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

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Global banking institutions are global in life, but national in death.

— Sir Mervyn King[1]

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There is no doubt that the development of a philosophical, legislative[,] and regulatory framework to facilitate the efficient resolution of cross-border insolvencies is critical to the continued development of sophisticated global markets and the encouragement of cross-border investment. As business itself becomes more globally interdependent, so too will business failure. A universal approach to cross-border insolvencies is critical, as is cooperation between national courts, authorities[,] and practitioners.

— Justice Gavin Lightman[2]

I. INTRODUCTION

The conglomeration of corporate business and their expansion across national borders has resulted in a complex web of persons and organizations that has created immense financial value and cemented transnational relationships in the financial, legal, and political spheres. This was due, in no small part, to the triumph of the market economy as the predominant mode of trade and commerce, where "more and more emphasis is placed on efficiency, predictability, calculability, replacement of human by non-human

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The Author acknowledges the invaluable guidance of Mr. James L. Bromley, Head of Global Insolvency and Restructuring at Cleary Gottlieb Steen & Hamilton LLP in New York.

Cite as 56 ATENEO L.J. 799 (2012).

1. TREASURY COMMITTEE, BANKING CRISIS: REGULATION AND SUPERVISION, 2008-9, H.C. 767, at Ev 32 (U.K.). The quote has been widely attributed to Mervyn King, the current Governor of the Bank of England.
2. Gavin Lightman, Justice of the High Court, & Stephen Gale, Partner, Herbert Smith Exchange House, A Special Relationship? US/UK Cross-Border Insolvency, Address at the 78th Annual Meeting of the National Conference of Bankruptcy Judges entitled "Getting Things Done in (Some) Foreign Courts: Judicial Perspective vs. Practitioners Perspective" (Oct. 11, 2004) (transcript *available at* http://www.abiworld.org/committees/newsletters/international/vol1num4/gale.pdf (last accessed Feb. 27, 2012)).

technology[,] and control over uncertainty."[3] International trade agreements, economies of scale, and the liberalization of once nationalized areas of industry have, therefore, allowed corporations to move more freely across increasingly porous national boundaries. While the merits of such developments have been debated since the 1970s,[4] the success of these transnational firms, coupled with the rise of communications technology and integrated financial markets, stand as eloquent testimony to what appears to be the irreversible march of globalization.

The 2008 Financial Crisis, however, has led many people to take thoughtful pause. With the spectacular collapse of Lehman Brothers[5] and the unprecedented bailout policies hastily implemented by national governments to stem the spread of financial contagion,[6] many observed that the utopian unity offered by globalization proved no match for national self-interest, particularly when dealing with distressed or failed corporations. While the 2008 Financial Crisis primarily exposed weaknesses in the existing financial regulatory architecture,[7] the question of cross-border resolution, as a whole, was again thrust into the international stage. Thoughtful students of globalization and multinational corporations have, therefore, asked whether these regimes actually serve to enhance cross-border commerce, or serve, instead, to illustrate what some have claimed to be "the end of globalization."[8]

The intent of existing cross-border insolvency regimes is certainly geared towards greater corporate globalization through the "universalization" of techniques for the resolution of multinational corporations. While these techniques are already embedded in resolution regimes such as the UNCITRAL Model Law on Cross-Border Insolvency (UNCITRAL Model

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3. George Ritzer, *The McDonaldization of Society*, 6 J. AM. CULTURE 100, 107 (1983). *See also* THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE 195-217 (1st ed. 1999).

4. *See* Seymour J. Rubin, *Transnational Corporations and International Codes of Conduct: A Study of the Relationship Between International Legal Cooperation and Economic Development*, 10 AM. U. INT'L L. REV. & POL'Y 1275 (1995).

5. Andrew Ross Sorkin, *Lehman Files for Bankruptcy; Merill is Sold*, N. Y. TIMES, Sep. 14, 2008, *available at* http://www.nytimes.com/2008/09/15/business/15lehman.htm (last accessed Feb. 27, 2012).

6. *See, e.g.*, Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 112 Stat. 3765 (to be codified at 12 U.S.C. § 5201 et seq.).

7. DICK K. NANTO, CONG. RESEARCH SERV., RL 34742, THE GLOBAL FINANCIAL CRISIS: ANALYSIS AND POLICY IMPLICATIONS 2 (2009).

8. HAROLD JAMES, THE CREATION AND DESTRUCTION OF VALUE: THE GLOBALIZATION CYCLE ch. 1 (2009). The said Chapter is entitled "The End of Globalization: A Millenial Perspective."

Law),[9] Chapter 15 of the United States (U.S.) Bankruptcy Code of 2005,[10] and the European Union Insolvency Regulation (E.U. Regulation)[11] — the ideal outcome of maximizing firm value and ensuring predictability for corporate creditors and shareholders may not in all cases operate effectively because of two factors: *first*, the high degree of discretion assumed by national insolvency authorities, particularly in determining the firm's center of main interests; and *second*, the inability of existing regimes to effectively resolve multinational corporate groups. It would appear that experience with respect to significant cross-border resolutions, in Europe for example, hinged upon territorial benefits and national self-interest. However, the imperatives of cooperation and coordination implicit in any effective cross-border resolution serve as a potent counter-force to this attitude of territoriality. It is in this way that existing cross-border insolvency regimes can be viewed as a double-edged sword that can serve to either enhance or hinder stakeholder confidence in corporations and multinational corporate groups, and on a more general plane, in the value of cross-border transactions and globalization itself within the corporate sphere.

II. THE MIDDLE GROUND APPROACH TO CROSS-BORDER RESOLUTION

It has often been suggested that multinational companies, like financial institutions, are global in life but national in death.[12] This pithy statement captures in succinct precision the threshold question that lies at the core of any discussion on the nature of any cross-border resolution regime. The application of differing legal systems to the resolution of a complex corporate institution results in a tension between the laws of the home and the host country; ultimately, a "choice of law" must be made between the laws of various jurisdictions.[13]

This tension is not difficult to understand. National authorities dealing with the failure of a multinational corporation within its territory would have an obligation to safeguard local creditors and employees that could

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

10. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), 11 U.S.C. §§ 1501-1532 (2006). Chapter 15 was created by Title VII of the Bankruptcy Abuse Prevention and Consumer Protection Act and came into effect on Oct. 17, 2005. *See* Pub. L. No. 109-8, 119 Stat. 23 (codified as 11 U.S.C. §§ 1501-1532 (2006)).

11. Council Regulation 1346/2000, 2000 O.J. (L 160) 1 (EC).

12. TREASURY COMMITTEE, *supra* note 1, at Ev 32.

13. *See* Rosa M. Lastra, *International Law Principles Applicable to Cross-Border Bank Insolvency*, *in* CROSS-BORDER BANK INSOLVENCY 164 (Rosa M. Lastra ed., 2011).

otherwise be disadvantaged by the application of a foreign resolution regime.[14] The response would be to "ring-fence" institutional assets, without regard to the link that such assets may have to the over-all and often multi-jurisdictional effort to rehabilitate or liquidate the ailing company.[15]

This situation basically describes the *territoriality approach* to cross-border resolution, which essentially holds that "the law of any country is applicable only to the assets or persons physically subject to that law."[16] In effect, territoriality contemplates independent resolution proceedings in separate jurisdictions under a "plurality of insolvency" approach that treats the financial conglomerate as made up of distinct legal entities as opposed to a single, inter-connected business unit.

On the other extreme is the *universality approach*, which holds that "one law, typically the law of the court with principal jurisdiction over the bankruptcy, will determine all legal questions."[17] Under this approach, all assets and liabilities of the parent and its foreign branches or subsidiaries are wound up as a single legal entity, notwithstanding its separate legal treatment in various jurisdictions. In effect, other jurisdictions would be expected to *defer* to the resolution proceedings of one single jurisdiction, and any local assets would not be ring-fenced, but instead consolidated as part of the main resolution proceedings.

While conceptually desirable,[18] universality has generally not been the preferred mode of cross-border bankruptcy proceedings, principally because of imperatives of sovereignty and local politics.[19] However, with the adoption of the UNCITRAL Model Law by several jurisdictions and the

14. International Monetary Fund [IMF], Legal, Monetary, & Capital Markets Departments, Resolution of Cross-Border Banks — A Proposed Framework for Enhanced Coordination (An IMF Policy Paper) 9, *available at* http://www.imf.org/external/np/pp/eng/2010/06 1110.pdf (last accessed Feb. 27, 2012) [hereinafter IMF Resolution of Cross-Border Banks].

15. *Id.*

16. CARL FELSENFELD, 1 A TREATISE ON THE LAW OF INTERNATIONAL INSOLVENCY 1-25 (2005).

17. *Id.*

18. Frederick Tung, *Fear of Commitment in International Bankruptcy*, 33 GEO. WASH. INT'L L. REV. 555 (2001). Tung states: "Conceptually, universalism is attractive. A unified proceeding enables one court to administer the entirety of the debtor's assets. This maximizes the value that can be preserved for creditors by facilitating a coordinated disposition of the debtor's assets." *Id.* at 561 (citing Jay Lawrence Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L.J. 457, 465 (1991)).

19. Id. at 559-60 (2001).

implementation of the E.U. Regulation in 2002,[20] a consciousness towards a more "universalist" approach has emerged in the international stage.[21] While the UNCITRAL Model Law does not apply to the resolution of corporate groups[22] — a difficulty that will prove crucial to the success of cross-border resolution proceedings — it contains ample guidance on the possibility of adopting a more coordinated and effective approach for the resolution of multinational corporations.

