

ARTICLES

CROSS-BORDER INSURANCE INSOLVENCIES: THE SEARCH FOR A FORUM CONCURSUS*

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TABLE OF CONTENTS

	<i>Page</i>
INTRODUCTION	306
1. UNITED STATES LAW	309
1.1. <i>The Uniform Insurers Liquidation Act</i>	310
1.1.1. <i>Background and Purpose of the UILA</i>	310
1.1.2. <i>Structure of the UILA</i>	311

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1.1.3. <i>Domiciliary and Ancillary Receivers</i>	314
a. Appointment of State Receivers	314
b. Appointment of Federal Receivers	315
c. Receiver's Control Over Assets	316
1.1.4. <i>Claims, Special Deposits and Priorities</i>	318
a. Filing Claims	319
b. Special Deposits	319
c. Priority of Preferred Claims	321
1.1.5. <i>Problems Arising Under the UILA</i>	322
1.2. <i>The Insurers Rehabilitation and Liquidation Model Act</i>	324
1.2.1. <i>Structure of the Model Act</i>	325
1.2.2. <i>Appointment of a Receiver</i>	325
a. Domiciliary and Ancillary Receivers	325
b. Receivers of Foreign or Alien Insurer	326
1.2.3. <i>Receiver's Control Over Assets</i>	327
1.2.4. <i>Stays and Injunctions</i>	328
1.2.5. <i>Claims</i>	329
1.2.6. <i>Priority of Distribution</i>	330
a. Federal Priority	330
b. Subordinated Priority	330
1.3. <i>Federal Bankruptcy Protection</i>	331
1.3.1. <i>Section 304</i>	332
1.3.2. <i>Section 304 and Foreign Insurers</i>	335
1.3.3. <i>Unanswered Questions</i>	338
2. ENGLISH LAW	339
2.1. <i>Introduction: Cross-Border Insolvencies</i>	339
2.2. <i>England's Law of Insolvency</i>	341
2.3. <i>England's Law of Insolvency as it Relates to Insurance and Reinsurance Companies</i>	341
2.4. <i>Special Deposits</i>	343
2.5. <i>England's Law Governing Cross-Border Insolvencies</i>	344
2.5.1. <i>Jurisdiction of English Courts to Liquidate Companies</i>	344
a. Circumstances in Which English Courts Have Jurisdiction	344
b. Liquidation of Unregistered Companies	346
2.5.2. <i>English Liquidation Procedures</i>	347
a. Governing Law	347
b. Appointment of Liquidators	348
c. Compulsory Liquidations	348
d. Voluntary Liquidations	349

e. Duties of Liquidators	350
2.5.3. <i>Section 426 of the Insolvency Act 1986</i>	351
2.5.4. <i>Mareva Injunctions</i>	353
a. Pre-Conditions of Mareva Injunctions	354
b. Disclosure Orders	355
c. Transatlantic Application	355
2.5.5. <i>The Liquidation of Foreign Companies with Assets and/or Creditors in England</i>	356
a. Options Available to Foreign Liquidators in the U.K.	357
b. Conduct of Ancillary U.K. Proceedings	360
2.6. <i>Review</i>	362
3. CANADIAN LAW	362
3.1. <i>Overview</i>	362
3.2. <i>Winding-Up Proceedings Against a Domestic Company</i>	363
3.2.1. <i>Automatic Stay</i>	364
3.2.2. <i>Appointment, Duties and Powers of Liquidators</i>	364
3.2.3. <i>Claims</i>	365
3.2.4. <i>Marshalling and Distributing Assets</i>	366
3.3. <i>Proceedings Involving Foreign Corporations Having Canadian Assets or Creditors</i>	367
3.3.1. <i>Registration Requirements</i>	368
3.3.2. <i>Foreign Liquidation Proceedings</i>	368
3.3.3. <i>Canadian Liquidation of a Foreign Insurer</i>	369
3.3.4. <i>Concurrent Liquidation Orders</i>	370
4. CONCLUSIONS	370
APPENDIX A	373
APPENDIX B	375
APPENDIX C	376

DEFINED TERMS

Although only three countries are addressed in this paper, the discussion implicates the common and statutory law of more than 50 American states, districts and territories, all of the Canadian provinces, and England, as well as the national or federal law of each country. The law of these jurisdictions is expressed in different terms. In order to minimize the confusion caused by these differing terms, certain key terms are employed throughout this paper. For ease of reference, those terms are listed and defined here:

CONSERVATION (or SUPERVISION) — the procedure whereby the receiver takes possession of an insurer or reinsurer's assets, business, and affairs to conserve them for the benefit of the company's creditors.

DOMESTIC — the forum jurisdiction under consideration. FOREIGN refers to all other jurisdictions.

DOMICILIARY — the jurisdiction in which the troubled company was organized. ANCILLARY refers to any other jurisdiction.

INSOLVENT, DEBTOR, TROUBLED, or DELINQUENT company — the insurance or reinsurance company which finds itself undergoing some type of regulatory proceeding.

INSURANCE COMPANY — a company transacting the business of insurance and/or reinsurance.

LIQUIDATION — marshalling and distribution of a company's assets; precludes the transaction of further business by the company.

RECEIVER, TRUSTEE, ADMINISTRATOR, REHABILITATOR, or LIQUIDATOR — the person appointed to reorganize or liquidate the affairs of an insolvent company.

REGULATORY PROCEEDING — the administrative or judicial process by which an insolvent insurance company is conserved, reorganized, rehabilitated or liquidated.

REHABILITATION — the preservation, whenever possible, of the business of an insurance company threatened with insolvency.

UNIVERSALITY — the conflict of laws theory which has as its precept that all disputes should be resolved in a single forum. TERRITORIALITY refers to its opposite, which accords no extraterritorial effect to the laws or judgments of a foreign country.

INTRODUCTION

A major multinational institution becomes insolvent. Panic spreads among the institution's customers and creditors. While the institution's owners struggle to preserve assets intact for the benefit of all creditors, local creditors of the company quickly try to appropriate local assets.

Although it sounds like a story from today's front page headlines, the institution involved was the Ammanati Bank of Pistoja, Italy, and the year was 1302.¹ Fortunately for the bank and its creditors, Pope Boniface VII used his considerable influence to persuade the owners of the bank to cooperate in an effort to preserve assets, and used local clergy throughout affected European countries to collect funds from the bank's debtors. Thus, the Holy See achieved what otherwise would have been impossible for a trustee or receiver: collecting assets for distribution across national borders.

¹ See Nadelmann, *Bankruptcy Treaties*, 93 U. PA. L. REV. 58 (1944) (citing Fliniaux, *La Faillite Des Ammanati De Pistoie et le Saint-Siege*, NOUVELLE REVUE HISTORIQUE DE DROIT FRANCAIS ET ETRANGER 436 (1924)).

Today, nearly 700 years later, multistate and multinational insolvencies still pose special problems and challenges. No single entity akin to the Papacy of the Middle Ages exists today that can effect a multinational collection and distribution of the assets of a debtor company. Instead, each country has its own laws for dealing with the insolvency of entities such as financial institutions and insurance companies.

Most jurisdictions seek to distribute the assets of a debtor company among its creditors in an expeditious, economical and equitable manner by appointing a single liquidator. However, when a debtor company has assets and creditors located around the world, is it preferable that the debtor's assets be the subject of adjudication in only one jurisdiction, or should concurrent insolvency proceedings be instituted in several jurisdictions? Since the 19th century, the two principal approaches to answering this question have been embodied in the territoriality and universality (or "doctrine of unity") theories of conflict of laws.²

The two theories support quite different approaches to answering such questions. The territoriality theory in its purest form does not recognize extraterritorial effects of any country's laws. A debtor company with assets situated around the world must be liquidated in separate, concurrent proceedings in each territory in which its assets are located, according to the laws of that territory. Domestic creditors prove their claims in domestic proceedings and domestic assets are distributed without regard to other proceedings taking place elsewhere. The territoriality theory has been criticized because the administration of separate proceedings in each territory is expensive and because creditors in one

² Note that in *In re Artola Hermanos, Ex parte Andre Chale* 24 Q.B.D. 640 (1890), Fry, L.J., considered three such theories. The three theories were described as follows:

One of these [theories] is this, that where there are concurrent bankruptcies each forum is to administer the assets locally situated within its jurisdiction, each forum of course allowing all the creditors, wherever resident, to prove but applying the doctrine of hotchpot so as to produce, so far as may be, equality between the proofs of the various creditors Another [theory] is this, that every other forum shall yield to the forum of the domicile, that the forum of every foreign country, every country not of the domicile, shall act only as accessory and in aid of the forum of the domicile. That, it is said, is the forum concursus, to which all persons who are interested in the administration of the estate are bound to have recourse. No doubt there is a great deal in point of law and principle to be said in favour of that view, and there are certainly some conveniences in it Then there is a third [theory] and it is this, that the forum of the country in which the debtor has assets and which first adjudicates him bankrupt, although it be not the forum of the domicile, is entitled to claim the assets from the tribunals of other countries in which he has assets.

territory may be paid a greater portion of their debts than like creditors in other territories, thereby violating the fundamental insolvency principle that creditors should be treated equally. In addition, this theory is increasingly criticized at a time when international cooperation is valued and pursued.³ However, separate, concurrent proceedings in different jurisdictions may be preferable if the debtor company conducts such different types of business in each jurisdiction that it is more practicable to liquidate the businesses separately.⁴

The universality theory supports the view that domiciliary liquidation proceedings should be recognized worldwide. In its purest form, the universality theory recognizes that the "domiciliary" liquidator must recover the debtor company's assets wherever they may be, and remove them to the domiciliary jurisdiction.⁵ All creditors of the debtor company must prove their claims in the domiciliary proceedings. The universality theory affords equal treatment of creditors and promotes international administration of law and justice. However, the theory is criticized because foreign creditors have to suffer the inconvenience and hardship of proving their claims in foreign liquidation proceedings. This paper does not focus on the practical problems liquidators experience in cross-border insolvencies.⁶ Rather, it addresses the responses of

³ Milligan-Whyte, Smith and Lewis, *Transnational Aspects of Insurance and Reinsurance Insolvencies: An Introductory Overview of Selected Issues From Bermudian, American and English Perspectives*, 1989 A.B.A. Sec. Tort & Ins. Practice, *Law and Practice of Insurance Company Insolvency Revisited* 1071, 1145 [hereinafter *Transnational Aspects*].

⁴ *Id.* at 1147.

⁵ See Fletcher, *International Conference Report: Cross-border Insolvency*, 2 *Insolvency Intelligence* 75 (1989).

There was general agreement [at the 1989 colloquium held at Aberystwyth University under the auspices of the United Kingdom National Committee of Comparative Law] that it is unrealistic to suppose that any principle of universality of bankruptcy can be attained at the global, nor possibly even at a regional, level in the foreseeable future. The differences between the individual national laws are such that it will continue to be a matter of insistence that certain interests and expectations arising under local law shall not be overridden by the effects of insolvency proceedings which take place elsewhere.

Id. Also see the December 1988 Law Reform Commission of Australia report entitled "General Insolvency Inquiry" in which Professor Dr. Hans Hanisch of Geneva University stated that "[t]he advantages of the unity principle seems to me to be overestimated. This principle in its strict sense is too idealistic taking into account the (often) wide gap of differences in a more 'global' view of laws concerned."

⁶ A few of the obvious difficulties with which liquidators must contend include: having little or no familiarity with laws of foreign jurisdictions; the failure of local courts to recognize the authority of foreign representatives; and the necessity to minimize costs and fees while marshalling and distributing the debtor corporation's worldwide assets as quickly as possible. For a good discussion of some of the practical problems of cross-border insolvencies, see Mackay, *Practical Problems of Cross Fron-*

the United States, England and Canada to some of the complex legal issues arising in cross-border insolvencies, such as the conflicting powers and duties of liquidators appointed in different jurisdictions to marshal and distribute worldwide assets of the debtor corporation, and the relative rights of domestic and foreign creditors to lay claims to those assets. In particular, these issues are examined with reference to cross-border insolvencies of insurance and reinsurance companies.

1. UNITED STATES LAW

The law of the United States is both universalist and territorialist in approach, reflecting the federal form of government. While the federal Constitution provides principles of universal application to the states, the states act as independent sovereigns with respect to matters entrusted to their care. Thus, in the United States, the regulation of insurance and reinsurance companies is the responsibility of the several states.⁷ That is, there are fifty-three⁸ different sets of statutes and regulations governing insurance companies, instead of a single set of federal statutes and regulations. Which set of regulations applies to the administration of a particular troubled insurance or reinsurance company depends on where the company is domiciled. This system is not as confusing or territorialist as it may first appear, however, as the laws of the various states are similar or identical in many respects, owing largely to efforts over the years to create uniform laws.⁹ One of these laws, which contains provisions governing multistate receiverships, is the Uniform Insurers Liquidation Act. The majority of states have adopted some version of this law.

tier Insolvency (1985); Cooper, *Location, Preservation and Recovery of Assets*, The British Institute of International and Comparative Law, *Cross Border Insolvency, Problems and Legal Principles* (1986).

⁷ See 15 U.S.C. § 1012 (1988) (regulation of insurance is the province of the several states); 11 U.S.C. § 109(b)(2), (3), (d) (1988) (insurance companies excluded as debtors from federal bankruptcy proceedings). The states have the authority to regulate, supervise and control insurance companies from the time of their foundation to the time of their dissolution. *State ex rel. Dirks v. Capitol Sec. Life Ins. Co.*, 84 S.D. 595, 174 N.W.2d 212, 213 (1970).

⁸ This number includes the fifty states, the District of Columbia and the United States territories of Puerto Rico and the Virgin Islands.

⁹ The National Association of Insurance Commissioners ("NAIC") is the primary organization that today attempts to create for the various states uniform law and policy in the area of insurance company insolvency through the creation and promotion of legislation and regulations which are designed to serve as models for state statutes and codes.

1.1. *The Uniform Insurers Liquidation Act*

As insurance companies with multistate (or multinational) assets and liabilities have become more the rule than the exception in the United States, uniformity in the laws governing the insolvency proceedings for these companies has become increasingly important in order to insure economic, equitable and expeditious administration. The Uniform Insurers Liquidation Act ("UILA"), approved by the National Conference of Commissioners on Uniform State Laws in 1939,¹⁰ is a statute designed to deal with the problems of administering troubled insurance companies which have assets and liabilities in more than one state. Currently, 30 states have adopted some form of the UILA.¹¹

1.1.1. *Background and Purpose of the UILA*

The UILA was enacted in response to the economic depression experienced in the United States in the late 1920s and 30s. The depression resulted in the forced liquidation or reorganization of numerous insurance companies, and the ensuing receivership proceedings were plagued by many problems. For example, in many instances, states would not recognize receivership proceedings for a particular company ongoing in a different state, and disputes arose as to the title and right of possession of the troubled company's assets. This confusion caused dissipation of the company's assets and frequently enabled debtors in certain states to avoid meeting their obligations.¹² Further problems arose from differences in state law concerning the filing of claims, the definition of preferences, and the priorities of creditors' claims.¹³

The drafters of the UILA¹⁴ felt that a general adoption of the UILA would "greatly facilitate proceedings commenced for the liquidation, rehabilitation or reorganization of insurance companies and . . . provide for the equitable distribution of the assets of defunct insurers."¹⁵ Reflecting a universalist approach, the statute was designed specifically for insurance insolvencies and to address "problems peculiar to

¹⁰ Uniform Insurers Liquidation Act, 13 U.L.A. 321, 328-53 (Master ed. 1986).

¹¹ See Appendix A.

¹² Prefatory Note to the UILA, 13 U.L.A. at 322 [hereinafter "Prefatory Note"].

¹³ See *G.C. Murphy Co. v. Reserve Ins. Co.*, 54 N.Y.2d 69, 429 N.E.2d 111, 114-15, 444 N.Y.S.2d 592 (1981) (listing the six "embarrassments" that the UILA was designed to eliminate).

¹⁴ The UILA was drafted by the National Conference of Commissioners on Uniform State Laws after collaboration with the Insurance Law Section of the American Bar Association, the NAIC, the insurance departments of several states, and certain other qualified authorities. Prefatory Note, 13 U.L.A. at 323.

¹⁵ *Id.*

the liquidation of business having assets and liabilities distributed in two or more states.”¹⁶ Specifically,

the greater number of [the assets of insurance companies] naturally have their situs in the state of domicile of the company, but a substantial portion is normally scattered over the entire territory within which the company carries on its business. . . . [T]he liabilities of insurance companies, consisting primarily of policy obligations, are also distributed over the several states in which the companies do business. This wide distribution of assets and liabilities creates a formidable array of problems when liquidation, rehabilitation or reorganization proceedings become necessary for an insurer which has drifted into financial difficulties.¹⁷

Thus, the purpose of the UILA is to provide a uniform and equitable method of preserving, making and processing claims against a defunct insurer, and to provide a fair, orderly and efficient procedure to distribute the assets of that insurer, so as to protect the interests of the company’s owners, policyholders and creditors, as well as the public.¹⁸ Specifically, the UILA is designed to secure equal treatment for all parties affected by an insurance insolvency, wherever those parties may be situated.¹⁹

1.1.2. Structure of the UILA

Under the UILA, the receivership or insolvency proceeding itself is referred to as a “delinquency proceeding,” and defined as “any proceeding commenced against an insurer for the purpose of liquidating, rehabilitating, reorganizing or conserving” a delinquent insurer.²⁰ The Act designates the various states that may be involved in any given de-

¹⁶ *Id.* at 322.

¹⁷ *Id.*

¹⁸ *Metropolitan Life Ins. Co. v. Board of Directors of Wis. Ins. Sec. Fund*, 572 F. Supp. 460 (W.D. Wis. 1983); *Vlasaty v. Avco Rent-A-Car System, Inc.*, 60 Misc. 2d 928, 304 N.Y.S.2d 118, 120 (Sup. Ct. 1969).

¹⁹ *Springer v. Colburn*, 162 So.2d 513, 516 (Fla. 1964). As one court noted, the UILA was enacted in part to prevent attempts by local creditors to seize the assets of a foreign insurer. *Ace Grain Co. v. Rhode Island Ins. Co.*, 107 F. Supp. 80, 82 (S.D.N.Y. 1952), *aff’d*, 199 F.2d 758 (2d Cir. 1952).

Although the UILA does not specifically mention reinsurance companies, it has been applied to reinsurance companies, as well as their contracts and property.

²⁰ UILA § 1(2). A company need not be insolvent to be the subject of a delinquency proceeding. *Ace Grain Co. v. Rhode Island Ins. Co.*, 107 F. Supp. 80, 83 (S.D.N.Y. 1952) (business of the company was carried on by receiver during delinquency proceedings).

linquency proceeding as follows:

DOMICILIARY STATE — the state in which the insurance company is incorporated or organized. If the insurer is incorporated or organized in a foreign country, then the domiciliary state is deemed to be the state in which that insurance company has, at the beginning of the delinquency proceedings, “the largest amount of its assets held in trust and assets held on deposit for the benefit of its policyholders or policyholders and creditors in the United States.”²¹ The domiciliary state is deemed to be the primary location for the delinquency proceedings.

ANCILLARY STATE — any state other than a domiciliary state. Ancillary states are those states where ancillary proceedings, i.e., delinquency proceedings parallel to those of the domiciliary state, may be instituted, because assets of the delinquent company are located there.

RECIPROCAL STATE — any state in which the substance of the UILA has been enacted.²²

The UILA defines certain types of assets²³ and claims involved in delinquency proceedings. “General assets” are defined as “all property, real, personal or otherwise, not specifically mortgaged, pledged, deposited or otherwise encumbered for the security or benefit of specified persons or a limited class or classes of persons.”²⁴ Assets situated in a state other than the domiciliary state are not exempt from classification as general assets by virtue of their location. Assets held in trust or on deposit in an ancillary state for the benefit of *all* the insolvent’s policyholders are deemed to be general assets.²⁵ Also, reinsurance proceeds

²¹ UILA § 1(5). *See, e.g.*, *Sears, Roebuck & Co. v. Northumberland Gen. Ins. Co.*, 617 F. Supp. 88, 89 (N.D. Ill. 1985) (Illinois action dismissed where delinquency proceedings for a Canadian company were ongoing in New York).

²² UILA § 1(7). To be considered reciprocal states within the meaning of the UILA, each state’s wording and interpretation of the provisions of the UILA need not be identical. *Twin City Bank v. Mutual Fire Marine & Inland Ins. Co.*, 646 F. Supp. 1139, 1140 (S.D.N.Y. 1986); *Murphy v. Ambassador Ins. Co.*, 195 N.J. Super. 274, 478 A.2d 1243, 1248 (1984); *but see Alabama Nat’l Life Ins. Co. v. Gammill*, 18 Ariz. App. 575, 504 P.2d 516, 520 (1972) (states were deemed to be non-reciprocal where there were “material differences” between the statutes of the states).

²³ “Insurance company assets take the form, for the most part, of special deposits required by state law, balances in the hands of insurance agents, policy premiums due but unpaid, and investments of reserve funds.” Prefatory Note, 13 U.L.A. at 322.

²⁴ UILA § 1(8).

²⁵ *See, e.g., In re Liquidation of Union Indem. Ins. Co. of N.Y.*, 132 Misc. 2d 102, 104, 502 N.Y.S.2d 907, 909 (Sup. Ct. 1986) (assets held in trust and on deposit for security of all policyholders are general assets); *Fletcher v. State Treasurer*, 16 Mich. App. 87, 167 N.W.2d 594, 596 (1969) (securities deposited by an insurance

typically are deemed to be general assets.²⁶

"Special deposit claims" are defined as any claims which have been secured by a deposit, made pursuant to a statute, for the security or benefit of a *limited* class of persons. Most states have statutes — designed to protect state residents against foreign insurance companies — that require an insurance or reinsurance company to post funds in the form of a "special deposit" with the state before being allowed to do business in that state.²⁷ These special deposits can take the form of bonds, trust accounts, escrow accounts, letters of credit, cash, or any other form of security approved or required by the state. The states usually require funds in an amount more than sufficient to cover all potential outstanding policyholder (and in some states, general creditor) claims against the insurance company by the residents of that state. In some states, the amount and form of the deposit is dependent upon the type of insurer involved and the type of insurance risk underwritten.²⁸

The substantive provisions of the UILA create a framework for simultaneous delinquency proceedings in different states with respect to a single delinquent insurance company.²⁹ The UILA outlines procedures for delinquency proceedings for both domiciliary and non-domi-

company with the state treasurer for the benefit of all policyholders were general assets). Generally, if the assets are held in trust for all United States policyholders, the assets will be deemed general assets. If the assets in a particular state are held in trust for only the policyholders of that state, however, the assets will *not* be deemed general assets.

²⁶ See *State ex rel. Low v. Imperial Ins. Co.*, 140 Ariz. 426, 682 P.2d 431, 437 (Ct. App. 1984). *Accord Excess & Casualty Reins. Ass'n v. Insurance Comm'r of Cal.*, 656 F.2d 491, 496 (9th Cir. 1981); *American Re-Ins. Co. v. Insurance Comm'r of Cal.*, 527 F. Supp. 444, 453 (C.D. Cal. 1981); *Skandia America Reins. Corp. v. Barnes*, 458 F. Supp. 13, 16 (D. Colo. 1978); *Florida ex rel. O'Malley v. Department of Ins.*, 155 Ind. App. 168, 291 N.E.2d 907, 913 (1973).

