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Global Venue Controls Are Coming: A Reply to Professor LoPucki

by

Honorable Samuel L. Bufford*

International venue shopping is developing for transnational insolvency cases,¹ Professor Lynn LoPucki contends, and it will lead to bad consequences.² The cause of such venue shopping, he says, is a universalist viewpoint that underlies recent developments governing the coordination of international insolvency cases.³ He argues that the world economy would benefit if the rules governing international insolvencies were guided instead by his vision of cooperative territorialism.⁴ Professor LoPucki argues that legal developments such as the UNCITRAL Model Law on Cross-Border Insolvency (the "Model Law"),⁵ the European Union Regulation on Insolvency Proceedings (the "EU Regulation"),⁶ the NAFTA Principles of Coop-

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¹For the purposes of this Article, the terms "insolvency case" and "bankruptcy case" are used interchangeably. There is a divide in the literature on how to refer to a court proceeding relating to an insolvency. The U.S. bankruptcy law consistently refers to a bankruptcy "case." Much of the international literature, on the other hand, refers to a "proceeding." Compare, e.g., *In re Manning*, 236 B.R. 14 (B.A.P. 9th Cir. 1999) (referring to domestic insolvency proceedings as a "bankruptcy case"), with Commission Regulation 1346/2000 on Insolvency Proceedings, 2000 O.J. (L 160) 1, as amended (regulating all international insolvency or bankruptcy matters within the European community).

²See LYNN M. LOPUCKI, *COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS* (2005), ch. 8, reprinted as *Global and Out of Control?*, 79 AM. BANKR. L.J. 79, (2005) (hereinafter "*Global and Out of Control?*"); see also Professor LoPucki's reply to this paper, Lynn M. LoPucki, *Universalism Unravels*, 79 AM. BANKR. L.J. 143 (2005) (hereinafter "*Universalism Unravels*").

³See LoPucki, *Global and Out of Control*, *supra* note 2, at 79-83.

⁴Professor LoPucki develops his "cooperative territorialism" view in two prior articles. See Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy*, 98 MICH. L. REV. 2216 (2000) (hereinafter "*Cooperative Territoriality*"); Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 CORNELL L. REV. 696 (1999) (hereinafter "*Cooperation in International Bankruptcy*").

⁵MODEL LAW ON CROSS-BORDER INSOLVENCY (1997); see also *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, 1997 XXVIII UNCITRAL Y.B. pt. 3, § 2, U.N. Doc. A/CN.9/442, reprinted in 6 TUL. J. INT'L & COMP. L. 415 (1998); see generally André J. Berends, *The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview*, 6 TUL. J. INT'L & COMP. L. 309 (1998).

⁶Commission Regulation 1346/2000 on Insolvency Proceedings, 2000 O.J. (L 160) 1, as amended; see also Ian F. Fletcher, *The European Union Convention on Insolvency Proceedings: An Overview and Comment*, with U.S. Interest in Mind, 23 BROOK. J. INT'L L. 25 (1997).

eration in Transnational Insolvency Cases ("NAFTA Principles"),⁷ and domestic laws such as § 304 of the U.S. Bankruptcy Code⁸ promote a modified universalist approach to international insolvency cases.⁹ According to Professor LoPucki, the elimination of a local court's discretion to deny the enforcement of a foreign bankruptcy order would result in international forum shopping.¹⁰ Professor LoPucki contends that the promotion of international venue shopping is among the worst of the evils of universalism because it has the potential for causing more economic harm than domestic forum shopping.

Professor LoPucki's article comes from his new book, *Courting Failure*.¹¹ The remainder of the book concerns domestic venue shopping and is based on Professor LoPucki's database of information on large publicly held companies that have filed bankruptcy since October 1, 1979 (when the present Bankruptcy Code went into force). In contrast, the materials on international insolvency lack the same moorings in empirical evidence.

I disagree with Professor LoPucki's view that universalism is bad. In my view, territorialism is much worse, and I support the effort to replace it with a modified version of universalism. While none of the legal regimes to which Professor LoPucki refers embodies a pure universalist view,¹² they do all adopt something close to modified universalism. I argue that an international legal regime based on a modified universalist viewpoint can bring us much closer to the appropriate administration of international insolvency cases than territorialism. History shows that Professor LoPucki's proposal for a "modified" version of territorialism is altogether unworkable.

I agree with Professor LoPucki that the unregulated version of universalism of recent years can lead to courts deciding to keep cases that should be sent to the courts of another country.¹³ In my view, a lack of structured rules governing the venue of transnational insolvency cases is responsible for this development. While the Model Law and the EU Regulation are quite

⁷Transnational Insolvency Project: Principles of Cooperation in Transnational Insolvency Cases Among the Members of the North American Free Trade Agreement (2003). I do not discuss substantially here the NAFTA Principles, because they are not presently in force anywhere, and the adoption of the important provisions for venue purposes depends primarily on implementing legislation that has not been adopted and is not presently pending.

⁸11 U.S.C. § 304 (2005).

⁹See LoPucki, *Global and Out of Control*, *supra* note 2, at 86-89.

¹⁰See *id.* at 79.

¹¹LYNN M. LOPUCKI, *COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS* (2005) (hereinafter "COURTING FAILURE").

¹²In contrast, the International Bar Association's Committee J Cross-Border Insolvency Concordat adopts a view that is much closer to a pure universalist position. See Int'l Bar Ass'n, Comm. J Cross-Border Insolvency Concordat, Sept. 17, 1995 (see especially Principle 1), reprinted in SAMUEL L. BUFFORD ET AL., *INTERNATIONAL INSOLVENCY*, Appendix A (2001).

¹³See LoPucki, *Global and Out of Control*, *supra* note 2, at 80-81.

different, the principal purpose of both is to impose a structure on venue decisions in insolvency cases with international dimensions. They need several modest improvements to further reduce the opportunities for unwise international forum shopping.

The venue rules in the EU Regulation and the Model Law are largely untested. In no reported case yet has the location of the main case been governed by any domestic version of the Model Law. There are a substantial number of non-controversial cases under the EU Regulation. *Daisytek* and *Eurofood*, which I discuss *infra*, are the main controversial cases. I do not defend venue decisions in international cases in the absence of the rules imposed by the Model Law or the EU Regulation. The important news is that the Model Law and the EU Regulation will make important changes in the venue decisions in transnational insolvency cases, and § 304 will disappear.

I defend the rules under the Model Law and the EU Regulation with three qualifications. First, both the Model Law and the EU Regulation need to separate the decision to open an insolvency case from the determination of when an insolvency case is a main case,¹⁴ and to provide different time frames for making these decisions. Further, the determination that a case is a main case should only be made after notice to the parties in interest. Second, both the Model Law and the EU Regulation should be amended to provide that main cases for the economically integrated entities in a corporate group may all be located in the same venue. As presently structured, both the Model Law and the EU Regulation require the treatment of each legal entity separately for the purpose of determining the location of its center of main interests (hereinafter “COMI”), which in turn determines the proper location of its main insolvency case. This needs modification, in my view, to permit the reorganization or liquidation of an entire economic unit, which will be more efficient than dealing with its corporate parts separately.¹⁵

Third, I recommend a “residency” rule like that in the United States,¹⁶ which would require that an international business enterprise have its COMI in a country for a minimum period of time before qualifying to file a

¹⁴A “main case” is one that should or must be recognized by courts of other countries. See *infra* notes 94-100 and accompanying text. The Model Law and the EU Regulation should also separate the granting of any “first day” orders from the determination of whether a case should be recognized by courts of other countries. See discussion in text accompanying notes 197-203 *infra*.

¹⁵This presumption should be rebuttable in a particular case. In fact, a decision to split off a corporate subsidiary for liquidation or reorganization in a different national venue may come later in a case, such as when it appears that an economic unit should be reorganized but that a particular entity should be excluded from the reorganization. At this point, if the entity is located abroad, it may be more efficient to deal with it in its home country, and its case should be transferred there pursuant to whatever procedure may be available.

¹⁶See *infra* notes 228-34 and accompanying text.

domestic enterprise-wide bankruptcy case. While this rule change would not prohibit venue shopping, it would make such shopping more difficult.

Unlike Professor LoPucki, I endorse the recent adoption of the domestic version of the Model Law as Chapter 15 of the U.S. Bankruptcy Code. The Model Law has already been adopted in a number of other major countries, including Japan, Canada and Mexico, and its adoption in England is expected imminently.¹⁷ It is time for the United States to join its trading partners in a legal regime that will better coordinate international insolvency cases.¹⁸

The remainder of this Article details my disagreements with Professor LoPucki. Part I discusses universalism and territorialism,¹⁹ especially the modified version of universalism that I support. Part II examines the international venue provisions of the Model Law and the EU Regulation. Part III introduces the relevant venue shopping cases. Only two groups of cases are relevant for the purposes of this paper: the French and German subsidiaries of Daisytek, and Eurofood (a subsidiary of Parmalat SpA, the Italian conglomerate). None of the other cases that Professor LoPucki discusses was subject to the venue provisions of either the EU Regulation or the Model Law. Part IV explains the amendments that I believe are needed for the EU Regulation and the Model Law to deal more effectively with venue decisions, and discusses how these changes would affect the venue decisions in *Eurofood* and the continental Daisytek subsidiaries. Finally, Part V contains concluding remarks.

I. UNIVERSALISM AND TERRITORIALISM

Universalism and territorialism are the two dominant theories of how bankruptcy laws should be structured to deal with international business insolvencies. The traditional approach is territorialism, where “the courts in each national jurisdiction seize the property physically within their control and distribute it according to local rules.”²⁰ In contrast, universalism in its pure form takes the view that all bankruptcy assets and claims should be resolved in the debtor’s “home country” under the laws of that country.²¹ Modified universalism takes the view that a non-home country court may open a secondary insolvency case to supplement the home country dominant

¹⁷Other countries that have adopted the Model Law include Poland, Romania, South Africa, Thailand, Serbia, Montenegro and Eritrea. Adoption is pending in New Zealand.

¹⁸As an additional benefit, international venue shopping will be more difficult under this proposed regime.

¹⁹Universalism and territorialism are often respectively referred to as “universality” and “territoriality.”

²⁰Andrew T. Guzman, *International Bankruptcy: In Defense of Universalism*, 98 MICH. L. REV. 2177, 2179 (2000); see also, e.g., Jay Lawrence Westbrook, *Choice of Avoidance Law in Global Insolvencies*, 17 BROOK. J. INT’L L. 499, 513 (1991).

²¹See, e.g., Guzman, *supra* note 20, at 2179.

case for a debtor.²² In the absence of a secondary case, the modified universalist view agrees with pure universalism that the entire case should be administered under the local law of the venue (except to the extent that choice of law rules lead to the application of foreign law).

Universalism has developed a specialized terminology. The dominant case in the “home country” is called the “main” case or proceeding.²³ A case in any other country is called a “secondary”²⁴ or “non-main”²⁵ case or proceeding. This terminology is unnecessary under the territorialist view; for a territorialist, every case is a main case within the country where it is filed, and each case has little effect outside that country.

None of the problems of either territorialism or universalism would arise if bankruptcy laws did not exist.²⁶ However, every country except Ghana has a bankruptcy law of some kind.²⁷ In addition, neither Professor LoPucki nor I take the view that bankruptcy laws should generally be repealed. We agree that bankruptcy laws are important to provide for the orderly liquidation or reorganization of businesses.²⁸ Our disagreement in these papers²⁹ centers on the theory behind how such laws should be designed to administer insolvency cases that extend beyond national borders.

A general examination of the problems of territorialism or the benefits of universalism is beyond the scope of this paper. Both Professor LoPucki³⁰ and I agree that neither territorialism nor universalism is a perfect solution to the problems that bankruptcy laws are designed to address. Our disagreement arises because he contends that a modified version of territorialism provides the best available solution to the administration of international bankruptcies,

²²Modified universalism is the version that I and virtually all other defenders of universalism follow—especially in the current international state of economic and legal development.

²³See, e.g., Model Law, art. 2(b) (defining “foreign main proceeding”); EU Regulation, art. 3.4 (authorizing the opening of a secondary proceeding before a main proceeding in certain circumstances).

