CROSS-BORDER INSOLVENCY: A COMPARATIVE ANALYSIS

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I. INTRODUCTION

In 1997, the United Nations Commission on International Trade Law (UNCITRAL) adopted a model law (UNCITRAL Model or Model Law) to offer guidance for cross-border insolvency proceedings and to serve as a foundational framework for nations choosing to implement it. As a model law, its adoption is entirely discretionary, and many nations that have chosen to adopt it have done so with additional limiting provisions or have enacted only select portions of the framework while ignoring others. The European Union (EU) has also drafted its own model law, titled the Council Regulation on Insolvency Proceedings (EU

* I would like to thank my friends and family, especially my mother and father, without whom law school would never have been possible. I would also like to thank Professor Larry Ponoroff for helping me to select a topic and for being one of my most influential law school professors.

Council Regulation), and it has many features similar to the UNCITRAL Model. However, the EU Council Regulation includes particular provisions that distinguish it from the UNCITRAL Model, particularly in the approach to the solutions for cross-border insolvency issues. In 2005, the United States adopted a large portion of the UNCITRAL Model as Chapter 15 under Title 11 of the U.S. Bankruptcy Code.

This Note first includes a brief background of each model law and of the United States' adoption of the UNICTRAL Model, focusing on the relevant provisions each law has in common as well as the areas in which the laws differ. Second, after an individual discussion of each law's background, a comparative analysis is presented that describes both the advantages and disadvantages of the unique provisions of each approach. Third, this Note provides a comparison of the United States' adoption of the UNCITRAL Model with other Nations' adoptions as well as how it differs from the original model as written. Lastly, a proposal for harmonization of these laws through adoption of the particular strengths of each individual law will be offered.

II. BACKGROUND

The purpose of this section is to provide a brief historical background of the drafting and adoption of the UNCITRAL Model to allow for a better understanding of its purpose and the role that the law was intended to play as well as the role it actually plays with regard to cross-border insolvency. Also included is a brief overview of some relevant cases in which various non-U.S. adoptions of the UNCITRAL Model have been utilized in the execution of cross-border insolvency proceedings. That discussion is followed by a similar description of the intention and purpose of the European Union's Council Regulation of Insolvency Proceedings and the role it is intended to play in cross-border insolvency proceedings in the EU. Finally, a concise overview of the U.S. adoption of the UNCITRAL Model as Chapter 15 under Title 11 of the United States Bankruptcy Code is included along with relevant cases applying the law as adopted.

Cross-border insolvency generally can be described as bankruptcy proceedings in which the insolvent debtor has either assets or creditors (or both) in more than one nation's jurisdiction. The main goal is efficiency, allowing a debtor to file one consolidated bankruptcy proceeding rather than necessitating the filing of multiple proceedings in each jurisdiction within which that individual or corporation has debts or assets.

There are traditionally two strategies (and more recently a third strategy, which is a hybrid of the two traditional approaches) that may be implemented in the execution of a cross-border insolvency. The two traditional approaches are the universality model and the territoriality model. A jurisdiction that implements and adheres to a universality model will treat a cross-border insolvency and all of its components as if they are a part of one single bankruptcy proceeding. As a result,

under the universality approach, all applicable debts and assets will be assessed universally and with equal weight, regardless of the jurisdiction within which a particular debt or asset is located.[1] Under a "universalist" approach, "the insolvency proceedings and rules of another jurisdiction govern where the 'other' jurisdiction is the focal point of the debtor's affairs."[2] Therefore, debtors in a jurisdiction foreign to the main proceeding can still be given priority over liquidation of assets in other jurisdictions. For example, when a debtor files a main proceeding in a jurisdiction foreign to the United States but has assets and debts in both the foreign jurisdiction and the United States, creditors in both jurisdictions will be treated as they would if they were all in the same jurisdiction. The current trend in cross-border insolvency is to follow a universality approach in the application of jurisdictional laws and prioritization of claims.[3] In fact, English courts have taken a strong stance in favor of the universality approach, stating that:

> bankruptcy proceedings should have universal application. There should be a single bankruptcy in which all creditors are entitled and required to prove. No one should have an advantage because he happens to live in a jurisdiction where more of the assets or fewer or the creditors are situated.[4]

Under the territoriality model, on the other hand, a court will take into account jurisdictional restrictions, and creditors within a particular jurisdiction will be afforded priority to assets located in that same jurisdiction before liquidation of those assets will be utilized to satisfy debts owed to creditors in foreign jurisdictions.[5] Under the territoriality theory, a creditor who might otherwise have priority to liquidation of assets in a jurisdiction foreign to the creditor may not realize the benefits of that liquidation at all. Utilizing the same example from above, under the territoriality model, creditors in the foreign jurisdiction would have priority over proceeds recovered from liquidation of the assets in the foreign jurisdiction. The same priority over proceeds from assets located in the United States would be afforded to creditors in the United States.

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[1] For a brief summary of the characteristics of both a universality and a territoriality approach, see Leonard Katz, *Cross-Border Insolvency and the Recognition of Foreign Liquidators in South Africa*, FINANCIER WORLDWIDE, *available at* http://www.ens.co.za/newsletter/briefs/GRIR07Digital_extracts.pdf. *See also* Nigel Barnett & Jessica Hyde, *Universality Versus Territoriality: Is the Battle Over?*, INT'L LAW OFFICE (Dec. 15, 2006), http://www.internationallawoffice.com/newsletters/detail.aspx?g=90139f7f-1873-db11-a275-001143e35d55.

[2] Donald S. Bernstein et al., *Recognition and Comity in Cross-Border Insolvency Proceedings*, *in* THE INTERNATIONAL INSOLVENCY REVIEW 1, 1 (Donald S. Bernstein ed., 2013).

[3] *See id.*

[4] Cambridge Gas Transp. Corp. v. Official Comm. of Unsecured Creditors of Navigator Holdings PLC, [2006] UKPC 26, [16].

[5] *See* Katz, *supra* note 1.

Finally, it has been suggested by authors Anne Nielsen, Mike Sigal, and Karen Wagner that a third model, referred to as either a modified-universality or qualified-universality approach, is gaining popularity.[6] This model has evolved as a hybrid of both the universality and territoriality models.[7] The theory combines the advantages of both the universality and territoriality models.[8] It is based on the idea of a central proceeding, usually called a main proceeding, supplemented with secondary proceedings, usually called foreign non-main proceedings.[9] Secondary proceedings are those initiated in jurisdictions outside that of the main proceeding and include assets or creditors of the insolvent party.[10] A general international consensus has evolved of late that this modified universality approach provides the greatest advantages.[11]

> Modified universalism, which would allow the law of the centre of main interests to apply except where the local jurisdiction has a compelling interest in applying local law, seems to have won the hearts and minds of many scholars and legislatures as the next best option to pure universalism. Still, the contours of this approach – being etched daily in countries that have adopted legislation based on UNCITRAL's Model Law on Cross-Border Insolvency – are far from settled, and how they are defined is likely to differ from country to country. So, even if modified universalism eventually prevails, a clear understanding of other nations' insolvency law and practices will continue to be essential for the insolvency practitioner to be effective in a flattened, globalised world.[12]

As a guideline for bringing these approaches into practice, UNCITRAL drafted the UNCITRAL Model.[13] The drafters intended for it to provide a modern

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[6] For a description of the evolution of the universality and territoriality models into this modern hybrid, see Anne Nielsen, Mike Sigal & Karen Wagner, *The Cross-Border Insolvency Concordat: Principles to Facilitate the Resolution of International Insolvencies*, 70 AM. BANKR. L. J. 533, 534 (1996).

[7] *See id.*

[8] *Id*.

[9] *Id*.

[10] *Id.*

[11] For a theoretical analysis in support of this theory, see Tin Yan Kerensa Chan, Modified Universality: The Best Model in Regulating Cross-Border Insolvency (June 2005) (unpublished L.L.M. thesis, The University of British Columbia), *available at* http://circle.ubc.ca/bitstream/handle/2429/16487/ubc_2005-0393.pdf?sequence=1.

[12] *See* Donald S. Bernstein, *Editor's Preface*, *in* THE INTERNATIONAL INSOLVENCY REVIEW, *supra* note 2, vii, viii.

[13] *UNCITRAL Model Law on Cross-Border Insolvency (1997)*, U.N. COMM'N ON INT'L TRADE LAW, http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html (last visited Mar. 30, 2015). *See also* U.N. COMM'N ON INT'L TRADE LAW,

legal framework and encourage cooperation and coordination between adopting jurisdictions in executing cross-border insolvency proceedings.[14] The United States adopted selected portions of the Model Law and enacted into law its own version as Chapter 15 to Title 11 of the U.S. Bankruptcy Code through Title VIII of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.[15] Chapter 15, a new chapter, is a semi-rigid adoption of the UNCITRAL Model in that it allows for discretionary recognitions of foreign proceedings as well as provides restrictions to recognition of proceedings in foreign jurisdictions that are either in violation of U.S. treaties or agreements or that may give rise to public policy issues.[16] Part of the U.S. adoption includes a statutory statement of purpose, which provides that Chapter 15 is intended to provide effective mechanisms with the objectives of cooperation between U.S. and foreign jurisdictions; greater legal certainty; fairness and efficiency; protection and maximization of assets; protection of investments; and preservation of employment.[17]

A. The UNCITRAL Model Law (United Nations)

In 1995, in anticipation of the decision to draft the UNCITRAL Model, an expert committee determined that there were six distinguishable categories of insolvency laws.[18] Those categories include:

(1) Countries with specific legislation providing for mandatory recognition of foreign insolvency proceedings opened in certain specified countries;
(2) Countries with express legislation providing for selective recognition or a practice of discretionary recognition;
(3) Countries that feature a practice of discretionary recognition;
(4) Countries that are signatories to multilateral treaties dealing with access and recognition;

UNICTRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT, U.N. Sales No. E.99.V.3 (1997) [hereinafter UNCITRAL MODEL].

