ARTICLES

THE CROSS-BORDER INSOLVENCY PARADIGM: A DEFENSE OF THE MODIFIED UNIVERSAL APPROACH CONSIDERING THE JAPANESE EXPERIENCE

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1. Introduction

One truism of a free market economy is that there will be insolvencies. Just as this is true in the domestic market, it is true in

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¹ See Thomas M. Gaa, Harmonization of International Bankruptcy Law and Practice: Is It Necessary? Is It Possible?, 27 INT'L L. 881, 885 (1993) ("Municipal bankruptcy law is based upon a simple truth—some businesses and commercial transactions will fail, and consequently, some obligations will not be satisfied in full."); Robert M. Lawless & Stephen P. Ferris, Professional Fees and Other Direct Costs in Chapter 7 Business Liquidations, 75 WASH. U. L.Q. 1207 (1997) ("To function effectively, market economies must efficiently process those businesses that inevitably fail because of the market's workings."); When

the now universally recognized global economy. The problems raised by these so-called cross-border insolvencies² are not new

Countries Go Bust, ECONOMIST, Oct. 3, 1998, at 88 ("It is universally accepted that well-functioning economies need well-designed bankruptcy procedures.").

² This Article uses the terms "insolvency" (in Japanese, "tōsan") and "insolvency proceeding" to describe all formal liquidation and reorganization proceedings. Cf. 11 U.S.C. § 101(32) (1994) (defining "insolvent" in the U.S. Bankruptcy Code to mean, inter alia, a "financial condition such that the sum of such entity's debts is greater than all of such entity's property, at a fair valuation"); U.C.C. §§ 1-201(22), (23) (1999) (defining an "insolvent" for the U.C.C. as, inter alia, "[one] who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due or is insolvent within the meaning of the federal bankruptcy law"); Chūshō kigyō tōsan bōshi kyōsai hō [Medium and Small Industry Insolvency Mutual Prevention Act], Act No. 84, 1977, art. 84(2) (defining insolvency (tōsan) to be any proceedings in bankruptcy, composition, reorganization, administration, or special liquidation or when a party cannot pay its debts as they come due).

It is acknowledged that in the United States insolvency is used interchangeably with the term bankruptcy on the one hand, but used narrowly to describe an economic condition on the other. Internationally, such usage appears to be the exception rather than the rule. See, e.g., YOSHIMITSU AOYAMA ET AL., TŌSAN HŌ GAISETSU [GENERAL STATEMENT ON INSOLVENCY LAW] 1-3 (7th ed. 1994) (discussing the broad meaning of insolvency in contrast to the narrow meaning of bankruptcy); ROY M. GOODE, PRINCIPLES OF CORPORATE INSOLVENCY LAW 1 (2d ed. 1997) (noting that unlike the United States, in Britain the general term insolvency is used rather than the specific term bankruptcy). This Article uses the term bankruptcy (hasan) to refer only to liquidation proceedings of both natural and judicial persons, such as those mentioned in Chapter 7 of the U.S. Bankruptcy Code, 11 U.S.C. §§ 701-766 (1999). See Hasan hō [Bankruptcy Act], Law No. 71, 1922, art. 105 (providing jurisdiction for the bankruptcy liquidation of both natural and juridical persons). Cf. GOODE, supra note 2, at 1 (noting that the term bankruptcy, in England, refers more specifically to an individual insolvency, with companies going into liquidation).

In addition, for the sake of creating international uniformity of terminology, this Article employs the term "cross-border insolvency" to refer to an insolvency proceeding involving more than one country. Using various phrases to describe the same concept creates confusion and complicates matters unnecessarily. A general survey of the literature suggests that the most often used phrase is "cross-border insolvency," which is the term the United Nations, the American Bar Association, and the International Bar Association have decided upon. See UNCITRAL Model Law on Cross-Border Insolvency, U.N. GAOR, 52d Sess., Annex I, at 68-78, U.N. Doc. A/52/17 (1997) [hereinafter UNCITRAL Model Law]; Cross-Border Insolvency and Related Credit Issues Program, A.B.A. SEC. OF INT'L L. & PRAC. (2000), www.abanet.org/intlaw/publications/wshop/Spring200.html; Cross-Border Insolvency "Concordat", I.B.A., Committee J, (1996), http://www.ibanet.org/general/-Bookdetails.nsp?ID=Bk234. As noted above, most U.S. writers have employed the term bankruptcy on the one hand and a variety of cross-border, international, or transnational terms on the other. See Gaa, supra note 1, at 881 n.1 (identifying the issue and citing various examples, but ultimately opting to use the phrase

and have been the subject of debate for nearly 700 years.³ Traditionally, the way most states and scholars resolved the international issues inherent in these cases was by partitioning an insolvency along national borders. This approach—known as territorialism— is consistent with classical concepts of sovereignty and jurisdiction and permits local courts to control local assets pursuant to local laws. The system is simple and predictable, but results in duplicative administrative costs and potentially disparate treatment of similar creditors who happen to be in different countries. In response to these limitations, various commentators have sought to create a more fair and efficient system. For the greater part, the answer that those theorists devised was a system—known as universalism—where an international insolvency proceeded in a single forum and under a single law regardless of the actual location of the parties, claims, or assets. As a result of these efforts, in the mid-1970s the cross-border insolvency "paradigm"4 shifted from a territorial approach to the universal model.5

[&]quot;international insolvency and bankruptcy"). I have modest hopes that others, including U.S. legislative drafters, will embrace the uniform term "cross-border insolvency." See Bankruptcy Reform Act of 1999 Part I: Hearing on H.R. 833 Before the Subcomm. on Commercial and Admin. Law and the House Comm. on the Judiciary, 106th Cong. (1999) (referring to "Ancillary and Other Cross-Border Cases").

³ See Philip R. Wood, Principles of International Insolvency 291 (1995) (discussing a treaty signed in 1204 between Verona and Trent regarding transfer of debtor's assets); Kurt H. Nadelman, Bankruptcy Treaties, 93 U. Pa. L. Rev. 58, 62 (1944), reprinted in Kurt H. Nadelmann, Conflict of Laws: International and Interstate 299, 303 (1972) (reviewing the debate on the Pope's coordination of the Ammanati Bank insolvency involving interests in Italy, Spain, England, Portugal, Germany, and France in 1302 and one of the first insolvency conventions between Holland and Utrecht in 1679).

⁴ A "paradigm" is an analytical model that defines "the legitimate problems and methods of a research field for succeeding generations of practitioners" and "from which spring particular coherent traditions of scientific research." THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 10 (2d ed. 1970).

⁵ Compare Joseph Story, Commentaries on the Conflict of Laws § 410, at 346 (1834) (rejecting the "ubiquity" rule of insolvency for a territorial approach favoring "local diligence") with Jay Lawrence Westbrook, Choice of Avoidance Law in Global Insolvencies, 17 Brook. J. Int'l L. 499, 515 (1991) (stating that "Julniversality... has long been accepted as the proper goal of international bankruptcy law by leading writers"). See also Chin Kim & Jimmy C. Smith, International Insolvencies: An English-American Comparison with an Analysis of Proposed Solutions, 26 Geo. Wash. J. Int'l L. & Econ. 1, 5 (1992) ("T]he universality theory has provided a starting point for countries wishing to enter into bankruptcy treaties or seeking to revise their own bankruptcy

The problem that remained, however, was that universalism in its pure form was not feasible without an international convention, because states were generally unwilling to allow, or give effect to, a foreign court's unfettered extraterritorial actions. In response to this impediment, a number of nations created modified or hybrid systems that integrated some of the benefits of universalism while still recognizing many of the practical effects of territorialism. These new regimes—called modified universalism and secondary insolvency—combined extraterritorial statutes for local insolvencies with laws that allowed for, but did not require, cooperation with foreign insolvencies. Most academics tended to

codes.").

To bridge the universality and territoriality theories, a modified universality, or qualified universality, theory has emerged. Modified universality recognizes the difficulty, given strong national interests in the preservation of sovereignty and the absence of treaties, in creating truly unified proceedings. The result under the modified universality theory is a central administrative forum located in one country, supplemented by ancillary, or secondary, proceedings located in other countries. The modified universality theory represents a realistic solution to the conflict inherent in the principles of universality and territoriality. It combines both principles, maximizing the advantages and minimizing the disadvantages of both.

Anne Nielsen et al., The Cross-Border Insolvency Concordat: Principles to Facilitate the Resolution of International Insolvencies, 70 Am. BANKR. L.J. 533, 534 (1996) (internal citations and punctuation omitted).

Identifying exactly when the paradigm shifted is a difficult endeavor, but in the United States, and perhaps Europe, the shift arguably occurred following the Bankhaus I.D. Herstatt K.G.a.A., Israel-British Bank (London) Ltd., and Banque de Finacement, S.A. cross-border insolvencies in the mid-1970s. See Charles D. Booth, A History of the Transnational Aspects of United States Bankruptcy Law Prior to the Bankruptcy Reform Act of 1978, 9 B.U. INT'L L.J. 1, 27-37 (1991). In Japan, the paradigm likely shifted following the 1978 Kosei Maru case. See infra note 331. See Yasuhei Taniguchi, International Bankruptcy and Japanese Law, 23 STAN. J. INT'L L. 449, 461-62 (1987).

⁶ See GOODE, supra note 2, at 495.

⁷ See NEW ZEALAND LAW COMMISSION, CROSS-BORDER INSOLVENCY: SHOULD NEW ZEALAND ADOPT THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY?, Parliamentary Paper E31AM, N.Z.L.C. Rep. 52, ¶ 14 (Feb. 1999), available at http://www.lawcom.govt.nz/CrossBorder/R52con. htm [hereinafter NEW ZEALAND LAW COMMISSION] ("There has been debate internationally for many years over whether a bankruptcy has universal application or whether its application is limited to the place of adjudication.... Out of that debate a third theory emerged which is known as 'modified universality."). Other commentators have stated:

⁸ See, e.g., UNCITRAL Model Law, supra note 2, arts. 15-24; Corporations Act, 1989 § 581 (Austl.); Bankruptcy Act, 1966 § 29 (Austl.); Bankruptcy and Insolvency Act, 1997 § 271 (Can.); Insolvency Act, 1986 § 426 (Eng.); Ein-

view these solutions as compromises or intermediate steps on the way to the eventual goal of pure universalism.9

This status quo continued until just recently, when a revisionist or backlash movement began to question the universal paradigm. The revisionists have challenged the assumptions of the universalism system and recharged a debate most thought was long finished. One branch of this movement has suggested a return to the original system of localized procedures, i.e., territorialism, though with some cross-border coordination. Another branch has creatively proposed a model based on a contract theory of bankruptcy. That is, allowing companies and their creditors to agree freely on any applicable insolvency law and forum that, in the event of their demise, will govern all aspects of their insolvency.

Whether or not legislators, courts, and other policy makers eventually decide to follow the revisionists' approach, their arguments have been extremely beneficial in helping to identify, isolate, and address many of the problems that must be overcome in any cross-border insolvency system.¹⁵ Furthermore, unlike many

⁹ See, e.g., Jay Lawrence Westbrook, A Global Solution to Multinational Default, MICH. L. REV. *26, *38 (forthcoming 2000) (describing modified universalism as "an awkward, interim solution" and as the "second best universalist solution" to pure universalism).

¹¹ See Hanisch, supra note 10, at 153 ("It could most probably be agreed that pure territorialism . . . should be abandoned.").

führungsgesetz zur Insolvenzordnung (EGInsO) [Introductory Code to the Insolvency Code], art. 102 (Ger.); Presidency Towns Insolvency Act, 1909 § 126 (India); Provincial Insolvency Act, 1920 § 77 (India); Bankruptcy Act, 1988 § 142 (Ir.); Insolvency Act, 1967 § 135 (N.Z.); 11 U.S.C. § 304 (1999) (U.S.).

¹⁰ See Lynn M. LoPucki, Cooperation in International Bankruptcy: A Post-Universalist Approach, 84 CORNELL L. REV. 696 (1999); Robert K. Rasmussen, A New Approach to Transnational Insolvencies, 19 MICH. J. INT'L L. 1 (1997). A backlash of sorts might also be seen in the EU's rejection of universalism for a secondary approach. See, e.g., Hans Hanisch, "Universality" Versus Secondary Bankruptcy: A European Debate, 2 INT'L INSOLVENCY REV. 151 (1993).

¹² See LoPucki, supra note 10, at 701-02.

¹³ See Rasmussen, supra note 10, at 5.

¹⁴ *Id.* at 4-5.

¹⁵ In addition to this Article, the revisionists have spurred a flurry of responses. See Hannah L. Buxbaum, Rethinking International Insolvency: The Neglected Role of Choice-of-Law Rules and Theory, 36 STAN. J. INT'L L. 23 (2000); Ulrik Rammeskow Bang-Pedersen, Asset Distribution in Transnational Insolvencies: Combining Predictability and Protection of Local Interests, 73 AM. BANKR. L.J. 385, 385-86 (1999); Symposium, Cross-Border Insolvency, MICH. L. REV. (forthcoming 2000) (containing essays by professors Arthur T. Guzman,

theoretical debates, this one actually matters. Global, regional, bilateral, and domestic proposals to address international insolvencies are on the table worldwide, and many will likely be adopted in some form in the next few years. ¹⁶ Thus, now more

Lynn LoPucki, Robert Rasmussen, and Jay Westbrook); Lisa Perkins, Note, A Defense of Pure Universalism in Cross-Border Corporate Insolvencies, 32 N.Y.U. J. INT'L L. & Pol. (2000).

The most obvious global proposal is the UNCITRAL Model Law, supra note 2, which is actually a model for unilateral domestic legislation. See The Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency, [1997] XXVIII UNCITRAL Y.B., U.N. Doc. A/CN.9/442, available at http://www.uncitral.org/english/sessions/wg_il/acn9-442.htm, reprinted in 6 TUL. J. INT'L & COMP. L. 415 (1998) [hereinafter Guide to Enactment of UNCITRAL Model Law]; Ron W. Harmer, UNCITRAL Model Law on Cross-Border Insolvency, 6 INT'L INSOLVENCY REV. 145 (1997). True multilateral treaty approaches most notably include the International Bar Association Committee J's 1986 Model International Insolvency Cooperation Act (MIICA) and its 1996 Cross-Border Insolvency "Concordat." See Harold S. Burman, Harmonization of International Bankruptcy Law: A United States Perspective, 64 FORDHAM L. REV. 2543, 2557-58 (1996); Nielsen et al., supra note 7 (reviewing the Concordat).

Regionally, the most obvious project is within the European Union, see European Union Convention on Insolvency Proceedings, Nov. 23, 1996, 35 I.L.M. 1223 [hereinafter EU Convention], which is now being enacted as a regulation. Council Regulation 1346/2000 of 29 May 2000 on Insolvency Proceedings 2000 O.J. (L 160) 1. The American Law Institute ("ALI") is reviewing the various possible approaches to insolvency co-operation among the North American Free Trade Agreement ("NAFTA") nations. See E. Bruce Leonard, The American Law Institute's Transnational Insolvency Project, 1999 ABI JNL. LEXIS 210.

Bilaterally, a number of proposals have been made. See, e.g., RAJ BHALA, BANK OF JAPAN, INTERNATIONAL DIMENSIONS OF JAPANESE INSOLVENCY LAW: A CONTEXTUAL APPROACH 58-59 (Inst. for Monetary and Econ. Studies, Discussion Paper No. 99-E-26, 1999); Peter G. Totty, Proposal for a Model International Bilateral Insolvency Treaty, with Capability for Adoption by the E.E.C., in CROSS-BORDER INSOLVENCY: COMPARATIVE DIMENSIONS 271-284 (Ian F. Fletcher ed., 1990) (proposing a series of interlocking bilateral insolvency treaties); Shoichi Tagashira, Intraterritorial Effects of Foreign Insolvency Proceedings: An Analysis of "Ancillary" Proceedings in the United States and Japan, 29 Tex. Int'l L.J. 1, 38 (1994) (proposing a bilateral treaty between the United States and Japan and stating, "further progress towards universality can best be accomplished through bilateral treaties. As the economic relationship between the United States and Japan develops further and cases involving the two countries accumulate, the time will become ripe for a bilateral treaty in the field of insolvency law."). But see Kim & Smith, supra note 5, at 29-30 (concluding that the bilateral treaty approach is not practical given temporal and substantive obstacles).

Legislation for revision of domestic insolvency statutes consistent with the UNCITRAL Model Law has been introduced in, among others, New Zealand, South Africa, and the United States. See NEW ZEALAND LAW COMMISSION,

than ever before in the seven centuries of theoretical philosophizing, the issue is ripe.

Sitting in the midst of this debate is Japan. Japan is in a unique position. First, Japan's insolvency system is among the most territorial of those employed by developed nations today. The Japanese experience, therefore, provides an excellent case study of how the territorial approach actually performs in the modern global economy. Second, the debate is particularly important to Japan, which is currently in the process of revising its entire insolvency scheme.¹⁷ The results of the debate will likely

supra note 7, ¶ 75. As of June 8, 2000, only Eritrea and Mexico have reported adopting legislation based on the UNCITRAL Model Law. See UNCITRAL, STATUS OF CONVENTIONS AND MODEL LAWS, pt. II, para. 13 (2000), available at http://www.uncitral.org/english/status/index.htm (last modified Oct. 11, 2000). Japan presently is reviewing its insolvency statutes. See infra note 17.

The government recently initiated an official comprehensive review of Japan's insolvency proceedings; however, final recommendations are not expected for some time. See Shozo Miyake, Japanese International Insolvency: The Problem of Territoriality, INT'L BUS. LAW. 238, 240 (May 1996); Kokusai tōsan hō sei seibi e [Towards Completion of the Cross-border Insolvency Law System], ASAHI SHIMBUN, Feb. 23, 2000, at 3. It was recently reported:

Japan is set to install a new legal framework for cross-border insolvency to cope with the growing number of corporate bankruptcies that cut across national boundaries, Justice Minister Hideo Usui said The Justice Ministry plans to extend the scope of domestic bankruptcy procedures to cover overseas assets and in turn subject domestic assets to bankruptcy proceedings initiated outside Japan upon approval from domestic courts.

Cross-Border Insolvency Steps Slated to Meet Times, JAPAN TIMES, Feb. 23, 2000, at 9. Further, the Supreme Court of Japan, as administrator of the judicial system, has stated:

[W]e are now facing another problem, which is revision of the insolvency system. Insolvency cases, which range from consumer bankruptcy cases to big corporation bankruptcy or reorganization cases, have been increasing sharply these days. But the insolvency procedure in this country is set up mainly on the basis of the Bankruptcy Law and the Composition Law, each of which was enacted more than seventy years ago. So the insolvency system has been criticized as being malfunctioning and not meeting the demand from the society. Under these circumstances, the insolvency system is now under revision. It is expected that a draft of the new law will be introduced within about five years. In any case, in order that civil justice can be made to function more adequately and efficiently and meet the demands and needs of ever-changing society, a constant vigilance must be maintained to improve the system and the law must be revised whenever deemed necessary.

Supreme Court of Japan, Outline of Civil Trial in Japan, ¶ IV,

influence the shape of any new Japanese legislation. Third, since the burst of the economic bubble in the early 1990s, Japan has seen a wave of mega-insolvency filings that impact countless people and interests both in Japan and abroad. The way in which Japan and other foreign countries address these international debtors, as well as their creditors and assets, has an immediate practical effect inside Japan and throughout the world.

This Article addresses the debate surrounding the optimal cross-border insolvency system by considering Japan's experience with international insolvencies as a case study. Following the introduction, Section 2 briefly sets out the various cross-border insolvency prototypes and the arguments for and against each model in a semi-systems analysis framework. Next, Section 3 reviews the Japanese experience, outlining the structure of Japan's insolvency system and examining Japan's territorial statutes and the courts' strict enforcement of these proceedings until the 1980s. The Section then discusses how Japanese courts, over the past twenty years, have struggled with and inconsistently deviated from the strict territorial framework in order to accommodate modern global concerns and incentives. The Section concludes with a summary of Japan's actual treatment of cross-border insolvency issues. In Section 4, I argue, based on Japan's experience, that the cross-border insolvency paradigm should be adjusted to a modified universal approach, which is feasible, flexible, fair, and efficient. Finally, Section 5 offers a brief conclusion regarding the lessons to be learned from the Japanese experience as well as the lessons Japan has to learn from the theoretical debate on the paradigm for cross-border insolvencies.19

http://courtdomino.courts.go.jp/civil.nsf/ffc82a0a5fb61e504925648f00352937/b4615015bcd825e849256739001101b8?opendocument#3-3.

Among the larger and more notorious Japanese insolvencies in the 1990s are Maruko (1991); Ken International (1991); Kizu Credit Bank (1995); Hyogo Bank (1995); Hokkaido Takushoku Bank (1997); Yamaichi Securities (1997); Mita Industrial (1998); Nippon Credit Bank (1998); the Long Term Credit Bank and its subsidiary Japan Leasing Corporation (1998); Nagasakiya (2000); and Sogo Department Store (2000). A listing and description of every major insolvency in Japan from 1997 to the present is available at Tokyo Shoko Research, http://www.tsr-net.co.jp/topics/ogata/index.html (last visited Nov. 15, 2000).

¹⁹ I provide one caveat or reader's guideline at the outset. This Article has two focuses: cross-border insolvency and Japan's insolvency system. Thus, if your interests are only in international insolvency, Sections 3.1-3.3 may be skipped. Conversely, if your interests lie in Japanese insolvency, you may skip

Models of Cross-Border Insolvency Proceedings

The various approaches to a cross-border insolvency may be classified into five general categories: (1) universalism; (2) modified universalism; (3) secondary insolvency; (4) corporate-charter contractualism; and (5) territorialism. The following Section, relying on the work by Professor Lynn LoPucki,²⁰ reviews the arguments for and against each of those systems. The Section does not, however, attempt to build an argument in favor of or opposed to any of the models based on this systemic review; the narrative is brief and descriptive rather than argumentative.

2.1. Universalism

Universalism, also known as pure universalism, unity, and ubiquity,²¹ is a system in which all aspects of a debtor's insolvency are conducted in one central proceeding under one insolvency law.²² Because countries are generally unwilling to allow another

Sections 2 and 4. Of course, I hope that some readers' interests overlap with mine and that their time allows for a full review of the entire Article.

²⁰ See LoPucki, supra note 10.

There are subtle differences among the various terms, including universalism itself, that differ depending upon the commentator and the examples used. See, e.g., GOODE, supra note 2, at 495-96 (distinguishing universalism from unity); NADELMANN, supra note 3, at 282 (using distinctively the terms universalism, unity, and ubiquity). See also Kurt H. Nadelmann, Creditor's Equality, 98 U. PA. L. REV. 41, 54 (1949/50) ("Use of such terms as 'unity,' 'universality,' and 'territoriality' of bankruptcy has not been found helpful in international discussions because of different meanings given to the terms in different countries."). This Article uses the term universality as defined in Section 2.1.

²² See, e.g., Donald T. Trautman et al., Four Models for International Bankruptcy, 41 AM. J. COMP. L. 573, 579 (1993).

A "partial" pure universal system is also possible. It would resemble a pure universal system, but would apply only to a limited number of countries. Such a system could be established through a bi- or multi-lateral treaty. See, e.g., Nordic Convention, infra note 27 (discussing the universal regime created by treaty among Denmark, Iceland, Norway, Sweden, and Finland). In addition, a country may unilaterally establish a "partial" pure universal system. For example, Australia has a two prong system that applies a pure universal framework to prescribed countries, which to date include Canada, Jersey, Malaysia, New Zealand, Papua New Guinea, Singapore, Switzerland, the United Kingdom, and the United States. See Bankruptcy Act 1966 § 29(2)(a), Schedule 5 (Austl.); Corporations Law § 581(2)(a) (Austl.); Re Ayers, 34 A.L.R. 582, 591 (Fed. Ct. 1981), affd en banc sub nom., Ayers v. Evans, 39 A.L.R. 129, 145 (Fed. Ct. 1981) (Austl.) (interpreting the statute to apply in a universal manner); IAN FLETCHER, INSOLVENCY IN PRIVATE INTERNATIONAL LAW 783-84 (1999).

state's courts to have unfettered control over local assets and persons, the universalist system relies predominately on some level of international treaty or convention.²³ The chief arguments in favor of universality are efficiency and economy, which produce larger distributions in liquidations and greater likelihood of success in reorganizations.²⁴ Universalism generates economies in a number of areas: avoiding duplication of administration expenses, selling cross-border assets as a whole, coordination of reorganization efforts, and encouraging efficient investment patterns.²⁵ In addition, an underlying argument, often unstated, is that the universal approach produces the fairest results because all creditors, wherever located, are treated equally by class.²⁶

A number of obstacles limit the use of the universal model, however. First, it has proven impossible to obtain the requisite international agreements at the bilateral, regional, and international levels.²⁷ Second, some argue that a universal system will

The second prong applies a modified universal approach to all other countries. See Bankruptcy Act 1966 § 29(2)(b) (Austl.); Corporations Law § 581(2)(b) (Austl.). New Zealand and England statutorily appear to have a similar system. See Insolvency Act 1967 § 135(1)-(2) (N.Z.); Insolvency Act 1986 § 426 (Eng.). However, they have tended to apply the purely universal provisions in a modified universal manner. See New Zealand Law Commission, supra note 7, at ¶37 (reviewing New Zealand's approach and discussing the unreported case of Re Beadle, No. B116/80 (High Ct. Auckland, Sept. 1, 1980)); Kent Anderson, Statutory Co-Operation Mechanisms for Cross-Border Insolvencies in England and America, 1 CO. Fin. & Insolvency L. Rev. 44, 48-61 (2000) (reviewing England's approach).

²³ See GOODE, supra note 2, at 494-95. As noted above, it is also possible to create a pure universal system without international treaties or conventions through unilateral domestic legislation for the automatic recognition of insolvencies from designated foreign countries. See supra note 22 (discussing Australia's systems).

See, e.g., Jay Lawrence Westbrook, Theory and Pragmatism in Global Insolvencies: A Choice of Law and Forum, 65 AM. BANKR. L.J. 457, 465 (1991).

²⁵ See id.; Lucian Bebchuk & Andrew T. Guzman, An Economic Analysis of Transnational Bankruptcies, 42 J. LAW & ECON. 775, 778-79 (1999) (arguing that universalism is more economically efficient ex ante); Rasmussen, supra note 10, at 18.

²⁶ See Ulrich Drobnig, Secured Credit in Cross-Border Insolvency Proceedings, 33 Tex. INT'L L.J. 27, 66 (1998).

For an example of the problem at the bilateral level, see Burman, supra note 16, at 2556 (1994) (noting the failure of the United States and Canada to ratify the draft United States of American-Canada Bankruptcy Treaty (Oct. 29, 1979)). Cf. WOOD, supra note 3, at 292 (noting France's multiple bilateral treaties); Michael Prior, Bankruptcy Treaties Past, Present, and Future: Their Failures and Successes, in INSOLVENCY LAW AND PRACTICE 226 (Harry Rajak ed., 1993)

confuse debtor-creditor relationships and defeat domestic expectations by making some otherwise routine insolvencies subject to separate laws and regimes.²⁸ Third, there are practical problems to its implementation. Most significantly, because the universal forum applies its *lex fori* to issues such as priorities, avoidances, and qualifications for reorganization protection, conflicts may arise with how other laws, such as the *lex situs* of various assets, resolve the same issues.²⁹ Furthermore, a general rule to determine which jurisdiction should act as the universal forum has yet to be conclusively defined, thus allowing for manipulative filings and forum shopping.³⁰ Fourth, the universal system makes no at-

(noting that Tunisia has successfully entered into nine bilateral insolvency treaties with, among others, Russia, France, Italy, and its North African neighbors).

For a discussion of regional treaties, see Burman, supra note 16, at 2555 (noting the failure of the European Union to adopt insolvency conventions in 1982 and 1990); Prior, supra note 27, at 226 (noting that an Arabian multilateral convention, Bankruptcy of the Arab Maghreb Union, has yet to be ratified). See also 1933 Nordic Convention on Bankruptcy, Nov. 7, 1933, 155 L.N.T.S. 115, as amended Oct. 11, 1977 and Oct. 11, 1982 (providing a universal system among Denmark, Iceland, Norway, Sweden, and Finland); FLETCHER, supra note 22, at 221-236 (reviewing the 1928 Bustamente Code among, inter alia, Costa Rica, Guatemala, Panama, Venezuela, and other Central American countries and the Montevideo Treaties among Argentina, Columbia, Brazil, Paraguay, Peru, and Uruguay); Michael Bogdan, The Nordic Bankruptcy Convention, in CURRENT DEVELOPMENTS IN INTERNATIONAL AND COMPARATIVE CORPORATE INSOLVENCY 701-08 (J.S. Zeigel ed., 1994); Michael Bogdan, International Bankruptcy Law in Scandinavia, 43 INT'L & COMP. L. Q. 49 (1985) (reviewing the Nordic Convention); Burman, supra note 16, at 2557-58 (discussing the International Bar Association's 1988 Model International Insolvency Cooperation Act and the 1995 Cross-Border "Concordat", both of which have failed to be adopted by any country); Prior, supra note 27, at 227-28 (reviewing the 1928 Bustamente Code and the Montevideo Treaties).

²⁸ See LoPucki, supra note 10, at 713-18. Commentators made similar arguments, unsuccessfully, concerning the United States' adoption of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980). See, e.g., Arthur Rosett, Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods, 45 Ohio St. L.J. 265, 268-269 (1984).

²⁹ See Hanisch, supra note 10, at 154-56; LoPucki, supra note 10, at 709-713.

³⁰ See LoPucki, supra note 10, at 713-18. Despite some arguments to the contrary, a standard—debtor's "center of interests" or "principal place of business" — does appear to be developing regarding a rule for determining a debtor's home or main forum in a multinational insolvency. See, e.g., EU Convention, supra note 16, art. 3.1 ("The place of [debtor's] registered office shall be presumed to be the center of its main interests in the absence of proof to the contrary."); UNCITRAL Model Law, supra note 2, arts. 2(b), 16(3) ("[I]n the absence of proof to the contrary, the debtor's registered office . . . is pre-

tempt at creating the optimal insolvency law and is neutral at best regarding the substantive social and economic values of the applicable law, i.e., the universal forum's law.³¹

2.2. Modified Universalism

Modified universalism incorporates the philosophy of universalism but accepts that a country may only unilaterally control its own territory and laws. Under a modified universal regime, a country does not try to coordinate its legislation with another country but rather creates a system that is open to cooperation while seeking the broadest impact possible for its own laws. There are two distinct aspects to this framework. The first aspect is that a state's insolvency laws must be drafted to reach out as widely as possible by providing for extraterritorial effect in all areas, including the creation of an estate, the issuance of protective stays, and the recognition of claims.³² In many cases, this doctrine of worldwide impact is merely overreaching that has no actual foreign effect. As a foundation, though, it allows for the possibility of full foreign enforcement. Second, the local courts must occasionally be willing to give up control of domestic assets and interests for the benefit of a foreign insolvency.³³ A local court in a

sumed to be the centre of the debtor's main interests."); GOODE, supra note 2, at 496. This standard appears consistent with the U.S. Bankruptcy Code's approach that makes ancillary assistance available under § 304 to foreign bankruptcies from a country "in which the debtor's domicile, residence, principal place of business, or principal assets were located at the commencement of such proceedings. . . ." 11 U.S.C. §§ 101(23), 304 (1994).

of universalism among commentators does not assert a new, substantive universal law, but merely recognition of the universal forum's administration of all aspects of an insolvency under its own law, regardless of its intrinsic value).

³² See, e.g., 11 U.S.C. § 541(a) (1994) (providing that an estate includes all of debtor's property "wherever located"); Bankruptcy and Insolvency Act §§ 2(1), 71(2) (defining property of the estate in Canada to include all of debtor's movables and immovable items, wherever situated).