²⁴See, e.g., EU Regulation, art. 3.3. I use the term “secondary” to refer to all non-main cases.

²⁵See Model Law, art. 2(c).

²⁶For a discussion of how businesses would be reorganized or liquidated without a bankruptcy system, see Douglas G. Baird, *A World Without Bankruptcy*, 50 *LAW & CONTEMP. PROBS.* 173 (1987).

²⁷While Ghana has drafted a bankruptcy law, it has yet to adopt one. See *Insolvency Bill, GPC/A231/300/5/2001* (on file with author).

²⁸The discussion of universalism and territorialism has developed almost exclusively in the domain of business bankruptcy. While virtually every country has a business bankruptcy law, consumer bankruptcy laws only exist in relatively few countries. In addition, the international dimensions of consumer cases raise issues beyond the scope of this discussion.

²⁹I have other disagreements with Professor LoPucki as to the themes of the other chapters of *COURT-ING FAILURE*; however, these issues are beyond the scope of this Article.

³⁰Professor LoPucki’s modified territorial views are explained more fully in two previous articles. See LoPucki, *Cooperative Territoriality*, *supra* note 4, at 2216; LoPucki, *Cooperation in International Bankruptcy*, *supra* note 4, at 696. This paper draws liberally from Professor LoPucki’s elaboration of his views in those pieces.

while I contend that a modified version of universalism provides a much better solution.

The problems that Professor LoPucki identifies do not arise from universalism, but from its imperfect development in bankruptcy law and practice today. While territorialism would mitigate such problems by preventing some of them from occurring, the cure is far worse than the disease.

A. UNIVERSALISM

Universalism comes in two forms: pure universalism and modified universalism. The pure form is idealistic, and is altogether impractical in a world with differing legal regimes, differing political and economic systems, differing court systems, and differing levels of realization of the rule of law.

Universalism yields a variety of benefits. These include a more efficient *ex ante* allocation of capital, reduced administrative costs due to a reduction in the number of proceedings, facilitated reorganizations, substantially increased liquidation value, and greater clarity and certainty to all parties in interest in most circumstances.³¹

1. *Pure Universalism*

In its pure form, universalism would have a single insolvency regime that is coextensive with the global economic structure, and that would govern all international insolvency cases. Under such a regime, there would be one main insolvency case for each business entity that would administer all of the entity's assets worldwide.³² That forum would manage the case, collect the assets, regulate a reorganization, and provide for the payment of creditors.³³ Similarly situated creditors in all countries would be treated equally. The case would be governed by a single legal regime governing the substantive rights of the parties in interest, which would eliminate conflicts among applicable laws that could vary the rights of either the creditors or the debtor and its owners.³⁴ The case would also be governed by one set of procedural rules

³¹See generally, Kent Anderson, *The Cross-Border Insolvency Paradigm: a Defense of the Modified Universal Approach Considering the Japanese Experience*, 21 U. PA. J. INT'L ECON. L. 679, 687-94 (2000); Lucian A. Bebchuck & Andrew T. Guzman, *An Economic Analysis of Transnational Bankruptcies*, 42 J.L. & ECON. 775, 778 (1999); Guzman, *supra* note 20, at 2179; Robert K. Rassmussen, *A New Approach to Transnational Insolvencies*, 19 MICH. J. INT'L L. 1, 6-10 (1997); Donald T. Trautman et al., *Four Models for International Bankruptcy*, 41 AM. J. COMP. LAW 573, 575-76 (1993); Jay Lawrence Westbrook, *A Global Solution to International Default*, 98 MICH. L. REV. 2276, 2292-98 (2000); Jay Lawrence Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L.J. 457, 465 (1991); Westbrook, *supra* note 20, at 514-15.

³²See, e.g., Westbrook, *A Global Solution to International Default*, *supra* note 31, at 2292-93; Trautman, *supra* note 31, at 575-76.

³³See, e.g., Westbrook, *A Global Solution to International Default*, *supra* note 31, at 2292-93; Trautman, *supra* note 31, at 575-76.

³⁴See, e.g., Westbrook, *A Global Solution to International Default*, *supra* note 31, at 2292-97.

that would provide for its commencement or opening, its administration and its closing.

The case for pure universalism is easy to state in economic terms.³⁵ As a general rule, economic transactions are most efficient and create the greatest economic value when they are unencumbered with transaction costs.³⁶ Debt collection inherently involves transaction costs. Bankruptcy systems are designed to reduce these collection costs through collective action.³⁷ However, multiple bankruptcy cases tend to defeat the benefits of collective action by multiplying the costs of participation and administration.³⁸ Thus the collective ideal is best achieved where a single main insolvency case handles everything that needs to be done to protect creditors, to reorganize or to liquidate business, to protect jobs, and to provide for an orderly and economical administration of the case. Furthermore, such a system decreases lending costs and does not skew investment choices.³⁹ In addition, a single court would improve dramatically the possibility of reorganization⁴⁰ and the preservation of the going concern value of an international business group.

Transaction costs are particularly problematic for international bankruptcies. Multiple insolvency cases in several countries for the same debtor duplicate transaction costs and vastly decrease economic efficiency. In addition, where languages are different, the costs of translation further reduce efficiency. Differences in legal systems also add substantial costs because the decision makers must educate themselves in the laws of every country involved. In sum, multiple bankruptcy cases in different countries multiply the transaction costs of bankruptcy enormously,⁴¹ and justify substantial efforts to harmonize such cases.

2. Modified Universalism

We do not live in a world with a single insolvency regime, or even with closely aligned regimes. Each country has its own insolvency system, and the differences are often dramatic.

Two examples illustrate the difference in insolvency systems. The French insolvency law, adopted in 1985, presumes that a business should be reorganized, not liquidated,⁴² and bankruptcy cases are normally initiated as

³⁵For a defense of pure universalism, see Liza Perkins, Note, *A Defense of Pure Universalism in Cross-Border Corporate Insolvencies*, N.Y.U. J. INT'L L. & POL. 787 (2000).

³⁶See, e.g., Rasmussen, *supra* note 31, at 27.

³⁷See, e.g., THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* 5 (1986).

³⁸See Perkins, *supra* note 35, at 805-06.

³⁹See, e.g., Rasmussen, *supra* note 31, at 27; Bebchuk & Guzman, *supra* note 31, at 778.

⁴⁰See, e.g., Westbrook, *A Global Solution to International Default*, *supra* note 31, at 2293.

⁴¹See, e.g., *In re Board of Dirs. Of Multicanal S.A.*, 314 B.R. 486, 522 (Bankr. S.D.N.Y. 2004).

⁴²See C. COM., art. L. 620-1. However, a 1994 amendment permits the court to order immediate liquidation where business has ceased or rescue is manifestly impossible.

reorganizations.⁴³ The goals of the French insolvency system, in order, are “(1) permitting the survival of businesses, the preservation of employees and employment, and (2) the discharge of their liabilities.”⁴⁴ The third statutory priority, the payment of creditors, is a goal that often is not reached.⁴⁵ In contrast, the German insolvency law presumes that a business should be liquidated, not reorganized, and a reorganization is undertaken only if the creditors choose this route after the insolvency administrator reports on the debtor’s economic situation.⁴⁶

Modified universalism shares the view that there should be a single main case for an international business in its home country, governed for the most part by the laws of the home country. However, modified universalism recognizes that the main case may need support through secondary or ancillary cases in other countries where assets are located or local court support is otherwise needed.⁴⁷ A local court, under this view, normally applies domestic law to its proceedings, and it retains the discretion to evaluate the fairness of home country procedures and to protect the interests of local creditors where appropriate.⁴⁸

Modified universalism recognizes that the substantive rights of the parties in interest in an insolvency case may differ substantially, depending on the country where the insolvency case is filed. To participate in a foreign case, creditors must learn the applicable procedures, must often hire local counsel to protect their rights, and must often deal with language differences.

Where legal systems are different, the economic analysis is more complex for modified universalism than for pure universalism. In calculating expected economic benefits, parties are assumed to take into account the legal systems and rules that will likely govern how their transactions are carried out and the benefits are allocated. In addition, the parties must evaluate the risks undertaken, including how these risks will be handled under the applicable legal system. If it is uncertain what legal system will govern the risks, it is difficult to quantify them. Where the distribution rules of legal systems are different, the ultimate beneficiaries of transactions may differ from those the parties have anticipated *ex ante*. Thus the application of varying distribution rules may result in the parties entering into sub-optimal transactions, and

⁴³See Jean-Michel Lucheux, *Draft Bill on Reorganization, Projet de Loi de Sauvegarde des Entreprises*, at http://www.iiiglobal.org/country/france/Draft_Bill_France.pdf.

⁴⁴See C. COM., art. 620-1.

⁴⁵See Richard L. Koral & Marie-Christine Sordino, *The New Bankruptcy Reorganization Law in France: Ten Years Later*, 70 AM. BANKR. L.J. 437, 453 (1996).

⁴⁶See § 156-59 InsO.

⁴⁷See, e.g., Westbrook, *A Global Solution to International Default*, *supra* note 31, at 2300-01; Westbrook, *Choice of Avoidance Law in Global Insolvencies*, *supra* note 20, at 514-15.

⁴⁸See, e.g., Westbrook, *A Global Solution to International Default*, *supra* note 31, at 2301.

leave them poorer than they would have been otherwise.⁴⁹

The procedure developed to reduce the inefficiencies of a universalist insolvency system is to authorize the commencement and prosecution of secondary cases to liquidate local assets and protect local creditors in a particular country. Secondary cases are territorial, for the most part, under both the EU Regulation and the Model Law.⁵⁰

In this debate I defend the modified version of universalism with qualifications. With recommended improvements, I believe that universalism's economic impact is far better than territorialism's, including Professor LoPucki's "cooperative" version.

B. TERRITORIALISM

Territorialism is the view that a bankruptcy case should be used only to administer the domestic assets of a multinational debtor under domestic law for the benefit of domestic creditors, whether through reorganization or liquidation.⁵¹ According to this view, assets located abroad should be administered in their own cases in the countries where they are located,⁵² without much regard for the enterprise as a whole.⁵³ For a long time, territorialism was the dominant approach of national bankruptcy laws. This was the domi-

⁴⁹To illustrate how universalism is supposed to work, Professor LoPucki invites us to assume that DaimlerBenz (now DaimlerChrysler AG) has filed a bankruptcy case in Germany. See LoPucki, *Global and Out of Control*, at 79-80. The German court, he says, would administer all of the company's assets in the U.S., as well as in other countries, under the laws of Germany. German law would govern the priorities of U.S. employees and customers, and U.S. courts would be required to enforce the German court orders. See *id.*

This dramatic scenario is unlikely, however, for two very important reasons. First, like any well-advised corporation, DaimlerChrysler has separately incorporated its U.S. operations, as well as those in each of the other countries where it does business. Indeed, DaimlerChrysler operates through nearly a thousand subsidiaries and affiliates. See *Statement of Investments in affiliated, associated and related Companies of DaimlerChrysler AG (DCAG) at December 31, 2004* according to § 313(2) HGB (German Commercial Code), at [http://www.daimlerchrysler.com/dccom/Investor Relations/Reports/Subsidiary List Group 2004.pdf](http://www.daimlerchrysler.com/dccom/Investor%20Relations/Reports/Subsidiary%20List%20Group%202004.pdf). Thus likely it would take a U.S. bankruptcy case to handle the insolvency of the U.S. DaimlerChrysler business, and U.S. law would determine the rights of the employees and customers, even those dealing with Mercedes automobiles sold in the United States.

A second reason that the German case and German court would not determine the rights of U.S. employees and customers is that a secondary case or cases would surely be filed in the United States if there are no U.S. main cases for the U.S. subsidiaries. See notes 131-49 *infra* and accompanying text. The secondary cases would administer U.S. assets and deal with U.S. problems relating to employees and customers.

⁵⁰See *infra* notes 137-43 and accompanying text (the EU Regulation); notes 144-54 and accompanying text (the Model Law).

