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## Coordinating Cross-Border Bankruptcy: How Territorialism Saves Universalism

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## COORDINATING CROSS-BORDER BANKRUPTCY: HOW TERRITORIALISM SAVES UNIVERSALISM

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*Jason K. Fincke*<sup>\*\*</sup>

*This article explores the difficulties of coordinating cross-border bankruptcies. These difficulties arise from the lack of a binding set of uniform international rules, forcing multinational businesses to look to domestic laws for guidance. The problem is that without coordinated, concurrent insolvency proceedings, an effective reorganization of a multinational corporation is impossible because a multitude of separate judgments ultimately leads to the dismemberment of a debtor's estate.*

*To address this challenge, an increasing number of countries—including the United States and several European countries such as Germany, Poland, Romania, Spain, and the United Kingdom—have enacted a Model Law on cross-border insolvency. This legal development has awoken the debate between territorialism and universalism with new fervor. Traditionally, territorialism allows the bankruptcy court of a particular jurisdiction to apply its laws for the benefit of its jurisdictional creditors, whereas universalism requires all involved jurisdictions to relinquish their sovereignty and apply the law of a foreign jurisdiction. The Model Law is based on a modified universalist concept with significant territorialist elements. It envisions that one court will coordinate the insolvency proceedings of a multinational enterprise, no matter where its assets and creditors are found.*

*Thus far, the debate between territorialism and universalism has focused on the respective strengths and weaknesses of each system, and the Model Law has been lauded for its universalist strengths and condemned for its alleged failure to protect domestic creditors. However, this Article argues that the Model Law's combination of territorialist and universalist features will make it*

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*successful in achieving its goals of efficiency, cost savings, and predictability. More specifically, this Article suggests that the Model Law's territorialist aspects, rather than its universalist aspects, will protect the interests of domestic creditors and other stakeholders. Finally, the Article concludes that the United States' enactment of the Model Law is a major step toward international cooperation for the United States and that domestic businesses will only be advantaged by this new cooperative approach.*

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## I. INTRODUCTION

Until recently the international community has been unable to effectively coordinate cross-border insolvencies.<sup>1</sup> Without coordinated, concurrent insolvency proceedings, an effective reorganization of a multinational corporation is impossible because separate, multiple judgments lead to the dismemberment of a debtor's estate.<sup>2</sup> The lack of a binding set of uniform international rules is a major factor contributing to the insufficiency of guidelines in cases of cross-border insolvency.<sup>3</sup> Furthermore, regional and bilateral agreements have, until now, lacked the cooperation of Member States or the necessary scope and thus have fallen short of their intended purpose.<sup>4</sup>

The lack of an international insolvency framework forces multinational businesses to look at domestic laws for guidance.<sup>5</sup> However, domestic insolvency laws significantly differ from each other by either being debtor- or creditor-oriented.<sup>6</sup> As Ian Fletcher, Professor at the University College of London, notes, the substantive differences in domestic insolvency laws have precluded the development of a uniform approach to multinational default. "The ensuing diversity [of domestic European laws] has been unusually intense, even by the standards of private international law, with the result that the quest for unifying principles has so far

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<sup>1</sup> SAMUEL L. BUFFORD ET AL., *INTERNATIONAL INSOLVENCY I* (Federal Judicial Center 2001), available at [http://www.fjc.gov/public/pdf.nsf/lookup/IntlInso.pdf/\\$file/IntlInso.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/IntlInso.pdf/$file/IntlInso.pdf) (last visited Sept. 30, 2008) ("One of the most noteworthy features of international bankruptcy law is the lack of legal structures, either formal or informal, to deal with an insolvency that crosses national borders").

<sup>2</sup> See *id.* (discussing various attempts at a universality approach to transnational insolvency issues).

<sup>3</sup> See generally David H. Culmer, *The Cross-Border Insolvency Concordat and Customary International Law: Is It Ripe Yet?*, 14 *CONN. INT'L L.J.* 564, 575 (1999).

<sup>4</sup> See Timothy E. Powers et al., *The Model International Insolvency Co-operation Act*, in *CURRENT ISSUES IN CROSS-BORDER INSOLVENCY AND REORGANIZATIONS* 233, 234–35 (E. Bruce Leonard & Christopher W. Besant eds., 1994); see also IAN F. FLETCHER, *INSOLVENCY IN PRIVATE INTERNATIONAL LAW* 7 (P.B. Carter ed., 1999) [hereinafter FLETCHER, *PRIVATE INTERNATIONAL LAW*].

<sup>5</sup> See Ian F. Fletcher & Hamish Anderson, *The Insolvency Issues*, in *CROSS-BORDER SECURITY AND INSOLVENCY* 257, 262 (Michael Bridge & Robert Stevens eds., 2001).

<sup>6</sup> See FLETCHER, *PRIVATE INTERNATIONAL LAW*, *supra* note 4, at 4–5.

proved to be elusive.”<sup>7</sup> The reconciliation of domestic insolvency laws is made more difficult because a country’s approach to insolvency is often rooted in that country’s particular societal values and public policies.<sup>8</sup> Thus, domestic courts in many countries, including the United States, are hesitant to defer jurisdiction to the court of another country that has a completely adverse set of guidelines in place.<sup>9</sup>

This hesitancy was cast aside in the United States with the recent passage of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. One of the lesser-known provisions of the Act was the adoption of the UNCITRAL<sup>10</sup> Model Law on Cross Border Insolvency in title VIII of the Act. The Model Law goes further than the former section 304 of the U.S. Bankruptcy Code in requiring U.S. bankruptcy judges to take legal cognizance of foreign insolvency proceedings. The adoption of the Model puts the United States in the company of Eritrea, Mexico, Japan, and South Africa (2000); Montenegro (2002); Poland and Romania (2003); Serbia (2004); the British Virgin Islands and Canada (with amendments) (2005); and the United Kingdom (2006).<sup>11</sup> Germany and Spain have adopted the Model Law in part.<sup>12</sup> The Model Law is pending adoption in New Zealand and has been introduced in Australia.<sup>13</sup>

These developments have awoken the territorialism/universalism debate with new fervor. The Model Law is a modified universalist concept with significant territorialist elements, and envisions that one court will coordinate the insolvency proceedings of a multinational enterprise, no matter where its assets and creditors are found. Territorialists support the current majority system of domestic court jurisdiction over domestic assets and creditors with coordination done on an ad hoc basis.

Thus far the universalist/territorialist debate has focused on the respective weaknesses and strengths of each system, and the Model Law has been lauded for its universalist strengths and condemned for its alleged failure to protect domestic creditors. However, this article will argue that it is the combination of the

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<sup>7</sup> *Id.* at 10.

<sup>8</sup> CARL FELSENFELD, FELSENFELD ON INTERNATIONAL INSOLVENCY 1–9 (2003); *see* BUFFORD, *supra* note 1, at 3 (“The legal rules governing insolvency law and practice are rooted deeply in the legal traditions of individual countries. In part this arises because insolvency law preempts and supersedes many rules of both substantive and procedural law. Moreover, the importance of national economic interests varies from country to country . . .”).

<sup>9</sup> Under former section 304(c) of the United States Bankruptcy Code, a U.S. bankruptcy court might recognize a foreign proceeding if that proceeding is substantially in accordance with the U.S. Bankruptcy Code. *See* NEIL COOPER & REBECCA JARVIS, RECOGNITION AND ENFORCEMENT OF CROSS-BORDER INSOLVENCY 128–29 (1996).

<sup>10</sup> UNCITRAL is the United Nations Commission on International Trade Law established by the General Assembly to further the progressive harmonization and unification of international trade law.

<sup>11</sup> UNCITRAL, Status: 1997 – Model Law on Cross-border Insolvency, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/insolvency/1997Model\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html) (last visited Nov. 23, 2008); UNCITRAL, *Model Law on Cross-border Insolvency* (May 30, 1997), available at <http://www.uncitral.org/pdf/english/texts/insolven/insolvency-e.pdf> (last visited Sept. 30, 2008) [hereinafter *Model Law*]; *see also* Samuel L. Bufford, *Global Venue Controls Are Coming: A Reply to Professor LoPucki*, 79 AM. BANKR. L.J. 105, 108 (2005) [hereinafter Bufford, *Global Venue Controls*].

<sup>12</sup> *See* Chris Farley, *An Overview, Survey, and Critique of Administering Cross-Border Insolvencies*, 27 HOUS. J. INT’L L. 181, 216 (2004).

<sup>13</sup> E. Bruce Leonard, *The International Year in Review*, 22 AM. BANKR. INST. J. 22, 78 (2003).

territorialist and universalist aspects that will make the Model Law successful in achieving its goals of efficiency, cost savings, and predictability. More specifically, its territorialist aspects, not its universalist aspects, will protect the interests of domestic creditors and other stakeholders. Furthermore, the universalist requirements of information-sharing and administrative coordination are far superior to a territorialist ad hoc, treaty-based approach.

In short, while chapter 15 of the U.S. Bankruptcy Code does not placate territorialist sensibilities, U.S. courts still retain broad control over domestic concerns through their power to recognize foreign cases and through their power to refuse enforcement of foreign decisions on the grounds of public policy. The most important universalist aspect of chapter 15 and the Model Law is the expectation that U.S. courts will coordinate with foreign bodies. As the Model Law is far from global adoption, the United States is leading by example. In joining some of its major trading partners in adopting the Model Law, the United States has sent a powerful message as to its preference for an international system governing cross-border insolvencies and as to what rights and privileges it demands for its own domestic enterprises.