³³ Such willingness to defer to a foreign court may be based on a statute, see, for example, 11 U.S.C. § 304 (1994) (providing framework to assist foreign insolvency proceedings); Insolvency Act 1986 § 426 (Eng.) (providing English courts shall assist insolvencies in certain designated foreign countries), or it may be based on a a court's general equitable power, see, for example, Victrix S.S. Co., SA v. Salen Dry Cargo A.B., 825 F.2d 709, 715 (2d Cir. 1987) (assisting a foreign insolvency based on the U.S. district court's general equitable power); Re Commercial Bank of South Australia, 33 Ch. D. 174, 178 (Chancery Div. 1886) (assisting a foreign insolvency based on the English court's equitable jurisdiction).

modified universal regime—usually referred to as the ancillary court—may relinquish control of those aspects of a case directly under its authority, but only after a review of the foreign insolvency proceeding.³⁴ The net result of this approach is that not only must a modified universal system be prepared to address cooperative universal-like cases, but it must also be structured to accommodate territorial proceedings, whether brought about by foreign non-recognition or by domestic denial of cooperation.³⁵

The advantage of the modified universal model is that it retains some of the efficiencies of pure universalism while incorporating the flexibility and discretion of the secondary and territorial approaches described below. The modified regime does not achieve the administrative efficiencies of pure universality, but it limits duplicative administrative expenses while allowing for coordinated liquidation and reorganization. In addition, the modified regime also accommodates those who are concerned about relinguishing national sovereignty, since ancillary courts retain the power to refuse to subvert those aspects of the insolvency over which they have direct control. In other words, the modified universalism allows for a flexible approach—either cooperative or independent—depending upon the particular circumstances of the insolvency case and the system requesting assistance. The modified model is also attractive because it is independent of international conventions and can therefore be accomplished unilaterally through domestic legislation.³⁶ Finally, the approach

³⁴ For a discussion of the standard of review in the United States and England, see Anderson, *supra* note 22 *passim*.

³⁵ One of the best examples of this breakdown of the modified approach into territoriality is the (in)famous Felixstowe Dock case. See Felixstowe Dock and Railway Co v. United States Lines Inc., [1989] Q.B. 360 (denying assistance to U.S. reorganization by English court); Leonard Hoffmann, Cross-Border Insolvency: A British Perspective, 64 FORDHAM L. REV. 2507, 2512-17 (1996) (discussing the Felixstowe opinion delivered by Lord Hoffmann of the British House of Lords). Ironically, the debtor, U.S. Lines, was able to get relief in Japan, albeit by filing a separate, independent bankruptcy. See Koji Takeuchi, Treatment of International Insolvency Issues in Japan, in CURRENT ISSUES IN CROSS-BORDER INSOLVENCY AND REORGANIZATION 69, 83-84 (E. Bruce Leonard & Christopher W. Besant eds., 1994) (reviewing the unreported case of In re U.S. Lines, Inc., No. (Hu) 215 (Tokyo Dist. Ct., 1987)).

³⁶ As exemplified by the UNCITRAL Model Law, supra note 2, the modified universal approach is not a negotiated international agreement; therefore, it may be implemented subject only to domestic concerns, influences, and constraints. See Guide to Enactment of UNCITRAL Model Law, supra note 16, art.

benefits from the fact that it is, or is becoming, the most common international system.³⁷

As with all of the other options, the approach has certain problems. First, the modified system may be unpredictable for planning purposes. A creditor does not know for certain the court in which a debtor will file its insolvency or whether the ancillary courts will deny or assist that court. 38 Second, some argue that any transaction costs saved by avoiding duplicative administrations are offset by the costs associated with petitioning for assistance from the ancillary courts.³⁹ Third, critics suggest that the end result of a modified approach is no different from that of territorialism, because most systems allow debtors to avoid triggering the modified universal mechanisms by filing local plenary cases and because ancillary courts are presumably hesitant to provide assistance in support of a foreign state's extraterritorial laws.40 Finally, as with universalism, the system is burdened with practical problems: what standard should be applied to determine the main forum and how should courts deal with choice of law questions, such as differing priority and preference rules?

2.3. Secondary Insolvency

The secondary insolvency system operates in a manner similar to the modified universal framework.⁴¹ First, local proceedings

Model Law, countries that follow a modified universal approach include, among others, Australia, Canada, England, Germany, India, Ireland, New Zealand, United States, and, arguably, Japan. See supra note 8 (providing statutory citations); infra Section 3.5. (reviewing Japan's movement to modified universalism). Commentators, however, disagree over what the majority approach is. See GOODE, supra note 2, at 496 (stating that a majority of nations follow the territorial approach); LoPucki, supra note 10, at 735 (suggesting that the secondary approach is dominant); Kim & Smith, supra note 5, at 4 (stating territoriality prevails); Jay Lawrence Westbrook, Universal Priorities, 33 TEX. INT'L L. J. 27, 29 (1998) [hereinafter Westbrook, Universal Priorities] (asserting "the realities of a world of modified territorialism").

³⁸ See LoPucki, supra note 10, at 729.

³⁹ See id.

⁴⁰ See, e.g., 11 U.S.C. § 303(b)(4) (1994) (allowing a "foreign representative of the estate in a foreign proceeding" to file a full plenary case in lieu of pursuing a modified universal resolution under § 304 of the Code). See also LoPucki, supra note 10, at 728-30 (arguing this will occur by direct refusals to cooperate and by manipulation of the standards for cooperation so that the balance falls for non-cooperation).

⁴¹ The secondary proceeding described here is largely based on the system

seek to have an extraterritorial effect.⁴² Second, local courts are willing to give some limited assistance to foreign-originated cases.⁴³ In contrast to modified universalism, a secondary system automatically denies any cooperation for locally secured and priority claims, which are administered in a local proceeding pursuant to the local insolvency law until satisfied by local assets.⁴⁴ Once this has been completed, the court has the option, as it does with modified universalism, to cooperate regarding any remaining assets or claims.⁴⁵ At this stage, the proceeding is the same as a modified universal one, and the secondary court contributes all the residual assets and claims (viz., general unsecured claims) to be administered and settled by the main forum pursuant to its laws.

The chief benefit of the secondary framework is that it largely avoids the problems associated with a conflict between the preference and priority rules of the main forum and the local forum. Because local secured and priority claims are automatically treated pursuant to local insolvency law to the extent that there is local property, the alleged and real problems associated with universalism's and modified universalism's application of foreign insolvency law to local issues are eloquently side-stepped. That in turn is beneficial because it guarantees predictability in local lending relationships and allows domestic public policy concerns, to the extent that they are represented in priority rules, to be partially served. Nevertheless, a secondary insolvency may still facilitate some international cooperation by transferring the unsecured creditors and surplus assets to the main insolvency for pro rata treatment. A further benefit is that the approach is politically feasible, since local courts retain control over the most important aspects of an insolvency and discretionary control over the rest.

in Switzerland. See Private International Law of 18 Dec. 1987, arts. 166-75 (Switz.); Hanisch, supra note 10, at 159. See also EU Convention, supra note 16, ch. III (creating a partially secondary system within the European Union); FLETCHER, supra note 22, at 246-301 (reviewing the EU Convention); Manfred Balz, The European Union Convention on Insolvency Proceedings, 70 AM. BANKR. L.J. 485, 519-27 (1996); Ian F. Fletcher, The European Union Convention on Insolvency Proceedings: An Overview and Comment, with U.S. Interest in Mind, 23 BROOK. J. INT'LL. 25, 40-45 (1997).

⁴² See LoPucki, supra note 10, at 732-33.

⁴³ See id. at 733.

⁴⁴ See id.

⁴⁵ See id.

As LoPucki points out, the principal disadvantage of the secondary approach is that the exception for dealing with local secured and priority claims swallows the rule of cooperation. 46 Most assets in an insolvency are used to satisfy secured and priority claims; thus, any cooperation generated by contributing the remains of the estate and directing general claimants to the main proceeding is illusory. 47 The argument continues that the secondary approach also inflects a corruptive influence on domestic insolvency laws by creating pressure to increase the number and size of priority categories, which local creditors may exploit. 48 An additional problem is that the secondary system makes few gains in efficiency; it requires both a local proceeding and an additional deliberation to determine whether the court should participate, even in a limited sense, with the main insolvency. 49

2.4. Corporate Charter Contractualism

In 1997, Professor Robert K. Rasmussen triggered a departure from the increasing movement toward pure universalism, through various modified and hybrid schemes, by suggesting that a corporate debtor should choose the substantive system governing its insolvency. The proposal—an outgrowth of the "contract bankruptcy" movement in the United States⁵¹—honors whatever choice a corporation and its creditors make regarding the applicable forum, law, and cross-border regime, in the event of an insolvency. To avoid *post ante* manipulation, among other

⁴⁶ See id. at 734.

⁴⁷ See U.S. GEN. ACCOUNTING OFFICE, CASE RECEIPTS PAID TO CREDITORS AND PROFESSIONALS 39 tbl.III.2 (1994) (providing that 21.8% of liquidation estates are distributed to priority unsecured creditors and 36.4% to unsecured creditors); Lawless & Ferris, supra note 1, at 1217 tbl.3 (showing that only 4.6% of distributions from a business liquidation go to unsecured creditors); LoPucki, supra note 10, at 734 n.194. Thus, in the United States, approximately only 2% of a liquidated estate would be available for transfer to the general pool.

⁴⁸ See LoPucki, supra note 10, at 735.

⁴⁹ See id. (arguing that even if a court does decide to participate, there is an incentive to minimize the participation "to the extent that local priorities absorb less than the entire estates of bankruptcy debtors... each country has an incentive to expand those priorities. Failure to expand them results in the export of assets with no assurance of corresponding return.").

⁵⁰ See Rasmussen, supra note 10, at 4-6.

⁵¹ See, e.g., Alan Schwartz, A Contract Theory Approach to Business Bankruptcy, 71 YALE L.J. 1807 (1998).

things, the rule requires that a corporation make the determination in its corporate charter.⁵² The approach is more procedural than substantive; it merely advocates giving debtors the flexibility to select any substantive law.⁵³ The obvious lynchpin to the theory is that all countries included in a debtor's insolvency must agree to recognize and enforce the debtor's chosen forum. To facilitate this, the proposal allows a country to refuse to enforce the debtor's choice where it would produce "unreasonable or unjust" results, i.e., results contrary to domestic public policy.⁵⁴

The main attraction of the corporate-charter model is that it encourages debtors to select the most efficient insolvency system. In theory, this should eventually result in a greater likelihood of success in a reorganization by making more assets available for distribution to creditors in a liquidation.⁵⁵ Further, like U.S. corporate law, the freedom of choice should create competition among nations to produce the most efficient insolvency law—a so-called "race to the top" for insolvency law.⁵⁶ Finally, because the approach enables a company to change its declared insolvency forum only with the consent of all of its creditors, it effectively prevents a debtor from forum shopping on the eve of filing.⁵⁷

⁵² See Rasmussen, supra note 10, at 31. Rasmussen would also allow a debtor to make a subsequent change to its declared choice of forum, but only with the approval of its creditors. *Id.*

⁵³ In the same vein, Rasmussen points out that pure and modified universalism are equally procedural rules, since they call for the application of the home forum's law without any particular weight to the law's substantive value. See id. at 4. Arguing from a different perspective, Gaa has submitted that public policy makers treat insolvency law as a matter of private law in which the state has only a peripheral interest. See Gaa, supra note 1, at 897. Thus, in nearly diametric opposition to Rasmussen's most basic assumptions, Gaa concludes that such treatment by policy makers actually hinders the harmonization of cross-border insolvency law. Id.

⁵⁴ Rasmussen, *supra* note 10, at 32-35.

⁵⁵ See id. at 20-21.

⁵⁶ See ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW 14-24 (1993) (arguing that laws may improve from comparative competition); Daniel R. Fischel, The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law, 76 NW. U. L. REV. 913 (1982) (claiming that the "race to the bottom" characterization of corporate law requires shareholders to behave irrationally); Ralph K. Winter, State Law, Shareholder Protection, and the Theory of the Corporation, 6 J. LEGAL STUD. 251 (1977) (arguing that competition in various markets causes corporations to compete to select the most efficient governance structure).

⁵⁷ See LoPucki, supra note 10, at 738 n.207, citing Robert K. Rasmussen, Debtor's Choice: A Menu Approach to Corporate Bankruptcy, 71 TEX. L. REV. 51,

The corporate insolvency approach, however, suffers from both pragmatic and theoretical problems. Perhaps most significantly, the practical barrier of convincing nations to accept the approach is daunting. These obstacles are best seen within a conflict of laws framework.⁵⁸ For example, complete freedom to choose the applicable law and forum, even under the auspices of a two-party international contract, is far from a given in the global community.⁵⁹ Furthermore, even those countries that view most expansively the principle of freedom of contract, such as England, generally do not apply it where the subject matter is one of significant domestic public policy interest, such as family law or

118 (1992) (noting that Rasmussen himself is not concerned with the issue of forum shopping).

⁵⁸ Rasmussen indirectly acknowledges the need to address conflict issues by providing a public policy exception to enforcement by ancillary courts. See Rasmussen, supra note 10, at 32-35. He fails, however, to entertain fully the issue (which necessarily involves a consideration of how various jurisdictions would address such a proposal), choosing instead to rely solely on two citations to the conflicts approach only in the United States. See id. at 32-33, citing The Bremmen v. Zapata Off-Shore Co., 407 U.S. 1 (1972). See also RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 187, 188 (1992) (adopting a substantial relationship to the transaction test).

the selection of a forum with no "substantial" relationship with the matter. See RESTATEMENT (SECOND) CONFLICT OF LAWS § 187(2)(a) (1992); see also EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS §§ 18.6-18.12 (2d ed. 1992) (reviewing U.S. cases and authorities restricting parties' autonomy to select a law beyond those with a "substantial" relationship to the matter). Further, party autonomy in contract disputes is limited for all members of the European Union by the requirements of the Rome Convention. See, e.g., European Union Convention on the Law Applicable to Contraction Obligations, June 19, 1980, 1980 O.J. (L 266) 1, reprinted in 19 I.L.M. 1492 (1980), art. 3(3) [hereinafter "Rome Convention"] (requiring application of the mandatory rules of a third jurisdiction, even though not the selected law, where all connections are with that forum), art. 7(1) (providing that the mandatory rules of a third jurisdiction may apply where there is a close connection with that country). Article 7(1) was not adopted by the United Kingdom. See Contracts (Applicable Law) Act § 2(2) (1990) (Eng.). Further, the Rome Convention does not apply to insolvency given its strong domestic public policy nature. See Rome Convention, art. 1(2)(e); see also Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, amended by Convention on the Accession of the Kingdom of Denmark, Ireland, Oct. 9, 1978, art. 1(1) (schedule 1 to Civil Jurisdiction and Judgments Act of 1991) [hereinafter Brussels Convention] (providing that the Brussels Convention on Enforcement of Judgments among the EU states does not apply to insolvency judgments).

property law.⁶⁰ From a private international law perspective, insolvency law is generally considered within this class.⁶¹

The theoretical obstacles to the contractual model center on the fact that such an approach effectively excludes a number of interested parties from the contracting process and thus eviscerates the protection provided by mandatory domestic legislation.⁶² For example, involuntary creditors who are normally protected at home with priorities will likely have their claims lumped in with general claims, or not enforced at all, in a foreign insolvency forum selected by the debtor. Similarly, small creditors have neither the resources nor the practical power to resist or investigate selection of forums unacceptable or disadvantageous to them.⁶³ Considering these limitations, the pressure on insolvency reform might actually create a "race to the bottom," with large creditors and debtors disproportionately influencing the competitive drafting process.⁶⁴ Furthermore, from the economic framework upon which the proposal was based, Bebchuk and Guzman ague that the alleged efficiency gains of the contractual model are not feasible.65

2.5. Territorialism

Territorialism is the default system for all cross-border insolvency systems, because it relies on actual in rem control over assets. 66 Under the territorial approach, a separate and independent plenary case is pursued in each forum in which the debtor's assets

⁶⁰ Compare Vita Food Prods. Inc. v. Unus Shipping Co. Ltd., [1939] App. Cas. 277 (P.C. 1939) (appeal taken from Nova Scotia), 1 All E.R. 513, 521 (1939) (Eng.) (stating with regard to contract law that a "connection with English law is not, as a matter of principal, essential") with ALLEN V. DICEY & J.H.C. MORRIS, THE CONFLICT OF LAWS 639-40, 807, 960 (Lawrence Collins ed., 12th ed., 1993 & Supp. 1997) (stating that English law (lex fori and lex situs) governs most family and property matters).

⁶¹ See WOOD, supra note 3, at 227; Gaa, supra note 1, at 885, 889-91, 893-95. Thus, the choice of law rule for insolvencies is lex fori, which is one reason why international conventions have proven so difficult. See DICEY & MORRIS, supra note 60, at 1131, 1169 (setting forth Rules 159(2) and 165).

⁶² See LoPucki, supra note 10, at 738-40.

⁶³ See id. at 738-39.

⁶⁴ See, e.g., William L. Cary, Federalism and Corporate Law: Reflections upon Delaware, 83 YALE L.J. 663, 666 (1974) (coining the term "race to the bottom" to describe negative competitive pressure on legislative efforts).

⁶⁵ See Bebchuk & Guzman, supra note 25, at 800-02.

⁶⁶ See LoPucki, supra note 10, at 742.

are located.⁶⁷ LoPucki enhances this framework slightly by advocating for cooperation among the independent courts and corresponding administrators.⁶⁸ The benefits of territorialism are varied. At the most basic level, territorialism, unlike any of the alternatives, does not require any special legislation, nor does it deviate from the universally adopted rules of jurisdiction and sovereignty. The territorial approach also avoids conflicts among priority and other substantive insolvency rules, because each court deals exclusively with local interests pursuant to local laws. In addition, it is argued that the territorial rule is more consistent with the expectations parties hold when making lending decisions.⁶⁹ That is, creditors extend credit based on the assets available in, and the insolvency laws of, the local jurisdiction; therefore, it is unfair and inefficient to apply another state's rules where they might defeat these legitimate expectations. Furthermore, the territorial approach arguably better reflects the fact that global businesses are largely organized by independent incorporation in each country where the debtor is doing business.70 In other words, companies are already opting for the territorial approach on a de facto basis by limiting corporate entities to political regions. Finally, the territorial rule may be viewed as more respectful of foreign legal systems because a court never has to deny recognition to a foreign case based on a discretionary bal-

The shortcomings of the territorial approach were the original catalyst for the movement towards the universal model. First, territorialism creates inefficient duplications of administration.⁷²

⁶⁷ It is unclear whether a debtor would have standing in a territorial regime where it had no assets in the forum for discovery purposes. *See, e.g., In re* Brierley, 145 B.R. 151, 160 (Bankr. S.D.N.Y. 1992) (allowing ancillary application for discovery assistance, but noting debtor would not be eligible for a full plenary proceeding).

⁶⁸ LoPucki, *supra* note 10, at 742-50.

⁶⁹ See id. at 751.

⁷⁰ See id. at 751-52. Cf. infra note 387 and accompanying text.

⁷¹ See LoPucki, supra note 10, at 752. For similar sentiments, see Attorney Gen. (United Kingdom) v. Heinemann Publishers Australia Proprietary Ltd. [No. 2] (1998) 165 C.L.R. 30 (Austl.) (establishing Australia's policy of respect by non-review of foreign public policy laws and quoting with approval Judge Learned Hand's opinion in Moore v. Mitchell, 30 F.2d 600, 604 (2d Cir. 1929)).

⁷² See, e.g., Westbrook, supra note 24, at 460-61. These inefficiencies are particularly seen in a case such as the one involving Bank of Credit, Commerce International, which occurred in seventy-two jurisdictions. Under a territorial

The administrative duplications increase the costs of the insolvency proceeding and hinder the sale of multi-state assets and reorganization of cross-border businesses.⁷³ Similarly, some commentators argue that territorialism is less economically efficient on an ex ante as well as ex post basis.74 Further, the concurrent proceedings can subject creditors to conflicting decisions, unequal distributions among similar creditors from different countries, and increased costs where the creditors are required or allowed to file in more than one proceeding.⁷⁵ In addition, contrary to previous assertions, many creditors extend credit based on assumptions about worldwide assets rather than merely local or domestic assets. 76 Denying or complicating those creditors' access to the resources defeats their expectations. Finally, the territoriality approach's inclination to "go-it-alone" has the unintended consequence of denying ancillary assistance to foreign insolvencies, which in turn breeds disharmonious international relations.

The variations and sub-categories of the five models for cross-border insolvency are limitless. Further, states complicate any wholesale classification of a legal system by employing more than one model simultaneously and by creating *sui generis* approaches. Moreover, among those laws that can be categorized, few are applied in accordance with their plain language. In spite of such labeling problems, the five rough categories provide a helpful comparative

approach, seventy-two trustees would have to be appointed, seventy-two judges would have to become familiar with the case, and issues of fraud could be litigated seventy-two times.

⁷³ See, e.g., id. at 460-61, 465.

⁷⁴ See Bebchuk & Guzman, supra note 25, at 778.

⁷⁵ See Kim & Smith, supra note 5, at 4; GOODE, supra note 2, at 496.

⁷⁶ See, e.g., Bank of Am. v. World of English, 23 B.R. 1015, 1016 (N.D. Ga. 1982) (suggesting that by Bank of America ("BoA") requiring the debtor's foreign subsidiaries to co-sign the subject loan, BoA made the decision to extend the credit based on debtor's assets in both the United States and Japan, as well as its multinational incorporation structure). This case is discussed in greater detail at *infra* notes 275-79, 303, 392 and accompanying text.

⁷⁷ See EU Convention, supra note 16 (combining traits of pure universalism, modified universalism, and secondary insolvency); WOOD, supra note 3, at 228 ("[I]n practice, most developed states adopt[ed] a combination of the . . . extremes [between universalism and territorialism]."); Hanisch, supra note 10, at 160-61, 164 (discussing and advocating mixed and combined systems).

⁷⁸ See infra Section 3.5. (discussing the application of Japanese laws); see also Anderson, supra note 22, at 48-61 (discussing application of England's Insolvency Act, § 426 (1986)).

vocabulary and framework that may be used to investigate the optimal approach to cross-border insolvency problems. This Article employs that framework below.

3. THE JAPANESE EXPERIENCE⁷⁹

3.1. Introduction

Japanese insolvency law is often cited as the quintessential ex-

⁷⁹ There is little to no comprehensive treatment of the Japanese insolvency system in English, though there is an assortment of articles of varying quality that address specific insolvency issues. For bibliographic purposes, I add the following English-language works on Japanese insolvency to the helpful list compiled in HARALD BAUM & LUKE R. NOTTAGE, JAPANESE BUSINESS LAW IN WESTERN LANGUAGES: AN ANNOTATED SELECTIVE BIBLIOGRAPHY 200-02 (1998); BHALA, supra note 16; Mokichi Hasebe, Problems in Implementing the Corporate Reorganization Law, in 2 LAW IN JAPAN 164 (Shin Motoki trans., 1968); Yukiko Hasebe, The Position of Creditors in the Distribution of Insolvent Estates: Consensual Secured Creditors in Japan, in CURRENT DEVELOPMENTS IN INTERNATIONAL AND COMPARATIVE CORPORATE INSOLVENCY LAW 403 (Jacob S. Ziegel ed., 1994); LAW AND JUSTICE IN TOKUGAWA JAPAN ch. 7 (John Henry Wigmore ed., pt. 2 1968); TAKAAKI HATTORI & DAN FENNO HENDERSON, CIVIL PROCEDURE IN JAPAN §§ 9.06-9.09 (1986); Tasuku Matsuo, Bankruptcy and Corporate Reorganization, in DOING BUSINESS IN JAPAN chs. 7-8 (Zentaro Kitagawa ed., 1999); Tasuku Matsuo & Richard Vliet, Creditor's Rights Under Japanese Law, in Current Legal Aspects of Doing Business in Japan and East Asia (John Owen Haley ed., 1978); Frank Packer & Mark Ryser, The Governance of Failure: An Antomy of Corrorate Panyletic Private Corrorate Panyletic Private Pri CORPORATE BANKRUPTCY IN JAPAN, (Ctr. on Japanese Econ. and Bus., Working Paper No. 62, 1992); Arnold M. Quittner, Cross-Border Insolvencies: Concurrent Japanese and United States Procedure, in INTERNATIONAL BANKRUPTCIES: DEVELOPING PRACTICAL STRATEGIES 33 (PLI No. 628, 1992); RECOGNITION AND ENFORCEMENT OF CROSS-BORDER INSOLVENCY: A GUIDE TO INTERNATIONAL PRACTICE 71-74 (Neil Cooper & Rebecca Jarvis eds., 1996); Koji Takeuchi, Treatment of International Insolvency Issues in Japan, in Current Issues in Cross-Border Insolvency and Reorganizations (E. Bruce Leonard & Christopher W. Besant eds., 1994); Koji Takeuchi, Japanese Insolvency Law, in MULTINATIONAL COMMERCIAL INSOLVENCY M-1 (American Bar Ass'n ed., 1993); PHILIP R. WOOD, PRINCIPLES OF INTERNATIONAL INSOLVENCY ch. 11 (1995); Stephen Baister, The Origins and Operation of Japanese Insolvency Law, 7/6 INSOLVENCY L. & PRAC. 181 (1992); Mary E. Hiscock & Kazuaki Sono, Security Interests and Insolvency in Japan, 44 RABEL ZEITSCHRIFT 757 (1980); Tatsuo Ikeda, Bankruptcy Law in Japan and Its Recent Development, 46 OSAKA U. L. REV. 9 (1999); Junichi Matsushita, Present and Future Status of Japanese International Insolvency Law, 33 TEX. INT'L L.J. 71 (1998); Junichi Matsushita, On Current International Insolvency Law in Japan, 6 INT'L INSOLVENCY REV. 210 (1997); Arnold M. Quittner, Cross-Border Insolvencies- Ancillary and Full Cases: The Concurrent Japanese and United States Cases of Maruko Inc., 6 INT'L INSOLVENCY REV. S33 (Supp. 1997).

ample of the territorial approach to cross-border insolvency.⁸⁰ Presumably, commentators draw such a conclusion from reading Japan's bare insolvency statute, which includes a section entitled the "Principle of Territoriality [in Japan]." Such a supposition is at best an oversimplification; at worst, it is flatly wrong. To understand Japan's present approach to cross-border insolvencies, it is beneficial to have an understanding of the divergent nature of Japan's modern approach to the subject, and it is essential to be aware of the courts' treatment of cross-border insolvency issues over the past twenty years.

In order to address the actual status of Japan's living law on cross-border insolvencies, this Section first outlines the various insolvency statutes and procedures. Next, the Section discusses the statutes that created the territorial approach to cross-border insolvency and the early case law that developed around those provisions. The heart of the Section reviews how modern Japanese courts have deviated from the territorial laws to create a more universal approach. The Section then concludes by summarizing the current status of Japanese cross-border insolvency law in practice.

⁸⁰ See, e.g., ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE LAW OF DEBTORS AND CREDITORS 886 (3d ed. 1996); Bebchuk & Guzman, supra note 25, at 787 ("Although some small efforts have been made to allow some limited degree of universalism, the laws of Japan remain very territorialist as the above legislation indicates."); Kim & Smith, supra note 5, at 3 ("An example of a strict territorial approach can be found in Japanese bankruptcy law"); Cross-Border Insolvency Steps Slated to Meet Times, supra note 17, at 9 (reporting based on a statement from the Japanese Ministry of Justice that, "Japan's existing legal system for corporate bankruptcy and rehabilitation does not cover overseas assets left in domestic business failures because it adopts the so-called principle of territorial jurisdiction, which leaves assets outside Japan off-limits to bankruptcy procedures."); Kokusai tōsan hō sei seibi e, supra note 17, at 3 (same report in Japanese).

⁸¹ Bankruptcy Act, art. 3 (1922) (Japan).

Due to space limitations, this Article does not review the historical foundations of Japanese insolvency law. For the best works in English on this important and fascinating area, see LAW AND JUSTICE IN TOKUGAWA JAPAN ch. 7 (John Henry Wigmore ed., pt. 2 1968), at 101-114 and Stephen Baister, The Origins and Operation of Japanese Insolvency Law, 7/6 INSOLVENCY L. & PRAC. 181 (1992). Wigmore's collection is the important translation of, inter alia, the Collection of Civil Customs (Minji kanrei ruishi), which compiled the formal and customary rules for all regions of Japan as a "Restatement" of Japanese indigenous law prior to the reception of Western codes. See id. apps. A-B at 115-17.

3.2. Structure of Japanese Insolvency System

Modern Japanese insolvency law is scattered throughout the statutory landscape. It is found in no less than three independent acts and various portions of the Commercial Code. Considered positively, one may argue that such a menu-like approach is beneficial because it adds flexibility to the system allowing debtors, creditors, and courts to find the most efficient system for the specific facts in the case. Traditionally, however, commentators have cynically viewed the dispersed nature of Japanese insolvency law and explained it as a failure of legislators to amend, abandon, or consolidate the existing laws as conditions changed and required new variations and solutions. Assume that the state of the

Whatever the reasons for the disjointed approach, Japan's insolvency law requires filers to make a number of determinations before seeking the court's protection.⁸⁵ First, one must decide

⁸³ See, e.g., FRANK PACKER & MARK RYSER, THE GOVERNANCE OF FAILURE: AN ANATOMY OF CORPORATE BANKRUPTCY IN JAPAN, (Ctr. on Japanese Econ. and Bus., Working Paper No. 62, 1992), at 31. See also Robert K. Rasmussen, A Debtor's Choice: A Menu Approach to Corporate Bankruptcy, 71 TEX. L. REV. 51 (1992) (discussing in the American context a proposal where debtors and creditors may select insolvency rules from various alternatives).

See, e.g., Junichi Matsushita, Present and Future Status of Japanese International Insolvency Law, 33 Tex. Int'l L. J. 71, 72-73 (1998) ("The reason for the existence of the five types is that each time a new type of proceeding was enacted, none of the previous laws governing insolvency proceedings were repealed or consolidated."); Curtis I. Milhaupt & Mark D. West, The Dark Side of Private Ordering: An Institutional and Empirical Analysis of Organized Crime, 67 U. CHI. L. REV. 41, 54 (2000) ("The multiplicity of legal regimes is the result of a process of continuous borrowing from other countries, without any attempt to eliminate or streamline existing procedures."); Patrick Shea & Kaori Miyake, Insolvency Related Reorganization Procedures in Japan: The Four Cornerstones, 14 UCLA PAC. BASIN L.J. 243, 245 (1996) ("Because old reorganization regimes were not eliminated when new ones were adopted and no attempt to integrate the four regimes was ever made, there are four separate reorganization regimes in Japan.").

This cynical view also seems to fail in the face of present revision efforts. See supra note 17 and accompanying text. Even though the entire insolvency system is being overhauled, there has been no movement to unify the system. In fact, additional alternatives are being created for financial institution failures, see infra Section 3.2.2.4., and consumer rehabilitation. See Kojin saimu sha no minji saisei tetsuduki ni kan suru yöamian [Draft Proposal Regarding Civil Rehabilitation Procedure for Individual Debtors], Ministry of Justice, http://www.moj.gu.jp/public/minji05/pub_minji05-1.htm (last visited Nov. 15, 2000); Hasan sezu seikatsu saiken OK [Reforming Life Without Going Bankrupt OK], ASAHI SHIMBUN, July 15, 2000, at 1.