⁵¹See LoPucki, *Cooperation in International Bankruptcy*, *supra* note 4, at 742-43.

⁵²See *id.* at 742.

⁵³See, e.g., *In re Board of Dirs. Of Multicanal S.A.*, 314 B.R. 486, 522 (Bankr. S.D.N.Y. 2004) (describing traditional territorialism).

nant view in the United States until at least the 1970s.⁵⁴ Similarly, Japan's three principal bankruptcy laws were thoroughly territorial until 1999, after which a tide of change swept territorialism out of its insolvency laws altogether.⁵⁵

Briefly, the defects of territorialism are as follows. First, the bankruptcy costs for an international business are enormously multiplied by the necessity of a parallel insolvency case in each country where assets are located.⁵⁶ Each jurisdiction requires separate administration, separate filing and evaluation of claims, and separate prosecution of relevant litigation.⁵⁷ Second, reorganization is much more difficult to achieve in a territorialist regime because it decreases liquidation values and makes coordination of cases extremely complex.⁵⁸ Third, conflicts between jurisdictions and courts can easily develop. Fourth, creditors cannot know in advance where the debtor's assets will be located when bankruptcy intervenes, which causes a less efficient *ex ante* allocation of capital.⁵⁹ Fifth, distribution results are both uneven, violating the bankruptcy principle of treating similarly situated creditors equally,⁶⁰ and unpredictable, increasing the cost of capital because of the uncertain outcome if insolvency supervenes.⁶¹ Finally, under territorialism, both the debtor and individual creditors can engage in strategic behavior to advance their private interests at the expense of the general interests of creditors.⁶²

1. "Cooperative" Territorialism

Professor LoPucki does not directly confront these criticisms of territorialism. Instead, he proposes a "cooperative territorialism," which he claims will ameliorate these problems. The proposed amelioration does not work.

Professor LoPucki's version of territorialism qualifies the concept in three respects.⁶³ First, an asset is located in a country, for the purposes of bank-

⁵⁴See Charles D. Booth, *Recognition of Foreign Bankruptcies: An Analysis and Critique of the Inconsistent Approaches of United States Courts*, 66 AM. BANKR. L.J. 135, 139-47 (1992).

⁵⁵See generally, Samuel L. Bufford & Kazuhiro Yanagida, *Civil Rehabilitation and Corporate Reorganization Law in Japan*, 39 CORNELL INT'L L.J. (forthcoming 2005) (describing the new Civil Rehabilitation Law and Corporate Reorganization Law in Japan).

⁵⁶See, e.g., Westbrook, *A Global Solution to International Default*, *supra* note 31, at 2309; Anderson, *supra* note 31, at 698-99.

⁵⁷See, e.g., Westbrook, *A Global Solution to International Default*, *supra* note 31, at 2309.

⁵⁸See, e.g., *id.*; Guzman, *supra* note 20, at 2202-04.

⁵⁹See, e.g., Guzman, *supra* note 20, at 2179 (stating the benefits of universalism, in contrast to territorialism); Bebhuk & Guzman, *supra* note 31, at 788-806.

⁶⁰See, e.g., Lore Unt, *International Relations and International Insolvency Cooperation: Liberalism, Institutionalism, and Transnational Legal Dialogue*, 28 LAW & POL'Y INT'L BUS. 1037, 1043 (1997).

⁶¹See *id.*

⁶²See Westbrook, *A Global Solution to International Default*, *supra* note 31, at 2309-11.

⁶³See LoPucki, *Cooperation in International Bankruptcy*, *supra* note 4, at 742-49. Professor LoPucki includes a fourth discussion, that cooperative territorialism will eliminate tensions between countries and provide a foundation for cooperation in insolvency cases. See *id.* at 750. This is not a change from traditional territorialism.

ruptcy administration, only if that country has *de facto* power over the asset.⁶⁴ Second, the host country may freely discriminate against foreign creditors.⁶⁵ Third, a transfer of assets abroad by the debtor is treated as a transfer to a different entity.⁶⁶

According to Professor LoPucki, such a regime would establish a foundation for "cooperation among courts and representatives that will be mutually beneficial in each case."⁶⁷ The cooperation "contemplated" includes (1) "establishment of procedures for replicating claims among the cases in various jurisdictions,"⁶⁸ (2) sharing distribution lists to make sure that no creditor receives more than full payment on its claim,⁶⁹ (3) joint sale of assets when it would be advantageous,⁷⁰ (4) "the voluntary investment by representatives in one country in the debtor's reorganization effort in another,"⁷¹ and (5) "seizure and return of assets that have been the subject of avoidable transfers."⁷²

Professor LoPucki states that there are two ways to achieve cooperation. First, countries will need to cooperate on a variety of matters through treaty or convention.⁷³ However, the history of bankruptcy treaties gives us little reason for optimism that a treaty or convention is likely to be developed to assist in cooperation under a territorial regime.⁷⁴ The only treaties with any consequential effect have been isolated.⁷⁵

The second method of cooperation, according to Professor LoPucki, is that his version of cooperative territorialism "is designed to serve as a foundation for, and to encourage, mutually beneficial cooperation by the representatives of particular bankruptcy estates."⁷⁶ However, examples abound of the

⁶⁴See *id.* at 743-44.

⁶⁵See *id.* at 744-48. Professor LoPucki does not state clearly how foreign creditors are to be treated. It may be that he thinks they may be excluded altogether.

⁶⁶See *id.* at 748-49. Professor LoPucki states that implementing this rule would require treaties providing for the return of fleeing assets. See *id.* at 749. He optimistically believes that negotiating treaties of this sort would not be difficult; however, I would be very surprised to see such a treaty anywhere in the world in my lifetime.

⁶⁷See *id.* at 750.

⁶⁸*Id.*

⁶⁹*Id.*

⁷⁰*Id.*

⁷¹*Id.*

⁷²See *id.*

⁷³See *id.* at 742. See also *id.* at 758-59 (admitting that the problem of strategic removal of assets before bankruptcy is a greater problem under a territorial regime than under a universalist regime).

⁷⁴See generally, BUFFORD, *supra* note 12, at 53-54 (noting that there have been few international treaties regulating transnational insolvency cases); Kurt H. Nadelmann, *Bankruptcy Treaties*, 93 U. PA. L. REV. 58, 61-68 (1944) (cataloguing European insolvency treaties up to 1948).

⁷⁵See generally, Nadelmann, *supra* note 74, *passim*.

⁷⁶See LoPucki, *Cooperation in International Bankruptcy*, *supra* note 4, at 742.

lack of cooperation by courts applying territorialist laws, and examples of cooperation are virtually unknown.

The Japanese *Maruko* case is a good example of the failure of territorialism.⁷⁷ Under the territorial regime then in place in Japan, the Japanese court could not enjoy a foreclosure on a major resort development on the Gold Coast of Australia.⁷⁸ In addition, an Australian bankruptcy case would not immediately stop the pending foreclosure because the automatic stay in Australia did not apply to secured creditors.⁷⁹ The value in the Australian property (as well as properties in Canada) was protected only by the filing of a Chapter 11 case in the United States. Because the lenders with security interests in the Australian property did substantial business in the United States, they decided to honor the U.S. automatic stay with respect to both the Australian and the Canadian properties.⁸⁰ The properties were sold for their economic values, the lenders were paid in full, and the universalist solution provided by U.S. bankruptcy law achieved a much larger return for creditors than could be achieved through the territorial Japanese law.

Professor LoPucki provides little reason to think that any cooperation would actually take place if his view is adopted. He points to no inducements that would lead to any such cooperation. Essentially none of this kind of cooperation has taken place in the past, and Professor LoPucki gives no reason why his kind of territorialism would be any different.

Professor LoPucki argues incorrectly that the delays resulting from commencing a case in each country (which alone can take several months in France and in many other countries), obtaining the appointment of an administrator and negotiating a deal between administrators from the various countries would likely be faster than filing an ancillary proceeding outside the country of the location of the COMI and collecting the assets.⁸¹ Under the EU Regulation, the most completely universalist system now in place, the opening of a main insolvency case is automatically and immediately effective throughout the EU.⁸² The administrator in the main case has community-wide authority⁸³ with no further formalities.⁸⁴ The substantial delays in

⁷⁷For a general description of the *Maruko* case, see 1 CARL FELSENFELD ET AL., *INTERNATIONAL INSOLVENCY* 6-36 to 6-38 (2003).

⁷⁸See Shinichiro Abe, *Recent Developments of Insolvency Laws and Cross-Border Practices in the United States and Japan*, 10 AM. BANKR. INST. L. REV. 47, 75 (2002).

⁷⁹See *id.*

⁸⁰See *id.*

⁸¹See LoPucki, *Cooperation in International Bankruptcy*, *supra* note 4, at 756-57.

⁸²See EU Regulation, arts. 16 & 17.

⁸³An international case under the European regulation can be expedited by the appointment of a liquidator who speaks the relevant languages. Alternatively, co-liquidators may be appointed, which may include the liquidators in the relevant foreign cases. For example, the Dublin High Court could have appointed Dr. Enrico Bondi, the Italian Parmalat administrator, as a co-liquidator in its *Eurofood* case.

⁸⁴See EU Regulation, art. 18.1. The only exception to this rule arises in a country where a secondary

opening a case which would be required in a territorialist system, as well as the other delays inherent in such a system, are avoided altogether. While the Model Law requires a court order, it essentially relies on motion practice which can be done quite quickly in most countries. Territorialism, even the cooperative kind, proceeds at a snail's pace in comparison.

Professor LoPucki argues that cooperative territorialism is in fact the system in place in the world today.⁸⁵ I disagree. Modified universalism of the sort I describe here, but without the improvements that I recommend, is the law in all of the major industrial countries in the world, and in all but one of the twenty-five members of the European Union (by reason of the EU-wide application of the EU Regulation). The last of the major industrial countries to jettison territorialism was Japan, where it has disappeared in the last five years.⁸⁶

Professor LoPucki also points to protocols as examples of cooperative territorialism at work.⁸⁷ However there are only twenty-five or thirty cases where protocols have been adopted.⁸⁸ Furthermore, protocols are almost universally adopted only in cases where each country involved is universalist, and are virtually unknown in territorialist countries.

In short, Professor LoPucki proposes nothing in his "cooperative territorialism" to mitigate the known faults inherent in territorialism. Mainly he argues that universalism has its own problems that make it even worse. While universalism does have problematic aspects, the balance weighs heavily on the side of universalism as the more efficient approach to international insolvencies, in my view.

II. THE MODEL LAW AND THE EU REGULATION

The two major sources of law for international cooperation in transnational insolvency cases are the Model Law and the EU Regulation,⁸⁹ which were both drafted in the 1990s and are roughly contemporaneous. The EU Regulation, the first drafted, was originally prepared as a stand-alone treaty

proceeding (which is strictly territorial) is opened, in which case the powers of the liquidator in the main case are subject to the secondary proceeding. *See id.*

⁸⁵See LoPucki, *Cooperative Territoriality*, *supra* note 2, at 2220.

⁸⁶See *supra* note 55 and accompanying text.

⁸⁷Most of the major protocols are available on the International Insolvency Institute website. See <http://www.iiiglobal.org/international/protocols.html>.

⁸⁸E-mail from Bruce Leonard, President of International Insolvency Institute, to Lynn M. LoPucki and Hon. Samuel L. Bufford (March 6, 2005 at 07:29 EST (on file with author)).

⁸⁹Professor LoPucki also refers to a third system, the American Law Institute's Transnational Insolvency Project under the North American Free Trade Agreement. See American Law Institute, *Transnational Insolvency Project: Principles of Cooperation in Transnational Insolvency Cases Among the Members of the North American Free Trade Agreement* (2003). While this project contains many good recommendations, it has not yet been adopted as law by any country.

for the EU Member States.⁹⁰ After completion of the drafting in 1995, it foundered on the United Kingdom's mad cow disease problem in 1996.⁹¹ On a separate track, UNCITRAL drafted the Model Law for adoption as internal legislation in any country, and issued it in 1997. After the promulgation of the Model Law and the 1999 expiration of the period for signing the EU treaty, the EU revived the EU Regulation project and promulgated it as an EU regulation in 2000, and it became effective in 2001. Both the EU Regulation and the Model Law are more or less workable,⁹² and are actually in operation in the world today. Professor LoPucki correctly claims that both systems rely on a modified universalist viewpoint.⁹³ These are two of the major sources, he contends, of coming venue shopping that will bring untold problems to the international bankruptcy world. I now take a closer look at each system.