## II. THEORIES AND PRINCIPLES OF INTERNATIONAL INSOLVENCY LAW: UNIVERSALISM AND TERRITORIALISM

In the absence of a substantive international insolvency law framework, the focus of international bankruptcy jurisprudence has long been on the choice of forum.<sup>14</sup> The choice of forum and the choice of law are intertwined in the area of international insolvency because no court will conduct bankruptcy proceedings pursuant to the laws of another jurisdiction.<sup>15</sup> Whether a jurisdiction follows a particular principle determines whether a cross-border insolvency will be administered in a single forum or in multiple fora. Thus, the principles of international insolvency law are not only outcome-determinative as to forum selection, but they are outcome-determinative regarding the selection of the substantive law governing the insolvency proceedings.

Two main theories suggest how cross-border insolvency proceedings should be structured: universalism and territorialism.<sup>16</sup> The historical approach has been territorialism, where “the courts in each national jurisdiction seize the property physically within their control and distribute it according to local rules.”<sup>17</sup>

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<sup>14</sup> Hannah L. Buxbaum, *Rethinking International Insolvency: The Neglected Role of Choice of Law Rules and Theory*, 36 STAN. J. INT'L L. 23, 30 (2000).

<sup>15</sup> *Id.*

<sup>16</sup> Bufford, *Global Venue Controls*, *supra* note 11, at 108. In addition to the two theories here, there are other lesser-known theories of international insolvency, most notably contractualism. See Robert K. Rasmussen, *Resolving Transnational Insolvencies Through Private Ordering*, 98 MICH. L. REV. 2252, 2254–55 (2000) (arguing that bankruptcy selection clauses can perform better from economic and political perspectives than can either universalism or territorialism).

<sup>17</sup> Andrew T. Guzman, *International Bankruptcy: In Defense of Universalism*, 98 MICH. L. REV. 2177, 2179 (2000) [hereinafter Guzman, *Defense of Universalism*] (quoting Jay Lawrence Westbrook, *Choice of Avoidance Law in Global Insolvencies*, 17 BROOK. J. INT'L L. 499, 513 (1991) [hereinafter Westbrook, *Choice of Avoidance Law*]).

In contrast, universalism in its pure form takes the view that all bankruptcy assets and claims should be resolved in the debtor's home country under the laws of that country.<sup>18</sup> Modified universalism provides that a non-home country court may open a secondary insolvency case to supplement the home-country dominant case for a debtor.<sup>19</sup> In the absence of a secondary case, modified universalism subscribes to the pure universalist view that the entire insolvency case should be administered under the local law of the home country.

Universalism has employed the use of specialized terminology to describe its cooperative approach. The dominant case in the home country is called the "main" case or proceeding.<sup>20</sup> A case in any other country is called a "secondary"<sup>21</sup> or "non-main"<sup>22</sup> case or proceeding. Territorialism does not require such specialized terminology because every case filed in a separate country is its own main case.

#### A. *Universalism*

Universalism refers to a multinational insolvency system in which a single court, that of the debtor's home country, has jurisdiction over a debtor's assets, wherever located, and distributes them in accordance with the law of that country. The pure form of universalism advocates an idealistic world where courts and legal systems are bound to enforce the orders of the court of the home country; out of respect for international comity, they do so. Most advocates of universalism do not advance the pure form of universalism because of the practical recognition of the enduring differences among political and economic systems, legal regimes, and court systems, as well as among enforcement of those regimes.<sup>23</sup> The universalist model envisions that local courts in each affected country will be obligated by domestic law (including principles of international comity) or international convention to enforce the orders of the home country court.<sup>24</sup> Thus, universalism is not a single-court system, but a dominant-court system.<sup>25</sup>

The modified version of universalism provides a regime that recognizes that transnational insolvencies involve a complex interaction of national laws and expects international comity. Under this system, local courts have a degree of freedom as to

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<sup>18</sup> *Id.*

<sup>19</sup> Modified universalism is the form of universalism that most defenders of universalism follow. See Bufford, *Global Venue Controls*, *supra* note 11, at 108, 109 n.22; see also Lynn M. LoPucki, *The Case for Cooperative Territoriality*, 98 MICH. L. REV. 2216, 2221 (2000) [hereinafter LoPucki, *Case*].

<sup>20</sup> See 11 U.S.C.A. § 1502(4) (2005) and *Model Law*, *supra* note 11, art. 2(b) (defining "foreign main proceeding"); Council Regulation 1346/2000, art. 3.4, 2000 O.J. (L 160) (authorizing the opening of a secondary proceeding before a main proceeding in certain circumstances).

<sup>21</sup> See, e.g., Council Regulation 1346/2000, *supra* note 20, art. 3.3.

<sup>22</sup> See 11 U.S.C.A. § 1502(5) (2005); *Model Law*, *supra* note 11, art. 2(c).

<sup>23</sup> See Jay Lawrence Westbrook, *Universal Priorities*, 33 TEX. INT'L L.J. 27, 28 n.4 (1998) ("There is also the notion of 'unity,' which means that one court administers all assets, but that notion is so far from contemporary reality that it is not really part of the working hypothesis of present scholars."). But see Liza Perkins, Note, *A Defense of Pure Universalism in Cross-Border Corporate Insolvencies*, 32 N.Y.U. J. INT'L L. & POL. 787, 788 (2000) (arguing for the adoption of pure universalism as the structure of an international insolvency system) [hereinafter Perkins, *A Defense of Pure Universalism*].

<sup>24</sup> Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 CORNELL L. REV. 696, 699 (1999) [hereinafter LoPucki, *Cooperation*].

<sup>25</sup> LoPucki, *Case*, *supra* note 19, at 2221.

whether compliance with home-country requests is appropriate. The most common legal standards to determine appropriateness are that compliance does not alter the legal entitlements of parties and that compliance does not offend the complying country's public policy.

### 1. Pure Universalism

Pure universalism envisions a single insolvency regime that reflects a global economic structure and that governs all international insolvency cases. Under such a regime, there would be, for each business entity, one main insolvency case that would administer all of the entity's assets worldwide.<sup>26</sup> That forum would manage the case, collect the assets, regulate a reorganization, and provide for the payment of creditors all around the world.<sup>27</sup> Similarly situated creditors in all countries would be treated equally.<sup>28</sup> The case would be governed by a single legal regime governing the substantive rights of the parties in interest, which would eliminate conflicts among applicable laws that could vary the rights of either the creditors or the debtor and its owners.<sup>29</sup> A unified set of procedural rules would also govern the case and would provide clear guidelines for its commencement or opening, its administration, and its closing.

The case for pure universalism is easy to state in economic terms.<sup>30</sup> The minimization or elimination of transaction costs produces the most efficient economic transactions that create the greatest economic value.<sup>31</sup> Bankruptcy systems are designed to reduce transaction costs, specifically debt collection costs, through collective action.<sup>32</sup> However, multiple bankruptcy cases tend to defeat the benefits of collective action by multiplying the costs of participation and administration.<sup>33</sup> Thus, where a single main insolvency case can be entrusted to protect creditors, to reorganize or to liquidate business, to protect jobs, and to provide for an orderly and economical administration of the case, economic efficiencies are created. Furthermore, such a system "decrease[s] lending costs and do[es] not skew investment choices."<sup>34</sup> In addition, by reducing the incentive for each forum to

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<sup>26</sup> See, e.g., Jay Lawrence Westbrook, *A Global Solution to International Default*, 98 MICH. L. REV. 2276, 2292–93 (2000) [hereinafter Westbrook, *Global Solution*]; Donald T. Trautman et al., *Four Models for International Bankruptcy*, 41 AM. J. COMP. LAW 573, 575–76 (1993).

<sup>27</sup> See, e.g., Trautman, *supra* note 26, at 575–76.; Westbrook, *Global Solution*, *supra* note 26, at 2292–93; Andre J. Berends, *UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview*, 6 TUL. J. INT'L & COMP. L. 309, 313 (1998); Jay Lawrence Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L.J. 457, 461 (1991) [hereinafter Westbrook, *Choice of Law*].

<sup>28</sup> Trautman, *supra* note 26, at 575 ("[A] fundamental tenet of the bankruptcy policies of most civilized countries is to treat all similarly situated creditors equally . . . .")

<sup>29</sup> See, e.g., Westbrook, *Global Solution*, *supra* note 26, at 2292–97.

<sup>30</sup> See generally Perkins, *A Defense of Pure Universalism*, *supra* note 23.

<sup>31</sup> See Robert K. Rasmussen, *A New Approach to International Insolvencies*, 19 MICH. J. INT'L L. 1, 6–10 (1997) [hereinafter Rasmussen, *A New Approach*].

<sup>32</sup> See THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* 5 (Harvard Univ. Press 1986).

<sup>33</sup> Perkins, *A Defense of Pure Universalism*, *supra* note 23, at 805–06.

<sup>34</sup> See, e.g., Rasmussen, *A New Approach*, *supra* note 31, at 27; Lucian A. Bebchuck & Andrew T. Guzman, *An Economic Analysis of Transnational Bankruptcies*, 42 J.L. & ECON. 775, 779 (1999) [hereinafter Bebchuck & Guzman, *Economic Analysis*].



increase its share of the pie administered for domestic creditors, a single court would improve dramatically the possibility of reorganization and the preservation of the value of an international business group.<sup>35</sup>

Transaction costs are particularly problematic for international bankruptcies. Multiple insolvency cases in several countries for the same debtor duplicate transaction costs and vastly decrease economic efficiency.<sup>36</sup> Differences in legal systems also add substantial costs because the decision-makers must educate themselves in the laws of every country involved.