[14] *UNCITRAL Model Law on Cross-Border Insolvency (1997)*, *supra* note 13.

[15] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, § 801 (2005).

[16] The adoption is considered semi-rigid in the sense that the United States did not adopt the entire Model Law as written, but rather adopted select portions of the UNCITRAL Model. *See id.* The prioritization of treaties and international agreements over judicial discretion is codified at 11 U.S.C. § 1503 (2012).

[17] The entire description of the purpose of incorporation of the UNICTRAL Model is codified at 11 U.S.C. § 1501.

[18] André J. Berends, *The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview*, 6 TUL. J. INT'L & COMP. L. 309, 315 (1998).

(5) Countries with legislation based on the principle of strict territoriality but with differing practice;
(6) [C]ountries that are wholly territorial.[19]

For reasons articulated later in this Note, the EU Council Regulation would likely be classified as the first type of insolvency law, involving express legislation for mandatory recognition. Both the UNCITRAL Model and the U.S. adoption of the Model Law under Chapter 15 of Title 11 would likely fall into the second category of insolvency laws since it involves express legislation authorizing discretionary recognition.

The decision by UNCITRAL to begin work on drafting a model law was initiated in cooperation with the International Association of Insolvency Practitioners (INSOL).[20] After two international colloquiums, it was determined that the goals of the model should be judicial cooperation and easier access to foreign courts.[21] The final negotiations occurred in Vienna at the thirtieth session of UNCITRAL during most of May 1997, and the Model Law was adopted by consensus on May 30, 1997.[22] The final description of the purpose of the UNCITRAL Model proclaims that it was devised to allow States to more effectively handle cross-border insolvency proceedings by encouraging cooperation and coordination; importantly, the Model Law does not aim to unify the insolvency laws of various nations.[23] According to the International Bar Association, the Model Law is "rapidly becoming the de facto statutory mechanism for cross border recognition of insolvency decrees and coordination of cross border insolvency cases."[24]

1. Notable Provisions

UNCITRAL cites four elements as being key to the achievement of its goal of assisting Member States in more effectively and efficiently handling cross-border insolvency proceedings.[25] These include access, recognition, relief, and cooperation and coordination.[26] The first element, access, serves the purpose of allowing representatives to the main bankruptcy proceeding to gain easier access to courts in foreign jurisdictions and utilize certain aspects of their legal powers in

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19 *Id.*
20 *See* UNCITRAL MODEL, *supra* note 13, pt. 2, art. 4.
21 *See id.* art. 5.
22 *See id.* art. 8.
23 *See id.* art. 3.
24 *SIRC Project: The UNCITRAL Model Law on Cross-Border Insolvency,* INT'L BAR ASS'N, http://www.ibanet.org/LPD/Insolvency_Section/Insolvency_Section/SIRC_ProjectCrossBorderInsolvency.aspx (last visited Mar. 30, 2015).
25 *See* UNCITRAL MODEL, *supra* note 13, pt. 2, art. 14.
26 *Id.* art. 24.

those jurisdictions.[27] The second element, recognition, aims to simplify procedures for recognition of a proceeding by a court in a foreign jurisdiction and to more clearly distinguish the characteristics of a foreign main proceeding from those of a foreign non-main proceeding.[28] The third element, relief, provides an explanation of the type of relief that should be made available by a court in a foreign jurisdiction, including, but not limited to, interim relief and automatic stay.[29] The final element combines the concepts of cooperation and coordination and both allows for and promotes cooperation between foreign courts and representatives as well as between foreign and local representatives.[30]

2. Adoption and Application

In order to encourage and assist individual States with adopting the Model Law, the Secretariat of UNCITRAL drafted a guide to adoption, which is included following the original text and description of the Model Law.[31] UNCITRAL determined that the Model Law could be a more useful tool for adopting nations with this guide, and would allow each State to vary its adoption of certain provisions to cater to its particular objectives.[32] At the end of the thirty-seventh session of UNCITRAL, which was held in New York in 2004, parts one and two of the *Legislative Guide on Insolvency Law* were adopted by consensus.[33] The guide included a statement of what UNCITRAL believed should be the key objectives of a state's insolvency laws and was intended to provide a reference guide to inform and assist both legislative and executive branches of governments with adoption, and to promote insolvency law reform around the world.[34] Part one

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[27] *Id.* art. 25.

[28] *Id.* arts. 29, 31-32.

[29] *Id.* arts. 35-37.

[30] *See* UNCITRAL MODEL, *supra* note 13, arts. 42-45 (describing mechanisms for coordination and cooperation).

[31] The Secretariat of UNCITRAL is provided by the International Trade Law Division of the Office of Legal Affairs of the United Nations and consists of "a small number of qualified lawyers from different countries and legal traditions." U.N. COMM'N ON INT'L TRADE LAW, A GUIDE TO UNCITRAL: BASIC FACTS ABOUT THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW 9 (2013), *available at* http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf.

[32] *See* UNCITRAL MODEL, *supra* note 13, pt. 2, arts. 9-10.

[33] U.N. COMM'N ON INT'L TRADE LAW, LEGISLATIVE GUIDE ON INSOLVENCY LAW, at iii, U.N. Sales No. E.05.V.10 (2005) [hereinafter UNCITRAL LEGISLATIVE GUIDE ON INSOLVENCY LAW]. The legislative guide was developed to "provide a comprehensive statement of the key objectives and principles that should be reflected in a State's insolvency laws. It is intended to inform and assist insolvency law reform around the world." *UNCITRAL Legislative Guide on Insolvency Law*, U.N. COMM'N ON INT'L LAW, http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2004Guide.html (last visited Mar. 30, 2015) [hereinafter *UNCITRAL Legislative Guide*].

[34] *See* UNCITRAL LEGISLATIVE GUIDE ON INSOLVENCY LAW, *supra* note 33, preface.

was a discussion of the key objectives and structural issues involved with drafting insolvency laws, especially those involving cross-border issues.[35] Part two highlighted the key components that make insolvency laws effective and explained in detail the various stages of an insolvency legal proceeding.[36] At the forty-second session in July of 2009, the *Practice Guide on Cross-Border Insolvency Cooperation* was adopted by consensus through consultation with judges and practitioners who specialize in insolvency proceedings.[37] Part three of the *Legislative Guide on Insolvency Law* was adopted in 2010, and its purpose was to serve as a guide to both national and international insolvency laws as they pertain to enterprise groups.[38] Finally, at the forty-fourth session of the commission in July 2011, the *UNCITRAL Model Law on Cross-Border Insolvency: A Judicial Perspective* was adopted by UNCITRAL in order to provide guidance to judges regarding legal issues that may arise under the Model Law.[39]

Nations that have adopted some version of the UNCITRAL Model as of this writing include: Australia (2008), Canada (2005), Colombia (2006), Eritrea (1998), Greece (2010), Japan (2000), Mauritius (2009), Mexico (2000), Montenegro (2002), New Zealand (2006), Poland (2003), Republic of Korea (2006), Romania (2002), Serbia (2004), Slovenia (2007), South Africa (2000), Uganda (2011), United Kingdom: British Virgin Islands (2003), United Kingdom: Great Britain (2006), and the United States (2005).[40] UNCITRAL does point out that since this is a model law, this list merely includes the Nations that have reported their adoption to the UNCITRAL Secretariat.[41] Because the U.S. adoption of the UNCITRAL Model is discussed in its own section, it will not be covered here.

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[35] *Id.* pt. 1.

[36] *Id.* pt. 2.

[37] The purpose of this guide was to provide information for both judges and practitioners with less familiarity in the field about the increasing importance in cross-border insolvency proceedings of cooperation and communication between local representatives and foreign courts as well as between local and foreign representatives. U.N. COMM'N ON INT'L TRADE LAW, UNCITRAL PRACTICE GUIDE ON CROSS-BORDER INSOLVENCY COOPERATION, at 1, U.N. SALES NO. E.10.V.6 (2010), *available at* http://www.uncitral.org/pdf/english/texts/insolven/Practice_Guide_Ebook_eng.pdf.

[38] U.N. COMM'N ON INT'L TRADE LAW, UNCITRAL LEGISLATIVE GUIDE ON INSOLVENCY LAW – PART THREE: TREATMENT OF ENTERPRISE GROUPS IN INSOLVENCY at 1, U.N. Sales No. E.12.V.16 (2012), *available at* http://www.uncitral.org/pdf/english/texts/insolven/Leg-Guide-Insol-Part3-ebook-E.pdf.

[39] U.N. COMM'N ON INT'L TRADE LAW, UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY: THE JUDICIAL PERSPECTIVE 1 (2012), *available at* http://www.uncitral.org/pdf/english/texts/insolven/V1188129-Judicial_Perspective_ebook-E.pdf.

[40] *Status: UNCITRAL Model on Cross-Border Insolvency (1997)*, U.N. COMM'N ON INT'L TRADE LAW, http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html (last visited Mar. 30, 2015) [hereinafter *UNCITRAL Status*].