²⁷ As one court noted, the term "special deposit" under the UILA was intended to mean "security deposits exacted from a foreign insurer as a condition precedent to doing business in a State for purposes of providing a general fund for the protection of resident policyholders." *G.C. Murphy Co. v. Reserve Ins. Co.*, 54 N.Y.2d 69, 429 N.E.2d 111, 113 n.2, 444 N.Y.S.2d 592 (1981).

²⁸ See, e.g., ILL. REV. STAT. ch. 73, para. 757 (special deposit requirements generally), para. 638 (domestic stock companies), para. 686 (reciprocal), para. 709 (Lloyds underwriters) (West Supp. 1990).

The UILA also defines "preferred" and "secured" claims. Preferred claims are any claims to which a state or the United States accords priority of payment from general assets. UILA § 1(9). Secured claims are claims secured by a mortgage, trust, deposit, pledge, etc., as well as claims which became liens upon specific assets of the company more than four months prior to the commencement of delinquency proceedings in the domiciliary state. UILA § 1(11); see *Joplin Corp. v. State ex rel. Grimes*, 570 P.2d 1161, 1164 (Okla. 1977) (where creditor took judgment against insurance company less than four months prior to the commencement of delinquency proceedings, the claim of the creditor was not a "secured" claim within the meaning of the UILA).

²⁹ The provisions of the UILA must be construed as a whole. *Martin v. General Am. Casualty Co.*, 226 La. 481, 76 So.2d 537, 542 (1954).

ciliary insurance companies, as well as the duties and responsibilities of the domiciliary and ancillary receivers.³⁰ The UILA also sets forth provisions governing the filing and proving of claims, priority of creditors' claims, special deposits, and the attachment and garnishment of assets. Overall, these provisions centralize the delinquency proceedings by vesting power in a single domiciliary receiver. This centralization reflects the universalist policy underpinnings of the UILA: in order to administer a multistate insolvency most effectively and consistently, one state and one receiver must be given primary control, and that receiver will use his power to assure fair and equitable treatment of all the company's creditors, wherever located.

1.1.3. Domiciliary and Ancillary Receivers

Delinquency proceedings may be initiated against an insurance company in the United States for a number of reasons, such as insolvency, failure to maintain proper books and records, refusal to submit to examination or inspection by state insurance authorities, or posing a risk to policyholders.³¹ Delinquency proceedings usually are carried out under the supervision of a designated state court, and often proceed according to some sort of court-approved plan of administration.

a. Appointment of State Receivers

Once delinquency proceedings are initiated in the state where a delinquent company is domiciled, the UILA provides that the court shall designate the commissioner³² of insurance for the state as the domiciliary receiver.³³ Most states have requirements outlining the specific method by which the receiver is to be appointed.³⁴

Some courts have held that an ancillary receiver cannot be appointed until *after* a domiciliary receiver has been appointed.³⁵ In any

³⁰ A "receiver" under the UILA is defined as a "receiver, liquidator, rehabilitator or conservator, as the context may require." UILA § 1(12).

³¹ See, e.g., ILL. REV. STAT. ch. 73, para. 800 (West Supp. 1990) (listing grounds for rehabilitation and liquidation of a domestic company).

³² Also referred to as the "director" or "superintendent" of insurance.

³³ UILA § 2(1) ("Whenever under the laws of this state a receiver is to be appointed in delinquency proceedings . . . the court shall appoint the [insurance commissioner] as such receiver.").

The judge of the supervising court has no power to appoint herself as receiver of the delinquent company in a delinquency proceeding. See, e.g., State ex rel Hunt v. Green, 508 P.2d 639, 642 (Okla. 1973).

³⁴ See, e.g., ILL. REV. STAT. ch. 73, para. 813 (West Supp. 1990) (state Attorney General petitions for appointment of receiver).

³⁵ See, e.g., Florida Ins. Guar. Ass'n. v. State ex rel. Dep't of Ins., 400 So. 2d

event, unless steps are taken under the statute to appoint an ancillary receiver, an ancillary receiver cannot be deemed to exist simply by virtue of the fact that assets of the insolvent company are situated in an ancillary state.³⁶ The commissioner of insurance must petition the court for appointment of an ancillary receiver (i) if there are "sufficient" assets of the company located in the ancillary state to justify the appointment of an ancillary receiver, *or* (ii) if ten or more state residents petition the commissioner requesting an ancillary receiver.³⁷ The UILA provides that the court shall appoint the insurance commissioner of the state as ancillary receiver.³⁸ Of course, if there are no assets of a company in a particular state, there is no basis for appointment of an ancillary receiver in that state.³⁹

b. Appointment of Federal Receivers

In the unusual circumstance that no state commissioner can be found to assume the responsibility of conducting delinquency proceedings for a particular company, a federal receiver may be appointed, although the UILA does not specifically provide for such an alternative. In *Inland Empire Ins. Co. v. Freed*,⁴⁰ an Idaho domiciled insurance company with its principal place of business in Utah was sued by a contract creditor, who alleged that the company was insolvent. The Idaho commissioner of insurance was appointed by the court as receiver. The commissioner objected to his appointment, alleging that because most of the assets of the company were beyond the jurisdictional reach of Idaho courts, he was unable to rehabilitate the company in Idaho. He suggested appointment of a federal court receiver and the receiver of the company in Utah supported his request.

The delinquent insurance company objected, contending that state laws provided for the appointment of commissioners and the conduct of delinquency proceedings in each state, and that a federal receiver was

813, 815 (Fla. Dist. Ct. App. 1981).

³⁶ See, e.g., *Springer v. Colburn*, 162 So. 2d 513, 516 (Fla. 1964).

³⁷ UILA § 3(1). At least one court has held that the commissioner of insurance, in an ancillary state where residents had claims against a non-domiciliary company, had a legal duty to exercise his discretion within a reasonable time, either to request appointment as an ancillary receiver or to transfer his state's special deposit to the domiciliary receiver. *New York ex rel. Bohlinger v. Annat*, 68 Ohio Law Abst. 453, 123 N.E.2d 71, 78 (C.P. 1954).

³⁸ UILA § 3(1) ("Whenever under the laws of this state an ancillary receiver is to be appointed in delinquency proceedings for an insurer not domiciled in the state, the court shall appoint the [insurance commissioner] as ancillary receiver.").

³⁹ *State ex rel. Low v. Imperial Ins. Co.*, 140 Ariz. 426, 682 P.2d 431, 438 (Ariz. App. 1984).

⁴⁰ 239 F.2d 289 (1956).

unnecessary. The state receiver for an Arizona insurance company — which owned ninety percent of the stock interest in the delinquent company — also objected to the appointment of a federal receiver.

In reaching its decision to appoint a federal receiver, the court noted that only six of the twenty-one states holding assets and liabilities of the delinquent company had adopted the UILA, and that the states of the company's domicile and principal place of business were unable (or unwilling) to conduct delinquency proceedings. While emphasizing the federal court's reluctance to interfere with the domestic policies of states,⁴¹ the court felt that under the "very special set of circumstances" of the case, the exercise of the federal court's equity jurisdiction was warranted.⁴² Under such extraordinary circumstances, the court found that appointment of a federal receiver was necessary and proper.⁴³

c. Receiver's Control Over Assets

Upon appointment of a domiciliary receiver, the court "shall direct the receiver forthwith to take possession of the assets of the insurer and to administer the same under the orders of the court."⁴⁴ Most states have statutes outlining the specific powers and duties of the receiver as supervisor, conservator, rehabilitator or liquidator of the delinquent company. In addition to these powers, the UILA vests the domiciliary receiver (and successors) with title to all property, contracts and rights of action of the delinquent company, *wherever situated*, as of the date of entry of an order giving the receiver possession of the company.⁴⁵ Upon taking possession of the assets, the domiciliary receiver must proceed to liquidate, rehabilitate, reorganize or conserve the company.⁴⁶ Typically, the domiciliary receiver has sole responsibility to operate the

⁴¹ The court noted that federal "receiverships for conservation of property 'are to be watched with jealous eyes lest their function be perverted.'" *Id.* at 293 (quoting *Kelleam v. Maryland Casualty Co.*, 312 U.S. 377, 381 (1940)).

⁴² *Inland Empire*, 239 F.2d at 293. The court suggested that the receivership could be carried out under the authority of 28 U.S.C. § 754, which outlines the powers of receivers with respect to property situated in different districts.

⁴³ In a similar proceeding, another federal court held that the delinquent company was not entitled to possession of securities deposited in a state to secure reinsurance obligations, where it was clear from the state's statutes that the company's only property right in the securities was that remaining *after* the trust had been administered in accordance with the statutes under which it was created. *Continental Bank & Trust Co. v. Gold*, 140 F. Supp. 252, 257 (E.D.N.C. 1956).

⁴⁴ UILA § 2(1).

⁴⁵ UILA § 2(2); *see Miner v. Punch*, 838 F.2d 1407, 1410 (5th Cir. 1988); *Murphy v. Ambassador Ins. Co.*, 195 N.J. Super. 274, 281, 478 A.2d 1243, 1247 (1984). The domiciliary receiver may sue in a reciprocal state to recover assets of the delinquent company. UILA § 10.

⁴⁶ UILA § 2(3).

delinquent company, to make policy decisions concerning the conduct of the delinquency proceedings, and to create a plan for administration of the company.

If an ancillary receiver is appointed in a reciprocal state, the UILA provides that the ancillary receiver has the same rights and powers regarding assets located in the ancillary state as the domiciliary state would grant to its own ancillary receivers.⁴⁷ In addition, the ancillary receiver is deemed to have the *sole* right to recover assets of the company located in the ancillary state.⁴⁸

An ancillary receiver has one duty, however, that is not imposed upon a domiciliary receiver. An ancillary receiver must, "as soon as practicable," liquidate from assets in his possession those special deposit claims and secured claims which are proven and allowed in the ancillary proceedings.⁴⁹ That being accomplished, any and all remaining assets of the company must be promptly transferred to the domiciliary receiver.⁵⁰

As might be expected, battles often erupt between domiciliary and ancillary receivers over assets, reflecting territorialist interests and biases. One of the hardest fought was between the receivers of Vermont and New Jersey over the assets of Ambassador Insurance Company. In *Murphy v. Ambassador Ins. Co.*,⁵¹ the delinquent company was domiciled in Vermont, but had done most of its business and had assets of approximately \$100,000,000 in New Jersey. Upon discovering that the company was insolvent, the Vermont domiciliary receiver instituted delinquency proceedings, and ultimately decided to liquidate the company.

The ancillary receiver in New Jersey then claimed possession of the company's New Jersey assets, asserting that he had a right to possess those assets until an actual plan of liquidation had been approved by the Vermont court. The ancillary receiver believed that because New Jersey held the lion's share of the company's assets and had a substantial percentage of the total claims, the ancillary receiver should maintain possession of local assets.

A New Jersey court disagreed, insisting upon a strict application of the terms of the UILA (which both states had adopted). In determining that the New Jersey receiver must turn over local assets to the

⁴⁷ UILA § 2(2).

⁴⁸ UILA § 3(2).

⁴⁹ UILA § 3(2). The ancillary receiver also shall pay all necessary expenses of the proceedings. *Id.*

⁵⁰ UILA § 3(2).

⁵¹ 195 N.J. Super. 274, 478 A.2d 1243 (1984).

Vermont receiver, the court relied on the UILA provision which vests possession and title of the company's assets in the domiciliary receiver, wherever those assets are located. The court rejected arguments that the ancillary receiver should maintain possession of the assets because New Jersey was the principal place of business and the principal situs of the company's assets, as well as concerns that New Jersey claimants would not receive equal treatment in Vermont. The court concluded that:

the domiciliary receiver is entitled to possession of Ambassador's assets wherever situated. This result will centralize the management of the delinquency proceeding in one state, eliminate confusion over title and right to possession of the impaired insurer's assets and best achieve the objectives sought by the Uniform Act . . .⁵²

The *Murphy* court's strict interpretation of the UILA is typical of the universalist construction given the statute by other courts. The rationale behind this tendency towards strict interpretation is perhaps best stated in a frequently quoted passage from *Motlow v. Southern Holding and Sec. Corp.*:

Experience has demonstrated that, in order to secure an economical, efficient, and orderly liquidation and distribution of the assets of an insolvent corporation for the benefit of all creditors and stockholders, it is essential that the title, custody, and control of the assets be entrusted to a single management under the supervision of one court. Hence other courts, except when called upon by the court of primary jurisdiction for assistance, are excluded from participation. This should be particularly true as to proceedings for the liquidation of insolvent insurance companies.⁵³

1.1.4. *Claims, Special Deposits and Priorities*

Once receivers are appointed in the domiciliary and ancillary status, the focus of the UILA shifts to the heart of the receivership process — the processing and payment of claims. In particular, the UILA provides for the filing of claims generally, the payment of claims out of specially deposited assets, and the relative priority of claimants in the payment process.

⁵² *Id.* at 281, 478 A.2d at 1247.

⁵³ 95 F.2d 721, 725-26 (8th Cir. 1938), *cert. denied*, 305 U.S. 609.

a. Filing Claims

Claimants residing in reciprocal states may bring claims against the delinquent company in either the domiciliary proceeding or in an ancillary proceeding in their own states.⁵⁴ If ancillary proceedings have not been commenced, a claim against a company in delinquency proceedings *must* be presented in the domiciliary proceedings, whatever the nature of the claim and regardless of where the claimant resides.⁵⁵ If the claims are controverted, and the ancillary forum is chosen for resolution of those claims, proper notice of the disputed claims must be given to the domiciliary receiver.⁵⁶ If such notice is given, the final judgment as to the controverted claim will be conclusive as to amount and priority in both the ancillary and domiciliary proceedings.⁵⁷

The UILA also provides that actions for attachment, garnishment, or execution of a judgment may not be commenced or maintained against the delinquent company or its assets during the pendency of the delinquency proceedings.⁵⁸ Also, any lien obtained against the delinquent company within four months prior to the commencement of any delinquency proceedings is considered void with respect to any rights arising in such proceeding.⁵⁹

b. Special Deposits

Territorialist concerns are given their greatest expression in the state statutes governing the creation and maintenance of special deposit funds. Under the UILA, claimants of a given state are given priority against special deposit funds held for their benefit, according to the

⁵⁴ UILA § 4(1). *See also* *Sears, Roebuck & Co. v. Northumberland Gen. Ins. Co.*, 617 F. Supp. 88, 89 (N.D. Ill. 1985); *Clark v. Standard Life & Accident Ins. Co.*, 68 Ill. App. 3d 977, 987, 386 N.E.2d 890, 899 (1979).

⁵⁵ UILA § 4(1). Many claimants have sought to circumvent this requirement in an attempt to bring claims in their own states, but unless ancillary proceedings have been initiated in those states, the courts have uniformly rejected such attempts. *See, e.g.*, *Sears, Roebuck & Co. v. Northumberland Gen. Ins. Co.*, 617 F. Supp. 88, 89 (N.D. Ill. 1985); *Zullo Lumber v. King Constr.*, 146 N.J. Super. 88, 94, 368 A.2d 987, 991 (1976); *G.C. Murphy Co. v. Reserve Ins. Co.*, 54 N.Y. 2d 69, 77-79, 429 N.E.2d 111, 115, 444 N.Y.S.2d 592, 596 (1981); *Insurance Affiliates Inc. v. O'Connor*, 522 F. Supp. 703, 706 (D. Colo. 1981); *Financial Int'l Life Ins. Co. of N.M. v. Beta Trust Corp., Ltd.*, 405 So.2d 306, 308 (Fla. Dist. Ct. App. 1981); *Vlasaty v. Avco Rent-A-Car Systems, Inc.*, 60 Misc. 2d 928, 930, 304 N.Y.S.2d 118, 120 (Sup. Ct. 1969).

⁵⁶ UILA § 4(2). Notice must be in writing, and must be delivered by registered mail or personal service at least forty days prior to the date set for the hearing. *Id.* § 5(2).

⁵⁷ UILA §§ 4(2), 5(2).

⁵⁸ UILA § 9.

⁵⁹ *Id.*

state's statutes.⁶⁰ If the special deposit claims have not been fully paid, after all special deposit funds have been exhausted, the special deposit claimants may share in the general assets of the company.⁶¹ However, in order to assure equal treatment of all the delinquent company's creditors wherever situated, the special deposit claimants who have already received a distribution from special deposit funds cannot share in general assets until "general creditors, and also claimants against other special deposits who have received smaller percentages from their respective special deposits, have been paid percentages of their claims equal to the percentage paid from the special deposit."⁶²

The availability of special deposits to local creditors under the UILA makes them a natural subject of dispute. For example, in *G.C. Murphy Co. v. Reserve Ins. Co.*,⁶³ an Illinois insurance company, as an unauthorized foreign insurer, was directed by the State of New York to post an "undertaking" in New York in response to a lawsuit filed against the Illinois company there. The Illinois company was required to post the undertaking before it could file any pleadings in the action.

Approximately six years later, an Illinois court placed the insurance company in liquidation and the liquidator claimed the right to remove the undertaking from New York as a general asset subject to the Illinois delinquency proceeding. The beneficiary of the undertaking claimed that the undertaking was a special deposit against which it was entitled to proceed in New York.

The Court of Appeals found that the undertaking was not a spe-

⁶⁰ UILA § 7; *see, e.g.*, *State ex rel. Ingram v. Reserve Ins. Co.*, 303 N.C. 623, 630, 281 S.E.2d 16, 20 (1981); *Comm'r of Ins. v. Equity Gen. Ins. Co.*, 346 Mass. 233, 239-41, 191 N.E.2d 139, 143-44 (1963) (special deposits must be applied in accordance with statutes under which they were created). Many states have now enacted statutes which give the state's guaranty fund a priority claim to special deposits on an expedited basis. *State ex rel. Ingram*, 303 N.C. at 630-31, 281 S.E.2d at 21. Guaranty funds are organizations set up in a state whose purpose is to provide expeditious relief to policyholders in that state in the event of an insurer or reinsurer insolvency. Guaranty funds typically are funded through assessments against all insurance companies doing business in a state in proportion to the amount of business each company writes. *See Hank, Post-Assessment Guaranty Funds: Are They The Ultimate Solution To The Insolvency Problem?*, *Ins. L.J.* 482 (1976). When an insolvency occurs, the guaranty fund pays resident claimants and is thereby subrogated to the claimants' rights against the company. Many states have now enacted "quick" or "early access" statutes which allow the guaranty fund immediate access to any special deposit funds held by the state. In *State ex rel. Ingram*, the North Carolina Supreme Court upheld the state guaranty fund's right to special deposits under a quick access statute.

⁶¹ UILA § 7.

⁶² *Id.*

⁶³ 54 N.Y.2d 69, 429 N.E.2d 111, 444 N.Y.S.2d 592 (1981). Another interesting dispute arose in *Missouri Div. of Ins. v. State ex rel. Fla. Dep't of Ins.*, 374 So.2d 589 (Dist. Ct. App. Fla. 1979), where a special deposit of one member of a reciprocal insurance exchange was deemed an asset of another member of the exchange.

cial deposit within the meaning of the UILA because the undertaking had been posted for the benefit of a particular claim and not for a limited class of beneficiaries.⁶⁴ Moreover, the court held that even if the undertaking could be deemed a special deposit under the UILA, the party would have to file its claim in Illinois because New York had not initiated ancillary proceedings. While the court was sympathetic to the burden imposed upon a party who was forced to make a claim outside its own state, the court felt that such a burden was justified in order to effectuate the purposes of the UILA:

We are also cognizant of the individual hardship suffered by the present plaintiff, who has been in the throes of litigation for the past seven years and now must pursue its claim in the distant forum of Illinois. By enacting the Uniform Insurers Liquidation Act, our Legislature has determined that such occasional instances of adversity are outweighed by the paramount interest of the various States in seeing that insurance companies domiciled within their respective boundaries are liquidated in a uniform, orderly and equitable manner without interference from external tribunals.⁶⁵

The UILA's treatment of special deposit claims reflects the dualistic approach of the Act. On the one hand, special deposit claims are handled with a healthy regard for the differences between states which are reflected in their statutory provisions. On the other hand, as the *Murphy* decision demonstrates, resolving conflicting claims in a single proceeding best accomplishes the universalist goals of the Act. The deference to states' territorialist concerns for protecting their own citizens' special deposit rights, embodied in the universalist procedures of the UILA, demonstrates that there is a middle ground between the two extremes.

c. Priority of Preferred Claims

In deciding which claims in a delinquency proceeding will be deemed "preferred," the UILA adopts a simple rule: the preference or priority scheme of the domiciliary state controls.⁶⁶ That is, regardless of where claims are brought, whether in the domiciliary or in ancillary proceedings, the law of the domiciliary state is applied to determine the relative priority of claims. This is another instance of the UILA achiev-

⁶⁴ *G.C. Murphy Co.*, 54 N.Y.2d at 79-80, 429 N.E.2d at 116; accord *Fletcher v. State Treasurer*, 16 Mich. App. 87, 167 N.W.2d 594 (1969).

⁶⁵ *G.C. Murphy Co.*, 54 N.Y.2d at 80-81, 429 N.E.2d at 117 (footnote omitted).

⁶⁶ UILA § 6.

ing its universalist goal by accommodating states' territorialist concerns.

The priority provisions of the UILA, however, do not replace other principles generally applicable to the payment of claims. For example, the UILA provisions do not eliminate rights of set-off.⁶⁷ Also, certain claims might not be elevated in the priority scheme: reinsurance claims typically will be given no higher priority than claims of general creditors in distributions under the UILA.⁶⁸

1.1.5. Problems Arising Under the UILA

Certain problems have arisen over the years in applying the UILA to multistate delinquency proceedings. Some of these problems arose out of disputes over the scope of injunctions or stay orders issued by receivers,⁶⁹ proper timing of claims,⁷⁰ and enforcement of judgments against the delinquent company.⁷¹

Other problems have arisen where a non-reciprocal state — a state

⁶⁷ Barnett Bank of Jacksonville v. Dept. of Ins., 507 So.2d 142 (Fla. Dist. Ct. App. 1987); Prudential Reins. Co. v. Super. Ct. of Los Angeles County, 216 Cal. App. 3d 1321, 265 Cal. Rptr. 386 (1990); *but see In re Liquidation of Midland Ins. Co.*, Index No. 41294/86, slip. op. (N.Y. Sup. Ct. Jan. 31, 1990) (appeal pending). For a general discussion of the law of set-offs in insurance insolvencies, see Schwab *et al.*, *Onset of an Offset Revolution: The Application of Set-Offs in Insurance Insolvencies*, 95 Dick. L. Rev. 449 (1991).

⁶⁸ *State ex rel. Long v. Beacon Ins. Co.*, 87 N.C. App. 72, 359 S.E.2d 508, *reh. denied*, 321 N.C. 480, 364 S.E.2d 671 (1987); *Pioneer Annuity Life Ins. Co. v. Nat'l Equity Life Ins. Co.*, 159 Ariz. 148, 765 P.2d 550 (1988).

