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On the Road to Universalism: A Comparative and Empirical Study of the UNCITRAL Model Law on Cross-Border Insolvency

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Abstract
The ability of the UNCITRAL Model Law on Cross-Border Insolvency to enhance unity in bankruptcy (i.e., universalism) has been doubted. Unlike the EC Regulation on Insolvency Proceedings, it does not provide rules on international jurisdiction and automatic recognition. Thus, both recognition of foreign proceedings and relief should be sought. The Model Law (like the EC Regulation) also lacks rules for corporate groups. For these reasons, commentators have predicted that countries implementing the Model Law will exploit the discretion and flexibility enshrined in this regime to protect local interest and will avoid maximum cooperation and deference to foreign jurisdictions. Nonetheless, this paper suggests that the Model Law has the potential of facilitating unified and centralised proceedings both for single and group companies. Moreover, the paper reports the results of a comparative empirical study (which investigated Model Law decisions) demonstrating that the Model Law is in fact on the road to universalism. Recognition under the Model

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Law has become something of a routine, group centralisations are being facilitated and a wide range of relief is being granted. The paper nevertheless points to the current shortcomings in the application of the Model Law and where it can be improved.

Keywords: UNCITRAL Model Law, recognition, relief, COMI, corporate groups, universalism, territorialism.

1. INTRODUCTION: THE AIM AND MOTIVATION OF THIS STUDY

The handling of insolvency proceedings[1] of international corporations – single companies or corporate groups[2] – can be greatly facilitated by following an international regime suggested from the 'top', namely implementing in all jurisdictions a framework, model or treaty of sorts (regarding the treatment of such insolvencies) in a uniform manner. In this way, conflicts between jurisdictions and laws can be diminished.[3] Furthermore, there is much sense in agreeing on a regime which unifies and centralises international insolvency proceedings in a single jurisdiction. Such methodology allows for a single worldwide distribution or reorganisation, or at least minimises the number of proceedings taking place while encouraging maximum cooperation between the multiple proceedings. Such unity in bankruptcy (which is the philosophical foundation of the universalist school of thought[4]) could ensure that the process will cover all or nearly all aspects of the business and its stakeholders.[5] This seems essential when considering a collective process (as in insolvency).[6] The approach also promotes efficient solutions for the business as a whole (notwithstanding its spread among different nations) which may be worth more than the sum of its parts. In the case of corporate groups the same logic applies where groups may be integrated so that a single business is the subject of the insolvency process.[7]

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1 The terms 'insolvency' and 'bankruptcy' are used interchangeably here.

2 The problem of cross-border insolvency of natural persons is outside the scope of this paper.

3 I.F. Fletcher, *Insolvency in Private International Law* (OUP 2005, supplement 2007), at p. 7.

4 *Idem*, at p. 11.

5 See J.L. Westbrook, 'A Global Solution to Multinational Default', 98 *Michigan Law Review* (2000) p. 2276, at pp. 2283-8. Cf., L.M. LoPucki, 'Cooperation in International Bankruptcy: A Post-Universalist Approach', 84 *Cornell Law Review* (1999) p. 696 (arguing for a cooperative territorialist approach whereby insolvencies are handled on a state-by-state basis with a degree of cooperation).

6 Fletcher, *supra* n. 3; Westbrook, *supra* n. 5, at pp. 2284-2285.

7 There may potentially be a conflict here with the corporate personality notion, but at least insofar as only procedural coordination of the proceedings is envisaged not much is at stake. See I. Mevorach, *Insolvency within Multinational Enterprise Groups* (OUP 2009), at pp. 187-9.

Two key international regimes for cross-border insolvency have been devised and have come into effect in recent years – the EC Regulation on Insolvency Proceedings (the EC Regulation)[8] and the UNCITRAL Model Law for Cross-Border Insolvency (the Model Law).[9] Both seem to accept the idea that an efficient and fair cross-border insolvency regime requires a degree of unification and maximum cooperation. However, not surprisingly, on the European level, Member States have managed to agree on a more coherent regime, while in the quest for consensus the representatives deliberating on the Model Law had to compromise more between a wider circle of countries. Thus, the Model Law incorporates a more flexible regime which leaves more room for manoeuvre by the adopting states in determining, for example, whether to recognise foreign proceedings or grant them relief.[10]

The EC Regulation came into effect in 2002 and has since been directly applicable in all Member States.[11] The Model Law, on the other hand, requires active adoption and implementation. It is up to each nation state to decide whether and how to enact it. Thus far (between 1998 and 2010), nineteen countries have adopted the Model Law.[12] Although not a negligible number and while it includes significant economies, it is still some way away from the ideal of providing a fully global framework for cross-border insolvency, as many countries have not yet enacted it.[13] This might be a result of a degree of scepticism as to the effectiveness of this framework, being, as it is, somewhat pliable (compared with the EC Regulation).[14] The expectation might therefore be that it cannot be a means to achieve unity in bankruptcy.

Indeed, it has long been the general view that nations tend to be concerned about surrendering sovereignty in insolvency matters and apply a 'grab rule' approach in practice (unless they become party to an agreement which forbids them to do so).[15] In

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[8] Council Regulation 1346/2000 on Insolvency Proceedings, *OJ* 2000 L 160/1.

[9] United Nations Commission on International Trade Law (UNCITRAL), *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment*, U.N. Sales No. E.99.V.3.

[10] See further section 2 below.

[11] Except Denmark.

[12] Australia (2008); 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); United Kingdom (2006); United States (2005); British Virgin Islands, Overseas Territory of the United Kingdom of Great Britain and Northern Ireland (2003). See: <http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html> (accessed: May 2011).

[13] *Idem*. Note, though, that local legislations are sometimes inspired by the Model Law even where it has not been enacted as such (see, e.g., Article 220 of the Spanish Insolvency Act 2003).

[14] See section 2 below.

[15] See Fletcher, *supra* n. 3, at p. 13 (explaining that the notion of territoriality is usually applied to foreign proceedings involving debtors with property or other interests which lie within the jurisdiction of the state in question). 'Territorialists' have generally stressed that a territorial regime (which allows the opening of separate territorial proceedings in the different countries where the international enterprise has presence) not only maintains the unique distinctions between legal re-

other words, if given the possibility (and the flexibility), countries may opt for territorialist insolvency solutions. If that is indeed the case, then it would be expected that even if countries take part in an international insolvency regime (like the Model Law), courts, in practice, will tend to protect local creditors and avoid giving universal effect to foreign proceedings. Presumably, courts still feel bound by the local system, and if such a model allows them, they will practise their inherent territorialist inclinations. Courts may give lip service to universalism but will find non-universalist solutions to cross-border problems.[16] The 'territorialist' inclination might even be particularly evident in cases of corporate groups (especially with respect to local subsidiaries), where courts may disallow their 'relocation' to centralised proceedings abroad.[17]

The opposing view considers the Model Law to be an extremely important step forward in the management of multinational insolvencies. The Model Law is somewhat 'modest' and does not contain rules which reflect 'pure universalism' but it does aim at a 'modified universalism', promoting a regime which allows for opening more than one set of proceedings but also strives for maximum cooperation and a worldwide perspective. As such, while perhaps not the final article, it can be a catalyst of universalism.[18] In regard to corporate groups, it has been argued that if applied generously – taking an enterprise approach and showing a universalist spirit – the Model Law could be utilised in a way that will achieve efficient solutions for groups, including centralisations in the appropriate cases.[19]

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gimes, but also corresponds with sovereignties' tendency to insist on applying their own insolvency laws to domestic assets and claimants. See L.M. LoPucki, 'The Case for Cooperative Territoriality in International Bankruptcy', 98 *Michigan Law Review* (2000) p. 2216; R.S. Avi-Yonah, 'National Regulation of Multinational Enterprises: An Essay on Comity, Extraterritoriality, and Harmonization', 42 *Columbia Journal of Transnational Law* (2003) p. 5, at pp. 8-9 and 12; F. Tung, 'Is International Bankruptcy Possible?', 23 *Michigan Journal of International Law* (2001) p. 31.

16 LoPucki, *supra* n. 5, at p. 700.

17 Indeed, territorialists suggest that a territorial approach is a better fit with the way enterprises operate – through local subsidiaries organised in different legal regimes with assets in the country where they operate (*idem*, at p. 750).

18 Westbrook, *supra* n. 5, at pp. 2301-2302; J.L. Westbrook, 'Multinational Enterprises in General Default: Chapter 15, The ALI Principles and the EU Insolvency Regulation', 76 *American Bankruptcy Law Journal* (2002) p. 1, at pp. 40-41.

19 Of course, centralisation of group members' proceedings in a single jurisdiction may not be always appropriate. It will be advantageous where the group was integrated and centralised and managed as a group from a single location. Yet, where the group operated in a more decentralised way (with autonomous and independently managed subsidiaries) other solutions may be more appropriate, e.g., coordination of the proceedings from a single jurisdiction or cooperation between multiple proceedings. See I. Mevorach, 'The Home Country of a Multinational Enterprise Group Facing Insolvency', 57 *International and Comparative Law Quarterly* (2008) p. 427. Recent new recommendations in the UNCITRAL Legislative Guide on the topic of enterprise groups (international aspects) focus only on this possibility, i.e., coordination of proceedings between group members. See pre-release (21 July 2010) of the new Part (Part Three) at: <http://www.uncitral.org/pdf/english/texts/insolven/pre-leg-guide-part-three.pdf> (accessed: May 2011).

Empirical evidence reported thus far regarding the use of the Model Law seems to be at odds.[20] UNCITRAL itself (via its Working Group V[21]) has noted the need to review the operation of the Model Law with a view to improving it if necessary and widening its reach.[22] It is therefore both timely and imperative to evaluate the Model Law, unearthing its merits or shortcomings. At a time when states emerge from a recession and insolvencies are likely to rise in volume (as they tend to 'lag behind' recession) identifying problems associated with insolvency and considering responses to the identified exigencies is of pressing importance. Furthermore, as many of the insolvencies have cross-border effects, the area of cross-border insolvency is certainly one of constant and urgent need of further development. Contributing to the development of the Model Law is of particular import as this is the only global model for international insolvency. Even for the Member States of the EU the EC Regulation is limited in its ability to regulate all cross-border insolvency scenarios, as it applies only to cases where the centre of the corporation at issue is within the EU[23] while the relationship between EU and non-EU countries in cross-border insolvency cases is outside its remit.

This paper aims to explore whether (as is hypothesised here) the Model Law is able to produce universalist outcomes and whether it does so in practice (as nation states are generally committed to universalism when applying it). Alternatively, the other contention might be more apparent. That is, the situation is that local sensitivities tend to slow down any universalist development as courts extensively use their discretion to avoid effective international solutions. The paper looks both at the structure of the Model Law and at its use in practice by courts of different countries (which adopted the Model Law) and considers both single and group cases in the context of recognition and relief decisions.

To the extent that the Model Law does go in the right direction (in the sense that it can and in fact does manage to achieve unity in bankruptcy[24]), the case for its wider

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[20] Focusing on the US experience. See J.L. Westbrook, 'An Empirical Look at Chapter 15', as presented to the National Conference of Bankruptcy Judges (October 2010) (arguing that the US version of the Model Law is highly successful in how it is applied); J. Leong, 'Is Chapter 15 Universalist or Territorialist? Empirical Evidence from United States Bankruptcy Court Cases' (11 August 2010), *Wisconsin International Law Journal* (forthcoming), available at SSRN: <http://ssrn.com/abstract=1690545> (accessed: May 2011) (arguing that US courts are very territorialist).

[21] Which deals with insolvency law matters.

[22] UNCITRAL Working Group V (Insolvency Law), *Report of Working Group V (Insolvency Law) on the work of its thirty-eighth session* (New York, 19-23 April 2010), para. 104(a), U.N. Doc A/CN.9/691 (28 April 2010) (discussions of this project are ongoing). The author is adviser to the UK delegation in the deliberations of the Working Group, yet the views expressed in this paper are the author's own.