## 2. Modified Universalism

The pure universalism approach is merely aspirational because there is a decided lack of harmony in the global economic structure, and each country has its own insolvency regime with its own principles and goals.<sup>37</sup>

Modified universalism embraces universalism's core belief of cooperation, but maintains the primacy of local courts' power to exercise discretion with respect to "the fairness of the home country procedures" and with respect to protecting the interests of local creditors.<sup>38</sup> In essence, "[m]odified universalism is universalism tempered by what is practical at the current stage of international legal development."<sup>39</sup> Thus, modified universalism allows for a single main case for a multinational concern in its home country (however defined), with the insolvency of the multinational concern governed primarily by the laws of its home country. However, modified universalism recognizes that the main case may need support through secondary or ancillary cases in other countries where assets or creditors are located.<sup>40</sup> A local court, under this view, normally applies domestic law to its proceedings, and it retains the discretion to evaluate the fairness of home country procedures and to protect the interests of local creditors where appropriate.<sup>41</sup>

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<sup>35</sup> Westbrook, *Global Solution*, *supra* note 26, at 2293.

<sup>36</sup> See *In re Bd. of Dirs. of Multicanal S.A.*, 314 B.R. 486, 521 (Bankr. S.D.N.Y. 2004).

<sup>37</sup> Compare the insolvency regimes of Germany and France, which are both now subject to the EU Regulation. German insolvency law creates a presumption that a business should be liquidated. The German court will only undertake a reorganization if the creditors choose this route and only after the insolvency administrator reports on the debtor's economic situation. See *Insolvenzordnung* [InsO] [Insolvency Statute], Oct. 5, 1994, BGBl. I at 2866, §§ 156–159, available at <http://www.iuscomp.org/gla/statutes/InsO.pdf> (last visited Oct. 27, 2008). In contrast, France presumes the reorganization of a business in order to permit the survival of the business, the preservation of employees and employment, and the discharge of liabilities, in this order. See Richard L. Koral & Marie-Christine Sordino, *The New Bankruptcy Reorganization Law in France: Ten Years Later*, 70 AM. BANKR. L.J. 437, 453 (1996).

<sup>38</sup> Emilie Beavers, Note, *Bankruptcy Law Harmonization In The NAFTA Countries: The Case of The United States and Mexico*, 2003 COLUM. BUS. L. REV. 965, 982 (2003).

<sup>39</sup> David Neiman, *International Insolvency and Environmental Obligations: A Prelude to Resolving the Conflicting Policies of a Clean Slate Versus a Clean Site in Transnational Bankruptcies*, 8 FORDHAM J. CORP. & FIN. L. 789, 826 (2003) (quoting AM. LAW INST., TRANSNATIONAL INSOLVENCY PROJECT: PRINCIPLES OF COOPERATION IN TRANSNATIONAL CASES AMONG THE MEMBERS OF THE NORTH AMERICAN FREE TRADE AGREEMENT 11 (Tentative Draft, 2000)).

<sup>40</sup> See Westbrook, *Global Solution*, *supra* note 26, at 2300–01; Westbrook, *Choice of Avoidance Law*, *supra* note 17, at 514–15.

<sup>41</sup> See Westbrook, *Global Solution*, *supra* note 26, at 2301.

Modified universalism recognizes that the choice of forum in a multinational concern, and thus the choice of insolvency law, may significantly affect the substantive rights of parties in interest outside the forum country. To participate in a foreign case, creditors would need to learn the applicable procedures and be forced to hire local counsel to protect their rights.

The concepts of predictability and party expectations are particularly important here. It is assumed that when entering into transactions with a multinational concern, parties take into account the legal systems and rules, including insolvency laws, that are likely to govern the performance and enforcement of the parties' commitments to each other. Where there is uncertainty as to what legal systems govern, transaction costs are higher and the difference in benefit distribution rules in competing legal systems may reward those who guessed correctly or who had the power to control the choice of forum and of law, not those to whom the economic benefit of the transaction belonged. Thus the application of varying distribution rules may result in the parties' entering into sub-optimal transactions, and leave them poorer than they would have been otherwise.<sup>42</sup>

Modified universalism recognizes the problems of a global system where debtors can easily choose a substantive law that will govern their insolvency and that is contrary to the expectations and interests of creditors. It thus authorizes the commencement and prosecution of secondary cases to liquidate local assets and protect local creditors in a particular country. These secondary cases are territorial, for the most part, under both the EU Regulation and the Model Law.<sup>43</sup> This is the approach the United States adopted in chapter 15 of the Bankruptcy Code.<sup>44</sup> A form of modified universalism has been adopted by other countries as well, including: "Australia, Canada, England, Germany, India, Ireland, New Zealand . . . and, arguably, Japan."<sup>45</sup> The adoption of modified universalism's principles by some of the world's largest economies provides strength to claims by the theory's supporters that modified universalism is the most widely used approach to cross-border insolvency.<sup>46</sup>

"[One] advantage of . . . modified [universalism] is that it retains some of the efficiencies of pure universalism while incorporating the flexibility and discretion of

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<sup>42</sup> See Lynn M. LoPucki, *Global and Out of Control?*, in *COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS* 207–32 (Univ. of Mich. Press 2005) [hereinafter LoPucki, *Global and Out of Control*] (presenting this argument and offering the scenario of a German court deciding the priorities of U.S. workers in a hypothetical DaimlerChrysler AG bankruptcy). However, this argument fails to acknowledge that under the new U.S. insolvency regime, DaimlerChrysler would most likely file a secondary case or cases in the United States to determine the rights of creditors in relation to its U.S. entities.

<sup>43</sup> See *Model Law*, *supra* note 11, arts. 15–24.

<sup>44</sup> Paul L. Lee, *Ancillary Proceedings Under Section 304 and Proposed Chapter 15 of the Bankruptcy Code*, 76 AM. BANKR. L.J. 115, 123 (2002).

<sup>45</sup> Kent Anderson, *The Cross-Border Insolvency Paradigm: A Defense of the Modified Universal Approach Considering the Japanese Experience*, 21 U. PA. J. INT'L ECON. L. 679, 692 n.37 (2000) [hereinafter Anderson, *Insolvency Paradigm*].

<sup>46</sup> See *id.* at 691–92. *But see* Frederick Tung, *Is International Bankruptcy Possible?*, 23 MICH. J. INT'L L. 31, 39–40 (2001) [hereinafter Tung, *Possible*] ("Analysts agree that territoriality is and has always been the dominant practice.")

the . . . territorial approaches described [above].”<sup>47</sup> The modified approach does not accomplish all of the benefits of universalism explained above; however, it does allow for a coordinated liquidation or reorganization.<sup>48</sup> Further, the modified method allays the fears of “those who are concerned about relinquishing national sovereignty, [because each jurisdiction] retain[s] the power to refuse to” submit to the insolvency laws of other countries.<sup>49</sup> Overall, the most positive aspect of modified universalism may be that “its pragmatic flexibility [i.e., its partial utilization of territorialism] provides the best fit with the problem presented by the current patchwork of laws in the global market, and . . . it will foster the smoothest and fastest transition to true universalism.”<sup>50</sup>

### B. *Strengths and Weaknesses of Universalism*

Universalism has the potential to yield significant benefits in an insolvency.<sup>51</sup> These include a more efficient ex ante allocation of capital,<sup>52</sup> reduced administrative and legal costs due to a reduction in the number of proceedings,<sup>53</sup> avoidance of forum shopping and the race to file,<sup>54</sup> facilitated reorganizations,<sup>55</sup> substantially increased liquidation value,<sup>56</sup> and greater clarity and certainty to all parties in interest in most circumstances.<sup>57</sup> Furthermore, international cohesion and cooperation lower transaction costs and, therefore, increase the flow of international trade.<sup>58</sup> Under a unified approach to cross-border insolvency, business people, investors, and lenders would be better able to quantify the risk associated with any potential international bankruptcy,<sup>59</sup> increasing information available on the market and thereby reducing the inefficiency in the international credit market.<sup>60</sup> Finally, a single approach “would also promote fairness and equality [in] the distribution of assets to all creditors by virtue of” administering a cross-border bankruptcy case in “one central forum under one law.”<sup>61</sup>

<sup>47</sup> Anderson, *Insolvency Paradigm*, *supra* note 45, at 691.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> Westbrook, *Global Solution*, *supra* note 26, at 2277.

<sup>51</sup> See Elizabeth J. Gerber, Note, *Not All Politics Is Local: The New Chapter 15 to Govern Cross-Border Insolvencies*, 71 *FORDHAM L. REV.* 2051, 2084–85 (2003); see also Westbrook, *Choice of Law*, *supra* note 27, at 465.

<sup>52</sup> Bebhuck & Guzman, *Economic Analysis*, *supra* note 34, at 778.

<sup>53</sup> *Id.*

<sup>54</sup> See Rasmussen, *A New Approach*, *supra* note 31, at 18.

<sup>55</sup> Westbrook, *Choice of Law*, *supra* note 27, at 465.

<sup>56</sup> Rasmussen, *A New Approach*, *supra* note 31, at 18.

<sup>57</sup> See Westbrook, *Choice of Law*, *supra* note 27, at 465; Jay L. Westbrook, *Universal Participation in Transnational Bankruptcies*, in *MAKING COMMERCIAL LAW: ESSAYS IN HONOUR OF ROY GOODE* 419, 421 (Ross Cranston ed., 1997) (“Territorialism produces distributions that are a function of local priorities and the presence of a greater abundance of assets in one jurisdiction than in another . . . . The distributions are always unpredictable and often unfair.”).

<sup>58</sup> Gerber, *supra* note 51, at 2084 (citing Brian M. Devling, Note, *The Continuing Vitality of the Territorial Approach to Cross-Border Insolvency*, 70 *UMKC L. REV.* 435, 435–36 (2001)).

<sup>59</sup> *Id.* at 2084–85.