⁶⁹ *Insurance Affiliates, Inc. v. O'Connor*, 522 F. Supp. 703 (D. Colo. 1981) (Illinois injunction prohibiting proceedings against a delinquent company outside Illinois was not entitled to full faith and credit in Colorado where Illinois had no personal jurisdiction over the parties in Colorado); *Joplin Corp. v. State ex rel. Grimes*, 570 P.2d 1161 (Okla. 1977) (any lien attempted to be created in contravention to delinquency proceeding injunction is invalid); *Delmarva Power & Light Co. v. Pettibone Corp.*, 505 A.2d 447 (Del. 1985) (New York injunction against the prosecution of claims against a delinquent company's insureds would not be extended full faith and credit in Delaware because New York had no personal jurisdiction over the parties); *accord General Acc. Fire & Life Assurance Corp. v. Hawkins*, 115 A.D.2d 357, 495 N.Y.S.2d 398 (1985); *Nasef v. U&I Investments, Inc.*, 91 Or. App. 344, 755 P.2d 136 (1988); *Janak v. Allstate Ins. Co.*, 319 F. Supp. 215 (D.C. Wis. 1970).

⁷⁰ *See, e.g., Bartholomew v. Glen Falls Ins. Co.*, 241 So.2d 698 (Fla. 1970) (date of delinquency proceedings declaring company insolvent were not determinative as to the actual date of company's insolvency).

⁷¹ *See, e.g., Attorney Gen. v. Ambassador Ins. Co.*, 166 Mich. App. 687, 421 N.W.2d 271 (1988). Another problem which may arise, which is not directly addressed by the UILA, is multistate insolvencies of a group of affiliated companies. For an interesting discussion of this problem, see Havens and Falon, *Insurer Insolvencies: Interstate Cooperation*, 1986 ABA Sec. Tort & Ins. Practice, *Law and Practice of Insurance Company Insolvency* 119. For a good discussion of problems under the UILA involving injunctions and stays, see Gavin, *Competing Forums For the Resolution Of Claims Against An Insolvent Insurer*, 1986 ABA Sec. Tort & Ins. Practice, *Law and Practice of Insurance Company Insolvency* 151.

which has not enacted the UILA — is involved in the delinquency proceedings.

The UILA contains no provisions addressing this circumstance, and courts have struggled to fashion equitable resolutions for the states involved. Most often, courts have held that UILA states have no duty to apply the principles of the UILA with regard to non-reciprocal states. For example, if a non-reciprocal state is the domiciliary state, courts have held that receivers in ancillary states are under no duty to return assets to the domiciliary.⁷² Other courts, however, have overlooked the fact that states are non-reciprocal and have enforced UILA-type principles based on notions of comity.⁷³

In addition to its lack of provisions governing involvement of non-reciprocal states in delinquency proceedings, the UILA has several other “gaps” that have caused difficulties over the years. For example, the UILA does not address the right of an insurance commissioner in an ancillary state to initiate delinquency proceedings of some sort in the ancillary state in the event that delinquency proceedings are never initiated in the domiciliary state. Also, the UILA contains no provisions governing a domiciliary receiver’s remedies in the event that an ancillary receiver refuses to cooperate with the domiciliary receiver in the collection and distribution of assets.

Some of these problems have been addressed in the Insurers Rehabilitation and Liquidation Model Act, an Act that covers many of the same issues as the UILA and is enjoying increasing popularity in the United States.⁷⁴

⁷² See *Preferred Ins. Co. v. Bentley*, 225 Ga. 160, 166 S.E.2d 340 (1969) (assets of a foreign insurer properly held for local creditor’s benefit where domiciliary state had not enacted UILA); *Martin v. General Am. Casualty Co.*, 226 La. 481, 76 So.2d 537 (1954) (ancillary creditor could satisfy claims out of funds seized in the ancillary jurisdiction where the domiciliary state was non-reciprocal); *Bonura v. United Bankers Life Ins. Co.*, 509 So.2d 8 (La. Ct. App. 1987) (Louisiana residents could assert their claims against a Texas insurance company in receivership in Louisiana because Texas was not a reciprocal state under the UILA).

⁷³ See, e.g., *Twin City Bank v. Mutual Fire & Inland Marine Ins. Co.*, 646 F. Supp. 1139 (S.D.N.Y. 1986) (New York court granted a stay of judgment to a non-reciprocal Pennsylvania insurance company in order to avoid creating a preference for one creditor over another); *Kelly v. Overseas Investors, Inc.*, 24 A.D.2d 157, 264 N.Y.S.2d 586, *rev’d on other grounds*, 18 N.Y.2d 622 (1965) (the UILA does not prohibit non-reciprocal states from extending comity to other states as the purpose of the UILA is to “enlarge rather than to contract the areas for the operation of interstate comity.”).

⁷⁴ For a good discussion of both the UILA and the Model Act, see Havens, *supra* note 71.

1.2. *The Insurers Rehabilitation and Liquidation Model Act*

An increasing number of states have enacted the Insurers Rehabilitation and Liquidation Model Act (the "Model Act");⁷⁵ in fact, some states which previously adopted the UILA have revoked it in favor of the Model Act.⁷⁶ The Model Act contains provisions governing all aspects of insurance company regulation in the United States with regard to conservation, rehabilitation, and liquidation, including provisions governing multistate proceedings.⁷⁷

Derived from the Wisconsin Insurers Rehabilitation and Liquidation Act,⁷⁸ the Model Act was adopted by the NAIC in 1968 as model legislation for insurer insolvency.⁷⁹ Since then, the NAIC has treated the Model Act as an evolving statute, responsive to changes in U.S. law and policy affecting the administration of insurance insolvency. The NAIC adopted the present version of the Model Act in 1978⁸⁰ in order to integrate the Act with the developing system of insurance guaranty funds.⁸¹ The NAIC's steadfast goal is to maintain the Model Act as a statute which fulfills the legal and operational needs of parties involved in insurer insolvencies, and to maintain coordination with the guaranty fund model acts.⁸²

The stated goals of the Model Act are to provide improved methods for the rehabilitation of insurers;⁸³ to make the liquidation process more efficient and economical;⁸⁴ to facilitate interstate cooperation in the rehabilitation and liquidation of insurers; and to protect the interests of policyholders, claimants and creditors.⁸⁵ To date, 16 states have adopted the substance of the Model Act.⁸⁶

⁷⁵ 1978 *Proceedings of the NAIC* I, 13, 15, 211, 238-41, 242-75. For the full text of the Model Act as of June 7, 1990, see 1990 *Proceedings of the NAIC* II 225.

⁷⁶ See Appendix A.

⁷⁷ Model Act § 1(D).

⁷⁸ WIS. STAT. §§ 645.01 *et seq.* For a good discussion of the development of state insurance insolvency laws, including the Wisconsin legislation, see Kimball, *History and Development of the Law of State Insurer Insolvency Proceedings: An Overview*, 1986 ABA Sec. Tort & Ins. Practice, *Law and Practice of Insurance Company Insolvency* 39-50 [hereinafter Kimball].

⁷⁹ 1969 *Proceedings of the NAIC* I, 168, 241, 271.

⁸⁰ See *supra* note 75.

⁸¹ Kimball, *supra* note 78, at 43.

⁸² See, e.g., 1988 *Proceedings of the NAIC* II, 351.

⁸³ Model Act § 1(D)(2).

⁸⁴ Model Act § 1(D)(3).

⁸⁵ Model Act § 1(D)(5).

⁸⁶ See Appendix A.

1.2.1. Structure of the Model Act

The Model Act adopts much of the basic terminology and procedure of the UILA, as well as the same universalist policy objective: centralization of delinquency proceedings in the domiciliary jurisdiction. It also invokes some of the territorialist principles applied in interpreting the UILA, insofar as non-reciprocal states are involved. Differences between the two statutes derive from the NAIC's efforts to clarify and improve UILA provisions.

As with the UILA, the Model Act refers to the insolvency proceeding as a "delinquency proceeding."⁸⁷ Delinquency proceedings may occur in either the domiciliary state,⁸⁸ an ancillary state, or both,⁸⁹ as either "summary proceedings"⁹⁰ or "formal delinquency proceedings."⁹¹ States are considered to be reciprocal under the Model Act if each has enacted the substance and effect of six sections of the Model Act governing "Interstate Relations."⁹²

1.2.2. Appointment of a Receiver

a. Domiciliary and Ancillary Receivers

The grounds for appointment of a domiciliary receiver under the Model Act closely parallel those in the UILA.⁹³ The two acts differ, however, as to the grounds for appointment of ancillary receivers. The UILA requires the state commissioner to petition for his appointment as an ancillary receiver if there are sufficient assets in the state to warrant such action, or if ten or more residents with claims petition for the appointment of an ancillary receiver.⁹⁴ Under the Model Act, however, the decision to petition for appointment as an ancillary receiver is left to the state commissioner's discretion, who may initiate proceedings if

⁸⁷ Model Act § 3(D). The Model Act distinguishes between "delinquency proceedings," generally, and "formal delinquency proceedings," which are limited to rehabilitation or liquidation proceedings.

⁸⁸ Model Act § 3(F).

⁸⁹ Model Act § 3(A).

⁹⁰ Model Act §§ 9, 10. The distinction between summary and formal proceedings is developed in the next section. *See supra* notes 93-97.

⁹¹ Model Act §§ 11-48.

⁹² Model Act § 3(O). The six key sections for purposes of reciprocity are Sections 17(A), 51, 52 and 54 through 56. *See State of Ohio v. Ramos*, 41 Ohio App. 3d 88, 534 N.E.2d 885 (1987) (model legislation is enacted to reduce problems in interstate rehabilitation and liquidation proceedings; principles of comity should apply between reciprocal states).

⁹³ Model Act §§ 11, 16(B), and §§ 4, 12, 17 (for rehabilitations and liquidations, respectively).

⁹⁴ UILA § 3.

“the protection of creditors or policyholders in [the ancillary] state so requires.”⁹⁵

Unlike the UILA, the Model Act distinguishes between summary proceedings⁹⁶ and formal proceedings.⁹⁷ Summary proceedings are initiated by a state commissioner’s filing of an *ex parte* petition seeking possession and control of an insurer’s property, books, accounts, documents, and other records.⁹⁸ Summary proceedings are conducted in confidentiality, but may be made public at the request of the insurer or by order of the court.⁹⁹ Such proceedings enable the commissioner to exercise control over the insurer while ascertaining what type of further corrective action may be necessary. Formal delinquency proceedings consist of rehabilitation and liquidation.¹⁰⁰ Essentially, summary proceedings are a prelude to formal proceedings. They enable the receiver to preserve the status quo until the company’s problems are resolved or formal proceedings begin.

Ancillary proceedings may be either summary or formal, with different purposes and procedures for their initiation. Summary proceedings are territorialist in nature. Whereas ancillary formal proceedings are designed to enable the ancillary receiver to protect policyholders and creditors within the jurisdiction and assist the domiciliary liquidator, the goal of ancillary summary proceedings is the preservation of an insurer’s assets and records within the state until formal proceedings are initiated. Ancillary formal proceedings may be initiated by a state’s commissioner following the appointment of a domiciliary liquidator for an insurer domiciled in another state.¹⁰¹ Alternatively, at the request of the commissioner of the domiciliary state of a foreign insurer having property located in an ancillary state, the commissioner of the ancillary state may, in his sole discretion, institute ancillary summary proceedings under the Model Act.¹⁰²

b. Receivers of Foreign or Alien Insurer

The Model Act distinguishes between “foreign” (those from any other U.S. state, district, or territory)¹⁰³ and “alien” (those from an-

⁹⁵ Model Act § 52(A).

⁹⁶ Model Act § 53.

⁹⁷ Model Act § 52.

⁹⁸ Model Act § 9(B).

⁹⁹ Model Act § 10.

¹⁰⁰ Model Act § 3(D).

¹⁰¹ Model Act §§ 52(A), 9, 10.

¹⁰² Model Act § 53.

¹⁰³ Model Act § 3(R).

other country)¹⁰⁴ insurers. If grounds exist for the commencement of delinquency proceedings against a foreign or alien insurer, and no domiciliary receiver has been appointed, the Model Act enables the state commissioner to petition either the designated state court or any appropriate federal district court for an appointment as the receiver.¹⁰⁵ Under a state court order, the commissioner, as receiver, may conserve or liquidate the foreign or alien insurer's assets found in the state.¹⁰⁶ In a federal receivership, the commissioner may liquidate a foreign or alien insurer's assets or business within the federal court's jurisdiction for the protection of policyholders and creditors in the commissioner's state.¹⁰⁷ Thus, the Model Act fills a gap in the protection provided by the UILA to policyholders and creditors. Whereas the UILA provides no mechanism for the liquidation of a foreign or alien insurer's assets absent the appointment of a domiciliary receiver, the Model Act explicitly empowers a commissioner, acting as liquidator, to initiate proceedings and secure assets for the satisfaction of residents' claims, even when no domiciliary receiver has been appointed. The Model Act thereby enables a non-domiciliary receiver to protect the territorialist concerns of his state.

In order to ensure a coordinated effort between liquidators, if a domiciliary receiver is appointed subsequently in a reciprocal state, the first liquidator thereafter acts as an ancillary receiver. If a domiciliary receiver is appointed in a non-reciprocal state, however, then the non-domiciliary liquidator *may*, but need not, petition for appointment as an ancillary receiver.¹⁰⁸

1.2.3. Receiver's Control Over Assets

Like the UILA, the appointment of a domiciliary receiver vests the receiver with title to all of the insurer's assets by operation of law.¹⁰⁹ Under both the Model Act and the UILA, an executive receivership is established in which the domiciliary receiver is directed to administer

¹⁰⁴ Although the Model Act does not define "alien," it seems clear that the definition is the same as that of a "foreign country:" "any other jurisdiction not in any state." Model Act § 3(4). "State" means "any state, district or territory of the United States and the Panama Canal Zone." Model Act § 3(R).

¹⁰⁵ Model Act §§ 49, 50(A), (E).

¹⁰⁶ Model Act §§ 49, 50(A).

¹⁰⁷ Model Act § 50(E).

¹⁰⁸ Model Act § 50(D).

¹⁰⁹ Accordingly, the Model Act empowers the domiciliary liquidator to recover balances due from agents in any reciprocal state (Model Act §§ 3(I), 51(A)), other than uncollected unearned premiums. *See, e.g.,* Hager v. Anderson-Hutchinson Ins. Agency, No. 86-841-E (S.D. Iowa, July 19, 1989) LEXIS 13614; Model Act §§ 12(A), 17(A).

the insurer's assets under the general supervision of the receivership court.¹¹⁰ However, the Model Act further requires that the receiver provide periodic accountings to the supervising court.¹¹¹ The UILA does not provide for this extra level of universalist protection.

With respect to assets, the Model Act distinguishes between a domiciliary liquidator appointed in a reciprocal state and one appointed in a non-reciprocal state.¹¹² A domiciliary liquidator appointed in a reciprocal state is vested with title to all assets in all reciprocal states — except for special deposits and the security on secured claims — upon the filing of the petition for liquidation, if the domiciliary state's statute so provides. When a domiciliary liquidator is appointed in a non-reciprocal state, however, the commissioner of the non-reciprocal ancillary state is vested with title to all of the assets situated in that state.¹¹³ No provision is made in the Model Act for the transfer of such assets to the domiciliary liquidator.

If an ancillary receiver is designated after the appointment of a domiciliary liquidator in a reciprocal state, the ancillary receiver must utilize any special deposits and security on secured claims located in his state to satisfy claims of residents. Upon the satisfaction of all special deposit and secured claims and payment of administrative expenses, all remaining assets must be transferred to the domiciliary liquidator.¹¹⁴

If the commissioner has commenced ancillary summary proceedings at the request of the commissioner of an insurer's domiciliary state, the commissioner obtains the right to possession and control of the insurer's assets and records located within his state. Through his seizure of the insurer's assets and records, the commissioner is able to assist the domiciliary commissioner in actions preliminary or supplementary to formal proceedings in the domiciliary state.¹¹⁵

Thus, reciprocity may be viewed as the Model Act's great equalizer. By restricting the rights of non-reciprocal state domiciliary receivers, the Model Act exhorts non-reciprocal states to adopt its universalist provisions.

1.2.4. *Stays and Injunctions*

Multistate stays and injunctions further the universalist goals of the Model Act. Following the entry of an order of liquidation, the

¹¹⁰ Model Act §§ 12(A) (rehabilitation) and 17(A) (liquidation).

¹¹¹ Model Act §§ 12(B), 17(E).

¹¹² Model Act §§ 51(A), (B).

¹¹³ Model Act § 52(C).

¹¹⁴ Model Act § 51(B).

¹¹⁵ See Comment, WIS. STAT. § 645.85 (1980).

Model Act enjoins the prosecution of all claims at law, equity, or in arbitration.¹¹⁶ The Model Act requires that full faith and credit be given to anti-suit injunctions entered in liquidation proceedings commenced in another state, if that other state would do likewise. The injunction enables the liquidator to evaluate all claims against the insolvent insurer uniformly.

Unlike the unlimited duration of the stay that arises upon the filing of a liquidation order, the Model Act provides only a 90 day stay (unless extended for a specified period) in rehabilitation proceedings.¹¹⁷ During this limited time period, the rehabilitator must retain counsel, prepare for further proceedings, and take such action against pending litigation as is necessary in the interests of justice and for the protection of policyholders, creditors, and the public. The rationale behind this provision is that if the rehabilitator needs to avoid actions instituted against the insurer, then the insurer should be liquidated rather than rehabilitated.¹¹⁸

The limited duration of the rehabilitation stay, however, may frustrate a receiver's efforts to control actions against the insurer. For example, in *Smalls v. Weed*,¹¹⁹ a Tennessee rehabilitator (Smalls) sought a stay of a bad faith action against the insurer which was pending in South Carolina, in order to compel the plaintiff to pursue his claim in the Tennessee rehabilitation proceedings. Noting that under South Carolina's statute an action against a company in rehabilitation is stayed for only 90 days following entry of the rehabilitation order — as opposed to the unlimited duration of liquidation stays — the court held that Smalls could maintain his suit in South Carolina because the insurer was in rehabilitation, not liquidation.

1.2.5. Claims

The Model Act and the UILA treat the filing of claims similarly.¹²⁰ Creditors may assert claims against the insolvent insurer's general assets or, if appropriate, they may pursue a special deposit claim¹²¹ or a secured claim.¹²² However, while the UILA is silent as to the

¹¹⁶ Model Act § 23(A). The liquidator has discretion, however, to allow actions to proceed if the circumstances so warrant.

¹¹⁷ Model Act § 14(A).

¹¹⁸ Comment, WIS. STAT. § 645.34(a) (1980 & Supp. 1990).

¹¹⁹ 360 S.E.2d 531 (S.C. App. 1987) (apparently decided under UILA-type provisions quite similar to the Model Act).

¹²⁰ Model Act §§ 54, 55.

¹²¹ Model Act § 3(Q).

¹²² Model Act § 3.

rights of residents in non-reciprocal states to file claims, the Model Act specifically allows such claimants to file their claims with the domiciliary liquidator.¹²³

1.2.6. Priority of Distribution

Under the Model Act, general assets are distributed in accordance with the domiciliary state's priority of distribution scheme.¹²⁴ An ancillary court's determination of priority is not binding upon the domiciliary liquidator.¹²⁵

a. Federal Priority

Although the Model Act's priority of distribution schedule is controlling as to most claims, recent authority suggests that federal government revenue claims may not be subject to the priority scheme of any state. In *Idaho ex rel. Soward v. United States*,¹²⁶ the Ninth Circuit held that the Model Act's priority schedule,¹²⁷ as enacted by the State of Idaho, did not preempt the Federal Insolvency Statute,¹²⁸ and that the federal government was entitled to receive full payment of its claim prior to satisfaction of obligations owing to all other creditors. The court's holding was based upon a determination that insurance insolvency proceedings are not "the business of insurance within the meaning of the McCarran-Ferguson Act."¹²⁹ Thus, the Model Act's primary goal — protecting the interests of insureds — was undermined.¹³⁰

b. Subordinated Priority

The Model Act encourages interstate cooperation by penalizing claimants residing in states where the ancillary receiver fails to transfer any assets (other than special deposits less administrative expenses) to

¹²³ Model Act § 54(A).

¹²⁴ Model Act § 57(A) (priority of distribution involving reciprocal states).

¹²⁵ Model Act § 54(B).

¹²⁶ 858 F.2d 445 (9th Cir. 1988), *cert. denied*, 109 S.Ct. 2062 (1989); *accord* *Gordon v. United States Dept. of Treasury*, 846 F.2d 272 (4th Cir.), *cert. denied*, 109 S. Ct. 390; *but see Fabe v. United States Dep't of Treasury*, No. 90-3364 (6th Cir. 1991). For a general discussion of the federal priority issue, see Howard, *Uncle Sam Versus the Insurance Commissioners: A Multi-Level Approach to Defining the "Business of Insurance" Under the McCarran-Ferguson Act*, 25 WILLAMETTE L. REV. 1 (1989).

¹²⁷ Under Model Act § 41(F), the federal government's claim would share at the fifth priority level.

¹²⁸ 31 U.S.C. § 3713.

¹²⁹ 15 U.S.C. § 1012(b).

¹³⁰ Model Act § 1(D).

the domiciliary receiver. The penalty exacted is the subordination of claims filed in the ancillary proceeding, other than special deposit or secured claims, to the next to last class of claims under the priority of distribution schedule.¹³¹ Thus, the sins of the receiver are visited on the policyholders with whose protection he is charged. The UILA contains no similar penalty provisions.

In summary, the Model Act — which has been enacted by an increasing number of states¹³² that once abided by the UILA — represents an attempt to clarify and improve the UILA. Although similar to the UILA, the Model Act provides a more comprehensive scheme for addressing the insolvency of domestic as well as foreign insurers. Its territorialist treatment of non-reciprocal states, and its penalty provisions against uncooperative ancillary states, provide incentives for adoption by nonsignatory states.

1.3. Federal Bankruptcy Protection

The principal disadvantage of both the UILA and the Model Act lies in the fact that neither act has been adopted by all American states and territories. The federal Bankruptcy Reform Act of 1978 (the “Code”)¹³³ does not suffer from the same defect: it is national legislation applicable in all 50 states, the District of Columbia and the U.S. territories. It provides a comprehensive scheme for the resolution of individual and corporate insolvency. In general, the Code offers bankrupts three types of relief: reorganization under Chapter 11; adjustment of debts by composition, extension or discharge under Chapters 9, 12 and 13; and liquidation under Chapter 7.

Whether an insolvent may avail itself of any such relief depends upon whether it is a “debtor” under the Code. Under the Code, domestic and foreign insurance companies cannot be “debtors,”¹³⁴ and thus are denied the full measure of the Code’s protection and relief. The reason for this exclusion derives from the states’ pervasive regulation of the business of insurance and Congress’ delegation to the states of the exclusive authority to regulate such activity.¹³⁵ When Congress enacted the statutory predecessor to the Code (The Bankruptcy Act of 1898), it determined that insurance companies are “bodies for which alternative

¹³¹ Model Act § 58. *See also* Model Act § 41 (classes for priority of distribution).