⁸⁵ See Honorable Shinjiro Takagi, Japanese Insolvency Proceedings in Gen-

whether to file for liquidation or reorganization.86 Following this choice, one's options will be narrowed because a number of the proceedings are only available to certain entities, such as corporations (kabushiki gaisha).87 If the filer selects liquidation, there are two primary alternatives—bankruptcy (hasan) or corporate special liquidation (tokebetsu seisan).88 For reorganizations, the options include composition (wagi), corporate reorganization (kaisha kosei), corporate arrangement (kaisha seiri), and a new proceeding for the reorganization of financial institutions such as banks and credit unions (kin'yū kikan no kōsei).89 Added to all of these formal legal options, many debtors opt for private arrangements (shiteki seiri, nai- or uchi-seiri, and nin'i seiri).90 As discussed below, the final decision of which proceeding to pursue will depend upon a balancing of the substantive and procedural advantages and disadvantages in light of the specific goals of the filer and the facts of the case. As background to the discussion of Japan's experience with international insolvencies, this Section extends the comparative methodology internally and briefly reviews the following aspects of Japan's various insolvency regimes: sources of law, commencement procedures, administration method, stays or preservation mechanisms, treatment of secured and priority claims, discharge and reorganization plan confirmation, and priority of distribution.

eral, at 904-05 (PLI Commercial Law & Practice Course, Handbook Series No. A4-4474, 1995).

As in the United States, see 11 U.S.C. §§ 706, 1112, 1307 (1999), a case may slide between categories after filing. See, e.g., Bankruptcy Act, art. 290 (Japan) (providing for conversion from bankruptcy to composition); Kaisha kōsei hō [Corporate Reorganization Law], Law No. 172, 1952, arts. 23-26 (providing for conversation from reorganization to bankruptcy), 27-28 (providing for conversion from reorganization to composition).

⁸⁷ See, e.g., Corporate Reorganization Law, art. 6 (extending jurisdiction only to corporations); SHOHO, arts. 431 (providing for the institution of Corporate Special Liquidations only for corporations), 381 (providing for the institution of Corporate Special Arrangements only for corporations); Financial Institutions Reorganization Act, infra note 192, art. 2 (noting application to banks and cooperative financial institutions only).

⁸⁸ See Takagi, supra note 85, at 904.

⁸⁹ See id.

⁹⁰ See Milhaupt & West, supra note 84, at 54-55.

3.2.1. Liquidation Proceedings

3.2.1.1. Bankruptcy

The Bankruptcy Act serves as the backbone of the entire Japanese insolvency system and all of the various Japanese insolvency proceedings follow the basic substantive and procedural structure created by the Act. Bankruptcy is the rough equivalent to Chapter 7 of the United States Bankruptcy Code and creates a general liquidation proceeding that may be used by both natural persons and corporations. Enacted in 1922, the Bankruptcy Act was modeled largely on the German Bankruptcy Law of 1877. Since that time, however, it has been extensively, though not completely, revised though amendments, particularly during the Allied Occupation.

Unlike the automatic commencement of proceedings upon the filing of an application in the United States, a Japanese insolvency case does not officially commence until a court makes a declaration of bankruptcy (hasan senkoku). Thus, a bankruptcy proceeding is initiated when a debtor or creditor applies for bankruptcy, but it has no effect until two weeks to six months later, when the court finds that the debtor has met the indicia of bankruptcy (hasan gen'in). Indicia of bankruptcy include both equi-

⁹¹ See, e.g., Wagi hō [Composition Act], Law No. 72, art. 11 (1992) [hereinafter Composition Act] (applying Bankruptcy Act provisions mutatis mutandis to compositions); Corporate Reorganization Law, art. 4 (copying language of Bankruptcy Act, art. 3, nearly verbatim).

⁹² See Bankruptcy Act, art. 105 (providing bankruptcy jurisdiction over natural and judicial persons).

For a slightly dated and rudimentary comparison of the United States and Japanese insolvency systems, see Brooke Schumm III, Comparison of Japanese and American Bankruptcy Law, 1988 MICH. Y.B. INT'L LEGAL STUD. 291 (1988)

⁹³ Hasan hō [Bankruptcy Act], Law No. 71, 1922.

⁹⁴ See Taniguchi, supra note 5, at 451. Amendments include: Law No. 70, 1926; Law No. 68, 1939; Law No. 61, 1947; Law No. 223, 1947; Law No. 173, 1952; Law No. 106, 1958; Law No. 161, 1962; Law No. 111, 1966; Law No. 36, 1967; Law No. 88, 1967; Law No. 48, 1970; Law No. 100, 1971; Law No. 94, 1975; Law No. 5, 1983; Law No. 43, 1985; Law No. 79, 1992; Law No. 110, 1996; Law No. 83, 1998; Law No. 87, 1999.

⁹⁵ Bankruptcy Act, art. 1.

⁹⁶ See Takeuchi, supra note 35, at 71; Schumm, supra note 92, at 298.

table and balance sheet insolvency as well as a suspension of payments.⁹⁷

Upon the ruling of commencement, a number of events occur that parallel practice in the United States. Automatically upon commencement, an estate (hasan zaidan) is created consisting of all of the debtor's assets and a trustee (kanzainin) is appointed to administer that estate. The trustee, almost invariably a lawyer (bengoshi), takes control of the assets and seeks to liquidate them for the benefit of the creditors. The trustee also has the right or duty to avoid or set aside fraudulent transfers and preferences (hi'nin ken). Also at this time, the date for a meeting of the creditors is set and arrangements are made for publication and notice of the bankruptcy. Following this, creditors must submit proofs of claims, which are subject to the approval of the trustee and confirmation by the court.

Notably though, unlike the United States, no automatic stay is issued at commencement. Instead, debtor's assets are only protected upon application for and granting of a "preservation measure" (hozen shobun). Preservation measures are generally directed at specific assets or proceedings rather than blanket protection, and in a bankruptcy, they are usually granted "provisionally" prior to official commencement. Related to the lack of an automatic stay, all secured creditors have the right to proceed against assets outside of the insolvency proceedings (hetsujyō ken). Further, those with rights of setoff (sōsai ken) and title

⁹⁷ See Bankruptcy Act, arts. 126, 127.

⁹⁸ *Id.* arts. 6, 142.

⁹⁹ Id. arts. 157-69.

¹⁰⁰ Id. art. 72. In addition to rules against transfers done with the intent to defraud, the law provides for two types of preferences. Id. art. 72(1). First, acts done after and within thirty days of filing may be avoided if, regardless of debtor's intentions, the beneficiary was an inside creditor, or the creditor had knowledge of the insolvency. Id. arts. 72(1)-(4). Second, acts done after or within six months of filing may be avoided if they were purely gratuitous and not based on a prior debt. Id. art. 72(5).

¹⁰¹ *Id.* arts. 143, 177.

¹⁰² Id. arts. 228, 229.

¹⁰³ *Id.* art. 155.

¹⁰⁴ *Id.*; Tasuku Matsuo, *Bankruptcy, in* DOING BUSINESS IN JAPAN § 7.03[3] (Zentaro Kitagawa ed., 2000).

¹⁰⁵ See Bankruptcy Act, arts. 92-97. Some argue that such a right produces a difference in Japanese and United States practice. See Milhaupt & West, supranote 84, at 54. However, insolvency practitioners with experience in both Ja-

ownership of property held by the debtor (torimodoshi ken) are similarly free to control the relevant assets without specific permission from the court.¹⁰⁶

In further contrast to the United States, the Bankruptcy Act does not provide for an automatic discharge at the conclusion of the bankruptcy proceeding, though it is widely granted in the accepted cases. ¹⁰⁷ In fact, the discharge provision was only introduced to the Bankruptcy Act in 1952 at the insistence of the U.S. Occupation reformers. ¹⁰⁸ In contrast to the strict non-discrimination features of the U.S. Bankruptcy Code, Japanese law imposes limits on bankrupts' future capacity in a number of areas, such as prohibiting them from acting as lawyers. ¹⁰⁹

Finally, Japan's general approach to priorities of distribution is consistent with the United States, though there are some differences in the details. For example, Japan does not give priority to claims by commercial fishermen but does give priority to funeral expenses. Japan's basic priority ordering is as follows: se-

pan and the United States suggest that in practice this difference is at most formal, not substantive. See Interview with Kenji Nakashima, Japanese Attorney with Kitahama Law Office and Frequently Official Insolvency Trustee, in Osaka, Japan (Mar. 16, 2000) [hereinafter Nakashima Interview].

¹⁰⁶ See Bankruptcy Act, arts. 87-98.

¹⁰⁷ See id. art. 366(2)-(20). In 1992, a typical year, approximately eighty-five percent of the total number of accepted bankruptcy cases resulted in discharge. See Yasuhiki Tanaka, Saikin ni okeru hasan wagi jiken no dōkō [Recent Trends in the Occurrences of Bankruptcy and Composition], 830 HANREI TAIMUZU 17, 20 tbl. 1 (1994). The figure is in fact higher, though, since five percent of accepted bankruptcy cases are of juristic persons, who have no need of discharge and merely dissolve. See id.; Taniguchi, supra note 5, at 454 n.19.

¹⁰⁸ See Law No. 173, 1952.

¹⁰⁹ Compare 11 U.S.C. § 525 (1999) (providing, in part, "a governmental unit may not deny, revoke, suspend, or refuse to renew [or grant] a license, permit, charter, franchise, or similar grant... solely because such bankrupt or debtor is or has been a debtor [in formal bankruptcy]") with Bengoshi hō [Lawyers Law], Law No. 205, 1949, art. 6(5). See also MINPŌ, arts. 846(4) (guardian of a minor), 847 (custodian), 852 (supervisor of a guardian), 1009 (executor of a will); Shintaku hō [Trust Act], Law No. 102, 1992, art. 5 (trustee); Kōshōnin hō [Notary Public Law], Law No. 53, 1908, art. 14(2) (notary public); Benrishi hō [Patent Agent Law], Law No. 100, 1921, art. 5 (patent agent); Kōnin kaikeishi hō [Certified public accountant law], Law No. 103, 1948, art. 4 (certified public accountant); Mizutani v. Kansai kin'yū K.K., 21 MīNSHŪ 274 (Sup. Ct. Mar. 9, 1967) (corporate director).

¹¹⁰ See In re Kojima, 177 B.R. 696, 702 (Bankr. D. Colo. 1995) (holding Japanese priorities are substantially in accordance with those of the U.S. Bankruptcy Code).

¹¹¹ See 11 U.S.C. § 507(a)(5)(B) (providing priority for U.S. fishermen un-

cured creditors to the extent of their security; 112 administrative claims (zaidan saiken), e.g., debtor's exemptions, administrative costs, and taxes; 113 priority claims (yūsen hasan saiken), e.g., employees' wages and funeral expenses; 114 general unsecured claims (hasan saiken); 115 and deferred claims (retsugoteki hasan saiken). 116 In 1998, approximately fifty-two percent of unsecured creditors were paid five percent or less of their claims while twenty percent of unsecured creditors were paid between twenty-five and fifty percent of their claims. 117

3.2.1.2. Corporate Special Liquidation

The second insolvency proceeding in Japan is known as Corporate Special Liquidation and is only available to corporations. Unlike the other Japanese insolvency regimes, the special liquidation provisions were not predominately based on any foreign law and are not found in an independent act but in the Commercial Code. 119 Just as in the United States, companies in Japan may

der the U.S. Bankruptcy code); MINPŌ, art. 306(3), 309.

In other nations as well, insolvency provisions for corporations are found in corporate law rather than independent substantive insolvency statutes. See, e.g., Corporations Act, div. IV (Austl.) (1989) (providing Australia's corporate reorganization provisions as part of its corporate law).

Regarding the indigenous source of special liquidation, see Takeuchi, supra note 35, at 69 n.3; 2 SHINZŌ TAKAYANAGI, NIHON HŌSEI SHI [HISTORY OF JAPAN'S LEGAL SYSTEM] 257-60 (1965) (by implication). But see PACKER & RYSER, supra note 83, at 33 (stating it "drew somewhat on contemporaneous U.K. corporate law"); Yoshimitsu Aoyama, Tokubetsu seisan [Special Liquidation], in SHINPAN CHŪKAI KAISHA HŌ [NEW EDITION INTERPRETATION OF CORPORATE LAW] 379 (Katsuro Ueyatani et al. eds., 1990).

¹¹² Bankruptcy Act, arts. 92-97.

¹¹³ *Id.* art. 47.

¹¹⁴ Id. art. 39; MINPŌ, arts. 306-28.

¹¹⁵ Bankruptcy Act, arts. 15-16, 256-89.

¹¹⁶ Id. art. 46.

^{117 1} GENERAL SECRETARIAT, (JAPAN) SUPREME COURT, SHIHŌ TŌKEI NENPŌ, MINJI GYŌSEI HEN [ANNUAL REPORT OF JUDICIAL STATISTICS, CIVIL AND ADMINISTRATIVE CASES VOLUME] 268-69 (1999) [hereinafter ANNUAL REPORT]. Hiscock and Sono note, based on dated statistics, however, that only sixty percent of known creditors even bother to file proof of claim forms after notification. See Mary E. Hiscock & Kazuaki Sono, Security Interests and Insolvency in Japan, 44 RABEL ZEIFSCHRIFT 757, 772 (1980).

¹¹⁸ See SHŌHŌ, arts. 431-55.

¹¹⁹ See id. Specifically, these provisions are found in sub-section 9(2) of chapter IV on corporations in book II on companies of the Commercial Code.

formally liquidate without relying on insolvency statutes.¹²⁰ For a company undergoing this type of self-liquidation, the Commercial Code provides these special liquidation rules when it becomes apparent that a corporation's liabilities are greater than its assets.¹²¹

Corporate Special Liquidation proceeds in the same general manner as bankruptcy. For example, a case does not officially commence until after the court confirms the application and stays or preservation measures are only granted by specific request. Further, secured creditors are not hindered by the proceeding, which eventually results in a pro rata distribution of limited funds among unsecured creditors. The proceeding, however, also has a number of special features. Most often noted is the fact that rather than an outside trustee, a former corporate director is usually appointed as liquidator. Unlike the other liquidation and reorganization proceedings, there are no rights of avoidance or

¹²⁰ See SHŌHŌ, arts. 404-16, 417-30 (providing dissolution provisions and liquidation provisions respectively). In the United States, see, for example, Model Business Corporation Act §§ 75-98, which provides for non-formal insolvency dissolution.

¹²¹ SHŌHŌ, art. 431, as translated, provides:

When it is deemed that circumstances exist which would seriously impede the carrying out of the liquidation, the Court may, upon the application of any creditor, liquidator, auditor, shareholder, or of its own motion, order the company to institute a process of special liquidation; the same shall apply in cases where the Court deems it suspicious that the liabilities of a company are in excess of its assets.

If there are grounds to suspect that the liabilities of a company are in excess of its assets, the liquidator shall file the application mentioned in the preceding paragraph.

Where it is deemed that the grounds mentioned in the first paragraph exist in respect of any company, the competent authorities to supervise the affairs of companies may give notice thereof to the Court; in such case, the Court may, of its own motion, order the institution of a process of special liquidation.

Id. (incorporating SHŌHŌ, art. 381(2), which is applied mutates mutandis, as paragraph (3)).

¹²² See Yasuhei Taniguchi, Gendai tōsan hō nyūmon [Introduction to Modern Insolvency Law] 18 (2d ed. 1999).

¹²³ See SHÕHŌ, arts. 431, 433, 383.

¹²⁴ See id.

¹²⁵ See id. art. 417(1).

setoff. ¹²⁶ In contrast to bankruptcy liquidation, and more similar to reorganization in composition, the creditors in a special liquidation may form a creditors' committee authorized to approve the proposed plan for liquidation and distribution of the debtor's remaining assets. ¹²⁷

The chief benefit of this approach is that it provides for a fair and orderly distribution of a company's limited assets through a process that is simpler and less involved than bankruptcy. Moreover, some argue that tax gains may be obtained in a special liquidation proceeding. Further, one interesting aspect of the special liquidation system concerning cross-border insolvencies is that it specifically extends to foreign companies. Thus, it has been particularly useful for foreign corporations seeking simply to close failing Japanese offices. In fact, both Bank of Credit, Commerce International ("BCCI"), and Barrings Bank relied on these provisions to wrap up their Japanese operations.

¹²⁶ See TANIGUCHI, supra note 122, at 18.

¹²⁷ See SHŌHŌ, arts. 439-44, 445-51.

¹²⁸ See Matsushita, supra note 84, at 74. In contrast to the over 390 articles of the Bankruptcy Act, Corporate Special Liquidation covers only 24 articles. See SHÖHÖ, arts. 431-55. The procedure is colloquially known as "mini bankruptcy." See 21 KAISHA SÖSHÖ, KAISHA HISÖ, KAISHA SEIRI, TOKUBETSU SEISAN [CORPORATE LITIGATION, EX PARTE LITIGATION, ADMINISTRATION, AND SPECIAL LIQUIDATION] 397 (Katsuo Yamaguchi ed., 1992).

¹²⁹ See HASAN TOKUBETSU SEISAN [BANKRUPTCY AND SPECIAL LIQUIDATION] 239 (Ken Nakatori ed., 1989); PACKER & RYSER, supra note 83, at 44 n.29.; Tatsuo Ikeda, Bankruptcy Law in Japan and Its Recent Development, 46 OSAKA U. L. REV. 9, 14 (1999).

¹³⁰ See SHŌHŌ, art. 485(2).

¹³¹ See Taniguchi, supra note 5, at 453-54.

Neither filing resulted in reported cases; however, the unreported opinions are noted in Miyake, supra note 17, at 238 n.2, and Takeuchi, supra note 35, at 83-84. Some of the unique features of the BCCI case have fueled domestic debate on a number of matters. For example, in a precursor to the Financial Institutions Reorganization Act, see infra note 192, the Minister of Finance instigated the case as an interested party (bank regulator), though it held no direct relationship (e.g., as creditor, liquidator, auditor, or shareholder) with the debtor. See Re Bank of Credit and Commerce International, No. (Hi) 2012 (Tokyo Dist. Ct., 1991). One of the judges in the Barrings case stated the same was true in that case as well. See Interview with Unnamed Japanese High Court Judge in Sapporo, Japan (Feb. 18, 2000). See also Takeuchi, supra note 35, at 83 n.62, 84 n.63; Toshikatsu Tomizawa, BCCI tōsan jiken ni omou [My Thoughts on the BCCI Insolvency], 9 SAIKEN KANRI [DEBT ADMINISTRATION] 3 (1991) (noting the extent of Japanese financial involvement); BCCI jiken no sono ato [BCCI and Its Aftermath], 499 NBL 4 (1992) (discussing the BCCI case and the issues it raised).

these benefits, the use of Corporate Special Liquidation has gradually increased over the past few years and is now resorted to more frequently than any of the reorganization options.¹³³

3.2.2. Reorganization Proceedings

3.2.2.1. Composition 134

In 1922, along with the Bankruptcy Act the Japanese Diet also passed its predominate reorganization law—the Composition Act. The Composition Act provides a judicial procedure resulting in a collective agreement between the debtor and its unsecured creditors upon agreement by a majority of them. The act was based on the Austrian Composition Act of 1914 and may only be initiated by a debtor. Composition proceedings are

¹³⁶ See, e.g., TANIGUCHI, supra note 122, at 16-17. The law actually provides that its primary purpose is the "prevention of bankruptcy." Composition Act, art. 1.

As seen at Table I, *infra*, the number of Corporate Special Liquidations has increased by approximately 300% in the 1990s.

above, see supra note 17, the Composition Act was superseded by the Civil Rehabilitation Act on April 1, 2000. See Minji saisei hō [Civil Rehabilitation Law], Law No. 225 of 1999, Supplementary Provisions (fusoku), arts. 1-2. Because the purpose of this Article is to consider how a territorial system actually performs within the modern global environment and given that it is unclear how the new law will be applied, it is beyond the scope of this Article. For a discussion of the new law, see, e.g., Stacey Steele, Evaluating the New Japanese Civil Rehabilitation Law, 2 AUSTL. J. ASIAN L. 54 (2000); Symposium, Minji saisei hō no rippō [Enactment of the Civil Reformation Act], 1171 JURISUTO 6 (2000). Within the symposium, particulary with regard to the new act's relationship to cross-border insolvencies, see Munehide Nishizawa, Kokusai tōsan [International Insolvency], 1171 JURISUTO 64 (2000).

¹³⁵ Composition Act, Law No. 72 of 1922. For an excellent review of the Composition Act in practice, see Theodore Eisenberg & Shoichi Tagashira, Should We Abolish Chapter 11: The Evidence from Japan, 23 J. LEGAL STUD. 111 (1994), reprinted in CURRENT DEVELOPMENTS IN INTERNATIONAL AND COMPARATIVE CORPORATE INSOLVENCY LAW 259 (Jacob S. Ziegel ed., 1994). Some debtors also use the Composition Act for liquidation. See Composition Act, art. 1 (providing no requirement that a debtor must reorganize). The advantage of liquidating in composition, rather than bankruptcy, is that it avoids compulsory and expedited dismantling of a business that has a greater value as a going-concern. See Eisenberg & Tagashira, supra, at 219 n.14.

¹³⁷ See Composition Act, art. 12; Taniguchi, supra note 5, at 453. Interestingly, the United States also briefly had a similar "composition" proceeding between 1874 and 1898. See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 550 (2d ed. 1985) (providing citations).

available to both natural persons and corporations, but they are most often used by small and medium-sized businesses. One of the main attractions of composition proceedings is that they are considered simpler and less expensive than corporate reorganizations, which are discussed below. 139

Along with the other insolvency proceedings, a composition case does not begin at filing but rather upon acceptance of the case by the court. This is significant in a reorganization because

¹³⁸ See Composition Act, art. 12; Eisenberg & Tagashira, supra note 135, at 220. Japan does not have a proceeding specifically aimed at reorganization of consumer debtors such as Chapter 13 of the U.S. Bankruptcy Code. See 11 U.S.C. §§ 1301-1330 (1994). Because natural persons are eligible to file composition cases, the provision might be used in a manner similar to Chapter 13. This is not common usage, however. See Eisenberg & Tagashira, supra note 135, at 220 n.18. The Ministry of Justice has proposed legislation to create a Chapter 13-like proceeding. See Shea & Miyake, supra note 84.

¹³⁹ See Eisenberg & Tagashira, supra note 135, at 220. In contrast to the Corporate Reorganization Law's nearly 300 articles, the Composition Act con-

tains only seventy. See Composition Act, arts. 1-70.

derway—a so-called Compulsory Composition (kyōsei wagi). See Bankruptcy Act, Law No. 71 of 1922, arts. 290-346. Compulsory Composition is a procedural mechanism similar to the U.S. provision allowing the conversion of a case from Chapter 7 to Chapter 11 or 13 under the U.S. Bankruptcy Code. See 11 U.S.C. §§ 706, 1112, 1307 (1994) (permitting the conversion of a case from chapters 7, 11, and 13). One commentator, however, has classified Compulsory Composition as a separate and independent reorganization proceeding. See Shea & Miyake, supra note 84, at 264-68. That perspective, which tends to over-emphasize the procedural nature of Compulsory Composition, is not followed in this Article. Other commentators, in both Japanese and English, have declined to take that perspective. See, e.g., TANIGUCHI, supra note 122, at 16 ("There are two forms of composition, the composition law regulated by the Composition Act and compulsory composition regulated by the Bankruptcy Act, however, in actual substance they are the same."); see also Matsushita, supra note 84, at 73 (excluding Compulsory Composition as one of the five types of insolvency in Japan).

With regard to Compulsory Composition, it is worth noting that there is no evidence of debtors converting or making duplicative filings in Japan merely for dilatory purposes. See, e.g., Shea & Miyake, supra note 84, at 264 (speculating that there are no more than two Compulsory Composition conversions a year). See also PACKER & RYSER, supra note 83, at 13 ("Especially since 1967, when applicants were no longer allowed to withdraw from the proceedings without court permission and provisions made for the immediate appointment of outside trustee to assume control of the firm, the opportunistic abuse of the Corporate Reorganization became rare if not impossible."). This is in stark contrast to one version of the notorious "Chapter 20" in the United States. See Lex A. Coleman, Individual Consumer "Chapter 20" Cases After Johnson: An Introduction to Nonbusiness Serial Filings Under Chapter 7 and Chapter 13 of the Bankruptcy Code, 9 BANK. DEV. J. 357 (discussing U.S. chap-

it gives the creditors a chance to oppose, and the court a chance to consider, the benefits of rehabilitation in the specific case. ¹⁴¹ To assist with the determination of whether to allow a debtor to proceed under the Composition Act, the court provisionally appoints an examiner (seiri i'in) at a preliminary hearing. ¹⁴² The examiner is charged with reviewing the debtor's records and advising the court as to whether reorganization is feasible. ¹⁴³ It is important to remember, however, that this initial determination by the court, regarding whether to allow a debtor to initiate the reorganization process, is separate from the later decision to confirm or reject the reorganization plan.

Once the court determines that the debtor is eligible, it appoints a trustee, ¹⁴⁴ who, unlike other Japanese insolvency trustees, has no authority to control the debtor. ¹⁴⁵ Instead, the composition trustee performs a number of supervisory jobs such as reviewing the debtor's operations, approving transactions made out of the ordinary course of business, and reviewing and approving creditors' claims. ¹⁴⁶ Given that management is otherwise left in control, like a debtor-in-possession in the United States, composition is a particularly attractive alternative to corporate managers. ¹⁴⁷

Upon commencement, a stay against all unsecured creditors is automatically issued, but there are no preservation measures

ter 20 filings, i.e., serial or multiple filings of Chapter 7 and Chapter 13 bankruptcies by consumer debtors). Japanese judicial officers state off-the-record that they suspect certain debtors of trying to make serial filings, but the tenyear exclusion of issuing a second bankruptcy discharge, see Bankruptcy Act, art. 366-9(4), and the fact that compositions do not extend to voluntary secured creditors, see Composition Act, arts. 42-43, make a simple serial chapter 20 scenario in Japan unlikely.

Further, because many aspects of a bankruptcy have already taken effect by the time of a conversion to compulsory composition takes place, proceeding in this manner almost guarantees failure of the reorganization. See Shea & Miyake, supra note 84, at 264-65.

¹⁴¹ See Eisenberg & Tagashira, supra note 135, at 221.

¹⁴² Composition Act, art. 21.

¹⁴³ Id. Examiners may in turn hire experts to assist with their review. See id. art. 21(2)

¹⁴⁴ *Id.* art. 27.

¹⁴⁵ *Id.* art. 32. The trustee, however, retains the right to manage receipts and disbursements of money. *Id.* art. 34.

¹⁴⁶ *Id.* arts. 31-38.

¹⁴⁷ See Ikeda, supra note 129, at 13.

available against secured interests. Similarly, composition does not directly involve secured creditors, and thus they may otherwise freely execute on security. As discussed below, this system puts pressure on the debtor to keep secured obligations in good standing, or otherwise come to some informal restructuring with its secured creditors. Further, neither the debtor nor the trustee has a right to avoid preferential transfers. 151

A reorganization plan is eventually adopted if those holding seventy-five percent of the unsecured claims and a majority of those attending the creditors' meeting approve the plan. 152 If the plan fails to gain approval, a second creditors meeting may be held to accommodate further negotiations and revisions to the plan, or the court may directly order liquidation. 153 Once the creditors approve the plan, the court almost always confirms it.154 At this point, the composition is concluded, the debtor resumes unfettered control of its affairs, and the relationship between debtor and creditors is modified in accordance with the plan. If the debtor later cannot execute the plan, the creditors may revoke it partially or wholly but must initiate new proceedings to enforce it.155 An empirical study has shown that the mean payment level under composition reorganization plans is 46.9%, over 6 years, following a grace period of 1.2 years, with a 42% successful completion rate. 156

¹⁴⁸ Composition Act, arts. 40, 43.

¹⁴⁹ *Id.* art. 43.

As discussed in Section 3.2.3., because composition does not involve secured creditors, debtors seeking to reorganize must make private arrangements with those creditors.

¹⁵¹ See Eisenberg & Tagashira, supra note 135, at 221 n.23. Cf. Composition Act, arts. 31, 33 (providing avoidance of acts done post-filing out of the normal course of business).

¹⁵² Composition Act, art. 49.

¹⁵³ *Id.* arts. 9, 59.

¹⁵⁴ See Eisenberg & Tagashira, supra note 135, at 240-41. The Act does allow a court to deny a plan where it finds fraud, unequal treatment, or other problems. See Composition Act, art. 51.

¹⁵⁵ See Composition Act, arts. 62, 64; Bankruptcy Act, arts. 329-32.

¹⁵⁶ See Eisenberg & Tagashira, supra note 135, at 225, 246 (summarizing and analyzing data from Japan).

3.2.2.2. Corporate Reorganization

The most formal rescue proceeding is corporate reorganization. The Diet passed the Corporate Reorganization Act in 1952, basing it on the existing Japanese insolvency statutes and chapter X of the old U.S. Bankruptcy Act. The law aims at reorganization of the debtor's business including both composition of debts and adjustment of the corporation's equity ownership. Only corporations may rely on its provisions, and unlike the other formal insolvency mechanisms, a debtor does not have to meet any specific conditions, such as equitable or balance sheet insolvency, to file. Corporate reorganization is an expensive proceeding that requires large sums for administrative expenses—varying from ¥ 3,500,000 (\$35,000) to ¥ 10,000,000 (\$100,000)— to

Id. art. 30.

¹⁵⁷ See Corporate Reorganization Law, Law No. 172 of 1952. As with compositions, a debtor may use the Corporate Reorganization Law to liquidate, see id. art. 191, or it may initiate the reorganization by converting an already filed liquidation proceeding, see id. art. 29. The most detailed discussion of an actual Corporate Reorganization proceeding in English appears in Shin Ushijima, The Internationalization of the Japanese Economy and Corporate Reorganization Procedures: The Iwazawa Group and Sapporo Toyopet Failures, in LAW IN JAPAN 27, 36-54 (Scott Earnshaw trans., 18th ed. 1986).

The Corporate Reorganization Law consists of 295 articles, making it substantially longer than any of the other reorganization proceedings. Composition Act, arts. 1-70; SHŌHŌ, arts. 381-403 (Corporate Arrangement). See also WOOD, supra note 3, at 209 ("The provisions in the Japanese Corporate Rehabilitation Law governing the reorganization plan are extremely elaborate, even more so than the U.S. version.").

¹⁵⁸ See Taniguchi, supra note 5, at 454. The U.S. occupation forces proposed the Act in 1949. *Id.*

¹⁵⁹ See Corporate Reorganization Law, art. 1.

¹⁶⁰ See id. art. 6 (providing jurisdiction only over corporations). Article 30 of the Corporate Reorganization Law provides:

⁽¹⁾ In the case where a company is unable to pay its obligations that are due without exceedingly impeding continuation of its business, the company may file with the Court an application of reorganization proceedings. The same shall also apply in the case where the facts compromising causes of bankruptcy are likely to take place with respect to the company.