<sup>60</sup> See *id.* at 2085; ROBERT A. HAUGEN, *THE INEFFICIENT STOCK MARKET: WHAT PAYS OFF AND WHY* 32–34 (1999) (stating market efficiency theory suggests that, in a market where investors have perfect information, assets will be accurately priced).

<sup>61</sup> Gerber, *supra* note 51, at 2085 (citing Sara Isham, Note, *UNCITRAL’s Model Law on Cross-*

While universalism has widespread support in the academic community, until recently governments have been reluctant to adopt it.<sup>62</sup> Any proposal that advocates international comity requires that adherents give up a measure of national sovereignty. Furthermore, when given the choice, multinational corporations will most likely file bankruptcy in a developed country, which may be to the detriment of developed countries that must recognize the main insolvency proceeding. Finally, some of the rules of universalist regimes, the most striking being on the issue of the insolvency of corporate groups, have not yet been fully developed.

### 1. National Sovereignty

Attempts to “harmoniz[e] insolvency law strike[] at the heart of deep-seated cultural differences and legal codes founded on quite different principles.”<sup>63</sup> In general, countries are unwilling to have the laws of another country encroach on their sovereignties.<sup>64</sup> This is especially true in a bankruptcy context, because “bankruptcy law is ‘meta-law’ . . . [I]t overrides contract-, property-, and other legal rights that exist outside of bankruptcy” such as commercial and family law.<sup>65</sup>

Lynn LoPucki, a professor at the University of California, Los Angeles School of Law, has developed his famous DaimlerChrysler example to show how various national legal rights would be trampled under a universalist approach.<sup>66</sup> In this hypothetical, DaimlerChrysler files for protection under German insolvency law, and under a universalist approach, Chrysler plant workers in Detroit would have to file a claim in German court to claim their wages and benefits. Thus, the fate of these workers’ claims would be determined under German, not U.S., law.

Unfortunately this example is misleading as to both the legal operations of most (modified) universalist regimes and as to their economic effects. Firstly, as will be explained in more detail below, modified universalist systems provide for the distribution of local assets in accord with the law of the place where the asset is located at the time of bankruptcy.<sup>67</sup> Secondly, as Andrew Guzman, professor at the University of California, Berkeley School of Law, explains, the economic benefits of a universalist system far outweigh any marginal harm to employees. Employees belong to a group that Guzman terms “weakly nonadjusting creditors.” These creditors, to a large degree, cannot or will not adjust the terms of their loans on a case-by-case basis to account for the risks associated with the loan, including the risk of nonpayment.<sup>68</sup> In essence, his argument is that while the costs of universalism

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*Border Insolvency: A Workable Protection for Transnational Investment at Last*, 26 BROOK. J. INT’L L. 1177, 1177–79 (2001)).

<sup>62</sup> See Tung, *Possible*, *supra* note 46, at 37 (quoting Guzman, *In Defense of Universalism*, *supra* note 17, at 2184).

<sup>63</sup> Douglass G. Boshkoff, *Some Gloomy Thoughts Concerning Cross-Border Insolvencies*, 72 WASH. U. L.Q. 931, 936 (1994) (quoting *Harmonizing European Insolvency Laws—A British Perspective*, reprinted in WKLY. NEWS AND COMMENT, BANKR. CT. DECISIONS, Dec. 10, 1992, at A3).

<sup>64</sup> Tung, *Possible*, *supra* note 46, at 46.

<sup>65</sup> *Id.* at 47 (citing Manfred Balz, *The European Union Convention on Insolvency Proceedings*, 70 AM. BANKR. L.J. 485, 486 (1996)).

<sup>66</sup> LoPucki, *Case*, *supra* note 19, at 2223.

<sup>67</sup> See *id.* at 2221.

<sup>68</sup> Westbrook, *Choice of Law*, *supra* note 27, at 466.

increase when nonadjusting creditors are accounted for, these costs are far outweighed by the benefits of universalism.<sup>69</sup> Moreover, the costs of universalism to such creditors are minimal because 1) the terms of the nonadjusting creditors' lending are generally only indirectly affected by the choice of bankruptcy law; 2) nonadjusting creditors' claims, while perhaps numerous, generally comprise a small percentage of the total amount involved in an insolvency; 3) national systems rarely provide priority status to unsecured trade creditors and limited priority status to employees; and, 4) weakly nonadjusting creditors can adapt their behavior, without incurring large expense, to reduce the costs of universalism.<sup>70</sup>

## 2. Discrimination Against Lesser-Developed Countries

Universalism also has the potential to discriminate against lesser-developed countries.<sup>71</sup> Most multinational companies have their principle places of business in industrial, developed countries.<sup>72</sup> Under a universalism approach, therefore, whenever a multinational company files for bankruptcy protection, the law of a developed country will govern over the law of lesser-developed countries.<sup>73</sup>

## 3. Determination of the Home Country of Corporate Groups

Finally, one of the biggest criticisms of universalism is the uncertainty surrounding how to determine the home country of a multinational corporation.<sup>74</sup> Judge Tina L. Brozman, sitting in the Bankruptcy Court for the Southern District of New York, criticized the practicality of this concept in *Barclays Bank v. Maxwell Communication Corp. (In re Maxwell Communication Corp.)*.<sup>75</sup> Judge Brozman has explained:

[I]n an age of multinational corporations, it may be that two (or more) countries have equal claim to be the "home country" of the debtor. Certainly, one could not simply employ the nation of incorporation alone . . . . [O]ne must look at this factor and . . . factors such as . . . the [location of the] debtor's "nerve center," assets, and creditors . . . and where the debtor's business is primarily conducted.<sup>76</sup>

As a result, it is possible for creditors and courts to disagree as to the home country of a single corporate group.

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Frederick Tung, *Fear of Commitment in International Bankruptcy*, 33 GEO. WASH. INT'L L. REV. 555, 576-77 (2001).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 577.

<sup>74</sup> *Barclays Bank v. Maxwell Commc'ns Corp. (In re Maxwell Commc'ns Corp.)*, 170 B.R. 800, 817, n.22 (Bankr. S.D.N.Y. 1994).

<sup>75</sup> *Id.* at 817.

<sup>76</sup> *Id.*

#### 4. Modified Universalism's Disadvantages

Modified universalism has its own particular set of disadvantages, and the implication of the criticism is that it has neither the advantages of territorialism nor the advantages of universalism. Some of the clearest weaknesses are as follows: 1) modified universalism “sacrifices nearly all of the supposed advantages of universalism” by “relieving courts of the non-forum country from the obligation to sacrifice their own creditors’ interests for the benefit of foreigners;” 2) it introduces additional uncertainties, because “the regime or regimes that will ultimately distribute the debtor’s assets may depend on the country in which the assets are located at the time of bankruptcy,” and “for the lender to predict the regime applicable to distribution at the time of the loan, the lender must guess what inter-country differences in bankruptcy law the forum court will consider substantial;” 3) it “could generate a bankruptcy proceeding in every country in which the debtor has assets, and perhaps even more;” 4) “it does not address the core problem of identifying the home country.”<sup>77</sup> However, territorialist critics of modified universalism might do well to note that forms of modified universalism include distinctly territorialist aspects.<sup>78</sup>

##### C. Territorialism

Territorialism is the view that a bankruptcy case should be used only to administer the domestic assets of a multinational debtor under domestic law for the benefit of domestic creditors, whether through reorganization or liquidation.<sup>79</sup> According to this view, assets located abroad should be administered in their own cases in the countries where they are located,<sup>80</sup> without much regard for the enterprise as a whole.<sup>81</sup>

Multinational companies have responded to territoriality by placing their holdings in each country in separate business associations formed under local law.<sup>82</sup> These associations comprise three forms: 1) “free-standing, self-sufficient businesses that the local country can reorganize or liquidate in accordance with local law”; 2) “subsidiaries that own only the local assets of an integrated, international business”; and 3) “a foreign entity that . . . own[s] local assets directly.”<sup>83</sup> “In these latter two circumstances, international cooperation may be needed to reorganize the business or liquidate its assets for the best price.”<sup>84</sup>

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<sup>77</sup> Perkins, *A Defense of Pure Universalism*, *supra* note 23, at 803 n.69 (citing LoPucki, *Cooperation*, *supra* note 24, at 732).

<sup>78</sup> Cf. Gerber, *supra* note 51, at 2059 n.54 (“[T]erritorialism may seem similar to modified universalism”); Bufford, *Global Venue Controls*, *supra* note 11, at 124 (stating that a Model Law secondary case is “rather like a cooperative territorialist case.”).

<sup>79</sup> See LoPucki, *Cooperation*, *supra* note 24, at 742–43.

<sup>80</sup> See *id.* at 742.

<sup>81</sup> See, e.g., *In re Bd. of Dirs. of Multicanal S.A.*, 314 B.R. 486, 522 (Bankr. S.D.N.Y. 2004) (describing traditional territorialism).

