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A Global Solution to Multinational Default

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A GLOBAL SOLUTION TO MULTINATIONAL DEFAULT

*Jay Lawrence Westbrook**

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A new world is slouching toward New York and London, Beijing and Bangkok, to be born.¹ If our planet and our values survive the

* Benno C. Schmidt Chair of Business Law, The University of Texas School of Law. B.A. 1965, LL.B. 1968, University of Texas. — Ed. During the twenty years I have been an academic, I have appeared as a witness and as counsel in a number of multinational bankruptcy proceedings in the United States and abroad. I have been employed on behalf of both debtors and creditors and both United States and foreign parties, so I do not believe my experience has produced any systematic bias.

I received some very helpful comments from Kenneth Klee, Ronald Mann, and Bruce Markell. I am especially grateful to my co-author Elizabeth Warren for her insights. As always, the staff of the Tarleton Law Library, especially John Pratter, have been invaluable. I have benefited from the excellent research assistance of Ryan Bull and Majid Yazdi, both Texas 2000. In addition, I want to express my gratitude to my former dean, Mark Yudof, for having opened the door of opportunity into the international insolvency field. Any missteps are despite all this help.

1. Our prospects have become more mixed since Yeats wrote *THE SECOND COMING* (1921).

secondary effects of that emergence, we may look forward to a humanity more prosperous and more integrated than at any time in human history. The force that drives us to that future is free-market capitalism constrained in the vessel of democratic institutions. One important element in its progress is the fashioning of an international system for managing the financial crises that are one of the free market's inevitable consequences. In this symposium, we debate which is the best such system we can devise.

The argument of this contribution to the symposium can be summarized as follows:

a) Universalism — administration of multinational insolvencies by a leading court applying a single bankruptcy law — is necessarily the correct long-term solution. Bankruptcy is one of those laws that cannot perform its function unless it is symmetrical to the market in which it operates. Virtually all theorists share this view and it is reflected in the nearly unanimous practice of nations, including the United States. The only substantive objection is that universalism would too greatly submerge national policies, but experience in the United States and elsewhere demonstrates that a national, market-symmetrical law can largely accommodate local policies. In the same way, an international system could permit considerable play to varying national policies and could enforce them more effectively against multinationals.

b) The primary objection to universalism is political. It is argued that universalism is unlikely to be achieved in the foreseeable future. Although political predictions are difficult, it is evident that globalization is producing enormous pressures for legal convergence and those pressures are most likely to prevail as to laws that require market-symmetry to be successful. Many of the obstacles to universalism are also obstacles to coordination and harmonization in antitrust, securities laws, and other business laws. Solutions in each area will feed solutions in the others if globalization continues.

c) Contractualism as an alternative to universalism is not workable domestically or internationally unless it is based on a system of dominant security interests. The theoretical benefits of such a system remain highly controversial and its prospects for international adoption are bleak.

d) The most difficult problem is fashioning an interim solution pending movement to true universalism. "Modified universalism," as proposed in the American Law Institute Transnational Insolvency Project, is the best answer because its pragmatic flexibility provides the best fit with the problem presented by the current patchwork of laws in the global market, and because it will foster the smoothest and fastest transition to true universalism.

I. BACKGROUND

The symposium has arisen on a wave of bankruptcy reform that is sweeping around the world. The reform movement addresses both domestic and international bankruptcy laws, and is powerfully supported by initiatives from the International Monetary Fund² and the World Bank.³ Legislatures in Bonn,⁴ Buenos Aires,⁵ Canberra,⁶ Ottawa,⁷ and Tokyo⁸ have rewritten their bankruptcy laws in the last decade, as have Russia and China (twice each) and most of Eastern Europe.⁹ New bankruptcy laws have also appeared in Singapore, Indonesia, and Thailand.¹⁰ The wave has not crested. In addition to the promise of further reform in Tokyo, the British government has introduced a bill substantially revising the Insolvency Act of 1986,¹¹ the Mexican Congress has adopted a measure completely rewriting La Ley

2. See LEGAL DEPT., INT'L MONETARY ORDERLY FUND, & EFFECTIVE INSOLVENCY PROCEDURAL PRINCIPLES: KEY ISSUES (1999) [hereinafter IMF Report].

3. See World Bank Initiative, <http://www.worldbank.org/legal/insolvency_in/overview.htm>.

4. Insolvenzordnung [Insolvency Law], art. 102, reprinted in Gesetzesbeschluss des Deutschen Bundestages, Drucksache 12/2443, April 21, 1994. The German law was adopted in 1994, but did not become effective until 1999. See Klaus Kamlah, *The New German Insolvency Act: Insolvenzordnung*, 70 AM. BANKR. L.J. 417 (1996).

5. Juan M. Dobson, *Argentina's Bankruptcy Law of 1995*, 33 TEX. INT'L L.J. 101 (1998) (Symposium on International Bankruptcy Law: Comparative and Transnational Approaches).

6. Corporations Act, 1989, ch. 5, div. 9, sec. 581, (Austl.), amended by Corporate Law Reform Act, 1992.

7. AM. LAW INST., TRANSNATIONAL INSOLVENCY PROJECT: INTERNATIONAL STATEMENT OF CANADIAN BANKRUPTCY LAW 5 (Tentative Draft April 15, 1997) (finally approved and awaiting translation) [hereinafter Canadian Statement].

8. Minjisaiseiho [Debtor rehabilitation law], Law No. 225 of 1999 (Effective April 1, 2000). See Junichi Matsushita, *UNCITRAL Model Law and the Comprehensive Reform of Japanese Insolvency*, in LEGAL ASPECTS OF GLOBALIZATION 151 (2000).

9. China: Supplementary Notices on Issues Concerning the Trial Implementation in Several Cities of State-Owned Enterprise Bankruptcy and Reemployment of Staff and Workers, March 2, 1997; People's Republic of China Enterprise Bankruptcy Law, enacted December 2, 1986, effective November 1, 1988. Russia: The Law of the Russian Federation, "On Insolvency (Bankruptcy)," #6 — FZ of 8th Jan., 1998, effective March 1, 1998, replacing Law on Enterprise Bankruptcy, effective March 1, 1993. Eastern Europe: Richard D. Coates and Arlene Elgart Mirsky, *Restructuring and Bankruptcy in Central and Eastern Europe*; Pamela Bickford Sak and Henry N. Schiffman, *Bankruptcy Law Reform In Eastern Europe*, 28 INT'L LAW. 927 (1994).

10. See OFFICIAL ASSIGNEE & PUBLIC TRUSTEE OFFICE OF SINGAPORE, A GUIDE TO THE NEW BANKRUPTCY ACT 1995, issued by the Official Assignee & Public Trustee Office of Singapore; Andrew Chan Chi Yin, *The Singapore Bankruptcy Act 1995*, 1 ASIAN COM. L. REV. 40-45 (1996); Tanya Senn, *The New Bankruptcy Law in Thailand*, 3 ASIAN COM. L. REV. 50 (1998); Stacey Steele, *The New Law on Bankruptcy in Indonesia: Towards a Modern Corporate Bankruptcy Regime?*, 23 MELB. U. L. REV. 144 (1999).

11. Insolvency Bill [H.L.], available at <<http://www.parliament.thestationer.uk>>.

de Quiebras Y Suspension de Pagos,¹² and many other ministries are well along with reform measures.¹³ These domestic reforms have included, in every instance, substantial examination of other countries' laws and reform proposals, so they rest upon an emerging international oeuvre of reform.¹⁴

The domestic reform movements are matched by the burgeoning interest in transnational bankruptcy (or insolvency),¹⁵ which we may define as the management of the general financial default of a multinational enterprise. The wave of reform at the international level demonstrates that the international community has a willingness and an ability to achieve reform in the field of multinational insolvency that is of obvious relevance to the present discussion. While the current reforms are only first steps, they go well beyond what most observers would have predicted just five years ago. In addition to the IMF and World Bank initiatives, the United Nations Commission on International Trade Laws ("UNCITRAL") has promulgated a Model Law on Cross-Border Insolvency (the "Model Law").¹⁶ The Model Law does not adopt substantive bankruptcy rules, but rather, provides a system of cooperation among the courts having jurisdiction over aspects of the assets and affairs of a multinational enterprise in financial distress.¹⁷ In many civil law countries, its adoption will provide an essen-

12. See *Ley de Concursos Mercantiles y de reforma al artículo 88 de la Ley Orgánica del Poder Judicial la Federación*, DIARIO OFICIAL, May 12, 2000, at 10.

13. New Zealand is one of many examples. See, e.g., New Zealand Ministry of Economic Development, Business Law: Major Projects, available at <http://www.med.govt.nz/buslft/bus_pol/bus_law/bus_law_projects.html> (discussing New Zealand government's review of possible insolvency policy developments).

14. For example, the British government has sent questionnaires to experts around the world. See THE INSOLVENCY SERVICE, DEPT. OF TRADE AND INDUSTRY, A REVIEW OF COMPANY RESCUE AND BUSINESS RECONSTRUCTION MECHANISMS (1999) (United Kingdom, seeking comments on proposed insolvency legislation) [hereinafter British Review]. See generally IMF Report, *supra* note 2.

15. "Bankruptcy" or "insolvency" law governs collective proceedings for the adjustment or collection of debts on behalf of all creditors and other interested parties. It excludes actions by a creditor or particular group of creditors to collect specific debts only, as with proceedings to seize and sell particular assets or to garnish debts In worldwide English-language usage, "insolvency" is perhaps the more common term for such proceedings where a business debtor is involved, but in North America "bankruptcy" is at least as often used for business proceedings as well as those involving consumers.

AM. LAW INST., TRANSNATIONAL INSOLVENCY PROJECT, PRINCIPLES OF COOPERATION IN TRANSNATIONAL INSOLVENCY CASES AMONG MEMBERS OF THE NORTH AMERICAN FREE TRADE AGREEMENT at 1 n.2 (Tentative Draft, Apr. 14, 2000) (final approval, May 16, 2000; forthcoming) [hereinafter ALI Statement]. In this article, the terms are used interchangeably.

16. U.N. COMM'N ON INT'L TRADE LAW, MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT, U.N. SALES NO. E.99.V.3 [hereinafter MODEL LAW]; *United Nations Commission on International Trade Law*, 30th Sess., at 3, U.N. Doc. A/CN.9/442 (1997) [hereinafter Guide to UNCITRAL Model Law], reprinted in 6 TUL. J. INT'L & COMP. L. 415, 439 (1998).

17. Guide to UNCITRAL Model Law, *supra* note 16, at I.3.

tial legislative direction permitting courts to cooperate with courts in other countries to manage multinational bankruptcies. In most adopting countries, it is likely to make cooperation in reorganization cases much easier, while frustrating efforts to engage in manipulation of assets and other fraudulent activity.¹⁸ The Model Law has been fashioned into a new Chapter 15 of the United States Bankruptcy Code, and has been contained in every version of the pending bankruptcy legislation in both houses.¹⁹ The basic principles of the Model Law are included in the new Japanese law²⁰ and its substance is part of the bankruptcy legislation adopted in Mexico.²¹ The government bill in Britain provides for its adoption there.²² It is under active consideration in a number of other countries, including New Zealand.²³

On a regional level, the countries of the European Union have negotiated a treaty providing for even closer coordination of transnational bankruptcies than the Model Law.²⁴ For a variety of reasons, it is now being adopted as a "regulation" and will be effective for all members except Denmark in May, 2002.²⁵ In North America, the initiative has come from the private sector in the form of the Transnational Insolvency Project of the American Law Institute.²⁶ Phase I of that Project produced international statements of the bankruptcy laws of the three NAFTA members.²⁷ Phase II of the project culminated in May, 2000, with approval of a statement of principles and legislative

18. Professor LoPucki and I disagree about the desirability of the Model Law. Compare Lynn M. LoPucki, *The Trojan Horse in UNCITRAL*, 33 Bankr. Ct. Dec. (CRR) No. 25 at A5 (Mar. 30, 1999) with Jay Lawrence Westbrook, *Fearful Future Far Off*, 33 Bankr. Ct. Dec. (CRR) No. 25 at A5 (Mar. 30, 1999).

19. See Bankruptcy Reform Act of 1999, H.R. 833, 106th Congress (1999) (passed by the House, 5/5/1999; passed by the Senate, in lieu of S. 625, 2/2/2000).

20. See Hideyuki Sakai & C. Christian Jacobson, *The Japanese Bankruptcy Process Enters a New Era: Enactment of the Civil Rehabilitation Law*, 11 NEWSLETTER OF COMM. J. 3 (2000).

21. See *supra* note 12.

22. See *supra* note 11.

23. See Mike Ross, *Insolvency Law Will Help Investors*, 2/18/99 NAT'L BUS. REV., Feb. 18, 1999, available in 1999 WL 12335944.

24. See European Union: Convention on Insolvency Proceedings, Nov. 23, 1995, 35 I.L.M. 1223 (1996) [hereinafter EU Convention].

25. See *European Union Regulation on Insolvency Proceedings*, OFFICIAL JOURNAL OF EUROPEAN COMMUNITIES 160 (June 30, 2000) <<http://Europa.eu.int/eur-lex/>> [hereinafter *EU Regulation*].

26. I am the United States Reporter for that project.

27. These statements have been approved by the Institute and are awaiting completion of translation. See Transnational Insolvency Project, International Statement of United States Bankruptcy Law (Tentative Draft April 15, 1997) [hereinafter U.S. Statement]; Transnational Insolvency Project, International Statement of Canadian Bankruptcy Law (Tentative Draft Apr. 15, 1997) [hereinafter Canadian Statement]; Transnational Insolvency Project, International Statement of Mexican Bankruptcy Law (Council Draft No.1 Dec. 1, 1997) [hereinafter Mexican Statement].

recommendations for closer cooperation in transnational bankruptcies among the NAFTA members.²⁸

Thus, the world is developing considerable experience and momentum in the field that we discuss in this symposium, and is beginning to demonstrate a capacity and willingness to find international solutions to the problems of general default. These movements have received relatively little attention in the academic literature until recently. I began writing and lecturing in support of universalist approaches in 1990. The ALI Project began in 1994. Professor Rasmussen's proposal for a contractual approach to international bankruptcy was published in 1997,²⁹ while Professor LoPucki's critique of universalism was published just last year.³⁰ Some important work has been done elsewhere in the last decade.³¹ On the whole, however, the subject is just emerging in the academy.³²

28. See ALI Statement, *supra* note 15.

29. See Robert K. Rasmussen, *A New Approach to Transnational Insolvencies*, 19 MICH. J. INT'L L. 1 (1997) [hereinafter Rasmussen, *A New Approach*].

30. See Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 CORNELL L. REV. 696 (1999) [hereinafter LoPucki, *Cooperation*].

31. See, e.g., CROSS-BORDER INSOLVENCY: COMPARATIVE DIMENSIONS, 12 UNITED KINGDOM COMPARATIVE LAW SERIES (Jan F. Fletcher ed., 1990); IAN F. FLETCHER, INSOLVENCY IN PRIVATE INTERNATIONAL LAW 10 (1999) [hereinafter FLETCHER, INTERNATIONAL INSOLVENCY]; PHILIP ST. J. SMART, CROSS-BORDER INSOLVENCY, 207-08, 248 (1991); 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 (1992); Douglas G. Boshkoff, *United States Judicial Assistance in Cross-Border Insolvencies*, 36 INT. COMP. L.Q. 729 (1987); Jacob S. Ziegel, *Ships at Sea, International Insolvencies, and Divided Courts*, 29 CAN. BUS. L.J. 417 (1998); see also Harold S. Burman, *Harmonization of International Bankruptcy Law: A United States Perspective*, 64 FORDHAM L. REV. 2543 (1996); David C. Cook, *Prospects for a North American Bankruptcy Agreement*, 21 SW. J.L. & Trade Am. 81 (1995). There have also been a significant number of helpful practice-oriented articles. See, e.g., AMERICAN BAR ASSOCIATION, INTERNATIONAL LOAN WORKOUTS AND BANKRUPTCY (1987) [hereinafter 1987 ABA]; RICHARD A. GITLIN & RONA R. MEARS, INTERNATIONAL LOAN WORKOUTS AND BANKRUPTCIES (1989); John A. Barrett, *Various Legislative Attempts With Respect to Bankruptcies Involving More Than One Country*, 33 TEX. INT'L L.J. 557 (1998); Evan D. Flaschen & Ronald J. Silverman, *Cross-Border Insolvency Cooperation Protocols*, TEX. INT'L L.J. 587 (1998); Bruce Leonard, *Managing Default by a Multinational Venture: Cooperation in Cross-Border Insolvencies*, TEX. INT'L L.J. 543 (1998); Daniel M. Glosband & Christopher T. Katucki, *Current Developments in International Law and Practice*, 45 BUS. LAW. 2273 (1990); Anne Nielson et al., *The Cross-Border Insolvency Concordat: General Principles to Facilitate the Resolution of Cross-Border Insolvencies*, 70 AM. BANKR. L.J. 533, 543 (1996).

32. There was very important work done in the past, but then the subject was neglected. See, e.g., Kurt H. Nadelmann, *Rehabilitating International Bankruptcy Law: Lessons Taught by Herstatt and Company*, 52 N.Y.U. L. REV. 1 (1977); [hereinafter Nadelmann, *International Bankruptcy*] KURT NADELMANN, CODIFICATION OF CONFLICTS RULES FOR BANKRUPTCY 64-67 (1974), reprinted in *Hearings on H.R. 31, 32 Before the Subcomm. on Civil and Constitutional Rights*, 94th Cong. at 1457H. (1976); Kurt Nadelmann, *Legal Treatment of Foreign and Domestic Creditors*, 11 LAW & CONTEMP. PROBS. 696, 697 (1946) [hereinafter Nadelmann, *Legal Treatment*]; Stefan A. Riesenfeld, *The Status of Foreign Administrators of Insolvent Estates: A Comparative Survey*, 24 AM. J. COMP. L. 288 (1976). The standard work, although now out of print, remains 1 DALHUISEN ON INTERNATIONAL INSOLVENCY AND BANKRUPTCY, PART II (1986).