[41] *Id.*

Great Britain adopted its version of the UNCITRAL Model as the Cross-Border Insolvency Regulations 2006 with the goal of adopting the Model Law, as written, to the fullest extent possible.[42] Some of the important differences from Great Britain's adoption and the original text of the UNCITRAL Model include: references to EU Council Regulation on Insolvency Proceedings; inclusion of Section 426 of the Insolvency Act of 1986; and inclusion of various types of relief available in British insolvency law not available under the UNCITRAL Model.[43] Notably, Great Britain adopted the UNCITRAL Model with the intention that it would operate in collaboration with, rather than supplant, the EU Council Regulation on Insolvency Proceedings and Britain's own Section 426 of the Insolvency Act of 1986.[44] In the event that the Model Law conflicts with the Council Regulation on Insolvency Proceedings, the EU regulation will govern.[45] Additionally, while British courts have discretionary power regarding when to recognize a foreign proceeding, due to the combination of the three laws governing cross-border insolvencies in Great Britain, there are situations in which, if certain criteria are met, the court is required to recognize a foreign proceeding.[46] Finally, the British adoption of the Model Law also includes a recognition of the difference between a foreign main proceeding and foreign non-main proceeding.[47] It is assumed that, due to the prioritization of the other two laws in situations involving foreign proceedings in the EU, and, more specifically, in Great Britain, the Model Law will apply most commonly to foreign proceedings in the United States seeking recognition in Great Britain.[48]

One notable case is *Re Namirei-Showa Co. Ltd.*; it provides an example of the utilization of the UNCITRAL Model as adopted by Great Britain to recognize a foreign main proceeding.[49] The case, which was an unpublished order by a British court, related to the discretionary recognition of insolvency proceedings that initially commenced as a foreign main proceeding in Japan.[50] The foreign representative of the Japanese court applied for recognition of the proceeding in Great Britain and provided documents to support the position that the case in Japan should be recognized as a foreign main proceeding pursuant to Cross-Border Insolvency Regulation 2006.[51] The British court subsequently

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42 SANDY SHANDRO, FRESHFIELDS BRUCKHAUS DERINGER, THE IMPLEMENTATION OF THE UNICITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY IN GREAT BRITAIN 1 (2006), *available at* https://www.altassets.net/pdfs/freshfields_UNCITRAL.pdf.

43 *Id.*

44 *See id.*

45 *Id.* at 2.

46 *Id.*

47 *See* Shandro, *supra* note 42, at 2.

48 *See id.* at 3.

49 Re Namirei-Showa Co. Ltd., No. 7542/08 (UK High Ct. of Justice 2008).

50 *Id.*

51 *The Cross-Border Insolvency Regulations 2006*, LEGISLATION.GOV.UK, http://www.legislation.gov.uk/uksi/2006/1030/schedules/made (last visited May 11, 2015).

recognized the proceeding as such.[52] Notably, in this case the debtor had also applied separately for recognition of the proceeding in the United States.[53]

As an example of the minimal ties a debtor must have to Great Britain in order to have its foreign proceeding recognized, consider *In Re European Insurance Agency AS*.[54] The debtor in that case was a company that had no places of business in Great Britain, nor did it carry on business there.[55] The only tie the debtor had to Great Britain was that it owned assets located in England and Wales.[56] The court determined this was enough and issued an order of recognition of the foreign main proceeding, which had been initiated in the foreign jurisdiction of Norway.[57]

B. Council Regulation of Insolvency Proceedings (European Union)

The EU Council Regulation was adopted by the Council of the European Union on May 29, 2000, and it became law on May 31, 2002.[58] The Council Regulation is considered directly applicable, which means not only that it has automatic legal effect, but also that it prevails over all domestic laws of nations in the EU, with the exception of Denmark.[59] The purpose of the EU Council Regulation is expressed as cooperation as well as efficient and effective operation of cross-border insolvency proceedings.[60] The Council Regulation applies to insolvency proceedings in which the debtor is a natural person, a legal person, or an individual.[61] Specifically excluded from recognition under the EU regulation are proceedings related to or involving insurance, credit institutions, investment issues, or securities issues.[62]

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[52] *In Re* European Insurance Agency AS, No. 6-BS30434 (UK High Ct. of Justice 2006).

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *In Re* European Ins. Agency AS, No. 6-BS30434 (2006) (Ch.) (Eng.).

[58] *EC Regulation on Insolvency Proceedings*, PRACTICAL LAW, http://uk.practicallaw.com/0-502-7023 (last visited Mar. 30, 2015). The European Council is the main decision-making body of the European Union and calls for each Member State to delegate one representative, thus affording each Member State equal representation. *Council of the European Union*, PRACTICAL LAW, http://uk.practicallaw.com/5-107-7562 (last visited Mar. 30, 2015).

[59] *EC Regulation on Insolvency Proceedings*, *supra* note 58.

[60] Council Regulation 1346/2000, On Insolvency Proceedings, recital 2,2000 O.J. (L 160) 1 (EC) [hereinafter Council Regulation].

[61] *See id.* recital 9.

[62] *See id.* art. 1(2).

1. Notable Provisions

The EU regulation requires that proceedings be opened in the State that is considered to be the center of main interests.[63] The center of main interests is "the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties."[64] The regulation also permits secondary proceedings to be opened in jurisdictions where the debtor has what qualifies as an establishment, and those secondary proceedings are then limited to the debtor's assets in that State.[65] Qualification as a center of main interests corresponds to the place where the "debtor conducts the administration of his interests on a regular basis" and that jurisdiction must be located within "the Community."[66] Some important goals of the EU Council Regulation include limiting forum shopping and providing choice-of-law provisions.[67] The UNCITRAL Model, on the other hand, does not consider avoidance of forum-shopping one of its primary objectives.[68]

A unique characteristic of the EU Council Regulation is that the court handling the main proceeding can order protective measures for assets in other Member States; in addition, an appointed liquidator may apply for preservation of assets in Member States prior to the opening of the main proceedings.[69] This is distinguishable from the UNCITRAL Model in that generally, under the Model Law, the main proceeding must be active and then recognized before court orders or preservation of assets can commence. The EU Council Regulation, much like the UNICTRAL Model, also dictates that the law of the State handling the main proceeding shall apply.[70]

The EU Council Regulation also provides a specific description of the liquidator's powers in a Member State proceeding.[71] Notably, the liquidator may exercise in another Member State all the power conferred upon him by the jurisdiction overseeing the main proceeding.[72] This includes an express power to move assets from the foreign Member State to the state that has jurisdiction over

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63 *See id.* recitals 12-14.

64 *Id.* recital 13.

65 *See* Council Regulation, *supra* note 60, recitals 12-14.

66 *Id.* recitals 13-14.

67 Bob Wessels, *The Changing Landscape of Cross-Border Insolvency Law in Europe*, *in* XII JURIDICIA INTERNATIONAL, 2007, at 116, 118, *available at* http://www.juridicainternational.eu/the-changing-landscape-of-cross-border-insolvency-law-in-europe.

68 *See* UNCITRAL MODEL, *supra* note 13.

69 *See* Council Regulation, *supra* note 60, recital 16.

70 *See id.* art. 4(1).

71 The liquidator's powers, in addition to those specifically provided by the Member State in which the proceeding is initiated, include the ability to remove debtor's assets from another Member state and specifically exclude any coercive measures that may be taken. *See id.* art. 18(1)-(3).

72 *See id.* art. 18(1)-(2).

the main proceeding.[73] However, this power is not unlimited. The regulation restricts a liquidator's rights by requiring that all actions taken by the liquidator in a foreign Member State not conflict with the laws of that Member State.[74]

In contrast to the discretionary recognition characteristic of the UNICTRAL Model, the EU Council Regulation dictates that an order opening an insolvency proceeding in a Member State is required to be recognized in all Member States the moment it becomes effective in the state handling the main proceeding.[75] Thus, it can be argued that the discretion with regard to recognition under the regulation has been left to the legislature rather than the judiciary. This is due to the fact that the legislature of each participating nation determines whether or not to take part as a Member State of the EU.[76] Since the EU Council Regulation does not allow judicial discretion with regard to recognizing a foreign proceeding in another Member State, save for situations that present important public policy issues, the shift of discretion from the judiciary to the legislature is evident on its face.[77] The legislatures' decision in each Member State to become part of the EU and, further, to ratify the EU Council Regulation indirectly imposes restrictions on the judiciary's discretion in recognizing a foreign proceeding initiated in a foreign Member State.

Also worthy of note is the fact that proceedings initiated in Member States under the EU Council Regulation may not be challenged by other Member States.[78] This situation arose in the administration of the bankruptcy proceeding of Daisytek, a company with its center of main interests in England.[79] A French court attempted to administer its own proceeding and a subsequent application for recognition was made.[80] Recognizing that a second main proceeding could not be opened in France under Articles 3(1) and 16(1) of the EU Council Regulation, the Versailles Appellate Court held that the French proceeding could not be recognized as a main proceeding.[81] Enforcement of this action was based on a public policy exception since Article 26 of the EU Council Regulation required the French court to recognize the British proceeding.[82]

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[73] *See id.*

[74] *See* Council Regulation, *supra* note 60, art. 18(3).

[75] *See id.* art. 18(1).

[76] For a general overview of the criteria for membership, as well as for the process by which states become members of the European Union, see *Conditions for Membership*, EUR. COMM'N, http://ec.europa.eu/enlargement/policy/conditions-membership/index_en.htm (last updated Nov. 19, 2014).

[77] *See* Council Regulation, *supra* note 60, art. 18.

[78] *See id.* art. 17(2).

[79] *In re* Daisytek-ISA Ltd., [2003] B.C.C. 562 (Ch) (Eng.).

[80] *See* Pascale Bloch & Didier Malka, *Supreme Court Rules on Application of EU Insolvency Regulation*, INT'L LAW OFFICE (Dec. 5, 2006), http://www.internationallawoffice.com/newsletters/detail.aspx?g=d22af53e-067f-db11-9c7d-001143e35d55.