⁽²⁾ In the case mentioned in the latter clause of the preceding paragraph, the creditors having claims corresponding to one-tenth or more of the amount of the capital, or the shareholders have schemes corresponding to one-tenth or more of the total number of shares issued, may also file the application.

be placed in the court's control upon filing;¹⁶¹ thus, it is only used by large public corporations— and even rarely by them.¹⁶²

A corporate reorganization proceeding follows the same basic pattern as the rest of Japan's insolvency options: the case is filed, the court approves the application, a trustee is appointed, the creditors' meeting is set, and notice is published. 163 A number of elements are notable, however. First, in contrast to Chapter 11 in the United States, but consistent with practice in many other nations that have reorganization schemes, the appointed trustee takes over management of the debtor. 164 Second, secured creditors are included in reorganization proceedings. 165 That scheme is in contrast with Japan's other insolvency regimes, where secured creditors are free to execute on security. 166 Stated differently, it means the court may issue stays or preservation measures against secured property and creditors, as well as unsecured property and creditors. 167 Stays are only issued provisionally upon application at filing, though they automatically issue upon formal commencement.168 Third, like Chapter 11 in the United States, but different from the other reorganization proceedings in Japan, the

depends on local rules. See DOING BUSINESS IN JAPAN, § 8.02(2)(c) (Zentaro Kitagawa ed., 1999) (explaining that Osaka courts determine the amount on a case-by-case basis depending upon the complexity and size of the case, but in all cases a minimum deposit of ¥5,000,000 (approximately \$50,000) applies, while Tokyo courts require amounts tied to the debtor's registered amount of paid-in capital); see also TANIGUCHI, supra note 122, at 252 (noting that deposits may vary from ¥3,500,000 (\$35,000) for companies with less than ¥50,000,000 (\$500,000) in paid-in capital to ¥10,000,000 (\$100,000) for companies with more than ¥1,000,000,000 (\$10,000,000). These amounts are held by the court for administrative fees such as examiner's costs. See, e.g., Corporate Reorganization Law, art. 101(2)(1).

See Ikeda, supra note 129, at 12. See infra Table I (providing that on average less than thirty cases were filed per year in the 1990s).

¹⁶³ See Corporate Reorganization Law, arts. 30, 46-47.

¹⁶⁴ See id. art. 174. The trustee also has various other investigating and reporting duties. See id. arts. 98–98(4), 175-88. Cf. 11 U.S.C. § 1107 (1994) (providing powers of a U.S. debtor-in-possession); Insolvency Act 1986 c.45 § 14, Schedule 1 (providing administrator's powers to manage a corporation in administration reorganization in the United Kingdom).

¹⁶⁵ See Corporate Reorganization Law, art. 123.

¹⁶⁶ See, e.g., Bankruptcy Act, arts. 92-97; Composition Act, art. 43.

¹⁶⁷ See Corporate Reorganization Law, art. 37.

¹⁶⁸ See id. arts. 37, 67.

Corporate Reorganization Act allows for restructuring of a debtor's equity composition. 169

The trustee, once appointed by the court, is given an opportunity to review and investigate the corporation and the claims, after which he submits a reorganization plan to the court and subsequently to its creditors and shareholders. The statute divides all of the interested parties into six categories, which may be consolidated, increased, or modified. The categories, in order of priority, include secured creditors, priority creditors, general creditors, creditors with deferred claims, preferred shareholders, and general shareholders.¹⁷² The plan must be approved by each of these groups, but the margin of approval varies by group and the specific facts of the case. 173 In general, to meet approval the plan must pass anywhere from a two-thirds majority of the general shareholders to a four-fifths majority of secured creditors if the plan alters their security rights. ¹⁷⁴ Following approval by the various interested groups, the court must confirm the plan before a debtor can begin to implement it. 175 Corporate reorganization is still a rare measure in Japan; therefore, specific statistics are not available and it is hard to generalize about the typical types of plans approved or their rate of success. 176

3.2.2.3. Corporate Arrangement

The third form of reorganization in Japan is corporate arrangement. Legislators created the corporate arrangement system along with the corporate special liquidation proceedings as part of the second wave of modern insolvency law reform in 1938.¹⁷⁷

¹⁶⁹ See id. arts. 129 to 131-2 (providing shareholders may participate in reorganization proceedings), arts. 211-12 (providing rights of shareholders may be modified by the reorganization plan), art. 221 (allowing a reduction of debtor's paid in capital), art. 222 (allowing issuance of new shares).

¹⁷⁰ *Id.* art. 189.

¹⁷¹ *Id.* art. 159.

¹⁷² Id.

¹⁷³ *Id.* art. 205.

¹⁷⁴ *Id.* art. 205.

¹⁷⁵ *Id.* arts. 232-33.

¹⁷⁶ See infra Table I, providing number of annual reorganizations varied from nine to eighty-eight in the 1990s. See also PACKER & RYSER, supra note 83, at 39 (noting estimates that general unsecured creditors get approximately twenty to thirty percent of their approved claims).

¹⁷⁷ See Shōhō chū kaisei hōritsu [Law for the Revision Within the Com-

Like corporate special liquidation, corporate arrangement is predominately a homegrown proceeding limited to corporations and found within the Commercial Code rather than in separate, independent legislation.¹⁷⁸ Created to respond to the limitations of the Composition Act, the Corporate Arrangement Act provisions aim at reorganization of a debtor under the most minimal degree of court control.¹⁷⁹

Consistent with its streamlined approach to judicial involvement, the Corporate Arrangement Act takes up only one section, twenty-two articles, in the Commercial Code. The process is simplified substantively as well. For example, after the standard commencement procedure, the court is not required to, and generally does not, appoint a trustee; thus, control remains with the debtor. The proceeding does, however, allow a debtor to apply for a stay against secured and unsecured creditors, thereby buying time to construct an orderly reorganization plan. After a debtor or its creditors' committee submits a plan for reorganiza-

mercial Code], Law No. 72, 1938, amending SHŌHŌ.

¹⁷⁸ See SHŌHŌ, arts. 381-403; Hiso jiken tetuduki ho [Non-Contentious Matter (ex parte) Procedure Act], arts. 135(24)-135(46) [hereinafter Non-Contentious Procedure Act]. Specifically, these provisions are found in section 7 of chapter IV on corporations in book II on companies of the Commercial Code. See also SHŌHŌ, art. 381 (providing Corporate Arrangement may only be instituted regarding a corporation).

Regarding the origins of the legislation, see TAKAYANAGI, supra note 119, at 257-60 (by implication). See also Takeuchi, supra note 35, at 69 n.3 ("Neither arrangement nor special liquidation were modeled after foreign legal systems."); cf. PACKER & RYSER, supra note 83, at 36 (stating, with citations, that the legislation "was drafted with slight reference to the rules in U.K. corporate law for arrangements and reconstructions under the supervision as well as procedures in Swiss Debtor Law"); SHINJIRO TAKAGI, SHÖHÖ JÖ NO KAISHA SEIRI TETSUDUKI 28-31 (1983) (suggesting that the legislation was based on American and English equity receivership ideas); Shea & Miyake, supra note 84, at 245 (stating, without citation, that the arrangement provisions were borrowed from England).

¹⁷⁹ See Ikeda, supra note 129, at 13-14. Reflecting its minimal nature, the procedure is colloquially referred to as "mini reorganization." KAISHA KŌSEI KAISHA SEIRI [CORPORATE REORGANIZATION AND CORPORATE ADMINISTRATION] 225 (Ken Nakatori ed., 1989).

¹⁸⁰ SHOHŌ, arts. 381-403.

 $^{181}~$ See SHōHō, art. 386; Shea & Mikake, supra note 84, at 257-58.

¹⁸² SHŌHŌ, arts. 383(1) (providing for an interim stay from time of filing where necessary and upon application), 383(2) (providing for an automatic stay on enforcement actions from the court's acceptance of the case for arrangement).

tion of the corporation, all creditors whose interests are affected by the plan must approve it. 183 This requirement of 100% approval limits the number of corporations relying on the proceeding, but it also makes final court confirmation of the plan unnecessary. 184 The other limitation on corporate arrangements is that the amount that must be paid into the court for costs at the initial filing is the same extravagant amount as in a corporate reorganization proceeding. 185 In net effect, and to contrast with a purely private workout, corporate arrangement procedures may be viewed as providing debtors with a limited protective stay from creditors in exchange for (1) filing fees and (2) limited court scrutiny and supervision. Because the proceeding requires full creditor support, its use is limited to cases where the debtor is in a relatively strong position and only a small number of creditors are affected. Thus, the majority of filings are by small to medium sized businesses. 186

3.2.2.4. Financial Institutions Insolvencies

The final formal insolvency system in Japan is the one being developed for the liquidation and reorganization of financial institutions such as banks and credit unions. Historically, Japanese government regulators did not allow financial institutions to fail

¹⁸³ See Ikeda, supra note 129, at 14. The Commercial Code does not provide specific requirements for the approval of a reorganization plan by the creditors or the court. See Shea & Mikake, supra note 84, at 269. Thus, there is no mechanism to give the court or a majority of the creditors the right to force a plan on holdout creditors. Cf. Corporate Reorganization Law, art. 205. The result is that, just as with a private refinancing agreement, any plan must be approved by all creditors whose rights are affected and correspondingly no court approval is necessary. See Shea & Mikake, supra note 84, at 269.

¹⁸⁴ See Corporate Reorganization Law, art. 205. A debtor, however, may leverage the fact that it may convert to a corporate reorganization, where complete creditor agreement is not required, to persuade holdout creditors to support the proposed reorganization plan. See KOKUSAI TŌSAN HŌ [INTERNATIONAL INSOLVENCY LAW] 64 (Morio Takeshita ed., 1991) (discussing an unreported composition case where the debtor applied such leverage).

¹⁸⁵ See Non-Contentious Procedure Act, art. 135-27; TANIGUCHI, supra note 122, at 252 n.*. Yamamoto reports that as of late 1999 the amount that was required to be deposited with the court was between ¥6,000,000 (\$60,000) and ¥20,000,000 (\$200,000). AKIO YAMAMOTO, TŌSAN HŌ NYŪMON [INTRODUCTION TO INSOLVENCY LAW] 54 n.* (1999).

¹⁸⁶ See PACKER & RYSER, supra note 83, at 12 (noting based on filing statistics that large company corporate arrangements were "even so limited as to be non-existent"); Tagashira, supra note 16, at 6.

or otherwise fall into insolvency proceedings. ¹⁸⁷ Instead, Japanese regulators generally orchestrated the purchase and acquisition ("P&A") of weaker banks by stronger competitors. ¹⁸⁸ This approach, however, ended in the 1990s, when due to the continuing economic recession, the government was unable to find willing and sufficiently stable buyers of weak banks. ¹⁸⁹ To address this new state of affairs, beginning in the mid-1990s, the legislature began enacting and revising a number of laws to deal specifically with the insolvency of financial institutions. ¹⁹⁰ Until these legislative efforts, financial institutions theoretically were to liquidate or reorganize under the general statutory regimes just as any other firm. ¹⁹¹

The main plank of the new regime is the Financial Institutions Reorganization Act ("FIRA").¹⁹² The long-term purpose of this act is to provide a systematic and organized procedure for both the reorganization and liquidation of insolvent financial in-

¹⁸⁷ See Curtis Milhaupt, Japan's Experience with Deposit Insurance and Failing Banks: Implications for Financial Regulatory Design?, 77 WASH. U. L.Q. 399, 410 (1999) ("[N]o member of the banking industry was allowed to exit (fail), other than through merger with a stronger member.").

¹⁸⁸ See id.

¹⁸⁹ See id. at 418-19; Bhala, supra note 16, at 63-68 (reviewing the banking insolvency regime).

See, e.g., Yokin hoken hō no ichibu wo kaisei suru hōritsu [Act to Revise a Portion of the Depository Insurance Act], Law No. 96, 1996, amending Depository Insurance Act (Yokin hoken hō), Law No. 34, 1971.

See Milhaupt, supra note 187, at 409. The limitations of this approach were further complicated by the fact that many financial institutions, such as credit unions, were not corporations that could take advantage of proceedings such as corporate reorganization. See Corporate Reorganization Law, Law No. 172 of 1952, art. 1 (limiting application to corporations).

The U.S. approach, of course, differs. In the United States, financial institutions (as well as insurance companies) are excluded from the bankruptcy code, see 11 U.S.C. § 109(b)(2) (1994), and dealt with in separate legislation. See Federal Deposit Insurance Act, codified as title 12 of the United States Code (providing insolvency regime for financial institutions).

¹⁹² Kin'yū kikan no kōsei tetsuduki no tokureitō ni kansuru hōritsu [Special Procedures for Reorganization of Financial Institutions Act], Law No. 95, 1996 [hereinafter Financial Institutions Reorganization Act or FIRA], art. 2 (noting application to banks (ginkō), including regular banks (futsū ginko), long-term trust banks (chōki shin'yō ginkō), and foreign exchange banks (gaikoku kawase ginkō) and to cooperative financial institutions (kyōdō soshiki kin'yū kikan), including credit associations (shinyō kyōdō kumiai), trust depositories (shin'yō kinko), and labor depositories (rōdō kinko)). The law took effect on April 1, 1997. FIRA app., art. 1.

stitutions.¹⁹³ FIRA most notably differs from the standard regimes by giving bank regulators special standing both to place a bank into bankruptcy or reorganization and to represent the interests of depositors in the insolvency.¹⁹⁴ The Act also expands the reorganization options available to non-corporate banks, such as savings and loans and credit unions, by making the provisions of the Corporate Reorganization Act available to them.¹⁹⁵ Further, a short-term supplement to the law allows the government to temporarily control troubled banks and act as a bridge until appropriate resolutions can be devised.¹⁹⁶

Otherwise, the law follows the general procedures established by the bankruptcy and corporate reorganization statutes. ¹⁹⁷ In fact, rather than being seen as creating a totally separate new regime, the Act may best be understood as providing certain exceptions and rules for special debtors (financial institutions) and special creditors (depositors) within the frameworks created by the standard liquidation and reorganization statutes. ¹⁹⁸ To date, only a handful of financial institutions have been subject to the new special framework. ¹⁹⁹ At present, the shape of the special system for financial institutions is unclear and still developing. ²⁰⁰

¹⁹³ See FIRA, art. 1. See also Atsushi Kitamura, Kin'yū kikan no kōsei tetsuduki no tokureitō ni kansuru hōritsu no gaiyō [General Thoughts on the Special Procedures for Reorganization of Financial Institutions Act], 598 NBL 41 (1996) (reviewing the FIRA); Kotatsu Uchibori & Masafumi Kawabata, Kin'yū kikan no kōsei tetsudukitō no gaisetsu [General Comments on the Procedure for Reorganization of Financial Institutions] (pts. 1 & 2), 612 NBL 22, 613 NBL 19 (1997) (same).

^{(1997) (}same).

194 See FIRA, arts. 161 (providing regulators with the power to file reorganization), arts. 167 (providing regulators shall create the list of depositors' claims in reorganization), 178 (providing regulators with the power to file bankruptcy), 184-185 (providing regulators shall create the list of depositors' claims in bankruptcy).

¹⁹⁵ *Id.* art. 20.

¹⁹⁶ See Kin'yū ki'nō no saisei no tame kinkyū socchi ni kansuru hōritsu [Act Concerning Emergency Measures for the Rehabilitation of Financial Functions], Law No. 132, (1998); id arts. 8-26 (providing that the government may take control by appointing an administrator), arts. 36-52 (providing that the government may take control by temporarily nationalizing the bank); Bhala, supra note 16, at 66 (describing the temporary measures).

¹⁹⁷ See Uchibori & Kawabata, supra note 193, at 25.

¹⁹⁸ Financial Institutions Reorganization Act, art. 20 (incorporating use of Corporate Reorganization Law's provisions to apply to credit unions that are not corporations), art. 2(3) (defining 'financial institutions' (kin'yū kikan)), art. 2(5) (defining 'depository credits' (yokintō saiken)).

¹⁹⁹ The most notable examples of the new system are the insolvencies of

3.2.3. Private Liquidations, Refinancings, and Workouts

All legal systems accommodate private liquidations and reorganizations as well as those pursued through the legal frameworks.²⁰¹ Such insolvencies may include entities that simply cease to exist, entities that liquidate outside of the formal bankruptcy proceedings, entities that refinance (kin'yū shien or kin'yū enjō) their debts individually, in groups, or in their entirety, and entities that go through extensive and quasi-formal workouts and restructuring of all of their financial areas, including their capital structure.²⁰² Reviewing these private arrangements in Japan is be-

Nippon Credit Bank and the Long Term Credit Bank, both of which were placed under special public receivership (tokubetsu kōteki kanri) in 1998. See Chōkin: kōteki shikin 6,951,100,000,000 en [LTCB: Public Financing of ¥6.951 Trillion], ASAHI SHIMBUN, Feb. 17, 2000, at 7 (noting public receivership); Nippon Credit Placed Under Government Control, THE PRESS (Christchurch, N.Z.), Dec. 14, 1998, at 24.

The situation with failing banks is further complicated because the Japanese government might end its guaranty of all deposits on Mar. 31, 2001. See Depository Insurance Act, Supplementary Provisions (fusoku), arts. 16-17, as amended by Law No. 133, 1998. This issue, known in Japan as "payoff," will likely continue to be a major issue of deliberation in the coming years. Nonetheless, the indications are that Japan will continue to pursue a special insolvency system for financial institutions. Participants in various advisory discussion groups on the revision of Japanese insolvency statutes have stated that they are not reviewing or revising the insolvency statutes considering financial institutions, because they expect these will continue to be treated in a separate, specific statute. Comments from members of the Insolvency Study Committee of the Hokkaido District Court in Sapporo, Japan (Dec. 3, 1999).

See, e.g., UNITED NATIONS, COMMISSION ON INTERNATIONAL TRADE LAW, POSSIBLE FUTURE WORK ON INSOLVENCY, U.N. DOC. A/CN.9/WG.V/WP.50 ¶157-160 (1999) [hereinafter UN REPORT]; WOOD, supra note 3, at chs. 18-20; Robert K. Rasmussen & David A. Skeel, Jr., The Economic Analysis of Corporate Bankruptcy Law, 3 AM. BANKR. INST. L. REV. 85, 115 (1995) (discussing private insolvency measures in the United States and arguing that private insolvency may be preferable to formal insolvency proceedings); Elizabeth Warren, The Bankruptcy Crisis, 73 IND. L.J. 1079, 1079 (1998) (speculating that "the increasing sophistication of [U.S.] parties to craft out-of-court workouts" has been a factor in keeping down the number of formal business insolvencies).

²⁰² See AOYAMA ET AL., supra note 2, at 18-23; PACKER & RYSER, supra note 83, at 20-30 (reviewing the option and arguing that in Japan informal insolvency is more prevalent than formal). Aoyama also suggests that a large number of formal insolvency cases are eventually resolved by private arrangements facilitated through mechanisms associated with formal proceedings, such as creditors' meetings. Id. at 20. Arrangements achieved in this way, however, only have binding effect on the creditors who attended the creditors' meeting and agreed to the private arrangement. See Showa Kenzai K.K. v. Endo K.K., 312 HANREI TAIMUZU 233 (Tokyo Dist. Ct., May 31, 1974). Thus, a holdout

yond the scope of this Article; however, a few points concerning informal insolvencies are worth mentioning.

First, many of the arguments that commentators have made regarding Japan's relatively low rate of general litigation may also apply to its relatively small number of filed insolvencies. In other words, inefficient legal systems, predictable legal resolutions, and unique cultural views on public legal resolutions may all contribute to a comparatively high number of private workout solutions in Japan. Similarly, there are a number of insolvency-specific provisions, both substantive and procedural, that tend to encourage private resolution rather than formal insolvency.

could still partially derail such a private settlement. Obviously natural debtors cannot cease to exist, but the equivalent— "fleeing into the night" (yonige)— is prevalent enough in Japan to warrant a common phrase. See AOYAMA ET AL., supra note 2, at 18 (using the term); 13 KAZUO YAMADA, NEW CROWN JAPANESE-ENGLISH DICTIONARY 1115 (1988) (defining yonige).

In a similar vein, private liquidation or settlement can also occur within the formal reorganization due to the efforts of "gangster-like 'professional' creditor managers" (jiken ya, seiri ya, sarubegi ya, pakari ya, or toritate ya) who specialize in manipulating creditors committee and insolvency administration for their private advantage. See Tasuku Matsuo & Richard Vliet, Creditor's Rights Under Japanese Law, in Current Legal Aspects of Doing Business In Japan and East Asia 208, 208 n.42 (John O. Haley ed., 1978). Viewed from one perspective this might be seen as an additional private insolvency "system." See Packer & Ryser, supra note 83, at 26-29; Milhaupt & West, supra note 84, at 67-68. However, most Japanese insolvency practitioners strongly dispute such a characterization and suggest seiri-ya is not relied on as an insolvency "option." See, e.g., Nakashima Interview, supra note 105; Interview with Ayumu Iijima, Japanese Attorney at Kitahama Law Office, Osaka, Japan (Mar. 16, 2000).

203 See Schumm, supra note 92, at 291 ("Japan has many fewer court-

supervised insolvency proceedings than the United States.").

²⁰⁴ See Takeyoshi Kawashima, Dispute Resolution in Contemporary Japan, in LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY (Arthur T. von Mehren ed., 1963) (discussing unique cultural views); John O. Haley, The Myth of the Reluctant Litigant, 21 LAW IN JAPAN 18 (1988) (discussing inefficient legal systems); J. Mark Ramseyer & Minoru Nakazato, The Rational Litigant: Settlement Amounts and Verdict Rates in Japan, 18 J. LEGAL STUD. 263 (1989) (discussing predictable legal resolutions).

Insolvency-specific arguments for the other rationales—i.e., predictable legal resolutions and culture—may also be made. See Ramseyer & Nakazato, supra note 204. Nonetheless, no empirical studies exist that suggest the particular predictability of insolvency distributions in Japan. On the other hand, a number of commentators have argued that a unique cultural aversion to insolvency reduces Japanese insolvency filings. Harmer, for instance, suggests:

The first reason [for a large number of informal private insolvencies] has to do with Japanese society and culture. The values of that society generally

Procedural provisions include the need for a large filing deposit, the requirement of finding indicia of insolvency, and the lack of an automatic stay and discharge. All of these contribute to the time, cost, and burden of an insolvency proceeding and thereby create incentives to resort to private arrangement. More substantive aspects of Japanese insolvency law that may encourage informal settlements include the replacement of management in a reorganizing firm, the failure of most formal proceedings to extend to secured creditors, and, as discussed below, the failure of Japanese insolvency jurisdiction to directly cover foreign assets. 207

lead to constructive, informal discussion and negotiation of commercial and other issues through which solutions may be found and a settlement reached. This acts as a disincentive to use legal proceedings to determine issues.

Ron W. Harmer, Bankruptcy in the Global Village: Comparison of Trends in National Law: The Pacific Rim, 23 BROOK. J. INT'L L. 139, 156 (1997). Other commentators have made similar claims. See Hiscock & Sono, supra note 117, at 772-73 ("Bankruptcy is still socially condemned as a moral wrong [in Japan]."); Matsuo, supra note 104, § 7.04 ("[M]any Japanese still consider... [a bankrupt] to be a disgraced person no longer worthy of the usual social considerations due a member of society."); Schumm, supra note 92, at 291 ("The Japanese martial and samurai traditions, and the consequent concern for family honor and pride, cause the Japanese to feel great shame and disgrace upon a failure such as a bankruptcy."). Apart from noting the debate in supra note 200, this Article does not address the accuracy or usefulness of such cultural assertions or whether such aversion to insolvency is comparatively unique to Japan.

²⁰⁶ See PACKER & RYSER, supra note 83, at 3, 17, 19; Matsuo & Vliet, supra note 202, at 208 ("[O]ut of court settlement is often resorted to in Japanese business practice in that most Japanese businessmen fear the waste of time and money involved in pursuing debtors into bankruptcy or rehabilitation.").

Aoyama provides three reasons why a debtor might select private arrangement over formal insolvency: (1) due to the rigid procedure involved in a formal insolvency, private arrangements are quicker than legal proceedings; (2) informal proceedings may be less expensive than formal ones because no unnecessary administrative expenses, such as employing a trustee, are needed; and (3) the arrangements and compromises to which debtors and creditors may agree in a private setting are more flexible. AOYAMA ET AL., supra note 2, at 19. Notably, almost all of the same arguments may be made, to varying degrees, regarding any country's insolvency system. In addition, I do not speculate on whether the number of formal insolvencies would increase if lawyers and other similar professionals were allowed to file without loss of their professional licenses. For a host of examples, see supra note 109 and accompanying text.

Because secured creditors are not specifically caught in most of the formal proceedings, Japanese debtors often must make private arrangements with their secured creditors even if they pursue a formal reorganization with their unsecured creditors. See Nakashima Interview, supra note 105. Interestingly,

Second, certain private insolvency systems have developed in Japan outside of the formal statute-based framework. The first and best known of these is the "main bank" system under which one bank serves as the debtor's primary lender as well as principal shareholder. Under this arrangement, that bank traditionally takes an active part in monitoring the debtor and assisting if financial difficulty arises. It is unclear to what extent the system has survived past the early 1990s, but in the classical model, it was assumed by the debtor, its creditors, and even regulators, that the main bank would assist and administer a private insolvency solution, such as a restructuring or orchestrated merger, if the need arose. It is a structuring or orchestrated merger, if the need arose.

Japan's second private insolvency regime that results in diminished formal insolvencies is the bank clearinghouse system.²¹¹ The clearinghouse system is somewhat like the system developed by private credit agencies in the United States. Both systems developed in response to creditors' needs for a central organization to collect, monitor, and disperse information about debtors by which the creditors can make decisions regarding future transactions.²¹² Under the clearinghouse system in Japan, banks agree to:

but not surprisingly, this also seems to be true of U.S. debtors in U.S. proceedings who seek to include Japanese property secured by Japanese creditors not subject to U.S. in personam jurisdiction. See In re Vessel Charters, Inc., No. 190-15866-260 (Bankr. E.D.N.Y. Jan. 10, 1991) (noted in Tagashira, supra note 16, at 22) (allowing a U.S. debtor-in-possession to settle outside of debtor's plan with a Japanese creditor who had arrested debtor's ship in Japan). See also infra notes 352-53 and accompanying text (discussing the Japanese trustee's reasons for filing a full plenary case in the United States in the Maruko reorganization).

²⁰⁸ See The Japanese Main Bank System: Its Relevance for Developing and Transforiming Economies xxi-xxii (Masahiko Aoki &

Hugh Patrick eds., 1994) (defining the main bank system).

²⁰⁹ See Paul Sheard, Main Banks and the Governance of Financial Distress, in THE JAPANESE MAIN BANK SYSTEM 188 (Masahiko Aoki & Hugh Patrick eds., 1994).

²¹⁰ See id. at 190. Interestingly, some firms specifically avoided main bank relationships and instead relied on financing from a wide number of sources, for the express purpose of eluding main bank monitoring. See Interview with Michiaki Nakano, Attorney and Deputy Trustee of Nikko Electric, Inc., in Tokyo, Japan (July 24, 2000) [hereinafter Nakano Interview] (stating this was Nikko Electric's pre-insolvency strategy).

²¹¹ For an extensive discussion of the system, see Toshihiro Matsumura & Marc Ryser, Revelation of Private Information About Unpaid Notes in the Trade Credit Bill System in Japan, 24 J. LEGAL STUD. 165 (1995).

²¹² Japan's Ministry of Justice is responsible for designating the clearing-house, thus it has a quasi-official sanction. See Tegata hō [Notes Act], Law No.

(1) report to the clearinghouse any debtor who fails to honor a promissory note; and (2) suspend for two years all transactions with a debtor who dishonors two notes in a six-month period.²¹³ Given the modern need for banking services, blackballing pursuant to the clearinghouse rules is the "guillotine" for a shaky business.²¹⁴ Thus, debtors will do whatever is necessary to prevent the fall of the clearinghouse penalties and generally will rollover dead if they are unable to find the means to commute or stay its effect.²¹⁵

A third non-formal insolvency system is created by the Civil Conciliation Act.²¹⁶ The Civil Conciliation Act provides a mediation service through the court system as an alternative to formal litigation.²¹⁷ Approximately three-quarters of the annual civil cases resolved through the conciliation process (182,978 cases in 1998) relate to the restructuring of financial arrangements.²¹⁸ The mediation option is an elective process run by the court system; it encourages voluntary settlement through the use of a three-party panel of lay and professional conciliators.²¹⁹ The process gener-

20 of 1932, art. 83 (providing the Ministry of Justice shall designate the clearinghouse to be used for check clearing); Kogitte hō [Checks Act], Law No. 57 of 1933, art. 69 (stipulating the same process for note clearing).

²¹³ See Hiscock & Sono, supra note 117, at 771 (discussing how a debtor's inability to make timely payments is regarded as a financial breakdown within business circles); Matsumura & Ryser, supra note 211, at 167-68, 173. Banks are required to present all notes and checks to the clearinghouse for payment. See Tegata hō [Notes Act]; Law No. 20 of 1933, art. 38(2); Kogitte hō [Checks Act], Law No. 57 of 1933, art. 31.

Matsumura & Ryser, supra note 211, at 167, 172. Ramseyer has similarly characterized the rule as "quick, hard, and fatal." J. Mark Ramseyer, Legal Rules in Repeated Deals: Banking in the Shadow of Defection in Japan, 20 J. LEGAL STUD. 91, 110 (1991).

²¹⁵ See Matsumura & Ryser, supra note 211, at 167 n.9 (noting that approximately 88% of large business failures are preceded by suspension of banking transactions under the clearinghouse rules).

²¹⁶ Minji chōtei hō [Civil Conciliation Act], Law No. 222 of 1951. See also AOYAMA ET AL., supra note 2, at 22-23 (suggesting conciliation resolves many situations that would otherwise be formal insolvencies).

²¹⁷ See Andrew M. Pardieck, Virtuous Ways and Beautiful Customs: The Role of Alternative Dispute Resolution in Japan, 11 TEMP. INT'L & COMP. L.J. 31, 41-44 (1997) (describing the procedures for conciliation under the Act).

ANNUAL REPORT, supra note 117, at 198. In 1998, the year for which the most recent statistics are available, there were 240,692 civil cases resolved in conciliation of which 76% were regarding loans or sales on credit. See id.

See Civil Conciliation Act, arts. 6, 7. The court may order conciliation sua sponte; the parties may agree to seek conciliation on their own initiative; or

ally works like a private arrangement in that all parties must agree to a compromise in order for any binding restructuring to go into effect. A recent supplement to the Act, however, allows arrangements to be made with less than complete agreement in a few limited situations. In effect, the Civil Conciliation Act creates a quasi-formal procedural mechanism to facilitate private arrangements and thereby avoid the need to resort to formal insolvency proceedings.

Despite the large number of private insolvencies in Japan, formal proceedings are still important for a number of reasons. First, informal proceedings occur under the shadow of the law cast by the formal insolvency statutes.²²² That is, decisions made by actors in private arrangements will reflect the options available in, and the likely results of, formal proceedings.²²³ Second, a large and increasing number of debtors are relying on the legal forms of insolvency.²²⁴ Thus, for the reasons that have led these entities to choose formal proceedings over informal proceedings and for these filings themselves, a review of the laws as written and interpreted is valuable. Third, the formal legal system is important for

for disputes in certain industries, the parties are required to try the conciliation process before formal litigation. See id. arts. 20, 24, 31, 32, 33.

²²⁰ See id. art. 16.

²²¹ See Tokutei saimu nado no chōtei no sokushin no tame no tokutei chōtei ni kan suru hōritsu [Act Concerning Special Conciliation for the Promotion of Conciliation of Certain Debts], Law No. 158 of 1999, art. 2(1) (providing that a debtor must be a corporation and otherwise unable to pay its debts to qualify for a special building restructuring); id. art. 2(4) (stating that relevant related parties are those who may make claims on debtor's property or have secured interest in debtor's property); id. art. 17(1) (providing that the Board of Conciliators, i.e., not the creditors themselves, may approve appropriate terms where application to conciliation has been made jointly).

See PACKER & RYSER, supra note 83, at 3. See generally Robert H. Mnookin & Lewis Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 YALE L. J. 950 (1979) (discussing the impact of a legal system on negotiations and bargaining outside judicial proceedings).

JAPANESE COMMERCIAL LAW IN AN ERA OF INTERNATIONALIZATION 217, 222 (Hiroshi Oda ed., 1994) (arguing generally that understanding the written insolvency law explains, to a degree, the informal insolvency actions taken by creditors).