It is in this manner that a "middle ground" approach has emerged in cross-border insolvency literature,[23] which, like the UNCITRAL Model Law, involves the "recognition of foreign proceedings, the coordination of proceedings concerning the same debtor, rights of foreign creditors, right and duties of foreign insolvency representatives, and cooperation between authorities in different states."[24] While not advocating a supra-national resolution authority,[25] this "middle ground" approach implicitly recognizes that states are not likely to surrender their sovereignty in resolving entities within their jurisdictions.[26] Still, because of imperatives of transnational cooperation that attempts to bring all parties together by recognizing a locus of corporate activity (i.e., the foreign main proceeding), jurisdictions are allowed a cooperative space from which a coordinated effort at corporate resolution could be undertaken. The approach, therefore, would allow the firm to be dealt with as a going concern rather than as a separate operating entity. This preserves total firm value and even allows for the possibility of

20. Council Regulation 1346/2000, art. 47.

21. UNCITRAL Model Law, *supra* note 9, pmbl.

22. Janis Sarra, *Oversight and Financing of Cross-Border Business Enterprise Group Insolvency Proceedings*, 44 TEX. INT'L L.J. 547, 548 (2009) (citing U.N. Comm'n on Int'l Trade Law [UNCITRAL], Working Group V (Insolvency Law), Treatment of corporate groups in insolvency, Report on its 32d Sess., May 14-18, 2007, U.N. Doc. No. A/CN.9/WG.V/WP.76/Add.2 (Mar. 6, 2007) [hereinafter Working Group V, 32d Session]).

23. *See* Rosalind Mason, *Cross-Border Insolvency Law: Where Private International Law and Insolvency Law Meet, in* INTERNATIONAL INSOLVENCY LAW: THEMES AND PERSPECTIVES 51-53 (Paul J. Omar ed., 2008); Lastra, *supra* note 13, at 171-72; STIJN CLAESSENS, ET AL., A SAFER WORLD FINANCIAL SYSTEM: IMPROVING THE RESOLUTION OF SYSTEMIC INSTITUTIONS 95 (2010); & Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 CORNELL L. REV. 696 (1999) [hereinafter LoPucki, *Cooperation in International Bankruptcy*].

24. Look Chan Ho & Rosa M. Lastra, *International Developments, in* CROSS-BORDER BANK INSOLVENCY 214 (Rosa M. Lastra ed., 2011).

25. *See* Jay Lawrence Westbrook, *Legal Integration of NAFTA Through Supranational Adjudication*, 43 TEX. INT'L L. J. 349, 350-54 (2008).

26. IMF Resolution of Cross-Border Banks, *supra* note 14, at 15.

coordinated corporate rehabilitation and not merely outright firm liquidation.

Obviously, the key for the success of this "middle ground" framework lies in both the cooperative desire of the parties and the implicit trust that states extend to one another. Realistically, however, this cooperation is ultimately exacted by exigencies of self-interest and perceived mutual benefit, that is, by cooperating in the resolution effort, would stakeholders in one jurisdiction reap benefits in the same way as stakeholders in another jurisdiction? The difficulty, though, is that states sometimes cannot be expected to play by the rules. Sometimes, they cannot be expected to honor their commitments towards cooperation, especially if breaking their promises would mean an advantage or benefit over other players in the game.

III. A SKETCH OF DOMINANT CROSS-BORDER INSOLVENCY REGIMES

The uncertainty created by unilateral action by domestic insolvency authorities has somewhat been assuaged by the increasing adoption of the UNCITRAL Model Law and the E.U. Regulation. The establishment of a legal framework that carries the force of domestic or international law is certainly a way to ensure stability and fulfillment of stakeholder expectations. Yet, even with these coercive and formal regimes, uncertainty persists because of the lingering ambiguity on when these regimes become operative in the first place.

The difficulty is placed in sharp focus by Professor Lynn M. LoPucki, the A. Robert Nell Professor of Law at Cornell Law School, who observes, quite daringly, that universalism, in the sense espoused by the UNCITRAL Model Law and the E.U. Regulation, "will not work."[27] She argues that because of the inherent difficulty in determining the multinational debtor's "home country," corporate creditors would not know what law will govern collection "until their debtors file[ ] [for] bankruptcy and the courts rule[ ] on venue."[28] Thus, the framework suggested by the UNCITRAL Model Law and the E.U. Regulation are inherently unpredictable, and, therefore, inefficient and unworkable.[29] LoPucki quoted U.S. Bankruptcy Judge Samuel L. Bufford:

> In calculating expected economic benefits, parties are assumed to take into account the legal systems and rules that will likely govern how the transactions are carried out and the benefits are allocated. In addition, the parties must evaluate the risks undertaken, including how these risks will be handled under the applicable legal system. If it is uncertain what legal system will govern the risks, it is difficult to quantify them. Where the

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27. Lynn M. LoPucki, *Universalism Unravels*, 79 AM. BANKR. L.J. 143, 143 (2005).

28. *Id.*

29. *Id.* at 150.

> distribution rules of legal systems are different, the ultimate beneficiaries of transactions may differ from those the parties anticipated *ex ante*. Thus the application of varying distribution rules may result in parties entering into sub-optimal transactions, and [may leave] them poorer than they would have been otherwise.[30]

Courts in the U.S. and the European Union (E.U.) have attempted to clarify this ambiguity through judicial pronouncements in the hope of providing more predictability on the appropriate venue and governing law for the resolution of multinational corporations. These pronouncements, and their efficacy, will be explored elsewhere in this Article. Before this, a sketch of the UNCITRAL Model Law, the E.U. Regulation, and Chapter 15 of the U.S. Bankruptcy Code is useful to provide appropriate background to Professor LoPucki's critical observations.

A. The UNCITRAL Model Law

The UNCITRAL Model Law was the result of a felt need to provide a "modern, harmonized, and fair framework" for the resolution of multinational corporations.[31] With the movement of corporations across barriers, many in the international community felt that with this increasing complexity of corporate form came the increasing possibility of corporate failures.[32] Thus, the formation of a consistent body of common rules was important to provide stability and predictability in times of corporate distress. It became apparent, however, that because of the wide range of legal regimes dealing with corporate insolvency in various countries, any acceptable Model Law would need to be procedural rather than substantive in nature. The UNCITRAL Model Law has been characterized as a template that countries [could] incorporate into their domestic bankruptcy law, making changes to [it], where necessary, to accommodate local law."[33] To date, 19 jurisdictions, including the U.S., have, in whole or in part,[34] adopted the articles of the UNCITRAL Model Law.

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30. *Id.* at 158 (citing Samuel L. Bufford, *Global Venue Controls are Coming: A Reply to Professor LoPucki*, 79 AM. BANKR. L.J. 105, 112-13 (2005)).

31. UNCITRAL, Cross-Border Insolvency: Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency, ¶ 1, 30th Sess., May 12-30, 1997, U.N. DOC. NO. A/CN.9/442 (Dec. 19, 1997) [hereinafter Enactment Guide].

32. *Id.*

33. LOUISE DECARL ADLER, MANAGING THE CHAPTER 15 CROSS-BORDER INSOLVENCY CASE: A POCKET GUIDE FOR JUDGES 2 (1st ed. 2011).

34. UNCITRAL, The UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective 6, *available at* http://www.uncitral.org/pdf/english/texts/insolven/pre-judicial-perspective.pdf (last accessed Feb. 27, 2012). The jurisdictions which have adopted the Model Law "in one form or another" are:

The framework for the operation of the UNCITRAL Model Law hinges upon the right of the foreign representative to seek insolvency relief in a jurisdiction with respect to proceedings taking place in another state. Here, the UNCITRAL Model Law introduces the concept of a "foreign proceeding"[35] which refers to "a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation."[36] What is important to stress is that the mere institution of a foreign proceeding does not require an UNCITRAL Model Law state to automatically afford relief in favor of a foreign representative: the law requires the foreign representative to *apply* for recognition of such foreign proceeding.[37] This application also involves a characterization of the proceeding as either a "foreign main proceeding" or a "foreign non-main proceeding."[38] In this regard, Article 17 (2) is instructive:

> 2. The foreign proceeding shall be recognized:
>
> (a) As a foreign main proceeding if it is taking place in the State where the debtor has the cent[er] of its main interests; or
>
> (b) As a foreign non-main proceeding if the debtor has an establishment within the meaning of subparagraph (f) of article 2 in the foreign State.[39]

While the UNCITRAL Model Law defines an "establishment" as "any place of operation where the debtor carries out a non-transitory economic activity with human means and goods or services,"[40] it is curiously silent as to the meaning of "center of main interests." The same silence is to be observed in the E.U. Regulation from which the UNCITRAL Model Law draws inspiration.[41] Still, the UNCITRAL Model Law provides the

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Australia (2008), British Virgin Islands (2003), Canada (2009), Colombia (2006), Eritrea (1998), Greece (2010), Japan (2000), Mauritius (2009), Mexico (2000), Montenegro (2002), New Zealand (2006), Poland (2003), Republic of Korea (2006), Romania (2003), Serbia (2004), Slovenia (2007), South Africa (2000) the United Kingdom (2006), and the United States (2005). *Id.*

35. UNCITRAL Model Law, *supra* note 9, art. 2 (a).

36. *Id.*

37. *Id.* art. 15 (1).

38. *Id.* art. 2 (b). A "foreign non-main proceeding" refers to "a foreign proceeding taking place in the State where the debtor has the center of its main interest." *Id.*

39. *Id.* art. 17 (2) (a) & (b).

40. UNCITRAL Model Law, *supra* note 9, art. 2 (f).

41. While the UNCITRAL Model Law was approved prior to the effective date of the E.U. Regulation, the E.U. Regulation was drafted first, and the

following useful presumption: "In 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."[42]

The determination of a debtor's center of main interests and, therefore, the jurisdiction handling the proceeding as a "main proceeding," is central under the UNCITRAL Model Law because it extends mandatory remedies to the corporation seeking relief from the forum. In particular, Article 20 states that upon recognition by the forum that the foreign proceeding is a foreign main proceeding, "[c]ommencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed"[43] and execution must be extended as a matter of right to the applying debtor.[44] Notably, similar stays are not extended as a matter of right in favor of debtors participating in foreign non-main proceedings.[45]

Another central aspect of the UNCITRAL Model Law is the provision for cooperation of, and direct communication among, insolvency authorities in the conduct of insolvency proceedings.[46] Among such forms of cooperation include:

> (b) Communication of information by any means considered appropriate by the court;

UNCITRAL Model Law transposed many of the former's most important provisions. Aaron L. Hammer & Matthew E. McClintock, *Understanding Chapter 15 of the United States Bankruptcy Code: Everything You Need to Know About Cross-Border Insolvency Legislation in the United States*, 14 L. & BUS. REV. AM. 257, 262 (2008).