[81] The Supreme Court subsequently dismissed the appeal. *Id.*

[82] *Id.*

2. Adopting Nations

The Member States of the European Union, listed along with their year of acceptance, include Austria (1995), Belgium (1952), Bulgaria (2007), Croatia (2013), Cyprus (2004), Czech Republic (2004), Denmark (1973), Estonia (2004), Finland (1995), France (1952), Germany (1952), Greece (1981), Hungary (2004), Ireland (1973), Italy (1952), Latvia (2004), Lithuania (2004), Luxembourg (1952), Malta (2004), Netherlands (1952), Poland (2004), Portugal (1986), Romania (2007), Slovakia (2004), Slovenia (2004), Spain (1986), Sweden (1995), and the United Kingdom (1973).[83]

C. Chapter 15 (United States)

Prior to adoption of the UNCITRAL Model and its predecessor, Section 304, courts evaluated cross-border insolvency cases on the basis of comity, which was defined as:

> neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.[84]

Black's Law Dictionary defines comity as "[a] practice among political entities (as countries, states, or courts of different jurisdictions), involving esp[ecially] mutual recognition of legislative, executive, and judicial acts."[85] I would summarize the concept of comity as the reciprocal, but discretionary, recognition of a foreign jurisdiction's laws when both nation states can gain a mutual direct or indirect benefit. In assessing the issue at hand, the U.S. Supreme Court in *Hilton*

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[83] *Countries*, EUR. UNION, http://europa.eu/about-eu/countries/ (last visited Mar. 31, 2015). The list of Member states of the European Union provided also includes a list of nations on the road to membership as well as additional potential candidates. *Id.* The European Union can potentially face its most drastic change in recent years if the rumors become reality that Britain, the longstanding largest economy in Europe, is leaving the European Union. *See* Anatole Kaletsky, *Will Britain Really Leave the European Union?*, REUTERS, Jan. 16, 2014, *available at* http://blogs.reuters.com/anatole-kaletsky/2014/01/16/will-britain-really-leave-the-european-union/. *See also* Oliver Wright, *Exclusive: Treasury to Warn British Public of Economic Risks of Leaving EU - and Tory Eurosceptics Are Furious*, INDEPENDENT (Jan. 23, 2014), http://www.independent.co.uk/news/uk/politics/exclusive-treasury-to-warn-british-public-of-economic-risks-of-leaving-eu--and-tory-eurosceptics-are-furious-9081481.html.

[84] Hilton v. Guyot, 159 U.S. 113, 164 (1895).

[85] BLACK'S LAW DICTIONARY 324 (10th ed. 2014).

v. Guyot refused to afford comity to the French judgment in question since France had not afforded such comity to U.S. judgments.[86] The Court noted that either a treaty or statute would have been "the most certain guide" to help determine whether U.S. law should give deference to the foreign jurisdiction.[87]

Following the era in which bankruptcy analysis was based solely on comity and had very little structure, cross-border insolvency issues in the United States were later governed by Section 304 of the U.S. Bankruptcy Code.[88] Section 304 was enacted as part of the 1978 Bankruptcy Act and called for an ancillary proceeding when a debtor had assets in the United States, when a foreign proceeding had already commenced.[89] Section 304 laid out six factors to be taken into account when determining the appropriateness of recognition of a foreign proceeding.[90] The six factors included: (1) just treatment of all claim holders; (2) protection of claim holders in the United States from prejudice or inconvenience; (3) prevention of fraudulent transfers of property; (4) distribution to creditors substantially in compliance with the U.S. Bankruptcy Code; (5) comity; and (6) an opportunity for the debtor to be afforded a fresh start.[91]

A notable example of a court giving equal weight to the various factors outlined in Section 304 is *In re Papeleras Reunidas S.A.*[92] Papeleras was a paper products company in the final stages of a bankruptcy proceeding in Spain when Adams, a U.S. corporation, successfully litigated a contractual dispute and was awarded a judgment totaling over $1.4 million, which made it the largest creditor of Papeleras.[93] In affirming the district court's decision to dismiss the ancillary proceeding, the court stated, "it is best to equally consider all of the variables of § 304(c) in determining the appropriate relief in an ancillary proceeding."[94]

The final era of cross-border insolvency governance followed Section 304 and was the U.S. adoption of the UNCITRAL Model as Chapter 15 under Title 11 of the U.S. Code.[95] Chapter 15 contains provisions that encourage U.S. courts to cooperate with the foreign court that has jurisdiction over the main bankruptcy proceeding.[96] If the U.S. court grants recognition, the foreign representative may be afforded certain rights, including the capacity to sue and to apply for appropriate relief in an appropriate U.S. Court.[97] Recognition is governed by Section 1517 of Title 11, which requires that the foreign proceeding be recognized as a foreign main or foreign non-main proceeding, and is subject to

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86 *Hilton*, 159 U.S. at 228.

87 *Id.* at 163.

88 Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978).

89 *Id.*

90 11 U.S.C. § 304 (1994) (repealed 2005).

91 *Id.*; *In re* Application of Papeleras Reunidas, S.A., 92 B.R. 584, 589-90 (1988).

92 92 B.R. 584 (1988).

93 *Id.* at 585.

94 *Id.* at 594.

95 *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, § 801 (2005); *see also* 11 U.S.C. §§ 1501-32 (2012).

96 11 U.S.C. § 1501(a)(1)(A)-(B).

97 11 U.S.C. § 1509.

the requirements of Section 1515 of the same title, which outlines the documentation required before a foreign proceeding will be considered for recognition.[98] Whether a proceeding is recognized as foreign main or foreign non-main is determined by the debtor's center of main interests, which is the jurisdiction in which the debtor conducts the administration of its business based on "activities on or around the time the Chapter 15 petition is filed."[99] Essentially, a foreign main proceeding is one in which the jurisdiction hosting the proceeding is also the location of the debtor's center of main interests, whereas a foreign non-main proceeding is a proceeding outside of the main proceeding jurisdiction, but one in which the debtor still carries on economic activity.[100]

One particularly important aspect of the U.S. adoption of the UNCITRAL Model in Chapter 15 is that it leaves discretion to American courts to decide whether to recognize a foreign proceeding in the interest of protection of creditors and other interested persons in the United States.[101] That discretion, however, is limited, as courts may not recognize foreign proceedings that are against public policy; in addition, courts must be satisfied that the legal procedures applicable in the foreign court will be fair to U.S. parties.[102] When the request for recognition is in conflict with a treaty or any other agreement with a foreign nation, the treaty or agreement will prevail and the proceeding will not be afforded recognition, even if the request fulfills all other requirements.[103] The public policy exception to recognition, however, is narrowly construed.[104] It is "intended to be invoked only under exceptional circumstances concerning matters of fundamental importance for the United States."[105] Ultimately, it appears that court's discretion is deferential toward recognition so long as all documentation requirements are met, but courts retain the ability to deny recognition where a serious public policy issue would exist, where U.S. parties would lack protection, or where conflict with a treaty or agreement would result from recognition.

In a proceeding where foreign representatives were appointed by the debtor rather than by the court, the Fifth Circuit in *In re Vitro SAB De CV*[106] affirmed the lower court's decision to recognize the proceeding. That case involved an insolvency proceeding commenced in Mexico by a Mexican corporation; the corporation's board of directors had named its own foreign representative for the purpose of the Chapter 15 proceeding.[107] The court made it

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98 11 U.S.C. §§ 1515, 1517.

99 *In re* Fairfield Sentry, Ltd., 714 F.3d 127, 136-37 (2d Cir. 2013).

100 Look Chan Ho, *Applying Foreign Law Under the UNCITRAL Model Law on Cross-Border Insolvency*, 24 BUTTERWORTHS J. OF INT'L BANKING & FIN. LAW 655, 656 (2009).

101 11 U.S.C. § 1522.

102 11 U.S.C. §§ 1503, 1506.

103 11 U.S.C. § 1503.

104 *See In re* Millennium Global Emerging Credit Master Fund Ltd., 474 B.R. 88, 95 (S.D.N.Y. 2012).

105 *In re* Ran, 607 F.3d 1017, 1021 (5th Cir. 2010).

106 *See In re* Vitro S.A.B. de CV, 701 F.3d 1031, 1042 (5th Cir. 2012).