[23] Article 3(1) and Recital 14 of the EC Regulation; *In re Brac Rent-A-Car Inc* [2003] EWHC (Ch).

[24] It is presumed here that this is the better approach. Of course, if one considers it best that territorialism will be the governing approach, then such results will demonstrate regression rather than progress. However, it seems that even territorialists believe that universalism is the ideal long-term solution, though arguing that universalism is not feasible in the foreseeable future and that

adoption becomes apparent. Enacting the Model Law in a country's legislation, and following the same general approach in the way it is applied, will mean that international insolvencies involving that country can be handled more effectively. Persuading countries to adopt the Model Law will have an additional positive effect – adoption of the Model Law by a growing number of countries will extend its coverage and enhance its global nature. Generally, positive findings regarding the use of the Model Law in practice may encourage countries to become more universalist (even if they do not adopt the Model Law) by following such similar approach taken by the states which have enacted the Model Law, thus raising the bar in international insolvencies. At the same time, if certain deficiencies in the operation of the Model Law are revealed, this can assist in seeking its improvement, unearthing the areas where the Model Law and its users could further progress towards universalism. In addition, where discrepancies in the way the Model Law is applied in different countries (which already adopted it) are evident – specifically where certain jurisdictions seem more territorialist than others – revealing these differences may encourage the more 'territorialist' countries to take a more worldwide perspective, being rest assured that the other enacting states follow the same direction.

The paper proceeds as follows. Section 2 examines the structure of the Model Law and the extent to which it can facilitate unity in bankruptcy (comparing it with the EC Regulation), while section 3 focuses on the operation of the Model Law in practice, delineating the results of a comparative empirical study which investigated courts' decisions applying the Model Law in different jurisdictions. Drawing upon the empirical findings, it will ask whether the Model Law has generated universalist results and has managed to achieve a degree of unification and centralisation in practice. Section 4 concludes.

2. CAN THE MODEL LAW FACILITATE UNITY IN BANKRUPTCY?

The Model Law proposes a regime which focuses on the recognition process and on relief and assistance to foreign proceedings.[25] A foreign representative appointed in any given jurisdiction where a collective insolvency process has opened against a debtor company may seek recognition of those proceedings in another jurisdiction (which enacted the Model Law) because, for example, the debtor has assets or creditors or subsidiaries there.[26] The court ('the recognising court') may or may not recognise the foreign proceedings. Certain relief (a stay of proceedings and execu-

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territorialism (with cooperative elements) is a better transitional solution than any form of modified universalism (Westbrook, *supra* n. 5, at p. 2319).

[25] For comprehensive accounts of the Model Law, see Fletcher, *supra* n. 3, ch. 8; L.C. Ho, *Cross-Border Insolvency, A Commentary on the UNCITRAL Model Law* (Globe Law and Business 2009), at p. 256.

[26] Article 15 of the Model Law.

tions against the debtor's assets as well as the right to transfer, encumber or dispose of his assets) is automatic upon recognition of the proceedings as the main proceedings,[27] while any additional relief[28] is discretionary. In this context it has been argued that the stay relief under the Model Law is anything but automatic as it is dependent on recognition, and any other relief is also doubtfully helpful in light of its discretionary nature,[29] especially when it comes to more universalist types of relief such as the enforcement of a foreign discharge[30] or the turnover of assets.[31] The latter relief is certainly paramount to the idea of a single worldwide distribution[32] but is subjected to an additional condition that the court is satisfied that the interests of creditors in the state are adequately protected.[33] In addition, the court may refuse to take any action whatsoever based on the Model Law if it will be manifestly contrary to the public policy of the state.[34]

Importantly, the Model Law does not provide uniform choice-of-law rules and each jurisdiction involved may apply its own private international laws. Generally, as the Model Law only provides model provisions which can be adopted in different ways in different countries' legislation, the result may be rather chaotic.[35] Specifically, countries may refrain from enacting the more ambitious, universalist parts of the Model Law, such as recognition based on a set of objective criteria (mainly the presence of the debtor's centre of main interests in the foreign jurisdiction), automatic relief and other discretionary relief.[36]

This is significantly different – and potentially much less ambitious and more 'territorialist' – than the EC Regulation's framework where the focus is on the ascertainment of jurisdiction by the court opening insolvency proceedings ('the opening court').[37] Under the EC Regulation, the opening court should determine whether it has international jurisdiction to handle the company's main proceedings.[38]

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[27] *Idem*, Article 20. But note that some jurisdictions which adopted the Model Law did not adopt the concept of the automatic stay (see *infra* n. 63).

[28] Under Article 7 or 21 of the Model Law. If the proceedings are recognised as 'non-main' proceedings (see *infra* n. 52) any relief is discretionary (Article 21).

[29] The court also needs to be satisfied that creditors and other interested parties are protected (Article 22(1) of the Model Law). It can also subject such relief to conditions (*idem*, Article 22(2)).

[30] J. Luna, 'Thinking Globally, Filling Locally: The Effects of the New Chapter 15 on Business Entity Cross-Border Insolvency Cases', 19 *Florida Journal of International Law* (2007) p. 671, at pp. 689-695.

[31] See *infra* nn. 49-50 and accompanying text.

[32] See J.L. Westbrook, 'Priority Conflicts as a Barrier to Cooperation', 27 *Pennsylvania State University International Law Review* (2009) p. 869, at p. 871.

[33] Article 21(2) of the Model Law.

[34] *Idem*, Article 6.

[35] See Fletcher, *supra* n. 3, at pp. 489-490.

[36] See *infra* n. 63.

[37] See G. McCormack, 'Jurisdictional Competition and Forum Shopping in Insolvency Proceedings', *Cambridge Law Journal* (2009) p. 169, at p. 176.

[38] Article 3(1) of the EC Regulation.

Its decision is then effective throughout Europe without further ado. Recognition is automatic and the powers of the representative (conferred on him by the law of the opening state) extend to the other Member States.[39] The representative may, in particular, remove the company's assets from the territories where they are situated.[40] The EC Regulation also provides that the law of the forum governing the main proceedings shall determine the insolvency matters.[41] The Regulation directly applies in the Member State's legislation, thus avoiding any differences in enactment. Certainly, it is more comprehensive and more apt to achieve the goal of unity in insolvency – the ideal of one court and one law which applies to the insolvency process. Yet, universalism is 'modified' as it is allowed to open local, territorial proceedings in any country where the debtor has an establishment.[42]

Nonetheless, there are more similarities between the Model Law and the EC Regulation than may appear at first sight, and although the Model Law leaves much room for manoeuvre, it has the potential of achieving unified solutions as well. Both models are based on the notions of 'centre of main interests' (COMI) and 'establishment'. Under the EC Regulation, the opening court should open main proceedings only if the company's COMI is located in that country.[43] Otherwise, as aforementioned, proceedings may only be opened if the company has an establishment (essentially a branch) in that jurisdiction, in which case the proceedings will be limited to the assets located in that state and may only be liquidation proceedings.[44] Under the Model Law, the recognising court should apply objective criteria when deciding whether to recognise the foreign proceedings. The criteria include some formal requirements as well as the basic condition that the proceedings are collective and a representative has been appointed. Otherwise, they refer to the same notion of locating the COMI of the debtor in regard to recognition of the main proceedings.[45] If the economic centre is in the foreign jurisdiction, then such recognition should be granted.

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[39] *Idem*, Articles 16-17.

[40] *Idem*, Article 18.

[41] *Idem*, Article 4 (subject to exceptions as delineated in Articles 5-15).

[42] *Idem*, Article 3(2) (and the law of the forum which governs the territorial proceeding will apply – Article 28).

[43] There is no definition of COMI, but it is presumed to be at the registered office of the company, which can be rebutted if the COMI is proved to be elsewhere (*idem*, Article 3(1)). The issue of the meaning of COMI is the subject of much debate, beyond the scope of this article. See, e.g., McCormack, *supra* n. 37; H. Eidenmüller, 'Free Choice in International Company Insolvency Law in Europe', 6 *European Business Organization Law Review* (2005) p. 423; I. Mevorach, 'Jurisdiction in Insolvency – A Study of European Courts' Decisions', 6 *Journal of Private International Law* (2010).

[44] Article 3(2) and (3) of the EC Regulation.

[45] Article 2(b) and Articles 15-17 of the Model Law. Here too, there is no definition, and the same presumption applies (see *supra* n. 43).

Thus, although recognition is not automatic under the Model Law, if (collective insolvency) proceedings are opened in a COMI forum, they should be recognised (as main proceedings) by the recognising court. The recognising court is also required to reach the decision as soon as possible.[46] Thereafter, although there is no automatic worldwide effect, the recognising court should grant the automatic stay of proceedings within its jurisdiction, as mentioned above. It may also grant additional relief. Here, the Model Law is very widely framed, permitting the court to grant any appropriate relief, e.g., extending the stay of proceedings beyond the basic moratorium (as allowed under local legislation),[47] providing information to the foreign representative, allowing the foreign representative to administer the local assets and so forth.[48] The Model Law also envisages that the recognising court may turn over assets to the foreign representative.[49] This means that the foreign representative will be entrusted not only with the administration or realisation of assets but also with the distribution of assets located in the recognising state. The consequence of such relief is that the assets will become part of the insolvency estate and will be distributed, unless other conditions apply, according to the laws of the opening state.[50]

Various types of relief or assistance may also be granted under the 'cooperation' and 'assistance' provisions of the Model Law.[51] Generally, the list of additional relief mentioned in the Model Law is non-exhaustive and courts may grant other types of relief going beyond the specific relief mentioned. Thus, apart from a basic stay of proceedings, which is crucial for the success of the process, courts can assist in many other ways. It appears that the primary methodology envisaged by the Model Law is invoking local laws and procedures in the recognising state. However, it is also possible that the recognising court will give universal effect to the foreign laws and processes, including the transfer of assets abroad and deference to the foreign law and its procedures, recognising and directly enforcing foreign plans, orders, schemes and other judgments. In this way, a *de facto* unified and centralised process in the foreign country where main proceedings were opened can be achieved.

Additionally, although the Model Law acknowledges the possibility of concurrent proceedings against the same debtor taking place, it attempts to minimise their number and their effect. First, if there is only an establishment in the foreign

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[46] *Idem*, Article 17(3).

[47] Especially where reorganisation is sought a more extensive moratorium may be required, for example, such that stops creditors from enforcing their securities.

[48] Article 21(1) of the Model Law. Interim relief, prior to recognition, may also be granted under Article 19.

[49] As aforementioned, this is subject to the requirement that the court is satisfied that the interests of the local creditors are adequately protected (Articles 21(2) and 22 of the Model Law).

[50] See Fletcher, *supra* n. 3, at p. 469.

[51] Article 7 (additional assistance under other laws of the enacting state) and Articles 25-27 (cooperation) of the Model Law.

jurisdiction, the recognising court should recognise the proceedings as foreign 'non-main' proceedings only.[52] Any relief is then discretionary, and the court should exercise greater caution when granting relief to a foreign non-main representative.[53] Second, although it is possible to open additional local insolvency proceedings (following recognition of foreign main proceedings), such concurrent proceedings will be limited in scope: they may only be opened if there are assets in the jurisdiction and only in regard to those assets.[54]

The Model Law does not include rules for corporate groups (nor does the EC Regulation). It only deals with single debtors. Yet, under both regimes, group-wide solutions and centralised proceedings against group members in one forum can be facilitated if a mutual COMI can be located in regard to all group companies. Again, the EC Regulation is more straightforward (though not suggesting any rule identifying a 'group COMI') and operates in a different way. Under the EC Regulation, a group process may be achieved if the opening court finds that the COMI of each group member is located in the jurisdiction. Any other Member States should then automatically recognise this decision.[55] Indeed, EU group centralisations are achieved frequently (even when the group members are registered in different countries), with courts often applying a head office functions test to locate the COMI, which usually represents the meeting point of all group members (especially where groups are integrated and centrally managed).[56] As mentioned above, the Model Law does not provide rules for international jurisdiction and automatic recognition. Still, group proceedings such as this could be recognised in a state which adopted the Model Law (where, for example, some of the subsidiaries are registered) if the (recognising) court finds that the COMI of each group member is located in the foreign jurisdiction (or, otherwise, each of the members has at least an

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[52] *Idem*, Articles 2(f) and 17(2)(b). This is similar to the concept of opening territorial proceedings under the EC Regulation. Note that some of the jurisdictions which enacted the Model Law did not adopt the concept of distinguishing between main and non-main proceedings or the definition of non-main proceedings (see *infra* n. 63).