¹³² In fact, the NAIC has implemented an accreditation procedure which likely will result in more states adopting the Model Act. 1990 *Proceedings of the NAIC II*, 23.

¹³³ 11 U.S.C. §§ 101 *et seq.* (1988).

¹³⁴ 11 U.S.C. § 109(b)(2), (d) (1988).

¹³⁵ 15 U.S.C. § 1012.

provision is made for their liquidation under various regulatory laws,¹³⁶ and therefore excluded them from domestic bankruptcy proceedings. Nevertheless, Section 304¹³⁷ of the Code empowers "foreign representatives"¹³⁸ of an insolvent foreign insurer involved in "foreign [delinquency] proceedings"¹³⁹ to invoke the Code's protective measures and remedies in aid of the foreign proceeding. The central themes of Section 304 are assistance for foreign representatives and judicial flexibility to fashion that relief.¹⁴⁰ Section 304 thus represents an effort to unilaterally adopt the universalist theory.¹⁴¹

1.3.1. Section 304

In formulating Section 304, Congress was aware of the growth of multinational business and of the complexities that arise when a large multinational entity becomes enmeshed in a foreign bankruptcy proceeding. Congress also was aware that the Bankruptcy Act of 1898 did not contain express provisions giving a foreign receiver the flexibility required to resolve the problems that arise when foreign proceedings

¹³⁶ H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 318-19 (1977); S. Rep. No. 95-989, 95th Cong., 2d Sess. 31 (1978); U.S. Code Cong. & Admin. News 5787, 5817, 6275.

The rationale for excluding insurance companies from protection under the Bankruptcy Code was explained in *In re Supreme Lodge of the Masons Annuity*, 286 F. 180, 184 (N.D. Ga. 1923):

The affairs of an embarrassed or insolvent insurance company often require much technical skill and judgment and time for their adjustment and a carrying forward of the business, to prevent lapses and to permit reinsurance to simplify them. And considering the variety of insurance obligations assumed and the various statutes thereof, a chief practical difficulty is the ascertainment of who are really to be considered creditors and in what amounts, often requiring much time and elaborate accounting for its solution. Under such circumstances even the election of a trustee in bankruptcy could be difficult, and a creditors' meeting could hardly prosecute any business, owing to conflicting interests of the various classes of claims.

¹³⁷ Section 304 is set forth in Appendix B in its entirety.

¹³⁸ Under the Code, a "foreign representative" is a "duly selected trustee, administrator, or other representative of an estate in a foreign proceeding." 11 U.S.C. § 101(23).

¹³⁹ "Foreign proceeding" is defined to mean a:

proceeding, whether judicial or administrative and whether or not under bankruptcy law, in a foreign country in which the debtor's domicile, residence, principal place of business, or principal assets were located at the commencement of such proceeding, for the purpose of liquidating an estate, adjusting debts by composition, extension, or discharge, or effecting a reorganization.

11 U.S.C. § 101(22).

¹⁴⁰ NORTON, BANKRUPTCY LAW AND PRACTICE, § 9A.09, at 15 [hereinafter NORTON].

¹⁴¹ *Id.*, § 9A.08, at 14.

are instituted and creditors seize assets located in the United States.¹⁴²

With these problems in mind, Congress endeavored in the Code to establish a statutory scheme that could provide a foreign representative with a flexible framework within which to confront the multitude of situations that can arise in a multinational insolvency. In particular, Section 304 of the Code gives a foreign representative the option to commence an ancillary proceeding.¹⁴³ The section thus gives foreign representatives a formidable tool to fashion a uniform administration for an international insurance insolvency by enabling them to administer a debtor's U.S. assets, prevent dismantlement¹⁴⁴ by local creditors, and obtain other appropriate relief through ancillary proceedings conducted in the United States.¹⁴⁵

Consistent with its purpose, the procedure for obtaining Section 304 relief differs from that for invoking a bankruptcy court's general jurisdiction. A petition filed under Section 304 does not commence a full and conventional bankruptcy case,¹⁴⁶ but merely supplements a proceeding pending before a foreign court or administrative tribunal.¹⁴⁷ The bankruptcy court, therefore, does not sit as an appellate court over

¹⁴² *Matter of Axona Int'l Credit & Commerce Ltd.*, 88 Bankr. 597, 604-06 (Bankr. S.D.N.Y. 1988).

Nevertheless, U.S. courts often had deferred to foreign case administration in the name of comity. Thus, in *In re Stoddard*, 242 N.Y. 148, 151 N.E. 159 (1926), the New York Court of Appeals held that the New York State Superintendent of Insurance should disburse to the receiver of a Norwegian insurer, the balance of a special deposit the insurer had placed with the state.

¹⁴³ Foreign representatives of debtors which are not insurance companies have the additional option to file a bankruptcy case under § 303(b)(4), or seek dismissal or suspension under § 305 of a pending bankruptcy case. *Axona*, 88 Bankr. at 606. The first option is not available to the receiver of a foreign insurance company because, as previously noted, an insurance company cannot be a debtor under the Code. The second option also is not a viable alternative, unless, for example, the foreign insurer has a U.S. branch or subsidiary which is the subject of a bankruptcy proceeding.

¹⁴⁴ *In re Lines*, 81 Bankr. 267, 271 (Bankr. S.D.N.Y. 1988) (the "principal purpose of § 304 is to allow 'foreign bankrupts to prevent piecemeal distribution of assets in this country by filing ancillary proceedings in domestic bankruptcy courts.'") (quoting *Victrix Steamship Co. v. Salen Dry Cargo, A.B.*, 825 F.2d 709, 713-14 (2d Cir. 1987)).

¹⁴⁵ H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 324 (1977); S. Rep. No. 95-989, 95th Cong., 2d Sess. 35 (1978).

¹⁴⁶ The procedures for commencement, prosecution and defense of an ancillary case are set forth in Bankruptcy Code § 101(19) and (20) (defining "foreign proceeding" and "foreign representative"), and Bankruptcy Rules 1002 (providing that a petition commencing a case shall be filed with the clerk), 1010 (governing service of the petition and summons), 1011 (governing responsive pleadings), and 1018 (governing contested petitions). Venue of the case is governed by 28 U.S.C. § 1410 (1988). For a general discussion of this procedure, see COLLIER BANKRUPTCY PRACTICE GUIDE ch. 19 (1990) [hereinafter COLLIER].

¹⁴⁷ *Axona*, 88 Bankr. at 606.

the foreign proceedings.¹⁴⁸

Certain disadvantages flow from the limited nature of the proceeding. For example, the filing of a Section 304 petition does not automatically stay the initiation or continuation of any other proceeding in the U.S. against the debtor¹⁴⁹ (thus the foreign representative should consider moving for a temporary restraining order when filing the Section 304 petition); a trustee cannot be appointed for the Section 304 proceeding as in a Chapter 7 or 11 case; no separate U.S. estate is created; and the foreign representative cannot take advantage of the Code's powers to avoid fraudulent transactions and recover preferential preinsolvency transfers.¹⁵⁰

Despite these limitations, the remedies available in a Section 304 proceeding are quite broad. If the Section 304 petition is not timely controverted, the court, in its discretion, may grant three types of relief: injunction, turnover,¹⁵¹ or "other appropriate" relief.¹⁵² However, the court's exercise of its discretion is to be guided by what will best assure an economical and expeditious administration of the estate, consistent with six criteria: just treatment of all claimholders; protection of United States claimholders against discrimination in the foreign proceeding; prevention of preferences and fraudulent transfers; distribution of estate proceeds "substantially in accordance with the order prescribed by this title;" comity; and, if appropriate, the opportunity for a "fresh start" for the debtor.¹⁵³ The courts have held that the "other appropriate relief" provision of Section 304(b)(3) means that the court "is free to broadly mold appropriate relief in near blank check fashion."¹⁵⁴ The

¹⁴⁸ *In re Gee*, 53 Bankr. 891, 904 (Bankr. S.D.N.Y. 1985).

¹⁴⁹ 11 U.S.C. § 362 (1988). Under Section 362, the filing of a bankruptcy petition operates as a stay, applicable to all entities, of the commencement, continuance or enforcement of any judicial, administrative or other action or proceeding against the debtor or its property.

¹⁵⁰ NORTON, *supra* note 140 § 9A.09, at 16-17. Another difference (and a major advantage) of Section 304 lies in the fact that an appearance by the foreign representative in a Section 304 proceeding does not submit the foreign representative to the jurisdiction of any court in the U.S. for any other purpose. 11 U.S.C. § 306 (1988).

¹⁵¹ One of the more frequent forms of a bankruptcy court's exercise of its jurisdiction in a Chapter 11 or 7 proceeding is the issuance of an order requiring turnover of the debtor's property or its proceeds to the supervision and control of the bankruptcy court. This is commonly called a "turnover" order. COLLIER, *supra* note 146 § 19.09[2], at 19-18.

¹⁵² 11 U.S.C. § 304(b) (1988).

¹⁵³ 11 U.S.C. § 304(c) (1988). The six factors are said to be codifications of historical factors that American courts have weighed when deciding whether to accord comity to a foreign court's decision. NORTON, *supra* note 140, § 9A.12, at 22.

¹⁵⁴ *In re Culmer*, 25 Bankr. 621 (Bankr. S.D.N.Y. 1982). Thus, § 304 has enabled foreign representatives to attach assets (*Id.*); challenge alleged fraudulent or preferential transfers (*In re Metzeler*, 78 Bankr. 674 (Bankr. S.D.N.Y. 1987)); pursue discovery (*In re Gee*, 53 Bankr. 891 (Bankr. S.D.N.Y. 1985)); seek relief from a stay

breadth of this provision should not, therefore, be underestimated.

1.3.2. Section 304 and Foreign Insurers

The foreign representatives of at least two insolvent reinsurers have invoked the power of Section 304. The first reported decision, *In re Gee*,¹⁵⁵ concerned a defunct Cayman Islands reinsurance company, Universal Casualty & Surety Co. Ltd. ("Universal"). Universal's management was located in New York, its records were scattered throughout Mexico, New York and London, and its creditors resided on three continents. A creditor filed a petition in the Cayman Islands requesting that the company be wound up, and Allan Gee was appointed receiver.

Gee filed a Section 304 petition to commence an ancillary proceeding in a New York bankruptcy court. He sought various forms of relief, including discovery, preliminary injunctions prohibiting certain individuals from disposing of Universal's assets, books, and records, and orders directing that all of Universal's property and records be turned over to Gee. Universal's New York directors responded by filing a Chapter 11 petition to have Universal placed into reorganization bankruptcy.

The parties presented their arguments to the New York court. Universal argued that the company could not be subject to Section 304 because it had no assets in New York. The court quickly rejected this argument, because the statute contains no such requirement. Universal next argued that Section 304 did not apply to it because it could not be a bankruptcy debtor; the court responded that such a limitation would eviscerate the purpose of Section 304. The court easily disposed of Universal's last argument — that the filing of its Chapter 11 petition superseded the Section 304 case — because it, too, would render Section 304 meaningless.

The court then applied the six criteria of Section 304 to determine the nature of the relief to be granted. It observed that the most significant criterion is comity — "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."¹⁵⁶ As the court explained, comity will

or file a proof of claim in a pending U.S. bankruptcy case (*In re A. Tarricone, Inc.*, 80 Bankr. 21 (Bankr. S.D.N.Y. 1987)); *In re Enercons Va., Inc.*, 812 F.2d 1469 (4th Cir. 1987)); and to file involuntary bankruptcy petitions (*In re Centre de Tricots de Gaspé, Ltée.*, 10 Bankr. 148 (Bankr. S.D. Fla. 1981)).

¹⁵⁵ 53 Bankr. 891 (Bankr. S.D.N.Y. 1985).

¹⁵⁶ *Hilton v. Guyot*, 159 U.S. 113, 143 (1895). *But see In re Papeleras Reunidas S.A.*, 92 Bankr. 584, 594 (Bankr. E.D.N.Y. 1988) ("it is best to equally consider all of

be granted to a foreign court's decision or judgment if it is shown that the foreign court is one of competent jurisdiction, and that the laws, public policy, and rights of the forum jurisdiction's residents will not be violated.¹⁵⁷ For comity to be extended, the foreign court must abide by fundamental standards of procedural fairness.¹⁵⁸

The court concluded its analysis by comparing the provisions of the Cayman Islands Companies Law to the Code. Although some differences were found, they were held to be insubstantial: "It is not necessary that the [foreign jurisdiction's bankruptcy laws] be a carbon copy of the Bankruptcy Code; rather, it must be of a nature that it is not repugnant to American laws and policies . . ." ¹⁵⁹ The court therefore concluded that Gee should be awarded the relief he sought.

The only other reported case involving a foreign insurer's invocation of Section 304 is *In re Lines*.¹⁶⁰ *Lines* involved The River Plate Reinsurance Co. ("River Plate"), a Bermudan reinsurer having its

the variables of § 304(e) in determining the appropriate relief in an ancillary proceeding").

¹⁵⁷ *In re Gee*, 53 Bankr. at 901. "Foreign-based rights should be enforced unless the judicial enforcement of such a [right] would be the approval of a transaction which is inherently vicious, wicked or immoral, and shocking to the prevailing moral sense." *Axona*, 88 Bankr. at 609 (citing *Culmer*, 25 Bankr. at 629 (citing *Cornfeld v. Investors Overseas Serv., Ltd.*, 471 F. Supp. 1255 (S.D.N.Y. 1979) (quoting *Intercontinental Hotels Corp. v. Golden*, 15 N.Y.2d 9, 13, 254 N.Y.S.2d 527, 529 (1964))).

Exceptions to the doctrine of comity are narrowly construed, particularly when the foreign proceeding is in a sister common law jurisdiction with procedures akin to those in the U.S. Courts have held that the bankruptcy laws of the following jurisdictions satisfy the "substantially similar" requirement of § 304(c)(4) or the requirements of comity: Bahamas, *In re Culmer*, 25 Bankr. 621 (Bankr. S.D.N.Y. 1982); Bermuda, *In re Lines*, 81 Bankr. 267 (Bankr. S.D.N.Y. 1988); Canada, *Clarkson Co. v. Shaheen*, 544 F.2d 624 (2d Cir. 1976) (*but see In re Toga Mfg.*, 28 Bankr. 165 (Bankr. E.D. Mich. 1983)); Cayman Islands, *In re Gee*, 53 Bankr. 891 (Bankr. S.D.N.Y. 1985); Dubai, *Drexel Burnham Lambert Group v. Galadari*, 610 F. Supp. 114 (S.D.N.Y. 1987); Ecuador, *In re Banco de Descuento*, 78 Bankr. 337 (Bankr. S.D. Fla. 1987); England, *In re Lines*, 81 Bankr. 267 (Bankr. S.D.N.Y. 1988); France, *Kenner Products Co., Div. of CPG Products Corp. v. Societe Fonciere et Financiere Agache-Willot*, 532 F. Supp. 478 (S.D.N.Y. 1982); Hong Kong, *In re Axona Int'l Credit of Commerce Ltd.*, 88 Bankr. 597 (Bankr. S.D.N.Y. 1988); Italy, *In re Enercons Va., Inc.*, 812 F.2d 1469 (4th Cir. 1987); Luxembourg, *IIT Int'l Inv. Trust v. Cornfield*, 619 F.2d 909 (2d Cir. 1980); Mexico, *In re Banco Nacional de Obras Y Servicio Publicos*, 91 Bankr. 661 (Bankr. S.D.N.Y. 1988); Netherlands Antilles, *In re Colo. Corp.*, 531 F.2d 463 (10th Cir. 1976); and Sweden, *Cunard S.S. Co. v. Salen Reefer Serv. A.B.*, 773 F.2d 452 (2d Cir. 1985). Courts have indicated, however, that the bankruptcy laws of Australia, *Interpool, Ltd. v. Certain Freights of the M/V Venture Star*, 102 Bankr. 373 (D. N.J. 1988), and Spain, *In re Papeleras Reunidas*, 92 Bankr. 584 (Bankr. E.D.N.Y. 1988), do not satisfy the requirements of § 304.

¹⁵⁸ *In re Gee*, 53 Bankr. at 902. See also *Interpool, Ltd.*, 102 Bankr. at 378 ("Procedural protections provided in the Bankruptcy Code are considered of paramount importance.").

¹⁵⁹ *In re Gee*, 53 Bankr. at 904 (citing *In re Culmer*, 25 Bankr. at 621).

¹⁶⁰ 81 Bankr. 267 (Bankr. S.D.N.Y. 1988).

principal place of business in Hamilton, Bermuda. River Plate transacted business in the United States. In order to sell reinsurance in the State of New York, River Plate had established a trust fund of US \$1.5 million with a New York bank. The fund was to serve as security for River Plate's American insureds and reinsureds for the payment of claims and return of unearned premium.

Reinsurance Company of America ("RCA") was reinsured by River Plate. RCA obtained and registered in New York a \$600,000 judgment. RCA attempted to levy on the trust fund to satisfy its judgment. Shortly thereafter, a petition to wind-up River Plate was filed in Bermuda, and two liquidators were appointed. The liquidators filed a Section 304 petition in New York seeking to enjoin the commencement of any actions or the enforcement of any judgments against River Plate. RCA opposed the liquidators' motion for injunctive relief on two grounds. First, RCA argued (like Universal) that the Section 304 petition must be dismissed because River Plate could not be a debtor under the Code. Relying on *Gee*, the court easily disposed of that argument. RCA then argued that the \$600,000 it claimed was not the property of the River Plate estate under Bermuda law. The court addressed the terms of the trust agreement and applicable provisions of The Companies Act of Bermuda, and concluded that the liquidators had demonstrated a probability of successfully establishing an ownership interest in the fund sufficient to warrant injunctive relief to protect the fund against diminution. Reasoning that the estate of a foreign debtor is defined by the law of the jurisdiction in which the foreign proceeding is pending, the court determined that resolution of the property issue would be left to the Bermuda court.¹⁶¹

The court then turned its attention to the six factors of Section 304(c). While noting that "affording comity to a foreign proceeding does not require a finding that the foreign court will grant comity to United States law,"¹⁶² the court nonetheless was satisfied that comity required that the Bermudan court be given the opportunity to rule on RCA's ownership claim. Thus, the liquidators prevailed on all points and obtained the injunctive relief they sought.

¹⁶¹ *In re Lines*, 81 Bankr. at 273 (implicates the second (protection of U.S. claimholders) and fourth (distribution of estate proceeds substantially in accordance with the Code's priority system) factors under § 304(c)).

¹⁶² *Id.* (citing *Cunard Steamship Co. v. Salen Reefer Serv.*, AB, 773 F.2d 452, 460 (2d Cir. 1985)).

1.3.3. Unanswered Questions

Despite the clear benefits of Section 304 for foreign representatives of insolvent insurers, a number of issues arise which have yet to be answered. The most obvious question relates to claims priority.¹⁶³ In the United States, most states have enacted priority schemes for the distribution of the assets of insolvent insurers that place policyholders' claims above the claims of general unsecured creditors;¹⁶⁴ in fact, most states regard claims of reinsureds as general creditor claims.¹⁶⁵ As a result, reinsureds' claims are rarely paid.

The Bankruptcy Code, however, makes no distinction between the claims of policyholders and reinsureds, and under Section 304(c)(4), the Code's priority system applies, not the distribution scheme of any state or country. Thus, although a United States policyholder could expect a greater distribution in a state proceeding administering the assets of a foreign insurance company, Section 304 has effectively eliminated her priority. The fact that Universal and River Plate were both foreign reinsurers (none of whose claimants were insureds) may explain the reason why this issue was neither raised nor addressed in either the *Gee* or *Lines* decisions. It should not be assumed, however, that this conflict of laws question has been settled.

Another troubling question relates to the number of ancillary proceedings that a foreign representative must initiate in order to protect assets located in different states in the United States. The federal statutory venue provision requires that the petition must be filed only in the district where the asset sought to be protected or the action sought to be enjoined is located.¹⁶⁶ This suggests that the foreign representative must file a separate petition in each such district. If that is the case, then the advantage of the Section 304 proceeding is limited in a case involving multistate assets, as the representative could be required to litigate in multiple jurisdictions under the risk of inconsistent results. The threat to unified administration of an international insolvency posed by such an interpretation of the statute undoubtedly will be addressed in future litigation.

¹⁶³ Closely related is the question of whether assets turned over to the foreign representative should be used first to satisfy the claims of United States creditors and then to satisfy the claims of foreign debtors. See *Norton, supra* note 140, § 9A.11, at 21.

¹⁶⁴ See, e.g., ILL. REV. STAT. ch. 73, para. 817(1)(c),(d) (West Supp. 1990); NAIC Model Act § 42. The same is true in Canada as well. See R.C.S. ch. W-11, § 161(2) (1985).

¹⁶⁵ See, e.g., *In re Liquidations of Reserve Ins. Co.*, 122 Ill. 2d 555, 524 N.E.2d 538, 542 (1988).

¹⁶⁶ 28 U.S.C. § 1410 (1988).

These and other questions await legislative or judicial resolution. The merits of Section 304, however, are clear. Between the UILA, the Model Act, and Section 304, the road to a universalist approach to multinational insurance insolvencies is being paved, albeit slowly. It now remains to consider how those efforts meet with the approaches of two of the jurisdictions in which American insurers frequently transact insurance business, England and Canada.

2. ENGLISH LAW

2.1. *Introduction: Cross-Border Insolvencies*

Cross-border insolvencies have been a source of difficult legal problems in England for many years. Around 1825, Jabez Henry, an English barrister, published a pamphlet in which he drew attention to the inevitable conflict between a country's insolvency laws favoring local creditors and the fundamental principle of insolvency proceedings that all creditors, local and foreign, should be afforded equal treatment. Promoting a universalist approach, Henry stated:

Each State of Europe though perhaps not aware of it while it frames its bankrupt code with a view solely to its own subjects, is in fact indirectly legislating for all the other states of Europe, by affecting foreign property and interests in a material degree. One great advantage to be expected from the adoption of something like a uniform system on this head is that it would place the subjects of each on a footing of equality as to those rights which they are equally acknowledged to possess, whether as favoured nations by particular conventions or otherwise; and it would besides enable every man, when trading with a foreigner, to know his risk and remedy.¹⁸⁷

As early as 1849, England's Bankruptcy Act contained universalist provisions aimed at dealing with the problems of cross-border insolvency. Section 220 of that Act provided that the bankruptcy courts in

¹⁸⁷ Graham, *Cross-Border Insolvency*, 42 CURRENT LEGAL PROBS. 217, 224 (1989) (quoting J. Henry, *Outline of Plan of an International Bankrupt Code for the Different Commercial States of Europe*).

Henry Wheaton, the American jurist, when asked by Jabez Henry whether he could conceive a general bankruptcy code for Europe, America and the Colonies, responded that such "an international bankrupt code would doubtless be beneficial; but I should think that the difficulties in establishing it by general consent would be found almost insuperable." *Id.* at 225. (This statement appears valid in light of the failure of the draft European Convention on Bankruptcy and Related Matters.)