See infra Table I (showing an increase of 1067% in insolvency filings in the 1990s and noting 111,798 formal insolvency filings in 1998). See also Harmer, supra note 205, at 158 (arguing that a trend among managers and creditors is to resist informal procedures, such as the main bank system, for formal proceedings).

actors who do not have the connections, size, or reputation to resort to the informal proceedings. In this vein, the formal options are particularly important in international insolvencies, because foreign debtors might be excluded from or limited in the informal options available to domestic debtors.

3.3. Incidences of Insolvency²²⁶

Much of the recent commentary has been devoted to the rise in Japanese insolvencies, which have increased by 1067% in the last ten years. However, as Table 1 below shows, the vast majority (over 93% on a ten-year average) of Japanese insolvencies are individual bankruptcies. Taken together, all forms of business reorganization comprise only 0.60% of the annual number of cases and have averaged only 287 filings per year for the past ten years. The infrequency of business insolvencies reinforces the

²²⁵ See Ramseyer, supra note 214, at 96-97 (discussing parties who do not have the size or reputation to rely on informal resolution mechanisms); Sheard, supra note 209, at 194 (noting that debtors with weak or non-existing ties to Japanese main banks as creditors are more likely to use formal insolvency measures rather than private, informal measures).

²²⁶ All of the filing data and statistics used in this Section come from *infra* Table I, which compiles ten years of data published annually by the Japanese court administrators in the annual 1 GENERAL SECRETARIAT, (JAPAN) SUPREME COURT, SHIHŌ TŌKEI NENPŌ, MINJI GYŌSEI HEN [ANNUAL REPORT OF JUDICIAL STATISTICS, CIVIL AND ADMINISTRATIVE CASES VOLUME] (1989-1998). Statistics from 1952 to the present regarding only large insolvencies are available at Tokyo Shoko Research, http://www.tsr-net.co.jp/topics/zenkoku/level 4/kensu.html (last visited Nov. 15, 2000).

²²⁷ See, e.g., Bankruptcies Surge 40%; 1,400 Firms Fail in January, JAPAN TIMES, Feb. 9, 2000, at 11; Ichigatsu no tōsan 1441 jiken, ASAHI SHIMBUN, Feb. 16, 2000, at 9 (discussing 1441 cases of insolvency in January); see also supra note 17 (discussing how one aspect of the government's response to the increase in insolvencies involves raising the entire insolvency system itself).

From a comparative perspective, this might not be as surprising as it first appears: Warren reports that only four percent of U.S. insolvency filings are done by businesses. See Warren, supra note 201, at 1079-80. Interestingly, Hiscock and Sono concluded, based on mid-1970s data, that "[c]onsumer bankruptcy is almost non-existent, because neither consumers nor their creditors pursue bankruptcy proceedings in those cases." See Hiscock & Sono, supra note 117, at 773, 782.

The data below assumes all compositions are of business entities, even though the regime is available to individuals. See Composition Act, art. 12 (showing that the data available does not differentiate between natural and juristic person debtors for compositions, perhaps reflecting the practical rarity of consumer or individual compositions). See also Eisenberg & Tagashira, supra note 135, at 220 n.18 (treating all compositions as business reorganizations and

importance of private resolutions, though such agreements undoubtedly occur in the shadow of the formal proceedings. Therefore, even though the data show an increase in the 1990s of 463% in corporate reorganizations and 631% in business liquidations, the alleged problem of exploding insolvencies is largely a matter of individual bankruptcies, which increased 1118% in the 1990s, and private workouts.

Table 1: Insolvency Cases Filed in Japan Between 1989 and 1998

	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998
Total All Insolvencies	10,481	12,638	25,405	46,097	46,693	43,595	46,944	60,751	76,532	111,789
Grand Total Individual Grand Total	9,433	11,480	23,491	43,394	43,816	40,614	43,649	56,802	71,683	105,468
Corporate	1,048	1,158	1,914	2,703	2,877	2,981	3,295	3,949	4,849	6,321
Total Bankruptcies	10,319	12,478	25,091	45,658	46,216	43,161	46,487	60,291	76,032	111,067
Bankruptcies Individual Bankruptcy	9,433	11,480	23,491	43,394	43,816	40,614	43,649	56,802	71,683	105,468
Corporate	886	998	1,600	2,264	2,400	2,547	2,838	3,489	4,349	5,599
Corp. Special Liquidation	60	58	<i>7</i> 0	89	80	132	163	178	172	249
Total Liquidations	10,379	12,536	25,161	45,747	46,296	43,293	46,650	60,469	76,204	111,316
Compositions	88	77	203	292	323	250	225	244	279	361
Corporate Reorganiza- tions	10	9	14	32	44	17	36	18	31	88
Corporate Arrangement	4	16	27	26	30	35	33	20	18	24
Financial Inst. Insolvencies	-	-			-	-	-		-	2
Total Reor- ganizations	102	102	244	350	397	302	294	282	328	475

3.4. Japan's Territorial Framework and Approach Through 1980

Cross-border insolvencies, defined broadly, and a system's response to the problems they raise may be reduced to three basic issues.²³⁰ First, how does a system treat foreigners in domestic

stating, "almost all composition debtors are business entities"); Junichi Matsushita, On Current International Insolvency Law in Japan, 6 INT'L INSOLVENCY REV. 210, 212 (1997) ("Almost all composition cases are corporate cases.").

²³⁰ In contrast to some commentators who define cross-border insolvencies based on procedural filings in more than one country, I use a broad definition that encompasses any insolvency filed in one country by a party with assets or

proceedings? Second, does the system at issue recognize the effect and determinations of a foreign insolvency—i.e., how does the system deal with insolvency importation? Third, does the system seek to have an effect beyond its territorial borders—i.e., to what degree does the system seek to export its insolvency? In response to these issues, Japan's experience may be divided into two periods: (1) the strict territorial framework and approach that extended until the early 1980s; and (2) the modified universal period that has since then developed.

The foundation for the first phase in Japan's cross-border insolvency experience was set by the strict territorial provisions adopted in the Bankruptcy and Composition Acts of 1922.²³¹ Unlike many insolvency systems that did not, or do not, address the issues raised by the failure of international entities, Japan consciously considered the problem and drafted for it as early as 1902.²³² Its resolution of the issue reflected the global situation in the early twentieth century. The drafters rejected a universal approach, because: (1) jurisprudence of the day held that insolvency proceedings were merely an organized execution mechanism and therefore limited to the reach of a country's sovereign power; (2) a universal system would be inconvenient and impractical for creditors trying to pursue their claims given the limitations of transportation and communication in the early 1900s; and (3) recognition of a Japanese universal system by foreign courts was unlikely where most, if not all, other states followed a territorial approach.233 Since that decision was codified in the provisions of

interests in another country. Thus, pursuant to this definition, some crossborder insolvencies may not appear locally as insolvencies since no local insolvency proceedings are initiated.

See Bankruptcy Act, Law No. 71 of 1922, art. 3; Composition Act, Law No. 72 of 1922, art. 11 (applying Bankruptcy Act, art. 3, mutatis mutandis).

²³² See 5 MASAHARU KATŌ, HASAN HŌ KENKYŪ [BANKRUPTCY LAW STUDY] 408-10 (1924) (noting that the adoption of the universal approach was discussed and recommended by the International Law Society prior to adoption of the Bankruptcy Act in 1922); Taniguchi, supra note 5, at 451 (describing the legislative movement behind the drafting of a new bankruptcy law). The United States did not adopt a resolute approach to cross-border insolvencies until the Bankruptcy Reform Act of 1978. See Booth, supra note 5, at 1-4, 37. Canada did not legislate for cross-border insolvencies until the 1997 amendments to the Bankruptcy and Insolvency Act. See Jacob S. Ziegel, The Modernization of Canada's Bankruptcy Law in a Comparative Context, 33 TEX. INT'L L.J. 1, 16-22 (1997).

²³³ See 1 MASAHARU KATŌ, HASAN HŌ KENKYŪ [BANKRUPTCY LAW STUDY] 330-331 (1912). Thus, quite contrary to the assertions of some com-

the 1922 Bankruptcy Act, all subsequent legislation—both the creation of new regimes and amendments to old statutes—have stuck to the model.²³⁴ On paper, Japan remains the strictest of territorial nations.

3.4.1. Treatment of Foreigners in Domestic Proceedings

The most fundamental question in the field of comparative and cross-border insolvency is the treatment of non-nationals in domestic proceedings, i.e., whether foreigners suffer any per se discrimination in otherwise purely domestic insolvency cases.²³⁵ There are two aspects to this issue: (1) whether foreign creditors and other interested parties are treated without discrimination in a domestic insolvency; and (2) whether foreign debtors have standing to file, and the local courts jurisdiction to hear, an insolvency of a non-national. Japan addresses the first issue directly. Article 2 of the Bankruptcy Act, which is adopted mutatis mutandis in the Composition Act, provides, "[A]n alien or foreign corporation shall have the same status as a Japanese national or Japanese corporation in regard to bankruptcy, provided however, that this shall apply only when Japanese nationals or Japanese corporations have the same status under the native laws of the alien or the foreign corporation."236 This is the embodiment of the reciprocity principle common at the turn of the twentieth century. The obvious purpose of this section was to protect

mentators, the territorial principle was copied from the German model, not the indigenous insolvency regime. See Bhala, supra note 16, at 50 ("It is as if the insolvency regime were written in and for the most inward-looking days of the Tokugawa Period and never updated to account for changing reality of globalization.").

²³⁴ See, e.g., Corporate Reorganization Law, art. 4 (enacted in 1952 and providing for the territorial approach). But see Minji saisei hō [Civil Rehabilitation Law], Law No. 225 of 1999 (reviewing civil rehabilitation).

Discriminatory treatment used in this sense refers to situations where a foreign national would be treated differently than a domestic citizen or other national. See Tagashira, supra note 16, at 6 (describing the conflicting views regarding the availability of Japanese insolvency proceedings to foreigners). Discriminatory treatment does not refer to substantive provisions that are inherently discriminatory such as the priority for domestic tax claims. See, e.g., 11 U.S.C. § 507(a)(8) (1999) (providing priority status for U.S. tax claims); Bankruptcy Act, art. 47(2) (providing priority status for Japanese tax claims). This does not refer to the non-enforcement of foreign claims that are directly or indirectly based on revenue or punitive laws. For a list of cases involving foreign revenue and punitive claims, see infra note 341.

²³⁶ Bankruptcy Act, art. 2 (emphasis added); Composition Act, art. 11.

Japanese citizens (both natural and corporate) from discrimination by foreign countries— an issue the Japanese were particularly sensitive to considering the so-called "Unequal Treaties" of the

immediately proceeding period.237

If strictly applied, the reciprocity statute requires insolvency courts to treat foreigners no differently than nationals only as long as Japanese receive such treatment in the foreigner's country. This is not a problem for nationals of most of the major developed nations today, because almost all systems treat foreigners and nationals alike. 238 Nonetheless, the potential for discriminatory treatment exists under the reciprocity rule. This reciprocity provision was not, however, copied or included by reference in any of the later insolvency regimes. In fact, the Corporate Reorganization Act expressly deleted the reciprocity proviso, leaving only the non-discrimination portion.²³⁹

Following the spirit of the Corporate Reorganization Act's provision, commentators widely believe that even where a strict application of the reciprocity provision might otherwise require it, a Japanese court today would not restrict foreigners from use of its insolvency statutes.²⁴⁰ Japanese authorities explain the rationale of this interpretation as follows: "[S]ince insolvency pro-

²³⁹ Corporate Reorganization Law, art. 3 ("Status of Aliens. Aliens of foreign companies shall have the same status as Japanese nationals or Japanese

companies in regard to corporate reorganization.").

²³⁷ See MIKIO HANE, MODERN JAPAN: A HISTORICAL SURVEY 68-69 (2d ed. 1992); Matsushita, supra note 84, at 73 (discussing Japan's treaties with England, France, Russia, the Netherlands, and the United States that opened Japan to trade and gave the foreign nations extraterritorial rights in Japan); Taniguchi, supra note 5, at 452-53 (describing the reciprocity requirement as anachronistic and noting that it is generally condemned today).

²³⁸ See DEV. FOR PROF'L EDUC., MULTINATIONAL COMMERCIAL INSOLVENCY (Daniel M. Glosband & E. Bruce Leonard eds., 1993) (providing reports from countries that claimed not to discriminate against foreigners in insolvency proceedings except for recognition of revenue or penal claims, including: Argentina (after the "hotchpot" rule), Australia, Bermuda, Canada, England, France, Germany, Israel, Mexico, Netherlands, Norway, Scotland, Sweden, United States, and Venezuela).

²⁴⁰ See, e.g., Takaaki Hattori & Dan Fenno Henderson, Civil Procedure in Japan § 9.06[9] n.139 (1986); Tagashira, supra note 16, at 6-7; Taniguchi, supra note 5, at 455-56; see also INTERNATIONAL INSOLVENCY LAW, supra note 184, at 67-68, 70-71 (discussing four unreported cases concerning a Chinese, North Korean, Italian, and unknown national where the Japanese court did not strictly require reciprocity). Interestingly, Bebchuk and Guzman recently made an argument in favor of applying a reciprocity requirement in international insolvencies. See Bebchuk & Guzman, supra note 25, at 806.

ceedings form a part of a nation's economic system, they should be available to all foreigners engaged in economic activity in Japan."²⁴¹ Either reflecting the dominance of this theory or the rarity of discriminatory insolvency laws globally, no reported examples of a Japanese court requiring reciprocity in insolvency exist.

The second issue regarding a foreigner's treatment in a domestic insolvency is whether a non-Japanese may be a debtor in a domestic Japanese insolvency. Japan does not answer this issue directly. There is no provision specifically granting standing to a foreign debtor or giving jurisdiction over such person's insolvency to Japanese courts. There is little question that the power exists, however, as it is implicit in the insolvency venue rules that specifically provide in which district court a foreign debtor must file in the event of insolvency in Japan. In giving foreign debtors standing to file any kind of insolvency in local courts, Japan is similar to the United States, but notably different from those countries, such as England, that limit the proceedings available to a foreign debtor. This seemingly universal aspect of the Japa-

Bankruptcy cases shall come under the exclusive jurisdiction of the district court having jurisdiction over the location of the principal place of business, or of the principal place of business in Japan if the principal place of business is in a foreign country, in the case the debtor is a person engaged in business, and in the case he is not a person engaged in business, or in the case he has no place of business, of the district court having jurisdiction over the locality wherein exists his ordinary court jurisdiction.

See Bankruptcy Act, art. 105; see also art. 107 (providing that if venue is not provided pursuant to article 105, the court with jurisdiction over the location of any property shall have exclusive jurisdiction). See also Composition Act, art. 3 (applying Bankruptcy Act, arts. 105, 107 mutatis mutandis); Corporate Reorganization Law, art. 6 ("Cases of reorganization shall come under the exclusive jurisdiction of the district court having jurisdiction over the location of the head office of the company, or, if the head office is abroad, the location of its principal place of business in Japan.") (emphasis added). But see HATTORI & HENDERSON, supra note 240, § 9.06[9] (noting earlier debate on this issue).

²⁴³ See 11 U.S.C. § 109 (1999) (providing any person that resides in, has a place of domicile or business in, or has property in the United States may be a debtor under the U.S. Bankruptcy Code). Foreign companies in England may not pursue voluntary winding up proceedings there. Insolvency Act 1986 § 221(4). Further, English administration is only available to English companies. Re Dallhold Estates (U.K.) Pty. Ltd., [1992] B.C.L.C. 621, 623, [1992] B.C.C. 394 (Ch.). But see GOODE, supra note 2, at 501 (stating that an administrative

²⁴¹ Tagashira, *supra* note 16, at 7.

²⁴² For example, Bankruptcy Act article 105 provides, with emphasis added:

nese regime is not surprising, however, and is a necessary outgrowth of its otherwise territorial approach described below. That is, because Japan's territorial statutes presume that foreign proceedings will have no effect in Japan and insolvent debtors must file separate proceedings in each country where they have assets or interests, it is necessary to allow all foreign debtors the power to file proceedings in Japan.

In summary, since before the Bankruptcy Act's enactment, Japanese law has provided the basic foundation for an open insolvency system. Interested foreign parties are protected from discrimination in domestic proceedings by an affirmative reciprocity statute. Even though a strict application of this rule would itself cause discrimination, both practice and theory have long foreclosed that possibility. Further, non-nationals are indirectly protected by those rules and theories which intimate that Japanese courts have the jurisdiction to hear the cases of foreign debtors. In this way, Japan has been able to mollify and modernize insolvency rules that were drafted to reflect a different and stricter international legal environment at the turn of the twentieth century.²⁴⁴

3.4.2. Non-Recognition of Foreign Insolvencies

In contrast to the generally open nature of Japanese insolvency law to foreigners seeking to participate in a domestic insolvency, the statutory rules regarding recognizing foreign insolvencies are as restrictive as possible. Though the stage was already set by the case law under earlier statutes, the Bankruptcy Act codified the approach in 1922 with article 3(2) which provides: "A bankruptcy adjudged in a foreign country shall not be effective with respect to properties existing in Japan." This provision was incorporated by cross-reference in the Composition Act, and the Corporate Reorganization Act copied it nearly verbatim. None of the other insolvency statutes contains similar provisions, but

order can be made against a foreign company where requested by a foreign court under section 426 of the Insolvency Act).

All five of the cross-border insolvency models begin from this nondiscriminatory base. *See also* GOODE, *supra* note 2, at 496-97 (reviewing the issue and noting, with citations, that England and the United States follow the nondiscriminatory approach).

²⁴⁵ Bankruptcy Act, art. 3(2) (emphasis added).

²⁴⁶ See Composition Act, art. 11; Corporate Reorganization Law, art. 4(2).

there is no doubt that the various drafters intended to create a strictly territorial regime.²⁴⁷

Until the 1980s, the courts consistently found that the effect of foreign insolvencies was limited to the plain meaning of Article 3. In a decision under the old bankruptcy act of 1872, Japan's highest court, the Great Court of Judicature, held that a bankruptcy in Hawaii had absolutely no effect in Japan and, therefore, the debtor was still liable to a Japanese creditor. The court summarized, "[A]bsent an international treaty or special statute, the bankruptcy declared in another country has no effect in this country, because the effect of a bankruptcy declaration is limited to the territory within which the local court has the power to enforce its judgments."

Courts have followed this precedent as recently as 1983, when the Osaka district court held that a debtor's bankruptcy in Hong Kong had no effect on proceedings taking place in Japan. ²⁵⁰ In this case, the debtor was an Indian national involved in litigation in Japan with his Indian bank regarding overdrafts in both Hong Kong and Japan. In the midst of the Japanese suit, a Hong Kong court declared the debtor bankrupt under Hong Kong law. ²⁵¹ In response to the Hong Kong declaration, however, the Japanese court found that the foreign bankruptcy did not stay or otherwise impact the Japanese litigation in any way. ²⁵² Leaving little room for future doubt and following closely the Hawaii judgment in language and reasoning, the court stated:

As a matter of textual interpretation, the words bankruptcy (basan) and reorganization (kōsei) used in the respective territorial provisions may be read broadly to incorporate all forms of foreign liquidation and reorganization proceedings. See Corporate Reorganization Law, art. 4(2); Bankruptcy Act, art. 3(2). As a matter of the spirit of the law, Japanese courts and commentators have consistently stated that the territorial approach covers even those laws where it is not specified. See, e.g., Matsushita, supra note 84, at 74-75 (discussing territoriality and noting its application to the Financial Institutions Reorganization Act even though not explicitly provided therein).

²⁴⁸ Chimura v. Kasamatsu, 8-6 TAIHAN MINROKU 85 (Great Court of Judicature, June 17, 1903).

²⁴⁹ *Id.* at 85.

²⁵⁰ Bank of India v. Clips Corp., 516 HANREI TAIMUZU 139 (Osaka Dist. Ct., Sept. 30, 1983).

²⁵¹ Id.

²⁵² *Id.* at 141.

According to the evidence, we recognize that the debtor received a declaration of bankruptcy in Hong Kong and that debtor's property in Hong Kong was included in those bankruptcy proceedings. However, absent an international treaty or special statute, the bankruptcy declared in Hong Kong has no effect in Japan, because the effect of a bankruptcy declaration is limited to the territory within which the local court has the power to enforce its judgments. Thus, the debtor's declaration of bankruptcy in Hong Kong has no impact on the debtor's standing in the present suit.²⁵³

In short, by statute and court interpretation as recent as 1983, Japan has followed the strictest interpretation of the territorial rule and given no effect to foreign insolvencies in Japan.

3.4.3. Restriction of Domestic Insolvencies' Foreign Effect

Japanese statutes similarly take the narrowest territorial view of the effect of a domestic insolvency abroad. Article 3(1) of the Bankruptcy Act, which was extended to reorganizations by incorporation in the Composition Act and the Corporate Reorganization Act, provides: "A bankruptcy adjudged in Japan shall be effective with respect to only the bankrupt's properties existing in Japan." The courts have traditionally given this statute a plain reading. For example, in 1959, the Tokyo High Court found that despite its salvage value, debtor's ship, which had sunk off the coast of Okinawa, was not part of the debtor's insolvency estate, because Okinawa was at that time under United States control. 255 The court reasoned:

²⁵³ Id

²⁵⁴ Bankruptcy Act, Law No. 71 of 1922, art. 3(1) (emphasis added). *See also* Composition Act, Law No. 72 of 1922, art. 11; Corporate Reorganization Law, Law No. 172 of 1952, art. 4(1).

²⁵⁵ Mitomo Salvage v. Ōhara Industries, K.K., 180 HANREI JIHŌ 39, 40 (Tokyo High Ct., Jan. 12, 1959). Regarding the United States control of Okinawa, see Treaty of Peace with Japan, Apr. 28, 1952, U.S.-Japan, 3 U.S.T. 3169, art. 2-3 (providing that Okinawa was under U.S. jurisdiction). For additional discussion of the interesting issue of Okinawa's legal status between 1945 and 1972, see Yoshio Nakano, Sengo shiryō: Okinawa [Post-War Data: Okinawa] (1967); Nick Sarantakes, Keystone: The American Occupation of Okinawa and U.S.-Japanese Relations, 1945-1972 (2000).

[Okinawa] is Japanese territory, but according to article 3 of the [United States-Japan] Peace Treaty it is excluded from exercise of Japanese sovereignty. Thus, Japan cannot order compulsory execution on tangible movables located there. It must follow then that this area is a foreign country for the purposes of article 3(1) of the Bankruptcy Act. Therefore, tangible movables located there remain as such and are not incorporated into a bankruptcy estate declared in Japan.²⁵⁶

The court went on to hold that because it could not control the foreign property, it could not uphold the lower court's preliminary stay for preservation of the property pending resolution of

the bankruptcy issues.257

The discussion by the court in the Okinawa case highlights the fact that foreign courts—rather than Japanese courts—will more often address the effect of a Japanese insolvency on overseas property. In other words, because a Japanese court cannot directly control property located abroad, it is more likely that the interested parties will call upon a foreign court with in rem jurisdiction over debtor's assets to decide their status. One example of this was Orient Leasing Co. Ltd. v. The Kosei Maru ("Kosei Maru")258 where a Canadian court was asked to determine the effect of a Japanese reorganization on a ship seized in Ontario. The debtor, a Japanese shipping company with numerous cargo vessels, had filed for corporate reorganization in Japan and had received a stay against execution that protected its ships from seizure. Ignoring this stay, the creditor, also a Japanese company, initiated arrest proceedings in Canada where one of debtor's ships was temporarily docked and sought to foreclose the mortgage it had on this vessel.

The Canadian court began its analysis by noting that the sole issue was the effect of the Japanese insolvency and its accompanying stay on property outside of a Japanese court's direct control.²⁵⁹ To answer this question, the court in Canada was required to determine the meaning of the reorganization law's equivalent of ar-

²⁵⁶ *Mitomo*, 180 HANREI JIHŌ, at 39-40.

²⁵⁷ *Id.* at 40.

²⁵⁸ 94 D.L.R. 3d 658 (Fed. Ct. 1978).

²⁵⁹ Id.

ticle 3(1) of the Bankruptcy Act. As a preliminary and procedural matter, the court first stated that because foreign law was a matter of fact, it could only determine the state of Japanese law as it stood presently based on the statutes and cases. In other words, it could not rule based on what Japanese insolvency law might become "under the possible creative influence of the Japanese jurisprudence."261 This determination effectively preempted the Japanese trustee's arguments because it had relied on Japanese legal experts to show where Japanese insolvency law might go, as a matter of law, through creative interpretation of the territorial provisions.²⁶² The court concluded, however, that the territorial statutes meant what they said—a Japanese insolvency was effective "with respect to only the bankrupt's properties existing in Japan."263 Applying this approach, the ship was in Canada, not Japan, and thus, the Japanese insolvency and stay did not prohibit the creditors from executing on the vessel.²⁶⁴

In dicta, the Canadian court did, however, review the Japanese trustee's arguments in favor of the broadest legal interpretation of the territorial statutes. The trustee's experts argued that the territorial statutes had an inherent ambiguity in their language that allowed the court to find that property outside of Japan in fact existed in Japan for the purpose of insolvency. This ambiguity allegedly arose because a Japanese court was always "potentially" in control of foreign property since the asset might be returned to Japan on its own or be repatriated at the direction of the insolvency trustee. In response to these arguments, the Canadian judge found:

Id. at 677. As in England, courts in Canada decide questions of foreign law as matters of fact. See, e.g., Sabena Belgian World Airlines v. Gulf Products Co., 35 A.C.W.S. 272, ¶¶ 38-39 (Alta. Q.B., 1992); C.M.V. CLARKSON & JONATHAN HILL, JAFFEY ON THE CONFLICT OF LAWS 10, 16-17 (1997). But see DOING BUSINESS IN JAPAN § 5.03[3], supra note 161 (providing that as a civil law country, issues of foreign law are a matter of law in Japan); SCOLES & HAY, supra note 59, at §§ 12.15-12.18 (providing that issues of foreign law are predominately a matter of law in the United States).

²⁶¹ Orient Leasing, 94 D.L.R. at 677.

²⁶² See id. at 677-78, 682-83.

²⁶³ Id. at 18-19, citing Reorganization Act, art. 4(1) and Bankrutpcy Act, art. 3(1).

²⁶⁴ *Id.* at 19.

²⁶⁵ See id. at 23-24.

Such a reasoning appears to me difficult to accept as it shows obvious weaknesses. On the one hand, the new interpretation suggested seems to me to go so far beyond the express statutory language of the enactment that I doubt whether any court could accept it, however wide the power of that court might be to construe the law.²⁶⁶

As discussed below, the Canadian court failed to predict where

the Japanese courts would soon be heading.

The drafters of Japan's insolvency statutes consciously rejected the theoretical benefits of a more universal approach to cross-border insolvencies for the pragmatic solutions of territoriality.²⁶⁷ As one of the original draftsmen perceptively explained:

Put briefly, as transportation gets better the world will get accordingly smaller. Therefore, because something like the accumulation and organization of assets in only one place would be convenient for creditors too, as an ideal, universalism is good and in the future something like this might become the standard. However, in the present situation where that has not yet occurred, and considering Japan's position, we cannot jump to that stage.²⁶⁸

Despite the realization of the drafter's predictions regarding improvements in technology and the changing international standard for cross-border insolvencies, Japanese legislators have refrained from amending the approach of Japan's insolvency statutes. Further, with the possible exception of the gradual

²⁶⁶ Id. (emphasis added).

²⁶⁷ 1 KATŌ, supra note 233, at 330-31.

²⁶⁸ 5 KATO, supra note 233, at 409-10. Professor Katō assisted in drafting the Bankruptcy Act. See Taniguchi, supra note 5, at 451-52

The legislators passively affirmed the territorial approach as recently as 1996 when they enacted the Financial Institutions Reorganization Act without limiting the territorial default structure. See Financial Institutions Reorganization Act, Law No. 95, 1996; Matsushita, supra note 84, at 75. As noted above, revision of the cross-border portions of Japan's insolvency regime is presently being debated and legislation will likely be introduced in late 2000 or 2001. See Kokusai tōsan hōsei ni kan suru yoamian [Draft Proposal Regarding the Legal Framework for Cross-Border Insolvencies], 689 NBL 52 (2000). Because the purpose of this Article is to study the effects of a territorial regime in a global

erosion of the reciprocity requirement, Japanese courts for most of the past century have read the statutes strictly. They have both refused to recognize any domestic effect of foreign insolvencies and, to the extent called upon, denied any foreign impact of a Japanese insolvency. In short, Japan deserved its reputation for having the quintessential territorial insolvency scheme from the beginning of the twentieth century until the early 1980s.

3.5. Deviating from Territoriality and Dabbling with Modified Universalism Since 1980

With the rise of Japan's involvement in the international marketplace in the 1970s, Japanese academics began to advocate a more universal approach to cross-border insolvency issues.²⁷⁰ After little initial effect, this movement began to take hold in the early 1980s, and since then, deviation from the strict territorial approach has become the general, but not universal, rule in Japanese courts.²⁷¹ In effect, the practical incentives and obligations created by the modern interconnected global economy pressured the courts to follow the advice of the theorists and the requests of the practitioners for a more universal stance. As a result, a partial, though arguably haphazard, modified universal regime has developed and can be seen in the four primary aspects of both insolvency importations and exportations, namely: (1) recognition of foreign insolvencies; (2) preservation of foreign assets; (3) conciliation of preference and avoidance rules; and (4) turnover of foreign property.

world, as noted above with regard to the new Civil Rehabilitation Law, the new proposals are beyond its scope. See supra note 17.

²⁷⁰ See Makoto Ito, Report for Japan, in CROSS-BORDER INSOLVENCY: NATIONAL AND COMPARATIVE STUDIES 178, 180 (Ian F. Fletcher ed., 1992), reprinted in JAPANESE REPORTS FOR THE XIIITH INTERNATIONAL CONGRESS OF COMPARATIVE LAW 136, 145 (1991) ("Recently the academic authorities have been asserting this criticism almost unanimously, and the bankruptcy court practice tends to accept this criticism."). In the West, this movement is best summarized and seen by the arguments in Orient Leasing, 94 D.L.R. 3d at 17-19. In addition, theoretical subtleties of the theory are best explained in English by the lead expert in the Orient Leasing case, Professor Yasuhei Taniguchi, in his 1987 article, supra note 5, at 460 n.34, 462-69. For a summary in English of the various academic opinions advocating this strain, see Takeuchi, supra note 35, at 74-76.

²⁷¹ See, e.g., Matsushita, supra note 229, at 210, 214 (discussing cases).

3.5.1. Foreign Insolvencies in Japan— Insolvency Importation

3.5.1.1. Recognition of Foreign Insolvencies in Japan

The statutory command is simple—foreign insolvencies shall have no effect on Japanese property. This has never meant, however, that Japanese courts are blind, deaf, and dumb to a foreign insolvency. Even the Bankruptcy Act as originally enacted acknowledged foreign insolvencies. Article 137 provides, "[I]n cases where there has already been an adjudication of bankruptcy in a foreign country at the time of filing a petition for bankruptcy [in Japan], the person filing the petition for bankruptcy need not give prima facie proof of the facts comprising the causes of bankruptcy."

This simple rule is meaningful in Japan where the filing party initially holds the burden of proving one of the indicia of insolvency before a court will accept a case. The rule has been applied in at least one case where a Japanese court held that a German declaration of bankruptcy satisfied the prima facie requirements for initiating bankruptcy protection in Japan. The shall be a prima facie requirements for initiating bankruptcy protection in Japan.

Furthermore, foreign insolvencies often have de facto effect on Japanese property, given that a foreign trustee can always control a debtor's unencumbered Japanese assets, regardless of any Japanese territorial statutes. For example, in *In re International Horizons, Inc.*, an American trustee (in fact, a debtor-in-possession) was able to administer the debtor's Japanese assets and otherwise continue the debtor's business in Japan with no involvement of the Japanese courts and only occasional approval of a U.S. bankruptcy court.²⁷⁶ *International Horizons* concerned the

²⁷² See Bankruptcy Act, art. 3(2).