[53] The court must be satisfied that the relief relates to assets that, under the law of the recognising state, should be administered in the foreign non-main proceeding or concerns information required in that proceeding (Article 21(3) of the Model Law).

[54] *Idem*, Article 28. But note that some jurisdictions (see the Canadian version of the Model Law) did not adopt this provision. The Model Law also requires the court to seek cooperation and coordination with the foreign proceedings (*idem*, Article 29; a similar requirement is found in the EC Regulation in regard to the relationship between main and secondary proceedings (Article 31 of the EC Regulation)), and, thus, if concurrent proceedings do take place, at the least they should be coordinated.

[55] Based on Articles 3(1) and 16 of the EC Regulation as explained above.

[56] See, e.g., *In re Daisytek-ISA Ltd* [2003] BCC 562; *Energotech SARL*, Tribunal de Grande Instance, Lure (France), 29 March 2006, [2007] BCC 123; *In re Hettlage KghA*, District Court of Munich (Germany), 4 May 2004, ZIP 2004, 962 (AG München Beschl.v.4.5.2004-1501 IE 1276/04); *Nortel Networks*, High Court of Justice Chancery Division Companies Court (UK), 14 January 2009 (UK).

establishment so the proceedings can be recognised as non-main proceedings in the same jurisdiction[57]). This requires, though, first that such 'group proceedings' be opened in a foreign jurisdiction and then that the recognising court accepts that the COMI or establishment of all group members is located in the same foreign jurisdiction and grants it the relevant relief accordingly. This may mean rebutting the presumption that the COMI is at the registered office[58] if some or all affiliates are registered in the recognising state or in another third country. Similarly to centralising group insolvencies under the EC Regulation, here too, finding a mutual COMI for all group members could be facilitated by courts taking account of the integrated nature of the group (if such is the case) and the fact that it has been managed as a group and was centrally controlled.[59]

However, the Model Law (similarly to the EC Regulation) also allows for denying recognition or relief if granting it will be contrary to public policy.[60] As mentioned above, the Model Law provides a further 'safety valve' where it requires courts to consider creditors and other persons' interests when determining whether or not to grant additional relief. The interests of local creditors are particularly stressed when considering whether to allow the turnover of local assets.[61] Nonetheless, to the extent that these provisions are regarded as exceptions rather than the rule, unification and centralisation may be the more common approach. The Model Law seems to suggest that courts should not frequently resist recognition or relief in global insolvency cases decided under its provisions, as it states that in interpreting its provisions a court shall consider the international origin of the Model Law and the need to promote an application of the law that is consistent with the application of similar statutes adopted by foreign jurisdictions.[62]

The Model Law could therefore be seen as a modest attempt at regulating multinational insolvencies. Yet, although it exhibits a fair degree of flexibility, it still has the potential of achieving universalist results. It establishes a quite straightforward recognition process and a wide range of relief which may be granted. It also encourages maximum assistance and cooperation. It possesses the mechanisms that allow a single court to preside over the process, whereby other courts may recognise that court's proceedings, may defer to its decisions and laws and may turn over assets to that foreign jurisdiction. The Model Law also has another merit: although it applies only in countries which adopted it, parties from any other countries can invoke it (in the countries which adopted it). In this way, main proceedings can be recognised even in a non-adopting country. Thus, any country may be the country of

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[57] Note that some laws did not adopt the distinction between main and non-main proceedings (see *infra* n. 63).

[58] See *supra* n. 43.

[59] See Mevorach, *supra* n. 7, at p. 186.

[60] See *supra* n. 34 and accompanying text. See also Article 26 of the EC Regulation.

[61] Articles 21 and 22 of the Model Law.

[62] *Idem*, Article 8.

the COMI. On the other hand, not all countries which adopted the Model Law enacted it verbatim, with the most notable derogation from the wording of the Model Law being the omission of the automatic stay of proceedings upon recognition by some of the enacting states.[63] Still, similar results may be achieved under such laws as well if, in practice, the recognition of foreign proceedings results in a rather smooth and immediate stay of proceedings or other required relief. All in all, the Model Law has considerable potential in achieving a degree of unity in bankruptcy. As such, it can be dubbed a 'modified universalist' model.

However, much depends on how the Model Law is applied by recognising courts. A much gloomier picture may appear if countries tend to avoid recognition and are tempted to be overly protective of local creditors. The paper proceeds to discuss the Model Law's operation in practice. Specifically, it seeks to substantiate whether or not courts applying the Model Law adopt a territorialist approach which is manifested in denying recognition of foreign (primarily main) proceedings, avoiding corporate groups' centralisations (especially when a local subsidiary is involved) and denying relief to foreign proceedings which is not automatic.

3. DOES THE MODEL LAW IN FACT FACILITATE UNIFICATION AND CENTRALISATION? EMPIRICAL FINDINGS

The question asked here is how the Model Law fares in practice, specifically to what extent courts applying it tend to adopt an internationalist rather than a parochial approach to global insolvencies. This question is addressed empirically by systemati-

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[63] The Korean Act (*infra* n. 70) (though abolishing previous legislation which was very territorialist) does not adopt the automatic stay and the distinction between main and non-main proceedings for this purpose. Any relief should be sought and can be sought only following a recognition order. This is consistent with local insolvency proceedings where a stay does not automatically follow a bankruptcy petition. Recognition is therefore only a basis for seeking relief. In Japan, too, the new legislation (Japanese LRAFIP, *infra* n. 70) replaced a more territorialist regime, but the enactment of the Model Law was not verbatim – relief is not automatic and should be sought following recognition. Mexican Title XII (*infra* n. 70) also requires a recognition order before the grant of relief (but only if the debtor has an establishment in Mexico). The automatic stay may also have different meanings in order to comply with the local legislations. Thus, for example, in the US Chapter 15 (*infra* n. 70) the stay is a broad one, whereas in Mexico it does not operate to prevent pursuit of individual actions as opposed to enforcement (see Ho, *supra* n. 25, at p. 256; B. Wessels, *International Insolvency Law* (Kluwer Law International 2006), at pp. 194-5. A few other notable derogations from the Model Law can be found in the Canadian CCAA (*infra* n. 70), which did not adopt the definition of non-main proceedings provided in the Model Law. Instead, a non-main proceeding is a 'foreign proceeding, other than a foreign main proceeding'. As mentioned above (*supra* n. 54), Canadian law also did not adopt the limitation in scope of concurrent proceedings opened following recognition of foreign proceedings as main proceedings (see D.S. Grieve, 'The New Canadian Cross-Border Insolvency Regime – Reflections on the First Year', *Annual Review of Insolvency Law* (2010) p. 299, at p. 305).

cally analysing a wide range of Model Law cases in order to make an explanatory inference on the basis of the accumulated data.[64] The focus is on inbound cases where courts were asked to grant recognition or relief to single companies or corporate groups. The results are set out below.

3.1 **Methodology**

The study attempted to examine as many Model Law cases as possible (regarding companies and groups[65]), from as many countries (which adopted the Model Law[66]). Accordingly, various databases and electronic case search engines were used to find information about such cases.[67] Results were then skimmed to exclude cases which

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64 G. King, R.O. Keobane and S. Verba, *Designing Social Inquiry* (Princeton University Press, Princeton, New Jersey 1994), at pp. 7-8.

65 As aforementioned, natural persons were excluded from the study. The reason is that the focus of this study is on unification and centralisation of businesses in default and the fact that the international bankruptcy of individuals may present different problems. However, occasionally, cases of individuals will be mentioned where the approach taken by the court sheds some light on the relevant issues investigated here, in particular in jurisdictions where the overall number of cases is very low.

66 Note that countries may have adopted legislations or a common law approach inspired by the Model Law (see, e.g., the Cayman Islands' approach to cross-border insolvency in Ho, *supra* n. 25, at p. 87; see also *supra* n. 13), or had cross-border provisions before the Model Law came into force or retained such provisions alongside their Model Law version. This study only focused on the jurisdictions which enacted the Model Law as such and are included in the UNCITRAL list of states that adopted the Model Law (*supra* n. 12). It also excluded cases of courts of these states (which adopted the Model Law) where the decisions were purely based on general private international law relating to bankruptcy.

67 Several searches were performed over a period of a few months (June 2010-January 2011) for all decisions available under Model Law legislations between the entry into force of the legislation (see *infra* n. 70) and the end of 2010, using the following resources: CLOUT (Case Law on UNICTRAL Texts, which contains abstracts of some of the decisions under the Model Law), Westlaw, LexisNexis and the WorldLII (the World Legal Information Institute's website) (using the terms: 'foreign proceedings', 'main proceeding', 'non-main proceeding', 'model law', 'cross-border insolvency', 'recognition', 'insolvency', 'bankruptcy', 'COMI', 'establishment', name of country, title of legislation, and different combinations of these terms), as well as additional searches of trustees' websites. US decisions were also gathered from <http://www.chapter15.com> (accessed: May 2011), which is a website that includes all filings under the US Model Law from 17 October 2005 up to June 2009 (since July 2009, the website stopped updating its documentations; the resources above were used to complete information on cases mentioned on the website where documentation was missing and to gather decisions given between July 2009 and the end of 2010) and from Bloomberg Law Reports (<http://media.bloomberg.com/bb/blawreport/kNTM2NjEyNDU>; accessed: May 2011) which provides lists of the significant Chapter 15 proceedings filed during 2009-2010. We did not have access to the US PACER system but managed to gather 145 US Chapter 15 company cases; another study of US cases based on PACER includes 94 cases (see Leong, *supra* n. 20) and a further study (Westbrook, *supra* n. 20) covers 378 cases (but this includes cases of individuals and separate group member filings whereas this study counts each group case once, see *infra* n. 71), both between 2005-2009; another empirical study of US Chapter

were outside the scope of the present investigation.[68] These searches and enquiries produced a list of 195 cases (listed in the Table of Cases),[69] from eight jurisdictions.[70]

The data compiled from each case included, to the extent possible, basic factual information about the case, including the country of origin and whether it concerned

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15 cases (B. Dawson, 'Offshore Bankruptcies', 88 *Nebraska Law Review* (2010) p. 317) includes cases between 2005-2008 but does not give exact numbers of the overall data. Canadian cases were also gathered from the website of the Office of the Superintendent of Bankruptcy, <http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/h_br02281.html> (accessed: May 2011). UK unpublished recognition orders were obtained from the London High Court on August 2010 (orders tracked through advertisements filed in the London and Edinburgh Gazettes) as well as from trustees or counsels to trustees. The assistance of local lawyers in gathering cases was especially valuable in regard to the Republic of Korea, Japan and Mexico, where we had technical difficulties conducting direct comprehensive searches. For these jurisdictions further information was gathered from books and articles (Ho, *supra* n. 25; Y. Tashiro, K. Fuse and K. Ohashi, 'Foreign Insolvency Proceedings and Recognition and Assistance Proceedings in a Case of Hong Kong Liquor Makers', 23 *The Turnaround & Credit Management* (2010) pp. 103-110 (free translation from Japanese); R. Silverman and Y. Ide, 'Insolvency Law in Japan', *ABI Journal* (October 2009), at pp. 52-53). Data were taken from the orders or decisions regarding recognition and/or relief as well as applications and affidavits filed in the cases, where available.