Broadly speaking, there are three academic positions: universalism, territorialism, and contractualism. The traditional positions are the first two.³³ According to the traditional territorialist approach, each country would seize local assets and apply them for the benefit of local creditors, with little or no regard for foreign proceedings. By contrast, universalism is considered a system where one court administers the bankruptcy of a debtor on a worldwide basis with the help of the courts in each affected country. Contractualism is an extension to the international level of the contractual theories of bankruptcy advanced in recent years. All three positions are represented in this symposium.

The discussion that follows is divided into two parts. Part I describes the ideal international system for managing the general default of a multinational enterprise.³⁴ It begins by distinguishing short-term transitional solutions from long-term theoretical ones. It then sketches the theoretical background for determining the proper scope of a bankruptcy law. It proceeds to describe the arguments for the proposition that "universalism" is the correct theoretical solution for the long term. Finally, it summarizes the argument that "modified universalism" is the better short-term solution. Part II responds to the positions taken in the prior articles by Professors Rasmussen and LoPucki, with some reference to their new articles in this symposium. It also comments upon Professor Guzman's article in this symposium.³⁵ In the process, it spells out the case for "modified universalism" as the best short-term transitional rule.³⁶

II. UNIVERSALISM

A. *A Universalist Convention*

Only in the last decade has the subject of transnational insolvency evolved from an interesting rarity to a distinct and important category

33. See ALI Statement, *supra* note 15, at 10.

34. This discussion does not include natural persons, even those in business. In that regard, it follows the ALI Project. See ALI Statement, *supra* note 15, at n.7. Bankruptcy of a natural person implicates a host of very difficult social problems, including domestic relations and property exemptions, that deserve a separate discussion, even in the international context.

35. As with any symposium, each of our papers is a moving target for the other participants, so we may assume that none of us concedes anything by silence.

36. As with bankruptcy, the problem of multinational security interests is plagued by transitional difficulties. See Neil B. Cohen & Edwin E. Smith, *International Secured Transactions and Revised UCC Article 9*, 74 CHI.-KENT L. REV. 1191, 1221 (1999); Ryan E. Bull, Note, *Operation of the New Article 9 Choice Of Law Regime in an International Context*, 78 TEXAS L. REV. 679, 715 n.178 (2000) (recognizing that stark contrasts between the choice-of-law regime in the revised Article 9 and that of most other countries may create inefficiencies in international secured transactions in the short and medium term).

in international finance and transnational litigation. In the midst of that development, my focus has been on short-term, pragmatic responses against the backdrop of a universalistic goal.³⁷ Now that the rush to globalization is still accelerating by the rise of the internet, it is appropriate to approach the problem from the long view, elaborating the best global bankruptcy system that might be created by a multinational convention on this subject.³⁸ Professors LoPucki and Rasmussen have done just that, presupposing adoption of multilateral treaties on transnational bankruptcy.

1. *The Theoretical Background*

Although this article is not the place to address at length larger theories of bankruptcy, it is necessary to sketch the basic propositions that underlie the case for universalism. The central theoretical point is "market symmetry": the requirement that some systems in a legal regime must be symmetrical with the market, covering all or nearly all transactions and stakeholders in that market with respect to the legal rights and duties embraced by those systems.

Many legal systems vary within a market. They may differ regionally, as with common law tort rules governed by state law in the United States. The contract system allows for enormous variation by virtue of publicly enforced private law created by contract. There is also considerable variation by industry, through both legal enactments and public enforcement of private codes and standard terms. Although there are always pressures to unify law to one degree or another at the level of the entire market, countervailing pressures to maintain local autonomy, party autonomy, and industry practices typically yield a pragmatic compromise in each field.

On the other hand, there are legal systems that cannot function effectively unless their scope is symmetrical with the market. That is, they must govern the interests of all parties throughout the market whose interests may be implicated. A common example of such a system is the law of intellectual property, which in virtually all jurisdictions is co-extensive with a national market and which imposes rules that govern the rights of all potential stakeholders, whether or not they have contractual relationships *inter se*. Such systems are often, but not invariably, considered to operate *in rem*, which may be a label

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

38. Both Professors LoPucki and Rasmussen assume such a treaty solution in their major articles on this subject. LoPucki, *Cooperation*, *supra* note 30, at 742; Rasmussen, *A New Approach*, *supra* note 29, at 26 n.120. Professor Rasmussen does not imply a time frame for such a treaty, while Professor LoPucki is ambiguous as to the temporal context for his proposal.

reflecting the need to govern the rights of all possible stakeholders throughout a market.

A legal system that requires a market-wide application may nonetheless permit a considerable amount of variation by contract, by regional or industry rules, or otherwise, but it is characteristic of such systems that they have a core of rules that cannot be governed by contract or other submarket systems precisely because those rules must apply throughout the market to achieve their functional purposes.

Despite a lack of general agreement about bankruptcy theory, there is a consensus that bankruptcy is a collective legal device that operates in each case to protect and adjudicate the interests of many stakeholders,³⁹ even though there are disputes about the identity of the stakeholders.⁴⁰ From Jabez Henry to the participants in this symposium,⁴¹ virtually all theorists have agreed that bankruptcy requires a single proceeding in which all of the debtor's assets and claims are administered under a single set of rules — in traditional terms, *in rem*. To achieve that result, it is necessary that the bankruptcy law cover the entire market in which the debtor company operates, and bind all of its participants. It is therefore unsurprising that virtually every country has established a national bankruptcy regime co-extensive with its national market. Most tellingly, as with intellectual property law, virtually all federated countries, including those (like the United States) that give considerable autonomy to regions (states) in business and commercial matters, nonetheless insist that the bankruptcy regime be national, to fit the national dimensions of the market.

That bankruptcy law must be ubiquitous does not mean it cannot allow for variation and for private bargains. The bankruptcy systems in many countries permit contractual priorities in the form of security interests and permit regional policies considerable play, as, for example, in the role of state property and commercial laws in bankruptcy proceedings in the United States. The bankruptcy system can permit considerable flexibility at the level of parties or regions, without losing its capacity to regulate the rights of all stakeholders throughout a national market and regardless of a lack of contractual relationships

39. One oft-cited discussion is in THOMAS JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* (1986) [hereinafter JACKSON, LOGIC].

40. Both legal theories and legal systems differ on this point. For example, some regard creditors as the only proper subjects of regard in bankruptcy, while others would consider the interests of owners (debtors and their shareholders) as well. See, e.g., Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 777 (1987); Douglas G. Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren*, 54 U. CHI. L. REV. 815 (1987); KAREN GROSS, *FAILURE AND FORGIVENESS* 138 (1997). See also IMF Report, *supra* note 2, at 7.

41. For Henry's interesting story, see FLETCHER, *INTERNATIONAL INSOLVENCY*, *supra* note 31, at 17-19; see also JACKSON, LOGIC, *supra* note 39; Kurt H. Nadelmann, *Once Again: Local Priorities in Bankruptcy*, 38 AM. J. INT'L L. 370 (1944) [hereinafter Nadelmann, *Local Priorities*].

among stakeholders. In this way, the interests of secured parties, unsecured contract creditors, tort victims, taxing authorities, shareholders, and other stakeholders can be resolved under a set of legal rules known in advance and legitimately binding on them all.

Because the consensus is broad and consistent, a few examples of the collective nature of bankruptcy should suffice. Two of the primary functions of liquidation bankruptcy are to maximize asset value and to distribute proceeds according to a scheme of priority based on legal rights.⁴² The process cannot maximize the value of a debtor's assets unless there is a moratorium or stay to prevent individual creditor seizures and a unified approach to assembling and selling those assets.⁴³ Similarly, neither principles of equality nor a set of legal priorities can have their desired effect unless they are applied in a common distribution.⁴⁴ Such a collective system cannot operate unless: i) the assets of a debtor are part of a common pool for the benefit of stakeholders and ii) the rights of all potential stakeholders are finally resolved prior to a final distribution. Only a single system operating under a single set of overall rules can achieve those unified results. A single system cannot be legally effective unless it controls assets and binds stakeholders throughout the market.

Reorganization bankruptcy (often called "rescue" elsewhere) is even more dependant upon the existence of a single reorganization activity. Although some debtors, or corporate groups, may split neatly into separate pieces to be sold or continued individually, most are complexly structured, making it very difficult to continue the enterprise without a substantially centralized direction.⁴⁵ Reorganizing a company is surgery upon a living being, as opposed to the disposal of one that has expired. Interim financing and supervision of the company's management are only two of the delicate functions that are difficult to carry out by cooperation between distant judges. If the company can be kept alive, the goal is a reorganization plan. Such a plan is not achievable unless a court can bind all stakeholders to the reorganization plan, including dissenters.⁴⁶ Only a system that conclusively resolves all stakeholders' legal rights can produce a financial restructuring that gives existing and future parties, including financiers, investors, and employees, a sufficient guarantee of legal certainty.

42. See ALI Statement, *supra* note 15, at 17.

43. See *id.* at 37. The ALI text provides examples.

44. See, e.g., Kurt H. Nadelmann, *Revision of Conflicts Provisions in the American Bankruptcy Act*, 1 INT'L & COMP. L.Q. 484, 484 (1952) ("[T]he policy to consider all property wherever located part of the estate has practical advantages, besides being the only one acceptable from the viewpoint of the equal distribution of all assets among all creditors.").

45. See *infra* text accompanying notes 158-164.

46. See ALI Statement, *supra* note 15, at 118.

Without such assurances, a reorganization plan cannot go forward. Such a system must be symmetrical to the market.

Turning to an *ex ante* perspective, to the extent that the outcomes of bankruptcy affect the availability and terms of credit and other forms of investment, predictability of outcome will tend to reduce transaction costs and risk premiums.⁴⁷ While high levels of predictability are never likely to be achievable in the context of general default,⁴⁸ material increases in predictability of outcomes will have benign efficiency effects *ex ante*. To the extent that a debtor's affairs are governed by a single legal regime, predictability, and therefore efficiency, will be enhanced.

It is therefore not surprising that when the Founders of the American Republic assembled to create a federation with a single national market they gave the national government the power to govern general defaults. Although bankruptcy occupies a privileged position as one of the few enumerated powers given to Congress in Article I, it received only cursory attention in the constitutional debates.⁴⁹ The likely reason is that the necessity for a single national law governing such collective proceedings seemed self-evident.⁵⁰ A sophisticated American voter in 1788 might have been against a national market, or thought its faults outweighed its virtues, but it would have been hard to deny such a market should be served by a national bankruptcy system. It is especially noteworthy that the Founders did not think the national market required national commercial laws, but left such matters to the states. Bankruptcy was the commercial law uniquely required at the national level. The compelling logic of this result is con-

47. See Andrew T. Guzman, *International Bankruptcy: In Defense of Universalism*, 98 MICH. L. REV. 2177, 2179, 2181, 2207 (2000); Robert K. Rasmussen, *Resolving Transnational Insolvencies Through Private Ordering*, 98 MICH. L. REV. 2252, 2255 (2000).

48. This point represents a hole in the literature that must be filled, although not by this Article. A theoretical model relating to insolvency must reflect the reality that general default produces considerable chaos and in many cultures, including our own, considerable litigation. To construct a model implicit with calm and deliberation is like a model of efficient firefighting that assumes a leisurely encounter with the fire. To put the point another way, there is an enormous potential for transaction costs built into the circumstance of general default. The minimization of those costs is one of the principal tasks of the theorist and the policymaker. The costs must be accounted for in any solution that is modeled or the model is useless. Assuming them away ignores the central problem, like the economist shipwrecked on the desert island who proposes to solve the problem of opening a can of food by assuming a can opener.

49. See James Madison, *The Federalist No. 43*, THE FEDERALIST PAPERS, 271 (Clinton Rossiter ed., 1961); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1105 (1833) (noting that the Federalist Papers contain only a single reference to the bankruptcy powers); Dan J. Schulman, *The Constitution, Interest Groups, and the Requirements of Uniformity: The United States Trustee and the Bankruptcy Administrator Programs*, 74 NEB. L. REV. 91, 99-105 (1995) (discussing the few indications of the original intent behind the bankruptcy power).

50. The importance of the task was outweighed for a long time by its difficulty. See *infra* text accompanying note 110.

firmed by the fact that similar systems are found in many nations with federal structures.⁵¹ The historical experience has been that bankruptcy law is made coextensive with a market, so that national markets require national bankruptcy laws, even where many other legal regimes are left to, or devolved to, a subsidiary level.⁵²

Domestically, all of this is commonplace and almost universally accepted.⁵³ It is certainly common ground among the contributors to this symposium. It follows that precisely the same logic will compel creation of a single legal regime to govern general defaults at the international level as soon as that is achievable.⁵⁴ Just as most commercial and property law in the United States remains at the state level, it is reasonable to assume that an international convention need not attempt to create an entire international commercial system.⁵⁵ But in my view it would certainly create a system administering a single bankruptcy law in a single, worldwide bankruptcy proceeding, if that were politically possible. It would do so for exactly the same reasons that have been compelling domestically, reasons that are even more cogent internationally.

Because bankruptcy is a market-symmetrical law, a global market requires a global bankruptcy law. A global default — that is, the general default of a multinational company — requires a single bankruptcy proceeding that can apply rules and reach results that are conclusive with respect to all stakeholders throughout the global market. Anything short of that procedure is, at best, a temporary accommodation that awaits the political will to achieve the proper legal result.

51. With respect to the structural similarities between the members of NAFTA, see Jay Lawrence Westbrook & Jacob S. Ziegel, *The American Law Institute NAFTA Insolvency Project*, 23 BROOK. J. INT'L L. 7, 13-14 (1997) ("In insolvency matters, all three [NAFTA] jurisdictions have the same basic statutory structure, with state or provincial laws governing most questions of contract and property, but with a federal insolvency law."). Additionally, the new German Bankruptcy Code shares federal aspects with the United States. See Manfred Balz, *Market Conformity Of Insolvency Proceedings: Policy Issues Of The German Insolvency Law*, 23 BROOK. J. INT'L L. 167 (1997); Kamlah, *supra* note 4.

52. One United States example is bankruptcy law at the national level, but the Commercial Code at the state level.

53. A proposal was made in recent years to move bankruptcy to the state level, but it is fair to say that it has not attracted any enthusiasm. See David A. Skeel, Jr., *Rethinking the Line Between Corporate Law and Corporate Bankruptcy*, 72 TEXAS L. REV. 471 (1994).

54. See Hannah Buxbaum, *Rethinking International Insolvency: The Neglected Choice-of-Law Rules and Theory*, 36 STANFORD J. INT'L L. 23, 60 (2000) (arguing for a single jurisdiction internationally following the logic of domestic practice).

55. See Donald T. Trautman, Jay Lawrence Westbrook & Emmanuel Gaillard, *Four Models for International Bankruptcy*, 41 AM. J. COMP. L. 573 (1994).

2. *Convergence of Laws*

The link between the consensus that a domestic bankruptcy law must be contiguous with a national market and the present discussion is, of course, the emergence of a global market. As noted above, there are always pressures to make laws symmetrical with a market. As the rush to globalization, reinforced by the internet, continues, there will be increased pressure to establish global legal rules.⁵⁶ For example, there is great pressure for protection of endangered species, a value that comes into apparent conflict with certain aspects of free trade.⁵⁷ Nations will have to achieve some convergence on those questions to resolve the conflict, typically through some combination of international rules and modification of the domestic rules in each country. The best example we have is the European Union ("EU"), although the larger world market offers important illustrations as well.

During the last half century, the development of the EU has demonstrated that international economic integration tends to generate legal convergence. Although some members would prefer a purely economic relationship, experience has shown that is not possible. Economic issues are, after all, at the heart of many political issues and the resolution of those issues typically becomes law, so that closer political ties and converging laws inevitably accompany closer economic integration.⁵⁸ For example, economic integration inevitably leads to a

56. See generally Bruce A. Markell, *A View from the Field: Some Observations on the Effect of International Commercial Law Reform on the Rule of Law*, 6 IND. J. GLOBAL LEG. S. 497 (1999) [hereinafter Markell, *Observations*].

57. See GATT: United States Restrictions on Imports of Tuna, GATT B.I.S.D. (39th Supp.) at 155 (1993) (Dispute Settlement Panel Report); GATT United States Restrictions on Imports of Tuna, 33 I.L.M. 839 (1994) (Dispute Settlement Panel Report); United States — Import Prohibition of Certain Shrimp and Shrimp Products, 36 I.L.M. 121 (World Trade Org., Oct. 12, 1998) (Appellate Body Report). A recent case in the European Court of Justice highlights the close connection between economic integration and integration of social policy. See Case C-50/96, *A.G. v. Schroder*, at ¶ 54 (2000) (in the context of gender discrimination in employment, one of the objectives of Article 119 of the EC Treaty "is to avoid a situation in which [companies in State with laws requiring equal pay] suffer a competitive disadvantage . . . as compared with [companies in States that have not]"). The issue of the competitive connection between economic and social integration was a prominent subject at an informal colloquium between members of the University of Texas Law School faculty and members of the European Court of Justice in Austin, Texas, on April 21, 2000. The colloquium was sponsored by the Supreme Court of Texas.