<sup>82</sup> LoPucki, *Case*, *supra* note 19, at 2219.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

Territoriality enters the international realm when a multinational's financial problems affect its entities in multiple countries. At this stage, territorialists invoke a cooperative territorialist approach. Essentially, advocates of this view maintain that in such cases, the necessary international cooperation takes place.<sup>85</sup> The parent firm or respective government authority initiates bankruptcy proceedings in each country where the corporate group has substantial assets.<sup>86</sup> Each court appoints a "representative" for the estate of each entity filing in its jurisdiction and those representatives negotiate a solution to the debtor's financial problems.<sup>87</sup> "If the estates are worth more in combination than they are separately, it will be in the interests of the representatives to combine them."<sup>88</sup> In the absence of an agreement, conflict of laws rules and priority rules of the country where an asset is located will determine who shares in the asset and in what proportion.<sup>89</sup>

### 1. Cooperative Territorialism

The cooperative territorialist approach, as advanced by Professor LoPucki, begins with the territorialist structure. When a multinational company's financial problems extend across borders, each financially distressed entity files for bankruptcy in each country where it has significant assets.<sup>90</sup> Each of the filings has equal standing.<sup>91</sup> Bankruptcy courts of a country will administer the assets of a multinational debtor within the borders of that country as a separate estate. Thus, with equal power and authority, "[e]ach of the bankruptcy courts would assume jurisdiction over the local assets[;] would determine whether to cooperate in a multinational reorganization or liquidation[;] and[,] in the event of liquidation, each would distribute the assets of the company among creditors and shareholders under local law."<sup>92</sup>

Initially this approach does not seem much different than pure territorialism. Thus, the key to this approach in the international context is a cooperative element.<sup>93</sup> Essentially, where international cooperation is needed in cross-border insolvency proceedings, each court appoints an administrator.<sup>94</sup> The administrators of the various estates negotiate and obtain court approval of an agreement ("protocol") that provides the terms for cooperation in the particular case.<sup>95</sup> These protocols result in

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<sup>85</sup> *Id.* at 2219.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *See, e.g.*, 11 U.S.C. 304(c)(4) (2005) (authorizing the turnover of U.S. assets to foreign bankruptcy proceedings "consistent with . . . distribution of proceeds of such estate substantially in accordance with the order prescribed by [the United States Bankruptcy Code]").

<sup>90</sup> LoPucki, *Cooperation*, *supra* note 24, at 743.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> Farley, *supra* note 12, at 199.

<sup>94</sup> Lynn M. LoPucki, *Universalism Unravels*, 79 AM. BANKR. L.J. 143, 162 (2005) [hereinafter LoPucki, *Universalism Unravels*].

<sup>95</sup> *See, e.g.*, Protocol and Implementing Court Order from the Maxwell Communications Corporation Bankruptcy, reprinted in JACOB S. ZIEGEL, CURRENT DEVELOPMENTS IN INTERNATIONAL AND COMPARATIVE CORPORATE INSOLVENCY LAW 636 (1994).

mutually beneficial procedures or substantive resolutions.<sup>96</sup> In some cases, however, “protocols are unnecessary because [a] foreign administrator [has sought] and [received] cooperation of other countries in ancillary proceedings.”<sup>97</sup>

Professor LoPucki advances five areas of cooperation that are designed to eliminate “the tension between countries by vesting each with bankruptcy power congruent with its sovereignty.”<sup>98</sup> First, he proposes “the establishment of procedures for replicating claims filed [in a bankruptcy proceeding] in any one country,” in any additional countries in which the debtor has filed.<sup>99</sup> Second, he proposes “sharing of distribution lists by [client] representatives to ensure . . . distributions [are not made] to creditors who have already recovered the full amounts owed to them.”<sup>100</sup> Third, he suggests various jurisdictions work together in “the joint sale of assets, when a joint sale would produce a [greater return] than separate sales in multiple countries.”<sup>101</sup> Fourth, Professor LoPucki recommends “the voluntary investment by [parties] in one country [to] the debtor’s reorganization effort in [other countries].”<sup>102</sup> Last, he suggests various jurisdictions cooperate with respect to “the seizure and return of assets that have been the subject of avoidable transfers.”<sup>103</sup>

LoPucki thus establishes two methods by which states can achieve the desired cooperation. The first method is the version of cooperative territorialism, advanced above, that “is designed to serve as a foundation for, and to encourage, mutually beneficial cooperation by representatives of particular bankruptcy estates.”<sup>104</sup> The second method is for countries to cooperate on a variety of matters through treaty or convention.<sup>105</sup>

## 2. Advantages and Disadvantages of Territorialism

### a. Advantages

Advocates of territorialist systems, especially the cooperative version, point to four main advantages: 1) predictability; 2) expectations of parties; 3) voidable transfers; and 4) cooperation.

Cooperative territorialism is essentially the system that is in operation in most of the world’s countries today.<sup>106</sup> Under a territorialist system, the bankruptcy administration of a multinational’s assets and operations within a given country is governed by the laws of that country. This is the expectation that credit extenders have at the time they lend to the multinational concern.

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<sup>96</sup> LoPucki, *Universalism Unravels*, *supra* note 94, at 162.

<sup>97</sup> *Id.*

<sup>98</sup> LoPucki, *Cooperation*, *supra* note 24, at 750.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 742.

<sup>105</sup> *See id.*; *see also id.* at 758–59 (admitting that the problem of strategic removal of assets before bankruptcy is a greater problem under a territorialist regime than under a universalist regime).

<sup>106</sup> LoPucki, *Universalism Unravels*, *supra* note 94, at 160.



A multinational concern can transfer its assets and operations from country to country with relative ease. Supporters of territorialism argue, however, that such transfers “are generally limited to a small portion of the debtor’s assets, [that] they occur incrementally, and [that] they are highly visible.”<sup>107</sup> There may be special concern about eve-of-bankruptcy transfers under a territorialist system, but the effect of such transfers on creditor priorities is limited to the assets transferred.<sup>108</sup> Territorialists would argue that it is reasonable to assume that creditors whose interests would be materially affected by such a transfer can anticipate a transfer and can negotiate a domestically enforceable clause in any lending contract that prevents or hinders a transfer.<sup>109</sup>

Territorialists argue that those whose rights are affected by an eve-of-bankruptcy “transfer can file claims in the country to which the transfer was made and reach the assets indirectly.”<sup>110</sup> Most countries employ a rule that effects a worldwide pro rata distribution to each general creditor, regardless of nationality.<sup>111</sup> “Only in the case where the transfer is from a country where insufficient assets remain to pay local priority claims or to a country that before the transfer did not have sufficient assets to pay local priority claims is the transfer likely to affect creditor entitlements.”<sup>112</sup>

Furthermore, with the slight modifications suggested by Professor LoPucki, territorialists argue that, because sufficient inducement exists, bankruptcy administrators tend to cooperate on an international level. First, if assets of a “multinational would bring a higher price if sold together, it will be in the [best] interests of administrators to sell them together and split the additional proceeds among them.”<sup>113</sup> Second, protocols have become enormously helpful in cross-border cases. In other cases, numerous examples of cooperation between U.S. and Canadian courts developed under the now-defunct Bankruptcy Code section 304.<sup>114</sup>

#### b. Disadvantages

Critics of territorialism mainly point to higher overall costs of a multinational insolvency, which are due to the lack of an effective structure of judicial cooperation.

First, the bankruptcy costs for an international business are enormously multiplied by the necessity of a parallel insolvency case in each country where assets are located. Each jurisdiction

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<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 160–61.

<sup>110</sup> *Id.* at 161.

<sup>111</sup> Jay Lawrence Westbrook, *Multinational Enterprises in General Default: Chapter 15, The ALI Principles, and The EU Insolvency Regulation*, 76 AM. BANKR. L.J. 1, 18 (2002) [hereinafter Westbrook, *Multinational Enterprises*] (“A creditor that receives a distribution in a foreign insolvency proceeding must stand aside in a local distribution until creditors of the same class (under local law) have gotten as much from the local proceeding as the first creditor got from the foreign one.”).

<sup>112</sup> LoPucki, *Universalism Unravels*, *supra* note 94, at 161.

<sup>113</sup> *Id.* at 162.

<sup>114</sup> *Id.*

requires separate administration, separate filing and evaluation of claims, and separate prosecution of relevant litigation. Second, reorganization is much more difficult to achieve in a territorialist regime because it decreases liquidation values and makes coordination of cases extremely complex. Third, conflicts between jurisdictions and courts can easily develop. Fourth, creditors cannot know in advance where the debtor's assets will be located when bankruptcy intervenes, which causes a less efficient *ex ante* allocation of capital. Fifth, distribution results are both uneven, violating the bankruptcy principle of treating similarly situated creditors equally, and unpredictable, increasing the cost of capital because of the uncertain outcome if insolvency supervenes. Finally, under territorialism, both the debtor and individual creditors can engage in strategic behavior to advance their private interests at the expense of the general interests of creditors.<sup>115</sup>

Additionally, problems may arise because the bankruptcy laws of particular countries do not authorize cooperation or because courts are given the discretion to cooperate and choose not to, even when cooperation would increase the value of the local estate. Although the areas of cooperation that Professor LoPucki has advocated would enhance the efficiency of contemporary transnational bankruptcy, without statutory mandate there is no guarantee under the cooperative territorialism approach that numerous jurisdictions would cooperate, even if there were rational financial inducement to do so.<sup>116</sup> Territorialists counter that "a country that will not authorize cooperation on a limited territorial basis will certainly not do so on the much more extensive basis of universalism."<sup>117</sup>

The cooperative territorialists' proposal of multilateral convention ignores the current lack of multilateral cooperation.<sup>118</sup> However, cooperative territorialism may be pragmatic in that it accepts that, in a world still dominated by sovereign nation-states, harmonization of bankruptcy laws is impractical, but territorial-based cooperation is possible.<sup>119</sup>

### III. THE MODEL LAW AND THE EUROPEAN UNION REGULATION

The two major sources of law for international cooperation in transnational insolvency cases are the Model Law and the European Union Regulation, which were both drafted in the 1990s. UNCITRAL drafted the Model Law for adoption as internal legislation in any country and issued it in 1997. The EU Regulation was promulgated in 2000, and it became effective in 2001. While this article does not

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<sup>115</sup> Bufford, *Global Venue Controls*, *supra* note 11, at 114 (internal citations omitted).