107 *See id.* at 1040.

clear that a court-appointed representative was not a necessary requirement for recognition and that a foreign representative does not necessarily need to meet the requirements of the Chapter 11 definition of a debtor in possession.[108] The court also noted that it was not necessary for the result in the foreign proceeding to be identical to that which would be achieved through a proceeding in a U.S. bankruptcy proceeding, but that the result merely had to be comparable.[109]

Regarding the public policy exception, several cases provide guidance with regard to determining whether an action in a Chapter 15 proceeding is contrary to public policy. In adhering to Congress' intention that public policy issues be narrowly interpreted, a U.S. district court held that Canadian procedures were not contrary to public policy even though such procedures lacked certain common components of an American proceeding, such as a jury trial.[110] Where a foreign proceeding did not provide unfettered access to court records, this alone was also not enough to find that recognizing the proceeding would be contrary to public policy.[111] Additionally, in assessing comity, the relief that may be granted in a foreign proceeding does not necessarily have to be identical to the relief that would be available in a U.S. proceeding, as was the case with *In re Metcalfe & Mansfield Alt. Invs*.[112] The court there suggested that great deference should be given toward finding comity when the foreign main proceeding is in a friendly jurisdiction (such as Canada in this instance).[113]

On the opposite side of the spectrum, an action that would frustrate a U.S. court's ability to administer the proceeding or that infringes upon Constitutional or statutory rights violates public policy and invokes the public policy exception.[114] The court in *In re Gold & Honey*[115] held that the foreign proceeding was neither a foreign main proceeding nor a foreign non-main proceeding, and therefore the proceeding should not be recognized. The factors important to this determination included the fact that the foreign proceeding was not collective in nature (a requirement under the definition of foreign proceeding),[116] the appointment of the representatives was in violation of U.S. procedural requirements, and adverse public policy issues existed; furthermore, it could not be shown that the proceeding was subject to the minimal control of the foreign court.[117] Notably, the court also held that the receivers were not appointed in compliance with the automatic stay and that recognition of the proceeding would adversely affect public policy.[118] It should also be noted that the

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[108] *See id.* at 1042.
[109] *See id.* at 1044.
[110] *See In re* Ephedra Prods. Liability Litig., 349 B.R. 333 (S.D.N.Y. 2006).
[111] *See In re* Fairfield Sentry, Ltd., 714 F.3d 127, 139 (2013).
[112] *See In re* Metcalfe & Mansfield Alt. Invs., 421 B.R. 685, 697 (Bankr. S.D.N.Y. 2010).
[113] *See id.* at 698.
[114] *See In re* Gold & Honey, Ltd., 410 B.R. 357, 373 (Bankr. E.D.N.Y. 2009).
[115] *See id.* at 367.
[116] 11 U.S.C. § 101(23) (2012).
[117] *See In re Gold & Honey, Ltd*, 410 B.R. at 373.
[118] *See id.* at 368.

proceeding was initiated in Israel, and the argument for recognition was not as compelling as it in had been with *In re Ephedra*, which was initiated in Canada.[119] This was primarily the case because of the numerous ways in which the Israeli legal system differs from that of the United States, whereas the Canadian and U.S. legal systems have many important similarities.[120]

A U.S. court was presented with a fact situation that required it to assess the public policy issues related to recognizing a foreign proceeding under Chapter 15 in the case of *In re Katsumi Iida*.[121] The debtor was a citizen of Japan, and had major assets in the form of a considerable financial stake in two luxury hotels in Hawaii, but notably owed no debts to creditors in the United States.[122] After being declared insolvent in Japan, the debtor filed a complaint, arguing that the foreign representative assigned to his case lacked authority to access his U.S. assets.[123] The Japanese bankruptcy court had issued an order authorizing the foreign representative to sell the Kahala Mandarin Oriental Resort, a hotel located in Hawaii and owned by the debtor.[124] Recognition had been requested under 11 U.S.C. § 1517, and the debtor contested recognition as a violation of public policy under 11 U.S.C. § 1506.[125] The court affirmed that nothing in the U.S. Bankruptcy Code or Hawaiian state law required the foreign representative to apply for an order from a U.S. court before exercising his or her authority as trustee of a bankruptcy proceeding.[126]

Creditors brought adverse proceeding claims challenging recognition of a proceeding as a main proceeding in the case of *In re Schefenacker PLC*, which was a Chapter 15 proceeding in which the debtor was a foreign auto supplier and had initiated a Company Voluntary Arrangement (CVA).[127] The CVA authorized the company to negotiate with creditors and establish insolvency terms that would need to be approved subsequently by a bankruptcy court in the United Kingdom.[128] The foreign representatives sought recognition in U.S. courts, but the action was challenged by German bondholders who claimed the action was a non-main proceeding because most of the company's production took place in

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[119] *See id. See also In re* Ephedra Prods. Liability Litig., 349 B.R. 333 (S.D.N.Y. 2006).

[120] For a comparative analysis of the ways in which the U.S. legal system differs from that of Israel, see Amnon Straschnov, *The Judicial System in Israel*, 34 TULSA L. REV. 527 (1998). For an analysis that also includes ways in which Canada's legal system is much more similar to that of the United States, see Richard A. Posner, *Judicial Review, a Comparative Perspective: Israel, Canada, and the United States*, 31 CARDOZO L. REV. 2393 (2010).

[121] *See In re* Iida, 377 B.R. 243 (B.A.P. 9th Cir. 2007)

[122] *See id.* at 247.

[123] *See id.* at 250.

[124] *See id.* at 249-50.

[125] *See id.* at 250.

[126] *See In re* Iida, 377 B.R. at 256.

[127] *See In re* Schefenacker PLC, Case No. 07-11482 (S.D.N.Y. 2007).

[128] *See id.*

Germany.[129] The U.S. court held that the main location of production is just one factor in determining if a proceeding is a main proceeding; furthermore, it held that Chapter 15 allows recognition of a non-main proceeding.[130] The court found it important, inter alia, that: the CVA had been approved by the requisite majority of creditors; absent the relief, Schefenacker could face irreparable injury; the relief would not cause undue hardship; and, finally, that enforcement of the relief would serve the interests of public policy.[131]

The issue of recognition of a proceeding as either a main proceeding or a non-main proceeding was raised in *In re Basis Yield Alpha Fund*.[132] There, a foreign debtor applied for recognition of an insolvency proceeding in the Cayman Islands by a U.S. court as a foreign main proceeding or, in the alternative, applied for recognition as a non-main proceeding under Section 1517(b)(1) of the Bankruptcy Code.[133] However, since the debtor had registered the business entity as an exempted company with a provision that said that most of the company's business would be conducted outside of the Cayman Islands, the bankruptcy court ruled that there was a genuine issue of material fact regarding the center of main interests analysis, which then precluded summary judgment on that issue.[134] Notably, the court determined that it could, sua sponte, assess whether or not the requirements of Section 1517 had been met, even where no creditors had objected to the application for recognition.[135]

Public policy concerns were raised in *In Re Qimonda AG*,[136] which involved Chapter 15 recognition of a foreign proceeding. After a foreign representative successfully applied for recognition in the United States of an insolvency proceeding in Germany, a French company sued to enjoin the bankruptcy proceeding.[137] Because the automatic stay that the foreign representative requested involved a non-debtor party, and this type of action is traditionally not granted under U.S. bankruptcy law, the public policy issues against recognition outweighed the U.S. court's acceptance of German law and recognition of the stay as part of the proceeding.[138] The court, therefore, entered an order enjoining the French company from pursuing its ancillary claims as adversary proceedings in the bankruptcy proceeding but granted the French company's motion for relief from the automatic stay to allow it to pursue its claims in a separate proceeding if it so desired.[139]

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129 See *id.*
130 *See id.*
131 *See id.*
132 *See In re* Basis Yield Alpha Fund, Case No. 07-12762 (S.D.N.Y. 2007).
133 *See id.*
134 *See id.*
135 *See id.*
136 *See In Re* Qimonda AG, 482 B.R. 879, 899 (Bankr. E.D.V.A. 2012).
137 *See id.*
138 *See id.*
139 *See id.* at 899.

Chapter 15 has additional restrictions on recognition. Specifically, proceedings involving railroads, insurance companies, banks, homestead associations, or credit unions may not be recognized due to the unique elements involved in those types of bankruptcies.[140] The list of excluded categories under Chapter 15 is similar to the list that notes who may not be a debtor under traditional U.S. bankruptcy law.[141] Furthermore, relief may not be granted under Chapter 15 in the United States for proceedings involving deposits, escrow accounts, trust funds, or other securities.[142]

III. ANALYSIS

The purpose of this section is to compare and contrast some of the more pertinent aspects of each law: the UNCITRAL Model, the EU Council Regulation of Insolvency Proceedings, and the U.S. adoption of the UNCITRAL Model in Chapter 15. The particular strengths of each law will be evaluated, as will some of each law's weaknesses. Some theories regarding the reasoning some nations may have for choosing to adopt particular provisions of each model law, as well as for leaving out particular provisions of each law, will also be addressed. An assessment of each law will be given, followed by suggestions for how a law's strengths and weaknesses can be harmonized.

A. Membership and Adoption

The UNCITRAL Model and the EU Council Regulation differ with regard to their application to various member nations and their adoption requirements. The UNCITRAL Model was written with the hope that it would be adopted by Member States; thus, it encourages uniformity and predictability.[143] However, there is no requirement that members of the United Nations adopt the UNCITRAL Model. Those nations that choose to adopt the UNCITRAL Model can implement the model in its entirety or can select and accept particular provisions. UNCITRAL's official list of nations that have adopted the law includes a disclaimer that "[a] model law is created as a suggested pattern for law-makers to consider adopting as part of their domestic legislation;"[144] therefore, "[t]he legislation of each State should be considered in order to identify the exact nature of any possible deviation from the model in the legislative text that was adopted."[145] Additionally, those nations choosing to adopt all or part of the UNCITRAL Model were to pass the model into law in their own countries in the

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140 11 U.S.C. § 1501 (c)(1) (2012), 11 U.S.C. § 109(b) (2012).
141 11 U.S.C. § 109(b).
142 11 U.S.C. § 1501(d).
143 *See* UNCITRAL MODEL, *supra* note 13.
144 *UNCITRAL Status*, *supra* note 40.
145 *Id.*

same manner the nation adopts any other bankruptcy law.[146] In the United States, the adoption of the Model Law as Chapter 15 is a perfect example of selective adoption; most of the UNCITRAL Model was adopted, but certain exceptions to rules exist, for example, for situations in which recognizing a proceeding would violate public policy. Other issues may be on the forefront, as Brazil, Russia, India, and China—some of the world's fastest-growing economies—have not adopted a version of the UNCITRAL Model or established their own legal regimes for handling cross-border insolvency proceedings.[147]

The EU Council Regulation, on the other hand, was written to become law in every member nation (except Denmark) immediately upon the regulation's adoption by the EU.[148] Further, the regulation was intended to preempt local bankruptcy laws of the member nations.[149] As discussed earlier, the UNCITRAL Model was written first, and nations subsequently had the option to adopt it in part or in its entirety. However, those nations contributing to the EU Council Regulation effectively chose to adopt it in its entirety merely by being a part of the EU when the regulation was drafted and voted into effect.[150] It is still uncertain how the binding nature of the regulation will be reconciled if new Member States join the EU. Additionally, author Bob Wessels argues that the EU Council Regulation is at odds with today's ever-advancing international business scheme because the regulation was designed to apply to a close-knit community of Member States.[151] However, he goes on to conclude, without specifically addressing the changes needed, that there is a future for uniform insolvency regulation if parts of the EU Council Regulation were renewed and others added.[152]

B. Recognition

The UNCITRAL Model does not include a mandatory recognition

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[146] *See* UNCITRAL LEGISLATIVE GUIDE ON INSOLVENCY LAW, *supra* note 33.