58. Three different philosophies of Western European integration vied for adoption in the immediate post-WW II era: federalism, functionalism, and neofunctionalism. The federalist philosophy, represented by Rene Pleven, French premier in 1950, was based on the view that unification would best be achieved by going to the heart of the matter and creating supranational institutions with substantial power (e.g., an all-European army). The essence of the federalist philosophy is reflected in the slogan "The worst way to cross a chasm is in little steps." According to the functionalists, integration of states can be achieved best by creating loosely knit organizations with authority only over technical economic tasks. As one technical task would "spillover" into other areas, integration forces will become overwhelming. Neofunctionalists, led by Jean Monnet, believed that the integration process should focus on creating supranational organizations for specific but politically significant

conflict between the laws regulating the flow of goods and services in the various integrating countries. France has always limited the word "champagne" to a wine from a certain region of France, while other European countries permitted it to be used more broadly to refer to a type of sparkling wine wherever produced. If there was to be a single market in wine, the legal conflict had to be resolved.⁵⁹ Much the same legal conflict existed with respect to the standard for something to be called "beer."⁶⁰ Although similar problems are arising globally,⁶¹ the EU provides by far the largest and most useful example of convergence of laws as economic integration progresses.⁶²

A few leading examples illustrate the process of convergence. Early in the development of the EU, its members adopted a common tax, the VAT.⁶³ It has moved steadily toward convergence in taxation ever since.⁶⁴ It has also moved step-by-step closer to a universal labor policy resting upon "the free movement of persons."⁶⁵ The latter concept has produced results that would have been politically unthinkable not so long ago. Increasingly, for example, lawyers and other professionals licensed in one EU country must be permitted to practice in all

tasks (e.g., coal and steel industries). For a fuller discussion, see ERNST B. HAAS, *THE UNITING OF EUROPE* (1958). The key point these philosophies had in common, which has been demonstrated in the subsequent history of the European Community, is that economic integration leads to political and legal convergence.

59. See *Tattinger v. Allbev Ltd.*, [1992] F.S.R. 647 (Ch. Apr. 15, 1992); *Tattinger v. Allbev Ltd.*, [1993] F.S.R. 641 (Ch. Feb. 8, 1993), reported in *THE TIMES* (London), Feb. 11, 1993, at 2, available in LEXIS, Nexis Library, Alleur File.

60. See Case 178/84, *Commission v. Germany*, 1987 E.C.R. 1227, 1268-72.

61. Another example is the movement toward convergence of rules concerning securities because of the globalization of the capital markets. See, e.g., INT'L FIN. L. REV., U.S. CAPITAL MARKETS REPORT (1999).

62. By a paradox more apparent than real, it also increases the pressure for devolution and subsidiarity as to certain kinds of issues. See, e.g., Nicholas Emiliou, *Subsidiarity: An Effective Barrier Against "the Enterprises of Ambition"?*, 17 EUR. L. REV. 383 (1992) (discussing the role of subsidiarity in the EU).

63. See TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, art. 99, 298 U.N.T.S. 11, 76.

64. Recently, the issue of withholding taxes from savings has proven controversial, see Dominic Hobson, *Mobile Capital: Outrunning the Tax Man*, WALL ST. J. EUR. 10, Mar. 16, 2000, yet the convergence of European taxation continues. Since January 1, 1993, the EU countries have had a standard minimum VAT rate of fifteen percent, with reduced rates of no less than five percent on specified categories of goods and services. See Jan E. Brinkmann & Andreas O. Riecker, *European Community Taxation: The Ruling Committee Report Gives Harmonization Efforts a New Impetus*, 27 INT'L LAW. 1061, 1063 n.6 (1993). Recently, the idea of EU-wide internet taxation is gaining popularity. See John Kennedy, *Taxing the Net: The European Union is Keen to Implement a Framework for Applying VAT on Internet Transactions*, BUS. AND FIN., Oct. 22, 1998.

65. See Harry Valetk, Note, "I Cannot Eat Air!": An Economic Analysis of International Immigration Law for the 21st Century, 7 CARDOZO J. INT'L & COMP. L. 141, 174 (1999) (summarizing the development of EU labor policies).

the rest.⁶⁶ Students who are qualified must be admitted without discrimination in schools throughout the Union.⁶⁷

Similarly, the free movement of services has enabled companies offering finance and banking services to operate everywhere in the Union with dwindling territorial restraints,⁶⁸ a development closely tied to the Euro and the establishment of a European Central Bank.⁶⁹ The pressures of globalization will create similar convergences throughout the world — indeed, are already doing so.⁷⁰ There are endless interesting questions about how all this can be managed politically and how fast it will develop, but there can be no serious question about the trend.

66. See generally Roger J. Goebel, *Lawyers in the European Community: Progress Towards Community-Wide Rights of Practice*, 15 *FORDHAM INT'L L.J.* 556 (1992); Bernhard Schloh, *Freedom of Movement of Lawyers within the European Economic Community*, 9 *ST. LOUIS U. PUB. L. REV.* 83 (1990); Diane M. Venezia, Note, *An EU Lawyer's Right to Practice Throughout the European Union*, 3 *CARDOZO J. INT'L & COMP. L.* 427 (1995).

67. See *THE HERALD*, Feb. 19, 2000 (United Kingdom).

68. See Maria Szonert-Binienda, *Passporting Financial Services Throughout the European Union*, 116 *BANKING L.J.* 456 (1999); Jennifer Manvell Jeannot, Note, *An International Perspective on Domestic Banking Reform: Could the European Union's Second Banking Directive Revolutionize the Way the United States Regulates Its Own Financial Services Industry?*, 14 *AM. U. INT'L L. REV.* 1715, 1731-38 (1999) (reviewing the EU's liberal approach to regulation of the financial services industry).

69. See Roberta S. Karmel, *The Case for a European Securities Commission*, 38 *COLUM. J. TRANSNAT'L L.* 9, 15 (1999) (“[W]ith the introduction of the euro, a window of opportunity has opened for integrating financial services.”).

70. See, e.g., Uruguay Round Agreements Act of 1994, Pub. L. No. 103-465, 108 Stat. 4809 (1994) (patent); The Berne Convention Implementation Act, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (copyright).

Antitrust presents a similar trend toward convergence of laws. There are a number of commentaries on the influence of U.S. antitrust laws on other countries. “The success of the United States in curbing anticompetitive behavior in its domestic markets led South Korea and Japan to adopt antitrust laws similar to those of the United States.” Danny Abir, *Monopoly and Merger Regulation in South Korea and Japan: A Comparative Analysis*, 13 *INT'L TAX & BUS. L.* 143, 143 (1996). “Because Taiwan began with a tabula rasa regarding antitrust law, the Fair Trade Law was patterned primarily after the antitrust laws of advanced industrial states — notably Japan, South Korea, Germany, and the United States.” Lawrence L.C. Lee, *Taiwan's Antitrust Statutes: Proposals for A Regulatory Regime and Comparison of U.S. and Taiwanese Antitrust Law*, 6 *IND. INT'L & COMP. L. REV.* 583, 595 (1996). There is growing cooperation internationally in the antitrust area as well. See, e.g., *U.S. Backs International Merger Body in Move to Ease Regulatory Friction*, *WALL ST. J.*, Sept. 15, 2000 (call for international regulation of mergers, reversing long-held U.S. policy); Agreement Between the Government of the United States of America and the Government of Japan Concerning Cooperation on Anticompetitive Activities (Oct. 7, 1999) <<http://www.usdoj.gov/atr/public/international/docs/3740.htm>> reprinted in U.S. Dep't of Justice, Antitrust Div., Press Release, United States and Japan Sign Antitrust Cooperation Agreement (Oct. 7, 1999) <http://www.usdoj.gov/atr/public/press_releases/1999/3739.htm>; Agreement Between the Government of the United States of America and the Government of Australia on Mutual Antitrust Enforcement Assistance (Apr. 27, 1999) <<http://www.usdoj.gov/atr/public/international/docs/usaus7.htm>>, reprinted in U.S. Dep't of Justice, Antitrust Div., Press Release, Attorney General Signs Antitrust Assistance Agreement with Australia (Apr. 27, 1999) <http://www.usdoj.gov/atr/public/press_release/1999/2382.htm>.

Professor LoPucki quotes me as saying that a rough similarity of laws is necessary to universalism.⁷¹ What I have in mind by such a statement is this general convergence of laws. Professor LoPucki's implication is that I am conceding that universalism will not be achievable for a very long time, because laws will long remain dissimilar. On the contrary, it is my sense that global economic integration is driving convergence of law at a surprisingly fast pace and this trend will make it possible to achieve a workable international bankruptcy system much sooner than might have been thought.⁷²

This general convergence of law yields a mix of international rules and modification of local rules. In those fields that require market symmetry, however, there will always be pressure for market-wide rules. Again, the EU experience is illustrative. In the field of intellectual property, which must also be market symmetrical, there is now a European Patent Office.⁷³ Although there are still national patent offices in Europe, the European office represents a very significant internationalization.⁷⁴

Even more directly to the point, the EU has now adopted an insolvency regulation governing cooperation in cross-border insolvency matters.⁷⁵ While the regulation is only a modest first step, it is most significant that its recitals base its adoption on the need for market-wide regulation.⁷⁶ It specifically states that “[t]he proper functioning of the internal market requires that cross-border insolvency proceedings should operate efficiently and effectively . . .” and that “[t]he activities of undertakings have more and more cross-border effects and

71. See Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy*, 98 MICH. L. REV. 2216, 2216 (2000) [hereinafter LoPucki, *Cooperative Territoriality*]. Of course, I did not say similar laws are necessary to modified universalism, my proposed interim approach.

72. See generally Markell, *Observations*, *supra* note 56; Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 BOSTON U. L. REV. 343 (1997).

73. See Convention on the Grant of European Patents, as amended by Decision of the Administration Council of the European Patent Organization of Dec. 21, 1978, 13 I.L.M. 268.

74. See Vivian S. Kuo & Gerald J. Mossinghoff, *World Patent System Circa 20xx, A.D.*, 38 IDEA 529, 541-42 (1998).

Under the EPC system, it is possible to file a single patent application with the European Patent Office (“EPO”) in one of the three official languages — English, French and German — and obtain patent protection in one, several or all of the nineteen contracting states if the applicant so desires. An issued patent from the EPC confers on the inventor the same rights as would be conferred by a national patent granted in a designated state. However, this application effort does not result in a single Community patent. Applicants to the EPO receive a series of patents, akin to a ‘bundle of rights,’ enforceable in each member state designated by the applicant. Patent rights are enforced by the respective courts of the member states as if the patents were issued by each state individually.

Id.

75. See *EU Regulation*, *supra* note 25.

76. See *id.* at Recitals 2-4, 8.

are therefore increasingly being regulated by Community law.”⁷⁷ The text goes on to imply that movement to a community-wide proceeding “with universal scope” is not attempted only because “it is not practical.”⁷⁸ While this regulation demonstrates the difficulty of achieving legal integration in the complex field of insolvency, it also provides the most important contemporary example of the way in which economic integration exerts inexorable pressure toward universalism.

3. *A Unified Law and Forum*

There are two elements necessary to a universalist convention for international bankruptcy: a single law and a single forum to govern each multinational case. These two elements are distinct and need not necessarily be conjoined in an international bankruptcy system, although ideally they would be.⁷⁹ Either could be achieved, at least in theory, by two different approaches — unified international institutions, or a unified set of conflicts rules. The first approach would establish a single international bankruptcy law and a single international bankruptcy court system, while the second would prescribe a uniform set of choice-of-law rules and choice-of-forum rules. However, choice-of-law rules are notoriously nonuniform and unpredictable, so a single law is, in principle, much more desirable from an *ex ante* perspective. Experience with the Restatement Second in the United States demonstrates the difficulty in achieving predictable choice-of-law results with any rule, no matter how carefully and insightfully crafted the text may be.⁸⁰ A single forum also would be desirable because some of the same problems exist with choice-of-forum rules,⁸¹ and multiple fora present problems of inconsistent administration.

A single international system of bankruptcy courts would achieve many of the benefits provided domestically by a single, national bankruptcy law.⁸² Admittedly, a court in such a system would still have

77. *Id.* at Recitals 2 & 3. The phrase “internal market” means the community-wide market.

78. *Id.* at Recital 11.

79. See Westbrook, *Theory*, *supra* note 37.

80. See Symeon C. Symeonides, *The Need for a Third Conflicts Restatement (and a Proposal for Torts Conflicts)*, 75 *IND. L.J.* 437, 446 (2000) (recognizing that the flexibility required from a conflicts Restatement renders precision, and hence predictability, more difficult); Russell J. Weintraub, “At Least Do No Harm”: *Does the Second Restatement of Contracts Meet the Hippocratic Oath?*, 56 *MD. L. REV.* 1284, 1315 (1997) (same).

81. See FLETCHER, *INTERNATIONAL INSOLVENCY*, *supra* note 31, at 771.

82. The text of the ALI’s *Principles* sets forth the principal benefits of a centralized international bankruptcy system. As the foregoing discussion indicates, a single international court applying a single international bankruptcy law would best achieve each of those objectives. This discussion follows the listing of the major benefits of bankruptcy in the ALI Statement, *supra* note 15, at 17, and is similar to those identified in the IMF Report, *supra* note 2, at 81-82.

many choice-of-law decisions to make in determining the proper national law to apply with respect to various pre-bankruptcy claims and property rights. Nonetheless, administration by a single court system, applying a single set of choice-of-law rules with some hope of consistency, would produce a far higher level of predictability in commercial transactions than we now have.

A single court would maximize asset values, even in liquidation, by providing a unified approach to assembly and sale of assets as a whole. If it commanded a worldwide stay, it could most effectively protect those assets prior to sale. Establishment of such a court would make preventing or undoing debtor fraud far easier and more certain, an especially urgent goal in a world of electronic funds transfers and asset-protection trusts.⁸³

A single court would improve dramatically the possibility of reorganization. With a single court to whom the manager of the reorganization could report and a single mechanism for adjusting the interests of stakeholders, the possibility of saving a sprawling multinational corporation would be greatly increased. For example, the ease of organizing and administering the necessary post-petition financing⁸⁴ and the greater certainty of the lender's protection on a worldwide basis would increase the availability of credit and reduce interest rates. A single court that was part of an international court system would also lower the risk of parochialism in the administration of the case.

A single international bankruptcy law would also confer unique benefits. It would create a single set of priorities and method of distribution, ensuring equality for stakeholders with similar legal rights everywhere in the world.⁸⁵ Perhaps most important to the stability and efficiency of the global commercial community, it would provide one consistent set of transfer-avoidance rules (such as preference and fraudulent conveyance avoidance), so that creditors would know the rules and would know they were protected against strategic behavior by debtors and other creditors. These are two separate points, each of

83. See, e.g., *Federal Trade Commission v. Affordable Media L.L.C.*, 179 F.3d 1228 (9th Cir. 1999) (offshore asset protection trusts are intended to create a scenario whereby a "defendant can assert that compliance with a court's order to repatriate the trust assets is impossible"); *In re Lawrence*, 238 B.R. 498 (Bankr. S.D. Fl. 1999) (imposing high burden of proof on debtor seeking to avoid a turnover order because of asset protection trust). See generally, Elena Marty-Nelson, *Offshore Asset Protection Trusts: Having Your Cake and Eating It Too*, 47 RUTGERS L. REV. 11 (1994) (describing various approaches to asset protection); T. Moers Mayer, *Will the Lawyers Pay? Counsel's Ethical, Civil and Criminal Exposure for Creating Offshore Asset Protection Trusts* (Spring Meeting of the Business Law Committee of the ABA, Apr. 5, 1997) (discussing the ethical and legal implications of asset protection trusts for the lawyers that form them).

84. See 11 U.S.C. §§ 364, 365 (1994); ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *THE LAW OF DEBTORS AND CREDITORS* 530-31 (3d ed. 1996).

85. The present territorial system virtually ensures that no nation's ideas of efficiency and fairness are followed. See Westbrook, *Theory, supra* note 37, at 461.

some importance. Because creditors would know the avoidance rules that would be applied, they could confidently structure loans and workouts within those rules. They would have some incentive to eschew transfers and other transactions that violate economic policy, thus enforcing that policy and avoiding very expensive litigation.⁸⁶ At the same time, they could obtain reliable legal opinions that certain approaches to restructuring the finances of a distressed debtor would pass muster if the restructuring failed and bankruptcy followed.

Such predictability in avoidance rules would have another favorable impact on out-of-court workouts. Where such rules are consistently enforced, creditors attempting to reach a consensual restructuring can be reasonably sure that secret deals with certain creditors or other persons could be unraveled in the event of general default. Providing that protection is one of the most important functions of avoidance rules. In both respects, then, creditors would have the relative predictability and workout protection they enjoy now in legally sophisticated societies.

Is a single international bankruptcy law administered by a single international court system⁸⁷ possible in the foreseeable future? It is implausible, but not, I think, impossible. Political predictions are always unreliable and I have nothing to offer in support of mine except a fair amount of recent experience in the politics of international insolvency reform.⁸⁸ We do have exemplary methods of achieving such results. Twenty-five years ago, the idea of an international forum with the power effectively to overrule a United States court would have been inconceivable to many, but the NAFTA trade tribunals are empowered to do that, albeit indirectly.⁸⁹ The Law of the Sea Treaty has

86. The problems are well illustrated by *In re Maxwell Communication Corp.*, 170 B.R. 800 (Bankr. S.D.N.Y. 1994), *aff'd*, 186 B.R. 807 (S.D.N.Y. 1995), *aff'd*, 93 F.3d 1036 (2d Cir. 1996).

87. I say "court system," because it is unlikely that a convention would establish a single court, like the International Court of Justice at the Hague, to administer a vital part of a global commercial system. It is much more likely that there would be regional courts or, in the case of the largest economies, international courts devoted to bankruptcies centered in a single country. These courts might be limited purpose commercial courts and more like arbitration tribunals than traditional courts. There are many interesting details, but they are not for this Article. I use "court" and "court system" interchangeably in this article, as clarity and ease of expression require, but I will always mean a court system in this context.

88. I am the United States Reporter for the ALI Transnational Insolvency Project and the co-chair of the United States delegation to UNCITRAL in connection with bankruptcy matters. I also serve as a consultant to the International Monetary Fund on such matters and I am a member of the Insolvency Task Force of the World Bank.