London and the provinces should be:

auxiliary, for all purposes of proof of debt, and for the examination of persons and witnesses upon oath, or for other like purposes, to the courts acting in matters of bankruptcy or insolvency in Scotland and in Ireland, and also to any court acting in such matter in any colony, island, plantation, or place under the Dominion of Her Majesty or, to any British judge elsewhere so acting.¹⁶⁸

English courts in the 19th century also addressed problems arising from concurrent foreign liquidation proceedings. In the 1889 case of *North Australian Territory Co. v. Goldsbrough, Mort, and Co.*,¹⁶⁹ liquidation proceedings were commenced in Australia against an English company after similar proceedings had been commenced in England. The Australian proceedings were deemed to be ancillary to the English proceedings:

The winding-up in [England] must go according to the law of this country, and according to the law of the corporation, which is a corporation in this country. Therefore any order made by the Australian courts for winding-up in Australia would merely be ancillary, just as in the converse case an order made in this country for winding-up an Australian company could only be ancillary to any winding-up taking place in Australia.¹⁷⁰

In England's Bankruptcy Act 1914, a provision was made for U.K. courts and "every British court elsewhere" to assist one another in bankruptcy matters.¹⁷¹ This provision was the precursor to the current English statutory law governing cross-border insolvency, Section 426 of the Insolvency Act 1986 ("Insolvency Act"). Section 426 is the sole U.K. statutory provision obligating U.K. and other courts to assist one another in matters of insolvency law.¹⁷² However, it is supplemented by English laws of jurisdiction, special deposits, appointments of liquidators, Mareva injunctions, and the options available to foreign liquidators in sequestering English assets and meeting the claims of English and foreign creditors.

¹⁶⁸ *Id.* at 225 (citing Bankruptcy Act 1849 § 220).

¹⁶⁹ 61 L.T.R. 716, 717 (Jan. 25, 1890) (dec'd 1889).

¹⁷⁰ *Id.*

¹⁷¹ Bankruptcy Act 1914 § 122.

¹⁷² See *infra* note 235.

2.2. *England's Law of Insolvency*

English corporate insolvency is governed by the Insolvency Act, the Insolvency Rules 1986 ("Insolvency Rules"),¹⁷³ and the Companies Act 1985 ("Companies Act"), as amended by the Companies Act 1989 ("1989 Act"). The Insolvency Act, Insolvency Rules and Companies Act set forth several insolvency procedures for companies: administration;¹⁷⁴ administrative receivership;¹⁷⁵ voluntary arrangements;¹⁷⁶ schemes of arrangement;¹⁷⁷ and liquidation.¹⁷⁸ This part of the paper focuses on liquidation proceedings.

2.3. *England's Law of Insolvency as it Relates to Insurance and Reinsurance Companies*

In the United Kingdom:

there is specific legislation relating to insurance insolvency (Insurance Companies Act 1982, Insurance Companies Winding-Up Rules 1985 and Policyholders Protection Act 1975), but its general application is only to direct insurance (principally life insurance), and there is no specific reinsurance application.¹⁷⁹

The Insurance Companies Act 1982, as amended ("Insurance Companies Act"), which regulates domestic and foreign insurance com-

¹⁷³ S.I. 1986, No. 1925, as amended by the Insolvency (Amendment) Rules 1987, S.I. 1987, No. 1919 and S.I. 1989, No. 397. Under the Insolvency Act § 411(5), the Secretary of State has promulgated the Insolvency Regulations 1986 ("Regulations"), S.I. 1986, No. 1994.

¹⁷⁴ Insolvency Act § 8-27; Insolvency Rules Part 2.

¹⁷⁵ Insolvency Act § 28-72; Insolvency Rules Part 3.

¹⁷⁶ Insolvency Act § 1-7; Insolvency Rules Part 1.

¹⁷⁷ Companies Act § 425-7. For a general discussion of administration, voluntary arrangements and schemes of arrangement, see Anderson, *Amreco: A Step Towards International Rehabilitations*, 7 J. INS. REG. 388, 404 *et seq.* (1989) [hereinafter Anderson].

¹⁷⁸ Insolvency Act § 73-246; Insolvency Rules Part 4.

¹⁷⁹ Singer, *The British Approach to Reinsurance Insolvency*, 1988 A.B.A. Sec. Tort & Ins. Practice, *Law and Practice of International Reinsurance Collections and Insolvency* 623, 624 [hereinafter *The British Approach*]. See also *Transnational Aspects*, *supra* note 3, at 1125 ("Thus, although there is specific legislation relating to the insolvency of insurance companies, there is none specifically designed for or applicable to reinsurance companies. It is therefore necessary for the practitioner to seek to apply to reinsurance insolvencies legislation primarily designed for direct insurance.").

It has been observed in J. BUTLER & R. MERKIN, *REINSURANCE LAW*, Part A.3.3 (1990) [hereinafter BUTLER & MERKIN], that strong arguments can be made both for and against whether reinsurance falls within the scope of the Insurance Companies Act. For purposes of this discussion, it will be assumed that the provisions of that Act regulate the conduct of reinsurance business in the U.K.

panies that carry on insurance business in the United Kingdom, provides that insurance companies may be liquidated under the Insolvency Act.¹⁸⁰ The Insurance Companies Act also sets forth certain liquidation procedures which apply to insurance companies, in addition to the procedures contained in the Insolvency Act.¹⁸¹ The Insurance Companies (Winding-Up) Rules 1985 ("Insurance Companies Rules")¹⁸² give effect to the provisions of the Insurance Companies Act relating to the liquidation of insurance companies.¹⁸³ The Insurance Companies Rules supplement the Insolvency Rules,¹⁸⁴ and in the event of a conflict between the Insurance Companies Rules and the Insolvency Rules, the Insurance Companies Rules prevail.¹⁸⁵

Under the Insurance Companies Act and Insurance Companies Rules, the assets and liabilities of an insolvent insurance or reinsurance company's long-term and general business¹⁸⁶ must be treated as assets and liabilities of separate companies for purposes of applying the assets in discharge of its liabilities under the Insolvency Act.¹⁸⁷ The Insurance Companies Rules further provide that the Secretary of State may, if an insurer's long-term business is continued by a liquidator under the Insurance Companies Act,¹⁸⁸ require all or part of the assets representing the funds maintained by the insurer in respect of its long-term business to be held by a person approved by the Secretary of State as trustee.¹⁸⁹ Those assets may not be released without the Secretary of State's

¹⁸⁰ See generally Insurance Companies Act §§ 53-59. For a discussion of whether the Insurance Companies Act applies to reinsurance companies, see Anderson, *supra* note 177, at 411.

¹⁸¹ See *supra* note 178.

¹⁸² As amended by the Insurance Companies (Winding-up) (Amendment) Rules 1986, S.I. 1986, No. 2002. Promulgated under the Insurance Companies Act, § 59.

¹⁸³ *Transnational Aspects*, *supra* note 3, at 1129 ("The basic principle underlying both the Insurance Companies Act and the [Insurance Companies Rules], which provide a detailed framework of rules to be followed by the liquidator of an insurance company, is that there must be a strict separation between the assets and liabilities relating to . . . primarily life assurance . . . and the assets and liabilities relating to other business of the Company."). See also Insurance Companies Regulations 1981, S.I. 1981, No. 1654 [hereinafter Insurance Regulations], as amended by the Insurance Companies (Amendment) Regulations 1982, S.I. 1982, No. 675, and the Insurance Companies (Amendment) Regulations 1985, S.I. 1985, No. 1419.

¹⁸⁴ The Insurance Companies Rules also supplement the Regulations.

¹⁸⁵ Insurance Companies Rules 3(2).

¹⁸⁶ The definitions of "long-term business" and "general business" are set forth in the Insurance Companies Act § 1(1). Long-term business includes life insurance. General business includes accident, sickness, ships, property damage, motor vehicle liability, aircraft, general liability and miscellaneous financial loss. *Id.* scheds. 1, 2.

¹⁸⁷ See Insurance Companies Act § 55(3), (4); Insurance Companies Rules 5.

¹⁸⁸ Insurance Companies Act § 56(2).

¹⁸⁹ Insurance Companies Rules 15(1).

consent.¹⁹⁰

The Policyholders Protection Act 1975 ("1975 Act") is territorialist legislation which provides for "indemnifying. . . or otherwise assisting or protecting policyholders and others who have been or may be prejudiced in consequence of the inability of insurance companies carrying on business in the United Kingdom to meet their liabilities under policies issued or securities given by them." It also provides for imposing levies on the insurance industry for such a purpose.¹⁹¹

2.4. *Special Deposits*

Under the Insurance Companies Act, "no person shall carry on any insurance business in the United Kingdom unless authorised to do so" ¹⁹² Section 9 of the Insurance Companies Act provides that such authorization must be denied if the applicant's main office is not located in a member State of the European Community, unless the applicant has made a deposit with the Accountant General of the Supreme Court.¹⁹³ No deposit is required, however, if the scope of the authorization is restricted to reinsurance.¹⁹⁴

The amount of the deposit is governed by statutory formula.¹⁹⁵ The deposit may be made, partly or wholly, in cash or permitted securities.¹⁹⁶ If the applicant is subsequently liquidated in the United Kingdom, the amount of the deposit must be repaid to the applicant.¹⁹⁷

¹⁹⁰ Insurance Companies Rules 15(2).

¹⁹¹ 1975 Act § 1. *See also* 1975 Act § 8(4) and 10(1), which limit the application of the 1975 Act to U.K. policies of insurance, "not being [policies] of reinsurance." 1975 Act § 8(4). It should be noted, however, that if reinsurance falls within the scope of the Insurance Companies Act, reinsurance companies who are authorized to carry on reinsurance business in the U.K. may be obligated under § 21 of, and sched. 3 to, the 1975 Act to contribute to a fund established under the 1975 Act for the protection of insurance policyholders.

¹⁹² Insurance Companies Act § 2(1).

¹⁹³ Insurance Regulations 14, 15. The twelve member states of the European Community are the United Kingdom, France, Spain, Portugal, Greece, Luxembourg, Belgium, the Netherlands, Italy, the Federal Republic of Germany, Denmark, and the Republic of Ireland.

¹⁹⁴ Insurance Companies Act § 9(3).

¹⁹⁵ Insurance Regulations 15. The amount of the deposit must be maintained by the applicant at a level equal to at least the "minimum." The "minimum" is one-half of the minimum guaranty fund appropriate to the margin of solvency which the applicant is required to maintain under the Insurance Companies Act. Insurance Regulations 14. For provisions relating to minimum guaranty funds and margins of insolvency, see Insurance Regulations 4, 9.

¹⁹⁶ Insurance Regulations 14, 17.

¹⁹⁷ Insurance Regulations 20(2).

2.5. *England's Law Governing Cross-Border Insolvencies*

Before domiciliary or ancillary proceedings to liquidate a company may be commenced in an English court, the person seeking to initiate the proceedings should determine whether the court has jurisdiction to liquidate the debtor company. The making of that determination requires knowledge of a number of rules.

2.5.1. *Jurisdiction of English Courts to Liquidate Companies*

a. Circumstances in Which English Courts Have Jurisdiction

Generally, English courts have jurisdiction to liquidate any company registered in England,¹⁹⁸ or any unregistered company.¹⁹⁹ However, an English court's jurisdiction to liquidate an unregistered com-

¹⁹⁸ Insolvency Act § 117(1).

¹⁹⁹ Insolvency Act §§ 221(1), (5), 225. *In re Matheson Bros. Ltd.* [1884] 27 Ch. D. 225; *In re Commercial Bank of S. Australia* [1886] 33 Ch. D. 174; *In re Federal Bank of Australia* [1893] W.N. 77; *In re The Syria Ottoman Ry. Co.* [1904] 20 T.L.R. 217. 1986 Act § 220 provides that a company which is not registered in any part of the U.K. under companies legislation is an unregistered company. An "overseas company," as defined in § 744 of the Companies Act, is not an unregistered company. Overseas companies include companies incorporated elsewhere than in Great Britain which, after July 1, 1985, establish a place of business in Great Britain, and companies so incorporated which have, before that date, established a place of business and continue to have an established place of business in Great Britain at that date. *Id.* Oversea companies are required to be registered in the U.K. under §§ 691-99 of the Companies Act, as amended by § 145, of and sched. 19 to, the 1989 Act. An insurer incorporated outside the U.K. which carries on insurance business within Great Britain must register as an overseas company under §§ 691-99 of the 1985 Act by virtue of § 87 of the Insurance Companies Act, as amended by sched. 2 to the Companies Consolidation (Consequential Provisions) Act 1985. Section 225 of the Insolvency Act provides that "[w]here a company incorporated outside Great Britain which has been carrying on business in Great Britain ceases to carry on business in Great Britain, it may be [liquidated] as an unregistered company. . . notwithstanding that it has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of the country under which it was incorporated." It has been submitted that the scope of §§ 220 and 221 of the Insolvency Act is uncertain. Howcroft & Totty, *Impact of US Chapter 11 Proceedings on English Assets of an American Company* [1988] 1 J. INT'L BANKING L. 18. They state:

The provisions relating to winding-up of unregistered companies are stated in section 220 to apply to any "company," an undefined term which arguably would not apply to a corporation established under the laws of the US. There is further uncertainty in that section 221(2) may apply to determine the court's jurisdiction absolutely or may apply to determine simply whether, as between the courts of Britain, the courts of Scotland or the courts of England should take jurisdiction. I submit that the better view is that "company" does apply to a US corporation and that section 221(2) is to determine simply which of British courts should take jurisdiction.

Id. n.22.

pany is contingent upon the debtor company (i) having assets, and creditors who would benefit from a liquidation order, within the jurisdiction,²⁰⁰ and (ii) being insolvent or, if solvent, not having its seat in a State which is a party to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, signed at Brussels in 1968 ("Convention"). The Convention defines the jurisdiction of United Kingdom courts, and the courts of other signatory countries, in civil and commercial matters.²⁰¹

English courts also have jurisdiction to liquidate an unregistered solvent company whose central management or control is exercised in England.²⁰² However, if such company is incorporated in another Convention country and that country regards the company as having its seat there, then the courts of that country would also have jurisdiction and English courts must decline jurisdiction in favor of the court first seised.²⁰³

English courts have jurisdiction to liquidate any company regis-

²⁰⁰ *In re Compania Merabello San Nicholas S.A.* [1973] 1 Ch. 75; *In re Eloc Electro-Optieck and Communicatie B.V.* [1982] 1 Ch. 43; *In re A Company* (No. 00359 of 1987) [1988] 1 Ch. 210 (the debtor company must have a sufficient connection with the jurisdiction and there must be a reasonable possibility that benefit will accrue to creditors of the debtor company from the liquidation — it is not necessary that the unregistered company have assets within the jurisdiction).

²⁰¹ For purposes of this paper, the Convention includes the Protocol on the interpretation of the Convention by the European Court, signed at Luxembourg on June 3, 1971. The Convention is, by virtue of the Civil Jurisdiction and Judgments Act 1982, as amended by the Civil Jurisdiction and Judgments Act 1982 (Amendment) Order 1989, S.I. 1989, No. 1346 ("CJJ"), an operative part of English law. CJJ § 2(1) ("The [Convention] shall have the force of law in the United Kingdom, and judicial notice shall be taken [thereof]."). The following countries have acceded to the Convention: Belgium, the Federal Republic of Germany, France, Italy, Luxembourg, the Netherlands, Denmark, the Republic of Ireland, and Greece. Section 43(2) of the CJJ provides that a company has its seat in the U.K. if and only if it was incorporated or formed under the law of a part of the U.K. or its central management and control is exercised in the U.K. Moreover, under § 43(3) of the CJJ, a company has its seat in a particular part of the U.K. if and only if it has its seat in the U.K. and (i) being incorporated or formed under the law of a state other than the U.K., its central management and control is exercised in that part, or (ii) it was incorporated or formed under the law of that part. Note that under § 43(5) of the CJJ, a company incorporated or formed under an enactment forming part of the law of more than one part of the U.K. or an instrument having effect in the domestic law of more than one part of the U.K. shall, if it has a registered office, be taken to have its seat in the part of the U.K. in which that office is situated, and not in any other part of the U.K.

²⁰² A.V. DICEY & J.H.C. MORRIS, 2 *Conflict of Laws* 1137-38 (11th ed. 1987) [hereinafter DICEY & MORRIS].

²⁰³ Insurance Companies Act sched. 1, art. 23 ("Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court."). For a discussion of when a court is first seised, see BUTLER & MERKIN, *supra* note 179, at D.4.1-31.

Thus, the Convention subscribes to the third theory of conflicts of laws noted by

Fry, L.J. See *supra* note 2.

tered in England, regardless of whether it is solvent or insolvent. The Convention does not apply to the liquidation of insolvent companies.²⁰⁴ In addition, Article 16(2) confers exclusive jurisdiction, in relation to the liquidation of companies, on the courts of the country in which the company has its seat.²⁰⁵ A company registered in England has its seat therein.²⁰⁶

b. Liquidation of Unregistered Companies

In determining whether English courts have jurisdiction to liquidate unregistered companies, several principles apply:

- (1) There is no need to establish that the company ever had a place of business [in England].
- (2) There is no need to establish that the company ever carried on business [in England], unless perhaps the petition is based on the company carrying on or having carried on business.
- (3) A proper connection with the jurisdiction must be established by sufficient evidence to show (a) that the company has some asset or assets within the jurisdiction, and (b) that there are one or more persons concerned in the proper distribution of the assets over whom jurisdiction is exercisable.
- (4) It suffices if the assets of the company within the jurisdiction are of any nature; they need not be 'commercial' assets, or assets which indicate that the company formerly carried on business [in England].
- (5) The assets need not be assets which will be distributable to creditors by the liquidator in the winding-up: it suffices if by the making of the winding-up order they will be of benefit to a creditor or creditors in some other way.
- (6) If it is shown that there is no reasonable possibility of benefit accruing to creditors from making the winding-up or-

²⁰⁴ The Convention does not apply to "bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings."

²⁰⁵ CJJ § 1(2). Convention art. 16(2). Article 16(2) provides that:

The following courts shall have exclusive jurisdiction, regardless of domicile . . . in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or the decisions of their organs, the courts of the Contracting State in which the company, legal person or association has its seat.

²⁰⁶ DICEY & MORRIS, *supra* note 202, at 1139.

der, the jurisdiction is excluded.²⁰⁷

Assuming the court has jurisdiction, an unregistered company may be liquidated under the Insolvency Act only:

- (a) if the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs;
- (b) if the company is unable to pay its debts; [or]
- (c) if the court is of opinion that it is just and equitable that the company should be wound up.²⁰⁸

2.5.2. *English Liquidation Procedures*

The Insolvency Act and Insolvency Rules prescribe in detail the procedures to be followed when a company is liquidated in the United Kingdom and the manner in which the liquidation must be conducted. Some of the procedures differ depending on whether the liquidation is of a compulsory or voluntary nature.

a. Governing Law

The liquidation of a company under the Insolvency Act is governed by English law.²⁰⁹ Therefore, all issues relating to the liquidation, including the proving of creditors' claims, the determination of priorities among creditors, and matters of procedure are regulated by

²⁰⁷ *Re Compania Merabello San Nicholas S.A.* [1973] Ch. 75. See also *In re Kailis Groote Eylandt Fisheries Pty. Ltd.* [1977] 17 S.A.S.R. 35 (local creditors without local assets held insufficient to confer jurisdiction); *In re Allobroqia Steamship Corp.* [1978] 3 All E.R. 423 (for this purpose, the term "assets" is broadly construed and may include a right of action, provided that it has a reasonable possibility of success).

²⁰⁸ Insolvency Act § 221(5). Insolvency Act § 222 provides:

An unregistered corporation is deemed . . . unable to pay its debts if there is a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding 750 [pounds Sterling] then due and

- (a) the creditor has served on the company, by leaving at its principal place of business, or by delivering to the secretary or some director, manager or principal officer of the company, or by otherwise serving in such manner as the court may approve or direct, a written demand in the prescribed form requiring the company to pay the sum due, and
- (b) the company has for 3 weeks after the service of the demand neglected to pay the sum or to secure or compound for it to the creditor's satisfaction.

See also Insolvency Act §§ 223, 224, for a discussion of when an unregistered company is unable to pay its debts.

²⁰⁹ DICEY & MORRIS, *supra* note 202, at 1147. Compare Insolvency Act § 426(5), *infra* note 241.

the Insolvency Act and the Insolvency Rules.²¹⁰ English law similarly governs liquidation proceedings in English courts which are being administered concurrently with foreign liquidation proceedings, even if the English proceedings are declared "ancillary" to those foreign proceedings. The policy behind this application of English law was articulated in *In re Suidair International Airways*:

If [English law governs] no confusion will result. If it is departed from, I cannot see how any other result would follow than the utmost possible confusion. Who could lay down as a clear and exhaustive proposition where the court was to draw the line in any particular case between administering the English law and the law of the main liquidation?²¹¹

b. Appointment of Liquidators

The procedure for appointment of liquidators depends upon whether the liquidation is compulsory or voluntary.²¹²

c. Compulsory Liquidations

The circumstances under which a compulsory liquidation of an insurer may be initiated are specified in the Insolvency Act and the Insurance Companies Act,²¹³ and include the inability of the company to pay its debts,²¹⁴ or a court determination that liquidation is just and equitable. A petition for an order of compulsory liquidation may be presented to the court either by the company, its directors, one or more creditors or contributories,²¹⁵ ten or more policyholders owning policies

²¹⁰ All such issues are also governed by the Regulations. See DICEY & MORRIS, *supra* note 202, at 173 ("All matters of procedure are governed by the domestic law of the country to which the court wherein any legal proceedings are taken belongs (lex fori).").

²¹¹ [1951] 1 Ch. 165, 173-74.

²¹² For detailed rules of procedure, see Insolvency Rules Parts 4, 7-13; Insolvency Act §§ 388-98.

²¹³ Insolvency Act § 122(1); Insurance Companies Act §§ 53, 54. Note, however, that under § 124(5) of the Insolvency Act, if a company is being voluntarily liquidated, a court may not make a compulsory liquidation order unless it is satisfied that the voluntary liquidation cannot be continued with due regard to the interests of the creditors or contributories.

²¹⁴ As such term is defined in the Insolvency Act § 123 and the Insurance Companies Act § 54(3). Note that under the Insurance Companies Act § 58, if an insurance company is "unable to pay its debts," the court may reduce the amount of the company's contracts on such terms and subject to such conditions as the court thinks just, in place of making a liquidation order.

²¹⁵ Insolvency Act § 124(1). A "contributory" is defined in § 79 of the Insolvency Act as every person liable to contribute to the assets of a company in the event of its

of an aggregate value of not less than ten thousand pounds Sterling, or the Secretary of State.²¹⁶ Upon presentation of the petition, the court may appoint a provisional liquidator.²¹⁷ Typically, the provisional liquidator is the official receiver,²¹⁸ although the court is empowered to appoint any other suitably qualified person.²¹⁹ The official receiver, as provisional liquidator, may seek a court order appointing a special manager with such powers as the court directs.²²⁰ Upon entry of a compulsory liquidation order, the official receiver becomes the liquidator of the company until he is replaced at a meeting of the creditors or contributories summoned for that purpose.²²¹

d. Voluntary Liquidations

There are two types of voluntary liquidations, those of members and those of creditors.²²² A company may be voluntarily liquidated if it

being liquidated.