A. COMMON FEATURES OF THE MODEL LAW AND THE EU REGULATION

Both the Model Law and the EU Regulation give primacy to an insolvency case that is opened in a debtor's "home country." Only that case can be a main case, the opening of which is entitled to recognition in other countries where the Model Law or the EU Regulation is in force. All cases in other countries subject to the Model Law or the EU Regulation are secondary to this main case.

In the last decade, universalists have settled on a concept to identify the home country of a multinational business entity. The home country, for the purposes of a main insolvency case, is the country where the COMI of the entity is located. This is the key concept used by the Model Law,⁹⁴ the EU Regulation⁹⁵ and the NAFTA principles.⁹⁶ The country where the COMI is located is the proper location for the main case,⁹⁷ and cases in other coun-

⁹⁰See generally, IAN F. FLETCHER, *THE LAW OF INSOLVENCY* ¶¶ 31-015 to 31-017 (2002).

⁹¹Mad cow disease broke out in the cattle herds in the United Kingdom in 1996, and in consequence the continental EU countries imposed a ban on the importation of UK beef. Upset with this course of events, the United Kingdom refused to sign the EU Insolvency Convention. See 1 FELSENFELD *supra* note 77, at 5-16 n.47.

⁹²The workability of the EU Regulation is put to the test in the *Eurofood* and *Daisytek* cases. See *infra* notes 160-96 and accompanying text.

⁹³There are some respects in which each of these models is not universalist. However, these factors are largely irrelevant to the discussion in this paper.

⁹⁴See Model Law, art. 2(b); see generally Bob Wessels, *International Jurisdiction to Open Insolvency Proceedings in Europe, in Particular Against (Groups of) Companies* 4-10 (2003), at http://www.iinglobal.org/country/european_union.html (explaining concept of COMI under EU Regulation).

⁹⁵See EU Regulation, art. 3.1.

⁹⁶See NAFTA Principles, *supra* note 7.

⁹⁷See EU Regulation, art. 3.1; Model Law, art. 2(b).

tries should generally be limited to secondary cases.⁹⁸ The law governing the insolvency case, for the most part,⁹⁹ is that of the country where the COMI is located and where the main case belongs.¹⁰⁰

The challenge, according to Professor LoPucki, is to determine where the COMI is located. Both the Model Law and the EU Regulation answer this question, at least in part. The Model Law provides: "In the absence of proof to the contrary, the debtor's registered office . . . is presumed to be the centre of the debtor's main interests."¹⁰¹ The EU Regulation has a similar provision.¹⁰² Recital 13 of the preamble to the EU Regulation amplifies on this concept as follows: "The 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties."¹⁰³

The EU Regulation gives critical importance to two factors in determining the location of the COMI. First, the COMI is located at the place where the debtor conducts the administration of its interests on a regular basis, which essentially means the place where it administers its commercial, industrial or professional activities.¹⁰⁴ Second, this is an objective test based on what is apparent to third parties, and especially to creditors.¹⁰⁵ Thus a creditor's view of where the COMI is located is an important factor. Virgós & Schmit explain the rationale for this rule: "Insolvency is a foreseeable risk. It is therefore important that international jurisdiction be based on a place known to the debtor's potential creditors. This enables the legal risks which would have to be assumed in the case of insolvency to be calculated."¹⁰⁶ Under both the Model Law and the EU Regulation, each company has a single COMI, and can have only one main case.¹⁰⁷

⁹⁸See EU Regulation, art. 3.2-3.

⁹⁹Standard rules of conflict of laws (or international private law, as the subject is known outside the United States) should be applied in many contexts in insolvency cases, and in some instances these rules will dictate the application of foreign law in the forum of the main case. See, e.g., *In re Maxwell Communication Corp.*, 93 F.3d 1036, 1048-50 (2d Cir. 1996).

¹⁰⁰See note 34 *supra* and accompanying text.

¹⁰¹Model Law, art. 16(3).

¹⁰²See EU Regulation, art. 3.1.

¹⁰³*Id.* pmb., recital 13. In EU law, the EU Regulation preambles have been treated as authoritative as the main text of the regulation. See, e.g., *In re Eurofood IFSC, Ltd.*, [2004] IESC 47, at 10, available at <http://www.courts.ie/judgments.nsf>.

¹⁰⁴See Miguel Virgós & Etienne Schmit, *Report on the Convention on Insolvency Proceedings in GABRIEL MOSS ET AL., THE EC REGULATION ON INSOLVENCY PROCEEDINGS: A COMMENTARY AND ANNOTATED GUIDE* (2003). The Virgós & Schmit report was the principal report on the EU Convention on Insolvency Proceedings, which was converted into the EU Regulation by the substitution of articles 44-47 (implementing the EU Regulation) for articles 43-46 and 48-55 (providing formalities for treaty implementation).

¹⁰⁵See EU Regulation pmb., recital 13.

¹⁰⁶See *id.*

¹⁰⁷See, e.g., Berends, *supra* note 5, at 355.

Further, under both the Model Law and the EU Regulation, the COMI analysis must be made separately for each legal entity. Except in a general way, neither the Model Law nor the EU Regulation provides for the coordination of the insolvency cases of related entities. More specifically, neither system authorizes the filing or opening of a main case for a particular company in a specific country because a parent company or other affiliate has opened a main case in that country.¹⁰⁸ I disagree with this feature of both of these laws; in my view, if the related entities form a group that functions as an integrated economic unit, then venue for all of those related entities should be proper where the collective COMI is located.¹⁰⁹

B. THE MODEL LAW

The Model Law (and Chapter 15 of the U.S. Bankruptcy Code) is invoked by an application by a foreign representative for recognition of a foreign proceeding.¹¹⁰ Such recognition is required if the foreign proceeding meets the statutory definition, the foreign representative is duly authorized, the application meets the formal requirements and it is made in the proper court.¹¹¹ The court granting recognition must decide whether the foreign proceeding at issue is a main proceeding or a non-main proceeding.¹¹² The foreign proceeding must be recognized as a main proceeding if the debtor's COMI is located in that country, or as a non-main proceeding if the debtor only has an establishment¹¹³ there. Typically the judge in the foreign proceeding will not have previously decided whether that proceeding is a main proceeding.

The Model Law provides that, where a country has recognized a main case in another country, a subsequent domestic bankruptcy case in the recognizing country must be a secondary case of limited scope. Such a case is permitted only if assets of the debtor are located in the recognizing country.¹¹⁴ In general, such a subsequent secondary case may only affect the as-

¹⁰⁸It appears that the European Regulation authorizes a liquidator in a main case to open a secondary case for a related entity in the same country, notwithstanding that the related entity's COMI is located elsewhere. See EU Regulation, art. 29 & pmb. 19.

¹⁰⁹See *infra* notes 216-28 and accompanying text.

¹¹⁰See Model Law, art. 15(1). Article 15(2) specifies the evidence that must accompany an application for recognition.

¹¹¹See *id.*, art. 17(1). An exception to mandatory recognition is provided if recognition is manifestly contrary to the public policy of the forum country. See *id.* arts. 17(1) and 6.

¹¹²See *id.*, art. 17(2). If the debtor has neither its COMI nor an establishment in the country where the foreign proceeding is pending, the proceeding falls into a third category, which is neither a main nor a non-main proceeding.

¹¹³The Model Law defines establishment as, "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services." *Id.* art. 2(f).

¹¹⁴See *id.*, art. 28.

sets in the recognizing country¹¹⁵ (a clearly territorialist restriction). However, the Model Law does not require that a previously pending case in a recognizing country be limited to a secondary case.¹¹⁶ If a bankruptcy case is already pending in the country recognizing a foreign main case, the Model Law requires cooperation between the courts and the administrators in the respective cases.¹¹⁷

Secondary cases have important universalist components under the Model Law. The Law specifies that, upon the recognition of a foreign case as either a main or a secondary case, the court may, at the request of a qualified foreign representative, entrust the distribution of all or part of the debtor's domestic assets to that foreign representative or another person designated by the court.¹¹⁸ However, the Model Law imposes a territorial condition on such an order: the court must be satisfied that the interests of domestic creditors are adequately protected.¹¹⁹

C. THE EU REGULATION

The EU Regulation took effect on May 30, 2002 for all transnational insolvency cases opened on or after that date in the EU countries (other than Denmark, which exercised its right under its EU accession treaty to opt out of the EU Regulation coverage). The EU Regulation also applies, effective May 1, 2004, to the ten countries that joined the EU on that date.

The opening of a main case under the EU Regulation has four main consequences.¹²⁰ First, the proceedings of a main case are governed by the laws of the country where the case is opened.¹²¹ Second, a judgment opening a case receives automatic recognition in all member states from the date that it becomes effective in the home state.¹²² Third, in principle the opening of a main insolvency case produces the same effects in every member state as in the home state (except as the EU Regulation provides otherwise),¹²³ except

¹¹⁵*See id.* The Model Law also permits the administration of foreign assets in a secondary case if they may properly be administered under the recognizing country's insolvency laws. However, the administration of such assets is permitted only to the extent necessary to achieve cooperation and coordination with courts and representatives in other countries. *See id.*

¹¹⁶*See id.*, art. 29(a)(2).

¹¹⁷*See id.*, art. 29.

¹¹⁸*See id.*, art. 21(1)(e).

¹¹⁹*See id.*, art. 22(1).

¹²⁰*See generally*, Wessels, *supra* note 94, at 1-2.

¹²¹*See* EU Regulation, art. 4.

¹²²*See id.*, art. 16.

¹²³By way of exception, the EU Regulation provides that local law governs contracts for the sale or use of real property, settlement under payment or settlement systems for financial markets, contracts of employment, and rights in real estate, ships or aircraft subject to domestic registration systems. *See id.* arts. 8-11.

in a state where a secondary case is opened.¹²⁴ Fourth, again subject to the opening of a local secondary case, the administrator in the main case may exercise his or her powers in every EU state, including repatriating assets,¹²⁵ registering the judgment,¹²⁶ and publishing notice in member states. These effects may only be challenged in the home court for the main case.¹²⁷

In addition, a judgment opening a main case in any EU country imposes the domestic effects of that case throughout the EU, except to the extent that the EU Regulation provides otherwise.¹²⁸ For example, an automatic stay or moratorium under the laws of the forum country for the main case applies to all creditors in every EU country,¹²⁹ except as to rights in rem,¹³⁰ setoff rights¹³¹ and sellers' rights based on reservation of title.¹³²

The EU Regulation for the most part adopts a universalist view; it intends to encompass all of the debtor's assets on a world-wide basis and to affect all creditors, wherever located.¹³³ Only one main case may be opened for a particular debtor.¹³⁴ The EU Regulation is based on the principle of mutual trust among the EU countries:¹³⁵ they trust their sister EU countries with respect to both their insolvency laws and their court procedures.¹³⁶

D. SECONDARY CASES

In addition to the main case for a legal entity, both the Model Law and the EU Regulation contemplate the possibility of the filing of a secondary or non-main case in a different country for the same legal entity.

The EU Regulation permits the opening of a secondary case in any country where the debtor has an establishment,¹³⁷ which means, "any place of operations where the debtor carries on a non-transitory economic activity

¹²⁴See *id.*, art. 17.

¹²⁵See *id.*, art. 18.1.

¹²⁶See *id.*, art. 22.

¹²⁷See *id.*, art. 17.2.

¹²⁸See *id.*, arts. 4.1, 17.1.

¹²⁹The consequences may be different under the EU Regulation if the country where the main case is opened lacks an automatic stay. For example, under Dutch law there is no automatic stay, and a stay is typically issued by the court. For another example, in Hungary a stay is issued only if it is approved in the meeting of creditors. Because the exceptions in the EU Regulation appear to apply only to moratoria that arise automatically upon the opening of a case, Article 25 may require that a stay that is not automatic does affect rights in rem, set off rights and rights based on reservation of title.