89. In cases involving anti-dumping and countervailing duty issues, parties to the NAFTA may appeal national court rulings to a bilateral panel. *See* North American Free Trade Agreement with Canada and Mexico, Dec. 17, 1992, Can.-Mex.-U.S., Art. 1904(2), 32 I.L.M. 605, 683 ("NAFTA"). The rulings of these panels, based on the substantive law of the importing country, are binding upon the parties and not subject to judicial review in national courts. *See id.*; § 19 U.S.C.A. 1516a(g)(2) (Supp. 1997) (exclusive review by binational panels); RALPH H. FOLSOM ET AL., NAFTA: A PROBLEM ORIENTED CASEBOOK 465 (2000).

created an Authority that may someday have both administrative and adjudicatory power over an important percentage of the world's wealth under the seas.⁹⁰ And, of course, the European Court of Justice has become a truly international court with "direct effect" on persons and companies throughout Europe and around the world.⁹¹

There is a sharper international sting in a patent's tail nowadays, because of the Trade-Related Aspects of Intellectual Property Rights ("TRIPS") provisions linking intellectual property rights to trade privileges under the WTO.⁹² A linkage of this sort makes an international rule more nearly enforceable in the sense that a domestic rule of law is enforceable. The linkage is plausible because of the close connection between intellectual property and the free flow of trade and investment.⁹³ It may be that the excesses of intellectual-property law will produce a backlash against this sort of linkage.⁹⁴ If not, linkages of

Already, cases have challenged the constitutionality of this procedure, but thus far have not met with success. See American Coalition For Competitive Trade v. Clinton, 128 F.3d 361 (D.C. Cir. 1997) (dismissing constitutional challenge to review of national rulings by a binational NAFTA panel and affirming constitutionality of the treaty-based exhaustion requirement).

90. United Nations Convention on the Law of the Sea, Dec. 10, 1982, reprinted in THE LAW OF THE SEA, U.N. Doc. A/ CONF. 62/122, U.N. Sales No. E.83.V.5 (1983).

91. See, e.g., Eric F. Hinton, *Strengthening the Effectiveness of Community Law: Direct Effect, Article 5 EC, and the European Court of Justice*, 31 N.Y.U. J. INT'L L. & POL. 307, 368 (1999) ("Much of European integration has been legal integration, and at the forefront of the integration movement has been the European Court of Justice."). As to its worldwide impact, one example is its interpretation of the competition rules of article 85 of the Treaty of Rome. See Treaty Establishing the European Economic Community, arts. 85-94, Mar. 25, 1957, 298 U.N.T.S. 11, amended by Treaty Establishing the European Community, Feb. 7, 1992, 1992 O.J. (C 224) 1, 1 C.M.L.R. 573. That interpretation is binding on the European Commission, which in turn can effectively veto mergers of multinationals centered outside the EU. See, e.g., Andre Fiebig, *The Extraterritorial Application of the European Merger Control Regulation*, 5 COLUM. J. EUR. L. 79 (1998); Crystal Jones-Starr, *Community-Wide v. Worldwide Competition: Why European Enforcement Agencies Are Able to Force American Companies to Modify Their Merger Proposals and Limit Their Innovations*, 17 WIS. INT'L L.J. 145 (1999); Amy Ann Karpel, Comment, *The European Commission's Decision on the Boeing-McDonnell Douglas Merger and the Need For Greater U.S.-EU Cooperation in the Merger Field*, 47 AM. U. L. REV. 1029 (1998) (all discussing the world-wide impact of the European Commission's stated doubts about whether the Boeing-McDonnell Douglas merger would be consistent with EU competition laws).

92. At least two symposia have discussed the impact of the TRIPS provisions on intellectual property issues. See Symposium, *Public and Private Initiatives After TRIPS*, 9 DUKE J. COMP. & INT'L L. 1 (1998); Symposium, *Intellectual Property Law in the International Marketplace — Trade-Related Aspect of Intellectual Property Right: Enforcement and Dispute Resolution* 37 VIRG. J. INT'L L. 275 (1997).

93. See generally J.H. Reichman, *From Free Riders To Fair Followers: Global Competition Under The TRIPS Agreement*, 29 N.Y.U. J. INT'L L. & POL. 11 (1997).

94. Both domestically and internationally, there are claims that recent strengthening of the intellectual property laws may have gone too far in limiting free trade and innovation. See Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996) (proposing the "democratic paradigm" as a method for successfully balancing protection of intellectual property with the goal of innovation); Lloyd L. Weinreb, *Copyright For Functional Expression*, 111 HARV. L. REV. 1149, 153-54 (1998) (contending policymakers, in broadening copyright protection to offer additional incentive or reward to creators, may

that sort might be used to develop other international commercial regimes, like a bankruptcy law, that can similarly claim a close connection to encouragement of truly global trade and investment.

The WTO is a global forum with real teeth.⁹⁵ The United States, for example, has simply ignored the rulings of the World Court,⁹⁶ but takes very seriously rulings from a WTO panel.⁹⁷ The WTO example makes it no longer easy to dismiss a proposal for a truly international forum to administer rules relating to worldwide commerce. If bankruptcy law were to follow intellectual property law in being tied to the GATT, it would have similar international leverage.

Another approach would be the Bilateral Investment Treaties ("BITs") that the United States and other capital-exporting countries have negotiated with a number of countries.⁹⁸ Membership in an international bankruptcy system, providing for a single law and a single forum, might easily become a standard term sought in such treaties. A bankruptcy system is especially important to investors, so its inclusion in BITs would be wholly appropriate. Certain crucial aspects of bankruptcy law, like the treatment of taxes, could be covered in the spe-

have lost sight of whether additional reward was necessary or justified). *But see* David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673, 739-40 (2000) (arguing that the new copyright act insufficiently protects copyright holders).

95. Its supporters don't like the characterization "arbitrators," and its opponents don't like "court." Forum is a neutral term.

96. *See* Military and Paramilitary Activities (Nicar. v. U.S.), 1984 I.C.J. REP. 392 (Judgment of Nov. 26). The United States official statement of withdrawal from the case may be found in U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the ICJ, Jan. 18, 1985, DEP'T ST. BULL., Mar. 1985, at 64. *See also* Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 I.C.J. REP. 14 (Judgment of June 27). For discussion of the case, and the effect of the United States withdrawal on the influence of the International Court of Justice, see, for example, Abram Chayes, *Nicaragua, the United States, and the World Court*, 85 COLUM. L. REV. 1445 (1985); W. Michael Reisman, *The Other Shoe Falls: The Future of Article 36(1) Jurisdiction in Light of Nicaragua*, 81 AM. J. INT'L L. 166 (1987).

97. While the United States blatantly disregards the International Court of Justice when needs require, it has consistently engaged the WTO despite disagreeing often with WTO rulings. Recently, within a few months following a WTO ruling against a United States tax subsidy for exports, the United States promptly proposed substantial changes in its tax law to accommodate the ruling. *See, e.g., U.S. Offers to Satisfy WTO Ruling By Ending Tax Break for Exporters*, WALL ST. J., May 3, 2000 (proposal to amend U.S. tax law to satisfy adverse ruling by WTO panel on U.S. tax-subsidy provision). Another recent example comes from the conflict with Europe over the EU's refusal to import beef products enhanced by growth hormones. Statement Of Ambassador David L. Aaron, Under Secretary For International Trade, U.S. Department of Commerce, Before the House Comm. on International Relations, June 15, 1999, available in 1999 WL 20008799 ("The United States will respect the WTO process and participate fully in [the beef importation] arbitration process.").

98. *See generally* Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639 (1998); Kenneth J. Vandeveld, *U.S. Bilateral Investment Treaties: The Second Wave*, 14 MICH. J. INT'L L. 621 (1993) (discussing the historical and modern uses of BITs for the United States).

cialized treaties being routinely negotiated and re-negotiated in specialized fields.⁹⁹

The remarkable movement toward globalization and legal convergence has recently been epitomized by the Model Law on Cross-Border Insolvency.¹⁰⁰ The announcement of this project by the United National Commission on International Trade Law ("UNCITRAL") in 1995 was greeted by widespread pessimism that any treaty or model law on the subject of bankruptcy could be achieved. The promulgation of the Model Law by UNCITRAL and its prospective adoption by leading commercial nations¹⁰¹ reflect the compelling logic of international cooperation in this field.

As noted above, there is a worldwide wave of domestic bankruptcy law reform currently building to a crest.¹⁰² It has been stimulated in significant part by the International Monetary Fund and the World Bank, whose interest was aroused by the East Asian crisis, but the reform wave pre-dates that interest and has broader causes.¹⁰³ In significant part, it is a response to the rapidly changing methods and scope of international finance and the concerns of investors about the management of risk. Given current trends and given the close connection between bankruptcy and investment risk, it is possible that a truly unified international bankruptcy system could be achieved.

If so, we would then have a system both "universal" and "unitary," a single law administered by a single court. This result would be true "universalism."¹⁰⁴ The other three authors in this symposium have not really addressed universalism in this sense in their prior writings. Neither have I. But surely universalism so understood must be accepted as the best long-term solution for multinational bankruptcies.¹⁰⁵ Given that all modern bankruptcy theories assume a collective regime, and given that virtually all countries have national bankruptcy laws, co-terminous with their national markets and transcending their regional governments, it is hard to imagine a bankruptcy scholar rejecting universalism as the correct ultimate goal internationally. It seems likely

99. The ALI Statement proposes that the difficult problem of coordinating or accommodating domestic tax priorities in a multinational bankruptcy be addressed by treaty. See ALI Statement, *supra* note 15, at 19. The numerous, ongoing tax-treaty negotiations between the United States and its friends are an obvious place to start.

100. MODEL LAW, *supra* note 16.

101. See *supra* text accompanying notes 16-23.

102. See *supra* text accompanying notes 2-15.

103. See Jay Lawrence Westbrook, *The Globalization of Insolvency Reform*, 1999 NEW ZEALAND L. REV. 401, 402-03.

104. I have led the way in avoiding the traditional terms, "universalist" and "unitary," in referring to a single law and a single forum. See Trautman et al., *supra* note 55, at 587. They have become less useful for various reasons, including ambiguous usage and a lack of connection with the rest of modern conflicts analysis.

105. See *supra* text accompanying notes 82 and 87.

that our differences relate to shorter-term and transitional solutions, which are much more difficult.

4. *The Continuing Role of National Policies*

There is one argument against complete universalism even in the long term: that a single international law would give insufficient play to domestic policies in each nation. This argument must be distinguished from the political claim that national policies will remain sharply different in the short and medium term, making universalism impractical. That claim has considerable force and may delay a treaty establishing universalism for a long time. The theoretical argument is that a single international bankruptcy regime will suppress necessary and important differences in policy among still-distinct national societies and cultures. There are three reasons that need not be true.

The first is that, just as state law is prevalent in domestic bankruptcies in the United States and other federated states, most of the law applied in an international bankruptcy case will continue to be national law. Indeed, even rules about priority of distribution can be kept at the national level to some extent under an international bankruptcy law. Our domestic practice is instructive. Security interests and other liens created under state law are routinely applied in a federal bankruptcy case, with limited exceptions for certain lien priorities that Congress has determined inappropriate in the bankruptcy context.¹⁰⁶ Thus each state is allowed, within limits, to grant priorities in bankruptcy distributions. Using the lien device, a universalist bankruptcy law could allow play to national priorities, within limits. For example, it could permit enforcement of liens or other priorities against work product produced by contractors, just as Congress has done.¹⁰⁷ Similar national priorities could be enforced with respect to employees, tort victims, or others within an agreed international framework.

The second reason we need not be concerned about universalism leaving too little room for local policies is that we have the option of applying an international regime only to companies of a certain size or a certain level of international activity. Limited application of a universalist regime only to large multinationals would permit local poli-

106. See 11 U.S.C. § 545 (1994).

107. See, e.g., *id.* (permitting avoidance of some state-law liens, but not others). See also LoPucki, *Cooperation*, *supra* note 30, at 746. Professor LoPucki suggests that under universalism foreign courts would be enjoining United States environmental laws and otherwise imposing on United States policies. See LoPucki, *Cooperative Territoriality*, *supra* note 71, at 122-23. That result is obviously neither necessary nor conceivable in any universalist system we would accept. His example is a Brazilian stay of the application of environmental laws to a debtor's operations in the United States. A stay's effect in a universalist system undoubtedly would be subject to the same police-power exception we have in our national law. See 11 U.S.C. § 362(b)(4). Among many other things, that exception protects the continuing application of state environmental laws. A universalist system would work in a similar way.

cies to be applied to local enterprises. As subsequent discussion will show, many local policies cannot be applied effectively to multinationals,¹⁰⁸ so little is lost locally by international governance of multinationals. Finally, as noted at the start, this discussion focuses on commercial entities — corporations and perhaps very rich individuals — rather than on consumers. It is likely that a universalist treaty would do the same, leaving the most sensitive questions of social policy to domestic law.¹⁰⁹

B. *Interim Solutions*

To this point, I have argued that the proper long-term, theoretical solution to the problem of multinational insolvency is universalism, whether or not such a solution is achievable in the foreseeable future. Although I am more optimistic than others, universalism may not be obtainable in the foreseeable future. To fashion such a system would require international consensus as to many questions that could not be left to domestic law. Even with global legal convergence, such a consensus may take a long time to achieve. To balance the fact that the Founders of the United States regarded a national bankruptcy law as essential, enacting one about a decade after the Constitution was adopted, we must consider that our ancestors did not succeed in fashioning a workable bankruptcy law for more than a hundred years. The nineteenth-century laws each lasted only a few years.¹¹⁰ Not until 109 years after the adoption of the Constitution did the United States achieve a permanent bankruptcy law. Our friends in the EU labored for more than thirty years to create a Union-wide bankruptcy regime.¹¹¹ Because there is room for pessimism as to when a bankruptcy treaty might be achieved, a discussion of transitional approaches is in order. What follows is an overall summary, postponing responses to specific arguments raised by others until the next section.

The Statement of Principles adopted by the American Law Institute summarizes the current taxonomy of reform:

[V]arious reform efforts can be characterized as based on modified universalism or modified territorialism, where those two concepts lie between the ends of a spectrum from universalism to territorialism. Modified universalism is universalism tempered by a sense of what is practical at the current stage of international legal development, while modified territorialism represents a movement away from territorialism in recognition of the increasing integration of the world economy. . . .

108. See *infra* text preceding note 150.

109. See *supra* text accompanying note 34.

110. See generally Charles J. Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5 (1995).

111. See FLETCHER, *supra* note 31, at 247.

Aside from universalism and territorialism, there is a second dichotomy that is distinct from that one, yet overlaps it sufficiently to confuse understanding. The second dichotomy is between "ancillary" and "parallel" proceedings. A multinational bankruptcy must nearly always involve some sort of judicial proceeding in more than one country, because judicial orders will be necessary to control assets during reorganization or liquidation. The proceeding in the debtor's home country, often called the "main" proceeding . . . will always be a full bankruptcy under its domestic law. The judicial proceedings in other countries may be ordinary lawsuits, ancillary proceedings, or parallel proceedings. An ordinary lawsuit may serve, for example, to gain control of a particular asset, but often more all-embracing solutions are required as a matter of speed and efficiency. In some jurisdictions those solutions will be in the form of an ancillary proceeding while other jurisdictions will prefer a parallel proceeding. An ancillary proceeding is designed primarily to aid the "main" proceeding in the debtor's home country. It does not contemplate a full administration and distribution of the debtor's local assets. Instead, as discussed *infra*, the court in the ancillary proceeding might issue injunctions against creditor lawsuits and seizures and provide a foreign administrator with assistance in gaining information about local assets.¹¹²

By contrast, a "parallel" proceeding is a full bankruptcy under domestic law. The court in a parallel proceeding administers the debtor's local assets in parallel with the administration in the main proceeding. The court in a parallel proceeding will generally have control over the debtor's domestic assets and over creditor actions by virtue of the usual stays and other powers available in the domestic bankruptcy law, so the relief available to an administrator acting in the main proceeding will be in the nature of cooperation.

Modified universalism is the approach that I have suggested as an interim or transitional solution. I believe that the "cooperative territorialism" proposed by Professor LoPucki in his *Cornell* article is one form of modified territorialism. The operation of modified universalism is illustrated by *In re Culmer*,¹¹³ one of the leading cases decided under section 304 of the Bankruptcy Code. There, a Bahamian corporation had assets in the United States and creditors had attached those assets, giving them certain priority rights under United States law. The Bahamian liquidators brought a petition under section 304 seeking a stay of the United States collection actions and turnover of the assets for distribution in the Bahamian proceeding. That they succeeded in both requests reflected the court's universalist view: because the Bahamian action satisfied the statute's choice-of-forum

112. ALI Statement, *supra* note 15, at 11-12.

113. 25 B.R. 621, 629 (Bankr. S.D.N.Y. 1982). The case law under section 304 is discussed *infra* at note 197.

rule,¹¹⁴ ancillary relief was indicated. The universalist perspective was emphasized by the fact that the relief included turnover of assets, in effect dispatching the creditors to the Bahamas to assert their claims. On the other hand, the court did not grant the relief until it had satisfied itself that Bahamian law could be trusted to be fair and was in general terms similar to United States law. That inquiry justifies the adjective “modified,” because the deference to the preferred universalist forum was not automatic, but required a practical finding of fairness and rough similarity. Presumably, a court committed to cooperative territorialism would have denied the petition, leaving the liquidators or other creditors to bring a full parallel United States bankruptcy, in which the court might cooperate on some level with the foreign court, but only within limits ensuring that creditors in the United States proceeding were given first access to the United States assets.¹¹⁵

The key difference between the two approaches is that modified universalism takes a worldwide perspective, seeking solutions that come as close as possible to the ideal of a single-court, single-law resolution, while territorialism of any sort seems to me to be defined by a conviction that local creditors have vested rights in whatever assets can be seized by their courts when insolvency looms. The first formulation of modified universalism described it thusly:

[Modified universalism] accepts the central premise of universalism, that assets should be collected and distributed on a worldwide basis, but reserves to local courts discretion to evaluate the fairness of the home-country procedures and to protect the interests of local creditors. The leading example is Section 304 of the U.S. Bankruptcy Code. . . .¹¹⁶

If the worldwide perspective is the appropriate one for a worldwide market, the view adopted by the ALI,¹¹⁷ then merely adding a hopeful gloss of cooperation to a territorial system will not do. The reason is that cooperation will be greatly limited by the rigidities of the domestic bankruptcy laws of each country. For example, once a full bankruptcy is opened in a country, its local law tends to establish strict rules on priority and the priority systems in each country differ greatly.¹¹⁸ The consequences are described in the ALI statement:

114. See 11 U.S.C. § 101(23) (2000) (defining a foreign proceeding in terms of indicia of the center of the debtor's business for the purpose of ancillary relief under section 304).