[147] The BRIC countries of Brazil, Russia, India and China are absent from the list of those who have adopted the UNCITRAL Model or some legal regime for handling cross-border insolvency. *See* Steven T. Kargman, *Emerging Economies and Cross-Border Insolvency Regimes: Missing BRICs in the International Insolvency Architecture (Part I)*, 6 INSOLVENCY & RESTRUCTURING INT'L 8 (2012). Studies predict that China and India will be the world's second and third largest economies, respectively, by 2028. *See Study Projects India to Be World's 3rd Largest Economy by 2028 After China, US*, HINDU (Dec. 27, 2013), http://www.thehindu.com/business/Economy/study-projects-india-to-be-worlds-3rd-largest-economy-by-2028-after-china-us/article5508247.ece.

[148] *See* Council Regulation, *supra* note 60.

[149] *Id.*

[150] *Id.* art. 18(1).

[151] *See* Bob Wessels, *Revision of the EU Insolvency Regulation: What Type of Facelift?*, *in* PROCEEDINGS FROM THE INTERNATIONAL CONFERENCE: THE FUTURE OF THE EUROPEAN INSOLVENCY REGULATION, at 92, 98 (2011).

[152] *See id.* at 99.

scheme, and most nations choosing to adopt it have kept the recognition scheme either wholly discretionary or have opted to allow for judicial discretion with certain restrictions.[153] This is particularly evident in situations where recognition can raise public policy issues and thus discourage recognition.[154] Some states that adopted a mandatory recognition provision have done so with the added requirement that the jurisdiction in which the proceeding is initiated must have also adopted some version of the UNCITRAL Model; others nations, however, do not have such a requirement.[155] For example, the Canadian adoption through Bill C-55 includes the entirety of Article 17 of the UNCITRAL Model, which requires recognition (absent a public policy issue) when the proceeding is determined to be a bona fide proceeding through satisfaction of four requirements.[156] Australia's adoption of the Model Law, however, includes the added requirement that a foreign representative's application for recognition also be accompanied by statements identifying all foreign proceedings involving the debtor, all proceedings under the Bankruptcy Act, all proceedings under specified portions of the Corporations Act, and all appointments of receivers.[157] Great Britain's adoption, on the other hand, simply requires that evidence be provided that a foreign proceeding exists and that a foreign representative has been appointed.[158] When those minimal standards are met, a representative seeking recognition in Great Britain will likely be successful.[159]

The acceptance of mandatory recognition can raise various issues in practice. In particular, an adopting nation may conflict with another nation seeking recognition, but a court would be compelled to recognize the proceeding absent a prevalent public policy issue suggesting the contrary. This lack of discretion can raise serious public policy issues, and since the UN is, for the most part, neutral with regard to participating nations, it is not likely to prevent nations from adopting the model when they are in conflict or disagreement with another

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[153] *See* UNCITRAL MODEL, *supra* note 13, arts. 6, 17.

[154] *See id. See also* Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law, G.A. Res. 52-158, U.N. Doc. A/RES/52/158, art. 15(1) (Jan. 30, 1998) [hereinafter U.N. Model Law].

[155] For a discussion of how these non-uniform adoptions of the Model Law may contradict the ultimate goal of providing uniformity and predictability in cross-border insolvencies, see S. Chandra Mohan, *Cross-border Insolvency Problems: Is the UNCITRAL Model Law the Answer?*, 21 INT'L INSOLVENCY REV. 199 (2012).

[156] *See* UNCITRAL MODEL, *supra* note 13, art. 17. *See also* Wage Earner Protection Program Act, S.C. 2005, c. 47 (Can.).

[157] Paul Nicols & Pouyan Afshar, *Focus: UNCITRAL Model Law in Australia: The Impact on Insolvency Practitioners and Creditors*, ALLENS LINKLATERS (Sept. 26, 2007), http://www.allens.com.au/pubs/insol/foinsolsep07.htm.

[158] Michael Quinlan & Angela Martin, *Focus: The UNCITRAL Model Law on Cross-Border Insolvency in Great Britain – Working Towards a Common Approach in Global Insolvencies*, ALLENS LINKLATERS (May 8, 2006), http://www.allens.com.au/pubs/insol/foinsolmay06.htm.

[159] *See id.*

member nation.[160] There is also the possibility that a member nation that has a positive relationship with other nations at present could make political or other decisions that create conflict between itself and other member nations.

The U.S. adoption of the UNCITRAL Model in Chapter 15 requires that foreign representatives apply for recognition by filing a specified application for recognition.[161] This is the exclusive remedy for seeking injunctive relief against the possibility of future litigation in U.S. courts arising from the proceeding.[162] As previously mentioned, a discretionary provision allows for denial of recognition where public policy issues come into play.[163] However, as was also discussed earlier, this exception to recognition is to be construed very narrowly, as the statute specifically notes that the public policy exception as a reason for refusal to recognize a foreign proceeding is limited to situations in which "the action would be manifestly contrary to the public policy of the United States."[164]

The EU Council Regulation, on the other hand, has a provision of mandatory recognition in its articles.[165] Specifically, the EU Council Regulation provides for mandatory recognition of secondary or ancillary proceedings in Member States but is limited only to assets of the debtor located within the jurisdiction of these ancillary proceedings.[166] Cooperation between liquidators appointed by the courts of all main and secondary proceedings is mandatory, and that includes the required sharing of all necessary information between those liquidators.[167]

On its face, this would seem to raise important public policy implications when conflict between member nations arises. However, upon further examination, it is possible that geography and culture may make mandatory recognition more palatable in the EU.[168] UN member nations are located in various areas of the world and represent a kaleidoscope of cultures.[169] As a result, the participating nations in the EU may be less likely to run into conflict and can

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[160] *See* T. Komarnicki, *The Problem of Neutrality Under the United Nations Charter*, 38 TRANSACTIONS OF THE GROTIUS SOC'Y, 1952, at 77. *See also Principles of UN Peacekeeping*, U.N. PEACEKEEPING, http://www.un.org/en/peacekeeping/operations/principles.shtml (last visited Mar. 31, 2015).

[161] 11 U.S.C. §1504 (2012).

[162] U.S. v. Jones, 333 B.R. 637, 638 (Bankr. E.D.N.Y. 2005).

[163] *See* 11 U.S.C. § 1506 (2012).

[164] *Id.*

[165] *See* Council Regulation, *supra* note 60, art. 3(2).

[166] *Id.*

[167] *See id.* art. 31.

[168] For a list of the member nations of the European Union, see *Countries*, EUR. UNION, http://europa.eu/about-eu/countries/index_en.htm (last visited Mar. 31, 2015). For a detailed map of the geographical layout of the member nations of the European Union, see *European Union Member States Detailed Map*, VIDIANI, http://www.vidiani.com/?p=10749 (last visited Mar. 31, 2015).

[169] For a list of member nations of the United Nations, see *Member States of the United Nations*, UNITED NATIONS, http://www.un.org/en/members/ (last visited Mar. 31, 2015).

be policed more directly. Also, since representatives from each Member State participated in the drafting of the EU Council Regulation, the implications of the mandatory recognition scheme were evident to each state upon its agreement to adopt the regulation.[170] Though it does not play as predominant a role as the provision in the UNCITRAL Model, it is worth noting that the EU Council Regulation does allow for certain exceptions to recognition. These include situations in which recognition is contrary to public policy, as is the case with the U.S. adoption of the UNCITRAL Model, or where a judgment may infringe upon personal freedom.[171] Additionally, creditors' rights may be restricted in cases where those same creditors have given their consent.[172]

Ultimately, it seems that the discretionary recognition provision adopted by the United States in its version of the UNCITRAL Model is the most flexible.[173] This type of approach allows for application that is appropriate to the particular situation and allows for fluidity of the law consistent with the constantly changing international political climate.[174] A nation that may be on good terms with the United States today (or another nation that is also a member of the UN and has adopted the UNCITRAL Model) may tomorrow be a nation with whom the United States is in conflict. The argument against this type of discretionary recognition provision is that it places considerable power in the hands of the judiciary. This should only be a concern for nations that do not have faith in the ability of their judiciary to remain neutral and fair and thus those nations may need more rigid laws with lower levels of discretion left to the courts. This includes nations that face issues with corruption and political influence in their court systems.[175]

The mandatory recognition requirement serves its purpose in limited applications: for example, where the participating nations are predominantly close geographically and have strong foreign relations. It should also be noted that mandatory recognition would likely be more applicable where the participating nations have similar insolvency laws, allowing for greater predictability of outcomes. Applying a mandatory scheme on a broader scale, such as that which the UN is attempting to put into effect, brings into play certain additional externalities that likely make that mandatory recognition scheme nearly impossible.