¹³⁰See *id.*, art. 5.

¹³¹See *id.*, art. 6.

¹³²See *id.*, art. 7.

¹³³Virgós & Schmit, *supra* note 104, at 281.

¹³⁴See *id.*

¹³⁵See EU Regulation, pmb. 22.

¹³⁶See Wessels, *supra* note 94, at 14-15.

¹³⁷See EU Regulation, art. 3.2.

with human means and goods.”¹³⁸ The adoption of the law of the forum country for the main case, and its exportation throughout the EU, are substantially modified if a secondary case is opened in another EU country.¹³⁹ Under the EU Regulation, cooperative territorialism governs in part the rights of creditors and the administration of assets in a secondary insolvency case. The secondary case is governed by the local law of the country where it is opened.¹⁴⁰ While the EU Regulation requires that a secondary case be a liquidation case,¹⁴¹ it also authorizes the administrator in the main case to obtain a stay of the liquidation for three months at a time,¹⁴² and to propose a reorganization as authorized by the insolvency laws of the country where the secondary case is opened.¹⁴³

The Model Law is more complex. A court applying the Model Law must determine whether a foreign case given recognition is a main case or a secondary (“non-main”) case.¹⁴⁴ A foreign case may be recognized as a secondary case only if the country where it is located has an establishment of the debtor.¹⁴⁵ For these purposes, “establishment” is defined virtually the same way as in the EU Regulation.¹⁴⁶

While the EU Regulation provides for automatic recognition of a foreign insolvency case within the EU, the Model Law provides a simple procedure for the recognition of a case in another country, whether a main case or a secondary case. The automatic stay or moratorium of the Model Law takes effect in the recognizing country upon the recognition of a foreign main proceeding.¹⁴⁷ However, the moratorium applicable upon the recognition of a foreign main proceeding under the Model Law is the recognizing court’s own moratorium, while under the EU Regulation the applicable moratorium is that of the home country. In addition, upon the recognition of a foreign secondary case, the recognizing court may issue an order for appropriate relief, including a stay coextensive with the automatic stay resulting from the recognition of a foreign main case.¹⁴⁸

The domestic impact of the recognition of a foreign main case differs

¹³⁸*Id.*, art. 2(h).

¹³⁹*See id.*, arts. 27-38.

¹⁴⁰*See id.*, art. 27.

¹⁴¹*See id.*

¹⁴²*See id.*, art. 33.

¹⁴³*See id.*, art. 34.1. Professor LoPucki erroneously claims that this is not permitted. *See* LoPucki, *Global and Out of Control*, *supra* note 2, at 86-87.

¹⁴⁴*See* EU Regulation, art. 17(2).

¹⁴⁵*See id.*, art. 17(2)(b).

¹⁴⁶ The only difference is that the Model Law definition adds “or services” to the end of the definition, so that the economic activity supporting an establishment may be carried out with services as well as with goods. *See id.*, art. 2(f).

¹⁴⁷*See id.*, art. 20.

¹⁴⁸*See id.*, art. 21(1).

under the Model Law and the EU Regulation. Under the EU Regulation, a bankruptcy case in a country where the debtor's COMI is not located must be a secondary case.¹⁴⁹ Because a secondary case requires an establishment of the debtor, the EU Regulation prohibits the opening of an insolvency case in a non-COMI country where the debtor lacks an establishment.¹⁵⁰ In contrast, the Model Law permits a non-COMI country to commence an insolvency case under its own insolvency law where the debtor lacks even an establishment. All that is needed, for Model Law purposes, is that the debtor have assets in that country.¹⁵¹

A secondary case under the Model Law is rather like a cooperative territorialist case. In general, such a case is limited to the administration of the assets located in the host country.¹⁵² However, such a case may be used for two other purposes. First, it may be used to implement cooperation and coordination with foreign courts and representatives under the provisions of the Model Law.¹⁵³ Second, such a case may administer assets not in the host country, where the host country's law provides that such assets should be administered in a bankruptcy case in that country.¹⁵⁴

III. THE SCOPE OF INTERNATIONAL VENUE SHOPPING

There are many transnational insolvency cases with natural homes that are undisputed. It is uncontested that the main insolvency cases for the following international corporations were venued in the correct country: Daewoo (Korea), LG Card (Korea), Maruko (Japan), Air Canada (Canada), Parmalat (Italy), Swissair (Switzerland), Alstom (France), and Global Telesystems Europe BV (Netherlands). Likewise, I know of no dispute that the main cases for the following businesses were properly venued in the United States: United Airlines, Global Crossing, Daisytec International, and Global Telesystems Inc.¹⁵⁵ Proper venue was achieved in all of these cases without the application of the COMI analysis of the Model Law, and in most of the cases without the application of the EU Regulation's COMI rules. Furthermore, none of these cases needed the revisions to the COMI analysis that I propose here.¹⁵⁶

It is important to note the accomplishments of universalism in these cases. Universalism permitted the coordinated collection of assets, assessment of

¹⁴⁹See *id.*, art. 3.2.

¹⁵⁰See Wessels, *supra* note 94, at 11.

¹⁵¹See Model Law, art. 28.

¹⁵²See *id.*, art. 28.

¹⁵³See *id.*

¹⁵⁴See *id.*

¹⁵⁵The proper venue for subsidiaries is a complex issue. See *infra* notes 216-28 and accompanying text.

¹⁵⁶See notes 197-227 *infra* and accompanying text.

claims, sale of the business including its international subsidiaries, or whatever other procedures would lead to the successful reorganization or liquidation of these businesses.¹⁵⁷

As I understand it, Professor LoPucki does not contend that any of these cases was filed in the wrong country. His position is that there are other cases that were filed in the wrong country, and the consequences are so severe that universalism should be scrapped. Professor LoPucki gives five examples of such cases: *BCCI*,¹⁵⁸ *Eurofood*, *Daisytek*, *Ciro del Monte* and *Enron Directo*. Presumably, these are the worst cases, in his view.

I address only the *Eurofood* and *Daisytek* cases. I do not defend the venue results for the other cases because none except *Enron Directo*¹⁵⁹ was subject to the new international rules under the Model Law and the EU Regulation requiring that a debtor's COMI be located in the country where the main case is opened. Before taking up *Eurofood* and *Daisytek-F*, I look at international venue shopping of cases into the United States.

A. INTERNATIONAL VENUE SHOPPING INTO THE UNITED STATES

Serious international venue shopping, to the extent that it takes place, consists principally in the filing of cases in the United States for businesses with non-U.S. home countries. Most of Professor LoPucki's examples fall in this category.

There has never been any law requiring, for the opening of a main case in the United States, that the debtor's COMI be located in the United States. An international insolvency case may take either of two paths in the United States. One path is to open a complete main case, typically under Chapter 11 of the U.S. Bankruptcy Code. This path does not lead to a determination of the debtor's COMI, because no such decision is provided for under U.S. law.

¹⁵⁷Admittedly, some of these cases are not yet complete. However, international coordination in each case has facilitated its progress to date.

¹⁵⁸*BCCI* is the case that most cried out for a universalist solution. It was a major international banking empire that specialized in doing business in third world countries, and had business establishments in seventy-three countries. It was incorporated in Luxembourg, and its headquarters were located in England until a last minute move to Saudi Arabia, the home of most of its top officers. The bankruptcy case was filed in Luxembourg, and the administrators were English. Its assets were liquidated largely under the laws of England. Given the widely dispersed location of its business interests, this was a good compromise under the facts of that case. The worst of all possible worlds would have been seventy-three separate territorial insolvency cases, with seventy-three sets of administrative expenses, as Professor LoPucki's view would have required. Neither treaties among the countries nor negotiated deals among seventy-three administrators could have solved the problem of coordinating these cases. One English accounting firm did the job for seventy-three countries. For a general description of the *BCCI* case, see 1 FELSENFELD ET AL., *supra* note 77, at 6-5 to 6-13.

¹⁵⁹I am unable to discuss the decision of Mr. Justice Gavin Lightman in the *Enron Directo* case because, while it was subject to the EU Regulation, it is not reported.

Indeed, COMI is a concept totally unknown in U.S. law until the recent enactment of Chapter 15 of the U.S. Bankruptcy Code.

The second path has been to open a case ancillary to a foreign case under § 304, soon to be supplanted by Chapter 15. A § 304 case was clearly a secondary case (“ancillary to foreign proceedings”), and not a main case. Section 304 was designed to give a large measure of flexibility to a U.S. court in coordinating such a case with one or more cases filed abroad. However, § 304 also had no requirement that there be a foreign main case; the foreign case supporting the § 304 case may be any kind of insolvency case, main or secondary.

I do not defend the present U.S. Bankruptcy Code as a model for sending international insolvency cases to the right country for venue purposes. My position is that the COMI rules in the Model Law and the EU Regulation, with suitable modifications, can achieve this goal in most cases (including in the United States under the new Chapter 15). My defense of the Model Law will apply to the United States after Chapter 15 goes into force on October 17, 2005.

We turn now to the *Eurofood* and *Daisytek* cases, that Professor LoPucki contends were “venue shopped” to the wrong foreign courts. A controversy is boiling in the European courts on the issue of the location of the COMI for these subsidiaries of large international enterprises.

B. EUROFOOD

Parmalat was a corporate empire based in Parma, Italy that collapsed in scandal in December, 2003. Fraudulent accounting left it with some \$19 billion in debt that it could not pay,¹⁶⁰ and resulted in one of the largest insolvency cases in European history. Parmalat SpA, the master holding company, commenced its case for extraordinary administration in Italy on Christmas Eve 2003, the day after the Italian law on extraordinary administration was amended to make the Parmalat case possible.¹⁶¹ Under the newly revised Italian procedure, the debtor filed its application for extraordinary administration with the Minister of Productive Activities.¹⁶² On the same day, the minister approved the Parmalat application and appointed Dr. Enrico

¹⁶⁰See Robin Sidel, *J.P. Morgan to Pay \$2 Billion as Street's Bill for Bubble Soars*, WALL ST. J., March 17, 2005, at A1.

¹⁶¹As amended in 2004, the Italian law on extraordinary administration provides a special set of insolvency procedures for a debtor with 1000 employees and debts of _100 billion. See Decree-Law no. 347, December 23, 2003, Gazz. Uff. no. 298 of December 24, 2003, § 1 (“Law no. 347/2003”), as amended. There are approximately six companies (notably including Fiat) in Italy that meet these conditions. For a general description and criticism of the 2004 changes, see Lucio Ghia, *The Italian Legislation Provided for the Parmalat Case Under a Critic Point of View*, at <http://www.iiglobal.org/country/italy/parmalat.pdf> (last visited May 11, 2005).

¹⁶²See Law No. 347/2003, as amended.

Bondi as administrator. Pursuant to the statute, on December 27, 2003 the local court in Parma confirmed that Parmalat SpA was insolvent and opened its extraordinary administration case.¹⁶³ Eventually, the Parma court opened similar extraordinary administration cases for sixty-six Parmalat entities.¹⁶⁴ Among the Parmalat cases, the principal venue dispute has arisen in the *Eurofood* case.¹⁶⁵

Eurofood, which was not included in the initial Parmalat extraordinary administration filing, is a relatively small¹⁶⁶ Irish subsidiary that served as a financing arm for other Parmalat subsidiaries in Venezuela and Brazil. On January 27, 2004, a month after the initial Parmalat filing, certain Eurofood creditors filed an involuntary winding up case (which qualified as a case governed by the EU Regulation)¹⁶⁷ in the high court in Dublin, Ireland.¹⁶⁸ The Dublin court appointed Pearse Farrell as temporary liquidator, and set a further hearing at which all interested parties could be heard.