Enactment Guide, *supra* note 31, at ¶ 31. The Guide states that the use of the term "center of main interests" "corresponds to the formulation in [A]rticle 3 of the [E.U. Regulation], thus building on the emerging harmonization as regards the notion of a 'main' proceeding. The determination that a foreign proceeding is a 'main' proceeding may affect the nature of the relief accorded to the foreign representative." *Id.*

42. UNCITRAL Model Law, *supra* note 9, art. 16 (3).

43. *Id.* art. 20 (1)(a).

44. Enactment Guide, *supra* note 31, at ¶ 32. The Enactment Guide reiterates that any such stay and suspension are "'mandatory' (or 'automatic') in the sense that either they flow automatically from the recognition of a foreign main proceeding or, in the States where a court order is needed for the stay or suspension, the court is bound to issue the appropriate order." *Id.*

45. UNCITRAL Model Law, *supra* note 9, art. 21. The court, however, may grant a stay upon the exercise of sound discretion. Enactment Guide, *supra* note 31, at ¶ 32.

46. UNCITRAL Model Law, *supra* note 9, art. 26.

(c) Coordination of the administration and supervision of the debtor's assets and affairs;

(d) Approval or implementation by courts of agreements concerning the coordination of proceedings; [and]

(e) Coordination of concurrent proceedings regarding the same debtor.[47]

Furthermore, the UNCITRAL Model Law contemplates situations where proceedings between two jurisdictions may proceed concurrently, with Article 28 clarifying that, "[a]fter recognition of a foreign main proceeding, a proceeding under [the domestic forum] may be commenced only if the debtor has assets in this State."[48] Conversely, Article 25 also authorizes the courts of the enacting State to seek assistance abroad on behalf of a proceeding taking place in the enacting State.[49]

B. *Chapter 15 of the U.S. Bankruptcy Code*

With the passage of Title VII of the Bankruptcy Abuse Prevention and Consumer Protection Act on 17 October 2005,[50] the U.S. formally adopted the cross-border resolution regime suggested by the UNCITRAL Model Law through Chapter 15 of the U.S. Bankruptcy Code, replacing Section 304[51] of the same, which previously provided for the rule through which a representative in a foreign bankruptcy proceeding could obtain relief in U.S. courts. Since Congress, with some modifications,[52] substantially engrafted

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47. *Id.* art. 27 (b)-(e).

48. *Id.* art. 28.

49. *Id.* art. 25. The Article provides:

> Article 25. *Cooperation and direct communication between a court of this State and foreign courts or foreign representatives.*
>
> (1) In matters referred to in [A]rticle 1, the court shall cooperate to the maximum extent possible with foreign courts or foreign representatives, either directly or through a [*insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State*].
>
> (2) The court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.

Id.

50. Pub. L. No. 109-8, 119 Stat. 23 (codified as 11 U.S.C. §§ 1501-1532 (2006)).

51. 11 U.S.C. § 304 (1978).

52. *See* Alesia Ranney-Marinelli, *Overview of Chapter 15 Ancillary and other Cross-Border Cases*, 82 AM. BANKR. L.J. 269 (2008) for a more in-depth discussion of the divergences of Chapter 15 of the U.S. Bankruptcy Code from the UNCITRAL Model Law. For example, Ranney-Marinelli observes that because of the language of Chapter 15, foreign representatives are barred from

the text of the UNCITRAL Model Law onto the provisions of Chapter 15,[53] rules on cooperation and coordination among U.S. and foreign insolvency authorities,[54] and foreign debtor remedies, are also reproduced under Chapter 15.

It has subsequently been held that the procedure outlined in the Chapter is the *exclusive remedy* for foreign representatives seeking injunctive relief against litigation in U.S. courts.[55] In other words, before stays may be granted to foreign representatives on behalf of debtor corporations, they must first seek the recognition of the foreign proceeding by U.S. courts. This is done by the filing of an application for recognition of the foreign proceeding.[56] Stays are not automatic by the mere filing of this application. The court determines the propriety of the application, including a determination of the nature of the purported proceeding, as either a "foreign main proceeding" or "foreign non-main proceeding." It is only upon the determination that the foreign proceeding is a "foreign main proceeding" that mandatory stays are enforced,[57] pursuant to the framework of the UNCITRAL Model Law. If the foreign proceeding is recognized as a "non-main proceeding," any relief granted by the court is discretionary, and is conditioned upon a showing that it is "necessary to effectuate the purpose of this [C]hapter and to protect the assets of the debtor or the interest of creditors."[58]

What is important to stress in this determination of the nature of the foreign proceeding is that the U.S. Bankruptcy Code, while adopting the distinctions and corresponding definitions of "foreign main proceeding" and "foreign non-main proceeding" under the UNCITRAL Model Law, fails to provide a clear definition of where the debtor has "the center of its main interests." Instead, it similarly provides for the presumption that "[i]n the absence of evidence to the contrary, the debtor's registered office, or habitual

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obtaining comity judgments from any court in the United States [(U.S.)], and his rights in the U.S. are limited to collecting or receiving claims of, or filing an involuntary petition against, the debtor. *Id.* at 270.

53. Hammer & McClintock, *supra* note 41, at 258 (citing In re Tri-Continental Exchange, Ltd., 349 B.R. 627, 632 & 636 (Bankr. E.D. Cal. 2006) (U.S)). In *In re Tri-Continental Exchange, Ltd.*, the court observed that Chapter 15 tracks the language of the UNCITRAL Model Law but contains some "adaptations designed to mesh [the latter] with [U.S.] law." *Id.* at 632.

54. 11 U.S.C. §§ 1525, 1526, & 1527, corresponding to Articles 25, 26, & 27 of the UNCITRAL Model Law, *supra* note 9.

55. United States v. Jones, 333 B.R. 637, 638 (Bankr. E.D.N.Y. 2005) (U.S.).

56. 11 U.S.C. § 1504.

57. *Id.* § 1520 (a).

58. *Id.* § 1521.

residence in the case of an individual, is presumed to be the center of the debtor's main interests."[59]

C. *The European Union Insolvency Regulation*

The E.U. Regulation came into force on 31 May 2002.[60] Under its provisions, all Member States of the E.U., except Denmark, were obliged to extend automatic cross-border recognition of insolvency proceedings involving multinational European corporations opened in any other Member States. Under the E.U. Regulation, these proceedings are limited to the "partial or total divestment of a debtor and the appointment of a liquidator" by the Member State where the insolvency proceeding is opened.[61] This determination is crucial because the E.U. Regulation requires that the law of the administering state, or the "State of the opening of proceedings," is the law that will govern the liquidation of the corporation.[62] This determination is made more urgent by Article 16, which requires all Member States to *automatically recognize* the authorities' resolution power if made within the scope of their jurisdiction.[63] The liquidator appointed by the State where the proceedings were opened is also authorized to exercise its prerogatives in every Member State,[64] including the power to repatriate assets outside of the territory to the main proceeding,[65] subject to limited exceptions.[66] State jurisdiction thus becomes a matter of significant interest.

When, therefore, does a Member State have this jurisdiction? The answer, unfortunately, is less than ideal: under Article 3 of the E.U. Regulation, the court of the state where the debtor has its center of main interest shall have jurisdiction to open insolvency proceedings.[67] As with the UNCITRAL Model Law, no specific guidance is provided for this

59. *Id.* § 1516 (c).

60. Council Regulation 1346/2000, art. 47.

61. *Id.* art. 1 (1).

62. *Id.* art. 4 (1). The E.U. Regulation specifies an expansive list of matters that are governed by the "State of the opening proceedings." *Id.* art. 4 (2). Notwithstanding this exhaustive list, the following matters are expressly excluded by the E.U. Regulation from the jurisdiction of the opening State: (a) rights *in rem* (Article 5), (b) set-off rights (Article 6), and (c) reservation of title (Article 7). *Id.* arts. 5-7.

63. *Id.* art. 16 (1).

64. Council Regulation 1346/2000, art. 18 (1). Note that the same Article limits the liquidator's power in States where secondary proceedings have been opened.

65. *Id.* art. 18 (2).

66. *Id.* art 18 (1). The right granted under this Article is subject to third parties' rights *in rem* (Article 5) and reservation of title (Article 7).

67. *Id.* art. 3 (1).

determination. However, the same presumption is allowed: the place of the registered office is presumed to be the center of its main interests in the absence of proof to the contrary.[68]

Once a State of primary proceedings has been properly opened, secondary or ancillary proceedings are possible in Member States where the multinational corporation has an "establishment."[69] The effects of these secondary proceedings, however, are limited only to the assets of the debtor situated in the territory of the "secondary" Member State,[70] and must be directed towards the winding up of the insolvent corporation.[71] In any event, Article 31 of the E.U. Regulation mandates cooperation and the sharing of information by liquidators appointed by courts of both the primary and secondary proceedings.[72]

IV. THE MEANING OF "CENTER OF MAIN INTEREST" AND ITS DIFFICULTIES

While the operational framework outlined in both the UNCITRAL Model Law and the E.U. Regulation provides a potent mechanism for the orderly resolution of multinational corporations, the application of these frameworks nonetheless hinges upon the initial determination of a corporation's center of main interests (COMI). By establishing a COMI, both the UNCITRAL Model Law[73] and the E.U. Regulation[74] hope to prevent forum shopping on the part of the debtor, and to encourage predictability of laws and proceedings on the part of the corporate creditors. Thus, for the UNCITRAL Model Law, COMI will determine whether automatic stays may be extended to the applying debtor,[75] while for the E.U. Regulation, it will dictate the choice of law under which corporate resolution will be undertaken.[76]

Unfortunately, the statutory standards that guide the determination of a corporation's COMI are fluid and open to judicial interpretation.[77] The

68. *Id.* art 3.

69. *Id.* art. 3 (2).

70. Council Regulation 1346/2000, art. 3 (2).

71. *Id.* arts. 3 (3) & 27.

72. *Id.* art. 31.

73. *See* UNCITRAL Model Law, *supra* note 9, pmbl.

74. *See* Council Regulation 1346/2000, whereas cl., ¶ 4.