115. See LoPucki, *Cooperation*, *supra* note 30, at 748-51.

116. See Jay Lawrence Westbrook, *Choice of Avoidance Law in Global Insolvencies*, 17 BROOK. J. INT'L L. 499, 517 (1991).

117. See ALI Statement, *supra* note 15, at 39 (discussing “General Principle V: Sharing of Value”).

118. See generally JAY LAWRENCE WESTBROOK, UNIVERSAL PARTICIPATION IN TRANSNATIONAL BANKRUPTCIES, MAKING COMMERCIAL LAW, ESSAYS IN HONOUR OF ROY GOODE 419 (Ross Cranston ed., 1997); Jay Lawrence Westbrook, *Universal Priorities*, 33 TEX. INT'L L.J. 27 (1998).

Distribution in bankruptcy rests on a body of substantive rules central to the process in each country In a transnational case, each court that is making a distribution in a local bankruptcy proceeding must apply its national distribution rules, including rules as to security and other priorities. In each country, those rules are relatively inflexible in liquidation cases. The national rules may leave more room for accommodation and compromise in reorganization proceedings, but they still impose significant legal constraints.

The difficulties created by differing priority systems constitute one of the major complications of parallel proceedings. A creditor or group of creditors that is the beneficiary of a domestic priority may assert that this right to priority in distribution must trump an effort at cooperation, whether it be cooperation in a plan of reorganization, by transfer of assets, or otherwise. Such assertions could block any important attempt at cooperation. Priority rules may be unwaivable except by unanimous agreement, a standard that encourages certain parties to "hold out" for their personal advantage despite agreement among the great majority of creditors, both privileged and general.¹¹⁹

The inevitable consequence is that real cooperation in a territorial system is necessarily very limited. Instead, recoveries will turn on the fortuitous or manipulated location of assets and the results will be highly unpredictable *ex ante*. Modified universalism attempts to achieve some of the benefits of universalism in a multi-forum, multi-law world. It requires each court to become part of an international system for maximizing value and fairness in the management of the default. In either an ancillary or parallel approach under national law, modified universalism permits the court to view the default and its resolution (liquidation or reorganization) from a worldwide perspective and to cooperate with other courts to produce results as close to those that would arise from a single proceeding as local law will permit.¹²⁰ Because it will develop experience, methods, and precedents through such cooperation, modified universalism will provide essential background for the development of a convention establishing a universalist system. In the meantime, modified universalism is an awkward, interim solution. I hope to show in the next part, to paraphrase Churchill, that it is the worst transitional system, except for all the others.¹²¹

119. ALI Statement, *supra* note 15, at 116.

120. See *In re Maxwell Communications, Inc.*, 93 F.3d 1036 (2d Cir. 1996).

121. See WINSTON CHURCHILL, Speech in the House of Commons (Nov. 11, 1947), reprinted in 7 WINSTON S. CHURCHILL: HIS COMPLETE SPEECHES 1897-1963, at 7566 (Robert Rhodes James ed., 1974) ("Many forms of Government have been tried, and will be tried in this world of sin and woe. No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of Government except all those other forms that have been tried from time to time.").

III. AN APPRECIATION AND CRITIQUE OF OTHER VIEWS

A. Professor Rasmussen

Professor Rasmussen is not only an accomplished scholar, but a kind of universalist, so I naturally find things to admire in his contractual-menu approach to international insolvency. He proposes adoption of a single insolvency law worldwide, as I do,¹²² although he does not propose a single court system to administer it. Just as I would envision my ideal bankruptcy law being internationalized, he envisions taking to an international level the contractual-menu approach to bankruptcy that he has advocated domestically. Each company would be free to select a bankruptcy regime to govern it in case of its general default. The choice would be made in its articles of incorporation and would be unchangeable without the approval of its creditors. I would suppose he would favor a privatized administration to go with the privatized provisions of his insolvency menu, perhaps in the form of arbitral tribunals.

One of the attractive elements in Professor Rasmussen's approach is that he does not forget that government will have to enforce the regime he proposes. Another attractive element is that the lawmaker's job is very simple. Thus, an international convention would presumably provide that all the contracting countries would enforce the requirement that every company's article of incorporation contain a choice-of-bankruptcy procedure from the menu and that the choice could not be changed without the agreement of every creditor. Each state would further agree to enforce the choice made. This proposal would create a great many transitional problems with countries that had not adopted the convention, but that is true of every proposal.¹²³

With regard to Professor Rasmussen's criticism of a non-contractual universalism, his arguments are similar to those he has directed at the domestic bankruptcy system. They rest almost entirely on the claim that parties will contract around any set of rules and the result must therefore be inefficient. To that extent, he joins many others in giving us Coase Without Costs, ignoring the possibility that the rules may create a system that is sufficiently close to the most efficient possible that it is not worthwhile to contract around it or that it is

122. Although Professor Rasmussen tucks this point into a footnote, he there concedes that it would be difficult to gain enforcement of his menu approach without an international agreement on the menu options. See Rasmussen, *A New Approach*, *supra* note 29, at 26 n.120. In fact, I say with some confidence that the menu approach is highly unlikely to be accepted without an international agreement on options. Absent such agreement, there would be a very complex and likely unworkable checkboard pattern of enforcement. Thus, I address the proposal in terms of such an agreement.

123. I would assert that universalism would create fewer transitional problems, especially in a world that has embraced modified universalism, but I will not pursue that point here.

worthwhile to do so in few enough cases that the default position creates more efficiency than it obstructs.

Because Professor Rasmussen's proposal essentially represents a translation of his general contractual-bankruptcy theories to an international level, a full statement of my objections to it would be a full-blown critique of his theoretical approach, which would take me too far afield in this article. I will address, however, two objections that have particular saliency internationally.

All contractual approaches to law rest on the basic argument that, assuming a perfect market and no transaction costs, parties will always adopt the most efficient bargain. Therefore, any legal constraint on that bargain must be irrelevant or inefficient. The constraint is irrelevant to the extent it permits the bargain to be struck, and inefficient to the extent it changes the terms of the private bargain. In the debtor-creditor context, this syllogism supports a bankruptcy law that has little or no content, except to enforce the bargain between the parties. In very brief summary, two of the key flaws in any contractual approach are lack of asset control (including protection of creditor priority) and the difficulty of disclosure (or "transparency"). These two flaws are especially important in the international context, so I will discuss them here. Both of them are correctable only if the contractual-menu is linked to an enforceable security interest, an interest that is very difficult to obtain internationally.

1. *Asset Control*

The first point is that any contractual approach to bankruptcy, including the menu, has no benefit unless the bargain is enforceable. The bargain is unlikely to be enforceable, however, unless coupled with a security interest. That fact leads to one of the most fundamental criticisms of any contractual approach to bankruptcy: that approach represents only a variant on the secured credit device and a minor one at that. Even Professor Rasmussen's contractual-menu approach, arguably the most plausible of these concepts, is subject to this critique.¹²⁴

A debtor-creditor bargain can be highly protected by a dominant security interest¹²⁵ coupled with appropriate contractual covenants.

124. As Professor LoPucki puts it, bankrupt debtors "may breach their contracts with impunity." LoPucki, *Cooperative Territoriality*, *supra* note 71, at 2235. Of course, that is not true if the contract is supported by a security interest.

125. By a dominant security interest, I mean either a blanket lien over substantially all the debtor's assets or a security interest in key assets which are difficult to replace, without which the debtor cannot function effectively, and which give a significant measure of control over cash flow. See generally Ronald J. Mann, *Explaining the Pattern of Secured Credit*, 110 HARV. L. REV. 625 (1997) [hereinafter Mann, *Secured Credit*]. For example, the typical single-asset real estate case would satisfy criteria one and two, but would satisfy three only where rents are held to be cash collateral. See, e.g., Glenn R. Schmitt, *The Continuing Con-*

Any bargain protected by such an interest has little to fear from bankruptcy.¹²⁶ The bankruptcy menu can offer little additional advantage beyond the security interest itself. On the other hand, where a creditor lacks sufficient bargaining power to negotiate such a lien,¹²⁷ any bankruptcy-menu bargain will be largely unenforceable in the context of general default, the bankruptcy context.¹²⁸ The reason is that any system that does not control the debtor's assets cannot protect the parties' bargain against debtor manipulation. It is all too easy for the debtor to use transfers to subsidiaries and affiliates, among many other devices, to undo the benefits for which the creditor has bargained. The legal mechanisms for preventing inappropriate asset transfers — notably fraudulent conveyance and preference rules — are clumsy and operate effectively only after the point of demonstrable insolvency in the period just prior to a formal bankruptcy.

Without the asset control provided by an effective system of security-interest enforcement, ex ante efficiencies cannot be obtained by bargaining over bankruptcy alternatives because the bargains cannot be enforced.

2. Disclosure

The second major problem with any contractual approach to bankruptcy, domestically and internationally, is the issue of disclosure:

fusion Over Real Property Rents As Cash Collateral In Bankruptcy: The Need for A Consistent Interpretation, 5 DEPAUL BUS. L.J. 1 (1992/1993).

126. Without writing the article here, I note that a creditor who can prevent use of the debtor's assets to administer the case (including paying the lawyers) can be quite sure of lifting the automatic stay quickly in almost all cases, rendering the bankruptcy irrelevant from the creditor's point of view. There may be a handful of cases in which that cannot be done. One instance is where there is too little at stake to make a lift-stay motion worthwhile.

It is true that in some circumstances in certain systems a bankruptcy petition may produce delay even for a creditor holding a valid security interest. That can happen in the United States, for example. Even if we had no bankruptcy system at all, such delays might result from a debtor's preliminary injunction litigation against foreclosure or other devices. Secured creditors are naïve if they can imagine a world in which there are no delays or costs for such creditors in a general default.

127. To say much the same thing in efficiency language, the costs to a debtor of granting a security interest may exceed the savings the debtor receives in the form of a lower interest rate and other favorable terms. The primary reason is that the security interest represents a substantial transfer of control over the debtor's assets to the creditor, especially if it is a "dominant security interest." Mann, *Secured Credit*, *supra* note 125, at 665, 668. The debtor (or its management) may conclude that the cost in lost business flexibility exceeds any savings the bargain enables the creditor to offer in exchange. This point is central to the ongoing debate about security interests, but it can only be mentioned here.

128. I do not mean to suggest that a security interest over some specific asset will have no value to a creditor in such a circumstance, but only that it will be insufficient to enforce the overall bankruptcy-menu bargain, because of the debtor's capacity to manipulate all the uncontrolled assets.

How will creditors, even adjusting creditors,¹²⁹ know and understand the bankruptcy configuration of the entity with whom they are dealing?¹³⁰ Will acquiring that information impose unacceptable transaction costs?¹³¹ Professor LoPucki has done an excellent analysis of these and other difficulties that face contractual theories with regard to disclosure. I will rest on that analysis for the proposition that the contractual-menu approach creates serious and intractable problems of transparency. As with asset control, only linkage with a security interest in an Article 9 type system of public registration could solve this problem.

3. *Security as a Solution*

One can imagine globalization leading to a system in which default is administered through a single secured-creditor system.¹³² Article 9 presents elegant solutions to the problems of priorities vis-à-vis the rights of third parties and its public-registration system effectively addresses the disclosure issue. If one were to adopt a privatized, contractual system for managing global defaults, Article 9 is the obvious model with which to begin fashioning such a system, because it solves the two central problems not solved by mere contractual-bankruptcy approaches. Importantly, it is a system that has been tested over many decades in highly successful economies.

Of course, the proposal of such a system would require addressing the decades-long debate in the United States and elsewhere concerning the efficiency and fairness of a secured-credit system,¹³³ especially one that effectively would pre-empt traditional bankruptcy laws as the mechanism for managing a general default. Furthermore, because such a system would be designed to manage general defaults, the traditional job of bankruptcy laws, it would have to be symmetrical with the global market and therefore would have to be adopted globally.

Yet to solve the problem with a secured-credit system is even more difficult internationally. A number of efforts have been under way for some time to try to achieve international agreement with respect to secured credit, but all are experiencing serious obstacles. There are a number of countries that have substantial reservations about granting unlimited first priority to security interests and there are a number

129. See Lucian A. Bebchuk & Jesse M. Fried, *The Uneasy Case for the Priority of Secured Claims in Bankruptcy*, 105 YALE L.J. 857 (1996) (introducing the term "adjusting creditor").

130. See LoPucki, *Cooperative Territoriality*, *supra* note 71, at 2246-47.

131. See *id.*

132. See *supra* note 125 for elucidation of a "dominant" security interest.

133. See Mann, *Secured Credit*, *supra* note 125.

that favor priority, but are not prepared to accept the United States approach to registration and disclosure of security interests.¹³⁴

The notion of using security interests in a single-creditor or syndicated-creditor approach to financing as a solution to the problem of a general default may be the most plausible alternative to universalism in the sense I use the term. If a single-creditor system would achieve our goals, the bankruptcy-menu approach would be unnecessary. If agreement on the role of security interests (asset control, priority, and disclosure) cannot be achieved, the bankruptcy-menu approach cannot be successful either. The point is not merely a question of political difficulty. In my view, the contractual-menu approach has been useful as an analytic tool,¹³⁵ but our development of a theoretical model at the international level will require us to proceed in a different direction.

B. *Professor LoPucki*

1. *Generally*

Professor LoPucki's *Cornell* article is, as usual, full of ideas that are contrarian, surprising, interesting, and useful.¹³⁶ That article is devoted in large part to critiquing my position, which is flattering, under the heading "universalism," which is misleading. The problem is that Professor LoPucki conflates two perspectives: a theoretical world of international agreement embodied in an agreed international convention and the current world as it is, semi-globalized and highly uncoordinated. Professor LoPucki criticizes universalism as if it were applied in the current world, while comparing it to a coordinated territorialism achieved under a global convention in a world ready to come to such an agreement. The defect in the comparison is like describing the difficulties of a 747 landing in the wilderness and then comparing its performance with a DC3 touching down at Heathrow. The fault may be mine, for having extolled the benefits of the long-term solution, universalism, while focusing my detailed analysis on modified universalism, a transitional rule. Because universalism has been so widely accepted in academic circles, I have been guilty of failing to present it adequately at the theoretical level. I will therefore compare theoretical, future universalism as I have described it above with Pro-

134. See 1997 U.N. Comm'n on Int'l Trade L.Y.B. 27, U.N. Doc. A/CN.9/434, para. 248, containing the report of the meeting of the Working Group on International Contract Practices of UNCITRAL in November 1996. The current version of the draft Convention prepared by the Secretariat is contained in the Convention on Assignment in Receivables Financing, 1998 U.N. Comm'n on Int'l Trade L.Y.B. 28, U.N. Doc. A/CN.9/WG.II/WP.96. See also Spiro V. Bazinas, *An International Legal Regime for Receivables Financing: UNCITRAL's Contribution*, 8 DUKE J. COMP. & INT'L L. 315 (1998).

135. I am tempted to say "heuristic," but I promised Mom I would not.

136. See LoPucki, *Cooperation*, *supra* note 30.

fessor LoPucki's theoretical, "conventionalized" territorialism as presented in his widely read article in the *Cornell Law Review*.¹³⁷ I will then compare modified universalism with the current system of territorialism. In both comparisons, universalism is the better system.

For clarity, the analysis starts with a single multinational corporate debtor, postponing the problem of corporate groups until the basics have been established.

"Cooperative territorialism" as proposed by Professor LoPucki in his *Cornell* article is a system in which each country exercises jurisdiction over the assets within its de facto power, without regard to legal concepts of jurisdiction.¹³⁸ Its courts manage and distribute those assets in accordance with the national priority system with complete freedom to deny priority treatment to "foreign" creditors (however "foreign" might be defined¹³⁹).¹⁴⁰ Where in a particular case it would be useful to cooperate — his example is in a joint sale of an asset package situated in two countries — the national courts would cooperate. The various avoiding powers would be applied to transfers of assets that were in the de facto power of a given court at the time of the transfer to be attacked.¹⁴¹ The court would apply its local avoidance law.¹⁴²

Professor LoPucki's territorial system is made cooperative and coherent through adoption of a convention, but it retains most of the disadvantages of any territorial system. Its fundamental flaw is that no national bankruptcy law is symmetrical with a global market. For the reasons mentioned earlier, no system of managing a general default can be effective unless it is symmetrical with the market. For that reason, countries have uniformly adopted national bankruptcy laws. When markets were mostly national, such a law was symmetrical with most of the market it governed.

137. *See id.*

138. *See id.* at 742-55.

139. *See infra* note 191.

140. *See* LoPucki, *Cooperation*, *supra* note 30. Professor LoPucki does not discuss how he would square this discrimination with the numerous treaties to which the United States is a party requiring "national treatment" for the citizens of the other treaty party. *See, e.g.*, Treaty between the United States and Israel Regarding Friendship, Commerce and Navigation, Apr. 3, 1954, 5 U.S.T. 550; Treaty between the United States and Japan Regarding Friendship, Commerce and Navigation, Apr. 2, 1953, 4 U.S.T. 2063. I am not clear if he would permit the courts to subordinate "foreign" creditors to general unsecured local creditors, but he would permit foreign creditors to file. *See* LoPucki, *Cooperation*, *supra* note 30, at 753-54; *see also* General Agreement on Tariffs and Trade — Multilateral Trade Negotiations: Agreement Establishing the Multilateral Trade Organization [World Trade Organization], Dec. 15, 1993, 33 I.L.M. 13 (1994).