68 I.e., cases not decided under the Model Law legislation, cases not concerned with inbound cases regarding recognition, relief or assistance, or cases concerning individuals.

69 Each case may have contained a number of decisions (by the same court or several courts). The data were not confined to closed cases as this could have limited the dataset considerably, especially since for most jurisdictions the Model Law legislation is new and there are only a few cases employing it. However, if there was no recognition or relief (apart from interim) order yet (case was pending to this effect or there was otherwise no information about the recognition or relief petition) the case was excluded. In case of a reversal of decisions by the same or a higher court, the final decision available was recorded, though the fact that there were obstacles in obtaining recognition or relief was also coded (see *infra* n. 72). Group petitions (see *infra* n. 71) were amalgamated and counted as one case. One of the cases in the dataset was split into two as that case included two petitions regarding two different proceedings (in different jurisdictions) against the same debtor, generating two different decisions (one denying recognition as main proceedings and one granting recognition as non-main proceedings).

70 UK Cross-Border Insolvency Regulations 2006, with effect from 1 April 2006 ('UK Regulations') (26 cases); Chapter 15 of the US Bankruptcy Code (11 USC, Sec. 1501, et seq.), with effect from 17 October 2005 ('US Chapter 15') (145 cases); Australian Cross-Border Insolvency Act 2008, with effect from 1 July 2008 ('Australian Act') (4 cases); Canadian Companies' Creditors Arrangement Act (CCAA), amended by Chapter 47 of the Statutes of Canada 2005, with effect from 18 September 2009 ('Canadian CCAA') (10 cases); New Zealand Insolvency (Cross-Border) Act 2006, Schedule 1, with effect from 24 July 2008 ('New Zealand Act') (3 cases); Title XII of the Mexican Mercantile Insolvency Law, with effect from 12 May 2000 ('Mexican Title XII') (1 case); Japanese Law for Recognition and Assistance to Foreign Insolvency Proceedings, with effect from 1 April 2001 ('Japanese LRAFIP') (3 cases); and Chapter 5 of the Republic of Korea Debtor Rehabilitation and Bankruptcy Act 2005, with effect from 1 April 2006 ('Korean Act') (2 cases). No cases were found for the other 11 jurisdictions which adopted the Model Law. Note that the Model Law provisions in the South African and British Virgin Islands legislation have not yet been brought into force.

a single company or a group.[71] Further data were collected about the recognition order and relief sought and granted, to the extent available. Specifically, it was enquired whether the recognising court was asked to recognise the proceedings as foreign main or non-main proceedings, which type of recognition order was granted, whether there were any obstacles in this context,[72] and what the reasons were for denying recognition (in case it was denied). In regard to corporate groups it was also asked whether the recognising court facilitated centralisation, i.e., recognised foreign proceedings in a place common to all group members under insolvency,[73] and, furthermore, whether the group was internationally spread or not, i.e., whether there was a locally registered subsidiary or other foreign registered affiliates (that is, not all affiliates were registered in the court seeking recognition).[74] Coding data about relief allowed appreciating the degree to which courts use their powers to grant relief apart from the basic stay of proceedings. Here too, it was assessed whether such an outcome involved any obstacles as defined above[75] (and what the reasons were for denying relief in case it was denied). The discretionary relief was split between the more distinctive (and universalist) type – i.e., entrustment of the distribution of assets to the foreign representative, deference to and application of the foreign law, enforcement of foreign judgments or orders directly in the recognising state; and any other discretionary relief.[76]

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[71] A group case was defined as a petition regarding two or more affiliates (either filed together, filed separately and later consolidated or considered jointly, or where orders were granted on the same date in regard to the same insolvency representative and members of the same group), or as a petition regarding a single entity where the insolvency of other affiliates in the same jurisdiction was mentioned in the case (but not merely mentioning the entity's relationship to other group members without information about the insolvency of those affiliates in the same jurisdiction) (An example is the case of *Stanford* (in the UK) where an application for recognition was made regarding the Antiguan company of the Stanford Group but its affiliation to other Stanford affiliates under receivership in the US was mentioned in the case (*Stanford International Bank Limited* [2009] EWHC 1441 (Ch), [2010] EWCA Civ 137)).

[72] Namely: objections by parties, appeals, conditions imposed by the court or stipulations agreed by the parties to which the order was subject.

[73] I.e., the court granted recognition (as foreign main or non-main proceedings) to proceedings against two or more affiliates in a foreign jurisdiction or to proceedings against a single company, mentioning its affiliation to another company under insolvency in the jurisdiction. Note that a case was coded as a 'centralisation' case even where it was concerned with part of a group, as long as the recognition order was granted in regard to all the group members petitioning for recognition. If one or more affiliates' proceedings (included in the petition) were not recognised in that same jurisdiction, the case was coded as a 'separation' case.

[74] If information was not conclusive on this point, the case was coded as a 'simple' one where all group members were registered in the same jurisdiction.

[75] *Supra* n. 72.

[76] See section 2 above for a delineation of types of relief under the Model Law. Note that when the court granted both the 'universalist' relief and other relief, it was coded as 'universalist'. Also note that the study did not code interim relief.

A few limitations of the dataset should be noted. First, the list of cases and the information on them is not exhaustive. Although the aim was to gather as many cases under the Model Law as possible rather than base the study on a sample, not all cases (and decisions in each case) were available to us. It is generally challenging to locate all relevant material from the different jurisdictions in the absence of a formal global unified registry of Model Law cases (apart from CLOUT, which is not comprehensive[77]). Additionally, decisions on these matters may not have been published, especially as over time, at least in some jurisdictions, the issuance of recognition orders may have become more ordinary and thus reasons for decisions are not necessarily issued.[78] Furthermore, where we were able to obtain unpublished decisions, the information available was sometimes limited.[79] In addition, as pending cases are included,[80] it might be that further decisions or orders were granted or previous orders were modified or terminated after the study had been concluded. Nonetheless, it is likely that mostly it is the unpublished decisions which are lacking (either such decisions are unavailable or they are the ones with less information), where it can be presumed that these were the more pedestrian applications where recognition and relief (or further relief following a previous recognition order) were granted as asked with no objections or important issues arising (or, in case of denial, the rejection was based on mere technicalities). The results should therefore be treated as a snapshot of the minimum rather than the maximum that the Model Law has managed to achieve. For the cases on which information was more limited (either because the case was pending or because a full docket of the case or written decisions were not available to us) this usually meant that only basic data could be gathered about recognition type, group type and centralisation, whereas further information about obstacles and relief was less conclusive. This limitation is taken into account in the results.

Second, the information available for the different jurisdictions is certainly not even, and for some jurisdictions there are many more cases than for others.[81] This is inevitable as the Model Law has been adopted in the various countries at different times and has generated very different amounts of decisions, and as information is more easily available in some jurisdictions than in others.[82] Therefore, the results regarding the various jurisdictions are not readily comparable. However, as the main aim of the research is to reveal the overarching general trend in courts around the world (rather than merely comparing between jurisdictions) the significance of the

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[77] See *supra* n. 67.

[78] See Grieve, *supra* n. 63, at p. 322.

[79] We have attempted to complete missing information by further investigating trustees' websites and data gathered from practitioners, but this was not successful in all cases.

[80] *Supra* n. 69.

[81] See *supra* n. 70.

[82] See *supra* n. 67.

results lies in their accumulative force. Nonetheless, where discrepancies in approaches are apparent, this is highlighted.

3.2 Recognition of foreign proceedings

The findings indicate that the Model Law actually works especially well in terms of facilitating recognition of proceedings opened in foreign countries. As shown in Table 1, out of the total of 195 cases forming the dataset of this study, recognition as foreign main or non-main proceedings was granted in all but nine of the decisions, i.e., 95% of the time. All these nine cases are US Chapter 15 cases, and in two of the cases where recognition was not granted, the court did not deny recognition as such, but rather the parties agreed that the petition would be dismissed. In another case, the court stayed the proceedings to allow the receiver to re-apply (as the original application did not meet the basic formal requirements).[83]

Moreover, in the vast majority of the recognition cases, courts granted recognition as foreign *main* proceedings (or with no specification as to whether the proceedings were main or non-main[84]). Only in six cases did the court recognise the foreign proceedings only as non-main proceedings;[85] in three of these six, the court was asked to recognise the proceedings only as non-main proceedings, and in one, the court was asked to recognise the proceedings either as main or as non-main proceedings. Only in two of these cases did the court find that the COMI of the company was actually in the recognising state (notwithstanding a petition to recognise the proceedings as main proceedings) and that there was only an establishment in the foreign jurisdiction.[86]

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[83] See further *infra* n. 100. And see similar conclusions reached in studies of US Chapter 15 cases (Leong, *supra* n. 20, at p. 13; Westbrook, *supra* n. 20, at p. 2). Both mention that US courts recognise foreign proceedings as main proceedings in almost all Chapter 15 filings, but note that Leong further states that Chapter 15 nonetheless represents territorialism, as he argues that courts grant only limited relief, see *infra* nn. 163-165 and accompanying text).

[84] As mentioned above, in some jurisdictions (Republic of Korea, Japan) there is no distinction between main and non-main proceedings in the legislation. Note that where the court granted recognition (either in a group or single company case) both as main and non-main proceedings (to the same debtor or to some affiliates in a group case) the case was coded as granting recognition as main proceedings, see *infra* n. 85) for an indication of the number of cases where such type of recognition was granted.

[85] In one case, there was no decision yet on the matter. All these cases are US Chapter 15 cases. Note, though, that in an additional six cases the court recognised proceedings as non-main in addition to recognising main proceedings. Five of these cases are cases concerning jointly administered corporate groups where in regard to some affiliates recognition was as non-main proceedings.

[86] *In re SPhinX Strategy Fund Ltd*., 351 B.R. 103 (Bankr. S.D.N.Y., 2006), aff'd, 371 B.R. 10 (S.D.N.Y 2007) (US); *In re Tradex Swiss AG*, Nos. 07-17180-JBR, 07-17518-JBR, 384 B.R. 34 (Bankr. D. Mass., 2008) (US).

Table 1: Frequency of granting recognition

	ROK[87]	UK	NZ	Aus	Jap	Mex	US	Can	All
Recognition granted	2[88] (100)	26 (100)	3[89] (100)	4 (100)	3 (100)	1[90] (100)	137 (94)	10 (100)	186 (95)
Main	2	26[91]	3	4	3	1	131[92]	10	181
Non-main	0	0	0	0	0	0	6[93]	0	6
Recognition denied[94]	0 (0)	0[95] (0)	0 (0)	0 (0)	0 (0)	0 (0)	9 (6)	0 (0)	9 (5)
Total	2	26	3	4	3	1	146	10	195

A breakdown of the cases between those where recognition was granted and those where it was denied. When recognition was granted, the cases are categorised according to type of recognition (main or non-main). The cases are presented per jurisdiction. (% of total cases in jurisdiction)

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[87] Republic of Korea.

[88] Recognition was also granted in a case involving an individual debtor (which is therefore not included in the dataset), though only after a second petition was filed and following reopening of the insolvency proceedings in the US, as the first recognition petition was denied due to proceedings being already closed in the US (the Korean court's conclusion in the first petition was that the applicant, who had formerly been a debtor in possession, no longer qualified as a foreign representative) (Seoul Central District Court 2006Gookseung1, 2007Gookseung2 (Republic of Korea)).