Thirteen days after the filing of the Eurofood-Dublin petition (a Monday), Bondi sought an order from the Italian Minister of Productive Activities for extraordinary administration of Eurofood in Italy.¹⁶⁹ The Minister approved the application the same day and appointed Bondi as Eurofood's administrator. The next day, Bondi filed a case for Eurofood in Parma. After business hours the following Friday, Bondi gave Farrell notice that the Parma court would hold a hearing the next Tuesday noon in Parma.¹⁷⁰ Bondi re-

¹⁶³See *In re Eurofood IFSC Ltd.*, decision of February 20, 2004, Parma Trib. Civ. & Pen. (It.) ("*Eurofood-Parma*") (English translation on file with author). I consider here four court decisions on Eurofood: *Eurofood-Parma*, the decision of the Italian court of first instance in Parma; Trib. ammin. reg. Lazio, sez. III, 16 luglio 2004, n.6998, Foro It. 2004, III, available at http://www.bitinia.com/foroitaliano/fascicol/cop_dic4.htm ("*Eurofood-Italy*") (English translation on file with author); *In re Eurofood IFSC Ltd.*, 2004 No. 33 cos (Dublin High Court, 2004) (on file with author) ("*Eurofood-Dublin*"); and *In re Eurofood IFSC Ltd.*, [2004] IESC 47, at <http://www.org/ie/cases/IESC/2004/47.html> ("*Eurofood-Ireland*"), the Irish Supreme Court decision on appeal from *Eurofood-Dublin*.

¹⁶⁴Parmalat-related cases were also eventually filed in other countries, including a Chapter 11 case and various types of litigation in the United States. See *Grant Thornton Int'l v. Parmalat Finanziaria SpA (In re Parmalat Finanziaria SpA)*, 320 B.R. 46 (S.D.N.Y. 2005).

¹⁶⁵Some controversy has also arisen with respect to five Dutch Parmalat entities (Parma Food Corp. B.V., Dairies Holding International B.V., Parmalat Capital Netherlands B.V., Parmalat Finance Corp. B.V. and Parmalat Netherlands B.V.) and two Luxembourg Parmalat entities (Olex S.A. and Parmalat Soparfi S.A.). The Parma court opened extraordinary administration cases for these entities on largely the same grounds as for Eurofood. See, e.g., Bob Wessels, *The EC Insolvency Regulation: Three Years in Force 5* (on file with the author); Financial Restructuring Alert, March 26, 2004 at <http://www.akingump.com/docs/publication/657.pdf> (last visited May 24, 2005).

¹⁶⁶Out of a total Parmalat debt of some \$19 billion, Eurofood owed approximately US\$122 million to Parmalat creditors, which was all guaranteed by Parmalat International, SpA.

¹⁶⁷The EU Regulation specifies which kinds of national insolvency cases in the various EU countries qualify for its application. See EU Regulation, art. 2(a) and Annex A. A winding up case under Irish law is such a case.

¹⁶⁸See *Eurofood-Dublin*, *supra* note 163, at slip opinion 3.

¹⁶⁹See *id.* at 8-10.

¹⁷⁰See *id.* at 9.

fused to provide Farrell copies of the moving papers, and the notice was insufficient to permit him to appear and defend in any reasonable manner.¹⁷¹ Meanwhile, Bondi gave no notice at all to the Eurofood creditors and they were unable to appear at the hearing.¹⁷² The Parma court opened a main insolvency case for Eurofood three days later.¹⁷³ The Dublin court, in contrast, proceeded at a more deliberate pace to assure that all of the parties in interest had an opportunity to be heard before deciding whether its case qualified as a main case.¹⁷⁴ The Dublin court decided that the Parma court acted without jurisdiction and that recognition of its decision to open a main case for Eurofood violated Irish public policy because the Parma court failed to observe due process principles.¹⁷⁵ Both the Parma and the Dublin decisions were appealed.

The Italian appellate court rejected appeals of the *Eurofood-Parma* decision by both Farrell and Bank of America in a decision published on July 16, 2004.¹⁷⁶ The court found that the opening of an Italian extraordinary administration case is a two-step process: first, the minister's issuance of a decree admitting a company into extraordinary administration, and second, the court's finding that the debtor is insolvent and setting procedures for the case.¹⁷⁷ For Eurofood, these steps took place on February 9 and February 20, 2004. The court further found that no case for Eurofood had been opened in Ireland at that time, for the purposes of automatic recognition under the EU Regulation. The Dublin high court decision of January 27 was too limited to constitute the "opening" of a case, because the Dublin court had only appointed a provisional liquidator as a precautionary measure without going into the merits even in a summary manner.¹⁷⁸ The Italian appellate court found that the March 15 Dublin decision, even if retroactive, could not take precedence over the February decisions in Italy, which were already in full effect.¹⁷⁹

¹⁷¹See *id.* at 10-11.

¹⁷²See *id.* at 9-10, 31.

¹⁷³Under Decree-Law no. 347/2004, the court is required to issue its decision on the opening of an extraordinary administration case within fifteen days of the decision by the Minister of Productive Activities. See *id.*, § 4.1. Thus the Parma court could have taken eleven more days (which included a weekend) before issuing its decision. Apparently the court did not take the extra time because the next hearing in the Dublin court was scheduled on the day before the fifteen days expired. See *Eurofood-Ireland*, *supra* note 163, at 18 ("it is not contested that the Parma Court was determined to proceed with the hearing on 17th February and to render its decision before the Irish High Court could make a winding-up order . . .").

¹⁷⁴Under Irish winding up law, there is no "opening" event, apart from the filing itself, that could have occurred before the decision of the Parma court to open an Italian main case for Eurofood.

¹⁷⁵See *Eurofood-Dublin*, *supra* note 163, at 21-33.

¹⁷⁶See *Eurofood-Italy*, *supra* note 163.

¹⁷⁷See *id.* at 12-14.

¹⁷⁸See *id.* at 10-11.

¹⁷⁹See *id.* at 12.

The appellate court further found that the Italian legislature properly enacted legislation to deal with the financial crises of large groups of companies “that are global both in orientation and in location”¹⁸⁰ and granted the Minister of Productive Activities the power to admit a company into extraordinary administration solely on the basis of its control relationship with its parent, to promote the uniform reorganization of companies in a group that are collectively caught up in a parent corporation’s financial difficulty.¹⁸¹ The appellate court rejected the bank’s challenge to the admission of Eurofood into extraordinary administration without notice to creditors, on the grounds that the minister’s decree to admit Eurofood into extraordinary administration was a matter of utmost urgency that could not await formalities of notice,¹⁸² and that in any event the initiation of a bankruptcy case is not subject to objection by creditors.¹⁸³

Eleven days later on July 27, 2004, the Irish Supreme Court affirmed the Dublin court, insofar as the decision was based on Irish law.¹⁸⁴ Insofar as the Dublin court’s decision was based on the EU Regulation, the Irish Supreme Court referred the matter to the European Court of Justice,¹⁸⁵ where it remains pending.¹⁸⁶

C. THE FRENCH AND GERMAN DAISYTEK CASES

Daisytek was a corporate group based in the United States whose cash flow problems led to the filing of nine cases in Dallas and sixteen in Leeds, England. Of the English filers, three companies were German and one was French. The high court in Leeds issued a “first day order” finding that the COMI for fourteen of the sixteen companies, including the four French and German subsidiaries, was in England, and that each case was a main case.¹⁸⁷ Notably, no appeal was taken from this decision.

Shortly after the filing of the Daisytek case in Leeds, the French management for SAS ISA-Daisytek (“Daisytek-F”) filed an insolvency case in the commercial court in Pontoise, France, principally to avoid the risk of personal liability for corporate debts after its cessation of payments.¹⁸⁸ Three days

¹⁸⁰See *id.* at 15.

¹⁸¹See *id.*

¹⁸²See *id.* at 24.

¹⁸³See *id.*

¹⁸⁴See *Eurofood-Ireland*, *supra* note 163, at 17-19.

¹⁸⁵See *id.* at 11-13.

¹⁸⁶See Case C-341/04, *Bondi v. Bank of America (In re Eurofood IFSC Ltd.)*, at <http://curia.eu.int/juris> (acknowledging the filing of the questions referred by the Irish Supreme Court); see also Case C-341/04, *Bondi v. Bank of America (In re Eurofood IFSC Ltd.)*, at <http://curia.eu.int/juris> (Sept. 15, 2004) (denying urgent review of the issues referred to the ECJ).

¹⁸⁷See *In re Daisytek-ISA Ltd.*, [2003] B.C.C. 562, [2004] B.P.I.R. 30, 2003 WL 21353254, at *1. The court deferred a ruling on the remaining two cases at the request of debtors’ counsel. See *id.*

¹⁸⁸See C. COM. art. L. 625-5.5. “Cessation of payments” is defined in the French insolvency law as the

later, following the intervening weekend, the Pontoise court found that the Leeds court had not validly opened a main case on the grounds that the Leeds court had impermissibly based its decision as to the Daisytek-F COMI on the location of the COMI of its parent company in England.¹⁸⁹ Accordingly, the Pontoise court opened its own main case for Daisytek-F¹⁹⁰ and denied a subsequent application of the English administrator to intervene.¹⁹¹

The French court of appeal in Versailles, reversing the decision of the commercial court in Pontoise, held that the EU Regulation required the recognition of the opening of the main Eurofood case in Leeds.¹⁹² After examining the text of the Leeds decision which was presented to the court both in its English original and in an authenticated translation, the court of appeal found as a procedural matter that the Leeds court considered all of the proper factors in determining that the Daisytek-F case was a main case.¹⁹³ Thus, the court of appeal ruled, a French court was not permitted to second-guess the substance of the Leeds decision, and was required to recognize the English decision opening a main case.¹⁹⁴

The decision of the court of appeal in Versailles is on review at the French *Cour de Cassation* (the French supreme court) at the request of the Ministry of Justice, which appeared as a party in interest beginning in the Pontoise court. No other party has sought review. It is expected that the Ministry of Justice will request that the *Cour de Cassation* refer the matter to the European Court of Justice.

Three days after the filing of the sixteen cases in Leeds, the German business manager of the German Daisytek subsidiaries filed motions in the Düsseldorf county court¹⁹⁵ for the opening of insolvency cases for those subsidiaries, but failed to inform the court of the pending Leeds cases. After being informed of the Leeds cases for the German Daisytek subsidiaries, on July 10, 2003, the Düsseldorf court opened competing main cases for the two German operating companies, ISA Deutschland GmbH and Supplies Team GmbH, and on August 1, 2003 it opened a secondary case for the German holding company PAR Beteiligungs GmbH. The English insolvency adminis-

moment in time when the debtor "is unable to meet its current liabilities from its liquid assets." See *id.*, art. L. 621-1.

¹⁸⁹See *In re SAS ISA-Daisytek*, Trib. Comm. Pontoise, 6ième ch., May 26, 2003 (on file with author), at 3.

¹⁹⁰See *id.* By French standards, the decision to open a main case for Daisytek-F was unusually quick. Normally it takes ten to fourteen days to open a case based on a voluntary filing.

¹⁹¹See *Klempka v. ISA Daisytek SAS*, [2003] B.C.C. 984, [2004] I.L. Pr. 6 (Versailles Ct. App.), 2003 WL 22936778, at *3.

¹⁹²See *id.* at *6-7.

¹⁹³See *id.* at *6.

¹⁹⁴See *id.* at *6-7.

¹⁹⁵In Germany, bankruptcy cases go to the county court, which is largely a small claims court. See § 2 InsO.

trator filed an extraordinary complaint against the German opening of the competing main cases, which the county court denied and referred up to the district court. Three months later the district court reversed the denial of the extraordinary complaint and remanded the cases to the county court for further proceedings. In due course, the county court closed the main insolvency cases for the two operating companies on March 12, 2004, and opened secondary cases for them.¹⁹⁶ Thus only secondary cases for the German Daisytek subsidiaries are now open in Germany, which is consistent with the EU Regulation.

IV. IMPROVEMENTS NEEDED IN THE MODEL LAW AND THE EU REGULATION

Neither the Model Law nor the EU Regulation creates a perfect world from the modified universalist perspective. Indeed, the application of the EU Regulation to date shows that both it and the Model Law need three improvements to make them workable in a modified universalist framework.