²¹⁶ Insurance Companies Act §§ 53, 54. A petition may not be presented by such ten or more policyholders except with the leave of the court, which will not be granted until a *prima facie* case has been established to the court's satisfaction and until security for costs for such amount as the court thinks reasonable has been given. Note also that under the Insurance Companies Act § 54(4), if it appears to the Secretary of State that it is expedient in the public interest that the company should be liquidated, he may, unless the company is already being liquidated by the court, present a petition for it to be so liquidated, if the court thinks it is just and equitable.

²¹⁷ Insolvency Act § 135(1). *See also* Insolvency Rules 4.25-4.31.

²¹⁸ For purposes of the Insolvency Act, the official receiver in a liquidation is any person who, by virtue of §§ 399 and 401 is authorized to act in that capacity. Under § 399(2) of the Insolvency Act, the Secretary of State may, subject to Treasury approval as to numbers, appoint persons to the office of official receiver. The official receivers are paid out of Parliamentary funds, hold office on such terms and conditions as the Secretary of State directs and may be removed from office if directed by the Secretary of State. *See also* Insolvency Rules 10, 4.104; Insolvency Act § 137.

²¹⁹ Insolvency Act § 135(2).

²²⁰ Insolvency Act § 177; Insolvency Rules 4.206-4.210. *See also* Insurance Companies Act § 56(3) ("If the liquidator is satisfied that the interests of the creditors in respect of liabilities of the company attributable to its long term business require the appointment of a special manager of the company's long term business, he may apply to the court, and the court may on such application appoint a special manager of that business to act during such time as the court may direct, with such powers, including any of the powers of a receiver or manager, as may be entrusted to him by the court.").

²²¹ Insolvency Act § 136(1), (2), (4). Under § 137(1) of the Insolvency Act, the official receiver may apply to the Secretary of State for the appointment of a person as liquidator in his place. Also, under § 401 of the Insolvency Act the Secretary of State is authorized to appoint deputy official receivers. *See also* Insolvency Act, §§ 136(3), 139(3), (4); Insolvency Rules 4.100, 4.102.

²²² Insolvency Act § 90 (If the directors of the corporation have made a statutory declaration of solvency in accordance with § 89 of the Insolvency Act, then within 5 weeks after a resolution of the corporation to voluntarily liquidate itself, the liquidation is deemed a members' voluntary liquidation. All other voluntary liquidations are creditors' voluntary liquidations). Under § 221(4) of the Insolvency Act, no unregistered company may be voluntarily liquidated. *See also* Insolvency Act § 96.

passes a special resolution that it be voluntarily liquidated or an extraordinary resolution to the effect that it cannot by reason of its liabilities continue its business and that it is advisable to liquidate.²²³ In a members' voluntary liquidation, the directors of the company convene a meeting of the company at which one or more liquidators is appointed for the purpose of winding-up the company's affairs and distributing its assets.²²⁴ On the appointment of the liquidator, all the powers of the directors cease absent specific approval.²²⁵ No insurance company which carries on long-term insurance business within the U.K. may be voluntarily liquidated.²²⁶

In a creditors' voluntary liquidation, the company convenes a meeting of its creditors,²²⁷ who then may nominate a liquidator.²²⁸ If the creditors fail to choose a liquidator, the company may do so.²²⁹

e. Duties of Liquidators

Under English law, a liquidator must wind-up the worldwide affairs of the debtor company and apply its assets in satisfaction of foreign and English creditors' claims.²³⁰ A liquidator must take into custody or under control all the property and things in action to which the company is or appears to be entitled.²³¹ However, a court may order that the liquidator must not take into custody or under control assets situated outside of England, or that the liquidator must not settle a list

²²³ Insolvency Act § 84(1). A company may also be voluntarily liquidated when the period, if any, fixed for the duration of the company by the Articles of Association (i.e., the by-laws) expires, or upon the occurrence of an event which the Articles of Association provide shall result in the company being dissolved, and the company in a general meeting has passed a resolution for voluntary liquidation.

²²⁴ Insolvency Act § 91(1). If no liquidator is appointed or nominated by the company, see Insolvency Act § 114.

²²⁵ Insolvency Act § 91(2).

²²⁶ Insurance Companies Act §§ 55(2), 15.

²²⁷ Insolvency Act § 98(1)(a). The creditors' meeting must be summoned for a day not later than the fourteenth day after the day on which the company in a general meeting resolves to be voluntarily liquidated.

²²⁸ Insolvency Act § 100(1).

²²⁹ Insolvency Act § 100(2). See also Insolvency Act §§ 100(3), 104; Insolvency Rules 4.101, 4.101A, 4.103. Under § 108(1) of the Insolvency Act, the court may appoint a liquidator in a members' or creditors' voluntary liquidation if "from any cause whatever there is no liquidator acting." Under § 108(2), the court may, on a showing of cause, "remove a liquidator and appoint another." Under § 109 of the Insolvency Act, with respect to a liquidator appointed in a members' or creditors' voluntary liquidation, the liquidator must within 14 days after his appointment publish and register a notice of his appointment. The liquidator is liable for fines if he fails to do so.

²³⁰ *In re Azoff-Don Commercial Bank* [1954] 1 Ch. 315 (non-U.K. creditors may prove their claims in U.K. liquidation proceedings in the same manner as U.K. creditors).

²³¹ Insolvency Act § 144(1).

of creditors to include foreign creditors without the court's direction.²³² The powers of English liquidators are enhanced first by the universalist provisions of Section 426,²³³ and second by the territorialist nature of Mareva injunctions.

2.5.3. Section 426 of the Insolvency Act 1986

Under English common law, the existence and dissolution of a company validly created under the law of a foreign country is governed by that law.²³⁴ Section 426 of the Insolvency Act supplements the common law by obligating courts of different jurisdictions to recognize liquidation orders of foreign courts and to give assistance to liquidators appointed by those courts.²³⁵

Section 426 provides that an order made by any U.K. court exercising insolvency law jurisdiction is enforceable in any other part of the United Kingdom as if it were made by a court exercising the corresponding jurisdiction.²³⁶ Furthermore, U.K. courts having insolvency law jurisdiction must assist courts having the corresponding jurisdiction in the United Kingdom or any designated country or territory.²³⁷ The insolvency law of a designated country or territory means "so much of the law of that country or territory as corresponds to" insolvency law in the United Kingdom.²³⁸ Insolvency law in the United Kingdom, as de-

²³² *In re Hibernian Merchants Ltd.* [1958] 1 Ch. 76.

²³³ Insolvency Act § 426 is set forth in its entirety in Appendix C.

²³⁴ See DICEY & MORRIS, *supra* note 202, at 1128 (citing *Bonanza Creek Gold Mining Co. v. R.* [1916] 1 A.C. 566 (P.C.); *National Bank of Greece and Athens S.A. v. Metliss* [1958] A.C. 509; *Arab Monetary Fund v. Hashim*, *The Times* (London), November 22, 1989 at 43, col. 6.) See also *Lazard Bros. v. Midland Bank* [1933] 1 A.C. 289 ("The will of the sovereign authority which created it can also destroy it.").

²³⁵ Section 426 received its impetus in the Cork Report, which states that modern insolvency law should "ensure due recognition and respect abroad for English insolvency proceedings." The Cork Report was prepared by a Government-appointed Insurance Law Review committee chaired by Sir Kenneth Cork. The committee examined England's law relating to insolvency, bankruptcy, liquidation and receivership and published its report in 1982. See *Insolvency Law and Practice: Report of the Review Committee, Her Majesty's Stationary Office*, Cmnd. 8558.

²³⁶ But see 1989 Act §§ 183(2), (3). See also § 426(2), which provides that § 426(1) shall not require a court in any part of the U.K. "to enforce, in relation to property situated in that part, any order made by a court in any other part of the" U.K.

²³⁷ Insolvency Act § 426(4).

Designated countries and territories include Anguilla, Australia, the Bahamas, Bermuda, Botswana, Canada, the Cayman Islands, the Falkland Islands, Gibraltar, Hong Kong, Montserrat, New Zealand, the Republic of Ireland, St. Helena, the Turks and Caicos Islands, Tuvalu, and the Virgin Islands. See *Cooperation of Insolvency Courts (Designation of Relevant Countries and Territories) Order 1986*, S.I. 1986, No. 2123.

²³⁸ Insolvency Act § 426(10)(d).

fined,²³⁹ includes provisions regulating the marshalling and distribution of assets, the proving of creditors claims and the winding-up of the affairs of insolvent companies.

The assisting court has discretion in deciding the manner in which the assistance is to be given,²⁴⁰ and is empowered to apply either the insolvency law of its jurisdiction or the jurisdiction of the requesting court. However, the assisting court, in exercising its discretion, must have particular regard "to the rules of private international law."²⁴¹ Courts have yet to interpret this clause.²⁴²

The universalist appeal of Section 426 is akin to that of the American Section 304. Both statutes empower receivers to obtain judicial leverage to move international insolvency proceedings in a unified direction. They stand in sharp contrast with other territorialist measures.

²³⁹ The "insolvency law" of England and Wales is defined in Section 426(10) (a) as "provision made by or under [the Insolvency Act] or sections 6 to 10, 12, 15, 19(c) and 20 (with Schedule 1) of the Company Directors Disqualification Act 1986." *See also* 1989 Act § 183(1).

The application of Section 426 depends, at least in part, on how courts interpret the term "corresponds to." Woloniecki, *Co-Operation Between National Courts In International Insolvencies: Recent United Kingdom Legislation*, 35 INT'L & COMP. L.Q. 644, 656-57 (1986) [hereinafter Woloniecki] ("In the case of a requesting court which applies its insolvency law to, say, an English company which does business in and has assets present within the jurisdiction of the [court requesting assistance under section 426], the requesting court's legislation corresponds in a narrow sense to section 221 of the Insolvency Act 1986. In such a case the English court would be bound [under section 426(4)] to assist a liquidator appointed by the requesting court. However, it is submitted that the foreign liquidator would not be automatically entitled to the company's assets situated in England. It is probable that, acting under [section 426(4)], the English court would require that winding-up proceedings be brought in England."). Thus, if the U.K. courts recognize the requesting court's jurisdiction to liquidate a foreign company, then the U.K. courts would appear to be bound to provide assistance to a liquidator appointed by that court.

²⁴⁰ *See id.* at 653 (the court may give conditional assistance or demand certain undertakings from the foreign liquidator.). *See also In re Osborn* 1931-1932 B. & C.R. 189, 194 ("I think this court is bound to give all the assistance that it can.").

²⁴¹ Insolvency Act § 426(5). Assistance may not be given if the proceedings of the court requesting it are "hopelessly bad under their own proper law, or [offend] against some overriding principle of English public policy." *In re A Debtor* (Order in Aid No. 1 of 1979) *ex parte* Viscount of the Royal Court of Jersey [1981] 1 Ch. 384, 402. For example, when the foreign judgment is obtained by fraud (*Abouloff v. Oppenheimer & Co.* [1882] 10 Q.B.D. 295) or when the foreign proceedings contravened principles of natural justice (*Jacobson v. Frachon* [1927] 138 L.T.R. 386). Also, assistance may not be given if it aids the enforcement of a foreign revenue law. *But see Ayres v. Evans* [1981] 56 F.L.R. 235.

²⁴² However, orders in deed, which are not reported, appear to have been granted in chambers under § 426 of the 1986 Act.

2.5.4. *Mareva Injunctions*

The effectiveness of any liquidation order made by an English court depends, at least in part, on the court's ability to ensure that the debtor company does not attempt to frustrate the purpose of that order by liquidating assets within and outside of the jurisdiction. English law protects creditors relying on liquidation orders by means of "Mareva" injunctions and ancillary disclosure orders.²⁴³

Mareva injunctions have been used to prohibit the removal of assets from the jurisdiction of England or Wales, in an effort to discourage defendants from attempting to frustrate plaintiffs in their execution of judgments.²⁴⁴ Recent case law²⁴⁵ has expanded the scope of Mareva

²⁴³ In 1975, in *Mareva Compania Naviera S.A. v. International Bulk-Carriers S.A.* [1975] 2 Lloyds Rep. 509, the Court of Appeal granted an injunction restraining the defendant from dealing with its assets so as to make itself judgment-proof. Since that decision, English courts have granted injunctions (commonly referred to as "Mareva" injunctions) restraining defendants from removing or otherwise dealing with assets both within and outside of the jurisdiction.

²⁴⁴ *Ashtiani v. Kashi* [1986] 2 All E.R. 970. See also the Supreme Court Act 1981 §§ 37(1) and (3), under which the courts have statutory authority to grant a Mareva injunction restraining a party from removing from the jurisdiction of the court, or otherwise dealing with, assets located within that jurisdiction in cases where that party is, as well as in cases where he is not, domiciled, resident or present within that jurisdiction.

²⁴⁵ *Babanaft Int'l Co. S.A. v. Bassatne* [1988] W.L.R. 232, 242 ("in appropriate cases, though these may well be rare, there is nothing to preclude our courts from granting *Mareva* type injunctions against defendants which extend to their assets outside the jurisdiction"); *Republic of Haiti v. Duvalier* [1989] 1 All E.R. 456; *Bayer A.G. v. Winter*, *The Times*, March 24, 1986; *Derby & Co. v. Weldon* [1990] Ch. 65. In *Derby*, Lord Donaldson stated that courts

'have unlimited power to grant an injunction in any case where it would be right or just to do so: and what is right or just must be decided, not by the caprice of the judge, but according to sufficient legal reasons or on settled legal principles' [quoting *Beddow v. Beddow* [1878] 9 Ch.D. 89, 93] . . . In my judgment, the key requirement for any *Mareva* injunction, whether or not it extends to foreign assets, is that it shall accord with the rationale upon which *Mareva* relief has been based in the past. That rationale, legitimate purpose and fundamental principle I have already stated, namely, that no court should permit a defendant to take action designed to frustrate subsequent orders of the court.

The court stated a preference that any Mareva injunction with extraterritorial effects should be subject to the following proviso:

Provided that, in so far as this order purports to have any extraterritorial effect, no person shall be affected thereby or concerned with the terms thereof until it shall be declared enforceable or be enforced by a foreign court and then it shall only affect them to the extent of such declaration or enforcement unless they are: (a) a person to whom this order is addressed or an officer of or an agent appointed by a power of attorney of such a person or (b) persons who are subject to the jurisdiction of this court and (i) have been given written notice of this order at their residence or place of business within the jurisdiction, and (ii) are able to prevent acts or

injunctions to provide that defendants must restrain from dealing with assets, *wherever* they might be, if their actions are designed to frustrate subsequent orders of the court. Nevertheless, "unqualified Mareva injunctions covering assets abroad can never be justified."²⁴⁶

a. Pre-Conditions of Mareva Injunctions

There are four fundamental conditions a plaintiff must satisfy to obtain a Mareva injunction:

- (1) The [English court must have] jurisdiction over the defendant in relation to the claim;²⁴⁷
- (2) The plaintiff [must have] a good arguable case against the defendant;
- (3) The defendant [must have] assets. . . which can be frozen by the Mareva injunction; [and]
- (4) [There must be] a real risk that unless a Mareva injunction is granted any judgment obtained could not be executed.²⁴⁸

A good arguable case is "one which is more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50 per cent chance of success."²⁴⁹ In determining whether there is a real risk that a defendant will frustrate the plaintiff's execution of judgment, courts consider evidence of the defendant liquidating assets or removing them from the jurisdiction, the evasive nature of the defendant in dealing with the plaintiff's claim, and other unexecuted judgments against the defendant.²⁵⁰ Moreover, a Mareva injunction will only be granted if the plaintiff represents to the court that it will compensate the defendant for any losses suffered by reason of the injunction if the plaintiff's claim fails, and pay the costs of complying with the injunction incurred by any third party.²⁵¹ Failure to comply with the terms of a Mareva injunction may result in the imposition of fines or imprisonment for contempt of court.²⁵²

omissions outside the jurisdiction of this court which assist in the breach of the terms of this order.

²⁴⁶ *Id.* at 77, 79. *Babanaft Int'l Co. S.A. v. Bassatne* [1988] 2 F.T.L.R. 116.

²⁴⁷ Mitchell, *Mareva Injunctions* [1988] 1 J. INT'L BANKING L. 23, 24 [hereinafter Mitchell] (citing *Siskina v. Distos S.A.* [1979] A.C. 210, 254 (the power to grant a Mareva injunction "presupposes the existence of an action, actual or potential, claiming substantive relief which the High Court has jurisdiction to grant.")).

²⁴⁸ Mitchell, *supra* note 247, at 23.

²⁴⁹ *Id.* at 24 (citing *The Ninemia* [1983] 2 Lloyds Rep. 600).

²⁵⁰ *Id.* at 25.

²⁵¹ *Id.* Plaintiffs' undertakings vary from case to case.

²⁵² *Id.* Note that Mareva injunctions may be served on and enforced against third

b. Disclosure Orders

In addition to granting Mareva injunctions over extraterritorial assets, English courts also have jurisdiction to order the disclosure of such assets.²⁵³ A disclosure order will be issued if disclosure will assist the plaintiff in tracing assets which were wrongfully removed by the defendant from the jurisdiction, or enable the court to determine the validity of the defendant's claim that he needs U.K. assets to meet expenses.²⁵⁴

c. Transatlantic Application

A frequently cited case explaining the application of Mareva injunctions in the context of transatlantic business is *Felixstowe Dock and Ry. Co. v. United States Lines, Inc.*,²⁵⁵ which evinces the territorialist nature of this relief. In *Felixstowe*, an English court refused to set aside Mareva injunctions directed against a U.S. company which was the subject of American reorganization bankruptcy proceedings. United States Lines ("USL") was a Delaware company which transacted business in England. USL petitioned a U.S. bankruptcy court under Chapter 11 of the Bankruptcy Code, which triggered a stay of the commencement and continuation of all local and foreign actions against USL. The debtor and a creditor's committee had implemented a plan of reorganization which depended upon a consolidation of the company's operations. This in turn was dependent upon return to the United States of USL's English assets.

Certain U.K. creditors of USL applied for and obtained Mareva injunctions in U.K. courts restraining the removal of USL's English assets from the U.K. USL argued in the English court that by restraining the removal of the company's assets, the English court was preventing the assets from being administered by the United States bankruptcy court and the creditors committee. The English court, however, considered the existence of the reorganization plan as but one of the matters to be weighed in determining whether the injunctions should be upheld. The court found that retaining the assets in the United Kingdom would give the plaintiffs — each of whom had claims against the U.S. company — security for a worthwhile percentage of

parties in possession the defendant's assets.

²⁵³ *Republic of Haiti v. Duvalier* [1989] 1 All E.R. 456.

²⁵⁴ Mitchell, *Mareva Injunctions and Domestic Assets* [1988] 3 J. INT'L BANKING L. 210, 211. See also *Derby & Co. v. Weldon*, [1990] Ch. 65, 94 ("It may be open to argument in some future case that in certain circumstances a discovery order can be made with a wider ambit than the Mareva injunction to which it is ancillary.")

²⁵⁵ [1989] 1 Q.B. 360.

their debts, whereas if transferred to the United States, the assets would be "a mere drop in the ocean of the total assets" and of marginal benefit to the company and its U.S. creditors. The court thus determined that the U.S. company would suffer no material prejudice if the injunctions were upheld. Although the assets would remain in the United Kingdom, the court found there would be no prospect of the assets being distributed without the intervention of ancillary liquidation proceedings. Moreover, the court considered that the plaintiffs would suffer substantial prejudice if the injunctions were discharged because the assets would be used to keep the United States company alive as a growing concern in a manner from which the plaintiffs could not possibly derive any benefit due to the United States company's proposed withdrawal from Europe.

Before the decision in *Mareva*,²⁵⁶ no method or procedure existed to protect a plaintiff who feared that a defendant was taking steps to render itself judgment-proof. Over the last fifteen years, the law of Mareva injunctions and ancillary disclosure orders has developed to such an extent that English courts now have jurisdiction to restrain judgment debtors from dealing with their assets, wherever they might be. So long as the granting of Mareva injunctions and the making of ancillary disclosure orders is consistent with principles of comity and international law — by ensuring that the defendant (*e.g.*, a foreign debtor company or a foreign liquidator of a debtor company) has a sufficient connection with and is subject to the jurisdiction of the English courts — English creditors of foreign debtor companies have a powerful territorialist tool to assist them in deriving maximum benefit from any ancillary liquidation proceedings they bring or rely on in England. In particular, a Mareva injunction may aid a foreign liquidator by freezing a debtor company's U.K. assets pending the outcome of foreign liquidation proceedings.

2.5.5. *The Liquidation of Foreign Companies with Assets and/or Creditors in England*

The liquidator of a foreign company which has assets and creditors in the United Kingdom may rely upon universalist and territorialist U.K. laws and procedures to facilitate an orderly and efficient administration of the debtor's estate. Although Section 426 is the obvious tool available to a liquidator of a foreign company located in a designated territory, there are numerous other options available to liquida-

²⁵⁶ *Supra* note 243.

tors of companies located elsewhere.

a. Options Available to Foreign Liquidators in the U.K.

Foreign liquidators have a number of means by which to regulate or influence the conduct of a debtor company's U.K. affairs. If liquidation proceedings have been commenced in a territory outside the United Kingdom and the reach of Section 426, the foreign liquidator may petition the English courts for an administration order under the Insolvency Act.²⁵⁷

The liquidator also may seek an order staying all U.K. actions and executions of judgments against the debtor company. English courts have inherent jurisdiction to stay actions, particularly in the context of foreign jurisdictional matters. However, in order to justify a stay of English proceedings, (a) there must be another forum to whose jurisdiction the defendant is amenable in which justice can be done between the parties at substantially less inconvenience or expense, and (b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court.²⁵⁸

As a third alternative, the foreign liquidator may claim title to the debtor company's U.K. assets by seeking an appointment as receiver of those assets²⁵⁹ or by asserting a foreign court's order vesting title in the assets in his name.²⁶⁰ In the Queensland case of *In re Young*, the court

²⁵⁷ *But see* Insolvency Act § 9(1). For a discussion on administration orders and their application to insurance and reinsurance companies, see Anderson, *supra* note 177.

²⁵⁸ DICEY & MORRIS, *supra* note 202, at 389-96 ("Where the case falls within the scope of the [Convention] the English court (a) must decline jurisdiction if the proceedings involve the same cause of action and are between the same parties and the courts of another Contracting State have been first seised of the action, and (b) may stay its proceedings where the courts of another Contracting State have been first seised of a related action which has not been the subject of a judgment."). Note that commencement of administration proceedings under the Insolvency Act effects a stay against actions and execution proceedings. Insolvency Act § 10.

²⁵⁹ *See, e.g., Re IIT* [1976] 58 D.L.R.(3d) 55; Supreme Court Act 1981 § 37(1) ("The court may by order . . . appoint a receiver in all cases in which it appears to the court to be just and convenient to do so."). Supreme Court Act 1981 § 37(2) ("Any such order may be made either unconditionally or on such terms and conditions as the court thinks just.").