141. *See* LoPucki, *Cooperation*, *supra* note 30, at 748-49.

142. *See* text accompanying *infra* notes 184-193.

A territorial system, being asymmetrical to a global market, has two serious weaknesses: the consequences of a general default depend upon the location of assets, and the laws of each jurisdiction differ greatly.¹⁴³ International bankruptcy is reduced to a game of musical chairs in which creditors cannot know in advance where the assets of the debtor will be located when the music stops. These flaws produce three bad results: a) distribution results are unpredictable; b) the debtor, perhaps in collusion with a favored creditor, can engage in strategic behavior up to and including fraud, by manipulation of asset location; and c) claims must be made, and administration and litigation must be conducted, in multiple jurisdictions at far greater cost. By contrast, in a world with a universalist convention establishing one bankruptcy law and one court system to administer it, the law would be highly predictable, movement of assets would be irrelevant, and the entire process could be administered efficiently. The consequence would be a great reduction in risk premiums and transaction costs and a great increase in fairness and efficiency.

To argue for territoriality as the goal of an international system is much the same as arguing for state-by-state bankruptcy within the United States. Even if there were a political case to be made for cooperative territoriality as an interim system, such a system as a long-term solution defies logic. For all the reasons discussed earlier, bankruptcy is inherently a market-symmetrical system and such a system is best served by universalism.

Territorialism is even less efficient if we consider only reorganization. Reorganization requires a high level of cooperation to administer and rescue a financially distressed multinational company. That is true whether the ultimate disposition is continuation or sale as a going concern. It is very difficult to engender the necessary cooperation among courts, given contending interests. Each court is bound by relatively rigid rules governing the details of entitlements under local bankruptcy law. Professor LoPucki's convention would apparently ensure that such entitlements were honored in detail.¹⁴⁴ For the reasons explained by the ALI Principles,¹⁴⁵ the result is to make it extremely difficult to achieve a reorganization. It has already been described how smoothly and efficiently reorganization of a multinational could be achieved under a single-law, single court universalist system. Reorganization is modern bankruptcy law. For that reason, it is the focus of nearly all the reform proposals being made and adopted

143. Nothing in Professor LoPucki's convention speaks to narrowing the differences between priority systems and other rules in each territorial enclave. On the contrary, Professor LoPucki wants to defend the integrity of each system's policy choices. See LoPucki, *Cooperation*, *supra* note 30, 751.

144. See LoPucki, *Cooperation*, *supra* note 30.

145. See ALI Statement, *supra* note 15, at 19.

around the world, from Germany to Mexico.¹⁴⁶ Indeed, the flexibility of reorganization statutes is often utilized today even where the business is to be liquidated in one sense or another.¹⁴⁷ To adopt territorialism as a long-term solution would be to leave multinational corporations mired in a liquidation-centered bankruptcy system already obsolete domestically.

The territorialist system also claims as a virtue the protection of the social policies of each nation through local priority rules and other local rules.¹⁴⁸ My initial discussion of true universalism explained how national policies could be diverse and yet protected in a universalist system, just as many state-law policies are enforced routinely in United States bankruptcy courts.¹⁴⁹ It also suggested that the international bankruptcy system might be limited to large, multinational companies, leaving local interests to be governed by local bankruptcy laws and policies. On the other hand, it is true that in a universalist system some bankruptcy rules would be imposed at the international level, as they are now imposed in most nations at the national rather than at the regional level. That result is natural, proper, and inevitable in a globalizing financial and commercial system that requires an underlying uniformity in the event of a multinational general default. Just as the free flow of goods, services, and investments in the American Republic required a national bankruptcy law, true globalization of trade and investment requires an international one. If the political viewpoints that would be offended by that result prevail in the end, then globalization will be halted in many other areas as well.

Even in a territorial system, local policies are very difficult to apply to multinationals, especially in the context of insolvency and general default. Is a tort victim protected by a territorial system? As things stand now, no web of laws ensures that a dangerous foreign product sold in the United States is backed by either insurance or substantial local assets. Absent local assets, how will a territorial system of bankruptcy protect the tort victim? What about the employee priority for repayment in bankruptcy? Would it be protected in a territorial system? No law requires a foreign company with an American payroll to have sufficient funds in the United States to pay employees. Instead, available funds may be e-transferred out of the country to a distant

146. Chapter 11, like the prophet, is dishonored by its local academics, but the rest of the world is interested and impressed. *See, e.g.*, Insolvency Bill [H.L.], Session 1999-2000 (2000), at <<http://www.parliament.the-stationery-office.co.uk/pa/cm199900/cmbills/173/2000173.htm>>; *see also*, British Review, *supra* note 14, at 12-13.

147. *See, e.g.*, *In re Maxwell Communication Corp.*, 170 B.R. 800 (Bankr. S.D.N.Y. 1994), *aff'd*, 186 B.R. 807 (S.D.N.Y. 1995), *aff'd*, 93 F.3d 1036 (2d Cir. 1996) (adoption of worldwide plan of liquidation).

148. *See* LoPucki, *Cooperation*, *supra* note 30, at 751-52.

149. *See supra* note 52.

bank moments before the payroll checks are processed, with no local assets to cover the employees. In those circumstances, only a universalist procedure would have the possibility of protecting the employees.

There is a whole legal industry devoted to helping foreign companies avoid or carefully limit their United States presence. Even “adjusting” creditors, like the larger suppliers, have no assurance that substantial United States assets stand behind a foreign company’s contractual promise. Because the territorial model of business simply does not apply to multinational companies, the assumption that local policies will be less vindicated in a universalist bankruptcy system is highly problematic with regard to multinationals.¹⁵⁰

By contrast, a universalist system, marshalling a company’s assets worldwide, could permit and *enforce* a limited range of agreed international priorities. For example, a priority for employees, one found in most domestic bankruptcy systems, could be agreed internationally and would be more reliably enforced than the existing territorial priorities. This example illustrates once more that globalization requires converging standards and that universalism is the best method for promoting convergence and taking advantage of its benefits.

In every respect, then, true universalism is a better long-term goal than cooperative territorialism, if one assumes continued globalization. The only basis that would remain for preferring cooperative territorialism would be the claim that universalism cannot be achieved politically or would take much longer to achieve. That point is discussed below.

2. Corporate Groups

In comparing universalism with territorialism at the theoretical level, one other point made by Professor LoPucki requires attention: the problem of corporate groups. This problem is also far broader than bankruptcy. In his classic multivolume treatise, *The Law of Corporate Groups*,¹⁵¹ Phillip Blumberg analyzes in detail the enormous legal problems that are presented by business enterprises with a single direction, but infinitely multipliable legal redoubts. He suggests that they may have to be treated as single entities under some circumstances,¹⁵² “piercing the corporate veil.” It goes without saying that I cannot seriously address the multitude of issues presented by corpo-

150. See text accompanying *infra* notes 152-165.

151. PHILLIP I. BLUMBERG & KURT A. STRASSER, *THE LAW OF CORPORATE GROUPS* (1998).

152. See *id.* at xxxix (recognizing that modern bankruptcy law often disregards the traditional rule of corporate separateness where related corporate entities have engaged in complex transactions, then fallen on difficult economic times).

rate groups within the confines of this Article nor can the bankruptcy aspects of those issues be easily isolated for analysis. Nonetheless, it is true that bankruptcy is one of the fields in which the corporate-group presents a major problem internationally. Indeed, Blumberg devotes an entire volume to it.

Understandably, Professor LoPucki does not attempt to answer the larger questions about corporate groups. Nonetheless, to use the general problem posed by corporate groups as an argument for cooperative territorialism, Professor LoPucki must show that territorialism is better suited to cope with the problem than is universalism. The ALI Statement of Principles identifies two categories of problems relating to corporate groups in the context of international bankruptcy.¹⁵³ The first is group liability. The second is consolidation or coordination. The first implicates all the larger issues just mentioned. Although most countries respect the corporate form most of the time, there are major exceptions, not limited to the odd tort case involving a taxi company.¹⁵⁴ The oft-cited instances are *Deltec*¹⁵⁵ and *Bhopal*,¹⁵⁶ both cases in which a parent company was exposed to liability for the obligations of its subsidiary.¹⁵⁷ Universalism's single court and single law are transparently better suited to sorting out the liability of various elements in a worldwide corporate group in such circumstances.

Professor LoPucki's claim that territorialism better manages international corporate groups relates to the second problem, procedural consolidation and coordination. He assumes a model in which corporate groups are neatly arranged in national slots. Each country where the group operates has its own local corporation and all of the assets and liabilities relating to that country are concentrated in that local

153. ALI Statement, *supra* note 15, at 96-97.

154. *See, e.g., Simon v. Philip Morris, Inc.*, 86 F. Supp. 2d 95 (E.D.N.Y. 2000) (holding that a British parent company actively involved in illegal conduct in the United States was therefore subject to jurisdiction and, impliedly, liability).

155. C-705-XVI. *Compania Swift de La Plata S.A., Frigorifica s/ convocatoria acreedores*. Corte Suprema de Justicia de la Nación, Buenos Aires, 4 Sept. 1973 (Michael W. Gordon, trans., *Argentine Jurisprudence: The Parke-Davis and Deltec Cases*, 6 LAW. AMER. 320, 330 (1974)); *see also* Michael W. Gordon, *Argentine Jurisprudence: Deltec Update*, 11 LAW. AMER. 43 (1979).

156. *See In re Union Carbide Corp.*, 809 F.2d 195 (2d Cir. 1987). *Bhopal* has raised one-law, one-forum questions with respect to tort liability, human rights violations, and criminal liability. *See id.* More than 15 years after the tragedy that injured 200,000 Indians these questions are still being contested. *See* Chris Hedges, *A Key Figure Proves Elusive In a U.S. Suit Over Bhopal*, N.Y. TIMES, Mar. 5, 2000, at A4 (discussing recent events with respect to criminal proceedings in India and a human rights suit in New York related to the disaster).

157. *See* Claudia M. Pardinás, *The Enigma of the Legal Liability of Transnational Corporations*, 14 SUFFOLK TRANSNAT'L L.J. 405 (1991); Jay Lawrence Westbrook, *Bhopal Symposium: Theories of Parent Company Liability and The Prospects for An International Settlement*, 20 TEX. INT'L L.J. 321 (1985); Lisa Moscati Hawkes, Note, *Parens Patriae and the Union Carbide Case: The Disaster at Bhopal Continues*, 21 CORNELL INT'L L.J. 181 (1988).

corporation.¹⁵⁸ The company then files a local bankruptcy and the local court administers the local assets for the benefit of the local creditors under the local law, perhaps with some measure of practical cooperation with the courts in other countries. Having constructed a perfectly territorial model, he makes a reasonable argument that a territorial legal regime best suits it. Here my dispute with him is primarily empirical. Although there are few data,¹⁵⁹ my sense is that the model is so far from the reality as to offer little support for the territorial view. In fact, many companies operate directly, rather than through subsidiaries, in countries outside of their country of incorporation or principal place of business. It is also common to establish a subsidiary in one country that serves regional purposes and has assets and liabilities all over a region. Even where first or second tier subsidiaries are established in each country of operation, it is often the case that the assets and operations are not maintained territorially, but are scattered around the corporate family, globally or regionally.¹⁶⁰ The companies in the corporate group regularly transfer assets among themselves for business and tax reasons as part of global cash management programs and in the course of inter-group politics. They also exchange cross-guarantees to third parties for the obligations of the parent and affiliates. Then there is fraud: moving assets across borders precisely to confuse and obfuscate. In short, the reality for most multinationals is a complicated mass of assets and liabilities sprawled across borders, not a neat territorial division. The corporate-group problem greatly complicates international bankruptcy issues. It does not make them territorial.

Take, for example, a multinational case in which some assets are in Mexico. The territorialist claim would be that the Mexican courts can simply dispose of the Mexican assets.¹⁶¹ Such a claim assumes a simple territorial reality that is counterfactual. If the standard for determining that an asset is Mexican is a legal one, like "jurisdiction," then there will be many potential conflicts of jurisdictional decisions in a territorial system. If the standard is raw power to control assets, there will be equal room for conflict, with even more serious consequences.

158. See LoPucki, *Cooperation*, *supra* note 30, at 751.

159. Here a marvelous empirical project awaits a young law or finance professor, involving a good deal of travel, much of it to sun-drenched islands. Pending that study, I proffer in support of my view of the facts, for what it is worth, eleven years in international practice. I was a partner in a firm called Surrey & Morse (now part of Jones, Day, Reavis, and Pogue) and my practice was largely devoted to litigation and transactions involving multinationals around the world.

160. Because these subsidiaries often have no business reality, it is hard to get business people to make reality congruent with the legal fiction. Exemplary of the point in text is the *Maxwell* situation. See Jay Lawrence Westbrook, *The Lessons of Maxwell Communications*, 64 *FORDHAM L. REV.* 2531 (1996) [hereinafter Westbrook, *Lessons*].

161. See LoPucki, *Cooperative Territoriality*, *supra* note 71, at 2234.

Suppose a bank account in the New York branch of a London bank held in the name of a Mexican corporation. The traditional, fictional choice-of-law rule would choose New York law as governing,¹⁶² but there is a substantial argument that the worldwide bank has the ultimate obligation to pay.¹⁶³ Thus the New York and English courts would have quite plausible claims to jurisdiction over the account on those grounds, while the Mexican bankruptcy court would be following another established doctrine by asserting jurisdiction over the account by virtue of a worldwide in rem jurisdiction over all of its debtor's property. As to power, both New York and London would have contempt power over the bank, while Mexico could order the debtor's officers to comply under pain of contempt.¹⁶⁴ Which court can "claim" the bank account under a territorial system? All three can do so. The bank and the debtor may well be subject to conflicting orders. Many other examples are available in a globalizing world in which attempts to assign assets, liabilities, and operations to particular territories are increasingly futile in every case that matters.

There can be little doubt that the problem of the legal responsibility of corporate groups will be addressed as the world continues to globalize. The general pressures for convergence already discussed will operate here as well. The operations of multinationals create grave policy problems for nation states and a serious legal problem for every person in a nation state who relies upon a territorial legal regime. For a tort victim or a small supplier, the risk of inefficiency and injustice because of an injury by one soldier in a multinational corporate army is substantial. The territorial system offers little defense. Even for contract creditors, the difficulty of identifying clearly the corporate actor with whom one is contracting, much less the laws that might apply to that actor's conduct, make such contracting expensive (because of the cost of information acquisition and the need for multiple solutions to bargaining issues) and the results unpredictable. These problems will continue to haunt all areas of commercial and business life in a globalizing world, from securities regulation to anti-trust to bankruptcy. Territorialism is less able to cope with them precisely because it turns upon a territorial model of economic conduct that is outdated on its way to obsolete. On the other hand, the steady

162. See RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 416, 369 (1934) (reflecting territorial view that the law of the place of payment governs liability for non-payment of obligations); *Zimmerman v. Sutherland*, 274 U.S. 253, 255-56 (1927) (stating that the liability of a bank for an obligation is governed by the law of the place where payment on the obligation was to be made, in this case Austria-Hungary).

163. See, e.g., *Citibank, N.A. v. Wells Fargo Asia Ltd.*, 495 U.S. 660 (1990) (recognizing the possibility that the debt of a Philippine branch could be recovered from the general assets of a New York bank).

164. I use the term "contempt" to embrace any judicial remedy for violation of court orders.

pressure for universalist solutions in all these commercial fields will interact with those in bankruptcy to evolve efficient answers.¹⁶⁵

3. *Lesser Universalism*

Because a truly universalist system may be many years away, it is appropriate to touch briefly upon lesser versions of universalism that would represent a substantial improvement on the ad hoc system of modified universalism or any form of territorialism.

a. Single Court, National Laws. The point was made earlier that a lesser form of universalism could be achieved by a single court system applying national bankruptcy laws. I will call such a system a “single-court” universalism. The single court would choose a single national bankruptcy law to apply in each case. It would choose the law to apply pursuant to an internationally agreed choice-of-law rule. This system would not be as good as true universalism. There would be a lower level of predictability because the single court would not have a single international bankruptcy law to apply. The choice-of-law decisions would multiply and grow greatly in complexity.¹⁶⁶ It would still be true that a single court system applying only two sets of choice-of-law rules (one for bankruptcy law and one for nonbankruptcy law) would, over time, produce results far more predictable than those obtainable in multiple tribunals.

Nonetheless, this point is one that greatly concerns Professor LoPucki, because of his conviction that the proper choice-of-law rule would be difficult to establish and enforce and would be subject to strategic manipulation.¹⁶⁷ The reason is that he believes it is impossible to state a workable conflicts rule designating the bankruptcy law of a company’s home country as controlling. He believes one cannot use the company’s state of incorporation because it is too subject to manipulation nor its principle place of business, because it is too hard to determine. Although he does not address this problem in the context

165. This Article would grow much bigger if these issues were discussed. For example, one could easily envision a system in which every corporate group, as defined, would be required to register (incorporate) in a country that it can demonstrate is an important center of its activities and to disclose that registration in its stationery, invoices, advertising, web sites, emails, and other business communications. Then an international rule or a choice-of-law rule could be tied to that location. Many other solutions are available as well, each with its own difficulties.

166. As with our current nonsystem internationally, the combination of choice-of-bankruptcy law and choice-of-nonbankruptcy law interacting as to each dispute multiplies the plausible alternative outcomes.