75. UNCITRAL Model Law, *supra* note 9, at art. 20 (1) (b).

76. Council Regulation 1346/2000, art. 3.

77. Aaaron M. Kaufman, *The European Union Goes COMI-tose: Hazards of Harmonizing Corporate Insolvency Laws in the Global Economy*, 29 HOUS. J. INT'L

absence of specific statutory standards has allowed courts to declare COMI status in opposition to similar declarations made by other competing courts, especially with respect to corporate groups involving parent-subsidiary relationships.[78] The result, particularly under the E.U. Regulation, has been a "first to file/first to win" race,[79] as courts were likely to declare COMI status on behalf of debtors that were beneficial to domestic interests.[80]

Similar difficulties have been raised under Chapter 15 of the U.S. Bankruptcy Code, particularly with respect to corporations registered abroad but have substantial business activities in the U.S.[81] These difficulties have undermined, instead of enhanced, the purpose of both the UNCITRAL Model Law and the E.U. Regulation in providing an orderly resolution regime for cross-border insolvency.

A. *COMI and the European Approach*

Perhaps the most celebrated European case involving conflicts in jurisdiction in cross-border insolvency involved the resolution of Parmalat, SpA (Parmalat), an Italian corporation then considered one of the largest food conglomerates in Europe, and its wholly-owned Irish subsidiary, Eurofood IFSC Ltd. (Eurofood).[82] Following fraud investigations against several managers and directors in 2003, Parmalat filed voluntary insolvency proceedings before insolvency authorities in Parma, Italy.[83]

More than a month later, Bank of America applied to the High Court of Ireland for compulsory winding-up proceedings against Eurofood and for the nomination of a provisional liquidator.[84] The Irish High Court approved the application and appointed a provisional liquidator for Eurofood.[85] Upon hearing of the Irish High Court's decision, the insolvency authorities in Italy moved for the admission of Eurofood to administration proceedings[86] and was followed by a declaration by the Italian courts that the COMI of

L. 625, 654 (2007) (citing Lynn LoPucki, *Global and Out of Control?*, 79 AM. BANKR. L.J. 79, 95 (2005) [hereinafter LoPucki, *Global*]).

78. *Id.* at 661.

79. *Id.* at 654 (citing LoPucki, *Global*, *supra* note 77, at 95 (2005)).

80. *Id.* at 639-40.

81. *Id.* at 652-53.

82. Case C-341/04, Eurofood IFSC Ltd., 2006 E.C.R. I-3813. I-3862 (EU).

83. *Id.*

84. *Id.* at I-3863.

85. *Id.*

86. *Id.*

Eurofood was in Italy and that, therefore, its courts exercised international jurisdiction over its resolution as well.[87]

Not to be undermined, the High Court of Ireland decided that the insolvency proceedings of Eurofood had been opened in Ireland by the Bank of America filing and that Ireland had first opened proceedings.[88] The court anchored its reasoning on the fact that being an Irish company, Eurofood had its registered address in Ireland, which satisfied the COMI presumption under the E.U. Regulation.[89] The Italian administrator of Eurofood appealed the ruling to the Irish Supreme Court, arguing that being a subsidiary of Parmalat, Eurofood was actually *controlled* from Italy.[90] The Irish Supreme Court decided to refer the matter to the European Court of Justice (E.C.J.) for a preliminary ruling.[91]

The E.C.J., focusing on the need to ensure objectivity, certainty, and foreseeability in the determination of COMI,[92] noted that under the 13th recital of the E.U. Regulation, the COMI "should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties."[93] The E.C.J. then pointed to the presumption found in Article 3 (1) of the Regulation and ruled that such presumption can only be rebutted through "factors which are both objective and ascertainable by third parties."[94] The E.C.J. ruled that the mere fact that a company's operations can be controlled by a parent in another jurisdiction is not an objective and ascertainable factor that can result in dislodging the Article 3 (1) presumption.[95]

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87. *Id.*

88. *Eurofood IFSC Ltd.*, 2006 E.C.R. at I-3863-64.

89. *Id.* at I-3864-66.

90. *Id.*

91. *Id.*

92. *Id.* at I-3868.

93. *Id.*

94. *Eurofood IFSC Ltd.*, 2006 E.C.R. at I-3868.

95. *Id.* at I-3869. The Court concluded:

> In those circumstances, the answer to the fourth question must be that, where a debtor is a subsidiary company whose registered office and that of its parent company are situated in two different Member States, the presumption laid down in the second sentence of Article 3 (1) of the Regulation, whereby the center of main interests of that subsidiary is situated in the Member State where its registered office is situated, can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect. That could be so in particular in

In situating Eurofood's COMI in Ireland, thereby denying Italian courts the power to revise Eurofood's COMI in accordance with Article 16 of the E.U. Regulation, the E.C.J. deferred to the strength of the presumption as a source of objectivity and ascertainability in determining COMI. The E.C.J.'s strong reliance on the statutory presumption, and the requirement of objective and ascertainable factors to justify its non-application, implies the limits of a court's discretion in determining a corporation's COMI: the presumption must be applied in the absence of compelling objective factors to the contrary. The E.U. Regulation, therefore, provides a simple and straightforward reference by which a party, including creditors and other stakeholders, can fix their expectations with respect to questions on COMI.

Courts in the U.S., while recognizing the need for predictability in COMI determinations in accordance with the ruling of the E.C.J., have tended to grant courts wider discretion in fixing a corporation's COMI. The difference, it seems, is in the subtle statutory differences and in the language of the presumption and the over-all legislative intent in its actual application.

B. *COMI and the U.S. Approach*

While Chapter 15 of the U.S. Bankruptcy Code substantially provides for the same presumption with respect to locating the COMI of corporations, Section 1516 (c) opens with the clause: "[i]n the absence of evidence to the contrary,"[96] which varies slightly from the E.U. Regulation formulation of the same presumption: "in the absence of proof to the contrary."[97] The variance in drafting was meant to underscore that the "ultimate burden of proof on the issue of [COMI] falls upon the foreign representative."[98] This would imply some discretion on the part of the court to weigh the probative weight of the foreign representative's "proof" for the debtor corporation's COMI and not merely rely upon the strength of the Section 1516 (c) presumption. This would also appear to authorize the court to substitute its own judgment as to the COMI of the debtor corporation outside of both the evidence of the foreign representative and the debtor's registered office.

> the case of a company not carrying out any business in the territory of the Member State in which its registered office is situated. By contrast, where a company carries on its business in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by the regulation.

Id.

96. 11 U.S.C. § 1516 (c).

97. Council Regulation 1346/2000, art. 3 (1).

98. Ranney-Marinelli, *supra* note 52, at 285 (citing H.R. REP. No. at 112-13 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 175).

The landmark cases of *In Re: SPhinX, Ltd.*[99] and *In Re: Bear Stearns High Grade Structured Credit Strategies Masterfund, Ltd.*[100] work out the exact consequences of this legislative intent.[101]

i. *In Re: SPhinX, Ltd.*

SPhinX was a corporation registered in the Cayman Islands and was involved in the business of "buying and selling securities and commodities in a manner that tracked ... certain [Standard and Poor's] Hedge Fund Indexes."[102] These funds did not actually conduct any business in the Cayman Islands, and had its assets managed by a Delaware corporation in New York City, which was in the middle of a Chapter 11 bankruptcy proceeding.[103] None of the SPhinX directors resided in the Cayman Islands and no board meetings occurred there.[104]

Among the clients of SPhinX was Refco Capital Markets, Ltd. (RefCo), which, together with its affiliates, was being liquidated as a Chapter 11 debtor in New York.[105] The creditors' committee of RefCo sued SPhinX for the recovery of alleged preferential payments, which suit was subsequently settled and approved by the insolvency court.[106] SPhinX thereafter filed for bankruptcy in the Cayman Islands and submitted a Chapter 15 application before the bankruptcy courts of New York.[107] At the Chapter 15 hearing, SPhinX sought to stay the execution of the settlement agreement, asserting the need to investigate the propriety of the settlement agreement.[108] SPhinX also requested that the Cayman Islands insolvency proceedings be recognized as a foreign "main" proceeding.[109]

99. In re SPhinX, Ltd., et al., 351 B.R. 103 (Bankr. S.D.N.Y. 2006) (U.S.) (penned by Judge Robert D. Drain).

100. In re Bear Stearns High Grade Structured Credit Strategies Masterfund, Ltd., 374 B.R. 122 (Bankr. S.D.N.Y. 2007) (U.S.) (penned by Judge Burton R. Lifland).

101. For a discussion on the reasons behind the diverging interpretation of COMI among E.U. and U.S. authorities, *see* Look Chan Ho, *Proving COMI: seeking recognition under Chapter 15 of the US Bankruptcy Code*, 22 (12) J. INT'L BANKING L. & REG. 636, 636-41 (2007).

102. *In re SPhinX*, 351 B.R. at 107.

103. *Id.*

104. *Id.* at 108.

105. *Id.* at 109.

106. *Id.*

107. *Id.*

108. *In re SPhinX*, 351 B.R. at 109.

109. *Id.*

In ruling upon SPhinX's application, the court first noted that:

> Although [Chapter 15] replaced [S]ection 304 [of the U.S. Bankruptcy Code], which previously governed cases ancillary to foreign proceedings, Chapter 15 maintains — and in some respects enhances — the 'maximum flexibility' that [S]ection 304 provided bankruptcy courts in handling ancillary cases in light of principles of international comity and respect for the laws and judgments of other nations.[110]

Thus, in determining whether the proceedings in the Cayman Islands should be considered as the "foreign main proceedings" within the intendment of Chapter 15, the court, noting the COMI presumption found in Section 1516 (c) and the fact that the burden of proof remains on the foreign representative to establish COMI,[111] enumerated various factors which could be relevant in determining the COMI:

> Various factors, singly or combined, could be relevant to such a determination: the location of the debtor's headquarters; the location of those who actually manage the debtor (which, conceivably could be the headquarters of a holding company); the location of the debtor's primary assets; the location of the majority of the debtor's creditors or of a majority of the creditors who would be affected by the case; and/or the jurisdiction whose law would apply to most disputes.[112]

The court clarified, however, that because of the supposed "flexibility" inherent in Chapter 15, such factors should not be applied mechanically. Instead, they should be viewed "in light of [C]hapter 15's emphasis on protecting the reasonable interests of parties in interest pursuant to fair procedures and the maximization of the debtor's value."[113] The court went so far as to declare that "one generally should defer ... to the creditors' acquiescence in or support of a proposed COMI."[114] For this reason, the court was willing to recognize COMI in the Cayman Islands notwithstanding the absence of any business activity, employees, or corporate connections, save for actual company registration.[115] In the court's

110. *Id.* at 112 (citing In re Brierley, 145 B.R. 151, 160 (Bankr. S.D.N.Y. 1992) (U.S.) & In re Culmer, 25 B.R. 621, 628 (Bankr. S.D.N.Y. 1982) (U.S.)).