The first major improvement needed is the adoption of procedures governing a decision on the location of the debtor's COMI, which in turn determines the country where a main case should be located. In particular, this decision needs to be decoupled from the decision to open an insolvency case and other "first day" orders, and the procedures need to provide for a fair venue hearing on notice to all creditors and other interested parties.

Second, both the EU Regulation and the Model Law need amendment to provide for the filing in the same venue for the insolvency cases of all the members of a corporate group that constitute an integrated economic unit. Third, to inhibit venue shopping, these laws should be amended to impose a "residency" rule requiring a corporation or corporate group to reside in a country for a period of time (perhaps six months) before it qualifies to file a main case in that country. Here I examine each of these recommendations in greater detail.

A. PROCEDURES FOR DETERMINING COMI

Many of the venue problems that have arisen in the administration of the international insolvency cases in recent years result from inadequate procedural rules. This inadequacy is particularly important in the decisions on the location of the COMI in the *Eurofood* and *Daisytek-F* cases. The timing of such a decision needs to be delayed to a certain extent, so that the quality of the evidence for the decision can be improved and the parties in interest can be heard.

¹⁹⁶See AG Düsseldorf, *Daisytek/Supplies Team*, Decision of March 12, 2004 (on file with author).

1. *Timing of the Decision on Whether a Case is a Main Case*

The determination whether a transnational insolvency case is a main case, based on the location of the COMI, tends to be made at the outset of a case, within a few days of its filing. In a civil law country, this decision is typically made at the same time as the decision opening the case. In a common law country, the decision is frequently included in the "first day order" package.

The decision whether a case is a main case is too important an issue in a transnational insolvency case to decide it at the outset before all of the parties in interest have an opportunity to be heard. The result of such a determination is substantial—it determines the country where the main case will proceed and which country's laws will for the most part govern the rights of creditors and other interested parties in the case. This decision needs careful consideration after all of the interested parties have been provided notice and an opportunity to be heard. Neither the EU Regulation nor the Model Law provides a procedure to assure notice to the interested parties and an opportunity to be heard before the decision on this issue is made.

The Dublin high court followed appropriate procedures in its Eurofood case to assure that all of the parties in interest would have notice of the hearing on the determination whether its case was a main case, that they would have sufficient time to prepare and present the relevant information for this determination, and that they would have a full and fair opportunity to present their views to the court. The court took a month and a half for briefing and hearings on this issue, and issued its ruling nearly two months after the initial filing of the case.¹⁹⁷ In the interim, the Italian court in Parma was rushing through a decision that its Eurofood case was a main case, based on a highly questionable finding that Eurofood's COMI was located in Italy.¹⁹⁸

Neither of the Daisytek-F decisions to open a main case provided even as much notice and opportunity to be heard as the Parma court provided in *Eurofood*. In Leeds, the first day of hearings included decisions to open main cases for fourteen Daisytek affiliates. Apparently, the French creditors received no notice in the Daisytek-F case filed in England. Furthermore, Daisytek-F's employees also received no notice in that case even though French law requires such notice. Indeed, the only evidence provided to the Leeds court was an extensive affidavit from the corporate manager in England.¹⁹⁹

Similarly, there was no notice given to the English administrators or to any creditors before the Commercial Court in Pontoise ordered the opening

¹⁹⁷See *Eurofood-Dublin*, *supra* note 163.

¹⁹⁸See *Eurofood-Parma*, *supra* note 163.

¹⁹⁹See *In re Daisytek-ISA Ltd.*, *supra* note 187, at *1-4.

of a main case in France for Daisytek-F. The English administrators appeared afterwards on a motion to intervene, which the Pontoise court denied.²⁰⁰

My view is that a decision on the “main case” issue should be delayed approximately a month after notice of the filing is given to creditors, to provide both notice of a hearing on this issue and an opportunity for all of the parties in interest to be heard. Under the EU Regulation, this procedural problem cannot be solved at the national level. However, it can be solved at the EU level by supplementing the EU Regulation with procedural rules that assure a reasonable degree of procedural fairness to the parties, or “due process,” as we call it in the United States.

The Model Law provides no better procedural rules than the EU Regulation on the determination whether a case is a main case. The Model Law focuses on the recognition of foreign cases, and the treatment of domestic cases thereafter in the recognizing state. However, the Model Law is silent on the procedure for recognizing a foreign case as a main case.²⁰¹ Moreover, the Model Law makes no provision for determining whether a domestic case is a main case.

Like the EU Regulation, the Model Law needs an international solution to provide for procedural rights of the parties in interest on a decision that a case is a main case. UNCITRAL would be the logical international body to propose such procedures. These procedures should be adopted by a country in connection with its domestic adoption of the Model Law itself, to assure that a decision recognizing a foreign case as a main case, or determining that a domestic case is a main case, is made only after the due process rights of the parties in interest have been respected.

Procedural rules on the decision to declare a case a main insolvency case need to include both a right to be heard and a right to notice.²⁰² Under the Italian rules applicable to the Italian *Eurofood* case, for example, creditors were not recognized as parties in interest on the decision to declare the case a main case,²⁰³ and thus they had no right to be heard. While the Parma court ordered the Italian administrator Bondi to give notice to the interested parties, he only gave belated notice to the Irish provisional liquidator and gave

²⁰⁰See *Klempka v. ISA Daisytek SAS*, *supra* note 191, at *3.

²⁰¹See *Berends*, *supra* note 5, at 352.

²⁰²See, e.g., *Eurofood-Ireland*, *supra* note 163, at 17-19 (finding that the Irish liquidator was not given fair notice of the Parma hearing sufficient to permit him to participate meaningfully and was improperly denied copies of the papers presented to the Parma court).

²⁰³See Tommaso Manferoce, *Gli Organi, Gli Effetti e l'Accertamento del Passivo* ¶ 103.3 in *IL FALLIMENTO E LE ALTRE PROCEDURE CONCURSUALI* 263 (Luciano Panzani ed. 2003); Lucio Ghia, *The Italian Legislation Provided for the Parmalat Case Under a Critic Point of View*, at <http://www.iiiglobal.or/country/italy/parmalat.pdf> (last visited May 24, 2005) (“the creditors have been deprived of their rights of credits” in the amended statute enacted for the Parmalat case).

no notice at all to Eurofood's three creditors, who apparently would have participated in the Italian hearing if they had been given the opportunity.

2. *Quality of Evidence on COMI Presented to the Court of First Instance*

The nature and quality of the evidence supporting a decision to open a main case is very important. Of the various *Eurofood* and *Daisytek* cases discussed here, the high court in Dublin was the only first instance court with quality evidence to support this decision. While the Dublin court appointed a temporary liquidator on an *ex parte* motion based only on an unopposed affidavit of the managing director of Bank of America,²⁰⁴ it postponed for two months the decision whether the case qualified as a main case so that the Italian administrator would have a full and fair opportunity to be heard.

The Leeds decision to open a main case for Daisytek-F does not disclose the evidence to support its decision. It is fair to assume, however, that this decision was unopposed, and that the court based its decision solely on a fairly detailed affidavit from the chief executive officer of Daisytek-ISA Ltd., the top level English holding company for the European Daisytek enterprise, that was filed with the bankruptcy petition.²⁰⁵ It is also fair to assume that the Leeds court gave no opportunity to controvert this evidence. The court made this decision without giving notice or an opportunity to be heard to the French creditors and other parties in interest.²⁰⁶ Notably, no notice was given to the 145 French employees, who had substantial rights under French law, including the right to be heard before the opening of an insolvency case²⁰⁷ and the right to a representative in the insolvency process.²⁰⁸ Finally, it is fair to assume that the court did not give much time to hearing or examining the evidence as to Daisytek-F, because the court made similar decisions in fourteen Daisytek cases that day.²⁰⁹ Similarly, the Parma court based its decision in *Eurofood* on extensive papers that Bondi filed, including nineteen exhibits, which he never provided to the Irish liquidator.²¹⁰

The French commercial court that decided to open a competing main case for Daisytek-F had somewhat more, albeit also one-sided, evidence in support of its decision. Bruce Robinson, the Daisytek-F president, presented a declaration in writing, and orally confirmed, that the high court in Leeds had opened a bankruptcy case for Daisytek-F, and that the company was in a

²⁰⁴See *Eurofood-Dublin*, *supra* note 163, at 6.

²⁰⁵See *In re Daisytek-ISA Ltd.*, *supra* note 187, at *3-4.

²⁰⁶See *id.*

²⁰⁷See C. COM. art. L. 621-4.

²⁰⁸See *id.*

²⁰⁹Indeed, in the court's eighteen paragraph decision on the fourteen applications, only paragraph 17 addresses the facts concerning Daisytek-F's COMI.

²¹⁰See *Eurofood-Dublin*, *supra* note 163, at 32.

state of cessation of payments.²¹¹ Philippe Kersebet, speaking on behalf of the employees, explained that the workforce was restless because of the opening of the case in Leeds, and because relations with suppliers were deteriorating.²¹² The Daisytek-F financial director also presented evidence on the tenuous state of the finances of the business.²¹³ Finally, the public prosecutor opined that the financial situation of the company was extremely tenuous and that it was close to liquidation.²¹⁴ The court did not hear from the administrators appointed in the Leeds case until the next month, when they filed third party proceedings to join the French case; the court promptly dismissed the application.

Thus, except in Dublin, all of the evidence presented in the courts of first instance in the Eurofood and Daisytek cases consisted of unopposed declarations and statements presented in *ex parte* proceedings where possible opponents were given either no notice whatever (Leeds and Pontoise) or insufficient notice to present an opposition (Parma). Failing to provide an opportunity for opposition, those courts certainly lacked a balanced presentation of the evidence on the location of the COMIs at issue, and much important evidence was likely not presented. It thus should come as no surprise that their decisions may be questionable. The adoption of procedures to give timely notice and an opportunity to be heard will vastly improve the quality of evidence presented to a court making a decision on whether a case should be a main case based on the location of the debtor's COMI.

This issue admittedly arises only under a universalist approach to transnational insolvency cases. Working out appropriate procedures for a determination that a case is a main case is one of the burdens of universalism. For a territorialist approach, there is no role for a decision to recognize a foreign case as either a main case or a foreign case, because a foreign case has no official status or recognition. Professor LoPucki leaves it to treaties and private initiative to solve the problems of coordination among such case. I consider this approach unsatisfactory.²¹⁵

B. CORPORATE GROUPS

Professor LoPucki correctly points out that virtually all multinational corporate empires are corporate groups, not single corporations, and indeed there are often hundreds of legally separate entities.²¹⁶ Some of them operate

²¹¹*In re SAS ISA-Daisytek*, *supra* note 189, at 2.

²¹²*See id.*

²¹³*See id.*

²¹⁴*See id.*

²¹⁵*See* text at notes 63-88 *supra*.

²¹⁶*See* LoPucki, *Global and Out of Control*, *supra* note 2, at 92. Professor LoPucki's illustration based on the hypothetical insolvency of DaimlerBenz (now DaimlerChrysler AG) misses the point because DaimlerChrysler is a corporate group consisting of nearly a thousand separate entities.

independent businesses, he points out, while others are integral parts of a larger business operation, and still others fall in between.²¹⁷

Neither the EU Regulation nor the Model Law addresses the problem of corporate groups. Each is drafted on the assumption that every legal entity must be evaluated separately to determine where its COMI is located, which is the proper venue for its main insolvency case.²¹⁸ This approach is unsatisfactory, because a corporate group that is an integrated economic unit can only be reorganized or liquidated efficiently if it is done collectively for the entire group.

Professor LoPucki's solution to the problem of corporate groups is exactly correct. The sensible solution, he says, is to administer economically integrated²¹⁹ group members in the home country of the integrated group, and to administer economically independent group members separately in their own home countries.²²⁰ The Italian court of appeal took essentially the same position in *Eurofood-Italy*, where it stated, "there is an obvious and undeniable need not to dissipate the economic worth underlying the Group, which cannot be effectively realized without a single insolvency procedure and uniform management of each and every business, irrespective of the scale of the subsidiary enterprises."²²¹ Professor LoPucki's problem is that he cannot arrive at the sensible solution from his cooperative territorial position while I can get there from a modified universalist view.²²² Here is a sketch of how such a rule could operate.