²⁶⁰ *Bergerem v. Marsh* [1921] B. & C.R. 195, 197; *In re Kooperman* [1928] B. & C.R. 49; *Pelegrin v. Coutts & Co.*, [1915] 1 Ch. 696; *but see Schemmer v. Property Resources Ltd.* [1975] 1 Ch. 273. Note that the authority of a liquidator appointed under the law of the place of incorporation of the debtor company is recognized in England. DICEY & MORRIS, *supra* note 202, at 1150. *See also* H. Picarola, *The Law Relating to Receivers, Managers and Administrators*, at 499 ("As a rule an appointment by a court in the place of incorporation of a company will be recognized but not if the receiver was appointed by way of equitable execution. Although Goulding, J., in

stated that:

It would seem therefore that a receiver appointed by a Californian court under the provisions of Californian law to the possession of Queensland property of a person over whom the Californian law had jurisdiction would be entitled to collect that property and give a good exchange therefor.²⁶¹

Another alternative available to foreign liquidators is to invoke the benefits of compulsory liquidation proceedings in England. It is well established that insolvency proceedings may be initiated in the English courts notwithstanding the fact that insolvency proceedings have already commenced with respect to the same debtor company in its country of incorporation or elsewhere.²⁶² However, if liquidation proceedings have commenced in a foreign court, liquidation proceedings in England will be stayed on the grounds of *forum non conveniens* if the foreign court is the appropriate forum for the administration of the liquidation.²⁶³ English courts must consider the interests of the litigants

Schemmer's case declined to express a view on the point an appointment in the jurisdiction where a company has established its central management and control would probably be recognized. It might even be the case that if the law of the company's place of incorporation would recognize the receivership order, an English court would do so."). However, whether the order of the foreign court vests title in U.K. assets in the foreign liquidator is entirely a question of fact. *Re IIT* [1979] 58 D.L.R.(3d) 55; *Macaulay v. Guaranty Trust Co. of New York* [1927] 44 T.L.R. 99 (the court gave effect to such an order with respect to the debtor's U.K. moveable property, that is, the credit balance of the debtor company's account at its bank in London). Note that in *Schemmer*, *supra* the court declined to define when English courts must recognize a foreign receiver's title to U.K. assets. See also *Primary Producers Bank of Australia v. Hughes* [1931] N.S.W. St. R. 14, 18 ("A liquidator appointed in the country of domicile has the power of collecting in a foreign country the assets of the company situated there, but that is not by virtue of any title in himself or of any trust attaching to the assets of which he is the trustee, but because by virtue of the law of the country of the company's domicile, he has the sole right of using the company's name in litigation.").

²⁶¹ [1955] Q. St. R. 254, 263.

²⁶² *In re Suidair Int'l Airways* [1951] Ch. 165; *Schemmers*, *supra* note 260; *Re Young* [1955] Q. St. R. 254; *In re Compania Merabello San Nicholas S.A.* [1973] 1 Ch. 75; *Banque des Marchands de Moscou (Koupetschesky) v. Kindersley* [1950] 2 All. E.R. 549 (liquidation proceedings may be commenced in a U.K. court in relation to U.K. assets of a foreign debtor company after the existence of that company has ceased under local law). It should be noted that under Section 145 of the Insolvency Act, the court may, on the application of the liquidator, direct that all or any part of the debtor company's property shall vest in the liquidator in his official name. Otherwise, the property remains vested in the name of the debtor company on trust for the benefit of its creditors. Also note that under Section 125(1) of the Insolvency Act "[o]n hearing a winding-up petition the court may dismiss it, or adjourn the hearing conditionally or unconditionally, or make an interim order, or any other order that it thinks fit; but the court shall not refuse to make a winding-up order on the ground only that the company's assets have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets."

²⁶³ See generally *Spiliada Maritime Corp. v. Cansulex Ltd.* [1987] 1 A.C. 460.

and justice in determining which is the appropriate forum for liquidation proceedings. The position of English creditors who have priority under English insolvency law but not under the foreign insolvency law is only one factor to be considered in such a determination.

As manifested in the four procedures available to foreign liquidators, the universality theory or "doctrine of unity" is favored in English Law, subject to certain qualifications.²⁶⁴ However, application of the universality theory is qualified. On the one hand, concurrent liquidation proceedings in England relating to a foreign debtor company are deemed ancillary to the domiciliary liquidation proceedings.²⁶⁵ But on

See also BUTLER & MERKIN, *supra* note 179, at D.4.1-45 (citing *Spiliada Maritime Corp. v. Cansulex Ltd.* [1986] 3 All E.R. 843:

(1) A stay will be granted on the ground of *forum non conveniens* only where the court is satisfied that there is some other available forum which both has jurisdiction and is appropriate for the trial in the sense that the case could be tried more suitably in the interests of all the parties and of justice. (2) The burden of persuading the court to grant a stay rests upon the defendant in the English proceedings. However, where particular matters are raised to justify a forum, the party raising the matter bears the burden of establishing it. If it has been established to the satisfaction of the court that there is another, more appropriate forum, the plaintiff in the English proceedings bears the burden of proving that the trial should nevertheless take place in England. (3) The defendant's burden of proof is not just to show that England is not the natural or appropriate forum, but to establish the existence of an alternative and more appropriate forum. This approach would emphasise that the defendant is seeking to deprive the plaintiff of his right to proceed in England and would also further the cause of international comity. (4) The court is to look initially at factors pointing towards another forum. Relevant factors demonstrating the availability of another forum include: (a) convenience and expense (e.g. availability of witnesses); (b) the proper law of the transaction in dispute; and (c) the places where the parties reside or carry on business. (5) If there is no evidence that any other forum is more convenient, a stay of the English proceedings will ordinarily be refused. (6) However, if the evidence demonstrates that there is another, more appropriate, forum for the trial, a stay will ordinarily be granted unless justice requires a stay to be refused. The plaintiff will, therefore, be permitted to proceed if it is shown that he would not obtain justice in the more appropriate forum.)

²⁶⁴ The universality theory is similar to the doctrine of comity. See *Hilton v. Guyot*, 159 U.S. 113, 164 (1895) ("Comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other."). Thus, the U.S. doctrine of comity would allow for the universal recognition of foreign liquidation proceedings, while at the same time recognizing the territorialist application of domestic laws in order to protect domestic creditors. This approach is substantially similar to the approach taken by English courts in relation to ancillary liquidations.

²⁶⁵ See *Primary Producers Bank of Australia Ltd. v. Hughes* [1931] N.S.W. St. R. 14, 17:

It is well settled that where a company is in process of liquidation in various jurisdictions, the liquidation in the country of its domicile is the main liquidation and that the others should be treated as ancillary thereto, and that distribution will not be made of the assets in the ancillary liqui-

the other hand, English courts appear concerned to ensure that liquidators of foreign companies appointed in English proceedings should not interfere with the debtor company's foreign affairs without special direction.²⁶⁶

b. Conduct of Ancillary U.K. Proceedings

If domiciliary liquidation proceedings have commenced abroad and "ancillary" proceedings have commenced in England, the English court may assist the foreign liquidator by first distributing the debtor company's U.K. assets to satisfy the claims of creditors having priority under English law,²⁶⁷ and then transfer any remaining assets to the foreign liquidator.²⁶⁸ English courts grant such assistance having regard for the relevant facts and circumstances. Generally, any sensible arrangements between English and foreign liquidators which benefit English creditors²⁶⁹ will be sanctioned by English courts so long as the arrangements adhere to the following general principles:

- (a) Preferred creditors, that is creditors having priority under English insolvency law, receive payment out of the debtor company's U.K. assets in priority to all other creditors, wherever located;
- (b) The remaining U.K. assets are then distributed equally among the non-preferred creditors, wherever located; and
- (c) Any non-preferred creditor who has received a payment out of the debtor company's assets by seizing or attaching assets in other jurisdictions must, before benefiting from an equal distribution of assets with other like creditors, account

dation except in co-ordination with the distribution taking place in the country of the company's domicile.

Although the term "ancillary jurisdiction" is often used, there is little discussion of what it is intended to mean. See *In re Commercial Bank of South Australia* [1886] 33 Ch. D. 174, 178.

In England, the term might be used to describe English proceedings which have been commenced to assist a foreign liquidator. See *In re Suidair Int'l Airways* [1951] 1 Ch. 165; *In re English, Scottish and Australian Chartered Bank* [1893] 3 Ch. 385, 394:

("One knows that where there is a liquidation of one concern the general principle is—ascertain what is the domicil of the company in liquidation; let the Court of the country of domicil act as the principal Court to govern the liquidation; and let the other Courts act as ancillary, as far as they can, to the principal liquidation.")

²⁶⁶ *In re Commercial Bank of South Australia* [1886] 33 Ch. D. 174, 178.

²⁶⁷ *Id.*; *In re Suidair Int'l Airways* [1951] 1 Ch. 165.

²⁶⁸ *In re Hibernian Merchants Ltd.* [1958] 1 Ch. 76.

²⁶⁹ See *Woloniecki*, *supra* note 239, at 661, 662; *In re P. MacFadyan & Co. ex parte Vizianagaram Co.* [1907] 1 K.B. 675.

for the assets seized or attached.²⁷⁰

This is commonly referred to as the “hotchpot rule.”

A transfer of assets from England to a foreign liquidator appointed in the domiciliary jurisdiction will not be sanctioned if the assets are to be used to pay the foreign liquidator’s costs. Nor will English courts sanction a transfer which results in a demotion of the rights of U.K. creditors. For example, as noted above, in United States liquidation proceedings, policyholders have priority over reinsurance creditors, whereas in English liquidation proceedings insurance and reinsurance creditors are treated equally.²⁷¹ Accordingly, English courts will not sanction a transfer of U.K. assets to a U.S. liquidator of a U.S. debtor company which wrote both insurance and reinsurance business because U.K. reinsurance creditors would be prejudiced. Similarly, a United States liquidator’s request to have concurrent U.K. liquidation proceedings declared ancillary to United States liquidation proceedings will fail for the same reason.²⁷² Nevertheless, United States reinsurance creditors may seek to liquidate the United States debtor company in the United Kingdom. Upon payment of claims in the United Kingdom proceedings, the United States reinsurance creditors would receive the same distributions as U.K. insurance and reinsurance creditors, except that the U.S. reinsurance creditors may have to account for the value of any assets seized or attached in the United States or paid to them in any United States proceedings.

²⁷⁰ See Woloniecki, *supra* note 239, at 662 (citing *In re English, Scottish & Australian Chartered Bank* [1893] 3 Ch. 385, at 394; *In re Oriental Inland Steam Co.* [1874] 9 Ch. App. 557; *Banco de Portugal v. Waddell* [1880] 5 App. Cas. 161; *Re Alfred Shaw & Co. ex parte Mackenzie* [1897] 8 Q.W. 93; *Primary Producers Bank of Australia v. Hughes* [1931] 32 S.R. (N.S.W.) 14, at 19; *In re Standard Insurance Co.* [1968] Q.R. 118; *In re Northland Services Pty Ltd.* [1978] 18 Aus. L.R. 684. See also *Transnational Aspects*, *supra* note 3, at 1147:

Provided . . . it can be demonstrated that the insolvency laws in the country of incorporation, where the principal liquidation is conducted, are substantially the same as in the UK, and that UK creditors will not be unfairly prejudiced by submitting to the foreign jurisdiction, then the Court can make an Order designating the UK liquidation as being ancillary to the principal liquidation overseas. The UK liquidator in those circumstances will effectively restrict his activities to assisting the foreign liquidation, for instance by collecting UK debts and agreeing the claims of UK creditors. Proceeds from collections in the UK, subject to the costs of the liquidation and after the payment of any claims from UK preferential creditors, will then be remitted to the principal liquidator, who will create a common fund out of which the claims of all unsecured creditors will be met *pari passu*.

²⁷¹ Insolvency Act §§ 175, 386, sched. 6.

²⁷² The British Approach, *supra* note 179, at 653.

2.6. Review

As demonstrated above, English law of insurance insolvency is essentially universalist in approach, subject to territorialist inroads. It remains to be considered in this article how the two theories are manifested in the law of Canada, a principal trading party of both the United States and the United Kingdom.

3. CANADIAN LAW

The Canadian approach to international liquidations has been described as the "plurality doctrine." This doctrine is regarded as representing a compromise between the territorialist and universalist approaches,²⁷³ and is premised on the belief that "bankruptcies should essentially be an extension of the private law which exists between the insolvent debtor and the creditors."²⁷⁴ Under this approach it is acceptable to initiate separate bankruptcy proceedings in different jurisdictions (*i.e.*, inside and outside Canada), if necessary, with each court applying the forum's substantive law to the proceedings initiated there.²⁷⁵ At first blush, this approach seems more closely aligned to the territoriality theory, but no matter how it is categorized, the Canadian approach to the liquidation of insurance companies appears to welcome ancillary proceedings.

3.1. Overview

The Canadian federal government has jurisdiction over the incorporation, registration and winding-up of domestic and foreign insurance companies. The governing federal entities are the Minister of Finance, the Superintendent of Insurance, and the Department of Insurance. The governing federal statutes are the Canadian and British Insurance Companies Act ("CBICA"),²⁷⁶ the Foreign Insurance Companies Act ("FICA"),²⁷⁷ and the Winding-Up Act ("WUA").²⁷⁸ The

²⁷³ Harding, *Re Sefel Geophysical Ltd.: A Canadian Approach to Some Specific Problems in the Adjudication of International Insolvencies*, 12 DALHOUSIE L.J. 412, 419 (1989).

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ R.S.C. ch. I-12 (1985). In general, the CBICA contains separate but symmetrical provisions governing the incorporation, registration and winding-up of Canadian, British and foreign insurance companies transacting life insurance business, fraternal benefit societies, and all other companies transacting insurance other than life insurance.

²⁷⁷ R.S.C. ch. I-13 (1985).

²⁷⁸ R.S.C. ch. W-11 (1985). Like the U.S. Bankruptcy Code, insurance companies may not be debtors under the Canadian Bankruptcy Act. R.S.C. ch. B-3, § 2 (1985).

CBICA, FICA and WUA provide mechanisms for resolving the financial difficulties of domestic and foreign insurance and reinsurance²⁷⁹ companies: i.e., control, rehabilitation, winding-up and liquidation.²⁸⁰ This paper focuses on winding-up proceedings.

3.2. *Winding-Up Proceedings Against a Domestic Company*

The WUA establishes procedures for winding-up domestic companies with three purposes in mind: (1) to provide for an equitable and ratable distribution of the assets of a company among its creditors without preference; (2) to protect the debtor from harassment by its creditors; and (3) to prevent the piecemeal realization of the debtor's assets.²⁸¹ A domestic insurance company may be wound-up if (i) efforts to rehabilitate the company would be futile,²⁸² or (ii) the company is insolvent.²⁸³ Canada's various provinces are auxiliary to one another

²⁷⁹ Reinsurance appears to be part of the business of insurance within the meaning of the Canadian and British Insurance Companies Act. Section 16 states that: "[t]he company may cause itself to be reinsured against any risk undertaken by it, and may reinsure any other insurer against any risk undertaken by that other insurer if the risk is of a class of insurance that the Company is registered to transact." R.S.C. ch. I-12, § 16 (1985). See also R.S.C. ch. I-12, §§ 128 (1985) (authorizing a reduction in the reserves of a Canadian company for reinsurance, and specifying the security posting requirements applicable to registered and unregistered reinsurers), 201(7) (same as respects British companies).

²⁸⁰ Insurance insolvency proceedings generally follow a review of the particular insurance company's financial status. Insurance companies are required to file annual statements of their operations with the Department of Insurance. R.S.C. ch. I-12, §§ 104 (1985) (Canadian companies), 211 (British companies); R.S.C. ch. I-13, § 30 (1985) (other foreign companies). Before a company's registration may be renewed, the Superintendent must examine the statement and report to the Minister whether the company is in a condition to meet its liabilities. R.S.C. ch. I-12, § 107(b) (1985). The Superintendent must report to the Minister any case where the Superintendent believes that a company's liabilities presently exceed its assets (or likely will within the following year), or where the company's assets are insufficient to adequately protect policyholders. R.S.C. ch. I-12, §§ 154 (1985) (Canadian life insurance companies), 175 (Canadian companies transacting insurance business other than life), 227 (British companies); R.S.C. ch. I-13, § 65 (1985) (other foreign companies). If the Minister agrees, he may then impose conditions or limitations on the company's registration, prescribe a time within which the company must make good any deficiency, or direct the Superintendent to take control of the company's Canadian assets. *Id.* If the company does not make good the deficiency, the Minister may request that the Attorney General of Canada apply to a superior court for an order directing the Superintendent to rehabilitate or wind-up the Company. R.S.C. ch. I-12, §§ 57 (1985) (the CBICA provides: "The company is subject to any general Act for the winding-up of companies"), 155, 157 (Canadian life insurance companies), 176 (Canadian companies transacting insurance business other than life), 183, 184 (all Canadian companies), 228 (British companies).

²⁸¹ Carfagnini, *The Winding-Up Act*, 66 CANADIAN BANKR. 77, 79 (1988).

²⁸² R.S.C. ch. I-12, §§ 157 (1985) (Canadian life insurance companies), 176 (Canadian companies transacting business other than life).

²⁸³ R.S.C. ch. W-11, § 160(2) (1985). An insurance company is deemed insolvent

for the purpose of winding-up a business, and proceedings relating to such a winding-up can be transferred from one court to another.²⁸⁴

3.2.1. *Automatic Stay*

Issuance of the winding-up order gives rise to a stay: no suit or other legal action may proceed or be commenced against the company, except with leave of the court and upon such terms as the court orders.²⁸⁵ Before the order is entered, the company, its creditors, or contributories (that is, debtors of the insolvent)²⁸⁶ may apply for restraint of any action, suit or proceeding against the company.²⁸⁷ The stay serves two important functions: first, creditors are compelled to come in and share ratably; and second, the stay ensures summary disposition of claims, thereby preventing the assets from being consumed by litigation costs and expenses.²⁸⁸ The breadth of the stay is limited to assets located in Canada; in order for an insolvent Canadian insurer to protect its foreign assets it must obtain a stay wherever the assets are located.²⁸⁹

3.2.2. *Appointment, Duties and Powers of Liquidators*

Pursuant to the winding-up order, the court will appoint a liquidator after notice to creditors, contributories, shareholders or members.²⁹⁰ Upon appointment, the liquidator has custody and control of all

if the company fails to pay any undisputed claim within 90 days or a disputed claim after final judgment, or if the company's certificate of registry remains unrenewed more than 30 days past expiration or withdrawal. *Id.* Either omission suggests that the company's assets are inadequate to protect the claims of potential policyholders. See Attorney General of Canada v. Cardinal Ins. Co., 39 O.R.2d 204, 209 (1982). Therefore, the Minister of Finance may request the Attorney General of Canada to apply to the court for an order that the company be wound-up. R.S.C. ch. W-11, § 160(2) (1985). In response to such an application, the company is entitled to negotiate to sell its assets or reinsure its business (R.S.C. ch. I-12, § 160 (1985)), or oppose the winding-up order and defeat it by demonstrating that its default was only temporary and thus not an indication of insolvency. R.S.C. ch. W-11, § 14 (1985).

²⁸⁴ R.S.C. ch. I-12, § 183 (1985).

²⁸⁵ R.S.C. ch. W-11, § 21 (1985).

²⁸⁶ R.S.C. ch. W-11, § 2 (1985).

²⁸⁷ R.S.C. ch. W-11, § 17 (1985). In fact, the court may arrest "any contributory or past or present director, manager, etc. of the company who is about to quit Canada or otherwise abscond" with company funds. R.S.C. ch. W-11, § 117 (1985).

²⁸⁸ Carson v. Montreal Trust Co., 23 D.L.R. 690, 692 (N.S.S. Ct. 1915).

²⁸⁹ See *In re Sefel Geophysical Ltd.*, 62 Alta.L.R.2d 193, 70 C. Bankr. (N.S.) 97 (Q.B. 1988). Section 304 of the U.S. Bankruptcy Code, discussed in Part 1.3 above, assists the liquidator in achieving such a result in U.S. courts. 11 U.S.C. § 304 (1988).

²⁹⁰ R.S.C. ch. W-11, § 23 (1985). The court, however, may itself discharge the functions of a liquidator. R.S.C. ch. W-11, §§ 48, 49 (1985).

property,²⁹¹ effects and choses in action to which the company is entitled, and all powers of the directors of the company cease.²⁹² The liquidator does not, however, take title to the assets.²⁹³

The WUA empowers the liquidator to make any compromises or arrangements the liquidator deems expedient.²⁹⁴ As in England, creditors of a financially troubled insurer are given the opportunity to fashion a remedy — such as a “compromise” or “arrangement” — to resolve the company’s difficulties.²⁹⁵

3.2.3. Claims

Within sixty days after appointment, the liquidator must “prepare a statement of all the persons appearing by the company’s books and records to be creditors of the company or claimants under any policy.”²⁹⁶ The liquidator must then publish notice of his intent to file the statement in the Canadian Gazette and other Canadian papers.²⁹⁷ Claimants who are not listed on the original statement must timely notify the liquidator of their claims. Creditors may object to the liquidator’s statement,²⁹⁸ which may then be amended.²⁹⁹ Only those claimants listed in the final statement will share in the assets of the company, up to the approved value of their claims.³⁰⁰ However, where the assets are not sufficient to cover all claims appearing in the statement in full, “the policyholders are not barred from any recourse they have, either in law or in equity,” against the company or any shareholder or director

²⁹¹ Such property includes special deposits (R.S.C. ch. I-12, § 76 (1985)) and “separate funds” (R.S.C. ch. I-12, §§ 68-70 (1985)), which are to be liquidated separately in winding-up proceedings. R.S.C. ch. I-12, § 70(2) (1985).

²⁹² R.S.C. ch. W-11, § 33 (1985).

²⁹³ See Carfagnini, *supra* note 281, at 91-95.

²⁹⁴ R.S.C. ch. W-11, §§ 38, 65 (1985).

²⁹⁵ The court may summon meetings of the company’s creditors, contributories, shareholders, or members for the purpose of ascertaining their wishes. R.S.C. ch. W-11, § 63 (1985). In order for a compromise in value or arrangement to be adopted, a meeting of all creditors must be arranged and threequarters in value of the creditors voting in person or by proxy must approve the arrangement. R.S.C. ch. W-11, §§ 65, 66 (1985). If approved, the arrangement “is binding on all the creditors . . . and also on the liquidator and contributories of the company.” R.S.C. ch. W-11, § 66 (1985).

²⁹⁶ R.S.C. ch. W-11, § 166(1) (1985). The statement must show the amount of each claim (including contingent and unliquidated claims, R.S.C. ch. W-11, §§ 71, 163 (1985)) and each claimant must be collocated and ranked according to amount. R.S.C. ch. W-11, § 166(2) (1985).

²⁹⁷ R.S.C. ch. W-11, § 168 (1985).

²⁹⁸ R.S.C. ch. W-11, § 166(3) (1985).

²⁹⁹ R.S.C. ch. W-11, § 166(4) (1985).