[89] In another case under the New Zealand Act which involved an individual (and is therefore not included in the dataset) and generated eight decisions thus far, the New Zealand court declined to recognise an English bankruptcy as either foreign main or foreign non-main proceedings under the New Zealand Act (Schedule 1), since the debtor's centre was in New Zealand and not in the UK (nor did he have an establishment there). Nonetheless, the court made an order to assist the English Court under Section 8 of the Act (which preserves the old assistance remedies) entrusting the administration or realisation of the assets owned by the bankrupt located in New Zealand with the foreign representative (*Williams* v *Simpson (No. 5)* HC Hamilton CIV 2010-419-1174, 12 October 2010 (New Zealand)) and had previously granted various interim relief under the New Zealand Model Law provisions (before determining on the COMI issue; *Williams* v *Simpson* High Court of New Zealand, HC HAM CIV 2010-419-1174 (New Zealand)).

[90] Another case under the Mexican Model Law which involved an individual (and is therefore not included in the dataset) supports the positive approach regarding recognition – in this case recognition under the Mexican Act was affirmed by the Supreme Court, which concluded that recognition was not unconstitutional (unless it contravened some public policy) and was not as such discriminatory and harmful to local creditors. Thus, although there was a challenge to recognition (which is more understandable when bearing in mind that it was the first known case under the Model Law) it was, eventually, clearly affirmed (see Amparo en revisión 1588/2004. Jacobo Xacur Eljure y otros, 26 October 2005 (Mexico)).

[91] In one other case, though, an English court mentions a recognition application of a Liberian liquidator (in the course of its decision on an application by the other party for permission to serve out of the jurisdiction for the purpose of winding up the company) and casts strong doubt on the likelihood of success of the recognition application. The court mentions that it is not clear whether the Liberian proceedings are 'foreign proceedings' for the purpose of the English Model Law as they are only supervisory proceedings. It also mentions the considerable problems associated with the judicial and legal system in Liberia (see *Flame SA* v *Primera Maritime (Hellas) Ltd* [2010] EWHC 2053 (Ch); we could not locate the recognition application or decision on that application).

[92] In one case, the court recognised the proceedings either as main or as non-main proceedings.

Furthermore, in the vast majority of the cases (86%) recognition was a rather smooth process. Only in 14% (27 cases)[96] of the total of 186 cases (where recognition was granted) were obstacles[97] recorded. Furthermore, in the vast majority of those cases the court simply rejected any objection.[98] Admittedly, data limitations[99] may suggest that some objections may not have been recorded, but in any case it is clear that the vast majority of objections were in fact rejected and recognition was granted.

The cases where the courts did not grant recognition were not only scarce but also mostly based on the objective criteria incorporated in the Model Law.[100] The *Bear Stearns* case[101] is an example. Here, the court was faced with an application of Cayman Islands liquidators to recognise Cayman Islands proceedings in the US. The US court noted that there was no significant presence of the two hedge funds in the Cayman Islands even though they were registered in that jurisdiction. In fact, their COMI was in the US. It therefore reached the conclusion that recognition (either as main or non-main proceedings) should be denied notwithstanding the fact that no one objected to the recognition petition. The decision was confirmed on appeal.[102] Only

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93 As aforementioned, cases where only some of the affiliates' proceedings were recognised as non-main proceedings or where proceedings against the same debtor were also recognised as main proceedings were coded as 'main proceedings' cases. There are six such cases.

94 Including the cases where recognition was not denied but was not granted either (see text preceding n. 83).

95 Note that in one case (*In re Stanford International Bank Limited* [2009] EWHC 1441 (Ch) [2010] EWCA Civ 137 (UK)) the court denied recognition of the US receivership but at the same time (same case) granted recognition as main proceedings to the Antiguan liquidation in regard to the same company.

96 24 cases under US Chapter 15, two cases under the UK Regulations and one case under the Canadian CCAA. Only objections specifically targeted at the recognition of the foreign proceedings are included here.

97 See *supra* n. 72.

98 In one case, recognition excluded one entity of the group and the parties thereafter agreed to dismiss the petition regarding this entity (see *infra* nn. 139-140 and accompanying text), in another case the recognition was subject to a stipulation regarding safeguarding certain rights (see *infra* n. 136), and in a few others (2) objections resulted in the court recognising the proceedings as non-main proceedings (see *supra* n. 86).

99 See section 3.1.

100 In three cases, the court determined that there was no COMI or establishment in the foreign jurisdiction; in one case, the court denied recognition based on absence of 'foreign proceedings' (as well as on public policy considerations, see *infra* n. 103); in one case, the procedure was not complied with; and one case was closed following determination that the receiver was in contempt of a US sale order. As aforementioned (text preceding n. 83), two other cases were closed following an agreement to dismiss the petitions, and in another case the court gave the representative 60 days to file a petition complying with the formalities under the Model Law.

101 *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, No. 07-12383, 374 BR 122 (Bankr. S.D.N.Y., 2007), aff'd 389 BR 325 (Bankr. S.D.N.Y., 2008) (US).

102 See also *In re Basis Yield Alpha Fund (Master)*, No. 07-12762, 381 BR 37 (Bankr. S.D.N.Y., 2007) (US); *In re British American Insurance Company Ltd* 425 B.R. 884 (Bankr. S.D. Fla, 2009) (US).

one case of recognition denial could be dubbed as more territorialist since it was, at least partly, based on the public policy exception, specifically the violation of a local (US) moratorium with extraterritorial effects.[103] Indeed, in certain circumstances, where, for instance, the objective criteria are not met (e.g., the company is neither centred nor has an establishment in the foreign jurisdiction, the foreign proceedings are not collective judicial or administrative proceedings or the procedure is not complied with) it is appropriate to deny recognition. Such rejections of recognition should not be viewed as 'territorialist'. The recognition process should not be a rubber-stamp exercise even when no objection is filed.[104] In any event, all in all, the findings show that recognition is rather easy and frequent and its denial too rare to be indicative of territorialist inclinations.

It also became evident from the results that recognition as foreign main proceedings is not confined to a close circle of countries. Although the vast majority of cases in the dataset are US Chapter 15 cases (146 of the 195 cases), the fact of the matter is that the other countries represented in the study also granted recognition to foreign proceedings. In fact, it is only in the US that some non-recognition cases were recorded. Additionally, although Canada and the US frequently featured in the other countries' recognition decisions (50 of the 146 US cases originated in Canada and 7 of the 10 Canadian ones in the US), many other countries were represented in the decisions of the different courts studied here. Specifically, main proceedings[105] were recognised in the Netherlands, Hong Kong, the US, the Republic of Korea, Australia, Japan, the Cayman Islands, Poland, Antigua, Switzerland, the British Virgin Islands, Belize, Germany, Kazakhstan, Italy, the Isle of Man, Mexico, Bermuda, France, Saint Vincent and the Grenadines, Spain, Iceland, Singapore, Nevis, Denmark, Aruba, Bahrain, Brazil and Russia[106] – a broad range of countries of different sizes and economic significance.

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[103] The court determined that the Israeli receivership was in violation of the automatic stay under US Chapter 11 and thus recognition would contravene public policy; it also concluded that the Israeli receivership did not constitute foreign proceedings (*In re Gold & Honey Ltd.*, 410 B.R. 357 (Bankr. E.D.N.Y., 2009) (US)).

[104] See also L.C. Ho, 'Creative Uses of Chapter 15 of the US Bankruptcy Code to Smooth Cross-Border Restructurings', 24 *Journal of International Banking Law and Regulation* (2009) p. 485, at p. 488.

[105] Or recognition of proceedings with no distinction between main and non-main proceedings (see *supra* n. 63).

[106] The Republic of Korea recognised main proceedings from the Netherlands (1) and Hong Kong (1); Japan recognised main proceedings from the US (1) and Hong Kong (2). Mexico recognised main proceedings from the US (1). New Zealand recognised main proceedings from the US (1), the Republic of Korea (1) and Australia (1). Australia recognised main proceedings from the Republic of Korea (1), the UK (1), Japan (1) and the Cayman Islands (1). The UK recognised main proceedings from the US (6), the Republic of Korea (3), Poland (1), Antigua (1), Switzerland (2), the British Virgin Islands (1), Japan (2), Belize (1), Germany (1), the Cayman Islands (2), Kazakhstan (2), the Netherlands (1), Italy (1) and the Isle of Man (2). Canada recognised main proceedings from the US (7), Mexico (1), Japan (1) and the UK (1). The US recognised main

Certainly, the results regarding recognition are reassuring. Courts (in the different countries which adopted and are applying the Model Law) are not acting in a territorial mode as recognition is easy and widespread. This seems to be clear to parties involved in such processes as objections to recognition are rather rare (and if they are advanced, they are usually rejected). Certainly, the public policy exception is rarely applied in this context. Thus, the goal of the 'recognition principle'[107] is being achieved as it manages, in practice, to produce prompt decisions with limited obstacles (if any) on the way, avoiding lengthy and time-consuming processes of recognising foreign proceedings in the jurisdiction where the company has had some of its interests. This brings certainty to the process. Recognition of the proceedings as main proceedings also usually means that some automatic relief will ensue[108] and, either way, it allows the court to consider discretionary relief that may be appropriate in the circumstances.[109]

These findings represent the general approach of the courts to recognition filings, without distinguishing between single and group cases. Yet, as aforementioned, it is interesting to appreciate the extent of the group phenomenon in the context of the Model Law case law and the approach of the courts specifically in these scenarios. The next section focuses on groups.

3.3 Centralisation of group proceedings

In light of recent debate and new developments regarding the 'group problem',[110] it is important and timely to investigate those cases where recognition was sought for a number of affiliates: are these scenarios frequent? Do courts allow centralisation of group proceedings in a single jurisdiction? And if so, is this confined to the 'simple' cases where all group entities 'come' from (i.e., are incorporated in) the same jurisdiction? As discussed above,[111] a territorialist prediction would be that courts will be reluctant to surrender control over locally registered affiliates. If the group is 'mixed' (in terms of the affiliates' origin), recognising all proceedings in a single jurisdiction requires either rebutting the presumption that the main proceedings are in

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proceedings from the UK (21), Hong Kong (1), Bermuda (5), Canada (50), the Cayman Islands (4), Saint Vincent and the Grenadines (1), the Republic of Korea (5), the Netherlands (1), France (3), Japan (7), Australia (6), Spain (2), Germany (5), Iceland (3), Singapore (1), Nevis (1), the British Virgin Islands (3), Kazakhstan (2), Denmark (1), Aruba (1), Mexico (3), Bahrain (2), Italy (1), Brazil (1), Russia (1) and Denmark (1). Note that some of these recognition orders were related to more than one company (i.e., to a group of companies).

107 See A/CN.9/WG.V/WP.97 (United Nations Commission on International Trade Law, Working Group V (Insolvency Law)), Judicial Materials on the UNCITRAL Model Law on Cross-Border Insolvency, 1 September 2010, at p. 12.

108 *Supra* n. 27.

109 *Supra* n. 28. On relief, see further below.

110 See *supra* nn. 7, 17 and 19 and accompanying text.

111 See *supra* n. 17 and accompanying text.

the jurisdiction of the registered office of the affiliate (at least for some of the members), or recognising those proceedings as non-main proceedings in the same place. In any case, these (mixed groups cases) may require more careful consideration of the jurisdictional rule and possibly the consideration of the group structure and management. Generally, results showing frequent recognitions of foreign proceedings against group members in a single jurisdiction, even in the cases where such centralisations are sought for wholly foreign groups and where all members are registered in the same jurisdiction, would suggest that this possibility is often sought by parties and that courts generally support it.[112]

Table 2: Frequency (and type) of group centralisations

	UK	Australia	Japan	US	Canada	All
Group centralisation[113]	2 (66)	2 (100)	1 (100)	62 (93)	8 (100)	75 (94)
Locally registered affiliates[114]	0	0	0	18	7	25
Companies registered in different foreign jurisdictions[115]	0	1	0	9	0	10
All companies registered in same jurisdiction	2	1	1	35	1	40
Separation[116]	1 (33)	0 (0)	0 (0)	5 (7)	0 (0)	6 (6)
Total group cases	3	2	1	67	8	81

A breakdown of the group cases between those where recognition was granted to group proceedings and those where it was denied. Where group recognition was successful, the cases are categorised according to type of group centralisation. Cases are presented per jurisdiction. (% of total cases in jurisdiction)

The results revealed first of all that the proportion of group cases (out of all the cases under the Model Law legislations within the dataset of this study) is substantial. 81 (of 195) cases (i.e., 42%) were group cases (many of these concerning more than one

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112 Of course, courts applying the Model Law can only facilitate centralisations by granting recognition to a centralised process opened in a foreign jurisdiction (see text accompanying nn. 57-59).