²⁷³ Id. art. 137. The same rule applies by analogy to the other forms of insolvency. See YUKIO KAISE, KOKUSAI TŌSAN HŌ JOSETSU [INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW] 15, 44 n.36 (1989).

²⁷⁴ See Bankruptcy Act, arts. 126, 127.

Deutsche Asia Tierke Bank v. Christian Holstein, 3707 SHIMBUN 7 (Kobe Dist. Ct., Apr. 26, 1934).

²⁷⁶ See In re Int'l Horizons, Inc., 11 B.R. 366, 369 (Bankr. N.D. Ga. 1981) (authorizing the trustee to "transfer cash collateral held in Japan by affiliates of the debtor... and thereafter transfer, if necessary, the 'sequestered funds' up to the remaining balance of cash collateral which the debtors are hereby authorized to use," thereby extending the U.S. bankruptcy court's jurisdiction over Japanese assets). The insolvency of International Horizons produced a number of reported opinions. Collectively, this Article refers to this insolvency and these cases as "International Horizons." Citations are provided to the specific

reorganization attempt by a U.S. parent corporation and its Japanese, Netherlands Antilles, and Bahaman subsidiaries.²⁷⁷ The case was complicated by Bank of America's efforts to thwart the reorganization and directly collect on \$60 million in credit it had extended to the debtor group.²⁷⁸ The case raises a number of interesting cross-border insolvency questions, but is notable here for the fact that the U.S. bankruptcy court and trustee assumed control over the debtor's assets in Japan without any attempt to receive local recognition of this foreign insolvency, let alone give effect to Japan's territorial commands.²⁷⁹ To the extent that no

relevant case where possible. The relevant cases include: Bank of Am., N.T. & S.A. v. Touche Ross & Co., 782 F.2d 966 (11th Cir. 1986); United States v. Int'l Horizons, Inc., 751 F.2d 1213 (11th Cir. 1985); Int'l Horizons Inc. v. Comm. of Unsecured Creditors, 689 F.2d 996 (11th Cir. 1982); Bank of Am., N.T. & S.A. v. Touche Ross & Co., 603 F. Supp. 351 (N.D. Ga. 1985); Bank of Am., N.T. & S.A. v. World of English, 23 B.R. 1015 (N.D. Ga. 1982); Int'l Horizons, Inc. v. Comm. of Unsecured Creditors, 16 B.R. 484 (N.D. Ga. 1981); In re Int'l Horizons, Inc., 51 B.R. 747 (Bankr. N.D. Ga. 1985); In re Int'l Horizons, Inc., 31 B.R. 723 (Bankr. N.D. Ga. 1983); American-Amicable Life Ins. Co. v. Int'l Horizons, Inc., 28 B.R. 97 (Bankr. N.D. Ga. 1983); In re World of English, N.V., 16 B.R. 817 (Bankr. N.D. Ga. 1982); World of English, N.V. v. Bank of Am., N.T. & S.A., 21 B.R. 524 (Bankr. N.D. Ga. 1982); In re Int'l Horizons, Inc., 11 B.R. 366 (Bankr. N.D. Ga. 1981); In re Int'l Horizons, Inc., 14 B.R. 199 (Bankr. N.D. Ga. 1981); Int'l Horizons, Inc. v. W. Pub. Co., Inc., 15 B.R. 798 (Bankr. N.D. Ga. 1981).

²⁷⁷ See World of English, 16 B.R. at 821.

[A Japanese legal expert testified] that if the payments at issue "were made in Japan to Japanese creditors, the claims for such payments are deemed [by Japanese law] to have existed in Japan." It therefore appears that a determination by this Court that under title 11 of the United States Code [i.e., the Bankruptcy Code] a preferential transfer has been made will not be binding in Japan. The danger that an order of this Court may not be enforceable in a foreign country is one of the major problems which arises in legal proceedings dealing with multinational corporations. However, the inability to domesticate an order of the Court in Japan does not [prevent this court from issuing such order or] indicate a lack of good faith on the part of the debtors in filing their Chapter 11 petitions. BoA [Bank of America] would be under the same disability if this case had not been filed in this Court in that they would have to proceed in a Japanese court with regard to economic activity which has taken place solely in Japan.

²⁷⁸ See Bank of Am., 782 F.2d at 968.

²⁷⁹ See Int'l Horizons, 11 B.R. at 369. The same U.S. bankruptcy court elaborated on this point in a separate opinion when it held that a Japanese court's non-recognition of a U.S. court's determinations and control over assets in Japan does not limit the U.S. court's power to control such property. In re World of English, 16 B.R. at 820. The court stated:

assistance is needed from a Japanese court, a foreign trustee's power over a debtor's assets is, as a practical matter, only limited by the foreign law.²⁸⁰

The Japanese courts acknowledged this indirect power and even extended its impact as early as 1903.²⁸¹ In 1903, a Japanese court of appeals allowed the bankruptcy trustee of an insolvent German decedent to pursue the debtor's rights in a Japanese lawsuit over a failed sale.²⁸² The assistance of the Japanese court was only required because the debtor had died, leaving the trustee incapable of proceeding directly in the debtor's name. By recognizing the foreign trustee's standing to proceed in the name of the decedent, the appeals court indirectly allowed the foreign insolvency to affect Japanese property through the German trustee's eventual de facto control of the asset.²⁸³

Beginning in the 1980s, the Japanese courts took this approach a step further and began interpreting the territorial statutes as narrowly as possible. The first and leading case in this movement was International Management Business K.K. v. Fincamera S.A. ("IMB") in 1981.²⁸⁴ In IMB, the trustee of a corporation involved in bankruptcy proceedings in Switzerland sought to gain control over a Japanese trademark of the debtor corporation. A Japanese creditor had already provisionally attached the trademark; thus, the Swiss trustee needed the recognition of the Japanese court in

Id.

See, e.g., Ito, supra note 270, at 183 ("In conclusion a foreign trustee may administer the debtor's assets located in Japan, if there are not attaching creditors on them.").

See, e.g., Gottfried v. Kobayashi, 660 SHIMBUN 12, 13 (Tokyo Ct. App. 1906). This decision was under the old Bankruptcy Act, but, as noted above, the court interpreted that code consistently with the territorial provisions found in the later Bankruptcy Act. See supra notes 248-49 and accompanying text.

²⁸² Gottfried, 660 SHIMBUN at 13. Decedents' estates may be subject to bankruptcy in Japan as well as in Germany. See Bankruptcy Act, art. 136. In the United States, decedents' estates are not eligible for bankruptcy. GEORGE M. TRIESTER ET AL., FUNDAMENTALS OF BANKRUPTCY § 3.01 (1986) (citing 11 U.S.C. §§ 101(33), 109). However, foreign bankruptcies based on deceased debtors may be recognized pursuant to § 304 of the U.S. Bankruptcy Code. See Goerg v. Parungao (In re Goerg), 844 F.2d 1562, 1568 (11th Cir. 1988) (recognizing and assisting the German bankruptcy of a deceased debtor).

²⁸³ See id. The court determined that a person's capacity was a matter of his national law; therefore, German rules applied, allowing the German trustee to act on behalf of the deceased's estate. *Id.*

²⁸⁴ 994 HANREI JIHŌ 53 (Tokyo High Ct. Jan. 30, 1981).

order to have the standing to try to set aside the attachment. In Japan, the trustee filed the case under the court's regular jurisdiction rather than pursuing a second bankruptcy, whether plenary or ancillary.²⁸⁵ This case differs from the 1903 case in that the Swiss trustee did not merely seek recognition of his standing, but also sought to use the power of the court to displace the attachment on the trademark. The Japanese creditor argued that the Swiss trustee had no standing to pursue any claims over the debtor's property in Japan, because article 3 of the Bankruptcy Act provided that a foreign bankruptcy had no effect on Japanese property.²⁸⁶ The Tokyo District Court disagreed, and the Tokyo High Court affirmed.²⁸⁷

The high court's opinion began by holding that article 3(2) prevented a Japanese court from recognizing or giving full effect to a foreign bankruptcy.²⁸⁸ By this, it appears the court intended that a foreign trustee in Japan could not apply any of the affirmative powers provided by either the foreign insolvency law or Japanese law, such as the rights of execution, avoidance, and preservation. However, the court held that the foreign trustee retained the right to act in the name of and on behalf of the debtor to the extent that he was given such power under the foreign law. 289 Thus, because Swiss law provided that the debtor's Japanese property was part of the estate and within the trustee's control, the Japanese court allowed the trustee to administer the debtor's Japanese property to the extent that the debtor was otherwise entitled to do so.²⁹⁶ In effect, this means that not only can a foreign trustee exert de facto control over unencumbered Japanese property, but he is also able to enlist the assistance of the Tapanese courts to a certain degree. Because the trustee is simply acting in the stead of the debtor, this holding is not necessarily ir-

The court had in rem jurisdiction over the trademark and in personam jurisdiction over the creditor. Further, the court would have had bankruptcy jurisdiction over the matter even if the debtor had no corporate presence in Japan since the property was located in Japan. See Bankruptcy Act, arts. 105, 107.

²⁸⁶ *IMB*, 994 HANREI JIHŌ at 53.

²⁸⁷ Id.

²⁸⁸ *Id.*

²⁸⁹ See id.

²⁹⁰ See id. The Swiss bankruptcy statute provided that debtor's property no matter where located was included in the bankruptcy estate. See Bankruptcy and Debt Collection Act, arts. 197, 240 (Switz.).

rational or even unexpected. However, it does go beyond the strict version of territorialism— which does not recognize a foreign trustee's status or standing to collect local assets— that was previously employed in Japan and is still arguably followed in Argentina, Austria, Denmark, and Norway, among others.²⁹¹ As a result, in practice a foreign trustee in Japan can now largely avoid the territorial rules and can administer Japanese property as

part of a foreign insolvency proceeding.

Later courts have not universally followed IMB's more lax version of territorialism.²⁹² In 1983, the Osaka district court chose not to apply an IMB approach in the Hong Kong and India case discussed above and instead interpreted the territorial rule strictly.²⁹³ In 1991, though, the Tokyo District Court rejected the Osaka court's traditional stance and applied the liberal interpretation advocated in IMB.²⁹⁴ In this case, the court recognized a Norwegian trustee's right to file a lawsuit on behalf of the debtor in order to undo corporate resolutions adopted in Japan.²⁹⁵ By doing so, the court both acknowledged the trustee's standing to act in Japan on behalf of the debtor and affirmatively provided the apparatus for the trustee to exercise his powers. The end result is that the combination of the strict territorial statute with the pragmatic desire and theoretical support for a more universal approach leaves the judicial approach unpredictable. Based on recent academic commentary²⁹⁶ and the few available cases, it appears the courts are inclined to support a universal approach where possible, but this is not yet a steadfast rule.

²⁹¹ See WOOD, supra note 3, at 243-44.

²⁹² As a civil law nation, Japan does not strictly follow the stare decisis rule and courts are not required to closely follow precedent. Nonetheless, cases are important in Japan and, to the extent possible, courts will try to rule consistently with earlier decisions. See MERYLL DEAN, JAPANESE LEGAL SYSTEM: TEXT AND MATERIALS 154-56 (1997) (reviewing the available English language sources); THE JAPANESE LEGAL SYSTEM 147-62 (Hideo Tanaka & Malcolm D.H. Smith eds., 1976) (reviewing the Japanese cases and literature).

²⁹³ Bank of India, 516 HANREI TAIMUZU at 139-40.

²⁹⁴ Jens Christian Tune v. Japan Pusunesu, K.K. (*In re A.S. Pusunesu Marine and Offshore Services*), 897 KIN Yū SHOJI 30, 34 (Tokyo Dist. Ct. Sept. 26, 1991).

²⁹⁵ Id.

²⁹⁶ Others have noted that academic commentary in Japan, while not a source of law, may be equally or more influential than prior case law. *See* DEAN, *supra* note 292, at 155-56 (collecting sources).

Using the facts of the IMB case as a hypothetical, it is interesting and educational to consider how these cases would have been handled if the courts had not been willing to move to a more universal approach. For example, under a strict territorial regime, where the foreign trustee could not directly collect against the assets, the case would likely begin with the trustee filing a bankruptcy application on behalf of the debtor.²⁹⁷ Next, a Japanese court would almost certainly grant the application based on the prima facie proof of the foreign insolvency proceeding.²⁹⁸ Following this, the court would appoint a Japanese trustee to collect and administer debtor's Japanese property, including such assets as the encumbered trademark in IMB. 299 After liquidating those assets, presumably with coordination of the foreign trustee, the Japanese trustee would distribute the proceeds pursuant to Japanese priority rules to all debtors with filed claims.300 Because of the foreign trustee's involvement in the case, distributions would undoubtedly include all of the Swiss claims as well as any additional Japanese claims not already filed there. Thus, the same creditors benefit from the Japanese asset, whether it is pursued territorially by the Japanese trustee or universally by the foreign trustee. The main difference in the simple case, however, is that under the territorial approach the distributions are reduced by the added administrative expenses of the Japanese proceeding.301 Therefore, for a simple case where there are no secured or priority creditors in the local venue, the end result is more or less the

²⁹⁷ See Bankruptcy Act, arts. 132-34. The foreign trustee could file as the debtor itself, as in the 1903 German case, or as a creditor of the Japanese debtor. *Id.* Further, recent cases suggest interested persons, such as foreign insolvency trustees and officials with supervisory duties regarding the debtor, may file as well. See Re Bank of Credit and Commerce International, No. (Hi) 2012 (Tokyo Dist. Ct., 1991) (allowing Japanese regulator to initiate a Japanese insolvency of a foreign debtor); Re United States Lines, No. (Hu) 216 (Tokyo Dist. Ct., 1987) (allowing a U.S. debtor in possession to initiate a Japanese insolvency of a foreign debtor). See also Takeuchi, supra note 35, at 83-85 nn.61-62 (noting these cases and stating, "[I]t is abundantly clear that a petition for insolvency proceedings against a foreign debtor filed by representative of the foreign insolvency proceeding in Japan will be recognized.").

²⁹⁸ Bankruptcy Act, art. 137 (providing foreign bankruptcy is prima facie proof of bankruptcy).

²⁹⁹ *Id.* art. 142 (requiring appointment of trustee).

³⁰⁰ *Id.* art. 256.

³⁰¹ See id. arts. 47(1), (3)-(7) (providing that a proceeding's administrative expenses are super priority claims to be paid before general distributions).

same, with the exception of the added expense and corresponding decrease in distributions due to the inefficient doubling of insolvency proceedings.³⁰² Japanese courts are seeking to avoid such inefficiency and waste by giving these statutes the most universal interpretation possible.

3.5.1.2. Preservation of Japanese Assets

The second key element in a cross-border insolvency is the ability to preserve assets from other collection proceedings. In the case of a foreign insolvency importation into Japan, the issue is simply whether Japanese courts will assist foreign proceedings by ordering local stays of execution. There are no reported Japanese cases regarding a direct request of a foreign insolvency for a stay or protection order concerning Japanese property of a foreign debtor. Further, in most situations foreign courts' attempts at preserving or controlling assets in Japan, through such measures as worldwide stays, have had no practical effect in Japan. 303

[In earlier cross-border cases], the [Japanese] administrators succeeded in obtaining the agreement of creditors not to attach [foreign] ships

³⁰² Of course, in a more complex case, such as where there are a variety of Japanese assets and secured and involuntary creditors, the end result might differ significantly. *See infra* Section 4.3.3. (discussing assumptions for the default model).

³⁰³ See, e.g., In re Vessel Charters, Inc., No. 190-15866-260 (Bankr. E.D.N.Y. Jan. 10, 1991) (noting that a Japanese creditor arrested a U.S. debtor's ship in Japan post-petition despite the automatic stay and without leave from the stay).

It is arguable that foreign orders for worldwide stays of execution have an undetectable de facto effect in Japan. The argument goes as follows: Creditors, both foreign and Japanese, refrain from executing or pursuing Japanese assets and proceedings following the issuance of a foreign worldwide stay due to their altruistic respect for the foreign declaration or, more realistically, their in personam subjection to the foreign court's jurisdiction. Because honoring a stay ipso facto means not taking any action, such decisions are nearly impossible to confirm. Notably though, none of the creditors in the International Horizons cases, whether secured, such as Bank of America, or unsecured, such as Western Publishing Company, pursued the debtor's Japanese assets in violation of the automatic U.S. stay. See, e.g., Bank of Am., 23 B.R., at 1015-16; Int'l Horizons, 15 B.R., at 798. Further, though not concerning Japanese property, this is the theory and power that the Maruko trustees relied on when they filed a plenary Chapter 11 case in the United States to avoid an Australian foreclosure. See infra notes 359-60 and accompanying text (discussing the rationale for filing in the United States). Finally, the inverse situation concerning the foreign recognition of a Japanese preservation order is discussed below. See infra notes 340-41 and accompanying text. Relevant to the argument here, Taniguchi notes:

For example, in Kōno v. United States International University, in which the debtor raised its pending reorganization in the United States in an effort to stall proceedings against it in Japan, the court stated:

The court recognizes the fact that Chapter 11 proceedings have begun; however, because these proceedings in the United States have no effect in Japan (see Bankruptcy Act, art. 3(2); Corporate Reorganization Act, art. 4(2)), the defendant [debtor] has not lost his status as a party in this suit.³⁰⁴

Interestingly, the debtors made the pragmatic decision not to aggressively pursue this point or a general defense of the Japanese suit, because they had limited Japanese assets and it was clear any judgment would not be enforceable in the United States since it was obtained in violation of the U.S. stay.³⁰⁵

On another recent occasion, however, a Japanese court recognized the effect of a foreign insolvency's stay on an action in Japan. In Bank Uoremu v. EIA International, the Tokyo district court recognized the effect of a French automatic stay on accrual of post-insolvency interest. The facts of the case are somewhat complicated. A debtor had a loan with the plaintiff, a French bank, that was guaranteed pursuant to a separate agreement with the defendant, a Japanese corporation. The debtor was unable to repay the loan and sought liquidation in France. Under the French Civil Code, this triggered a stay on the accrual of addi-

abroad [i.e., a worldwide stay against executing on foreign assets]. Such an amicable solution, based on the Japanese inclination to avoid confrontation, had long kept the problem [of violations of such Japanese stays] under the surface.

Taniguchi, supra note 5, at 461-62 n.36.

³⁰⁴ Kōno v. United States Int'l Univ., 1554 HANREI JIHŌ 91, 100 (Osaka Dist. Ct. May 23, 1995).

³⁰⁵ See Interview with Thomas Flippen and Koji Yamaguchi, Debtors' American and Japanese Counsel of Yamaguchi International Law Offices, in Osaka, Japan (Mar. 15, 2000).

³⁰⁶ Bank Uoremu v. EAI Int'l, 1589 HANREI JIHŌ 86 (Tokyo Dist. Ct., Feb. 7, 1996).

³⁰⁷ *Id.* at 87.

tional interest due directly under the loan.³⁰⁸ Because the debt was not satisfied directly by the debtor or indirectly by its liquidation, the bank sought to collect the loan's outstanding balance, as well as accrued interest to date, from the guarantor in Japan. The Japanese court recognized the debt and the guarantor's responsibility for it, but only granted interest to the date of the debtor's filing for bankruptcy in France.³⁰⁹ In short, the Japanese court recognized and upheld the substantive effect of the stay of proceedings triggered by the French insolvency. Thus again, though somewhat haphazardly, the Japanese courts appear to be recognizing the effect of foreign insolvencies more widely than required under a strict reading of the Japanese statutes.

3.5.1.3. Conciliation of Priority and Avoidance Rules

The most difficult issue for any of the cross-border insolvency models to address is the coordination of conflicting priority and avoidance rules.³¹⁰ Japanese priorities and avoidance terms are substantially similar to those of the United States and other countries;³¹¹ therefore, it is not unreasonable to suspect a Japanese court might assist a foreign insolvency with an avoidance problem or despite a difference in priority rankings. However, no reported cases deal with a Japanese court denying a foreign request

³⁰⁸ Id. at 88 (citing article 5 of the French Civil Code, CODE CIVIL [C. CIV. art. 5 (Fr.)], which provides that no interest may be claimed from the date of the opening of a judicial recovery proceeding).

³⁰⁹ Bank Uoremu, 1589 HANREI JIHŌ 86, at 91.

³¹⁰ See, e.g., Bang-Pedersen, supra note 15, at 386 (discussing coordinating priority rules in a universal regime); LoPucki, supra note 10, at 758-60 (discussing a territorial approach to avoidance rules), 759-60 (discussing coordination of priority rules in a territorial system).

One U.S. court has found that Japanese priorities are "consonant with and complementary to" the U.S. Bankruptcy Code. In re Kojima, 177 B.R. 696 at 702. See also Yukiko Hasebe, The Position of Creditors in the Distribution of Insolvent Estates: Consensual Secured Creditors in Japan, in CURRENT DEVELOPMENTS IN INTERNATIONAL AND COMPARATIVE CORPORATE INSOLVENCY LAW 403 (Jacob S. Ziegel ed., 1994) (discussing Japanese priorities).

U.S. courts have also found Japanese avoidance rules consistent with those in the United States. See Kojima, 177 B.R. at 701-02 n.25 (referring to 11 U.S.C. § 304(c)(3) and finding that Japanese insolvency law sufficiently prevents preferential and fraudulent dispositions of property). See also Frank Bennett, Jr., Preference Rules in Japanese Bankruptcy Law, in Japanese Commercial Law In an Era of Internationalization 217 (Hiroshi Oda ed., 1994) (reviewing avoidance powers in Japan).

for assistance based on a divergence from Japan in the rankings of the foreign insolvency law's priorities. Further, there are no reported cases dealing with a Japanese court ordering or denying repatriation of Japanese property to a foreign insolvency proceeding based on the avoidance rules of either Japan or the foreign country. The lack of precedent is not surprising given the restrictive environment created by the territorial rules. As a consequence, there is simply not enough evidence to speculate under what circumstances a Japanese court might consider turning over property based on foreign or Japanese avoidance rules or otherwise deny assistance based on differences in foreign priorities.

3.5.1.4. Turnover of Japanese Property

As the Swiss *IMB* case above shows, by recognizing the standing of foreign insolvency trustees and foreign statutes' inclusion of Japanese property in the foreign insolvency estates, Japan's courts indirectly allow the turnover of Japanese property for the benefit of foreign insolvencies in a large number of cases. Even where local creditors have already provisionally attached an asset, Japanese courts have assisted foreign trustees' efforts to defeat or satisfy such attachments and, thereby, facilitate the liquidation and repatriation of the proceeds for the benefit of the foreign insolvency.³¹³

Two significant obstacles, however, remain to proceed with the turnover of Japanese property for the benefit of a foreign proceeding. First, even the broadest interpretation of article 3 of the Bankruptcy Act cannot wholly defeat the plain language of the territorial command. For example, the court's liberal approach is of no assistance where a creditor has attached a local asset that does not fully satisfy its claims. Because the foreign trustee, at best, can only assume the standing of the debtor, he has no

³¹² Some argue that foreign trustees are barred from using Japanese avoidance powers since those provisions may only be exercised by trustees appointed in Japanese proceedings. See Ito, supra note 270, at 184 ("The avoiding power of such [fraudulent or preferential] transaction[s] can be exercised only by the trustee appointed in the Japanese insolvency proceeding."). This seems to be a rational conclusion; it is, in fact, the one made in the United States. See infra note 344 and accompanying text. However, the statutes' text is silent regarding who may exercise the power. See Bankruptcy Act, art. 72; Corporate Reorganization Law, art. 74. Thus, at a minimum, the argument seems to be open.

authority based on an earlier filed bankruptcy or the avoidance powers of either the foreign law or Japanese law to avoid an attachment on debtor's property.³¹⁴ Thus, diligent creditors who learn of a foreign insolvency can still circumvent the *pari passu* distribution rule by being the first to attach unencumbered Japanese property, a result other creditors can only avoid by institut-

ing a local insolvency proceeding.

Second, the plain language of the statutes ensures that courts will continue to be inconsistent in their treatment of international insolvencies. Thus, even though the academics and practitioners assert that the universal rule of the *IMB* case is the preferred and predominate approach, the courts are applying neither universalism nor territorialism consistently. Further, there does not seem to be any unifying characteristics or factors to assist predicting when the court will or will not recognize the foreign insolvency. In short, Japan's cross-border insolvency rules are unpredictable because of the conflict between the statutory commands and pragmatic demands.

3.5.2. Japanese Insolvencies Abroad -- Insolvency Exportation

3.5.2.1. Recognition of Japanese Insolvencies Abroad

The second aspect of an international insolvency system is extending domestic cases abroad. The effect of a domestic insolvency abroad, beginning with its recognition, is chiefly a matter for the foreign courts and statutes to determine. However, as the Kosei Maru case shows, the status of the national law can be an important element in the foreign court's adjudication. In Kosei Maru, the Canadian court rejected the argument that Japanese insolvency statutes allowed the Japanese court and trustee to control assets outside of Japan. Recently, however, Japanese insolvency trustees have unhesitatingly acted abroad, collecting and

³¹⁴ As long as equity in the Japanese property remains, the foreign trustee may resolve the attaching party's claims in order to assume the residual value of the asset for the general benefit of the foreign proceeding.

³¹⁵ See, e.g., Takeuchi, supra note 35, at 72-85 (arguing in favor of the IMB approach). Compare Bank of India, 516 HANREI TAIMUZU, at 139 with Tune, 897 KIN YŪ SHŌJI, at 30; compare Kōno, 1554 HANREI JIHŌ, at 100 with Bank Uoremu, 1589 HANREI JIHŌ, at 86.

³¹⁶ Kosei Maru, 1 F.C. at 670.

administering debtors' foreign property independently and with the indirect and direct assistance of foreign courts.³¹⁷ In turn, Japanese courts have affirmed this practice and even appointed special administrators solely for the purpose of collecting foreign property.³¹⁸ Thus, although Japanese insolvency law does not provide for extraterritorial effect, this has been achieved through the initiative of Japan's trustees and the willingness of foreign court's to assist.

Japanese trustees have sought foreign recognition of domestic insolvencies in two ways—indirectly and directly. Contemporaneously with the Japanese courts' first affirmatively non-

Perhaps the most interesting and convoluted case of a Japanese trustee acting abroad indirectly and directly with the assistance of a foreign court was in the Maruko case. Infra note 355. In Maruko, the Japanese trustee, acting as debtor-in-possession of the concurrent U.S. Chapter 11 case, received ancillary recognition of the U.S. case by a Canadian court that approved the liquidation of Canadian assets pursuant to the U.S. trustee powers in 11 U.S.C. § 363(h) despite creditors' objections. See Nakashima Interview, supra note 105.

see Nakashima Interview, supra note 105 (noting the Japanese trustee privately liquidated assets in Australia and Korea with the agreement of secured Japanese creditors and the approval of the Japanese court). For an example of where a trustee acted indirectly with the assistance of a foreign court, see infra notes 318-21 and accompanying text (reviewing the Kowloon Container case). For an illustration of where a trustee acted directly with the assistance of a foreign court, see Kojima et al., infra note 324 (discussing the author's activities in the United States as trustee of a Japanese bankruptcy). See also Abe et al., infra note 355 (discussing the authors' activities in the United States as trustee of a Japanese reorganization); Satoru Murase, Bankruptcy Attorneys: Modern-Day Samurai, N.Y.L.J., Sept. 14, 1998, at C1 ("Japanese insolvency trustees] oversee sales of hundreds of millions of dollars worth of assets located throughout the world, many of which are remnants of the global Japanese investment flurry of the 1980s.").

The best example of appointing separate trustees specifically to administer foreign assets is *Maruko*, discussed below, where the court appointed three lawyers (bengoshi) to act in this capacity. See infra note 355 (naming the lawyers). See also In re SAS, No. (Fu) 91 (Nagoya Dist. Ct. 1991) (appointing an additional trustee to deal exclusively with the debtor's foreign assets and supervising reorganization of debtor's French subsidiary); In re Urban, No. (Fu) 87 (Nagoya Dist. Ct. 1991) (appointing a separate trustee to administer debtor's foreign assets); RECOGNITION AND ENFORCEMENT OF CROSS-BORDER INSOLVENCY: A GUIDE TO INTERNATIONAL PRACTICE 73-74 (Neil Cooper & Rebecca Jarvis eds., 1996) [hereinafter RECOGNITION AND ENFORCEMENT]; Takeuchi, supra note 35, at 77 n.45 (commenting on the practice); Ito, supra note 270, at 180 ("Concretely speaking, courts admit that the trustee may administer the debtor's assets located abroad."); Nakano Interview, supra note 210 (referring to Nakano, who was appointed to administer Nikko Electric's Indonesian assets).

territorial decisions such as *IMB*, Japanese trustees began extending the impact of local insolvencies indirectly by seeking recognition and assistance from foreign courts. This indirect approach is best seen in the Hong Kong case *Re Kowloon Container Ware-house Co. Ltd.*³¹⁹ In *Kowloon*, the trustee of a bankrupt Japanese company traveled to Hong Kong and initiated a separate and independent liquidation of the debtor under Hong Kong law.³²⁰ In these concurrent plenary proceedings, a Hong Kong trustee was appointed, but it was the Japanese trustee who actively pursued the Hong Kong assets.³²¹ For unrelated reasons the Japanese trustee was unsuccessful in realizing any assets, but no objections or other obstacles appear to have limited the trustee in his indirect approach.³²²

Two points are notable regarding this methodology. First, just as in the hypothetical *IMB* situation discussed above, any assets the Japanese trustee realized in this manner would be diminished by the administrative costs and other claims incurred in the Hong Kong proceeding. Second, the trustee's indirect approach would have failed the test for de facto control used by the Tokyo High Court in *IMB*, because when the court examined the trustee's empowering law it would have been evident that he did not have direct authority to control foreign property.³²³

Because of these limitations, beginning in the 1990s, Japanese trustees adopted a more direct approach to extending the effect of domestic proceedings abroad when the foreign statutes and courts allowed it. One example from the United States is *In re Kojima*. ³²⁴ *Kojima* dealt with a Japanese trustee's request to the U.S. bank-

³¹⁹ Re Kowloon Container Warehouse Co. Ltd. [1981] H.K.C. 222 (High Ct. 1981).

This case might alternatively be addressed in Section 3.5.3. below, which reviews concurrent plenary cases. It is covered here because I submit that the Japanese proceeding was dominant and the Hong Kong insolvency was only filed to assist and serve the objectives of the Japanese case.

Re Kowloon, at *10 (noting that the Hong Kong trustee did not appear in the case, but that the Japanese trustee did).

³²² *Id*.

³²³ See supra notes 284-87 and accompanying text (discussing the *IMB* requirement of authority under the trustee's home law).

³²⁴ Kojima, 177 B.R. 696 (Bankr. D. Colo. 1995). The Japanese trustee has written on his experiences in this case. See Hideki Kojima et al., Gaikoku shisan kakuho to nichibei tōsan hō katsuyō no keiken [Experience with Preserving Foreign Assets and the Practical Uses of U.S. and Japanese Insolvency Law], 616 NBL 27 (1997).

ruptcy court for ancillary assistance pursuant to section 304 of the U.S. Bankruptcy Code. The trustee sought the U.S. court's help in confirming its right to a golf course owned by the debtor and subject to claims by U.S. creditors. In deciding to grant the trustee's request, the U.S. court reviewed the Japanese insolvency system and found, "[C]learly, the Japanese bankruptcy law is neither contradictory nor 'repugnant' to the laws and policies of this country. Indeed it is consonant with and complementary to the principles which govern the United States' Bankruptcy Code." 326

The decision, however, is strangely silent regarding the territorial provisions of Japan's insolvency statutes.³²⁷ The opinion suggests that the U.S. creditors in fact argued, "[T]he Japanese Trustee has no right or authority to proceed in the United States Bankruptcy Court."³²⁸ However, the court only addressed this issue in determining whether the Japanese trustee was a "foreign representative" for the purposes of U.S. bankruptcy law.³²⁹ In response to this issue, it was undisputed that the Japanese trustee and insolvency were within the meaning of "foreign representative" and "foreign proceeding" under U.S. law.³³⁰ It is unclear,

The Japanese trustee stated that he believed this was only the second time that a Japanese insolvency had requested assistance under § 304 of the U.S. Bankruptcy Code (the other instance occurring in connection with the Sanko Steamship insolvency discussed *infra* note 333). See Kojima et al., supra note 324, at 28.