<sup>116</sup> Cf. Perkins, *A Defense of Pure Universalism*, *supra* note 23, at 823 (stating that cooperative territoriality would encourage "mutually beneficial cooperation" among countries).

<sup>117</sup> LoPucki, *Case*, *supra* note 19, at 2219.

<sup>118</sup> Westbrook, *Global Solution*, *supra* note 26, at 2308 ("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.")

<sup>119</sup> Tung, *Possible*, *supra* note 46, at 37.

discuss the EU Regulation in great detail, it is useful to compare the Regulation's purer form of universalism with the Model Law's modified universalism.

#### A. *Common Features of the Model Law and European Union Regulation*

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

Under modified universalism, the home country, for the purposes of a main insolvency case of a multinational business concern, is the country where the concern's "center of main interests" (COMI) is located. This is the key concept used by the Model Law<sup>120</sup> and the EU Regulation.<sup>121</sup> The country where the COMI is located is the proper location for the main case,<sup>122</sup> and cases in other countries should generally be limited to secondary cases.<sup>123</sup> The law governing the insolvency case is that of the country where the COMI is located and where the main case belongs.<sup>124</sup>

COMI is a universalist concept, but the challenge of answering where the COMI is located is answered by a territorialist presumptive rule. The Model Law provides: "In the absence of proof to the contrary, the debtor's registered office . . . is presumed to be the centre of the debtor's main interests."<sup>125</sup> The EU Regulation has a similar provision.<sup>126</sup> Recital 13 of the preamble to the EU Regulation provides that "[t]he 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties."<sup>127</sup>

The EU Regulation gives critical importance to two factors in determining the location of the COMI. First, the COMI is located at the place where the debtor conducts the administration of its interests on a regular basis, which essentially means the place where it administers its commercial, industrial, or professional activities.<sup>128</sup> Second, this is an objective test based on what is apparent to third

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<sup>120</sup> See *Model Law*, *supra* note 11, art. 2(b); Bob Wessels, *International Jurisdiction to Open Insolvency Proceedings in Europe, In Particular Against (Groups of) Companies* 4–10 (2003), available at [http://www.iiiglobal.org/component/option,com\\_jdownloads/Itemid,101/task,viewcategory/catid,39/](http://www.iiiglobal.org/component/option,com_jdownloads/Itemid,101/task,viewcategory/catid,39/) (explaining the concept of COMI under the EU Regulation) (last visited Oct. 10, 2008).

<sup>121</sup> See Council Regulation 1346/2000, *supra* note 20, art. 3.1, 2000 O.J. (L 160).

<sup>122</sup> See *id.*; see also *Model Law*, *supra* note 11, art. 2(b); 11 U.S.C.A. § 1502(4) (2005).

<sup>123</sup> See Council Regulation 1346/2000, *supra* note 20, art. 3.2–3.

<sup>124</sup> Standard rules of conflict of laws (or international private law, as the subject is known outside the United States) should be applied in many contexts in insolvency cases, and in some instances these rules will dictate the application of foreign law in the forum of the main case. See, e.g., *Maxwell Commc'ns Corp. v. Societe Generale*, 93 F.3d 1036, 1048–50 (2d Cir. 1996).

<sup>125</sup> *Model Law*, *supra* note 11, art. 16(3).

<sup>126</sup> See Council Regulation 1346/2000, *supra* note 20, art. 3.1.

<sup>127</sup> *Id.* pmb., recital 13. In EU law, EU regulation preambles have been treated as equally authoritative as the main text of the regulation. See, e.g., *In re Eurofood IFSC, Ltd.*, [2004] S.C. 47 (Ir.), at 10.

<sup>128</sup> See Miguel Virgos & Etienne Schmit, *Report on the Convention on Insolvency Proceedings* 51, available at [http://aei.pitt.edu/952/01/insolvency\\_report\\_schmidt\\_1988.pdf](http://aei.pitt.edu/952/01/insolvency_report_schmidt_1988.pdf) (last visited Oct. 21, 2008). The Virgos & Schmit report was the principal report on the EU Convention on Insolvency Proceedings,

parties, and especially to creditors.<sup>129</sup> Thus, a creditor's view of where the COMI is located is an important factor in its determination. Miguel Virgos and Etienne Schmit explain the rationale for this rule: "Insolvency is a foreseeable risk. It is therefore important that international jurisdiction . . . be based on a place known to the debtor's potential creditors. This enables the legal risks which would have to be assumed in the case of insolvency to be calculated."<sup>130</sup> Under both the Model Law and the EU Regulation, each company has a single COMI and can have only one main case.<sup>131</sup>

One of the main critiques of the COMI analysis, under both the Model Law and the EU Regulation, is that it must be made separately for each legal entity. Neither the Model Law nor the EU Regulation provides for the coordination of the insolvency cases of related entities within a corporate group. More specifically, neither system authorizes the filing or opening of a main case for a particular company in a specific country because a parent company or other affiliate has opened a main case in that country.<sup>132</sup>

#### *B. The UNCITRAL Model Law: Modified Universalism with a Territorialist Foundation*

"UNCITRAL is the core legal body in the United Nations" designed to promote unification and harmonization of international trade law.<sup>133</sup> In an effort to encourage consistency in the field of international bankruptcy, UNCITRAL adopted a Model Law on cross-border insolvency on May 30, 1997.<sup>134</sup> The Model law is a concise, procedurally focused thirty-two article text.<sup>135</sup>

The Preamble of the Model law states:

The purpose of this Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:

Cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;

Greater legal certainty for trade and investments;

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which was converted into the EU Regulation by the substitution of articles 44–47 (implementing the EU Regulation) for articles 43–46 and 48–55 (providing formalities for treaty implementation).

<sup>129</sup> See Council Regulation 1346/2000, *supra* note 20, pmb., recital 13.

<sup>130</sup> See Virgos & Schmit, *supra* note 128, at 51.

<sup>131</sup> See Berends, *supra* note 27, at 355.

<sup>132</sup> It appears that the EU Regulation authorizes a liquidator in a main case to open a secondary case for a related entity in the same country, notwithstanding that the related entity's COMI is located elsewhere. See Council Regulation 1346/2000, *supra* note 20, art. 29 and pmb. 19.

<sup>133</sup> Spiros V. Bazinas, *Multi-Jurisdictional Receivables Financing: UNCITRAL'S Impact on Securitization and Cross-Border Perfection*, 12 DUKE J. COMP. & INT'L L. 365, 365 n.2 (2002).

<sup>134</sup> See *Model Law*, *supra* note 11; see also Evan D. Flaschen et al., *Foreign Representatives in U.S. Chapter 11 Cases: Filling the Void in the Law of Multinational Insolvencies*, 17 CONN. J. INT'L L. 3, 18 (2001).

<sup>135</sup> Ronald J. Silverman, *Advances in Cross-Border Insolvency Cooperation: The UNCITRAL Model Law on Cross-Border Insolvency*, 6 ILSA J. INT'L & COMP. L. 265, 267 (2000).

Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;

Protection and maximization of the value of the debtor's assets; and

Facilitation of the rescue of financially troubled business, thereby protecting investment and preserving employment.<sup>136</sup>

These objectives are very similar to the U.S. Bankruptcy Code's "central purpose of . . . marshal[ing] creditors and organiz[ing] distribution."<sup>137</sup> True to its territorialist elements, the Model Law does not preempt the substantive law of different jurisdictions; "rather, it provides a [method] for the . . . interdependent operation of various local laws, courts and court appointees."<sup>138</sup> To accomplish the objectives of the Model Law, as well as to enhance the insolvency laws of various jurisdictions, the drafters of the Model Law enumerated nine general territorialist and universalist principles.<sup>139</sup> Those principles are:

The court of the enacting State shall recognize only one foreign proceeding as foreign main proceeding.

The recognition of a foreign proceeding shall not restrict the right to commence a local proceeding.

A local proceeding shall prevail over the effects of foreign proceeding and over relief granted to a foreign representative, regardless of whether the local proceeding was opened prior to or after the recognition of foreign proceeding.

When there are two or more proceedings, there shall be cooperation and coordination.

A foreign proceeding shall be recognized as a foreign main proceeding if the foreign proceeding is opened in the State where the debtor maintains the center of his main interests. A foreign proceeding shall be recognized as a foreign non-main proceeding if the foreign proceeding is opened in a State where the debtor has an establishment.

Upon recognition of a foreign proceeding as a foreign main proceeding, some types of relief will come into effect automatically . . . Upon recognition of a foreign proceeding as a foreign non-main proceeding, relief can only come into effect if it is granted by the court.

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<sup>136</sup> See *Model Law*, *supra* note 11, pmb1., recital (e).

<sup>137</sup> Elizabeth Warren & Jay L. Westbrook, *Go Directly to Jail; Do Not Collect \$200*, 22 AM. BANKR. INST. J. 44, 44 (2004) (quoting *In re Simonini*, 282 B.R. 604, 620 n.16 (W.D.N.C. 2002)).

<sup>138</sup> Flaschen et al., *supra* note 134, at 18.

<sup>139</sup> See Berends, *supra* note 27, at 320–21.

Coordination may include granting relief to the foreign representative. In granting relief to a foreign representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets falling under the authority of the foreign representative.

Creditors shall be allowed to file claims in any proceeding. Payments to creditors from multiple proceedings shall be equalized.