167. See LoPucki, *Cooperation*, *supra* note 30, at 720, 729. Actually, Professor LoPucki focuses upon the problem in the context of the choice-of-forum issue, but the questions are much the same.

of a global convention specifying the relevant standard, it seems clear he does not believe that a workable standard can be articulated.¹⁶⁸

I agree that the law of the place of incorporation is unsatisfactory because of the risk of sham incorporation — a company organized under a flag of convenience unrelated to the location of its business, management, and assets. Professor LoPucki, however, is also not satisfied with a “principal place of business” or “center of main interests” standard. He argues that such a standard is hopelessly imprecise and will lead to much litigation and inconsistent decisions. Yet the principal place of business standard in one formulation or another is commonplace throughout American law — state and federal¹⁶⁹ — and is found elsewhere as well.¹⁷⁰ That sort of standard has produced some litigation, but I am unaware of any widely held view that it is so imprecise as to be impractical or to maim any important legal objective. The center-of-main-interests standard was adopted in the EU Convention¹⁷¹ and the Model Law,¹⁷² with no substantial claim asserted that the standard was too difficult to enforce. A similar standard has been applied by the United States courts in applying section 304 of the Bankruptcy Code in the choice of forum context without provoking substantial litigation.¹⁷³ It is unclear why great difficulty should be anticipated for it in the context of a bankruptcy convention, especially if it is applied by a single court system around the world.

168. See LoPucki, *Cooperation*, *supra* note 30, at 718.

169. See, e.g., 28 U.S.C. § 1332(c)(1) (1994) (“[A] corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business.”). This standard has given rise to a certain amount of controversy, but has remained in place because it is reasonably workable. See John B. Oakley, *Prospectus For The American Law Institute’s Federal Judicial Code Revision Project*, 31 U.C. DAVIS L. REV. 855, 882-84 (1998) (discussing the controversy regarding interpretation of this clause at the federal level, but concluding that sufficient consensus has been reached among courts to prevent raising the issue in the ALI revision). Consider also the “chief executive office” standard in § 9-103 of the Uniform Commercial Code. U.C.C. § 9-103(3)(d) (1994); 8 Hawkland U.C.C. Series (West Group) § 9-103:9 (1997) (collecting cases that discuss the “chief executive office” standard).

170. See, e.g., Canadian Statement, *supra* note 7, at 118 (explaining that Canadian law applies a chief place of business standard to choose the law applicable to security interests in mobile goods and intangibles); Kamlah, *supra* note 4 (explaining that the new German bankruptcy code utilizes a center of main interests standard).

171. Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, 1990 O.J. (C 189) 32, 29 I.L.M. 1413 (1990) [hereinafter Brussels Convention].

172. MODEL LAW, *supra* note 16, at IV.31.

173. Section 304 permits deference to a “foreign proceeding.” Section 101 of the Bankruptcy Code defines such a proceeding: “‘foreign proceeding’ means proceeding, whether judicial or administrative and whether or not under bankruptcy law, in a foreign country in which the debtor’s domicile, residence, principal place of business, or principal assets were located at the commencement of such proceeding, for the purpose of liquidating an estate, adjusting debts by composition, extension, or discharge, or effecting a reorganization.” 11 U.S.C. § 101(23) (1994).

Furthermore, it is not necessary to assume a raw, unsophisticated choice between place of incorporation and principal place of business in choosing a choice-of-law rule for an international convention in a globalizing world. For one thing, the choice may be multidimensional. The Model Law provides that the place of incorporation is presumed to be the center of the debtor's main interests.¹⁷⁴ It would be a short step to make that presumption rebuttable only by a clear showing that the center was elsewhere. A naked incorporation in a sun-drenched bank haven would fall easily before proof of the actual center of the business, while a multiply-centered business incorporated under the law of any of its centers would be easily "centered" for bankruptcy purposes. Any law professor can then devise the marginal hypothetical where the plant is in Chicago, while the CEO, one secretary, and a fax machine actually reside on the sun-drenched isle, but the marginal cases will be few. Resolved in a single court, they would present little practical difficulty across the run of cases. The specification of court jurisdiction in the highly successful Brussels Convention serves as an excellent early model for this sort of international rulemaking in the context of a single-court, referred-question system.¹⁷⁵ The model would work as well for choice of law, even though it is somewhat more complicated than choice of forum.

b. Single Law, National Courts. Another lesser form of universalism might consist of a single international bankruptcy law enforced by national courts, which I will call a "single law" system. Such a system would be the mirror-image of the single-court system. The rule for selecting the primary court to administer a general default, with other courts serving in an ancillary role, would likely be one of the variants just discussed. For the same reasons, there should not be great difficulty in identifying the proper court to play the primary role.

174. See Ulrik Rammeskov Bang-Pedersen, *Asset Distribution in Transnational Insolvencies: Combining Predictability and Protection of Local Interests*, 73 AM. BANKR. L.J. 385, 419 (1999) ("According to the UNCITRAL Cross-Border Insolvency Model Law Article 16(3), the center of the debtor's main interest is presumed to be the debtor's registered office . . .").

175. See Brussels Convention, *supra* note 171. For a general discussion of the convention today, see Robert C. Reuland, *The Recognition of Judgments in the European Community: The Twenty-Fifth Anniversary of the Brussels Convention*, 14 MICH. J. INT'L L. 559 (1993); see also Patrick J. Borchers, *Comparing Personal Jurisdiction in the United States and the European Community: Lessons for American Reform*, 40 AM. J. COMP. L. 121, 138-43 (1992) (criticizing some aspects of the Brussels Convention, but still offering it as a model preferable to American constitutionalizing of jurisdiction); Friedrich K. Juenger, *A Shoe Unfit for Globetrotting*, 28 U.C. DAVIS L. REV. 1027, 1039 (1995) (although criticizing the Brussels Convention's treatment of non-signatories, agreeing that its approach to personal jurisdiction issues could be an effective model for shaping U.S. law); Russell J. Weintraub, *How Substantial Is Our Need for a Judgments-Recognition Convention and What Should We Bargain Away to Get It?*, 24 BROOK. J. INT'L L. 167, 167-68 (1998) (suggesting that the Brussels Convention offers an excellent model on which to base negotiations for a new judgments convention).

If a single international bankruptcy law were administered by multiple national tribunals, many of the benefits described above would be reduced or eliminated, but the results would nonetheless be more uniform, more predictable, more efficient, and more fair than would be possible using national bankruptcy laws.

In either system of lesser universalism, the manager of a reorganizing business (corporate management or an appointed trustee)¹⁷⁶ would have one court to supervise the worldwide restructuring of the business. That result alone would make even these lesser forms of universalism superior to territorialism, where reorganization efforts on a transnational basis would remain difficult or impossible, as explained above.

c. Multiple Law and Courts. The final alternative would be a multilaw, multicourt convention that had only a choice-of-law rule and a choice-of-court rule. That system would be better than we have now, because the governing rules would be adopted at the international level and binding on all the contracting parties, but it would be far short of true universalism. It is difficult to say if it should be considered as the lowest form of universalism or the highest form of the transitional solution, modified universalism.

d. Bankruptcy as Part of a Converging and Internationalizing Legal World. These systems regulating international bankruptcy will not evolve in a vacuum. As the EU example demonstrates, a globalizing world will generate increasing pressures for predictable international rules in a number of areas relating to commerce. Transnational business will demand to be regulated (or deregulated) at an international level.¹⁷⁷ Although many areas will remain governed by national laws, some level of predictability, or even uniformity, will be required to accommodate the growing globalization of business enterprise. That accommodation can be achieved in three ways: sufficient convergence of national laws (as in the uniform-law movement within the United States), adoption of an international substantive rule, or adoption of an international choice-of-law, choice-of-forum rule. Specific solutions may combine these approaches, achieving a "one-law, one-forum" solution.¹⁷⁸

Universalist bankruptcy will be one important example, but only one, of a one-law, one-forum solution. Securities regulation, antitrust

176. In the United States and a number of other countries, the debtor remains in possession in a reorganization. See IMF Report, *supra* note 2, at 57-58. In many other countries, the creditors or a court appoint a trustee to take over the management of a reorganizing company. See *id.*

177. See Jay Lawrence Westbrook, *Extraterritoriality, Conflicts of Laws, and the Regulation of Transnational Business*, 25 TEX. INT'L L.J. 71 (1990).

178. Ultimately, the point is achieving an international regime for business, whether than regime is substantively regulatory or deregulatory. See *id.*

enforcement, and environmental laws are already farther along in some respects than bankruptcy. The EU example suggests that bankruptcy will be more difficult than most others and slower in coming. For the reasons indicated above, the convergence approach alone cannot work efficiently for the collective device that is bankruptcy because of the need for market symmetry. The result must be the slow process of evolution of an international regime or an international rule that chooses predictably the applicable local regime. A combination of the two — the former applied to as-defined large multinationals and the latter for local enterprises — is a definite possibility. Also quite possible is a combination of international and national solutions in a single-court or a single-law system, as has just been described.

For present purposes, the point is that in a globalizing world there will be many occasions other than bankruptcy to deal with issues like sham incorporation and multiple business centers. Tax issues, labor regulations, trade preferences, and a host of other questions will require either an international legal regime or rules “centering” a business for legal purposes or both. It is more than likely that these converging requirements will solve, or set up for solution, the one-law, one-forum problem for bankruptcy as well.¹⁷⁹

4. *Transitional Rules*

Having done me the favor of forcing me to articulate the arguments for universalism as the proper theoretical and long-term solution, Professor LoPucki has granted me the further courtesy in this symposium of conceding that I am right.¹⁸⁰ He is prepared to narrow the argument to the best system for transition. I am convinced that modified universalism is the best transitional rule, because it moves us in the right direction — toward true universalism — and provides the essential experience to inform the fashioning of a multinational bankruptcy convention when that time comes. It also permits flexible, pragmatic decisions to be made in the here and now that enable parties to obtain some portion of the benefits of universalism.

A transitional rule must satisfy two requirements. Like all rules, it should produce the fairest and most efficient results possible. In addition, it should assist, rather than retard, the transition to the long-term rule that will produce the best results. To the extent that the two objectives conflict, we should aim for a sensible balance.

We start with the issue of the best rule for current results, the heart of Professor LoPucki’s argument. Realizing that cooperation is essen-

179. See *supra* text accompanying note 165.

180. Such a concession marks the mature and secure scholar. However, Professor LoPucki insists it will be “decades if not centuries” before universalism can be installed, a view I regard as far too pessimistic. See *supra* notes 87-103 and accompanying text.

tial to the fairest and most efficient results, Professor LoPucki argues for a "cooperative" territorialism, which is not quite an oxymoron, at least as a transitional rule. The difficulty is that Professor LoPucki's proposal simply exchanges one set of legal problems for another, while making cooperation much less likely. As noted above,¹⁸¹ assets and operations do not fall neatly into territorial boxes. Under Professor LoPucki's approach, each national forum must decide which assets are part of its jurisdiction, but it will routinely be the case that more than one forum can fairly claim jurisdiction as to various assets. He has exchanged one difficult choice-of-forum problem for many such problems. Attempts to cooperate in the face of these conflicting claims will be very difficult. That difficulty will be increased by Professor LoPucki's insistence on "protection" of every arguable right of a local creditor (however "local creditor" may be defined in a globalizing world).¹⁸²

He has seriously complicated the choice-of-law problem in the bargain, because a territorial system requires that many courts decide what law applies to various assets and transactions rather than having most, if not all, of those decisions concentrated in the main proceeding. Thus we could look forward to six countries claiming the right to apply preference law to one pre-bankruptcy payment, with three deciding it was preferential and recoverable and three deciding it was not. That result creates large inefficiencies, *ex ante* and *ex post*. Modified universalism offers a substantial chance of avoiding such results, because it will often result in a single court resolving such issues. Cooperative territorialism does not. Indeed, cooperative territorialism not only risks multiple and inconsistent jurisdictional and choice-of-law decisions, but it is necessarily tied to hopelessly obsolete territorial choice-of-law rules.¹⁸³

The *Maxwell* case illustrates these points, because it involved the principal problem Professor LoPucki invokes against modified univer-

181. See *supra* notes 158-164 and accompanying text.

182. See ALI Statement, *supra* note 15, at 38.

183. See generally Russell J. Weintraub, *An Approach to Choice Of Law That Focuses On Consequences*, 56 ALB. L. REV. 701, 702 (1993); Robert A. Lefflar, *The Nature of Conflicts Law*, 81 COLUM. L. REV. 1080 (1981); David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933); Brainerd Currie, *Survival of Actions: Adjudication versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205 (1958); Willis L.M. Reese, *Conflict of Law and the Restatement Second*, 28 LAW & CONTEMP. PROBS. 679, 679-80 (1963) (all criticizing the territorial/vested rights approach to choice of law and expressing the view that its time had passed). *But cf.* Joanna Benjamin, *Property Rights in the Financial Markets, the Internet and Conflicts of Laws — The Idea of Location*, Schmitthoff Conference 2000: Law and Trade in the 21st century (London, June 1-3, 2000) (abstract; copy on file with author) ("In the global weightless economy, the fiction of location serves to simplify the conceptual aspects of conflict of laws."); Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249 (1992) (arguing for territorial choice-of-law rules within the United States).

salism — the difficulty of identifying a debtor's principal place of business — as well as the problems his solution exacerbates. In *Maxwell*, the legal saga began when Mr. Maxwell fell or was pushed off his yacht in Spanish waters. His troubled empire fell apart in scandal and fraud. One of his groups of companies filed for Chapter 11 in the United States and for insolvency administration in the United Kingdom, the filings within days of each other. The case was the classroom example for Professor LoPucki's concern: the parent's headquarters were in London and most of its financing was there, but most of its assets were in other countries. Specifically, eighty percent of its assets were in companies headquartered in the United States.¹⁸⁴ Thus one could make a nice argument for either the United States or the United Kingdom as the country of the main proceeding for the parent. Because of these ambiguities at the start, the United States court forged a compromise: it refused to dismiss the United States case under section 304, but de facto deferred to British administration of the case, subject to concurrence on key decisions by an examiner appointed to watch out for United States interests. This result was a classic application of modified universalism, because the administration was centralized in the United Kingdom for the most part, but the United States examiner was in a position to ensure that United States interests were not compromised.

Maxwell also presented a classic transnational preference problem, which the bankruptcy and district courts resolved essentially by deferring to British law and the British courts on a finding that the United Kingdom was the center of the case.¹⁸⁵ Although the analysis is much more complicated in detail,¹⁸⁶ that result was squarely consistent with the pragmatic, yet centralizing instinct of modified universalism.

The final result in *Maxwell* was an agreed plan of liquidation on a worldwide basis, apparently the first ever.¹⁸⁷ The key point is that the courts and the parties were able to take a worldwide view of the case, rather than a parochial one. The fact that United States creditors would have gotten considerably more money had United States law been applied to the preference issue did not deter the United States courts from choosing the cooperative result. Had the courts applied the "vested rights" views suggested by cooperative territorialism, the United States creditors in that case would have done better, but United States creditors in the next "n" cases might well have done

184. It must be noted, however, that these companies — including Random House and the Official Airline Guide — in turn had assets all over the world.

185. *In re Maxwell Communication Corp.*, 170 B.R. 800, 818 (Bankr. S.D.N.Y. 1994), *aff'd* 186 B.R. 807, 822 (S.D.N.Y. 1995), *aff'd*, 93 F.3d 1036, 1051 (2d Cir. 1996).

186. See Westbrook, *Lessons*, *supra* note 160.

187. See *id.*

worse because of an inability to achieve a fair and acceptable world-wide result.

Professor LoPucki might claim *Maxwell* as a good example for his approach, because two parallel proceedings were involved, rather than a United States section 304 case ancillary to the British case. Yet modified universalism can operate through parallel proceedings and that is what happened in *Maxwell*.¹⁸⁸ The reason *Maxwell* must be seen as an application of modified universalism rather than cooperative territorialism is that the rights of the parties were seen from a worldwide perspective, rather than as a series of rights vested in each territory. Indeed, Professor LoPucki's notion that local creditors are somehow cheated of vested rights by a transnational solution to a transnational bankruptcy¹⁸⁹ lies at the heart of our disagreement.¹⁹⁰

The payments challenged as preferential in *Maxwell* amounted to more than \$100 million. Their recovery would thus have increased distributions to all unsecured creditors by a substantial percentage. Furthermore, if the transferee banks (all of which had substantial operations in the United States) had suffered a preference judgment in a purely United States proceeding, the United States creditors would have done better still.¹⁹¹ Although application of British law would not have been impossible had *Maxwell* been governed by a system of cooperative territorialism, it seems likely that there would have been an overwhelming inclination to apply United States law in a United States proceeding governed by a notion of fixed local rights. Instead, the Second Circuit Court of Appeals opinion in that case largely ignored choice-of-law approaches. It affirmed the lower courts primarily to vindicate international cooperation in a case they found to be mainly British.¹⁹² It seems probable the court would have come to the

188. An ancillary, deferential approach is better in a system of modified universalism, but not essential. See ALI Statement, *supra* note 15, at 15.

189. See LoPucki, *Cooperative Territoriality*, *supra* note 71, at 2217-18 ("injustice to the individual creditors [when a court] surrenders . . . assets") and at 2238 ("change in entitlements"); LoPucki, *Cooperation*, *supra* note 30, at 711-13.

190. See ALI Statement, *supra* note 15, at 35 (General Principle V).

191. Note, however, that the text is written as if one could meaningfully speak of "a United States creditor" without an armload of caveats. In fact, most countries, including the United States, permit foreigners to file claims and receive distributions without discrimination. See ALI Statement, *supra* note 15, at 34 n.46; Guide to UNCITRAL Model Law, *supra* note 16, at 30. The result is that "local" benefits may flow to the more sophisticated multinational creditors at least as much, if not more, as to stereotypical local creditors. The complications are endless and make the notion of "local" creditors with vested rights even more attenuated. See ALI Statement, *supra* note 15, at 38; Guide to UNCITRAL Model Law, *supra* note 16, at 459-50.