³²⁶ Kojima, 177 B.R. at 702.

The court did note the reciprocity provision of the Japanese Bankruptcy Act, which it cited favorably for the finding that "[i]mplicit and explicit in the Bankruptcy Law of Japan is the fair and equal treatment for foreign parties in a Japanese case." *Id.* at 701 (citing and quoting article 2 of the Bankruptcy Law of Japan (1991)).

³²⁸ *Id.* at 697.

³²⁹ Id. at 698-99 nn.10-12. The Japanese trustee clearly recognized both aspects of the problem regarding his authority. See Kojima et al., supra note 324, at 28. The trustee stated:

According to the territorial principle of Japanese law (Bankruptcy Act, art. 3(1)), my trustee authority did not extend to foreign assets. Further, according to U.S. law, it was necessary for my standing as bankruptcy trustee to be recognized in America... As the bankruptcy trustee, I [realized that I needed to figure out] the procedure in America to clear these hurdles.

Id.

The court provided in a footnote that the U.S. creditors did not challenge that the Japanese trustee and bankruptcy were a foreign representative and a foreign proceeding under U.S. bankruptcy law. *Kojima*, 177 B.R. 699, at

however, whether the court misinterpreted, or whether the creditor failed to raise, the argument that the trustee lacked the power to act in the United States as a matter of the territorial commands of Japanese law.³³¹ Whatever the reasons for the court's failure to address this issue, Kojima is important because it suggests that: (1) by trustees acting personally, Japanese insolvencies can be directly extended to cover foreign assets; and (2) foreign courts are willing to assist duly appointed Japanese trustees without an inquiry into their powers under Japanese law. Allowing Japanese trustees to act abroad either directly or indirectly has become the rule in Japan;³³² therefore, for the vast majority of cases, the only limitation on the extraterritorial impact of a Japanese insolvency is that which is occasionally imposed by the foreign courts.

3.5.2.2. Preservation of the Foreign Assets

Kojima also shows how a Japanese insolvency can benefit from a foreign stay. In Kojima, the trustee received a stay from a U.S. bankruptcy court against a U.S. creditor who sought to control property that was arguably owned by the debtor.³³³ State

n.12, citing 11 U.S.C. §§ 101(23) to 101(24) (defining a foreign proceeding and a foreign representative respectively).

³³¹ This is not to suggest or advocate that a U.S. court should ignore modern Japanese case law and practice and find, based on the bare statutes, that the Japanese trustee is acting beyond his powers under Japanese law by seeking to control foreign assets. Rather, I raise the point merely to note that it was available and that the court left the issue unanswered. Cf. Kosei Maru, 1 F.C. at 670 (raising and answering the issue of the effect of Japan's territorial statutes on recognition under a modified universal regime). It is also unclear whether the issue was raised or addressed in the other Japanese case that fell under § 304—Sanko Steamship, discussed infra note 333. See Taniguchi, supra note 5, at 467.

³³² See Takeuchi, supra note 35, at 76-78 (citing cases); RECOGNITION AND ENFORCEMENT, supra note 318, at 72.

³³³ Kojima, 177 B.R. at 704. The Bankruptcy Court for the Southern District of New York also granted a stay for the benefit of a Japanese insolvency pursuant to § 304 of the U.S. Bankruptcy Code in the factually similar case of In re Tsuboi (In re Sanko Steamship Co., Ltd.), No. 86-B-10291 (Bankr. S.D.N.Y. July 30, 1986). This decision is reproduced at Kōji Takeuchi, Jitsurei kara mita kokusai tōsan no hōteki shomondai [Various Legal Problems in International Insolvency as Seen from Actual Cases], 7 SAIKEN KANRI [DEBT ADMINISTRATION] 4, 10 n.8 (1986). The Sanko insolvency, Sanko Steamship Co. Ltd. v. Eacom Timber Sales Ltd., 32 D.L.R. 4th 269 (B.C. Sup. Ct. 1986), highlighted one representative problem of the global insolvency, namely, the worldwide arrest of 25 of the debtor's 264 ships. The case is further discussed in BRIAN STEWART, CORPORATE INSOLVENCY IN JAPAN: SANKO STEAMSHIP CO., LTD. (1986);

courts have also been willing to grant stays for Japanese insolvencies based on comity under state law.³³⁴ Nonetheless, whether the Japanese trustee is able to preserve assets abroad will largely be a matter for the foreign court and foreign law to determine, though Japanese law may be a factor.³³⁵

A foreign injunction is not the only way to preserve assets abroad though. Foreign assets may also be protected by a world-wide preservation order issued by a Japanese court and binding on all those within the personal jurisdiction of the court.³³⁶ There are no reported cases dealing with this approach, and it is not clear to what extent Japanese courts have been asked or have is-

Henry Lewis Goodman et al., Use of United States Bankruptcy Law in Multinational Insolvencies: The Axona Litigation—Issues, Tactics, and Implications for the Future, 9 BANKR. DEV. J. 19, 23 n.18, 24 n.20 (1992); Ito, supra note 270, at 180-81; Takeuchi, supra note 35, at 77 n.43.

³³⁴ See Japanese Company Has Suit Stayed Pending Foreign Bankruptcy Action; Nunez v. Arbelo, Supreme Court, IA Part 18, Justice Dowd, N.Y.L.J., May 20, 1993, at 25 (granting a stay in New York state court in favor of Japanese reorganization proceeding pursuant to comity theory under New York state law and without reviewing territorial principals of Japanese insolvency laws).

335 Similar to the discussion below regarding a U.S. bankruptcy court's power to order turnover of property to a Japanese insolvency, see *infra* notes 346-48 and accompanying text, it is arguable that a U.S. bankruptcy court does not have the authority to issue a stay on property allegedly involved in a Japanese insolvency pursuant to § 304. As a matter of U.S. law, a bankruptcy court may issue a stay on "property involved in [a] foreign proceeding." 11 U.S.C. § 304(b)(1). Courts have broadly interpreted this language and do not require a definite finding that the U.S. property is part of the foreign estate. See, e.g., Koreag, Controle et Revision S.A. v. Refco F/X Assocs., Inc. (In re Koreag), 961 F.2d 341, 348-49 (2d Cir. 1992) (discussing the scope of § 304(b)(1)). Thus, one might argue that because the Japanese trustee may indirectly control the debtor's U.S. property and thereby repatriate it, it is "involved" in the Japanese proceeding for the purpose of § 304(b)(1). On the other hand, one might counter that because the property, pursuant to article 3(1) of the Bankruptcy Act, cannot be controlled directly by the Japanese court and is not considered part of the estate while situs is still abroad, it is not "involved" with the Japanese proceedings. As noted above, see supra notes 326-329 and accompanying text, it is unclear whether these Japanese law issues were argued in any of the Japanese cases brought under § 304.

³³⁶ Arguably a third method would be to seek a worldwide protective order from a third nation's courts. This was essentially what the *Maruko* trustees did to protect Australian property, albeit through a full concurrent proceeding rather than an ancillary application. *See infra* notes 355-61 and accompanying text (reviewing the reasons for *Maruko* applying for a full Chapter 11 reorganization in the United States). *Cf.* Hughes v. Hannover Ruckversicherungs-Aktiengesellschaft [1997] 1 B.C.L.C. 497 (C.A.) (denying a Bahaman insolvency court's ancillary request to the English courts for a worldwide stay to protect the Bahaman insolvency estate from proceedings in the United States).

sued injunctions for the preservation of a debtor's foreign assets. However, the issue was indirectly raised in Kosei Maru. In that case, the attaching creditor was a Japanese company involved in the debtor's Japanese reorganization and subject to the in personam jurisdiction of the reorganizing court. Thus, when the creditor seized the ship in Canada, it arguably violated the Japanese preservation order and was subject to sanctions. The Japanese trustee considered pursuing a claim against the creditor, but instead eventually settled comprehensively with it. Nonetheless, this example suggests that a general preservation order issued by a Japanese court—that does not specifically limit its scope—may arguably be considered a worldwide stay against those within the court's control. This rule is far from settled though and, as discussed below with regard to the Maruko case, the strict territorial statutes make its application circumspect at best.

3.5.2.3. Conciliation of Priority and Avoidance Rules

Just as with inbound cases, conciliating conflicting priority and avoidance rules is one of the most difficult areas in cross-border insolvency. Further, although differences are *ipso facto* fifty percent attributable to Japanese law, whether the foreign country honors the Japanese rules, follows its own rules, creates a case-specific compromise rule, or denies all cooperation outright will be a matter for the foreign law and court. Nonetheless, broadly speaking, Japanese priorities are consistent with most major systems; thus, differing priority rankings will generally only pose a problem for government claims and in a few other specific situations.³⁴¹

³³⁷ Kosei Maru, 1 F.C. at 671-72.

³³⁸ See Taniguchi, supra note 5, at 469 n.48 (noting that the trustee considered pursuing a claim against the creditor in Japan).

³³⁹ See id.

³⁴⁰ See infra notes 355-62 and accompanying text (noting that in Maruko, the Japanese trustee sought a U.S. worldwide stay rather than an express Japanese preservation order, because he was concerned that a Japanese court would not expressly extend the scope of its preservation measures to restrict a Japanese lender from foreclosing on the foreign real property of a Japanese debtor).

³⁴¹ The court in Kojima found that Japanese priorities were "substantially in accordance with" the U.S. Bankruptcy Code. Kojima, 177 B.R. at 701-02 n.30 (quoting § 304(c)(4)). However, the Japanese priority for funeral expenses, for example, could conceivably cause a foreign court concern if unique facts made those expenses so great as to deny all unsecured claims of the foreign

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Similarly, the general avoidance rules in Japan will be familiar to insolvency practitioners in many other systems, though the specifics of how they operate will differ.342 But again, how the foreign court deals with this conflict of laws issue (i.e., whether to apply the Japanese avoidance rules, the local avoidance rules, or deny cooperation completely) can only be determined by that court and its law. As for America's answer to this question, the bankruptcy court in Kojima held that a Japanese trustee could not apply the American avoidance rules. 343 Kojima and other cases, however, suggest somewhat inconclusively that a U.S. bankruptcy court might recognize and enforce a foreign trustee's use of the foreign system's avoidance powers to disgorge U.S. assets.344 In the end, it may be said that the Japanese rules for priorities and

This Court determines that, at least, a colorable claim for fraudulent transfer, an unauthorized post-petition transfer, or an otherwise improper and avoidable transfer, has been shown by a preponderance of the evidence, under either Japanese bankruptcy law or Colorado state law, and that the dispute should be resolved by a court in the United States.

Id. (citations omitted and emphasis added). See also Maxwell Communications Corp. v. Societé Générale (În re Maxwell Communications Corp.), 93 F.3d 1036, 1055 (2d Cir. 1996) (applying, based on the doctrine of comity, England's avoidance rules in the U.S. portion of a concurrent full plenary insolvency case); Metzeler v. Bouchard Transp. Co. Inc. (In re Metzeler), 78 B.R. 674, 676-77 (Bankr. S.D.N.Y. 1987) (holding that in the United States a foreign trustee may exercise the avoidance powers available pursuant to the foreign insolvency law, but that such exercise might be constrained as necessary by the balancing of the factors in \S 304(c)).

creditors. See MINPO, arts. 306(3), 309.

Most countries do not enforce foreign revenue or punitive claims. See, e.g., Johansson v. United States, 336 F.2d 809 (5th Cir. 1964) (U.S.); United States v. Harden, [1963] 41 D.L.R.2d 721 (Can.); Government of India v. Taylor, App. Cas. 491 (H.L. 1955) (Eng.); Peter Buchanan, Ltd. v. McVey, [1955] App. Cas. 516, [1954] I.R. 89 (Ir. S.C. 1951) (Ir.). See also, Uniform Foreign Money-Judgments Recognition Act § 1(2) (adopted by thirty U.S. states as of May 1999); DICEY & MORRIS, supra note 60, at 97 (Rule 3(1)); SCOLES & HAY, supra note 59, at § 24.43; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 120 (1971) (by implication). Recently, however, this rule has been relaxed in certain cases. See a.g. Ruller v. Heited Kingdom, 553 So 2d 1344 (Fla. App. 1990) tain cases. See, e.g., Bullen v. United Kingdom, 553 So.2d 1344 (Fla. App. 1990) (U.S.); Re Ayers, (1981) 34 A.L.R. 582, 591 (Fed. Ct.), affd en banc sub nom., Ayers v. Evans (1981) 39 A.L.R. 129, 145 (Austl.); Re Tucker [1988] L.R.C. (Comm.) 955 (Isle of Mann); Connor v. Connor, [1974] 1 N.Z.L.R. 632 (N.Z.); Priestly v. Clegg, (1985) (3) S.A. 955 (T.P.D.) (S.A.).

³⁴² See supra note 311 and accompanying text.

³⁴³ Kojima, 177 B.R. at 703 n.35.

³⁴⁴ See id. at 703.

avoidances do not inhibit the foreign extension of a Japanese insolvency any more than (and arguably less than)³⁴⁵ those of the more statutorily universal systems.

3.5.3.4. Turnover of Foreign Property

The most fundamental issue for a Japanese insolvency extending abroad is whether the trustee will be able to repatriate foreign assets. Just as a foreign trustee may indirectly control unencumbered Japanese property with little obstacle and no help from the local court, Japanese trustees can and do repatriate unencumbered foreign property for the benefit of the Japanese estate. This rule even extends to encumbered property where the Japanese trustee is willing to settle with the foreign claimant. For all other foreign property though, the trustee can only bring back the assets with the assistance of the court that has actual in rem control of the assets. Therefore, once again, the extent of a Japanese insolvency's reach overseas will largely be a matter for the foreign court and law.

The content of Japanese law, however, will arguably be an obstacle in some cases including those in the United States. Pursuant to section 304 of the U.S. Bankruptcy Code, a bankruptcy court can only order turnover of U.S. property if it is "property of [the foreign proceeding's] estate." Whether U.S. property is part of a Japanese estate is a matter for Japanese insolvency law. 349 Given that article 3(1) of the Japanese Bankruptcy Act provides, "A bankruptcy adjudged in Japan shall be effective only with respect to the bankrupt's properties which exist in Japan," U.S.

³⁴⁵ For example, the United States preference for U.S. fishermen's claims, see 11 U.S.C. § 507(a)(5)(B), seems more likely to cause difficulties than Japan's preference claims for funeral expenses. *See* MINPO, arts. 306(3), 309.

³⁴⁶ For example, in *Maruko*, discussed below, the trustees liquidated assets in Canada for the benefit of the concurrent insolvencies without initiating formal insolvency proceedings there. *See* Quittner, Supplement, *infra* note 355, at S44.

The court in Kowloon left this possibility open to the Japanese trustee. Kowloon, [1981] H.K.C. at *57. Cf. In re Vessel Charters, Inc., No. 190-15866-260 (Bankr. E.D.N.Y. Jan. 10, 1991) (allowing a U.S. debtor-in-possession to settle outside of the debtor's plan with a Japanese creditor who had arrested debtor's ship in Japan).

³⁴⁸ See 11 U.S.C. § 304(b)(2) (1994).

³⁴⁹ See 2 COLLIER ON BANKRUPTCY ¶ 304.06 (Lawrence P. King ed., 15th ed., rev. 1999) (citing sources).

property of a Japanese debtor is simply not part of the Japanese estate. Therefore, it cannot be turned over pursuant to section 304. Nonetheless, the trustee might repatriate property where it does not need the court's assistance and may receive other assistance in the United States pursuant to section 304, such as the stay in *Kojima*. Still, a turnover of U.S. assets appears to directly contravene the combined effect of the United States and Japanese statutory commands. In this way, even the broadest interpretation of Japan's territorial statutes falls short of creating a comprehensive modified universal system to replace its historically territorial approach.

3.5.3. Coordination of Cross-Filed Insolvencies

The Japanese cases also suggest a third category that is neither strictly an exportation of a Japanese insolvency nor the importation of a foreign one.³⁵² In Japan as elsewhere, this type of "center-less" case that leads to independent cross-filed plenary proceedings has so far been less common than those cases that are clearly export or import directed.³⁵³ To a degree, the cross-filed plenary

350 Bankruptcy Act, Law no. 71 of 1922, art. 3(1).

³⁵¹ See supra note 334 and accompanying text; see also supra note 335 (noting that a U.S. court's authority to issue even a stay is also at least questionable).

³⁵² I define these cases as cross-filed plenary cases, a definition that includes those cases where full insolvency measures are initiated in more than one forum; thus, it does not include cases where an insolvency is not filed in the second forum or where an ancillary or secondary insolvency proceeding is filed in the second forum. This Article treats those concurrent plenary cases where one forum significantly dominates the objectives and operations of the joint case as indirect importation or exportation. See supra Section 3.5.2.

353 No statistics are available to test this claim. However, I make this assertion based on my broad definition of cross-border insolvency, supra note 230, and my narrow definition of cross-filed plenary cases, supra note 352. Also, I believe this is a rational conclusion because: (1) it is generally not in the interest of debtors or their trustees to file full cases in the secondary forum since to do so would preempt their de facto control of the case in that jurisdiction; (2) it is not in the interest of local secured, priority, or diligent debtors because they will do better outside of insolvency; and (3) if the second forum allows for some form of ancillary or secondary proceeding, as many now do, supra note 8, this type of proceeding will peel away a portion of those cases that would otherwise be filed as cross-filed plenary cases. Despite all of these reasons, some large asset cases warrant plenary cross-filings. Outside of Japan, recent and notable large cross-filed plenary insolvencies include, among others: Maxwell Communications in England and America, Olympia & York in Canada and America, and BCCI in the Cayman Islands and Luxembourg. See

cases are quintessential examples of the territorial rule in action (i.e., each country deals only with those aspects within its direct control) with the added dimension of coordination between the primary proceedings.³⁵⁴

The most notable proceeding of this type in Japan was the Maruko insolvency.³⁵⁵ Maruko was a Japanese real estate devel-

CURRENT ISSUES IN CROSS-BORDER INSOLVENCY AND REORGANIZATION 69, 83-84 (E. Bruce Leonard & Christopher W. Besant eds., 1994) (providing a collection of articles reviewing these insolvencies); Rasmussen, *supra* note 10, at 36 n.2.

³⁵⁴ The *Maruko* insolvency, see *infra* note 355, operated very similarly to LoPucki's proposed cooperative territorialism. *Cf.* LoPucki, *supra* note 10, at 151-71.

355 This Article refers to this insolvency and the related articles and cases as the "Maruko case." It has produced a number of reported opinions. See In re Maruko Inc., 219 B.R. 567 (Bankr. S.D. Cal. 1998); In re Maruko Inc., 206 B.R. 225 (Bankr. S.D. Cal. 1997); Aino v. Maruko, Inc. (In re Maruko Inc.), 200 B.R. 876 (Bankr. S.D. Cal. 1996); In re Maruko Inc., 160 B.R. 633 (Bankr. S.D. Cal. 1993). However, the best accounts of the case are by the Japanese court appointed trustees of Maruko and their lead U.S. counsel. See Arnold M. Quittner, Cross-Border Insolvencies: Concurrent Japanese and United States Proin International Insolvencies: Developing Practical STRATAGIES 33 (PLI No. 628, 1992) [hereinafter, Quittner, PLI] (Quittner was the lead U.S. counsel for the debtor-in-possession, i.e., the Japanese trustees); Shōgo Abe et al., Heikō tōsan no jitsumu: Kōsei kaisha marukō no jitsumu ni miru bekoku tōsan tetsuduki [Practical Experiences with International Concurrent Insolvencies: American Insolvency Procedure Considering the Actual Case of the Reorganization of Maruko] (pts. 1-7), 556 NBL 6 (1994), 558 NBL 13 (1994), 559 NBL 38 (1994), 563 NBL 50 (1995), 565 NBL 50 (1995), 568 NBL 59 (1995), 569 NBL 64 (1995) (Abe was the head trustee and the other three authors were trustees appointed to manage foreign property.); Arnold M. Quittner, Cross-Border Insolvencies—Ancillary and Full Cases: The Concurrent Japanese and United States Cases of Maruko Inc., 2 INT'L INSOLVENCY REV. 171 (1995), reprinted in Supplement, INT'L INSOLVENCY REV. S33 (1997) [hereinafter Quittner, Supplement].

A similar concurrent filing in the United States and Japan also occurred in the insolvency of Ken International, though the legal questions in that case largely dealt with public law issues, such as racketeering claims and fraud. Regarding this case in Japan, see In re Ken International, No. (Fu) 1594 (Tokyo Dist. Ct. 1991). Regarding this case in the United States, see Mizuno v. Salisbury (In re Mizuno), No. 97-56689 1999 U.S. App. LEXIS 8566 (9th Cir. Apr. 30, 1999); Mizuno Bankr. Estate v. Mizuno (In re Mizuno), No. 96-55077 1997 U.S. App. LEXIS 25314 (9th Cir. Sept. 17, 1997); United States v. Ken Int'l Co., no. 95-10225, 1997 U.S. App. LEXIS 10474 (9th Cir. Mar. 20, 1997); United States v. Ken Int'l Co., 113 F.3d 1243 (9th Cir. 1997), aff'g 897 F.Supp. 462 (D. Nev. 1995); United States v. Ken Int'l, Co., Ltd., 184 B.R. 102 (Bankr. D. Nev. 1995). The debtor challenged the Japanese trustee's standing to file a concurrent insolvency in the United States and otherwise control U.S. assets, but the court denied the motion on procedural grounds without addressing any substantive arguments based on Japanese or U.S. insolvency law. See Ken Int'l,

opment company with significant assets in Japan, the United States, Australia, Canada, Korea, as well as a number of other countries.³⁵⁶ In August 1991, Maruko filed for reorganization in Japan.³⁵⁷ A trustee was appointed and after consultation with U.S. counsel, the trustee filed for full Chapter 11 protection in the United States in addition to and concurrent with the Japanese proceeding.³⁵⁸

The reasons for pursuing a full reorganization in the United States were varied, but three stood primary.359 First, as the Japanese trustees put it, "The number one reason [we chose to file a concurrent plenary case in the United States] was that it was unclear what the actual situation [in Japan] was regarding the socalled territorial principle codified in article 4 of the Japanese Corporate Reorganization Act."360 Broken down, this concern of the trustees had two parts. First, they did not want to proceed under the strictly territorial rules embodied by the Japanese statutes, because that would foreclose pursuing a large portion of the intertwined assets of the debtor. Second, the trustees did not have confidence in the stability of the few universal-leaning precedents. Thus, they sought to avoid both the limitations and ambiguity of Japan's cross-border insolvency law by filing a concurrent case in the United States. The joint filing resulted in an interesting situation where the trustees became debtors-in-possession in the United States and thereby added all of the powers of the United States Bankruptcy Code to those powers they already possessed under the Japanese Corporate Reorganization Act. The resulting situation appears to have been the best pragmatic arrangement for

¹⁹⁹⁷ U.S. App. LEXIS 10474, at *3-*6.

³⁵⁶ See Abe et al., supra note 355, at pt. 1, 7 (adding Korea and noting Maruko's U.S. property was in Hawaii, California, New Jersey, New York, Nevada, and Guam); Quittner, Supplement, supra note 355, at S34.

³⁵⁷ In re Maruko K.K., No. (Mi) 1 (Tokyo Dist. Ct., Aug. 29, 1991).

³⁵⁸ See Aino, 200 B.R. at 878.

³⁵⁹ For an in-depth discussion of the various factors in deciding to file a full Chapter 11 case, see Abe et al., supra note 355, at pt. 1, 6-9; Quittner, Supplement, supra note 355. This was actually the most controversial issue in the Japanese portion of the case. Eventually it was resolved under the theory that the Japanese trustee was not acting as trustee for filing in the United States; rather, he was acting as manager-in-fact of the debtor. See Nakashima Interview, supra note 105.

³⁶⁰ Abe et al., *supra* note 355, pt. 1 at 7.

an extremely complex case, but the maneuverings seem, at best,

complex and, at worst, over-reaching.

The American lawyer for the trustees stated the second reason for the concurrent plenary filing as follows: "[T]he compelling considerations in the analysis of an ancillary case versus a full Chapter 11 concerned primarily the need for an immediate world-wide stay of all creditor actions, with the exception of actions in Japan which were within the jurisdictional power of the Tokyo district court and interim trustee."361 Surrounding this prioritization was the fact that a major resort Maruko was developing in Australia was in danger of immediate foreclosure by Japanese creditors, and a number of U.S. properties were similarly threatened. Given the territorial statutes in Japan and difficulties in getting a comprehensive stay in Australia, the trustee elected to pursue a full case in the United States where a worldwide stay would issue automatically on filing and sufficiently control all those creditors— Australian, Canadian, Korean, Japanese, American, or otherwise—who were subject to personal jurisdiction in the United States. In this way, the Japanese trustees were able to get a preservation order on foreign property without relying on the authority of the Japanese court or each local court where assets were located. Ironically, the U.S. and Japanese courts eventually agreed that the Australian property would be administered by and included in the Japanese reorganization.362 The Japanese court confirmed this approach. Thus, in effect, it assisted the trustee in circumventing the restrictive aspects of the territorial rule.363

The third major reason for pursuing a concurrent full case in America was that such a division significantly simplified an almost overwhelmingly complex situation. Maruko had ¥39 billion (\$390 million) in non-Japanese assets, of which the U.S. portion alone qualified the case as a "mega-case" according to the bankruptcy judge handling the matter. Further, the Japanese por-

Quittner, Supplement, supra note 355, at S42. See also Abe et al., supra note 355, pt. 1 at 8 (providing same reasoning).

 ³⁶² See Nakashima Interview, supra note 105.
 363 See Abe et al., supra note 355, pt. 1 at 10.

³⁶⁴ Id. pt. 1 at 7. See also In re Maruko, 160 B.R. at 637 n.1 (noting that "mega-cases" are those with over \$100 million in assets). Quittner notes in his article that as of his writing, the reorganization had realized \$130 million in the United States. See Quittner, Supplement, supra note 355, at S45.

tion of the reorganization had a significant number of assets in its own right and was complicated by involving numerous unsecured consumer creditors.365 Added to all of this, any universal approach would have had to resolve numerous logistical obstacles such as the added time and language barriers that would accompany notifying a large group of creditors in various countries.³⁶⁶ In response to these obstacles, the trustees persuaded the United States and Japanese courts to sever the case and the jurisdiction of the courts largely, but not exclusively, along territorial lines.³⁶⁷ For the Japanese court, this divided jurisdiction was significantly consistent with the territorial statutes, but it also required small universal steps beyond a purely territorial approach, such as requiring a group of Swiss creditors to file their claims in Japan.³⁶⁸ In the end, the Maruko reorganization was able to manage efficiently a number of multimillion-dollar assets and thousands of claims and, thereby, has generally been viewed as a success and model for further international insolvency cooperation.³⁶⁹

Maruko is the exception that proves the rule as to the rarity of center-less mega insolvencies involving Japan. As of its filing it was the largest insolvency in the history of Japan and involved over \$130 million of assets in the United States.³⁷⁰ Nonetheless, it shows the flexibility necessary to best address large and complex insolvencies. The Maruko case also highlights the problems created by the ambiguity in modern Japanese insolvency law resulting from strictly territorial statutes and universal application. The courts are willing to stretch the territorial rules when they need to—such as with the IMB Swiss trademark case—but exactly

when they will do this is unpredictable.

³⁶⁵ See Quittner, Supplement, supra note 355, at S42-S45 (noting that Maruko had over 30,000 Japanese creditors).

³⁶⁶ *Id.* at S45.

³⁶⁷ See Quittner, PLI, supra note 355, apps. 2-3 (providing that the order granted by the U.S. bankruptcy court dividing the jurisdiction of the case).

³⁶⁸ See id. at S41-42.

³⁶⁹ See Abe et al., supra note 355, pt. 1 at 6. Tagashira, supra note 16, at 18, 34-35; Jay Lawrence Westbrook, Creating International Insolvency Law, 70 AM. BANKR. L.J. 563, 563 n.2 (1996).

³⁷⁰ See Abe et al., supra note 355, pt. 1 at 7; Quittner, Supplement, supra note 355, at S45.

3.6. Summary of Japan's Experience with Cross-Border Insolvencies

Japan's approach to cross-border insolvencies was relatively sophisticated when it was drafted at the beginning of the twentieth century. Unlike the United States, which did not specifically deal with the problems of international failures until the Bankruptcy Reform Act of 1978, Japan considered, debated, and decided to follow the dominate approach to the vexing problem in 1922. As a result, Japanese statutes created a strictly territorial regime. The legislature has continued to endorse this framework, affirmatively as late as 1952 and passively and recently as late as 1996.³⁷¹

Beginning in the 1980s, however, Japanese courts began to chip away at the strict territorial approach by allowing creative avoidance of the statutes' plain meaning. Academics and practitioners have encouraged these efforts, because they believe the territorial rule unnecessarily limits a cross-border insolvency from achieving the best results possible for all the parties involved. Further, they argue that rigid territoriality is no longer demanded by international conditions that now in fact allow for and favor a more universal approach.

As a result of this conflict between the liberal objectives of the practitioners and theorists and the strict rules of the statutes, the courts' decisions have been inconsistent.³⁷² The deviations from the more universal approach do not appear to reflect a true debate regarding the merits of territoriality or a desire to protect local interests or public policy. Rather, they suggest an uncertainty as to how far theory should allow practice to be pulled away from the statutes' plain meaning. The result is the courts' decisions have deviated from a purely territorial approach for a generally modified universal leaning, but they do so haphazardly, leaving other

³⁷¹ The Diet enacted article 4 of the Corporate Reorganization Law on June 7, 1952. See Corporate Reorganization Law, Law No. 172, 1952. The Diet did not deviate from, and otherwise incorporated, the territorial approach when it created the newest insolvency system—the Financial Institutions Reorganization Act—on July 18, 1996. See FIRA, art. 20 (extending Corporate Reorganization Law to apply to credit unions that are not corporations). Further, the legislature has passively consented to the regime by failing to amend the territorial statutes. This may change in the coming years. See supra note 17 and accompanying text (discussing the revision efforts).

³⁷² Compare Bank of India, 516 HANREI TAIMUZU 139 with Tune, 897 KIN'YÜ SHŌJI 30; compare Kōno, 1554 HANREI JIHŌ at 100 with Bank Uoremu, 1589 HANREI JIHŌ 86.

areas ambiguous or undeniably territorial. Given this situation, the Japanese government's present efforts at revision are welcomed whether they eventually affirm the territorial rule or suggest a new direction.

4. A DEFENSE OF MODIFIED UNIVERSALISM CONSIDERING THE JAPANESE EXPERIENCE

Japan's experience, both good and bad, with international insolvencies demonstrates why the modified universal framework should be the paradigm of cross-border insolvency. Modern Japanese practice shows first that a modified universal approach is possible in today's world. The Japanese cases also highlight the benefits of allowing a regime to be supple enough to accommodate systemic modifications designed for the actual circumstances. Finally, Japanese experience illustrates the inequities and inefficiencies that occur under a territorial regime. In short, Japan shows that the modified universal approach has all the elements of an attractive paradigm: feasibility, flexibility, fairness, and efficiency.