113 See *supra* n. 73.

114 I.e., at least one of the group members was incorporated in the recognising state.

115 I.e., groups with members from different jurisdictions (but with no affiliate in the recognising state).

116 I.e., where recognition (either as main or non-main proceedings) is not granted to all affiliates in the same jurisdiction (or to a single member in the foreign jurisdiction where another insolvent affiliate is under insolvency proceedings as mentioned in the case).

company and sometimes numerous entities).[117] In the US, nearly half of all cases were group cases and in Canada the vast majority involved groups.[118] Apparently, the phenomenon of groups in international insolvency is momentous and thus deserves full attention. More interestingly, and as shown in Table 2, it appeared that courts applying the Model Law tend to facilitate centralisations of group proceedings. When faced with an application to recognise foreign proceedings in regard to a number of group members in the same jurisdiction, courts usually (in 94% of the group cases) grant such recognition. 'Separation' cases are rare and decisions on 'separation' are not always concerned with the group scenario (i.e., treating each member separately and ignoring the group context) but are sometimes based on other reasons.[119]

Moreover, centralisations are frequent not only when all group members originate (in terms of their forum of incorporation) from the same jurisdiction. Thus, in almost half of the cases (35 of the total of 75 group centralisations) the group was mixed (that is, it was not wholly registered in a single foreign jurisdiction),[120] and in a third (25) of the cases of total group centralisation the group had a locally registered affiliate.[121] In regard to all these types of groups, courts usually (in the vast majority of cases, i.e., 90%) recognised all the proceedings (of the group members) as main proceedings.[122] It is therefore evident that courts tend to facilitate joint processes abroad, even if this requires rebuttal of the presumption that the COMI is at the registered office and even where this is done in regard to a local entity. In this context, courts seem to heavily rely on the location of senior management or the global headquarters as factors connecting all the entities to the foreign jurisdiction, and sometimes even refer to the 'group centre' in the reasoning behind recognising all members' proceedings as foreign main proceedings (in the same jurisdiction).[123]

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[117] See the meaning of groups used in this study, *supra* n. 71.

[118] 8 of 10 (80%) in Canada and 67 of 146 (46%) in the US (note that Westbrook, *supra* n. 20, shows that group cases only constitute a third of the total US Chapter 15 filings, but he seems to have employed a narrower definition, only including groups administered jointly (cf., n. 71 for the definition used here), and, in any case, a third is also quite significant). Also, our study may not have identified all the group cases as sometimes information was not comprehensive. The number of cases is therefore the minimum but there may be more group cases.

[119] Violation of an automatic stay, or an improper application which does not meet the formal requirements.

[120] Note that when information was not clear as regards the origin of an entity, we presumed that it was registered in the same foreign jurisdiction (i.e., that it was a 'simple' case).

[121] Table 2 shows the distribution of these results between the different jurisdictions.

[122] Only in 7 of the total of 75 cases did the court recognise some or all of the foreign proceedings as non-main proceedings (3 with locally registered subsidiaries, 3 with companies registered in different jurisdictions and 1 where all companies were registered in the same jurisdiction).

[123] See, e.g., *In re Shermag Inc.*, No. 08-12015 (Bankr. M.D.N.C. Jan. 14, 2009) (US) (the court stated that '[t]he Canadian proceedings are pending in Canada which is the location of the Shermag group's centre of main interests, and as such, constitutes foreign main proceedings…').

Furthermore, even if in regard to some of the subsidiaries proceedings are recognised as non-main proceedings, this does not preclude centralisations. Evidently, in the seven cases where the court recognised proceedings against certain affiliates as non-main proceedings,[124] these were not proceedings separately opened against parts of the group in other jurisdictions, but rather proceedings opened against the affiliates in the same jurisdiction where insolvency proceedings were opened against other affiliates. Here too, recognising courts accepted and facilitated such joint handling of group proceedings by granting recognition to all the proceedings, albeit by recognising some as non-main proceedings, and by granting relief in relation to all the group members. For example, in *AXA Insurance*,[125] the court granted recognition as main proceedings (in the UK) to three of the four group entities and as non-main proceedings to the French subsidiary. Subsequently, the court enforced a UK scheme of arrangement regarding all entities.[126]

These findings are quite encouraging and support the view that centralisations become a common practice, supported by courts applying the Model Law. Nonetheless, it seems that there is still room for improvement. First, although centralisations are common, they are mostly associated with Canadian or US groups and with Canadian or US decisions. Thus, out of the 75 cases in which centralisation occurred, 62 were US Chapter 15 cases. Of these cases, 36 involved recognition of foreign proceedings in Canada. Another 8 centralisation cases were Canadian CCAA cases. Of these cases, 6 involved recognition of foreign proceedings in the US. This is not to say that in other cases (not involving US or Canadian groups) centralisations were denied. On the contrary, the results show that there is no difference in centralisations' success rates when petitions come from elsewhere, or when proceedings are recognised by other courts.[127] The amount of centralisations the in US or Canada may also be a reflection of economic reality where many international groups operate in these jurisdictions. However, it may also suggest that parties operating in these countries (the US and Canada), and courts applying the Model Law there, are more aware of the centralisation possibility and thus make more use of it. Indeed, between Canada and the US, there is already a long experience of close

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[124] See *supra* n. 122.

[125] *In re AXA Insurance UK Plc et al.*, Nos. 07-B-12110 – 07-B-12113 (Bankr. S.D.N.Y., 2007) (US).

[126] In all group cases involving recognition of non-main proceedings (see *supra* n. 122) (except for one where relief was denied in relation to all the group entities), relief was granted in relation to all group members included in the petition. In 5 cases, the court enforced foreign plans, schemes or orders concerning the group companies. In one other case, only a stay was granted (discretionary relief was not requested). On relief, see further below.

[127] As shown in Table 2, the separation cases are mostly US ones. These are few (5) and one does originate in Canada. US courts recognise centralised proceedings from many other jurisdictions (26 centralisation cases did not originate in Canada). Other recognising courts which dealt with group petitions granted recognition to all members in a single jurisdiction too (except in one UK case, as is shown in the Table).

cooperation and deference in group cases even before the enactment of the Model Law.[128] There is no such well-established practice elsewhere.

In addition, according to the findings, some 20% of the obstacles (objections and appeals) concerning recognition in general[129] were related to group cases.[130] In Canada, the only case involving a major obstacle to recognition (but with recognition still being granted) was *Gyro-Trac.*[131] In this case, proceedings were opened in the US against three companies of the Gyro-Trac group, two of which were registered in Canada (the parent and one of the subsidiaries, the other subsidiary was locally registered). The US representative then sought recognition in Canada of the proceedings opened against the Canadian companies as main proceedings. A creditor objected, arguing that these proceedings should only be recognised as secondary proceedings. Yet, the court found that the companies had their main centre in the US (the court also mentioned the importance of finding a mutual COMI for all group members where a restructuring of the business was envisaged).[132] The creditor then sought leave to appeal, arguing that the lower court wrongly considered the COMI of the group instead of the COMI of each member separately. Ultimately, the Court of Appeal, refusing the leave to appeal, confirmed that the lower court had rightly determined where the COMI was regarding each group entity individually.[133] A notable case in the US where the group difficulty arose is *Main Knitting*,[134] where a Canadian representative sought recognition as main proceedings of proceedings opened in Canada against a Canadian parent and two US subsidiaries (as they were all centrally controlled in Canada). US creditors objected, arguing that the US subsidiaries had a significant presence in the US. Eventually, the parties reached a settlement which safeguarded certain rights of the US creditors (regarding their claims against US assets) to which the recognition order was subject.[135]

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128 See J.S. Ziegel, 'Corporate Groups and Crossborder Insolvencies: A Canada-United States Perspective', 7 *Fordham Journal of Corporate & Financial Law* (2002) p. 367; R.K. Rasmussen, 'The Problem of Corporate Groups, a Comment on Professor Ziegel', 7 *Fordham Journal of Corporate & Financial Law* (2002) p. 395.

129 See *supra* n. 96.

130 The other obstacles are mostly related to the factual determination of COMI in general and whether the proceedings are foreign proceedings, i.e., the application of the objective criteria.

131 *In re Gyro-Trac (USA) Inc.*, 2010 QCCS 1311 CarswellQue 2952 (Que. S.C.), *In re Gyro-Trac (USA) Inc.*, 2010 QCCA 800, 2010 CarswellQue 3727, EYB 2010-172927, 66 C.B.R. (5th) 159 (Que. C.A.) (Canada).

132 *In re Gyro-Trac (USA) Inc.*, 2010 QCCS 1311 CarswellQue 2952 (Que. S.C.) (Canada).

133 *In re Gyro-Trac (USA) Inc.*, 2010 QCCA 800, 2010 CarswellQue 3727, EYB 2010-172927, 66 C.B.R. (5th) 159 (Que. C.A.) (Canada). For further details on this case, see Grieve, *supra* n. 63, at pp. 312-319.

134 *In re Main Knitting Inc. et al.*, Nos. 08 (11272, 11273, 274) (Bankr. N.D.N.Y., 2008) (US).

135 See *In re Main Knitting Inc. et al.*, Nos. 08 (11272, 11273, 274), Order Granting Recognition of Canadian Proceedings under 11 U.S.C. S.1515 (Bankr. N.D.N.Y. June 18, 2008) (US); Stipulation and Order Resolving Objection of HSBC Bank USA, National Association to Petition for Recognition of Canadian Proceedings under 11 U.S.C.

Moreover, group centralisations have not always been successful, and some of the separation cases (where the court denied recognition to some or all of the affiliates) appear to be closely linked to the group problem. In *Stanford*,[136] the English court denied recognition of the US receivership,[137] finding the COMI of the Stanford subsidiary to be in Antigua and not the US (which was the centre of the fraudulent activities of the Stanford Group). In another case,[138] creditors objected to the inclusion of a separate US corporate entity in the French liquidation proceedings, arguing that this would contravene public policy. The recognition order excluded this entity and eventually the parties agreed to dismiss the Chapter 15 petition regarding this entity and to coordinate between the French and US Chapter 11 proceedings.[139]

Finally, it should also be noted that the data indicate that in the US, Canada and elsewhere there were other group insolvencies where proceedings were not opened in the same jurisdiction. Consequently, in these cases there was no group recognition process under the Model Law, or otherwise such a process encompassed only parts of the insolvent group. For example, in the Chapter 15 case of *Spansion*,[140] it is mentioned that separate Chapter 11 proceedings were opened against affiliates of the Japanese company; in *Mecharcome*,[141] Chapter 15 proceedings were filed regarding Canadian proceedings while a restructuring process against subsidiaries was ongoing in France; in *Nortel*, proceedings regarding part of the group were opened in Canada and regarding another part in the UK (both were filed for Chapter 15 recognition[142]); and so forth. This may reflect the economic reality where some groups may be non-integrated or decentralised to such a degree that centralisation was either difficult or not required.[143] However, bearing in mind the absence of explicit rules for groups in the Model Law and the obstacles that parties may encounter in proving the existence of a mutual COMI, it is not unlikely that even when centralisation will benefit cases of group collapses, it is not always sought (or achieved).