Therefore, nations that can reliably place discretion in the hands of their

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[170] *See* Council Regulation, *supra* note 60, art. 18(1).

[171] *Id.* art. 26(6). *See also Insolvency Proceedings*, EUR. UNION, http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/l33110_en.htm (last updated Feb. 24, 2011).

[172] *See Insolvency Proceedings*, *supra* note 171.

[173] 11 U.S.C. § 1522 (2012).

[174] *See generally* Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033 (1981); *Do We Have a Living Constitution?*, NAT'L CTR. FOR CONSTITUTIONAL STUDIES, http://www.nccs.net/do-we-have-a-living-constitution.php (last visited Mar. 31, 2015).

[175] *See generally* TRANSPARENCY INT'L, GLOBAL CORRUPTION REPORT 2007 (Diana Rodriguez & Linda Ehrichs eds., 2007).

judiciary would benefit the most from doing just that: allowing their judiciary to determine when recognition is appropriate on a case-by-case basis. This method also seems the most adaptive to the constantly changing and sometimes volatile political situations that the international relations climate can create. Those nations that do not have faith in the ability of their courts to make discretionary decisions with these foreign relation implications would likely benefit the most from a limited discretionary system. This type of system would involve a certain level of rigidity because it would require the judiciary to apply the law on a nondiscretionary basis by requiring the court to follow very strict guidelines.

C. Center of Main Interests

Both the UNCITRAL Model and the EU Council Regulation are conspicuously silent on the exact meaning of the phrase "center of main interests."[176] This is unusual considering that this an important foundational aspect for the determination of whether a proceeding is recognized as a foreign main proceeding or a foreign non-main proceeding. Center of main interests (COMI) is defined by Thomson Reuters as "the jurisdiction with which a person or company is most closely associated for the purposes of cross-border insolvency proceedings."[177]

Both the UNCITRAL Model and the EU Council Regulation include language that indirectly provides guidance with regard to what is a center of main interests. Both allow for the presumption that a jurisdiction is a center of main interests.[178] The UNCITRAL Model is said to presume that "[i]n the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the center of the debtor's main interests."[179] It is not clear what level of proof is necessary to rebut this presumption. The EU Council Regulation also includes the presumption that the place of the registered office is the debtor's center of main interests, but this presumption is rebuttable if appropriate evidence to the contrary is presented.[180] Like the UNCITRAL Model, the EU Council Regulation does not specify what qualifies as appropriate evidence.[181] Additionally, Article 13 of the regulation states that a company's center of main interests "should correspond to the place

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[176] Pedro Jose F. Bernardo, *Cross-Border Insolvency and the Challenges of the Global Corporation: Evaluating Globalization and Stakeholder Predictability through the UNCITRAL Model Law on Cross-Border Insolvency and the European Union Insolvency Regulation*, 56 ATENEO L.J. 799, 808 (2012).

[177] *Center of Main Interests (COMI)*, PRACTICAL LAW, http://uk.practicallaw.com/6-503-3605?service=crossborder (last visited Mar. 31, 2015).

[178] *See* UNCITRAL MODEL, *supra* note 13, art. 16(3). *See also* Council Regulation, *supra* note 60, art. 3.

[179] UNCITRAL MODEL, *supra* note 13, art. 16(3).

[180] *See* Council Regulation, *supra* note 60, art. 3.

[181] *Id.*

where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties."[182] Determining a center of main interests under the EU Council Regulation scheme is particularly important because that decision governs which EU member state takes jurisdiction when multiple insolvency proceedings are brought for the same debtor in multiple EU Member States.[183]

Further, while the COMI is important under both the UNCITRAL Model and the EU Council Regulation, both models use the term in different ways. Under the UNCITRAL Model, COMI is utilized to determine the degree to which a court must recognize a foreign proceeding.[184] Meanwhile, the EU Council Regulation uses the concept to help determine which Member State takes precedence when proceedings have commenced in multiple jurisdictions within the EU.[185] This, in turn, helps determine "which country's substantive and procedural law will govern the proceeding and will have a large impact on how the assets are realized for the benefit of creditors."[186] Notably, because the determination of the COMI under both the UNCITRAL Model and the EU Council Regulation determines if a foreign proceeding is a main or non-main proceeding, this decision can have a powerful effect on the case since:

> the effects of recognizing a foreign main proceeding are automatic and extensive, whereas the effects of recognizing a foreign non-main proceeding are discretionary and far more limited in scope. Thus, under both the Code and the EC Regulation, there are incentives to qualifying a proceeding as a foreign main proceeding.[187]

Oddly, while the UNCITRAL Model was enacted prior to the EU Council Regulation, the drafting of the UNCITRAL Model followed the EU Council Regulation chronologically.[188] As a result, the EU Council Regulation was first in recognizing the concept of center of main interests, and the concept was imported

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[182] *See id.*

[183] *See Center of Main Interests (COMI)*, *supra* note 177.

[184] *See id.*

[185] *See id.*

[186] Samuel L. Bufford, *International Insolvency Case Venue in the European Union: The Parmalat and Daisytek Controversies*, 12 COLUM. J. EUR. L. 429, 431 (2006).

[187] Alexandra CC Ragan, Comment, *COMI Strikes a Discordant Note: Why U.S. Courts Are not in Complete Harmony Despite Chapter 15 Directives*, 27 EMORY BANKR. DEV. J. 117, 130 (2010).

[188] For a chronological history of the drafting and enactment of the UNCITRAL Model, see *Working Group I*, U.N. COMM'N ON INT'L TRADE LAW, http://www.uncitral.org/uncitral/en/commission/working_groups/1Procurement.html (last visited Mar. 31, 2015). For the Council Regulation drafting history, see generally GABRIEL MOSS, ET AL., THE EC REGULATION ON INSOLVENCY PROCEEDINGS: A COMMENTARY AND ANNOTATED GUIDE (2d ed. 2009).

from the regulation's draft to the UNCITRAL Model.[189] The UNCITRAL guide indicates that this occurred.[190]

In the United States, Chapter 15 initially faced the same inconclusive approach to determining when and how to confirm or deny a center of main interests. In a case decided during the first year of Chapter 15's enactment, a bankruptcy court looked to the EU Council Regulation for guidance in determining a COMI.[191] In analyzing a debtor's COMI, another court that same year, however, looked to the effect of recognition.[192] Many years later the COMI test was more thoroughly articulated by the U.S. Court of Appeals for the Second Circuit in *Morning Mist Holdings Ltd. v. Krys*.[193] The court in that case determined that the "the filing date of the Chapter 15 petition should serve to anchor the COMI analysis."[194] The court also cited a law review article written by one of the drafters of Chapter 15, which suggested that COMI "could have been replaced by 'principal place of business' as a phrase more familiar to American judges and lawyers."[195] The principal place of business had previously been established by the "nerve center" test in *Hertz v. Friend*.[196] With this clarification, it would seem that the United States now has a more definitive approach to determining the COMI than both the UNCITRAL Model and the EU Council Regulation.

D. Treatment of Foreign Creditors

One of the goals of the UNCITRAL Model is to allow for similarly situated creditors to be treated equitably and in accordance with others with similar interests and rankings.[197] Any agreements made specifically with the debtor are also considered.[198] For instance, Australia's adoption of the UNCITRAL Model:

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[189] *See* Council Regulation, *supra* note 60, art. 3. *See also* UNCITRAL MODEL, *supra* note 13.

[190] *See* UNCITRAL MODEL, *supra* note 13, pt. 2, arts. 31, 72.

[191] *See In re* Tri-Continental Exch., 349 B.R. 627 (Bankr. E.D. Cal. 2006).

[192] *See In re* SPhinX, LTD., 351 B.R. 103 (Bankr. S.D.N.Y. 2006).

[193] *See* Morning Mist Holdings Ltd. v. Krys (*In re* Fairfield Sentry Ltd.), 714 F.3d 127 (2d Cir. 2013) (determining that the bankruptcy court's finding were not erroneous and supporting the conclusion that the debtor's center of main interests was in the British Virgin Islands).

[194] *Id.* at 134.

[195] *Id.* at 135 (citing Jay Lawrence Westbrook, *Chapter 15 at Last*, 79 AM. BANKR. L.J. 713, 719-20 (2005)).

[196] Hertz Corp. v. Friend, 559 U.S. 77, 97 (2010) (also clarifying that the nerve center should be more than a "mail drop box" or "a bare office with a computer," but rather should be the "place of actual direction, control, and coordination, in the absence of such manipulation").

[197] *See UNCITRAL Legislative Guide*, *supra* note 33, at 11-12.