192. *In re Maxwell Communication Corp.*, 93 F.3d 1036, 1048-49 (2d Cir. 1996).

opposite conclusion under a legal regime focused on territorialism and maximizing returns to local creditors.¹⁹³

Professor LoPucki's discussion of the experience under section 304 of the United States Bankruptcy Code illustrates our disagreement. Modified universalism is a concept based on section 304 and the cases thereunder. Section 304 was primarily the brainchild of that excellent scholar and comparativist, Professor Stefan Riesenfeld.¹⁹⁴ It was designed to permit United States courts to act in an ancillary role to a foreign court when that court was in the home country of the debtor, the site of the "main" bankruptcy proceeding involving that debtor.¹⁹⁵

Professor LoPucki's description of the litigation under section 304 turns the jurisprudence on its head. To a lesser extent, the same thing is true of Professor Guzman.¹⁹⁶ They emphasize a handful of cases in which the United States courts have refused to defer to foreign bankruptcy proceedings in the debtor's home country and largely ignore the many cases in which the United States courts have eagerly and enthusiastically cooperated with those courts, acting in a truly ancillary role.¹⁹⁷ In the great majority of cases, the United States courts have

193. Professor LoPucki, in his Cornell article, would solve the *Maxwell* case another way by claiming that payments that could be traced to U.S. companies would be voided on a fraudulent conveyance theory and then, under his proposed treaty, the British courts would transfer those assets from the British bankruptcy estate to the United States estate. See LoPucki, *Cooperation*, *supra* note 30, at 715-18. There simply is not room in the current discussion for a full analysis of this suggestion, but it should be noted that the payments in *Maxwell* came primarily from the sale of United States companies, not from the accounts of United States companies as such and, in any case, those companies were apparently solvent, so it is not clear how fraudulent conveyance law would apply. There are a number of other difficulties with the suggested approach that could be part of an interesting exchange on that subject alone.

194. See Riesenfeld, *supra* note 32.

195. See *id.*

196. See Guzman, *supra* note 47, at 2185; LoPucki, *Cooperative Territoriality*, *supra* note 71, at 2121.

197. See, e.g., *Vesta Fire Ins. Corp. v. New Cap Reinsurance Corp.*, 244 B.R. 209 (S.D.N.Y. 2000); *In re Thornhill Global Deposit Fund, Ltd.*, 245 B.R. 1 (Bankr. D. Mass. 2000); Order Appointing Examiner, *In re Maxwell Communication Corp.*, No. 91 B 15741 (TLB) (Bankr. S.D.N.Y. 1992) (Brozman, J.); Order Confirming Plan, *In re Maxwell Communication Corp.*, No. 91-15741 (TLB) (Bankr. S.D.N.Y. 1993) reviewed in *In re Brierley*, 145 B.R. 151 (Bankr. S.D.N.Y. 1992) (describing cooperation in Maxwell Communications Case); *In re Axona Int'l Credit & Commerce, Ltd.*, 88 B.R. 597 (Bankr. S.D.N.Y. 1988), *aff'd*, 115 B.R. 442 (S.D.N.Y. 1990) (avoiding transfers to United States creditors and returning proceeds to Hong Kong primary proceeding for distribution); *In re Ocana*, 151 B.R. 670 (Bankr. S.D.N.Y. 1993); *In re Rubin*, 160 B.R. 269 (Bankr. S.D.N.Y. 1993); *In re Culmer*, 25 B.R. 621, 629 (Bankr. S.D.N.Y. 1982); *Haarhuis v. Kunnan Enter., Ltd.*, 223 B.R. 252 (D.D.C. 1998); *In re Kingscroft Ins. Co.*, 138 B.R. 121 (Bankr. S.D. Fla. 1992); *In re Banco de Descuento*, 78 B.R. 337 (Bankr. S.D. Fla. 1987); *In re Singer*, 205 B.R. 355 (S.D.N.Y. 1997); *In re Brierley*, 145 B.R. 151 (Bankr. S.D.N.Y. 1992); *In re Rukavina*, 227 B.R. 234 (Bankr. S.D.N.Y. 1998); *In re Fracmaster*, 237 B.R. 627 (Bankr. E.D. Texas 1999); *In re Schimmelpenninck*, 183 F.3d 347 (5th Cir. 1999); *In re Manning*, 236 B.R. 14 (B.A.P. 9th Cir. 1999); *In re Treco*, 229 B.R. 280 (Bankr. S.D.N.Y. 1999), *aff'd* 239 B.R. 36 (S.D.N.Y. 1999); *In re Bird*, 222 B.R. 229 B.R. 90 (Bankr. S.D.N.Y. 1999); *In re Ionica, PLC*, 241 B.R. 829, 838 (Bankr. S.D.N.Y. 1999). Cf. *In re YMB Magnex Int'l, Inc.*, 249 B.R. 402

steadfastly refused to apply section 304(c) in a narrow and technical way, as Professor LoPucki reads it, but have given it a broad and generous construction.¹⁹⁸ For the most part, the cases in which they have not deferred to a foreign “main” proceeding have been where they felt, rightly or wrongly, that the foreign proceeding was fundamentally unfair.

For example, in the *Interpool* and *Papeleras Reunidas* cases, discussed by Professor LoPucki,¹⁹⁹ the United States courts found that the foreign laws were inadequate and unfair, respectively.²⁰⁰ Modified universalism is “modified” precisely because it permits local courts to evaluate foreign law and foreign courts before deferring to a main proceeding. In these two cases, the United States courts were very likely wrong,²⁰¹ but their inquiry was legitimate. On the other hand, United States courts have more often found foreign law to be adequate and fair and have deferred.²⁰²

By contrast, the court in *Toga*,²⁰³ a widely criticized decision,²⁰⁴ applied the restrictions of section 304(c) quite literally: if a United States creditor would be disadvantaged, then we go it alone territorially. That is presumably the result endorsed by Professor LoPucki.²⁰⁵ Obviously, that understanding of section 304 would be squarely contrary to its intent to promote international cooperation, because it would leave only two possibilities: the case in which the United States creditors all feel they will be better off abroad, in which case no United States proceeding is needed or will be brought, or the case in which the United States creditors can realize some advantage through a parochial treatment in the United States courts and are absolutely entitled to it. To put it another way, to understand section 304 as saying we only cooperate when it is in our interest to do so (or worse, in the interest of every one of “our” creditors)²⁰⁶ is to say we will cooperate rarely. Happily, most United States cases have held to the contrary, finding that section 304(c) requires only that the foreign law be of the

(Bankr. E.D. Pa. 2000) (following earlier deferral to Canadian receivership, the court follows Canadian court in permitting securities litigation to proceed in another court).

198. See generally Buxbaum, *supra* note 54, at 57, 69; Westbrook, *Theory, supra* note 37, at 471-73.

199. See LoPucki, *Cooperation, supra* note 30, at 709-10, 730.

200. I discuss these cases in detail in Westbrook, *Theory, supra* note 37, at 471-78.

201. See *id.*

202. See *supra* note 197.

203. *In re Toga Manufacturing*, 28 Bankr. 165 (Bankr. E.D. Mich. 1983).

204. See *In re Ironica PLC*, 241 F.R. 829, 838 (Bankr. S.D.N.Y. 1999) (collecting authorities critical of the *Toga* case); see also Westbrook, *Theory, supra* note 37, at 471-73.

205. See LoPucki, *Cooperation, supra* note 30, at 730.

206. See *supra* note 191.

same sort generally as ours and adequate to the task of managing fairly the consequences of the financial distress of the debtor at hand. They have generally deferred to a foreign main proceeding, even dismissing United States cases that might conflict with a worldwide administration,²⁰⁷ except where they had serious doubts about the fairness of the foreign proceeding.²⁰⁸ That description of the section 304 litigation is consistent with what I have called modified universalism. The cases that are discussed by Professors LoPucki and Guzman are the exceptions, not the exemplars.

Not only is modified universalism a better rule here and now, but it will be more helpful in the necessary transition to true universalism. It seems self-evident that judges who have been engaged in active cooperation in every case as required by modified universalism, and who have had to evaluate foreign bankruptcy laws in order to determine whether to defer to a main proceeding, will develop the precise experience necessary to inform the crafters of a universalist convention. Territorialist judges will cooperate less and conflict with one another more, reducing their cooperative experience and their interest in cooperative solutions. Policymakers cannot be expected to move the world in one leap from a highly territorial system to a universal one. A gradual development of cooperative experience, agreed protocols,²⁰⁹ shared distributions,²¹⁰ and the like will provide the necessary confidence, and knowledge, to permit a universalist regime to be established.

Professor LoPucki's *Cornell* article has made a real contribution to the field by articulating a series of important and interesting questions. At the end of the day, however, universalism is the right answer and modified universalism is the right bridge from here to there.²¹¹

207. See *In re Axona Int. Credit & Commerce, Ltd.*, 88 B.R. 597 (Bankr. S.D.N.Y. 1988), *aff'd*, 115 B.R. 442 (S.D.N.Y. 1990) (avoiding transfers to United States creditors and returning proceeds to Hong Kong primary proceeding for distribution).

208. See ALI Statement, *supra* note 15, at 143, Reporter's Note 68 (U.S. courts deferring to Canadian and Mexican courts). Other NAFTA courts have returned the favor. See *id.*

209. See ALI Statement, *supra* note 15, at Appendix 3 (exemplary protocols).

210. See Westbrook, *Lessons*, *supra* note 186, at 2535.

211. Nonetheless, two interesting student notes dismiss the progress so far as hopelessly inadequate and demand more far-reaching solutions, although in more or less opposite directions. Liza Perkins, Note, *A Defense of Pure Universalism in Cross-Border Corporate Insolvencies*, 32 N.Y.U. J. INT'L L. & POL. 787 (2000) (arguing that the answer is pure universalism); Lore Unt, Note, *International Relations and International Insolvency Cooperation: Liberalism, Institutionalism, and Transnational Legal Dialogue*, 28 LAW & POL'Y INT'L BUS. 1037 (1997) (arguing that the answer is cooperation among decentralized courts in liberal states). Unt's writing preceded LoPucki's defense of territorialism, but it would seem she would reject it because it is strongly oriented to national states, an orientation she would likely regard as regressive.

C. Professor Guzman

Professor Guzman is a thorough-going universalist who is not committed to a contractual solution to the international bankruptcy problem, so I begin by agreeing with many of the points he makes. His article is devoted to efficiency arguments that turn on the reduction of costs as a function of predictability of result.²¹² I largely agree with those arguments, but I must disagree with him in two respects: these arguments are not new to the literature and they have probably been overstated.

I first made the argument that universalism would produce lower borrowing costs through greater predictability in 1990.²¹³ In an article published in 1991, I asserted "that the increased predictability of the results of default [from universalism] would significantly reduce the costs of borrowing and other credit for multinationals."²¹⁴ Others had made the argument before me.²¹⁵ Yet I fear that the efficiency argument may be overstated. On reflection, I think we have to be cautious in claiming too much by way of increased efficiency and decreased transaction costs arising from predictability. For one thing, predictability in the legal and operational confusion of general default will always be limited.²¹⁶ For another, unsecured creditors receive so little in bankruptcy that even adjusting creditors are unlikely to tailor their bargains in material respects because of bankruptcy recoveries.²¹⁷ Data²¹⁸ and expert reports²¹⁹ combine to suggest that unsecured creditors recover little in liquidations in the United States or anywhere else in the world. Therefore, one has to be modest in claiming that the bargains made by such creditors would be much affected by variations in bankruptcy recoveries.²²⁰

212. See Guzman, *supra* note 47, at 2181.

213. My 1990 lecture was published as GLOBAL INSOLVENCIES IN A WORLD OF NATION STATES, CURRENT ISSUES IN INSOLVENCY LAW (1991).

214. See Westbrook, *Theory*, *supra* note 37, at 466.

215. See Nadelmann, *Local Priorities*, *supra* note 41.

216. See text accompanying *supra* note 48.

217. See Ronald Mann, *Strategy and Force in the Liquidation of Secured Debt*, 96 MICH. L. REV. 159, 241-43 (1997).

218. See Michael J. Herbert & Domenic E. Pacitti, *Down and Out in Richmond, Virginia: The Distribution of Assets in Chapter 7 Bankruptcy Proceedings Closed in 1984-1987*, 22 RICH. L. REV. 303, 315-16 (1988).

219. See Roy Goode et al., *Debtor-Creditor Regimes*, in WORLD BANK, BUILDING EFFECTIVE INSOLVENCY SYSTEMS 1, 2-3 (1999).

220. That is one reason that I am not convinced that the ex ante view of bankruptcy is the only important one, as Professor Guzman asserts. See Guzman, *supra* note 47, at 2186 n.43. Another is the fact, recently demonstrated again in East Asia, that creditors, even sophisticated creditors like the leading money-center commercial and investment banks, regularly make serious errors in risk assessment.

Nonetheless, there may be identifiable groups of debtors unlikely to grant security. In their general defaults, unsecured creditors might do better. One of those groups might be multinational companies. Although more empirical study needs to be done, there is some reason to think that companies are less likely to grant security as they grow larger and more successful.²²¹ The explanation would be that companies prefer not to submit to the control entailed in granting security and therefore resist granting it.²²² Multinational companies may be larger than most. Therefore, empirical investigation may reveal that bargains with multinationals are not as likely to be secured, rendering recoveries by the unsecured creditors of multinationals more likely. The possibility that multinationals might be less likely to grant security may be enhanced by the difficulty of getting valid and enforceable security interests internationally, making it arguably less likely that multinational debtors and their creditors would find it worthwhile to bargain for such security.

If there is a subgroup of firms that are multinational and that do not grant security to creditors, international bankruptcy arrangements might materially affect the bargains they strike with their unsecured creditors, because those creditors might anticipate material differences in recoveries in a general default under various possible bankruptcy regimes. If so, then international bankruptcy rules might have material ex ante effects on the bargains struck by unsecured creditors of multinational debtors. Although contractual-bankruptcy arrangements could not effectively be enforced,²²³ a universalist bankruptcy regime that would predictably protect creditors might make possible more efficient bargains and better risk-pricing. For example, such a regime might provide protection against distressed grants of security to secure previously unsecured debts.

In any case, Professor Guzman's interest is primarily in weakly adjusting and non-adjusting creditors.²²⁴ Truly involuntary creditors²²⁵

221. See Mann, *Secured Credit*, *supra* note 125; see also Michael J. Barclay & Clifford W. Smith, Jr., *The Priority Structure of Corporate Liabilities*, 50 J. FIN. 899 (1995). There may be some evidence on this point forthcoming from the Business Bankruptcy Project. See generally Elizabeth Warren & Jay Lawrence Westbrook, *Financial Characteristics of Businesses in Bankruptcy*, 73 AM. BANKR. L.J. 499 (1999).

222. See Mann, *Secured Credit*, *supra* note 125, at 664-68. The argument is a complex one, depending upon the cost to a debtor of losing control of assets as compared with any lowering of the cost of borrowing consequent upon the grant of security. See *id.*; see also Henry Hassmann & Reinier Krakaman, *Hands-Tying Contracts: Book Publishing, Venture Capital Financing*, 8 J.L. ECON. & ORG. 628 (1992).

223. See *supra* Section III.A.1.

224. Professors Bebchuk and Guzman have also argued that territorialism is actually better for countries adopting it, providing incentives for local investment by debtors through lower borrowing costs offered by favored local creditors. See Lucian A. Bebchuk & Andrew T. Guzman, *An Economic Analysis of Transnational Bankruptcies*, 42 J.L. & ECON. 775 (1999). Although this Article is not the occasion to address that contention, I should note that I disagree with it. One objection is that their analysis turns on discrimination against

are not well-protected under domestic law in most countries and are not likely to do well under either territorialism or universalism until substantive reforms are made. All adjusting creditors, full to weak, will do better under universalism, as Professor Guzman says, although not as well as he and I might like, for the reasons just mentioned. Predictability will reduce risks and costs *ex ante* to some extent and that effect is useful. There are details that would be interesting to pursue, but this article is too long already.

IV. CONCLUSION

Perhaps the most important result of this symposium is that we are all found to favor universalism as the long-term solution to general default by a multinational. Professor Guzman and I seem fairly close together in looking to a form of universalism as a transitional solution as well. Professor Rasmussen's concept of universalism remains focused on privatization. He seems not to find much value in transitional solutions short of that. Professor LoPucki remains committed in the near term to territorialism mitigated by agreements to cooperate.

Universalism is the future of international bankruptcy, and the future may come sooner than we imagine. No one knows if globalization will continue at its current, accelerating pace, but we do know that in other fields there are meaningful international legal rules in place today that seemed far-distant ten years ago and would have been almost unimaginable ten years before that. If globalization does proceed apace, then the pressures for a universal system for managing the financial crises of multinational companies will prove irresistible: global bankruptcy for a global market.

foreign creditors. In fact, there is little formal discrimination against foreign creditors in the great majority of countries. See ALI Statement, *supra* note 15, at 34 n.46. It seems unlikely that informal discrimination would be consistent enough to affect investment patterns materially in countries with reasonably reliable judicial systems. (Countries without such systems must, of course, be evaluated by investors on an entirely different scale.) Any effect would therefore be small. For a different analysis of incentives for territorialism arising in countries that believe they can predict that they will be "surplus" countries, see Westbrook, *Theory*, *supra* note 37, at 465 n.26.

225. See TERESA A. SULLIVAN, ELIZABETH WARREN & JAY L. WESTBROOK, AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA 293 (1989). Professor LoPucki advanced our concept greatly in his ground-breaking article, Lynn M. LoPucki, *The Unsecured Creditors Bargain*, 80 VA. L. REV. 1887 (1994). Professors Bebchuk and Fried have refined that concept considerably with their insight about adjusting and nonadjusting creditors, although I agree with Professor LoPucki that all creditors are on a spectrum from almost-fully-adjusting to completely involuntary and therefore non-adjusting. See LoPucki, *Cooperative Territoriality*, *supra* note 71.