³⁰⁰ R.S.C. ch. W-11, § 166(4) (1985). See *Re A.G. Can and Northumberland General Ins.*, 56 O.R.2d 609 (High Ct. of J. 1986).

thereof.³⁰¹

The foregoing procedures for filing claims are territorialistic. Although fair and adequate for apprising Canadian creditors of their rights,³⁰² foreign creditors who do not receive the published notice are disadvantaged in protecting their claims on the company's assets.

As in the United States and the United Kingdom, secured creditors may rely on their security and cannot be compelled to file a claim under the WUA.³⁰³ Canadian courts have consistently held that under the WUA, secured creditors may:

- (1) stand outside the liquidation proceedings and realize upon their security in any manner authorized by law [without recourse for any deficiency];
- (2) release their security to the liquidator and prove their claim as an unsecured creditor; or
- (3) come into the liquidation proceedings, value their security [in any initial distribution of assets] and prove their claim for any deficiency as an unsecured creditor [in any future distribution of assets].³⁰⁴

If the secured creditor elects to participate in the liquidation proceedings, however, he will be subject to the procedures of the WUA.³⁰⁵ In that event, the liquidator may either consent to the creditor's retention of the security or require that the creditor deliver and assign the security to the liquidator.³⁰⁶

3.2.4. *Marshalling and Distributing Assets*

The Canadian law respecting the marshalling and distribution of assets is universalist in approach. A Canadian liquidator may require that all funds and securities of the Canadian insurance company — wherever situated — be transferred to the liquidator to facilitate a proper distribution of the assets to all of the company's policyholders in accordance with the WUA's priority ranking scheme.³⁰⁷ The court has

³⁰¹ R.S.C. ch. W-11, § 167 (1985).

³⁰² The publication employed to convey notice is the Canadian Gazette and other Canadian papers. R.S.C. ch. W-11, § 168 (1985).

³⁰³ *Re Brampton Gas Co.*, 4 O.L.R. 509, 518 (Ont. Div. Ct. 1902); R.S.C. ch. W-11, §§ 78-84 (1985).

³⁰⁴ Carfagnini, *supra* note 281, at 97; R.S.C. ch. W-11, §§ 78-84 (1985).

³⁰⁵ *Re Brampton Gas Co.*, 4 O.L.R. at 518.

³⁰⁶ R.S.C. ch. W-11, §§ 79, 87 (1985).

³⁰⁷ R.S.C. ch. W-11, § 164 (1985). Claims are paid in the following order of priority:

- (a) first, costs of liquidation;

broad powers to aid the liquidator's marshalling of assets.³⁰⁸ Moreover, if a foreign state or country refuses to transfer requested funds or securities, the policyholders in that foreign jurisdiction have no right to claim any share of the assets of the company other than the funds deposited in their jurisdiction.³⁰⁹ Thus, Canadian law pressures foreign receivers to participate in a unified insolvency proceeding.

If a foreign creditor does not transfer its security back to the Canadian liquidator, and if the creditor's claim is prioritized more favorably under its own jurisdiction's priority ranking scheme than under the WUA, the creditor may well benefit by its refusal to transfer funds to the liquidator. For example, in *In re Sefel Geophysical Ltd.*,³¹⁰ a troubled Canadian company obtained a stay of proceedings against all creditors. Because the majority of the assets were located in the United States, the company sought a similar stay in the United States to prevent the U.S. revenue authorities from attaching the company's United States assets. Under the Canadian Bankruptcy Act and the WUA, a foreign revenue claim would not be paid in a winding-up proceeding, while under the U.S. Bankruptcy Code a federal tax claim would generally receive preferential treatment. Based on equitable principles, the court held that the preferred status accorded to claimants under American bankruptcy law should be honored by the Canadian liquidation court. This holding coincides with the prevailing "plurality doctrine," which acknowledges and gives effect to the laws of the ancillary jurisdiction.

3.3. *Proceedings Involving Foreign Corporations Having Canadian Assets or Creditors*

Canada has enacted legislative provisions which specifically ad-

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- (b) secondly, claims of preferred creditors;
 - (c) thirdly, claims of policyholders ranking as follows: claims that have arisen under the policies of the insurance company prior to the date of the filing of the Statement, and claims of policy-holders to the value of their policies computed as providing in the Winding-Up Act; and
 - (d) lastly, creditors other than policy-holders, reinsurers and preferred creditors are entitled to receive a dividend on their claims only if the assets are more than sufficient to pay the claims in subparagraphs (a), (b) and (c) above.

R.S.C. ch. W-11, § 161 (1985). See also Carfagnini, *supra* note 281, at 89.

The expenses of administration are payable out of sums appropriated by Parliament, for which domestic and foreign registered companies may be assessed. R.S.C. ch. I-12, § 186 (1985). Assessed companies have a claim against the insolvent's assets with priority over shareholder claims. R.S.C. ch. I-12, § 188 (1985).

³⁰⁸ See generally R.S.C. ch. W-11, §§ 108-35 (1985).

³⁰⁹ R.S.C. ch. W-11, § 164(3) (1985).

³¹⁰ 62 Alta.L.R.2d 193, 70 C.Bankr. 97 (Q.B. 1988).

dress some of the issues that arise when a non-Canadian insurance company with Canadian assets or creditors is placed into receivership. As discussed below, the nature and placement of such assets is governed by statute, as is judicial recognition of foreign receivership proceedings and judgements and opportunities for Canadian receivership of foreign insurers.

3.3.1. Registration Requirements

Under the CBICA and the FICA, a foreign company cannot transact the business of insurance in Canada unless it is registered,³¹¹ posts a deposit of securities,³¹² and maintains assets in Canada in an amount required for its class of insurance business.³¹³ This is generally accomplished by vesting securities in the name of a trustee under a trust indenture.³¹⁴ Claims against such assets often arise where the company is being liquidated abroad or where the company is subjected to liquidation in Canada.

3.3.2. Foreign Liquidation Proceedings

Canadian laws governing foreign insolvency proceedings against foreign debtors is essentially universalist. Thus, the courts of all Canadian provinces (except Quebec) will give effect to a foreign liquidation order, provided it was issued by the jurisdiction in which the foreign company was formed.³¹⁵ Recognition will not be refused because the foreign jurisdiction does not afford reciprocal recognition to Canadian liquidation orders.³¹⁶ Thus, if so ordered by the debtor's court, the foreign company's Canadian assets may be transferred to the company's

³¹¹ R.S.C. ch. I-12, § 195 (1985) (British companies); R.S.C. ch. I-13, § 4 (1985) (other foreign companies).

³¹² R.S.C. ch. I-13, § 7 (1985).

³¹³ R.S.C. ch. I-12, §§ 200 (1985) (British life insurance companies), 201 (British companies transacting insurance business other than life insurance); R.S.C. ch. I-13, §§ 12 (1985) (foreign life insurance companies), 14 (foreign companies transacting insurance other than life insurance). This amount can be reduced where the risk is reinsured (R.S.C. ch. I-13, § 15 (1985)), or there is an excess. R.S.C. ch. I-13, § 26 (1985). A letter of credit may be posted in lieu of assets. R.S.C. ch. I-12, § 207 (1985) (British companies).

³¹⁴ R.S.C. ch. I-12, § 209 (1985) (British companies); R.S.C. ch. I-13, § 28 (1985) (other foreign companies). Interest on the securities is transferred to the company so long as the requirements of FICA have not been violated. R.S.C. ch. I-13, § 27 (1985).

³¹⁵ *In re C.A. Kennedy Co. and Stibbe-Monk Ltd.*, 14 O.R.2d 439, 445, 74 D.L.R.3d 87, 92-93 (H. Ct. Div. 1976).

³¹⁶ *Williams v. Rice and Rice Knitting Mills*, 3 D.L.R. 225, 36 Man. R. 266, 7 C.Bankr. 699 (K.B. 1926).

domiciliary liquidator.³¹⁷ Such transfers conform with the principles of international comity, by which Canadian courts give effect to the orders of foreign courts.

*In re C.A. Kennedy Co. and Stibbe-Monk Ltd.*³¹⁸ illustrates the Canadian approach to enforcement of foreign liquidation orders. C.A. Kennedy Company, a Canadian entity, obtained judgment in Ontario against Stibbe-Monk Limited, an English company, and obtained a garnishee order attaching all debts which Dorothea Knitting Mills Limited, another Canadian company, owed to Stibbe-Monk. Stibbe-Monk had previously obtained a loan and granted its lender a floating charge or assignment on all of the company's assets, which included the Dorothea obligation. Stibbe-Monk's lender appointed a receiver in England for the company, and notice of the appointment was sent to all of its creditors. The trial court directed that Dorothea pay into the court the debt due to Stibbe-Monk. The issue before the High Court of Justice was whether it should recognize the receiver's right to the funds under English law. The court determined that it should, holding that an assignment made to a receiver in a foreign jurisdiction is entitled to recognition.³¹⁹ Therefore, C.A. Kennedy's attempted garnishment failed.

3.3.3. *Canadian Liquidation of a Foreign Insurer*

In contrast to the Canadian approach to foreign insolvency proceedings against foreign debtors, the Canadian approach to domestic liquidations of foreign debtors is territorialistic.

A foreign company may be liquidated in Canada even if liquidation proceedings have not been commenced in the insurer's country of domicile. The Superintendent of Insurance may take control of the assets of a company when he believes that the company's assets are not accounted for satisfactorily, the company has failed to pay an outstanding liability, or there exists any practice or state of affairs that are prejudicial to Canadian policyholders or creditors.³²⁰ Once the Superintendent takes control, the Minister of Finance may request that the Attorney General of Canada apply for an order to wind-up the company's business in Canada under the WUA.³²¹ Once such an order is

³¹⁷ R.S.C. ch. I-13, § 452(b) (1985).

³¹⁸ 14 O.R.2d 439, 445, 74 D.L.R.3d 87 (H. Ct. Div. 1976).

³¹⁹ *Id.*, 14 O.R.2d at 448.

³²⁰ R.S.C. ch. I-12, § 227 (1985) (British companies); R.S.C. ch. I-13, § 64.1 (1985) (1st Supp. § 127) (other foreign insurers).

³²¹ R.S.C. ch. I-12, § 227 (1985) (British companies); R.S.C. ch. I-13, § 66(2) (1985) (1st Supp. § 129) (other foreign insurers).

obtained, a liquidator is appointed to wind-up the company's affairs as if the company was a Canadian domiciliary, pursuant to the winding-up provisions of the WUA. Assets maintained in Canada are part of the company's general assets, available *pari passu* to all policyholders in Canada.³²² Thus, Canadian creditors are protected from a dissipation of assets located in Canada and benefit from the Canadian priority ranking scheme.

3.3.4. Concurrent Liquidation Orders

Even if foreign liquidation proceedings have been instituted in the company's domiciliary jurisdiction, creditors or foreign liquidators may initiate concurrent liquidation proceedings in Canada. This may occur where Canadian legislation is more advantageous to a Canadian creditor, or where the foreign liquidation proceedings have no extraterritorial effect.³²³ A concurrent order would operate as ancillary to a foreign order.³²⁴ However, in Canada the term "ancillary" appears to connote that each jurisdiction will distribute the assets situated therein according to its own law, and thus is closely aligned with the territoriality theory. Therefore, unless a vesting order is obtained by the foreign liquidator, Canadian law will be applied to issues such as the admission of claims, claims priority, stay of proceedings, and the voidability of transactions.³²⁵

At the conclusion of the winding-up of a foreign insurance company in Canada, all surplus assets are distributed among those entitled.³²⁶

4. CONCLUSIONS

Searching for a *forum concursus* is the perennial task of receivers. In the best of all worlds, where there is one debtor with an identifiable group of assets, those assets would be distributed to creditors on an equal basis in a single proceeding. The problems engendered by differences in the laws of competing jurisdictions, however, make that task nearly impossible to accomplish. This is especially true in the case of

³²² R.S.C. ch. I-12, §§ 219 (1985) (British companies), 208 (British mutual fire insurance company).

³²³ See Grace, *Law of Liquidations: The Recognition and Enforcement of Foreign Liquidation Orders in Canada and Australia-A Critical Comparison*, 35 INT'L COMP. L.Q., 666, 667 (1986).

³²⁴ *Id.* at 680; *accord In re Hibernian Merchants Ltd.* [1958] 1 Ch. 76.

³²⁵ Grace, *supra* note 323, at 680.

³²⁶ R.S.C. ch. W-11, §§ 138, 139 (1985).

an insolvent insurance company. Most jurisdictions require that before an insurer may transact business within its borders, the insurer must post security or make a deposit to protect policyholders in that jurisdiction. When the insurer becomes insolvent, there is an immediate crystallization of divergent interests in different jurisdictions: each creditor wants his due, and the company's receiver — or the courts — must resolve these competing interests.

The insolvency of multinational insurance companies requires a global solution. Adoption of legislation embodying principles of the universalist theory offers the best hope for achieving such a solution. Territorialist procedures hamper the efforts of receivers to marshal and distribute the assets of insolvent insurers in an efficient, equitable manner. Nevertheless, jurisdictions have justifiable concerns for protecting the rights of their constituents. The task placed before international receivers, therefore, is to fashion a universalist procedure which strikes a balance between protecting such individuals' rights and the rights of all creditors to equal treatment. As discussed at length in this article, each of England, Canada and the 50 states and territories of the U.S., as well as the federal government, has endeavored to strike that balance.

In the United States, uniform and model legislation has been created which attempts to address the myriad issues arising from multinational insurance insolvencies. The UILA and the Model Act are both universalist in approach. Each facilitates the administration of the estates of multi-jurisdictional insurers through the establishment of domiciliary and ancillary receivers. Yet each act also embodies territorialist limitations, such as the protection afforded to the rights of special deposit claimants. Implementation of the universalist goals of the acts is accomplished by according reciprocal treatment to signatory jurisdictions. Although at first blush reciprocity appears to be a territorialist limitation — since non-signatory jurisdictions may be deprived of the benefits of the signatories' laws — it in fact serves as one of the means for effectuating cooperative and complementary proceedings among jurisdictions with potentially competing interests. Unfortunately, neither act has been adopted by all United States jurisdictions.

Against the backdrop of such diversity lies Section 304 of the federal Bankruptcy Code. The principal advantage of this legislation is its universal application to all of the American states and territories, and its accessibility to foreign receivers. The principal limitation of Section 304 derives from its inability to resolve problems attendant to multinational insurance insolvencies. As part of the Bankruptcy Code, Section 304 simply does not contemplate the unique circumstances presented by an insurance insolvency.

English legal procedures applicable to cross-border insolvencies may be criticized for encouraging English courts to weigh the interests and demands of U.K. creditors against those of foreign liquidators and creditors. The territorialist underpinnings of Mareva injunctions and disclosure orders thus compromise the fundamental principle that all creditors should be afforded fair and equal treatment. In contrast, Section 426 of the Companies Act is universalist legislation. Like the American Section 304, it facilitates conjunctive administration of an insolvent's estate. Unfortunately, the application of Section 426 is limited to the United Kingdom and certain designated countries.

Canadian law, too, is essentially universalist in approach, with a smattering of territorialist protections. Like Sections 304 and 426, it empowers foreign receivers to marshal Canadian assets for administration and distribution in a foreign proceeding; this is so even if the foreign jurisdiction does not afford reciprocal recognition of Canadian orders, a unique extension beyond the limitations imposed on Sections 304 and 426. Similarly, domestic receivers may demand return to Canada of all funds and securities held in foreign lands, and in appropriate circumstances, Canadian courts will respect foreign priority of distribution law. The territorialist aspects of Canadian law are evident, however, in its provisions governing domestic and ancillary liquidations of foreign insurers.

In anticipation of the inevitable reduction in size of the international insurance and reinsurance markets and the increase in the number of cross-border insolvencies, simplicity and consolidation of laws governing cross-border insolvency is essential. Unambiguous legislative action is required to provide receivers with the opportunity to understand their respective rights, powers and duties. Only then will the law best serve all courts, receivers and creditors in avoiding conflicts and strained relations when confronted with cross-border insurance insolvencies. Sections 304 and 426 represent the furthest steps taken toward a global approach to multinational insurance insolvencies. Moreover, the United States, England, Canada and the European Community all have spent years drafting and negotiating the terms of proposed agreements intended to result in the adoption of a unified approach, though to date their efforts have not yielded an acceptable agreement. Perhaps the brightest prospect for successfully implementing a global approach lies in the possibility of countries adopting legislation modeled after Sections 304 and 426. It remains to be seen whether the goal of a multinational approach to insurance insolvencies can be attained. In the interim, insurance company liquidators must resign themselves to continuing their search for a *forum concursus*.

APPENDIX A

STATUTORY CROSS-BORDER INSURANCE INSOLVENCY
PROVISIONS

(United States and Territories)

<u>STATE</u>	<u>UILA</u> ³²⁷	<u>NAIC MODEL ACT</u> ³²⁸	<u>OTHER</u>
Alabama	1943		
Alaska	1966		
Arizona	1954		
Arkansas	1959		
California	1988		
Colorado	1955		
Connecticut		X	
Delaware	1953		
Florida	1959		
Georgia	1961		
Hawaii	*	X	
Idaho		X	
Illinois	1941		
Indiana		X	
Iowa		X	
Kansas			X
Kentucky		X	
Louisiana	1948		
Maine	1969		
Maryland	1963		
Massachusetts	1939		
Michigan	1957		
Minnesota		X	
Mississippi			X
Missouri	1976		
Montana	*	X	
Nebraska			X
Nevada	1971		

³²⁷ Uniform Insurers Liquidation Act (indicating date of substantial adoption of major provisions).

³²⁸ National Association of Insurance Commissioners Insurers Rehabilitation and Liquidation Model Act (substantial adoption of major provisions).

* denotes that the state repealed the UILA and adopted the NAIC's Model Act.

<u>STATE</u>	<u>UILA</u>	<u>NAIC MODEL ACT</u>	<u>OTHER</u>
New Hampshire		X	
New Jersey	1972		
New Mexico	1953		
New York	1940		
North Carolina	*	X	
North Dakota			X
Ohio		X	
Oklahoma	1957		
Oregon	1941		
Pennsylvania		X	
Puerto Rico	1958		
Rhode Island	1940		
South Carolina		X	
South Dakota	*	X	
Tennessee	1969		
Texas		X	
Utah		X	
Vermont			X
Virgin Islands	1968		
Virginia			
Washington	1947		
West Virginia	1958		
Wisconsin		X	
Wyoming	1967		

* denotes that the state repealed the UILA and adopted the NAIC's Model Act.

APPENDIX B

304. CASES ANCILLARY TO FOREIGN PROCEEDINGS

(a) A case ancillary to a foreign proceeding is commenced by the filing with the bankruptcy court of a petition under this section by a foreign representative.

(b) Subject to the provisions of subsection (c) of this section, if a party in interest does not timely controvert the petition, or after trial, the court may -

(1) enjoin the commencement or continuation of -

(A) any action against -

(i) a debtor with respect to property involved in such foreign proceeding; or

(ii) such property; or

(B) the enforcement of any judgement against the debtor with respect to such property, or any act or the commencement or continuation of any judicial

proceeding to create or enforce a lien against the property of such estate;

(2) order turnover of the property of such estate, or the proceeds of such property, to such foreign representative or

(3) order other appropriate relief.

(c) In determining whether to grant relief under subsection (b) of this section, the court shall be guided by what will best assure an economical and expeditious administration of such estate, consistent with -

(1) just treatment of all holders of claims against or interests in such estate;

(2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;

(3) prevention of preferential or fraudulent dispositions of property of such estate;

(4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;

(5) comity; and

(6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

APPENDIX C

426. CO-OPERATION BETWEEN COURTS EXERCISING JURISDICTION IN RELATION TO INSOLVENCY

(1) An order made by a court in any part of the United Kingdom in the exercise of jurisdiction in relation to insolvency law shall be enforced in any other part of the United Kingdom as if it were made by a court exercising the corresponding jurisdiction in that other part.

(2) However, without prejudice to the following provisions of this section, nothing in subsection (1) requires a court in any part of the United Kingdom to enforce, in relation to property situated in that part, any order made by a court in any other part of the United Kingdom.

(3) The Secretary of State, with the concurrence in relation to property situated in England or Wales of the Lord Chancellor, may by order make provision for securing that a trustee or assignee under the insolvency law of any part of the United Kingdom has, with such modifications as may be specified in the order, the same rights in relation to any property situated in another part of the United Kingdom as he would have in the corresponding circumstances if he were a trustee or assignee under the insolvency law of that other part.

(4) The courts having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist the courts having the corresponding jurisdiction in any other part of the United Kingdom or any relevant country or territory.

(5) For the purposes of subsection (4) a request made to a court in any part of the United Kingdom by a court in any other part of the United Kingdom or in a relevant country or territory is authority for the court to which the request is made to apply, in relation to any matters specified in the request, the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction.

In exercising its discretion under this subsection, a court shall have regard in particular to the rules of private international law.

(6) Where a person who is a trustee or assignee under the insolvency law of any part of the United Kingdom claims property situated in any other part of the United Kingdom (whether by virtue of an order under subsection (3) or otherwise), the submission of that claim to the court exercising jurisdiction in relation to insolvency law in that other part shall be treated in the same manner as a request made by a court for the purpose of subsection (4).

(7) Section 38 of the Criminal Law Act 1977 (execution of war-

rant of arrest throughout the United Kingdom) applies to a warrant which, in exercise of any jurisdiction in relation to insolvency law, is issued in any part of the United Kingdom for the arrest of a person as it applies to a warrant issued in that part of the United Kingdom for the arrest of a person charged with an offence.

(8) Without prejudice to any power to make rules of court, any power to make provision by subordinate legislation for the purpose of giving effect in relation to companies or individuals to the insolvency law of any part of the United Kingdom includes power to make provisions for the purpose of giving effect in that part to any provision made by or under the preceding provisions of this section.

(9) An order under subsection (3) shall be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

(10) In this section, "insolvency law" means -

(a) in relation to England and Wales, provision made by or under this Act or sections 6 to 10, 12, 15, 19(c) and 20 (with Schedule 1) of the Company Directors Disqualification Act 1986 and extending to England and Wales;

(b) in relation to Scotland, provision extending to Scotland and made by or under this Act, sections 6 to 10, 12, 15, 19(c) and 20 (with Schedule 1) of the Company Directors Disqualification Act 1986, Part XVIII of the Companies Act or the Bankruptcy (Scotland) Act 1985;

(c) in relation to Northern Ireland, provision made by or under the Bankruptcy Acts (Northern Ireland) 1857 to 1980, Part V, VI or IX of the Companies Act (Northern Ireland) 1960 or Part IV of the Companies (Northern Ireland) Order 1987;

(d) in relation to any relevant country or territory, so much of the law of that country or territory as corresponds to provisions falling within any of the foregoing paragraphs; and references in this subsection to any enactment include, in relation to any time before the coming into force of that enactment the corresponding enactment in force at that time.

(11) In this section "relevant country or territory" means -

(a) any of the Channel Islands or the Isle of Man, or

(b) any country or territory designated for the purposes of this section by the Secretary of State by order made by statutory instrument.