111. *In re SPhinX*, 351 B.R. at 117.

112. *Id.*

113. *Id.*

114. *Id.* "It is reasonable to assume that the debtor and its creditors (and shareholders, if they have an economic stake in the proceeding) can, absent an improper purpose, best determine how to maximize the efficiency of a liquidation or reorganization and, ultimately, the value of the debtor." *Id.*

115. *Id.* at 121.

logic, the fact that no party-in-interest had objected to the proceedings,[116] and that the foreign representatives were in the best position to undertake the winding-up of the debtor's business,[117] ostensibly justified a finding of COMI in the Islands. However, because the application was obviously meant to delay the recognition of RefCo's claim, the court, in the exercise of its discretion, declined to grant such status, and, instead, recognized the Cayman Islands proceeding as a "non-main proceeding."[118]

From the absence of any effective link between SPhinX and its place of incorporation, it can be conceded that the court correctly determined that the Cayman Islands was not the proper COMI for the debtor corporation. The presumption found in Section 1516 (c) was, therefore, correctly overturned. However, while properly situating the role of the presumption in the scheme of COMI determination, the court's ultimate approach appears to be problematic. In adopting the underlying attitude of "flexibility" that supposedly permeates through Chapter 15 and applying such standard to the determination of COMI, the court seems much more consistent with previous holdings pertaining to the repealed Section 304 of the U.S. Bankruptcy Code without recognizing that the determination of COMI under Chapter 15 was meant to be a "streamlined and objective inquiry."[119] The *SPhinX* decision, therefore, represented a "break with the stricter European approach to defining COMI,"[120] and "threaten[ed] to [undermine] the very unanimity that is meant to be at the heart of the Model Law and the goal of uniform interpretation throughout the world reflected in [Section] 1508."[121] The designation of the Cayman Islands as a "non-main proceeding" without determining the existence of an "establishment" as required by Chapter 15 further compounds this uncertainty. There is also nothing in the language of Chapter 15, contrary to the dicta announced in *SPhinX*, that creditors have the power to consent to a main proceeding in a place where COMI does not objectively lie or that

116. Curiously, however, the court seems to have overlooked the fact that the representatives of RefCo had objected to the recognition. *In re SPhinX*, 351 B.R. at 109.

117. *Id.* at 120.

118. *Id.* at 121-22.

119. Benjamin J. Christenson, *Best Let Sleeping Dogs Lie: Interpretation of "Center of Main Interest" Under Chapter 15 of the Bankruptcy Code and an Appeal for Additional Judicial Complacency*, 2010 U. ILL. L. REV. 1565, 1585 (2010) (citing Daniel M. Glosband, *SPhinX Chapter 15 Opinion Misses the Mark*, AM. BANKR. INST. J., December 2006-January 2007, at 44, 45, & 48 (2007)).

120. Alexandra C.C. Ragan, *COMI Strikes a Discordant Note: Why U.S. Courts Are Not in Complete Harmony Despite Chapter 15 Directives*, 27 EMORY BANKR. DEV. J. 117, 145 (2010).

121. *Id.* at 145 (Glosband, *supra* note 119, at 44 & 85.).

creditors have to object to recognition in order for courts to examine the propriety of a COMI determination outside of the Section 1516 (c) presumption.[122]

ii. *In Re: Bear Stearns High Grade Structured Credit Strategies Masterfund, Ltd.*

A different approach was taken in *Bear Stearns*, which involved similar facts and circumstances as that found in *SPhinX*. Like SPhinX, Bear Stearns was an investment fund registered in the Cayman Islands.[123] Its assets were administered by a Massachusetts corporation, which performed all back office functions, while its fund manager, Bear Stearns Asset Management Inc., was located in New York.[124] It appeared that the only relationships that Bear Stearns had with the Cayman Islands were its corporate registration, maintenance of its standing as a registered company, and two directors who resided in the Islands.[125] Because of the 2008 Financial Crisis, Bear Stearns filed bankruptcy proceedings in the Cayman Islands, with administrators promptly filing Chapter 15 recognition before the New York bankruptcy court.[126]

While the petition faced no objections and the presumption in Section 1516 (c) could, in theory, have significant suasion, the court nonetheless ruled that the recognition of "main" or "non-main" proceedings was not an automatic procedure even in the absence of objection.[127] The court then went on to examine compliance with the definitional requirements of Chapter 15. Based on the evidence on record, the court eventually ruled that the proceedings pending before the courts in the Cayman Islands could not be considered "foreign main proceedings."[128] It cited, with approval, the E.C.J. *Eurofood* standard that the COMI presumption can be disregarded in the case of a "letterbox company," of which Bear Stearns in the Cayman Islands was an example.[129] Neither can the Cayman Islands proceedings be

122. Christenson, *supra* note 119, at 1585 (citing Ranney-Marinelli, *supra* note 52, at 287–88).

123. *In re Bear Stearns*, 374 B.R. at 124.

124. *Id.*

125. *Id.*

126. *Id.* at 125.

127. *Id.* at 129 (citing Enactment Guide, *supra* note 31, at ¶ 122). The presumption raised by Section 1516 (c) does "not prevent in accordance with applicable procedural law, calling for or assessing other evidence if the conclusion suggested by the presumption is called into *question by the court* or an interested party." *Id.* (emphasis supplied).

128. *In re Bear Stearns*, 374 B.R. at 133.

129. *Id.* at 127 & 129.

considered "non-main" because Bear Stearns had not demonstrated the existence of an "establishment" there.[130]

The strict resolution by the *Bear Stearns* court resulted from the rejection of the flexibility standard found in *SPhinX*, thereby ruling that although flexibility is an important component of Chapter 15, such flexibility only comes into play *after* recognition is found proper as either main or non-main.[131] The court refused to be a "rubber stamp" on the question of recognition, particularly in a case where no party had objected to the proposed COMI designation.[132] Meanwhile, in addressing the role of the COMI presumption in Section 1516 (c), the court found that it should not be considered a "catch-all provision:"[133] "[The] presumption 'permits and encourages fast action in cases where speed may be essential, while leaving the debtor's true 'center' open to dispute in cases where the facts are more doubtful.' This presumption is not a preferred alternative where there is a separation between a corporation's jurisdiction of incorporation and its real seat."[134]

While some commentators have expressed disappointment at the dearth of European authorities in reaching the *Bear Stearns* result that would have otherwise bolstered continuity and commonality of approach,[135] *Bear Stearns*

130. *Id.* at 132.

131. *Id.*

132. *Id.* at 130-31. The court said:

> [I]f the parties in interest had not objected to the Cayman Islands proceeding being recognized as main, recognition would have been granted under the sole grounds that no party objected and no other proceeding had been initiated anywhere else ... To the extent that non objection would make the recognition process a rubber stamp exercise, this Court disagrees with the dicta in the *SPhinX* decision.

Id.

133. Ragan, *supra* note 120, at 147.

134. *In re Bear Stearns*, 374 B.R. at 128 (citing Jay Lawrence Westbrook, *Locating the Eye of the Financial Storm*, 32 BROOK. J. INT'L L. 3, 6 (2007)). On appeal, the district court affirmed the holding of the bankruptcy court, highlighting that recognition proceedings involve a "mechanistic process" and advised against using many factors for determining COMI recognition. In the mind of the district court, using more factors could generally result in multiple proceedings all claiming main proceeding protection. In re Bear Stearns High Grade Structured Credit Strategies Masterfund, Ltd., 389 B.R. 325, 331–32 (S.D.N.Y. 2008) (U.S.) (district court affirming bankruptcy court opinion).

135. *See* Gabriel Moss & Michael Havaron, *Building Europe — the French Case Law on COMI*, 20 (2) INSOLV. INT. 20, 20 (2007) and Leif M. Clark, *"Center of Main Interests" Finally Becomes the Center of Main Interests in Case Law*, 43 TEX. INT'L L.J. 14 (2008).

appears to have been adopted by subsequent bankruptcy courts as the appropriate standard in interpreting COMI determinations.[136]

V. CHALLENGING THE EXISTING CROSS-BORDER INSOLVENCY REGIMES: RESOLVING THE MULTINATIONAL CORPORATE GROUP

Another weakness of both the UNCITRAL Model Law and the E.U. Regulation is its inability to address the resolution of multinational corporate groups.[137] For countries such as the U.S. that have adopted the UNCITRAL Model Law, the thrust of local proceedings (i.e., Chapter 15) is the protection of assets found in the forum when insolvency proceedings of a *single corporate entity* have been opened either as main or non-main proceedings in another jurisdiction. The treatment is substantially similar under the E.U. Regulation. Eurofood, for example, while a wholly owned subsidiary of Parmalat, was resolved as a separate corporate entity under Irish law. Meanwhile, SPhinX and Bear Stearns were resolved as separate juridical entities whose only aim for recognition under Chapter 15 was to essentially seek protection for corporate assets found in the U.S. The effect, therefore, is that resolution, while ostensibly universal in terms of treatment of assets and claims, is actually territorial in substance and process. The inevitable piecemeal resolution of the corporate group may, absent careful coordination, eventually result in undermining the very purpose of a cross-border insolvency regime — the maximization of firm value, the protection of creditors, and the salvaging of the firm as a going concern.