If there are surplus proceeds of a local non-main proceeding, they shall be transferred to the main proceeding.<sup>140</sup>

### C. Process

The Model Law (and chapter 15 of the U.S. Bankruptcy Code) is invoked by an application by a foreign representative for recognition of a foreign proceeding.<sup>141</sup> Such recognition is required if the foreign proceeding meets the statutory definition, the foreign representative is duly authorized, and the application meets the formal requirements and is made in the proper court.<sup>142</sup> The court granting recognition must decide whether the foreign proceeding at issue is a main proceeding or a non-main proceeding.<sup>143</sup> The foreign proceeding must be recognized as a main proceeding if the debtor's COMI is located in that country, or as a non-main proceeding if the debtor merely has an establishment there.<sup>144</sup>

Under the Model Law, where a country has recognized a main case in another country, any subsequent domestic bankruptcy case in the recognizing country must be a secondary case of limited scope.<sup>145</sup> Such a case is permitted only if assets of the debtor are located in the recognizing country.<sup>146</sup> A subsequent secondary case generally only affects the assets in the recognizing country (a clearly territorialist restriction).<sup>147</sup> If a bankruptcy case is already pending in the country recognizing a foreign main case, the Model Law then requires cooperation between the courts and the administrators in the respective cases.<sup>148</sup>

## IV. THE EU REGULATION: MODIFIED UNIVERSALISM WITH EMPHASIS ON UNIVERSALISM

The EU Regulation, which took effect on May 30, 2002, was designed to function in a community of nation-states that had similar cultural, historical,

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<sup>140</sup> *Id.* at 321–22.

<sup>141</sup> *See Model Law, supra* note 11, art. 15(1); 11 U.S.C.A. § 1504. Article 15(2) specifies the evidence that must accompany an application for recognition. *See Model Law, supra* note 11, art. 15(2).

<sup>142</sup> *See Model Law, supra* note 11, art. 17(1). An exception to mandatory recognition is provided if recognition is manifestly contrary to the public policy of the forum country. *See id.* art. 6.

<sup>143</sup> *See id.* art. 17(2).

<sup>144</sup> The Model Law defines establishment as, “any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.” *Id.* art. 2(f).

<sup>145</sup> *See id.* art. 28.

<sup>146</sup> *See id.*

<sup>147</sup> *See id.*

<sup>148</sup> *See id.* art. 29.

political, and legal backgrounds. The EU Regulation is based on the principle of mutual trust among the EU countries;<sup>149</sup> for the most part, they trust their fellow EU countries with respect to both their substantive laws and their court procedures.<sup>150</sup> So, it is not surprising that the EU Regulation takes a more universalist approach to some aspects of insolvency, an approach that only works in a common economic system where coordination and cooperation are the norm. Thus, the regulation intends to encompass all of the debtor's assets on a world-wide basis and to affect all creditors, wherever located.<sup>151</sup>

Four main effects follow from the opening of a main case under the EU Regulation.<sup>152</sup> First, the laws of the country where the case is opened govern the proceedings of the main case.<sup>153</sup> Second, in contrast to the Model Law, all member states automatically recognize a judgment opening a case from the date that the judgment becomes effective in the home state.<sup>154</sup> Third, the opening of a main insolvency case is supposed to produce the same effects in every member state as in the home state (except as the EU Regulation provides otherwise),<sup>155</sup> except in a state where a secondary case is opened.<sup>156</sup> Fourth, the administrator in the main case may exercise his or her powers in every EU state, including the powers of repatriating assets,<sup>157</sup> registering the judgment,<sup>158</sup> and publishing notice in member states (again subject to the opening of a local secondary case). The effects of the exercise of these powers may only be challenged in the home court for the main case.<sup>159</sup> In addition, a judgment opening a main case in any EU country imposes the domestic effects of that case throughout the EU, except to the extent that the EU Regulation provides otherwise.<sup>160</sup>

## V. SUBSEQUENT SECONDARY CASES

Both the Model Law and the EU Regulation provide for the filing of a secondary or non-main case in a different country for the same legal entity.

The EU Regulation permits the opening of a secondary case in any country where the debtor has an establishment, which means, "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods."<sup>161</sup> The adoption of the law of the forum country for the main case and its application throughout the EU are substantially affected if a secondary case is

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<sup>149</sup> See Council Regulation 1346/2000, *supra* note 20, pmbl. 22.

<sup>150</sup> See Wessels, *supra* note 120, at 14–15.

<sup>151</sup> Virgos & Schmit, *supra* note, 128 at 51.

<sup>152</sup> See Wessels, *supra* note 120, at 1–2.

<sup>153</sup> See Council Regulation 1346/2000, *supra* note 20, art. 4.

<sup>154</sup> See *id.* art. 16.

<sup>155</sup> The EU Regulation provides that local law governs contracts for the sale or use of real property, settlement under payment or settlement systems for financial markets, contracts of employment, and rights in real estate, ships, or aircraft subject to domestic registration systems. See Council Regulation 1346/2000, *supra* note 20, arts. 8–11.

<sup>156</sup> See *id.* art. 17.

<sup>157</sup> See *id.* art. 18.1.

<sup>158</sup> See *id.* art. 22.

<sup>159</sup> See *id.* art. 17.2.

<sup>160</sup> See *id.* arts. 4.1, 17.1.

<sup>161</sup> *Id.* art. 2(h).

opened in another EU country.<sup>162</sup> Under the EU Regulation, local law governs in part the rights of creditors and the administration of assets in a secondary insolvency case, a decidedly territorialist approach.<sup>163</sup> While the EU Regulation requires that a secondary case be a liquidation case,<sup>164</sup> it also authorizes the administrator in the main case to obtain up to a three-month stay of the liquidation,<sup>165</sup> and to propose a reorganization according to the insolvency laws of the country where the secondary case is opened.<sup>166</sup>

The Model Law has more complicated concerns about harmony between courts. A court applying the Model Law must determine whether a foreign case given recognition is a main case or a secondary (“non-main”) case.<sup>167</sup> A foreign case may be recognized as a secondary case only if the country where it is located has an establishment of the debtor.<sup>168</sup> Secondary cases have important universalist components under the Model Law. The Law provides that, upon the recognition of a foreign case as either a main or a secondary case, the court may, at the request of a qualified foreign representative, entrust the distribution of all or part of the debtor’s domestic assets to that foreign representative or another person designated by the court.<sup>169</sup> However, the Model Law imposes a territorial condition on such an order: the court must be satisfied that the interests of domestic creditors are adequately protected.<sup>170</sup>

While the EU Regulation provides for automatic recognition of a foreign insolvency case within the EU, the Model Law provides a procedure for the recognition of a case in another country, with territorialist limitations. The automatic stay or moratorium of the Model Law takes effect in the recognizing country upon the recognition of a foreign main proceeding.<sup>171</sup> However, the moratorium applicable upon the recognition of a foreign main proceeding under the Model Law is the *recognizing court’s* own moratorium, while under the EU Regulation the relevant moratorium is that of the home country. In addition, upon the recognition of a foreign secondary case, the recognizing court may issue an order for appropriate relief, including a stay coextensive with the automatic stay resulting from the recognition of a foreign main case.<sup>172</sup> Again, any administration of the debtor’s domestic assets by a foreign court representative is subject to the recognizing court’s approval.<sup>173</sup>

The domestic impact of the recognition of a foreign main case differs under the Model Law and the EU Regulation. Under the EU Regulation, a bankruptcy case in a

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<sup>162</sup> See *id.* arts. 27–38.

<sup>163</sup> See *id.* art. 27.

<sup>164</sup> See *id.*

<sup>165</sup> See *id.* art. 33.

<sup>166</sup> See *id.* art. 34.1.

<sup>167</sup> See *Model Law*, *supra* note 11, art. 17(2).

<sup>168</sup> See *id.* art. 17(2)(b).

<sup>169</sup> See *id.* art. 21(1)(e).

<sup>170</sup> See *id.* art. 21(1).

<sup>171</sup> See *id.* art. 20.

<sup>172</sup> See *id.* art. 21(1)(a).

<sup>173</sup> See *id.* art. 21(2).



country where the debtor's COMI is not located must be a secondary case.<sup>174</sup> Because a secondary case requires an establishment of the debtor, the EU Regulation prohibits the opening of an insolvency case in a non-COMI country where the debtor lacks an establishment.<sup>175</sup> In contrast, the Model Law permits a non-COMI country to commence an insolvency case under its own insolvency law where the debtor lacks even an establishment. All that is necessary, for Model Law purposes, is that the debtor has assets in that country.<sup>176</sup>

A secondary case under the Model Law generally is limited to the administration of the assets located in the host country.<sup>177</sup> However, such a case may be used for two other purposes. First, it may be used to implement cooperation and coordination with foreign courts and representatives under the provisions of the Model Law (a universalist component).<sup>178</sup> Second, such a case may administer assets not in the host country, where the host country's law provides that such assets should be administered in a bankruptcy case in that country (a more territorialist provision).<sup>179</sup>

#### VI. THE MODEL LAW: WHERE UNIVERSALISM AND TERRITORIALISM OVERLAP

Both sides of the universalism-territorialism debate agree that international economic efficiency should be one of the main goals of any multinational insolvency regime. However, exactly how one approaches economic efficiency and how each of the main strands of international insolvency policy approaches the question determine which regime one finds most beneficial. As we will see, territorialism clearly excels in the area of predictability because it allows parties to calculate risk in advance and enter into optimal transactions. Where the Model Law (and thus chapter 15) mirrors a territorialist regime in this regard (e.g., secondary cases), it advances international economic efficiency and protects U.S.-based creditors. Where the Model Law advocates a more universalist approach with regard to predictability (e.g., by using the "center of main interests" standard), predictability suffers, despite the provision of other benefits.