The universalist solution is to modify the COMI definition to provide that the corporate group venue decision be based on the collective COMI of all of the legal entities that operate together as an integrated economic unit. Thus where two or more companies are economically integrated and operate as a single economic group, the COMI decision for the corporate group would displace a decision based on the COMI of the separate legal entities. In contrast, where a company is not integrated into the group as a single economic unit, the court should decide its proper venue separately based on

²¹⁷See *id.*

²¹⁸See, e.g., Wessels, *supra* note 94, at 18-20 (stating that the EU Regulation provides no rule for groups of affiliated companies); Robert van Galen, *The European Insolvency Regulation and Groups of Companies*, at [http://www.iiiglobal.org/country/european union/articles.pdf](http://www.iiiglobal.org/country/european%20union/articles.pdf) (proposing revisions to the EU Regulation to provide for joint bankruptcy cases for corporate groups).

²¹⁹I agree with Professor LoPucki that "economic integration" is not a legal term of art, and needs better definition. I have borrowed it from Professor LoPucki, and have tried to put some flesh on its bones.

²²⁰See LoPucki, *Global and Out of Control*, at 93-94. For a similar proposal, although somewhat different in its details, see van Galen, *supra* note 218.

²²¹*Eurofood-Italy*, *supra* note 163, at 25.

²²²Accord, Westbrook, *A Global Solution to International Default*, *supra* note 31, at 2314-15 (stating that territorialism is less able to cope with the problems of international business life because "it turns on a territorial model of economic conduct that is outdated on its way to obsolete").

the location of its COMI, as the EU Regulation and the Model Law now provide.

It is much harder to manipulate the COMI of a corporate group than it is to manipulate the COMI of a particular corporation.²²³ This is especially true for the large corporate groups that interest Professor LoPucki. Moving the COMI of a corporate group such as General Motors, IBM or General Electric would be a formidable task. Furthermore, the possibility of filing secondary cases in those countries that have an establishment substantially ameliorates the procedural difficulties of a foreign main case. Thus use of the COMI of the corporate group for bankruptcy venue purposes promotes *ex ante* predictability and reduces transaction costs. In contrast, forum shopping is much easier under a territorialist view—forum shopping can be accomplished simply by moving the assets of a single company to another forum.

According to my view on corporate groups, both Daisytek-F and the German Daisytek operating subsidiaries should not have had main cases in England because they were essentially stand-alone operations except for the activities of one manager in England. In contrast, under my approach the Eurofood case most certainly would be properly venued in Italy, and not in Ireland.

Admittedly, making a COMI decision for a corporate group or economic unit will be more difficult than making such a decision for an individual legal entity. It will be necessary first to define which legal entities form a part of the integrated economic unit for which the COMI decision is to be made. In contrast, if the decision is made separately for each legal entity, there is no issue of identifying the entity in question. This decision is rather similar in scope and difficulty to a decision that courts must now make in defining a relevant market for the purposes of antitrust litigation,²²⁴ and not unlike decisions on the application of such concepts as due process or equal protection. Like the relevant market decision, the definition of the corporate group should be decided early in the insolvency case, but not before appropriate briefing and opportunity for the parties in interest to be heard. Courts will need judges with suitable training to make such decisions, which may lead to the wider adoption of specialized bankruptcy courts or the assignment of bankruptcy cases to specialized commercial courts with appropriately trained judges.²²⁵

²²³Accord, Guzman, *supra* note 20, at 2214.

²²⁴See, e.g., *Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 961-64 (6th Cir. 2004) (court must use "reasonable interchangeability" standard in ascertaining the relevant product market to evaluate rules limiting player participation in intercollegiate basketball tournaments); *Spanish Broadcasting Sys. Of Fla., Inc. v. Clear Channel Communications, Inc.*, 376 F.3d 1065, 1074 (11th Cir. 2004) (attempted monopolization of Spanish-language radio stations).

²²⁵Some countries already have specialized bankruptcy courts. These countries include the United

Professor LoPucki claims that these standards are highly subjective.²²⁶ I disagree. While the application of each of these concepts depends on the facts of each particular case, both case law and commentaries have developed a host of guides for their application. The application of these concepts in courts of first instance is not even subject to a rule of discretion on appeal. Appellate courts demand objective application and do not hesitate to reverse if courts of first instance make decisions that do not meet objective standards. Nonetheless, some such decisions are close calls; for this reason we have judges to make the calls. There is no role for subjective decisions on these subjects in judicial systems, either in the United States or abroad.

My proposed rule would also not provide an easy solution for a company that is only partially integrated into the corporate group, and may or may not be able to operate separately. This decision would turn on the facts of the particular case and may call for a difficult judgment by the trial judge. As the Eurofood and Daisytek cases illustrate, this kind of decision will not likely arise often as to entities of substantial importance. However, it is the job of a judge to make difficult decisions, and this is no different in kind from many other decisions that judges are routinely required to make. Furthermore, creditors *ex ante* will know that they are dealing with such a company in most cases, and will price their credit accordingly.

Professor LoPucki argues that a corporate group can easily manipulate the location of its COMI by integrating or disintegrating its operations, or by buying or selling major portions of its business, in contemplation of bankruptcy.²²⁷ This kind of tactic is not easy and is highly unlikely, except at the margins, because the economic and legal consequences of such actions far exceed the impact on a bankruptcy court's determination of the COMI of the corporate group. Buying or selling a major part of the business makes a fundamental change in the nature of the business, and has major (sometimes prohibitive) tax consequences as well. Integrating or disintegrating a corporate group may also expose the surviving business to liability by removing the shield provided by separate entities and may subject it to unexpected consequences resulting from different regulatory systems. These impacts are complex and subtle, and are highly unlikely to be taken to change the location of a corporate group's COMI solely for bankruptcy purposes.

States, Thailand and Slovakia. In other countries, such as Ukraine and Morocco, bankruptcy cases go to commercial courts that handle other commercial cases, but not non-business cases. Yet others, such as Canada and Romania, have commercial law panels in their first instance courts of general jurisdiction that handle bankruptcy cases

²²⁶See LoPucki, *Universalism Unravels*, *supra* note 2, at 153-54.

²²⁷See *id.* at 155-58.

C. RESIDENCY REQUIREMENT FOR COMI

Under the EU Regulation, the determination of the COMI, for the purposes of opening a main case, is made as of the date of the opening of the case.²²⁸ The Model Law is less specific; a court recognizing a foreign proceeding decides whether the foreign proceeding is a main proceeding.²²⁹ This recognition decision does not require that the foreign court have decided this issue, and in fact the foreign court frequently will not have addressed this issue. For the recognition of a foreign main proceeding, the Model Law only requires that the foreign proceeding be in fact a main proceeding. This gives the recognizing court flexibility as to the point or period of time to which the recognizing court should look when it makes this determination. Professor LoPucki can rightly charge that the lack of specificity in the Model Rules, and the EU Regulation's focus on the moment of the opening of a case,²³⁰ create an opportunity for manipulation of the COMI in some cases. I agree that a better rule is needed.

I recommend a residency rule for both the Model Law and the EU Regulation that would specify a minimum period of time during which the COMI must be located in a relevant venue to qualify to open a main insolvency case there. Under such a rule, a court would not permit a change in COMI just before filing a bankruptcy case to govern the proper international venue of a main case. The international rules do not presently address this issue, but they should.²³¹

U.S. bankruptcy law takes this approach for the purpose of determining the proper venue among the various states. Proper venue for a case in the United States is the district where venue was proper for the 180 days immediately preceding the filing of the case.²³² If the district where venue would be proper has changed during the 180-day period, the proper venue is the alternative district which has qualified as the proper venue for a longer period of time during the 180-day window than any other.²³³

Under a similar rule, a debtor would typically qualify for opening a main case only in a country where its COMI has been located for more than six

²²⁸See *Skjevesland v. Geveran Trading Co. (No. 3)*, [2003] B.C.C. 209, [2003] B.P.I.R. 73, 2002 WL 31947334, *aff'd*, [2002] EWHC 2898, [2003] B.C.C. 392, [2003] B.P.I.R. 924, 2003 WL 1610215 (Eng.); see also Bob Wessels, *Moving House: Which Court can Open Insolvency Proceedings?* 4 (2003), at http://www.iiiglobal.org/country/european_union/MovingHouse.pdf.

²²⁹See Model Law, art. 20.

²³⁰But see *Skjevesland*, where, in deciding the location of the COMI for an individual, the court considered the various places where the debtor had resided during the three years before filing his bankruptcy case.

²³¹The failure to provide a residency requirement led recently to an apparent attempt to change the location of the COMI in the *Eurofood* case. See *Eurofood-Dublin*, *supra* note 163, at 6-7.

²³²See 28 U.S.C. § 1403(1) (2005).

²³³*Id.*

months before its filing.²³⁴ Six months is not a magic term; it could be any duration of time long enough to make it unlikely that a potential debtor would change its COMI on the eve of bankruptcy to invoke the jurisdiction and laws of a country different from where it has traditionally conducted its business. Indeed, a year may be a more appropriate time period for such a rule.

While I disagree with Professor LoPucki's view that, with no better guide, courts will always decide to keep a large international insolvency case, I agree that it is better to have rules to guide this decision than to leave the decision to unfettered judicial discretion.

CONCLUSION

Venue shopping is not out of control in international insolvency cases. While some venue shopping may occur in a handful of high profile cases, in fact it is quite uncommon. Furthermore, the developing legal systems for the regulation of international insolvency cases in the Model Law and the EU Regulation include provisions that will substantially (if not completely) curb improper venue shopping in the international arena.

I conclude that three modifications are needed to make the Model Law and the EU Regulation work more effectively for venue purposes. First, a court should make the decision to designate a case as a main case for a particular corporation or corporate group only after giving the parties in interest both (1) sufficient notice, and (2) a full opportunity to be heard on the issue. Second, the Model Law and the EU Regulation should be amended to permit the filing in a single venue of all cases in a corporate group that constitute an integrated economic unit. Third, a minimum residency rule for both corporations and corporate groups will also discourage inappropriate venue shopping.

At least one international court may soon issue decisions that will give guidance on the interpretation of the EU Regulation on this subject. One case, involving the Eurofood subsidiary of Parmalat, is pending before the European Court of Justice, and another, involving the French subsidiary of Daisytek, appears to be headed to that court.

Modified universalism is superior to territorialism as a system for handling international insolvency cases. I especially approve of the version of universalism embodied in the EU Regulation, which provides for the automatic recognition of judgment in insolvency cases from other EU countries, if the foregoing recommended changes are made. The *Eurofood and Daisytek-F* cases, which both arose under the EU Regulation, are not counter to my

²³⁴Moss recommends a different approach to this problem under the EU Regulation: in the case of undesirable forum shopping, he recommends that a court ignore steps taken purely to avoid the appropriate jurisdiction. See Moss, *supra* note 104, at 171; accord *Wessels, supra* note 94, at 5.

position. Instead, they reflect inadequate procedures for determining the location of the COMI's of the subsidiaries at issue in those cases.

My recommendation of the EU Regulation approach is subject to one additional condition. I do not advocate its unlimited extension except to countries where the institutions of the home country, including its courts, can be trusted. A foreign court must have the authority (as under both the Model Law and the EU Regulation) to decline enforcement of a court order from a foreign court on the grounds of public policy.²³⁵

Absent an EU Regulation type of regime, I heartily recommend the Model Law, again with the recommended revisions, as a solid basis for cooperation between countries and their courts in dealing with the insolvency cases of international corporate groups. It embodies a version of modified universalism that will (a) level the playing field among creditors and treat similarly situated creditors equally, whatever their national origin; (b) lead to less distortion in investment decisions because it is more predictable *ex ante*; (c) substantially improve the return to creditors because it will substantially reduce transaction costs in the bankruptcy process; (d) provide greater clarity and certainty to the parties in interest in most circumstances; and (e) promote the reorganization of businesses rather than their liquidation when this will be more beneficial to creditors and the economic community.

²³⁵See Model Law, art. 6; EU Regulation, art. 26.