The reality in corporate business, however, is quite different. Far from being a mere aggrupation of separate entities, corporations that are part of a multinational corporate group often operate as a *single economic unit* and are interconnected in ways that integrate them into a wider web of related and

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136. *See* In re Oversight & Control Comm'n of Avánzit, S.A., 385 B.R. 525, 532 (Bankr. S.D.N.Y. 2008) (U.S.) (which quoted *Bear Stearns* but not *SPhinX*) and In re Ernst & Young, Inc., 383 B.R. 773, 779–81 (Bankr. D. Colo. 2008) (U.S.) (analyzing "Bear Stearns factors" to find COMI).

137. Edward S. Adams & Jason K. Fincke, *Coordinating Cross-Border Bankruptcy: How Territorialism Saves Universalism*, 15 COLUM. J. EUR. L. 43, 46 (2009).

> [T]he Model Law and the [E.U.] Regulation currently require the treatment of each legal entity separately for the purpose of determining the location of its COMI ... . Such a structure ... creates vast economic inefficiencies ... Virtually all multinational corporate empires are corporate groups, not single corporations ... Given the fact that most multinational corporate entities contain multiple groups of companies, it is surprising that the Model Law and the [E.U.] Regulation have not provided for insolvency proceedings that address the corporate group as a whole.

Id. at 83 (citing LoPucki, *Global*, *supra* note 77, at 221).

interdependent functions and processes. Because of the complexity of business activities that may be concentrated in various jurisdictions, some have asked whether corporate groups even have a center of main interests.[138] This poses unique challenges for countries under both the E.U. Regulation and the UNICTRAL Model Law, including such issues as COMI determination and subsidiary director duties versus parent company insolvency. This is particularly relevant considering that corporate groups have established subsidiaries in jurisdictions that span both the E.U. Regulation and the UNCITRAL Model Law, not to mention countries that have their own separate and distinct insolvency regimes.

A. COMI Determination of Corporate Groups

At the outset, it should be noted that the problem of determining COMI in the context of cross-border insolvency of corporate groups generally arises only in situations where *both* the parent and the subsidiary are insolvent. If only the parent company or the subsidiary is insolvent, general resolution techniques are already available under the UNCITRAL Model Law and the E.U. Regulation, subject, of course, to the difficulty of COMI determinations already extant in single-company resolutions.

With corporate groups, however, because of the guarantees and cross-default provisions usually built into creditor agreements of both the parent company and the subsidiary, the insolvency of either one will almost usually result in the insolvency of the other. The operational approach, therefore, is for each separate corporation to file bankruptcy proceedings in the territorial jurisdiction in which it is incorporated, and then seek Chapter 15-like remedies in jurisdictions where they are available. This was demonstrated in the Eurofood/Parmalat insolvency, where the subsidiary was resolved under Irish law (its country of incorporation) separate from the insolvency proceedings of its parent company, Parmalat, in Italy.

In these cases, the E.C.J. provides a helpful starting point in determining the COMI of corporations that are part of a wider corporate group. Under the E.C.J.'s holding in *Eurofood*, where a company carries on its business in the territory of the Member State where its registered office is situated, "the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by that Regulation."[139] This ruling, however, promotes a disjointed and territory-by-territory resolution of each subsidiary separate

138. Vanessa M. Cross, COMI, Corporate Groups and Forum Shopping: A Comparison of E.U. and U.S. Cross-Border Insolvency Law (An Unpublished LL.M Paper) 24, *available at* http://documents.jdsupra.com/d856d570-34e8-4953-851b-a25efb87 794a.pdf (last accessed Feb. 27, 2012).

139. *Eurofood IFSC Ltd.*, 2006 E.C.R. at I-3868.

from the resolution of the parent company, resulting in inefficiencies and inevitable loss of firm value.

However, while this approach may seem to run counter to the purposes of an orderly resolution, territorial treatment of a corporate group may actually be more efficient, as creditors, both local and foreign, and stakeholders, such as employees and contractors, have a more certain venue for litigating their separate claims (e.g., in the corporation's COMI, which is presumed to be its registered office). This is primarily due to the privity that these stakeholders have with the specific corporation: allowing a territorial resolution would respect the separate juridical personality of the contracting corporation, and thereby provide stability for these corporate relationships. This would be in line with the E.U. Regulation that the venue of the resolution proceedings should be objectively "ascertainable by third parties."[140] Furthermore, preserving the separate juridical personality of the corporation would preserve other essential features of the corporate form including the relevant director duties upon resolution or liquidation.[141]

B. *Fiduciary Duties and Creditor Protection in the Context of Group Insolvencies*

Another related, although little discussed, complication in the resolution of corporate groups is the fiduciary duties of subsidiary boards when operating either within the zone of insolvency or in insolvency itself, which may sometimes conflict with the over-all value-maximizing imperatives in the resolution of the entire corporate group. These fiduciary duties are, of course, a consequence of the separate juridical personality inherent in every corporate enterprise.[142] The basic question that drives this discussion involves the constituency to which corporate directors owe fiduciary duties. When operating in the zone of insolvency or in insolvency itself, are corporate directors expected to protect the interests of shareholders, or do they owe constituent obligations to other corporate stakeholders, particularly, to corporate creditors? A legal framework that imposes strict shareholder loyalty may be problematic for corporate group resolutions, because subsidiaries may be placed in a situation where the interests of the parent company in

140. Council Regulation 1346/2000, whereas cl., ¶ 13.

141. Needless to state, should the parent company have undertaken fraudulent or iniquitous conduct through the subsidiary, corporate piercing principles should be available to render the parent company liable. In which case, for purposes of consistency, the parent company ought to be sued in bankruptcy in the territory of its COMI pursuant to the E.U. Regulation. *See generally* Harry Rajak, *Corporate Groups and Cross-Border Insolvency*, 44 TEXAS INT'L L.J. 521, 525-29 (2009).

142. *See* Soledad M. Cagampang, *The Fiduciary Duties of Corporate Directors Under Philippine Law*, 46 PHIL. L. J. 513 (1971).

insolvency conflict with the interests of subsidiary shareholders, who are similarly faced with corporate liquidation.

The approach varies from jurisdiction to jurisdiction, although by means of generalization, it would be accurate to state that U.S. and European approaches to director duties to creditors in insolvency situations are not consistent. Corporation Law in Germany, for example, imposes a duty upon corporate directors in managing the corporation's bankruptcy estate.[143] Corporate boards are directed to enhance the corporation's "trust fund," which is a pool of capital set aside by law towards which corporate creditors can rely upon to satisfy their claims in situations of insolvency.[144] This is enhanced by the duty to file for bankruptcy protection,[145] implying that German corporations can no longer operate while insolvent even if doing so may be beneficial for shareholders in the long run. Extending the protection further, other jurisdictions, like France, hold directors who act negligently in insolvency personally liable to creditors.[146] All these protections are in keeping with E.U. Company Directive (77/91/EEC)[147] to maintain strict capital maintenance standards for corporate enterprises for the protection of corporate creditors.[148]

Meanwhile, the U.S. approach has been quite categorical. While early jurisprudence had allowed directors to consider the interests of creditors for U.S. corporations in insolvency proceedings,[149] prevailing corporate doctrine

143. Andreas Engert, et al., *Twilight in the Zone of Insolvency: Fiduciary Duty and Creditors of Troubled Companies (Comparative and International Perspectives)*, 1 J. BUS. & TECH. L. 313, 316 (2006) (citing Production Resources Group, LLC v. NCT Group, Inc., 863 A.2d 772 (Del. Ch. 2004) (U.S.)).

144. *Id.*

145. *Id.*

146. *See* CODE DE COMMERCE [C. COM.] arts. L-223-22 (SARL) & 225-251 (SA); art. L. 624-3 (*action en comblement du passif*); & art. L. 624-5 (*action en extension de redressement ou de liquidation judicaire*) (Fr.).

147. Council Directive 77/91/EEC, 1977 O.J. (L 026)1 (EC).

148. *Id.* whereas cl., ¶ 2.

149. *See* Credit Lyonnais Bank Nederland, N.V. v. Pathe Communications Corp., No. 1215, 1991 WL 277613 (Del. Ch. Dec. 30, 1991) (U.S.) and Production Resources Group, LLC v. NCT Group, Inc., 863 A.2d 772 (Del. Ch. 2004) (U.S.).

In *Credit Lyonnais v. Pathe*, the Delaware Chancery Court said that directors owe a duty of care not simply toward the stockholders of the corporation, but toward a "corporate enterprise," including company's creditors. Thus, when a corporation is insolvent or in the "zone of insolvency," creditors cannot be taken for granted since they are essential to the sustenance of the corporation. *Credit Lyonnais*, 1991 WL 277613 at *1108.

as asserted by the Delaware Supreme Court in *North American Catholic Educational Programming Foundation, Inc. v. Gheewalla*,[150] states that "the creditors of a Delaware corporation that is either insolvent or in a zone of insolvency have no right, as a matter of law, to assert direct claims for breach of fiduciary duties against the corporation's directors."[151] The court reasoned that recognizing such duty, particularly when the corporation is insolvent, would create uncertainty for directors who have a fiduciary duty to exercise business judgment to maximize the value of the insolvent corporation for the benefit of all those having an interest in it, and not merely for corporate creditors.[152]

The decision in *Production Resources v. NCT* supports *Credit Lyonnais*, where the Court stated that "[w]hen a firm has reached the point of insolvency, it is settled that under Delaware law, the firm's directors are said to owe fiduciary duties to the companies creditors." *Production Resources Group*, 863 A.2d at 790-91.

See also Cory Dean Kandestin, *The Duty of Creditors in Near-Insolvent Firms: Eliminating the "Near Insolvency" Distinction*, 60 VAND. L. REV. 1235 (2007).