4.1. Modified Universalism Is Feasible

The drafters of Japan's insolvency statutes recognized that a universal approach to cross-border insolvency was ideal, but they rejected such a course as not viable.³⁷³ At the dawn of the twenty-first century their rationales no longer suffice. First, the drafters' concerns over doctrinal purity are no longer an obstacle and even the doctrinal defenders, the academics, predominately endorse overturning the territorial rule. Second, technology has made the practical burden of requiring domestic creditors to pursue claims abroad nearly indistinguishable from pursuing the claims at home. The liability is particularly lessened by the willingness of insolvency courts to accommodate foreign participation by means such as mail and electronic filing, and telephone and video conferencing.³⁷⁴ Third, because a majority of states are doing it,

³⁷³ See 1 KATŌ, supra note 233, at 330-331.

³⁷⁴ See In re Culmer, 25 B.R. 621 (Bankr. S.D.N.Y. 1982) (holding that foreign creditors would not be inconvenienced or otherwise prejudiced by liquidation proceedings in the Bahamas, because the Bahamian statutes provided for, inter alia, sufficient notice, submission of claims by affidavit and mail, and the right to appeal determinations); A.L.I., DRAFT RULES FOR TRANSNATIONAL INSOLVENCY IN UNITED STATES, CANADA, AND MEXICO,

there is no longer a need to fear that foreign courts will ignore or be offended by extraterritorial assertions in insolvency. As the court in *IMB* stated: "[T]he modified universal approach] conforms with current fast paced international economy as well as actual transactions which are increasing and rapidly developing."³⁷⁵

While modified universalism is feasible today, the alternatives of pure universalism or corporate-charter insolvency are not. The impediment for both of these regimes is the same: insolvency law inherently involves strong domestic public policy issues that no state is willing to unconditionally surrender. This is reflected by, among other things, the fact that in both the common law and civil law systems the choice of law rule for insolvencies is lex fori.377 Specific examples are also available. For example, crossborder insolvencies often bring about a conflict of two fundamental yet irreconcilable rules: (1) that a country will not enforce foreign revenue laws; and (2) that a domestic government will prioritize its own tax claims.³⁷⁸ Added to this, almost all systems have developed slightly different priorities, avoidance rules, and tests for the availability of reorganization assistance. 379 These differences are not at issue in every case, but they are often enough that no country is willing to give blanket recognition to an alternative set of rules, whether those be international rules developed by consensus and compromise or specific rules adopted by private agreement between the debtor and its creditors. Universalism and corporate-charter contractualism are not feasible today or in the long run, because they do not sufficiently address states' desire to maintain ultimate control over local insolvency issues.

⁵⁽c), 6, 7, 8(b), 11 (1999), reprinted in Leonard, supra note 16, at *4-*10 (providing guidelines to allow cross-border participation in foreign insolvency proceedings by telephone, video, facsimile, mail, courier service, publicly-accessible electronic system, or other electronic means).

³⁷⁵ IMB, 994 HANREI TAIMUZU at 54. See also Bhala, supra note 16, at 52-58 (dispelling the same rationale).

³⁷⁶ See WOOD, supra note 3, at 227; Gaa, supra note 1, at 885, 889-91, 893-95.

 $^{^{377}}$ See Restatement (Second) of Conflict of Laws § 300; Dicey & Morris, supra note 60, at 1151-63 (Rules 159(2), 165).

³⁷⁸ See 11 U.S.C. § 507(a)(7); Bankruptcy Act, art. 47(2).

³⁷⁹ See supra notes 103-110, 341 and accompanying text (discussing the slight differences between U.S. and Japanese priority and avoidance rules).

4.2. Modified Universalism Is Flexible

Japan's experience shows that a modified universal framework can accommodate flexibility. Any system can benefit from flexibility. The modified universal and secondary hybrid approaches both incorporate and take advantage of two kinds of flexibility. First, these regimes allow for a court to opt out of cooperating in an international insolvency. Second, these systems provide the courts with the flexibility to custom-tailor the specific form of cooperation to the facts of the case. None of the other options provide for both types of flexibility; instead, these models merely impose one-size-fits-all solutions.

The flexibility to deny cooperating with a foreign insolvency outright is one of the chief attributes of the modified and hybrid approaches. As noted above regarding feasibility, the discretion to deny assistance is essential when the insolvency raises important concerns of domestic public policy. Further, this safety valve allows a state to maintain ultimate control and sovereignty over those items within its direct control, while still pursuing most of the goals of universalism. At the same time, this discretion acts as a disincentive against manipulative behavior such as forum shopping. Some commentators have suggested that universalism and modified universalism tolerate and even encourage forum shopping by debtors.380 However, under the modified and secondary approaches, the ancillary courts retain the ability to undercut any benefits from forum shopping by denying recognition and assistance to the shopped forum.381 Thus, both the actual and potential power to deny assistance act as strong disincentives for the selection of a non-natural or inappropriate forum.³⁸²

The second aspect of flexibility— the ability to tailor the process to the facts— may be seen by the different approaches employed by the trustees and courts in *Kojima*³⁸³ and *Maruko*.³⁸⁴ For

³⁸⁰ See LoPucki, supra note 10, at 720-23, 730-31.

³⁸¹ See, e.g., Hughes v. Hannover Ruckversicherungs-Aktiengesellschaft [1997] 1 B.C.L.C. 497 (C.A.) (denying modified universal assistance to a Bahaman insolvency that arguably forum shopped out of a U.S. bankruptcy filing).

³⁸² The "natural forum" is the forum "with which the action has the most real and substantial connection." See DICEY & MORRIS, supra note 60, at 403. In cross-border insolvency the natural forum is arguably in the jurisdiction where the debtor's "center of interest" or "principal place of business" is located. See supra note 30.

³⁸³ Kojima, 177 B.R. 696.

a simple case, a simple answer is usually best. Thus, in Kojima where there was only one foreign asset in an otherwise entirely domestic bankruptcy, the best and easiest solution was to allow the trustee to include that asset in its Japanese administration. However, as a case becomes more complicated, the benefits of a secondary or a coordinated territorial approach increase. Thus, in Maruko, courts in both the United States and Japan independently concluded that the optimal approach was to pursue separate, but coordinated insolvencies. Certain cases are simply too big or too complex to deal with using generalized default rules; thus, these cases benefit from and demand flexibility to opt into more appropriate arrangements.

Flexibility does come at a cost, however. As the corporate-charter model best highlights, the flexibility of the modified and secondary systems comes into effect post ante, thus alterations may cause unpredictability and its associated costs. As long as the court is mindful of this risk, however, it should actually be able to use this suppleness to find the arrangement that best reflects the debtor's and creditors' pre-insolvency assumptions. In other words, the flexible approach is able to avoid the other models' presumption that parties in all cases will be making pre-insolvency lending decisions based either on the assumption that the domestic law will apply—the territorial assumption— or that the home-country law will apply—the universal assumption.

4.3. Modified Universalism Is Fair and Efficient

4.3.1. Default Rules for the Typical Cross-Border Case

Given that both the modified universal and secondary approaches are feasible and allow for flexibility, the obvious question becomes which of the two is the better alternative. Adding to the complexity of this inquiry is the fact that either system may be designed to allow for the other to exist as a sub-choice. In the end, resolution between the two options requires a policy decision to be made regarding which of the two models most fairly and efficiently operates as a default rule. What constitutes the

³⁸⁴ *Maruko*, 219 B.R. 567.

³⁸⁵ Kojima, 177 B.R. 696.

³⁸⁶ Maruko, 219 B.R. 567.

fairest and most efficient rule, however, depends on one's assumptions regarding two issues: (1) the degree to which most national insolvency schemes are comparatively similar or dissimilar; and (2) the likely form of most typical international insolvency scenario.³⁸⁷

Regarding the first assumption, the greater the degree of similarity between national insolvency systems, the fewer conflicts likely to arise between how a local court and home court would resolve similar questions at issue. Where there is no difference in how two courts deal with a problem, the only question that remains is how to most efficiently administrate the case. While experts disagree as to which national insolvency systems are in fact similar, partially based on the Japanese cases discussed above, it is presumed here that most insolvency systems will resolve most issues in generally the same manner.³⁸⁸ Of course, I acknowledge

Our thesis is that because both countries [Canada and the United States] have market economies and share the same assumptions and broad objectives for formal reorganization, it was highly likely, if not inevitable, that the two countries would develop reorganization systems that function in essentially the same way. The functional aspects of these systems were shaped not by culture or politics, but by necessity.

An implication of our Article, therefore, is that the functional aspects of judicially supervised reorganization systems tend to converge. If we are correct, any country that opts for court-supervised reorganization against a similar economic background is likely to arrive at the same functional solutions.

Arguably a third and equally important assumption is one's belief that a theoretical model may, in practice, be applied rationally, predictably, and even formalistically. This Article only addresses how Japan's territorial model is applied and suggests that in practice it results in unpredictability. See supra note 311. Addressing this issue for the other models is beyond the scope of this Article; however, I argue elsewhere that in practice, a rational and predictable standard for modified universalism has developed in both England and the United States. See Anderson, supra note 22, at 70-72.

³⁸⁸ See UN REPORT, supra note 201, at ¶¶ 24, 32, 33 (summarizing comparative insolvency studies by G22, IMF, and Asian Development Bank and concluding, inter alia, that there is broad agreement on the key objectives, issues, frameworks, and tools used by developed insolvency regimes). Compare LoPucki, supra note 10, at 708-11 with Andrew T. Guzman, In Defense of Universalism in Cross-Border Insolvencies, MICH. L. REV. *21-*22 (forthcoming 2000); Robert K. Rasmussen, Resolving Transnational Insolvencies Through Private Ordering, MICH. L. REV. *22 (forthcoming 2000). See also Lynn M. LoPucki & George G. Triantis, A Systems Approach to Comparing U.S. and Canadian Reorganization of Financially Distressed Companies, HARV. INT'L L. J. 267, 342 (1994) (emphasis added), stating:

that few systems are identical and differences will arise, particularly with regards to such things as non-consensual and priority claims; however, I assert that these differences are less likely than the similarities and thus are better approached as exceptions to a general default rule.

The second assumption relates to the type of international insolvency for which the model is designed. Stated differently, a system's approach to cross-border insolvency optimally should be tailored to the types of scenarios most likely to occur. Unfortunately, empirical evidence does not exist in Japan or elsewhere that provides a clear picture of the typical cross-border insolvency. An intuitive and educated guess might surmise that from a numerical standpoint most "cross-border insolvencies" do not involve mega-cases with significant assets in two or more countries. Rather, more typically international insolvencies in-

In the United States, LoPucki reports that 31% of the 266 large, public corporations that filed for reorganization in the United States between 1980 and 1997 owned foreign assets. See LoPucki, supra note 10, at 724 n.147. Similar to the situation in Japan, this information unfortunately does not provide a picture of the typical international debtor (e.g., whether an individual or corporation, if a corporation, whether large or small, and so forth), the typical international proceeding (e.g., whether liquidation or reorganization), the typical size of the proceeding (e.g., amount of assets and liabilities), the percent of the typical case that is international (e.g., the amount and kinds of assets abroad), and so forth.

³⁹⁰ See supra note 230 (providing my broad definition of cross-border insolvency). A mega-case is defined as one with over \$100 million in assets. S. ELIZABETH GIBSON, A GUIDE TO THE JUDICIAL MANAGEMENT OF MEGA-CASES (1992), available at 1992 WL 477113. In the United States and Japan, the vast majority of business insolvencies involve small and medium sized firms. See Eisenberg & Tagashira, supra note 135, at 216 (providing statistics for the United States and noting that much of recent insolvency research focuses on addressing the large, though relatively rare, cases); PACKER & RYSER, supra

³⁸⁹ See, e.g., Rasmussen, supra note 10, at 32 ("Empirical evidence is needed to ascertain the types of multinational firms which encounter financial distress.").

In Japan, the International Insolvency Research Group conducted empirical research focused on Japan-originated international insolvencies between September 1985 and March 1987. See Makoto Ito & Manabu Azuma, Kokusai tōsan jitsumu ni arawareta mondaiten—kokusai tōsan jitsumu chōsa hōkoku [Problem Areas Evident in the Actual Practice of International Insolvency—Report from the Survey of the Actual Practice of International Insolvency], in KOKUSAI TŌSAN HŌ [INTERNATIONAL INSOLVENCY LAW] 58-84 (Morio Takeshita ed., 1991). This work combined surveys of trustees with court-filed statistics to identify seventeen cross-border insolvency cases over this eighteen month period. Id. Its aim, however, was to identify typical problem areas of international cases, not to define the typical type of international case. Id.

volve the "growing number of Canadian and Mexican border cases" or their Japanese equivalent, the insolvency of pachinko parlors owned by Korean nationals.³⁹¹ Further, even relatively large, center-less insolvency cases might best be approached as analogous to border cases for those portions that involve only limited assets in non-significant third-country forums, e.g., *Maruko's* treatment of the Canadian and Korean properties.³⁹² The

note 83, at 8 (providing that less than 1% of all business insolvencies involve large corporations). Furthermore, a large number of individual insolvencies, approximately 20%, actually represent failed small and medium business entrepreneurs. See TERESA A. SULLIVAN ET AL., AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA 111 (1989).

Westbrook seems to come to a contrary conclusion suggesting that large insolvencies—not minor insolvencies—should be the focus of an international universal regime. See Westbrook, supra note 9, at *21.

³⁹¹ Westbrook, Creating International Law, supra note 358, at 563; Remarks of Retained Attorneys of Resolution and Collection Corporation (kabushiki gaisha seiri kaishū kikō) at The Meeting of Financial Law Research Forum at Hokkaido University (June 10, 2000) (noting one of the problem areas in pursuing debts assumed by the RCC). See, e.g., In re McTague, 198 B.R. 428, 429 (Bankr. W.D.N.Y. 1996) (stating that "[a]lthough the [U.S. bankruptcy] courthouse is only a seven story building, Fort Erie, Ontario, Canada is clearly visible from its upper floors" and going on to describe the close economic connection among actors on both sides of the border).

JoPucki asserts that the standard multi-national corporate (MNC) practice of incorporating subsidiaries under local law creates a de facto territorial system, because a MNC's foreign assets are held independently by the local foreign subsidiary corporation. See LoPucki, supra note 10, at 751-52. Westbrook challenges this assumption as a matter of substance. See Westbrook, supra note 9, at *44-*45. Even assuming the accuracy of the assumption, courts at times have ignored separate corporate identity or allowed joint administration of parents and independent subsidiaries. Thus, though it is far from settled, authority exists for the proposition that a court will pierce the corporate veil of a subsidiary for the benefit of enlarging the estate of the primary debtor. See Scoles & Hay, supra note 59, at § 23.19 (citing sources).

Furthermore, courts will allow the joint administration of related debtors, both domestic and foreign. See, e.g., Quittner, PLI, supra note 355, at 339 (noting that in the Maruko case, the the court allowed the joint administration in the United States of the Japanese parent company and a number of U.S. subsidiaries). In International Horizons, the court ordered the joint administration of a U.S. parent and its various foreign subsidiaries, despite extremely convoluted connections with the United States and the vigorous protests of its creditors. See Bank of America, 23 B.R. at 1017. The parent debtor, its subsidiaries, and the creditors had a mess of connections including cross-ownership, crosslending, cross-guarantees, and cross-management. See id. at 1016. However, the court did not try post ante to untangle the actual legal relationships of the parties or the parties' assumptions about the significance of those relationships. Rather, it took a pragmatic route and ruled that due to the "unique symbiotic... interrelationship of the debtors and their affiliates" and the desire to avoid

few reported Japanese cases anecdotally support these conclusions.³⁹³

Pending better empirical evidence, the following arguments are based on my position that the international insolvency paradigm should address the problems typical of a relatively straightforward border case—rather than those of a complex, center-less mega insolvency. Of course, one of the underlying assumptions of this conclusion is that I am discussing a default rule, and I believe that the less frequent complex mega insolvencies may and can better accommodate the incremental costs of opting out of that default system.

Accepting these presumptions, modified universalism, and its tendency to encourage cooperation, appears to be more fair and efficient system than the secondary insolvency regime and the other available models. As described above, secondary insolvency is premised on differences in treatment of secured and priority claims and, in practice, produces territorial results in most cases.354 Thus, local secured and priority creditors are protected from potentially different treatment by the foreign insolvency law, but unsecured creditors see no benefits since few gains in efficiency are possible. For the presumably few complex cases involving significant assets, the secondary insolvency approach is perhaps occasionally the better alternative; for most cases, however, such an approach is not necessary and is to the disadvantage of a large number of creditors who are either not secured in or not given priority by a given jurisdiction. On the other hand, the modified universal framework begins with the presumption that a universal

³⁹⁴ See supra notes 42-43 and accompanying text (discussing the fact that the secondary insolvency model results in minimal contributions to the global pool of assets for unsecured creditors).

[&]quot;[f]ragmentation of the[] proceedings," the debtor and its subsidiaries should be treated jointly for administrative purposes. World of English, 16 B.R. at 821. This ruling, nonetheless, did not prevent the same court from later finding that the subsidiary debtors were not the alter egos of the parent. International Horizons, 51 B.R. at 751.

³⁹³ See, e.g., Ito & Azumu, supra note 389, at 60-68 (reviewing the seventeen cases identified in their survey); see also supra Section 3.4.5. (reviewing most reported Japanese cross-border insolvency cases). One of the obvious problems of relying on reported cases for evidence is the fact that smaller debtors generally do not have the resources or motive to pursue an issue to the point of reporting.

approach will be followed but gives the court the flexibility to opt out of this regime if the facts so dictate.³⁹⁵

In practice, the universal approach is taken more often than not.³⁹⁶ Believing that most national insolvency systems are in effect similar and that the quintessential cross-border insolvency case involves relatively minor foreign participation without particularly vexing issues, I submit that the modified universal approach presents a more fair and efficient default rule for cross-border insolvencies.

4.3.2. Fairness

Fairness is a primary consideration for a cross-border insolvency paradigm; however, it is discussed surprisingly infrequently in the literature or the cases. Modified universalism is more fair than the territorial approach—either in the pure form or as the de facto result of a secondary bankruptcy—because it treats like creditors equally and best meets their expectations.

One of the fundamental objectives of modern insolvency law is fairness in the distribution of like claims—the so-called pari passu rule. The international level, there are two ways to achieve this equality. First, under a centralized approached (used by universalism, modified universalism, contractualism, and for the unsecured portion of secondary insolvencies) all like creditors must file in one court which applies one standard and eventually makes distributions on an equal basis. The second method is known as the "hotchpot rule" and is used in territorialism. It involves creditors filing claims in each court where assets are lo-

³⁹⁵ Determining "when the facts so dictate" is an important issue beyond the scope of the Article. As noted above, I argue elsewhere that a rational and predictable standard has developed under both the English and U.S. approaches to this issue, and I have recently advocated a standard based on a combination of those rules. See Kent Anderson, Kokusai tōsan hō: komon rō shokoku no keiken ni motoduita teian [Cross-border Insolvency Law: A Proposal Based on the Based on the Experience of Various Common Law Countries], Paper presented at Hokkaido University Civil Law Research Forum (July 7, 2000) (on file with author).

³⁹⁶ See Anderson, supra note 22, at 48-61 (discussing the results of the English and American modified universal system).

³⁹⁷ See GOODE, supra note 2, at 141 ("The most fundamental principle of insolvency law is that of pari passu distribution, all creditors participating in the common pool in proportion to the size of their admitted claims.").

³⁹⁸ See, e.g., UNCITRAL Model Law, supra note 2, art. 32; PHILIP ST. J. SMART, CROSS-BORDER INSOLVENCY 272-78 (2d ed. 1998).

cated and subsequently having those claims approved by the various local courts pursuant to the assorted local laws and then adjusted depending upon what the debtor has received from the other proceedings.³⁹⁹

The centralized approach is more fair because creditors are automatically treated equally. In contrast, the hotchpot rule produces haphazard and inherently unfair results due to the administrative confusion caused by creditors filing in a variety of courts and courts attempting to make cross-border adjustments. Further, because this inconsistency of results rewards diligent creditors who file in multiple states, it encourages an aggressive race to the courthouse— known in the literature as the "grab rule." An example of this was seen in the Kosei Maru where the plaintiffs benefited by seizing the ship, but to the harm of the debtor's reorganization efforts and the fair treatment of the other creditors. 401

The modified universal rule also produces more fair results than the secondary or territorial models because it more closely replicates creditors' expectations. LoPucki argues that creditors make lending decisions based on assumptions about the local insolvency laws. 402 While this undoubtedly is the case in purely domestic consumer transactions (e.g., personal financing to buy a new Panasonic television) and transactions with large global companies (e.g., financing for the local Honda dealership), the Japanese cases indicate that creditors' lending decisions regarding medium-sized debtors doing transnational business (e.g., financing to Tanaka Commercial K.K. for a single U.S. construction project) also consider the international implications. 403 For example, creditors in both International Horizons and Maruko extended their credit specifically knowing that it would be used for (and in many cases secured by) foreign developments. 404

³⁹⁹ See id.

⁴⁰⁰ See Westbrook, supra note 24, at 460.

⁴⁰¹ Kosei Maru, 1 F.C. at 671-72.

⁴⁰² See LoPucki, supra note 10, at 751.

⁴⁰³ Furthermore, as the U.S. Supreme Court held well over a century ago, when a party does business with someone from a different nation (or extended into another nation), they implicitly accept that the rules of the foreign forum might apply. See Canada S. Ry. Co. v. Gebhard, 109 U.S. 363 (1883).

⁴⁰⁴ For a discussion on the assumptions made by creditors in the *International Horizons* cases, see *supra* note 276 and accompanying text. *See also* Quittner, Supplement, *supra* note 355, at 544 (discussing Maruko's practice of

4.3.3. Efficiency

Beyond the amorphous standard of fairness, modified universalism is the most efficient of the feasible regimes. The modified universal model achieves this efficiency from a number of angles. First, as discussed above, the flexibility of the modified choice allows a court to employ the most efficient regime for the facts of the case. Second, also as noted above, because modified universalism is becoming the international standard, or at least majority approach, applying it produces greater predictability which correspondingly improves the efficiency of proceedings. 405

Third and more basically, the modified universal approach can achieve great savings by avoiding the duplicative administrative costs incurred by maintaining two or more full actions, as is the case with both the secondary and territorial systems. Administration costs can be notably expensive. The U.S. portion of the *Maruko* case alone generated \$4.6 million in attorneys' fees. This amount did not include any of the Japanese admini-

[&]quot;syndicating" foreign properties for sale in Japan). At one point, Bank of America, as a secured lender of the U.S. debtor International Horizons, argued that the assets, which debtor's subsidiaries held originally outside of the United States and on which it was seeking to levy, were not U.S. situs property. See Bank of America, 23 B.R. at 1016, 1020 (noting BoA's argument that subsidiaries' assets were not in the United States, therefore, subsidiaries were not eligible to be debtors under the U.S. Bankruptcy Code); Maruko, 219 B.R. at 568 ("Maruko specialized in developing commercial properties worldwide, after entering into sale-lease back agreements with Japanese investors."). In other words, this suggests that the secured lender extended credit to a U.S. debtor based on assumptions about being able to realize on foreign assets as well as domestic U.S. assets.

See supra note 8 and accompanying text (noting modified universal systems). See also UNCITRAL Model Law, supra note 2, pmbl. (providing an effective mechanism for dealing with cases of cross-border insolvency).

⁴⁰⁶ Of course, the best example of the expense of good administration is Charles Dickens's *Bleak House*, where what Mr. Jarndyce referred to as "Wiglomeration" spun the Chancery Court until the entire estate of *Jarndyce v. Jarndyce* was consumed by costs. *See* CHARLES DICKENS, BLEAK HOUSE 98, ch. LXV (Oxford University Press, 1966) (1853).

⁴⁰⁷ See How One Bankruptcy Attorney Developed an International Practice, 29 BCD NEWS & COMMENT, Aug. 6, 1996, LEXIS, News Library, Allnws File. See also Maruko, 160 B.R. at 637 (reviewing the attorneys' request for \$1,533,787 in attorneys' fees and \$156,552.74 in costs as of November 1992).

stration expenses,⁴⁰⁸ the U.S. Trustee's statutory fees,⁴⁰⁹ other U.S. administrative expenses such as the court's use of a fee examiner,⁴¹⁰ administration expenses inherent in the nature of a real estate reorganization, such as appraiser expenses,⁴¹¹ or even the legal fees for the remainder of the case which continued for over six more years.⁴¹² Thus, given what may be extreme administrative expenses, the default rule in a cross-border insolvency should be the one where these costs are only triggered when the specifics of a case demands it.

Furthermore, certain foreign aspects of an international insolvency case are too insignificant to justify even the minimum administrative expenses associated with a simple liquidation. For example, in both the Swiss trademark case and the Norway corporate resolution case while the trustees could have accomplished the same results by initiating a concurrent bankruptcy in Japan, this would not have benefited any Japanese interests and would have only limited the amount of proceeds available for disruption to claimants. Many items in cross-border insolvencies are just too small to substantiate the expense of the territorial or secondary rules.

Beyond administrative expenses, the modified universal approach is arguably faster than proceeding through the nearly full

⁴⁰⁸ Japanese administration expenses were notably less than those in the United States. The Japanese trustee and the five deputy trustees were placed on a set monthly "salary" as managers of the debtor. *See* Nakashima Interview, *supra* note 105. For example, the deputy stationed in and responsible for the U.S. portion of the case was paid a monthly salary of approximately \$5000 for all of his services. *See id.*

⁴⁰⁹ See 28 U.S.C. § 1930(a)(6) (1989 & Supp. 2000); Maruko, 219 B.R. at 573 (requiring Maruko to pay the U.S. Trustee a quarterly amount based on a sliding percentage of all distributions made by the debtor even after the confirmation of the reorganization plan).

⁴¹⁰ See Maruko, 160 B.R. at 637 (noting the appointment of a fee examiner).

⁴¹¹ See, e.g., Column, Value & Cents: Allocation of Real Estate Value Between Real Property Interests and Intangible Assets, 1994 AM. BANKR. INST. J. LEXIS 2675, at *3-*5 (discussing methods and costs necessary to appraise property as part of an insolvency).

⁴¹² The case was filed on August 29, 1991, and was still pending in both Japan and the United States as late as 1996 and 1998 respectively. *See Maruko*, 200 B.R. at 878 (reporting in the U.S case, on September 30, 1996, that the Japanese case was still pending); *Maruko*, 219 B.R. at 568 (reporting that the U.S. case, as of February 5, 1998, had yet to be dismissed or converted, even though the court had confirmed the finalized plan).

⁴¹³ See, e.g., In re McTague, 198 B.R. at 428, 433 (Bankr. W.D.N.Y. 1996).

administration of a secondary insolvency. The dilatory nature of fully completing local proceedings before transferring proceeds to a foreign insolvency is best seen in the hypothetical case that would have occurred had the Swiss trustee in *IMB* pursued a Japanese bankruptcy. The end result would have been the same, but the cost in time would have been significant. Given the importance of speed in a cross-border insolvency, one of the advantages of a universal approach is that it does not duplicate proceedings

unnecessarily and therefore can proceed more rapidly.

In addition, a modified universal proceeding is more efficient than a secondary insolvency, because it provides a better framework for dealing with international assets and operations. This in turn ensures that a trustee can achieve the assets' greatest liquidation value or the coordination necessary for a successful multinational reorganization. Under a modified universal approach, the trustee has the option of selling debtor's property separately or as a group, whichever will bring the highest amount. For many cases, there will be no advantage in selling assets in an international package, but where the foreign property is individually insignificant or part of an interlocking group, the ability to sell assets in various jurisdictions together is to the advantage of all parties. For example, in the IMB Swiss trademark case the liquidation value of the Japanese trademark by itself was minimal, but the mark had significant value to the buyer of the debtor's other international marks or its entire business. Proceeding territorially or secondarily would sacrifice this added value or complicate the process of capturing it by requiring the various worldwide trustees to coordinate their sales.

Similarly, reorganizations benefit from being able to coordinate their worldwide assets. Even under a modified universal system this is notoriously difficult, but as an ideal (or paradigm) its validity is unshakable. The best Japanese example is the *Kosei Maru*. In that case, debtor's reorganization efforts were significantly hampered by one creditor taking advantage of Japan's ter-

⁴¹⁴ See Andre J. Berends, The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview, 6 Tul. J. INT'L & COMP. L. 309, 321 (1998). Modified universal regimes nevertheless involve obstacles to speedy resolution. Each decision must be approved in ancillary proceedings, which necessarily incorporates a delay. However, under an ancillary proceeding there is no time lost in educating a new court and trustee on all of the aspects of the case.

⁴¹⁵ Kosei Maru, 1 F.C. at 670.

ritorial rule through the jurisdiction of a third country. 416 In response to this, a shipping debtor in reorganization will have to forego any attempt at reorganization or curtail its business to avoid those jurisdictions that will allow creditors to seize and sell debtor's assets despite the home country's reorganization protection.417 In either event, sabotaging the reorganization efforts and the corresponding loss of the company's going-concern value injures the rest of the creditors.

The Japanese experience confirms the benefits of modified universalism. Japan has in modern practice rejected territorialism and its derivative, secondary insolvency, because both systems produce relatively inefficient and unfair results. Japan has followed the modified universal model because it provides the flexibility to maintain one's own national sovereignty and address the exceptional cases. Finally, Japan has adopted a modified universal framework because it is feasible and practicable in the modern world.

5. CONCLUSION

Japan's insolvency statutes dictate the narrowest version of territorialism. Yet the courts have allowed practitioners and academics to stretch these statutes to the point that the living law is now nearly a complete model of modified universalism. No restrictions are placed on the extraterritorial extension of domestic insolvencies, and Japanese courts are willing to assist foreign insolvencies to the absolute theoretical limits. Further, the system has always been grounded on a non-discriminatory platform. The experience in Japan suggests that the territorial approach has failed in the face of the realities of an international and interconnected world. In molding a system that responds to the pragmatic needs of debtors and creditors, Japan has settled on a system that is feasible and flexible yet achieves gains in fairness and efficiency.

Id. at 671-72.
 Seven of the 13 (54%) cross-border insolvencies of Japanese businesses identified by the Japanese survey between 1985 and 1987 involved shipping or shipping-related debtors. See Ito & Azumu, supra note 389, at 60-67. For a contrary conclusion regarding maritime insolvencies, see Melissa K.S. Alwang, Steering the Most Appropriate Course Between Admiralty and Insolvency: Why an International Insolvency: Why an International Insolvency Treaty Should Recognize the Primacy of Admiralty Law over Maritime Assets, 64 FORDHAM L. REV. 2613 (1996).

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Unlike universalism or corporate-charter contractualism, modified universalism is feasible today through purely domestic legislation. Unlike pure universalism, corporate charter contractualism, or territorialism, modified universalism is flexible enough to allow a court to tailor proceedings to conform with the parties' original expectations, the practical limitations of the case, and the optimal economic strategy for either liquidation or reorganization. Finally, compared to secondary insolvency and the other frameworks, modified universalism creates the fairest and most efficient set of default rules considering the likely legal conflicts and factual scenarios.

All of these qualities contribute to the explanation of why modified universality should be the cross-border insolvency paradigm. As a paradigm, modified universalism should be the model from which academics, legislators, and courts begin their discussions for improvement of the existing cross-border insolvency regime. Modified universalism is not a second-best alternative in the evolution towards pure universalism, nor should it be seen as merely an enlightened or cooperative version of a basically territorial approach. Modified universalism is the paradigm because it is a realistic option that achieves much more than the alternatives. Thus, at the beginning of the twenty-first century, as individual nations and groups of nations consider the various proposals for a global insolvency framework, the discussions should begin with the best alternative— the modified universal system.

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