[198] *Id.*

> explicitly provides that foreign creditors have the same rights as Australian creditors to commence and participate in an Australian insolvency. Foreign creditors (other than foreign tax or social security creditors) must not be ranked lower than unsecured claims of other creditors simply because they are foreign.[199]

An amendment has been proposed for the EU Council Regulation that would allow foreign creditors to challenge the judicial decision to open an insolvency proceeding in a foreign jurisdiction.[200] This would not only afford greater rights to foreign creditors, but would also allow for greater assurance that proceedings are opened in the appropriate Member State, in turn reducing the risk of debtors engaging in forum shopping.[201] Also, one unique aspect of the EU Council Regulation is that tax claims of Member States may be recognized in proceedings opened in other Member States.[202]

E. Relief Available

Key aspects of the type of relief offered upon recognition under the UNCITRAL Model include a stay upon execution against debtor's assets.[203] The Model Law also provides a provision by which "[t]he court may refuse to grant relief under this article if such relief would interfere with the administration of a foreign main proceeding."[204] This suggests that greater relief is available when a proceeding is recognized as a foreign main proceeding. The Model Law does have a provision that allows for discretionary relief regardless of recognition as a main or non-main proceeding, which can likely be codified by the legislature or left to the discretion of the judiciary.[205]

Since the EU Council Regulation includes a choice-of-law provision, the law of the state in which the main proceeding is opened can affect what relief is available.[206] The effects of recognition under the EU Council Regulation "shall,

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[199] Ian Walker & Natasha Toholka, *Australia Adopts UNCITRAL Model Law on Cross-Border Insolvency*, INT'L LAW OFFICE (June 20, 2008), http://www.internationallawoffice.com/newsletters/detail.aspx?g=3566c2cd-4c91-4326-9139-0649aebfe784&redir=1.

[200] *See Commission Proposal for a Regulation of the European Parliament and of the Council: Amending Council Regulation (EC) No 1346/2000 on Insolvency Proceedings*, COM (2012) 744 final (Dec. 12, 2012), *available at* http://ec.europa.eu/justice/civil/files/insolvency-regulation_en.pdf.

[201] *See id.*

[202] *See* Council Regulation *supra* note 60, art. 39.

[203] *See* UNCITRAL MODEL *supra* note 13, art. 19(1)(a).

[204] *See id.* art. 19(4).

[205] *See id*. art. 21.

[206] *See* Council Regulation *supra* note 60, art. 4.

with no further formalities, produce the same effects in any other Member state as under this law the State of the opening of the proceedings."[207] Some of the more common aspects, such as a stay of execution upon debtor's assets, would likely be put into effect through this provision. Notably, under the EU Council Regulation, creditors retain certain rights in foreign jurisdictions. For instance, a creditor retains the right to set-off (traditional bankruptcy action) if it is allowed by the Member State in which the creditor is located.[208]

Since Chapter 15 was based on the UNCITRAL Model, many of its provisions are either identical or quite similar to the wording of the Model Law. Much like in the UNCITRAL Model, under Chapter 15, the reliability and type of relief available is largely dependent upon whether the proceeding in question is recognized as a foreign main proceeding or a foreign non-main proceeding. Where a foreign main proceeding is recognized, mandatory stays will be enforced, adequate protection is available, and a foreign representative will have the powers given to a trustee or debtor in possession to operate and maintain a business in a reorganization.[209] Where a non-main proceeding is recognized, relief is at the discretion of the court "where necessary to effectuate the purpose of [Chapter 15]"[210] and is dependent upon a showing that such relief is necessary to "protect the assets of the debtor or the interests of the creditors."[211] Most often this relief is in the form of a stay issued by the recognizing court.[212]

IV. IMPLICATIONS

A. Public Policy Issues

While it is true that the discretionary method of recognition applied in the United States can have public policy implications, the use of this method is possible in a nation that has faith in its judiciary to remain politically neutral and to be shielded from corruptive influence. However, for a nation that has a politically influenced judiciary or a corrupt judicial system, only two methods of recognition are available. One method, the most restrictive method, would involve a mandatory recognition scheme with exact guidelines to which judges must adhere when evaluating a foreign proceeding. The other method, a less restrictive one, would involve discretionary recognition with certain parameters in place. The trade-off in removing discretion from the judiciary in certain jurisdictions is that the decision-making power remains in the hands of the legislature. There is a balance that must be struck with regard to where certain nations want that discretion to lie.

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207 *See id.* art. 17.
208 *See id.* art. 6.
209 *See* 11 U.S.C. § 1520 (2012).
210 *Id.* § 1521.
211 *Id.*
212 *Id.* § 1521(a)(1).

B. Conflict of Laws

An interesting situation arises when a nation that is a member of the EU, and thus governed by the EU Council Regulation, has also adopted at least some portion of the UNCITRAL Model. This is the case with Great Britain. In that jurisdiction, when a conflict arises between these two laws, the EU Council Regulation takes precedent.[213] However, since this preemption structure is primarily based on the EU Council Regulation's proclamation that it is to take precedent over state law, it seems to be a self-assigned power.

Ultimately, the provision some nations have adopted that requires the jurisdiction of the foreign main proceeding to also have adopted the Model Law may be the best solution. However, foreign relations might be strained when a nation refuses to recognize a proceeding that would otherwise be recognized but for that requirement. Additionally, as previously mentioned, some of the world's largest developing economies have yet to adopt either the UNCITRAL Model or any other statutory structure that addresses cross-border insolvencies. The strength of the UNCITRAL Model may lie in the number of adopting nations since greater cooperation would provide for more predictability. As the number of nations with similar statutory frameworks for cross-border insolvency grows, proceedings should be expected to run into fewer obstacles.

C. Center of Main Interests

Under both the UNCITRAL Model and the EU Council Regulation, the requirement that a center of main interests be determined to qualify a proceeding as a foreign main or foreign non-main proceeding is intended to prevent forum shopping by corporate debtors. Historically, the United States and the UK have been the favored jurisdictions for initiating cross-border insolvency proceedings.[214] Unfortunately, with the apparent lack of clarity about the exact requirements for a jurisdiction to be considered a center of main interests, both laws seem to fall short of their intended goal in this regard. The potential legal implication of this disparity is that restricting a debtor's ability to forum shop may not be fully realized. A debtor still has the presumption of COMI in his favor and

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[213] Quinlan & Martin, *supra* note 158.

[214] Some of the various factors relevant to debtors' decision to attempt to forum shop include existence of fair and transparent proceedings, treatment of priority of creditors, ability for the debtor to remain in possession, availability of debt for equity swaps, and availability of DIP finance. For a complete list, see *Forum Shopping and COMI Shifting—Overview*, LEXISNEXIS, https://www.lexisnexis.com/uk/lexispsl/restructuringandinsolvency/document/393781/55KG-P041-F18C-C001-00000-00/Forum%20shopping%20and%20COMI%20shifting%E2%80%94overview (last visited Mar. 31, 2015).

thus is capable of a minimal level of forum shopping.[215] Additionally, is it suggested that with companies becoming increasingly globalized, the ability to forum shop will be enhanced in the future.[216]

The U.S. adoption of the UNCITRAL Model may be interpreted to have a less restrictive requirement with regard to judicial interpretation of what qualifies as a COMI. Notably, the provision regarding presumptions in the code adopts the language "in the absence of evidence to the contrary," which suggests that any evidence, however small, can rebut the presumption.[217] However, in *Morning Mist*, this presumption was essentially replaced by a specific test, thus providing additional guidance to courts not provided by either the UNCITRAL Model or the EU Council Regulation.[218] With what was previously a loophole being somewhat closed as a result of *Morning Mist*, the U.S. approach has come closer to accomplishing the goal of restricting a debtor's ability to forum shop.[219]

Conversely, both the UNCITRAL Model and EU Council Regulation's approach to restricting forum shopping has fallen short. Since the United States has officially adopted the "nerve center" test as the test for COMI, the implications of having a more definitive and reliable test can have quite an impact. Since the determination of a "center of main interests" helps to determine if a proceeding is a foreign main or a foreign non-main proceeding, the level of discretion afforded to the court can be greatly affected by this test. Having an appropriate test in place, as the United States does now, can help to restrict forum shopping as well as limit unpredictability in choosing when and where to initiate cross-border insolvency proceedings. Sometimes the actual center of main interests is not abundantly clear, and this can create issues with determining whether to classify the proceeding as a foreign main or foreign non-main proceeding. Other times a debtor selects a forum for purposes such as taking advantage of certain legal provisions beneficial to the debtor's particular type of filing.

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[215] Both regulations fail to provide a specific definition of "center of main interests" and thus allow a debtor to take advantage of the presumption in favor of holding that the jurisdiction in which a proceeding is initiated is the center of main interests. *See* U.N. Model Law, *supra* note 154, art. 16(3). *See also* Council Regulation, supra note 60, art. 3.

[216] *See Forum Shopping and COMI Shifting—Overview*, *supra* note 214.

[217] 11 U.S.C. § 1516 (2012).

[218] *See* Morning Mist Holdings Ltd. v. Krys, 714 F.3d 127 (2d Cir. 2013).

[219] *See id.*; s*ee also* UNCITRAL MODEL, *supra* note 13, art. 16(3); Council Regulation, supra note 60, art. 3.

V. CONCLUSION

The UNCITRAL Model will be complete when a provision that provides for a universal system of recognition of foreign proceedings is added to the law and later adopted by recognizing nations. One of the many goals of the UNCITRAL Model is predictability in cross-border insolvency proceedings. However, the discretionary adoption approach allows for a certain level of unpredictability. Since each nation is governed independently, the discretionary scheme seems to be the safer choice because public policy issues may arise or because proceedings in certain jurisdictions may lack characteristics that fairness requires. Also, since the Model Law does not always take precedent, as is the case in Great Britain where the EU Council Regulation takes precedent when a conflict arises, there may be situations that give rise to uncertainty as to the applicable law.

While the UNCITRAL Model may not be perfect, it has many distinct strengths. However, it will fail to reach its full potential until universal acceptance of this model is accomplished. Only then can the motivating factors of uniformity and predictability truly come to fruition. The first step toward this goal is to encourage developing economies such as Brazil, Russia, India, and China to adopt some form of statutory structure to allow for predictability in cross-border insolvency proceedings. With those nations' economies growing at their current rate, it is likely that many business transactions will involve debtors and creditors in those nations, which will lead to an increased need for uniformity and predictability in cross-border insolvencies involving those nations.