150. N. Am. Cath. Ed. Programming Found., Inc. (NACEPF) v. Gheewalla, 930 A.2d 92 (Del. S. Ct. 2007).

151. *Id.* at 103. Needless to state, while the Delaware courts hold pre-eminence among other courts in terms of corporate law issues, state courts are not bound to follow Delaware precedent. Nonetheless, it has been observed that courts in other States have followed the Delaware Supreme Court's lead in *Gheewalla*. *See, e.g.*, Jetpay Merch. Svs., LLC v. Miller, No. 3:07-CV-0950-G, 2007 WL 2701636 (N.D. Tex. Sep. 17, 2007) (U.S.); In re I.G. Svs., Ltd., Nos. 99-53170-C & 99-53171-C, 2007 WL 2229650 (Bankr. W.D. Tex. July 31, 2007) (U.S.); In re Vartec Telecom, Inc., No. 04- 81694-HDH-7, 2007 WL 2872283 (Bankr. N.D. Texas Sep. 24, 2007) (U.S.); In re Mooney, No. 05-13392-JMD, 2007 WL 2403774, *2 (Bankr. D.N.H. Aug. 17, 2007) (U.S.); In re Felt Mfg., Inc., 371 B.R. 589 (Bankr. D. N.H. 2007) (U.S.); & Metcoff v. Lebovics, No. X06 CV 055000521S, 2007 WL 2570410, *4 (Conn. Super. Aug. 16, 2007) (U.S.). *See* John D. Eaton & Jessica Casciola, *What of direct creditor claims after "Gheewalla"?*, NAT'L L. JOURNAL., Mar. 3, 2008, *available at* http://www.bergersingerman.com/files/articles/Eaton/Eaton%20NLJ%20Article.pdf (last accessed Feb. 27, 2012).

152. *NACEPF*, 930 A.2d at 101.

> It is well established that the directors owe their fiduciary obligations to the corporation and its shareholders. While shareholders rely on directors acting as fiduciaries to protect their interests, creditors are afforded protection through contractual agreements, fraud and fraudulent conveyance law, implied covenants of good faith and fair dealing, bankruptcy law, general commercial law[,] and other sources of creditor rights. Delaware courts have traditionally been reluctant to expand existing fiduciary duties. Accordingly, 'the general rule is that directors do not owe creditors duties beyond the relevant contractual terms.'

The court did concede, however, that creditors may bring a derivative suit on behalf of a corporation for breach of fiduciary duties. This means that any award received from the derivate suit filed by creditors actually redounds directly to the corporation and not to creditor's pockets. While such benefit may arguably reach corporate creditors upon liquidation, creditors must nonetheless anchor any action on a breach of duty owed to the corporate enterprise as a whole, and not by reason of any obligation owed to creditors in particular. In this sense, the extent of creditor protection in insolvency is significantly limited.

The divergence of European and U.S. practice with respect to creditor rights and director duties ultimately highlights the inherent differences in their respective insolvency regimes. Whereas European systems are generally considered more solicitous of corporate creditors (which implies the bent towards corporate liquidation instead of rehabilitation), U.S. bankruptcy laws are more debtor-centric,[153] thereby allowing the firm more flexibility in maintaining the firm as a going concern, even when the corporation is, in fact, insolvent. The distinction, in itself, would already pose complications for individual unaffiliated corporations; what more for corporations that are part of a corporate group? In either case, claims of subsidiary creditors who want to get immediate satisfaction for their claims may face opposition from parent companies that may want to preserve subsidiary property, either to effect an over-all reorganization or to use such assets to satisfy its own parent-company claims. The subsidiary and its board are invariably caught in the middle. The manner by which these boards act in these situations will be greatly influenced by the particular legal framework under which the subsidiary corporation is to be resolved, a question in which COMI, again, plays a crucial role.

VI. AMIDST THE DISCORD, SHARED PRINCIPLES: GLOBALIZATION AS IMPETUS AND RESULT

Frameworks for cross-border resolution came late in the development of multinational corporate practice.[154] This observation is not surprising, considering the strong worldwide economy of the era where the forces of globalization directed all efforts at encouraging international commerce and the free-flow of services and capital. The failures of firms were, therefore, not high on the agenda of both corporate players and regulators. It was not

Id. at 100.

153. Engert, et al., *supra* note 143, at 321.

154. Terrence C. Halliday, *Legitimacy, Technology and Leverage: The Building Blocks of Insolvency Architecture in the Decade Past and the Decade Ahead*, 32 BROOK. J. INT'L L. 1081, 1082 (2007). *See also* Ian F. Fletcher, *Maintaining the Momentum: The Continuing Quest For Global Standards and Principles to Govern Cross-Border Insolvency*, 32 BROOK. J. INTL'L L. 767, 768-776 (2007).

until the 1990s that quiet work was begun by various international institutions that recognized the need for an orderly resolution of corporations whose influence, either as a single entity or as a financial conglomerate, could now be seen to stretch across the globe.

The Asian Financial Crisis in 1997 served as a sobering reminder that firms could indeed actually fail. And that failure, amidst the trend in corporate structures, often meant the need to account for assets and liabilities scattered across various jurisdictions and legal systems. Accepting this reality of the globalized firm carried with it the recognition that local resolution regimes were ill-suited to deal with cross-border insolvency. Thus, within the span of 10 years, between 1995 to 2005, there were at least five competing standards proposed for effective cross-border resolution:[155] the World Bank's *Principles for Effective Insolvency and Creditor Rights Systems*,[156] the International Monetary Fund's *Orderly and Effective Resolution Procedures*,[157] the Asian Development Bank's *Law and Policy Reform Standards*,[158] the European Bank for Reconstruction and Development's *surveys*,[159] and the American Law Institute's North American Free Trade Agreement (NAFTA) Insolvency Project.[160] The findings of these proposals were eventually consolidated into a single proposed global standard found in the UNCITRAL Legislative Guide on Insolvency.[161] In the meantime, both the E.U. Regulations and the UNCITRAL Model Law had come into effect. The speed at which these initiatives were completed highlighted the

155. Halliday, *supra* note 154, at 1082-83.

156. World Bank, Principles for Effective Insolvency and Creditor Rights Systems (A Revised Draft of the Earlier Released Document of the Same Name), *available at* http://siteresources.worldbank.org/GILD/Resources/FINAL-ICRPrinciples -March2009.pdf (last accessed Feb. 27, 2012).

157. The International Monetary Fund, Orderly and Effective Resolution Procedures, *available at* http://www.imf.org/external/pubs/ft/orderly/index.htm (last accessed Feb. 27, 2012).

158. Asian Development Bank (ADB), The Need for an Integrated Approach to Secured Transactions and Insolvency Law Reforms (A Report Prepared for the ADB), *available at* http://www.adb.org/documents/others/insolvency/integ_approach_secured_trans.pdf (last accessed Feb. 27, 2012).

159. European Bank of Reconstruction and Development, Transition Report 1999: Ten Years of Transition (A Report on Market Reforms and Economic Policies of Europe and the Baltic Region), *available at* http://www.ebrd.com/downloads/research/transition/TR99.pdf (last accessed Feb. 27, 2012).

160. AM. LAW INST., TRANSNATIONAL INSOLVENCY: COOPERATION AMONG THE NAFTA COUNTRIES (2003).

161. UNCITRAL, LEGISLATIVE GUIDE ON INSOLVENCY (2005), *available at* http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf (last accessed Feb. 27, 2012).

fact that an effective and orderly cross-border resolution regime was essential for the smooth functioning of a truly globalized corporate environment. Their proliferation within such a short period of time can only be viewed as an implicit consensus across various legal systems that there is much economic and social value to be gained from a shared cross-border resolution framework.

Focusing now on the two dominant resolution regimes today — the E.U. Regulations and the UNCITRAL Model Law — one can easily perceive two over-arching themes that animated its enactment and secures its present implementation: *first*, that any cross-border resolution regime will ultimately have to contend with local and often disparate insolvency systems, and that, therefore, pragmatic solutions to specific questions are likely to be more efficient in securing wide-spread adherence than ambitious "universal" structures; and *second*, considering these local and disparate insolvency systems and taking into account the inter-related links that tie corporations to other corporations and corporations to assets and liabilities in other jurisdictions, coordination and cooperation are essential to achieve the ends for which these frameworks were intended to address; and these are: stability and predictability in times of corporate distress.

A. The Economic and Psychic Costs of Discord

As they say, however, the devil is indeed in the details. It would be accurate to state, of course, that the E.U. Regulations and the UNCITRAL Model Law are not two competing insolvency regimes because they do, in fact, deal with different aspects of cross-border resolution: the E.U. Regulations are jurisdictional in character, while the UNCITRAL Model Law is merely recognitional. Still, it is unfortunate that while both adopt seemingly identical concepts of COMI — a fact, no doubt meant to ensure uniformity in application — the absence of specific statutory standards in both regulations has led to differing interpretations across both sides of the Atlantic. Echoing Professor Ian Fletcher's disappointment with the fundamental disparity in COMI approaches,

> [r]egrettably, at present there is an absence of clear, universally agreed-upon rules to determine these issues, so that the outcome of such crucial legal questions is unpredictable at best. This is unfortunately the case even with respect to the [E.U.] Regulation and the UNCITRAL Model Law, whose recourse to a near-common vocabulary by the use of key concepts such as '[COMI]' and 'establishment' seemed initially to herald a significant leap forward in the standardization of rules of jurisdiction. Despite the enormous efforts expended in negotiating and drafting them, neither the [E.U.] Regulation nor the [UNCITRAL] Model Law succeeded in providing a clear and precise definition of '[COMI],' while their respective

> definitions of 'establishment' may also prove to be difficult to apply in relation to some forms of commercial activity.[162]

Consequences of *Eurofood* and *Bear Stearns*, therefore, will likely continue to produce some sense of disquiet among corporate creditors and stakeholders. This concern is particularly acute for stakeholders in corporate groups who are faced with another set of unique structural difficulties that continue to be unaddressed by any adequate multilateral resolution framework, including corporate group COMI determinations, and conflicting fiduciary duties during subsidiary-parent company insolvencies.

Understood from this vantage point, it is not difficult to conclude that both the E.U. Regulation and the UNCITRAL Model Law, while intending to provide an adequate framework for cross-border insolvency, has not been reliable because of uncertainties in their implementation and shortcomings in their scope. These uncertainties and shortcomings lend much to the thinking that these regimes actually *hinder* globalization by manufacturing roadblocks to consistent and predictable resolution of multinational corporations. Indeed, the bedrock of cross-border commerce is stability and predictability. Absent this valuable commodity in both domestic and international systems, inefficiencies and costs arise, creditors become reluctant to provide capital, and, when they do, they are extended at an additional risk premium. Meanwhile, stakeholders in general are left more insecure about the integrity and viability of the firm particularly in crisis situations.