In conclusion of this point, courts applying the Model Law appear to take a fairly universalist stance quite frequently when faced with group cases. This is quite encouraging, especially as there are no concrete rules for this type of cases in the Model Law. Once group proceedings are opened in a single jurisdiction (based on that jurisdiction's private international law rules or based on the EC Regulation if in Europe) they will usually be recognised as such in Model Law jurisdictions, even

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136 *In re Stanford International Bank Limited* [2009] EWHC 1441 (Ch) [2010] EWCA Civ 137 (UK).

137 But at the same time granted recognition as main proceedings to the Antiguan liquidation regarding the same company.

138 *In re S.N.C. Summersun et cie, et al.*, No. 06-10955 (SMB) (Bankr. S.D.N.Y.) (US).

139 See Stipulation and Order in Aid of Chapter 11 and Chapter 15 Cases, 2 May 2007.

140 *In re Spansion Japan Limited*, No. 09-11480 (Bankr. D. Del., 2009) (US).

141 *In re Mecachrome International Inc.*, No. 09-24076 (Bankr. C.D. Cal. June 5, 2009) (US).

142 See *In re Nortel Networks UK Limited*, No. 09-11972 (Bankr. D. Del. June 8, 2009) (US); *In re Nortel Networks Corporation, et al.*, No. 09-10164 (Bankr. D. Del. Jan. 14, 2009) (US).

143 See Mevorach, *supra* n. 7, at pp. 158 and 189-94.

where some of the entities of the groups are registered in the recognising state. This practice entails a reduction in administrative costs of handling multiple proceedings in different jurisdictions against what is essentially the same global business. It also increases the likelihood of achieving unified solutions for the group and, as a consequence, greater returns to creditors (especially where groups are integrated and, accordingly, a package sale or a group-wide reorganisation plan can be most beneficial).[144] However, there is still a case for making this possibility more widespread, while also clarifying how such centralisations can be achieved. This will further enhance certainty of outcomes in this context and efficiency in the handling of such proceedings, ensuring that the opening of joint proceedings regarding integrated groups could be easily recognised and avoiding any excessive litigation to this effect.

3.4 Granting relief to foreign proceedings

Turning to relief, here too, the results are quite reassuring. A territorialist prediction is that, apart from an automatic stay of foreign main proceedings (where this is available), further relief will not be granted, certainly not the universalist type such as the entrustment of distribution of assets to the foreign jurisdiction or deference to foreign laws, orders, schemes and so forth.[145] The present investigation indicates the contrary. As shown in Table 3, courts granted discretionary relief in 108 of the 186 recognition cases, i.e., about 60% of the time.[146] Notably, regarding 44 cases where recognition was granted, we did not have sufficient information about discretionary relief (that is, it might have been awarded or not).[147] If these cases were discarded from the total, then we could argue that in 3 out of every 4 cases (108 of 144, i.e., 75%) discretionary relief was awarded.

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144 *Idem*, at pp. 153-9 and 175-6. See also *supra* n. 19.

145 See text accompanying nn. 29-34.

146 This is apart from the automatic relief which follows recognition. Note that in Japan and the Republic of Korea where such relief is not automatic (*supra* n. 63) the courts did, at least, grant a stay of proceedings in all the cases in our dataset. Also note that, as mentioned above, in 6 cases (of all recognition cases) the court only recognised the foreign proceedings as non-main proceedings. In such cases any relief is discretionary. For 2 of these cases there was no information on relief. In the other 4 a stay of proceedings was granted as well as universalist relief (i.e., these cases were coded under 'universalist' discretionary relief).

147 Either we had only basic information about the case (whether it involved a single company or a group, the group type, whether recognition was granted and what type of recognition was granted) or information about the case was more comprehensive but indicated a request for further relief with no order on this issue available.

Table 3: Frequency of granting discretionary relief

Type of relief granted	ROK	UK	NZ	Aus	Jap	Mex	US	Can	All
Discretionary relief	1 (50)	11 (42)	2 (66)	4 (100)	2 (66)	1 (100)	78 (57)	9 (90)	108 (58)
'Universalist' discretionary relief[148]	0	3	0	1	0	0	58	5	67
Other discretionary relief[149]	1	8	2	3	2	1	20	4	41
No discretionary relief[150]	1 (50)	15[151] (58)	1 (33)	0 (0)	1 (33)	0 (0)	59 (43)	1 (10)	78 (42)
Total (cases granting recognition)	2	26[152]	3	4	3	1	137	10	186

A breakdown of the recognition cases between those where discretionary relief was granted (including type of relief) and those where it was not. Cases are split between the different jurisdictions. (% of total cases in jurisdiction)

Moreover, in 67 of the 108 cases where discretionary relief was granted (i.e., 62%) relief was particularly universalist, whereby courts turned over assets to the foreign jurisdiction, enforced its orders or deferred to its laws. For example, in *Swissair*,[153]

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148 Entrustment of the distribution of assets to the foreign representative, deference to and application of the foreign law, enforcement of foreign judgments or orders directly in the recognising state.

149 Providing information, examining witnesses, entrusting the administration or realisation of all or part of the debtor's assets in the jurisdiction with the foreign representative, and other means of cooperation and assistance (which do not amount to relief under the first category).

150 Either asked and not granted (6), or not asked (15), or no information about discretionary relief was available (44), or only final orders were available (according to which no discretionary relief was granted) but no information about the relief request (13).

151 In one recognition case (*Rubin* v *Eurofinance* SA [2009] EWHC 2129 (Ch); [2010] EWCA Civ 895 (UK)) relief (enforcement of foreign judgment) was actually granted following recognition but by applying common law rules, even though the application for relief was under the UK Regulations (and while avoiding a conclusion on the possibility of granting the relief under the Model Law; see further text accompanying nn. 176-178). Therefore, the case was coded as a no relief (under the Model Law) case.

152 In another UK Regulations case, the foreign liquidator asked the English court to open territorial proceedings in the UK. The case is not included in the recognition table since recognition was not sought, and it is not included in the relief table either, because although it is a case where the court granted discretionary relief, it was a 'territorialist' relief. The court did explain, though, that it was appropriate in the circumstances as it had been requested by the foreign representative and it was beneficial to the general body of creditors (see *In re OJSC Ank Yugraneft* [2008] EWHC 2614 (Ch) (UK)).

153 *In re Swissair* [2009] EWHC 2099 (Ch) (UK).

the English court remitted assets to the Swiss proceedings, to be distributed under Swiss law; in *Akers* v *SAAD*,[154] the Australian court recognised the Cayman Islands foreign proceedings and entrusted the distribution of all of the debtor's assets located in Australia to the foreign representatives. Similar relief was granted by US courts in cases such as *New World Network International*,[155] *Pope & Talbot Inc*.[156] and *Madill*.[157] In other cases, courts applied the Model Law to give full force and effect to a foreign scheme or reorganisation plan,[158] or to enforce other foreign orders.[159] As aforementioned, the Model Law does not deal with choice-of-law issues. Nonetheless, courts have been willing to defer to foreign insolvency laws or to apply foreign laws in Model Law cases. Thus, in *Qimonda*,[160] a US court deferred to German law in regard to questions of executory contracts. In *Condor*,[161] the US court applied foreign avoidance law (the law of Nevis) to recover certain assets fraudulently transferred to the US. Encouragingly, another empirical study, which focused on relief under US Chapter 15,[162] reports a rather similar finding. However, its interpretation is fundamentally different. Essentially, it showed that in about half of the Chapter 15 cases the courts granted universalist relief.[163] While this finding is presented as indicating a territorialist approach, here it is argued that it is actually a universalist sign. It is evident that in the Chapter 15 study the conclusion is based on the rationale that, according to the universalist prediction, courts will always grant such relief. Yet, this is rather unrealistic considering that relief is much dependent on circumstances, and it also ignores the fact that the universalist expectation is that the Model Law will be a catalyst of universalism – a step forward – rather than the final

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154 *Akers* v *SAAD Investments Company Ltd* [2010] FCA 1121 (Australia).

155 *In re New World Network International, Ltd*, No. 06-10157 (ALG) (Bankr. S.D.N.Y., 2006) (US).

156 *In re Pope & Talbot, Inc., et al.*, No. 08-11933 (Bankr. D. Del., 2008) (US).

157 *In re Madill Equipment Canada, et al.*, No. 08-41426 (Bankr. W.D. Wa., 2008) (US).

158 See, e.g., *In re Archangel Diamond Corporation*, 3 February 2010, No. CL-10-89559-00CL (Ont. S.C.J. [Commercial List]) (Canada); *In re AXA Insurance UK Plc et al.*, Nos. 07-B-12110 – 07-B-12113 (Bankr. S.D.N.Y., 2007) (US); *In re Tembec Industries Inc*., Case No. 08-13435 (Bankr. S.D.N.Y., 2008) (US).

159 Such as substantive consolidation; see, e.g., *In re Trade and Commerce Bank*, No. 05-60279 (Bankr. S.D.N.Y., 2005) (US); *In re Fraser Papers Inc*., et al., No. 09-12123 (Bankr. D. Del., 2009) (KJC) (US).

160 *In re Qimonda AG*, No. 09-14766, 425 B.R. 256 (Bankr. E.D. Va., 2009) (RGM) (US).

161 *In re Condor Insurance Limited*, 601 F.3d 319, 2010 WL 961613 (5th Cir. 2010) (US).

162 Leong, *supra* n. 20.

163 Note that there are several differences in dataset and categorisation between the Chapter 15 study and our study which may explain the slight difference in results. Our dataset of Chapter 15 cases contains cases regarding which there was no information about relief. In terms of categorisation, the Chapter 15 study focused specifically on the 'entrusting the distribution of assets' relief (which includes other relief, such as enforcement of schemes where the scheme included entrustment of distributions) whereas our category of universalist relief is broader (as it also includes deference to and application of the foreign law and enforcement of foreign judgments or orders directly in the recognising state).

solution.[164] Perhaps the interpretation depends on whether one wishes to see the glass as half empty or half full.

Table 3 further shows that in the other 41 (of the 108) discretionary relief cases, courts granted other types of discretionary relief (which were not coded as universalist) such as entrusting the administration or realisation of the assets in the jurisdiction to the foreign representative,[165] extending the stay of proceedings to preclude enforcement of securities,[166] appointing an international trustee to administer the local assets[167] or assisting the foreign trustee,[168] and allowing for the examination of witnesses[169] or for the discovery of information.[170]

All in all, the data suggest that the use of discretionary relief is certainly significant. Yet, there are some notable problems. First, there seem to be cases where discretionary relief could have been sought (as it could have been an appropriate and relevant relief in the circumstances) but was not.[171] For example, in the Japanese case of *Azabu Tatemono*,[172] in which the Japanese court recognised the foreign US Chapter 11 proceedings, a request to give effect to the debt discharge granted by the US court might have been suitable (giving a universal effect to the foreign proceedings) but was not pursued by the parties (most likely because such relief is not on the list of relief available under the Japanese LRAFIP (Law for Recognition

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164 See also Westbrook, *supra* n. 20, who does not provide details on relief but does give indicative examples of the flexibility and openness of US courts in granting relief under Chapter 15.

165 See, e.g., *In re Gyro-Trac (USA) Inc., et al.*, Superior Court, District of Quebec, 1 April 2010, *In re Gyro-Trac (USA) Inc., et al.*, Cour d'appel du Québec, 23 April 2010 (Canada); *In re Redcorp Ventures Ltd*., No. 09-12019 (Bankr. W.D. Wash., 2009) (US).

166 See, e.g., *In re Samsun Logix Corporation* [2009] EWHC 576 (Ch) (UK); *In re* TPC Korea Co., Limited (High Court, Chancery Division, 29 October 2009, 19984/2009) (UK).

