While generally following the universality principle, the EC Regulation acknowledges the need to protect local creditors by allowing the commencement of secondary proceedings in certain instances.

Although the EC Regulation is limited in its substantive and geographical range, its structure, especially the provisions regarding the conflict-of-law rules, will be an important guideline on the way to a similar regulation with a global scope. The EC Regulation will create a high degree of certainty regarding applicable law, the recognition and enforcement of judgments and the cooperation between concurrent insolvency proceedings. Prior to the EC Regulation, an insolvent company would have been subject to multiple proceedings. After May 31, 2002, only a main insolvency proceeding could be commenced in the Member State where the company had its center of main interest.

However, the EC Regulation also has significant disadvantages, and it seems that the European Council could have taken further steps to create a more effective approach. For example, it may be difficult to interpret the meaning of "center of main interest," and many significant provisions of the EC Regulation are discretionary rather than mandatory. As a result, courts of different states will have discretion regarding whether to grant applications under the regulation. Furthermore, it is likely that different Member States' courts are likely to develop different rules governing the exercise of their discretion. While the possibility of secondary proceedings might help to ensure the fair treatment of local creditors, the resulting existence of parallel proceedings causes cross-border insolvencies to become extremely complicated and expensive to administer efficiently.

Despite some of these disadvantages, the EC Regulation will provide effective remedies for the jurisdictional nightmare of multinational default and will serve as a model for future multilateral insolvency treaties reaching beyond the territory of the EU.