More importantly, outside of the increased costs arising from inconsistent implementation, the effects of the prevailing uncertainty has deeper psychic consequences — absent an adequate international or cross-border framework, corporate managers, regulators, and courts are wont to approach cross-border problems from a more territorial, if not parochial, perspective. This has been aptly demonstrated in the *Eurofoods* case, and, to a limited degree, to the *Bear Stearns* case where the U.S. courts have insisted on retaining discretion in COMI determinations. This attitude and disposition of mind are dangerous for proponents of globalization, because such attitudes and dispositions may ultimately breed an "us versus them" environment that undermines the very essence of a shared global space.

B. Amidst Discord: Shared Principles and the Cooperative Territoriality Approach

There is no doubt that the existing regimes are far from perfect. They are, as many international endeavors are wont to be, products of negotiation and compromise. However, these are not necessarily grievous faults. Indeed, there is immense value in the fact that these cross-border resolution regimes exist at all and thereby provide some level of order and predictability in

162. Fletcher, *supra* note 154, at 781.

complex corporation resolutions. Save perhaps for certain exceptional cases, these regimes are internally consistent within their own respective areas of coverage. What is clear, though, is that these existing cross-border resolution regimes, and others like them in various regions of the world, have increased the level of awareness in, and discussion of, cross-border insolvency issues among national and international authorities. In this respect, at least, both the E.U. Regulation and the UNCITRAL Model Law have succeeded in facilitating, instead of hindering, globalization. Through these existing regimes, some jurisdictions have, in fact, enacted new and more robust insolvency regimes that, while not entirely consistent with prescribed international standards, move towards the general trajectory of greater international cooperation and stakeholder predictability in the area of cross-border insolvency.[163]

Therefore, just as globalization allowed the corporation to venture beyond local shores, globalization, as well, will likely serve as the pragmatic key that will move cross-border insolvency forward. The consistent feature of mandated cooperation and coordination, whether singly or in a group, in cross-border insolvency allows for a potent force to counter the economic and psychic tendencies of strict territorialism. Indeed, courts cooperating with other courts, while arguably acting in domestic self-interest, must ultimately face forces outside of their insular needs:

> When courts engage in cross-border cooperation, it can scarcely be supposed that they do so under circumstances where each court is blind to the international implications of the action it is being invited to take at the request of its foreign counterpart or of interested parties including, most prominently, the foreign representative.[164]

Here, again, the force of globalization becomes both *impetus and result*: cooperation drives cooperation, and the accretion of mutually acceptable outcomes over the course of continued dealings will likely lead to more convergence of systems and predictability of expected results.

On this score, and in the face of tendencies towards territoriality brought about by uncertainties in the prevailing resolution regimes, some commentators have highlighted the application of a so-called "cooperative territoriality" paradigm where independent insolvency proceedings can be undertaken,[165] but each would be under the obligation to cooperate with other jurisdictions in either resolving the assets properly belonging to a

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163. *See, e.g.*, An Act Providing for the Rehabilitation or Liquidation of Financially Distressed Enterprises and Individuals [Financial Rehabilitation and Insolvency Act (FRIA) of 2010], Republic Act No. 10142, § 36 (2010), which adopts the UNCITRAL Model Law on issues involving cross-border insolvency.

164. Fletcher, *supra* note 154, at 780.

165. LoPucki, *Cooperation in International Bankruptcy*, *supra* note 23, at 742.

corporation under insolvency in another jurisdiction (as when, for example, the asset is owned by such foreign corporation or is given as security for a creditor of such foreign corporation) or in effecting a common desired result of rehabilitation.

> Cooperative territoriality ... eliminates the tension between countries by vesting each with bankruptcy power congruent with its sovereignty. No nation need recognize foreign authority over domestic assets or sacrifice the interests of local debtors or creditors in particular cases. The elimination of that universalist tension provides the foundation for cooperation among courts and representatives that will be mutually beneficial in each case. Among the kinds of cooperation contemplated are the following: (1) the establishment of procedures for replicating claims filed in any one country in all of them; (2) the sharing of distribution lists by representatives to ensure that later distributions do not go to creditors who have already recovered the full amounts owed to them; (3) the joint sale of assets, when a joint sale would produce a higher price than separate sales in multiple countries or when the value of assets within a country is not sufficiently large to warrant separate administration; (4) the voluntary investment by representatives in one country in the debtor's reorganization effort in another; and (5) the seizure and return of assets that have been the subject of avoidable transfers.[166]

The hope, therefore, is that an acceptable resolution framework for corporate groups will emerge which will be both pragmatic in terms of creditor and stakeholder protections, but which will also resolve the definitional deficit in COMI already found in existing regimes, through the adoption of this "cooperative territoriality" paradigm. Already, the UNCITRAL is working towards the completion of such a proposal, and makes reference to heretofore unissued Part Three of the UNCITRAL

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166. *Id.* at 750. A counter-proposal to the "cooperative territoriality" approach suggested by Professor Irit Mevorach is applying the concept of COMI to the corporate group. Mevorach cautions, however, that the application of COMI for the corporate group should be based on "clear and objective tests," otherwise, States are not likely to recognize the designation. Irit Mevorach, *Appropriate Treatment of Corporate Groups in Insolvency*, 8 EUR. BUS. ORG. REV. 179, 190 (2007).

It is submitted, however, that fixing a COMI for the entire corporate group, while appealing in concept, would be difficult to apply in practice, because of the radical shift in legal frameworks that will have to be undertaken by the participating countries. In the E.U., for example, there will be two separate regimes applicable to corporate resolution — one for independent corporations and another for corporations which are part of corporate groups. Furthermore, the approach undermines the separate juridical nature of the corporation.

Legislative Guide on Insolvency[167] (the UNCITRAL Legislative Guide) as starting point for discussion:[168]

> 37. The Working Group agreed that the topic was very important, reflecting the current commercial reality of global business and of cross-border insolvency proceedings. As to adding material to the Guide to Enactment, while some reservations were expressed as to the appropriateness of that course of action, it was agreed that reference should be made to part three of the Legislative Guide and the solutions adopted with respect to the treatment of groups in insolvency, particularly in the international context. Beyond that, however, and particularly with respect to the concept of the COMI of an enterprise group, it was suggested that once the Working Group had reached agreement on the factors relevant to identifying the COMI of an individual debtor, it might be possible to consider the group issue further and, in particular, the relevance of those factors in the group context.[169]

Notably, Part Three of the Legislative Guide recognizes that corporate groups, as a general rule, should be resolved on the territorial level, respecting each corporation's separate juridical personality.[170] Instead, the Legislative Guide proposes a regime of joint applications and procedural coordination as a means to achieve orderly resolution of the group.[171] This implicitly avoids the problem of COMI determination since each corporation would necessarily be resolved in the jurisdiction of the place of incorporation, and also recognizes the strong local interests that continue to play in cross-border resolution proceedings. As correctly observed by Prof. Ian F. Fletcher:

> [I]t would be politically naïve to suppose that sovereign states would be prepared, at any time in the foreseeable future, to abandon all possibility of maintaining the benefits of localized rules, under which parties may have based their expectations in their dealings with a debtor, by conceding

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167. UNCITRAL, Legislative Guide: Part Three, Treatment of enterprise groups in insolvency (pre-release, July 21, 2010), *available at* http://www.uncitral.org/pdf/english/texts/insolven/pre-leg-guide-part-three.pdf (last accessed Feb. 27, 2012) [hereinafter Part Three, UNCITRAL Legislative Guide].

168. UNCITRAL, Working Group V (Insolvency Law), Report on its 40th Sess., Oct. 31-Nov. 4, 2011, Vienna, U.N. Doc. No. A/CN.9/738 (Nov. 21, 2011) [hereinafter, Working Group V, 40th Session]. *See also* Working Group V, 32d Session, *supra* note 22.

169. Working Group V, 40th Session, *supra* note 168, at ¶ 37.

170. Part Three, UNCITRAL Legislative Guide provides: "6. As a general rule, insolvency laws respect the separate legal status of each enterprise group member and a separate application for commencement of insolvency proceedings is required to be made with respect to each of those members." Part Three, UNCITRAL Legislative Guide, *supra* note 167, at 18.

171. *Id.* at 22.

complete and overarching control to the provisions of some foreign insolvency law under which the debtor's global estate comes to be administered.[172]

VII. CONCLUSION

The motives behind the enactment of the E.U. Regulations, the UNCITRAL Model Law, and Chapter 15 of the U.S. Bankruptcy Code were noble enough. That they were enacted at all, and at such rate of speed, demonstrates both the pervasiveness of the multinational corporation, and the importance that orderly and predictable cross-border resolution plays in the stability of the overall corporate system. With various jurisdictions saddled by differing priorities and varying insolvency policies, it is inevitable that divergences in application arise, often with unsettling effects for corporate constituencies.

The diverging application of the COMI principle between the E.U. Regulation and the UNCITRAL Model Law as represented by Chapter 15 of the U.S. Bankruptcy Code illustrates what perhaps is a reality of doing business in multiple jurisdictions. Such costs, however, may very well promote an anti-globalization paradigm which, when unchecked, will not only increase costs and breed inefficiencies, but promote a parochial attitude that runs counter to the aims of globalization.

Policymakers and insolvency authorities, therefore, have a crucial role to play in countering this paradigm. While motivated by different causes, internalizing the value of both pragmatism and cooperation in both decisional law and government policy can alleviate the forces that drive the E.U. Regulation and the UNCITRAL Model Law apart. Already, UNCITRAL has set itself to the task of providing guidelines for the resolution of corporate groups, while at the same time grappling with the issues raised by COMI in both independent and group corporate settings. It is through this need for cooperation and coordination implicit in these existing regimes that raises awareness of the consequences of cross-border resolution outside of narrow parochial interests. It is in this sense that these regimes have the potential to enhance orderly resolution and promote globalization in the corporate sphere. In the meantime, corporate stakeholders can work within these imperfect frameworks with a sense of cautious optimism that both systems are, at the end of the day, driven by imperatives towards predictability, stability, and maximization of corporate value.

172. Fletcher, *supra* note 154, at 782.