167 See, e.g., Seoul Central District Court 2009Gookseung1, 2010Gookji 2, 3 November 2010 (Republic of Korea); *AHK*, Tokyo District Court (11 November 2003) (Japan).

168 See 206/2004 Juzgado Cuarto en Materia Civil en el Distrito Federal (8 June 2005) (Mexico).

169 See, e.g., *In re Laurence, Scott & Electromotors Ltd.*, No. 07-12017 (Bankr. S.D.N.Y., 2007) (US); *Omegatrend International Pty Ltd (in Liq)* v *New Image International Ltd NZHC Auckland CIV 2010-404-4098* (New Zealand).

170 See, e.g., *Picard* v *Film Advisers LLP* [2010] EWHC 1299 (Ch) (UK); *In re Pacific Northstar Property Group*, NZHC Auckland CIV 2009-404-6312 (New Zealand).

171 Only in 6 cases of the dataset was discretionary relief under the Model Law sought and not granted (though in one case it was granted under common law – see *supra* n. 151). In another 2 cases, the petition referred to 'universalist relief' but only 'other' relief was granted. General petitions for 'any additional relief' or 'any relief the court may think fit' and so forth were not coded though, since these do not represent an explicit request for universalist relief (however, including such requests, as was done in the empirical study of relief under Chapter 15 (Leong, *supra* n. 20), would certainly increase the number of cases where additional relief was requested and not granted). The dataset also contains cases involving requests for further relief but where orders on such requests were not available to us or where there was insufficient information about relief – such cases were coded under 'no information on discretionary relief' (see *supra* n. 147).

172 *Azabu Tatemono*, Tokyo District Court, 3 February 2006 (Japan).

and Assistance to Foreign Insolvency Proceedings)). Indeed, it is not clear whether such a petition would have succeeded. This eventually led to the opening of concurrent local proceedings in Japan to assess and adjudicate the local claims.[173] In another case, decided by English courts,[174] a request to apply foreign law, if granted, might have avoided excessive litigation and conflicting judgments of the UK and US courts. However, such relief was not sought.[175] Furthermore, courts seem to be hesitant regarding the extent to which they can rely on the Model Law provisions in order to give universal effect to foreign proceedings. For example, in one case,[176] the UK Court of Appeal 'by-passed' the Model Law (even though the Model Law was invoked) by granting particularly universalist relief under common law principles (direct enforcement of a foreign judgment) which was first denied by the lower court,[177] noting that:

> Having reached that conclusion, it is unnecessary to decide whether to cooperate with the New York Court by enforcing its judgment under the 2006 Regulations. *What troubles me is that the specific forms of cooperation provided by Article 27 do not include enforcement. Indeed there is no mention anywhere of enforcement yet the guidance clearly had it in mind. On the other hand cooperation 'to the maximum extent possible' should surely include enforcement, especially since enforcement is available under the common law.* I would prefer to express no concluded view about the point since it is unnecessary to my decision.[178]

Even when universalist relief was granted under the Model Law, for example, in *Condor* above, this was sometimes achieved only after much litigation and appeals.[179] Indeed, the grant of discretionary relief often involves obstacles (which is not unexpected for a discretionary power). Of the cases where discretionary relief was granted (108), in a third (32 cases) obstacles were recorded (objections, appeals, stipulations, etc.) of which about 70% (22 cases) involved subjecting the relief to conditions or reducing its scope.[180] For example, the stay on enforcement of

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173 The two parallel proceedings were then coordinated (see Silverman and Ide, *supra* n. 67).

174 *Perpetual Trustee* v *BNY* [2009] EWHC 1912 (Ch) (28 July 2009); [2009] EWCA Civ 1160 (6 November 2009); [2009] EWHC 2953 (Ch) (17 November 2009) (UK).

175 In the end, the parties reached a settlement. It should be noted, though, that the English and American courts communicated throughout the process and that the English court recognised the US proceedings as main proceedings.

176 *Rubin* v *Eurofinance* SA [2010] EWCA Civ 895 (UK).

177 *Rubin* v *Eurofinance* SA [2009] EWHC 2129 (Ch) (UK).

178 *Rubin* v *Eurofinance* SA [2010] EWCA Civ 895, para. 63 (UK) [emphasis added].

179 *In re Condor* (*supra* n. 161) the appellate court reversed the decisions of the first and second instance courts.

180 This does not include assurances such as mentioning in the decision that the relief will not contravene public policy, or is fair and reasonable, or that stakeholders will not be affected and so forth (as we cannot know for sure what the court would have decided if some stakeholders might have been affected); see also Leong, *supra* n. 20, who mentions that in many of the 'entrusting

securities in *Samsun*[181] was subject to the condition that the Korean receiver undertook not to argue that the security holder was bound by a decision of the Korean courts on the validity of the security if the creditor decided to participate in the Korean proceedings. As mentioned above, in *Main Knitting*,[182] a creditor objected to the centralisation of the group process in Canada. The court granted recognition and facilitated the centralisation, but the recognition and relief (which included entrusting the distribution of the assets to the foreign representative) was subject to a stipulation whereby it was agreed to safeguard certain rights of the US creditor in regard to property of the American subsidiary. Similarly, in *ROL Manufacturing*,[183] another group centralisation case, the court entrusted the distribution of the assets to the foreign representative subject to an agreement whereby certain US creditors would be paid in accordance with the US priority rules.

Additional ambiguities about universalist relief remain regarding the extent to which such relief is dependent on similarities with foreign laws. Thus, sometimes courts, while granting universalist relief, mention the similarity between the foreign and the local law. For example, in *Swissair*[184] (where assets were remitted), the English court mentioned that under Swiss law the assets would be distributed *pari passu* (as English law requires).[185] While this may not amount to subjecting the relief to conditions, it begs the question whether in different circumstances (where the foreign law was different) the outcome would have been the same. Nevertheless, differences between laws did not always present a problem to courts applying the Model Law. For example, in *Qimonda*,[186] the US court stressed the difference between the US and German laws regarding the treatment of executory contracts in

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distribution' cases (28) the US court imposed qualifications on this relief (but this seems to include various assurances to the court as well); cf., the findings on recognition (above) where there were less objections and the vast majority of objections were completely rejected (see *supra* nn. 96-98 and accompanying text).

181 *In re Samsun Logix Corporation* [2009] EWHC 576 (Ch) (UK).

182 *Supra* n. 134.

183 *In re ROL Manufacturing (Canada) Ltd*., No. 08-31022 (S.D.Oh., 2008) (US).

184 *Supra* n. 153.

185 See also the approach expressed by the English court in a recent EC Regulation case (*In re Alitalia Linee Aeree Italiane S.p.A*. [2011] EWHC 15 (Ch)). The particular point raised in the case was whether assets located in the UK should be turned over to the Italian trustee and applied in discharge of liabilities which were not preferential as a matter of English law but which would be accorded priority under Italian law (even though secondary liquidation proceedings were opened in the UK). The court denied the main insolvency representative's petition and mentioned that such a remedy would not accord with the EC Regulation scheme. Furthermore, it also stated that there was no inherent power in common law under which assets should be remitted to be applied otherwise than on a *pari passu* basis in accordance with English law principles. See also previously *In re HIH Casualty and General Insurance Ltd* [2005] EWHC 2125; [2006] EWCA Civ 732; *McGrath* v *Riddel* [2008] UKHL 21, decided before the entry into force of the UK Regulations, where in a second appeal the House of Lords agreed that assets should be turned over to Australia, yet the judges diverged in their reasoning for reaching that conclusion.

186 *Supra* n. 160.

bankruptcy (and noted that some creditors would be adversely affected by being subjected to German rather than US law) but nonetheless wholly deferred to German law.[187]

Furthermore, the use of universalist relief appears to be more common in some countries compared with others. In particular, the present study did not record any use of universalist relief in Japan, the Republic of Korea, New Zealand or Mexico. Specifically in Japan and the Republic of Korea the findings show that more relief might have been appropriate but might have seemed unavailable. The dataset here is extremely small but still indicates a rather territorialist tendency, which may also be a result of enactment of the Model Law in a manner which has limited accordance with the original Model Law.[188] Anyhow, although recognition has been rather easy to obtain, and these regimes too seem to have moved from a totally territorialist approach to a regime which takes a wider worldwide perspective, in terms of relief, local interests may still prevail. Thus, in the case decided by the Korean court where no additional relief was requested,[189] local proceedings were opened after the recognition of the foreign proceedings which rendered futile a request for additional relief (such as entrustment of the administration of local assets). A possible request for discretionary relief had a similar fate in another case under the Korean Act involving an individual debtor (which therefore is not included in the dataset). Here, relief was initially requested (appointment of an international insolvency trustee and invalidation of the seizure of the Korean assets) but eventually the request was withdrawn since local insolvency proceedings were opened against the debtor, notwithstanding the debtor's claim that he had already been discharged in the US proceedings. This was confirmed by the appellate court and the Supreme Court, which concluded that giving effect to the foreign discharge would be contrary to public policy.[190] Similarly, how universalist relief could have been appropriate (but was not sought) in the *Azabu Tatemono* case (Japanese) has already been discussed above.[191]

All in all, courts applying the Model Law do use the various types of relief provided for in the Model Law and even go beyond its specific language. The overall tendency is cooperative and often universalist. Nonetheless, there is a great deal of discrepancy between jurisdictions, as well as uncertainties regarding the type and extent of relief which can be granted. There is, therefore, scope for clarifications (as well as a wider use) of relief. In this regard, the leading principle should be deference

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187 See also *In re Metcalfe & Mansfield Alternative Investments*, 421 B.R. 685 (Bankr. S.D.N.Y. 2010), where the US court agreed to grant enforcement of Canadian discharges even though they contravened US law.

188 See *supra* n. 63.

189 Seoul District Court 2007Gookseung1, Gookji1, 18 October 2007 (Republic of Korea).

190 See Seoul Central District Court 2007Gookseung2, 2008Gookji1; Seoul High Court 2008 Ra1524; Supreme Court 2010Ma1600 (Republic of Korea).

191 See *supra* nn. 172-173 and accompanying text.

to the foreign main proceedings. This should include the turnover of assets or funds to the foreign proceedings, deference to the laws concerning bankruptcy of the foreign jurisdiction (regarding priorities, executory contracts, avoidance of transactions and so forth), enforcement of its judgments or orders directly in the recognising state including reorganisation plans or schemes, as the case may require and subject to the public policy exception only (which should rarely be applied). Such an approach will ensure efficiency and fairness, upholding the collective nature of insolvency proceedings whereby all rights and remedies of creditors and other stakeholders worldwide could be determined by a single court.

4. CONCLUSION

This paper has attempted to show that the Model Law can and in fact does operate in a relatively (i.e., modified) universalist way and has the potential to enhance the universalist ideal. Although it does not provide rules of international jurisdiction and automatic recognition (as does the EC Regulation) it can facilitate unity in bankruptcy via its recognition and relief mechanisms. Furthermore, the body of jurisprudence which has started to emerge shows that, in practice, it greatly facilitates uniformity in international insolvencies. Thus, recognition of foreign proceedings is quite a simple and common process, centralisation of group proceedings is supported by the courts and a range of relief is being sought and granted. A territorialist prediction that courts will remain committed to localism appears to be misplaced. Yet, the road to greater uniformity may involve taking more steps. In particular, the study has highlighted the need for clearer rules for international groups in insolvency and further standardisation and less discretion regarding relief. It is also apparent that some jurisdictions are taking the lead in pushing the universalist spirit enshrined in the Model Law forward, extending its scope and potential. Hopefully, this will encourage others to follow – both countries which have already enacted the Model Law and those that have not yet done so. In this way, the prospect of the Model Law becoming a truly global framework enhancing unity in insolvency could be realised.

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