However, the territorialist claim that cooperative territorialism induces cooperation is weak. Giving courts wide discretion as to cooperation with foreign courts and proceedings produces inconsistent decisions governing creditors in similar situations. Such uncertainty inhibits the flow of international capital. To the contrary, the modified universalist approach embodied in the Model Code and chapter 15, with its presumption of international cooperation, advances these efficiencies. The Model Law's artful, albeit imperfect, balance of territorial and universalist elements provides strong protections for U.S. multinationals and their creditors.

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<sup>174</sup> See Council Regulation 1346/2000, *supra* note 20, art. 3.2.

<sup>175</sup> See Wessels, *supra* note 120, at 11.

<sup>176</sup> See *Model Law*, *supra* note 11, art. 28.

<sup>177</sup> See *id.*

<sup>178</sup> See *id.*

<sup>179</sup> See *id.*

A. *Secondary Cases under the Model Law: Territorialism's Advantages*

“The international bankruptcy system can be a success only if it is predictable.”<sup>180</sup> Creditors expect to know, at the time of their extensions, what laws and procedures will determine their recovery rights. As Judge Samuel Bufford, who sits on the U.S. Bankruptcy Court in Los Angeles, has noted:

In calculating expected economic benefits, parties are assumed to take into account the legal systems and rules that will likely govern how their transactions are carried out and the benefits are allocated. In addition, the parties must evaluate the risks undertaken, including how these risks will be handled under the applicable legal system. If it is uncertain what legal system will govern the risks, it is difficult to quantify them. Where the distribution rules of legal systems are different, the ultimate beneficiaries of transactions may differ from those the parties have anticipated *ex ante*. Thus the application of varying distribution rules may result in the parties' entering into sub-optimal transactions, and leave them poorer than they would have been otherwise.<sup>181</sup>

The territorialist aspects of the administration of secondary case under the Model Law provide this predictability.

The Model Law permits a non-COMI country to commence a secondary insolvency case under its own insolvency law where the debtor lacks even an establishment. In order to file such a case under the Model Law, the debtor merely must have assets in that country.<sup>182</sup> In this way, a secondary case under the Model Law is rather like a cooperative territorialist case<sup>183</sup> and is limited to the administration of the assets located in the host country.<sup>184</sup>

Principles two and three of the Model Law establish the primacy of a local proceeding over the authority of foreign proceedings.<sup>185</sup> These are clear expressions of territorialism.<sup>186</sup> Of course, the Model Law establishes some cooperative limitations on this pure territorialism.<sup>187</sup> If secondary proceedings (e.g., local proceedings) have taken place before the main proceeding has begun (i.e., in a foreign country), the secondary proceeding shall be reviewed by the court of the

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<sup>180</sup> LoPucki, *Universalism Unravels*, *supra* note 94, at 158.

<sup>181</sup> Bufford, *Global Venue Controls*, *supra* note 11, at 112–13.

<sup>182</sup> See *Model Law*, *supra* note 11, art. 28.

<sup>183</sup> Bufford, *Global Venue Controls*, *supra* note 11, at 120–21.

<sup>184</sup> See *Model Law*, *supra* note 11, art. 28.

<sup>185</sup> Berends, *supra* note 27, at 321–22.

<sup>186</sup> Tung, *Possible*, *supra* note 46, at 39 (stating that territorialism is the time-honored “behavior of nations . . . exercising jurisdiction over assets and parties within their borders”).

<sup>187</sup> Jay M. Goffman & Evan A. Michael, *Navigating Through a Multinational Restructuring: Cross-border Insolvencies, Proceedings and Workouts*, *Cross Border Insolvencies, A Comparative Examination of Insolvency Laws of Industrialized Countries* (Am. Bankr. Inst. CLE, 5th Annual N.Y. City Bankr. Conf., May 5, 2003).

main proceeding.<sup>188</sup> The court in the main proceeding can then modify or terminate any relief previously granted if it is deemed inconsistent with the main proceeding.<sup>189</sup>

Consistent with the view of the Model Law that local courts, to the extent possible, shall administer local assets, the court of the local proceeding has two checks on the power of the foreign court of a main proceeding. Initially, a representative of the court of the main proceeding must apply for recognition with the local court.<sup>190</sup> If proceedings have already taken place before the court, then the court is well aware of the stakes involved or at least the potential impact on creditors. Creditors get notice of the application and have an opportunity to challenge it. Furthermore, the purpose of the secondary case under the Model Law is not merely to serve in a subordinate role to the main case (though this may be part of the process), but to provide a basis for coordination and cooperation with the main case as well as to serve as a forum to administer assets that are best administered in the local court and not in the foreign court.<sup>191</sup>

If the court grants recognition to the main proceeding, it is fully aware that its proceedings are now secondary. The court has an obligation under the Model Law to cooperate with the main proceeding. If the court of the secondary proceeding has already granted relief (already a consideration for the court of the secondary proceeding when it grants recognition to the main proceeding), and the court of the main proceeding modifies this relief, the court of the secondary proceeding has options. Cooperation and coordination with the court of the main proceeding court are two of them.

However, the Model Law also contains a provision that allows the recognizing court to opt out of the Model Law, to refuse to enforce a judgment of the court of a main proceeding, and to enforce the law of its own jurisdiction if an action would be contrary to the public policy of that particular state.<sup>192</sup> This public policy exception is especially powerful vis-à-vis the rights of creditors as established in principles eight and nine. Additionally, the Model Law provides the possibility for local courts to discriminate in the application of priorities when distributing assets to creditors.

[Under the “hotchpot rule,” a] creditor that receives a distribution in a foreign [bankruptcy] proceeding [cannot receive additional distributions at another local proceeding involving the same debtor] until creditors of the same class . . . have gotten as much from the local proceeding as the first creditor [received in the foreign proceeding].<sup>193</sup>

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<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> See *Model Law*, *supra* note 11, art. 17.

<sup>191</sup> *Id.* art. 28.

<sup>192</sup> *Model Law*, *supra* note 11, art. 6.

<sup>193</sup> *Id.* art. 32; Farley, *supra* note 12, at 216 (quoting Westbrook, *Multinational Enterprises*, *supra* note 111, at 18); see also David Costa Levenson, *LL.M THESES: Proposal for Reform of Choice of Avoidance Law in the Context of International Bankruptcies from a U.S. Perspective*, 10 AM. BANKR. INST. L. REV. 291, 347 (2002).

Critics of the public policy exception have validly pointed out two of its weaknesses: that the exception will swallow the rule and that, as bankruptcy law affects a vast number of other areas, the exception is not equipped to define the jurisdiction of courts over conflicting local and foreign laws. First, under the Model Law and chapter 15, the presumption of the law is coordination and cooperation with foreign courts. Thus, when making decisions, the local courts of secondary proceedings must be cognizant of international comity. If the EU Regulation, with a similar public policy exception, is any indication, then the public policy exception will be used rarely and only in the most egregious of cases.<sup>194</sup>

Second, there are significant questions to be resolved over the extent of each court's jurisdiction under the Model Law. Issues of bankruptcy jurisdiction have already arisen in the United States and have to a large degree been resolved.<sup>195</sup> In other words, "if bankruptcy were to become universalist while the remainder of regulatory law remained territorial, the system would have to grapple with a new, problematic interface between the two."<sup>196</sup>

To the extent that any new international legal system has to address complex and conflicting laws of member jurisdictions, territorialist critics astutely point out that these potential disputes are of significant economic consequence. However, the territorialist provisions of the Model Law provide a safeguard, augmented by universalism. Article 28 specifically envisions that some assets over which the court of the main proceeding may have jurisdiction may best be administered by the local court of the secondary proceeding. Thus, where issues of a cross-border insolvency touch upon domestic laws that are subject to particular regulatory regimes (labor contracts, pensions, environmental laws) or are politically sensitive, the expectation of the Model Law is that these issues would either be given over to the court of secondary proceedings to decide or the affected courts would collaborate through their representatives on a mutually agreeable solution.<sup>197</sup> Guided by the underlying principles of coordination and cooperation, courts of a main proceeding are unlikely to issue orders in direct conflict with a fundamentally important regulatory regime of a court of a secondary proceeding. If they do, a domestic court may invoke the public policy exception under article 6.

### *B. Judicial Cooperation: Universalism's Advantages*

#### 1. The Model Law

The Preamble to the Model Law establishes, as its first and second purposes, the promotion of the objectives of "[c]ooperation between the courts and other

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<sup>194</sup> See *Model Law*, *supra* note 11, Pt. IV 20(e); Case C-341/04, *Bondi v. Bank of America (In re Eurofood IFSC Ltd.)*, 2006 E.C.R. I-3813, ¶ 67 (holding that Italy's use of the public policy exception disregarded relevant procedural rules guaranteed by this public policy).

<sup>195</sup> See 11 U.S.C.A. 365(a)(3) (2005) (prohibiting changes in certain provisions of shopping center leases); 11 U.S.C.A. 1113 (2005) (detailing the requirements for rejection of a collective bargaining agreement); 11 U.S.C.A. 1114(e)(1) (2005) (requiring the continued payment of retiree benefits during chapter 11 reorganization); 28 U.S.C.A. 1334 (2005) (giving bankruptcy courts jurisdiction over certain actions and prohibiting them from assuming jurisdiction over others).

<sup>196</sup> LoPucki, *Case*, *supra* note 19, at 2238.

<sup>197</sup> See *Model Law*, *supra* note 11, arts. 7, 28.

component authorities of . . . [s]tates involved in cases of cross-border insolvency” and “greater legal certainty of trade and investments.”<sup>198</sup> Thus, the courts of those nations that adopt the Model Law are exhorted from the very beginning to keep in mind that the purpose of the law is to promote cooperation in the goal of facilitating international trade and capital flows.

The structure of the Model Law also embodies these purposes. As noted above, a secondary case is limited to the administration of the assets located in the host country. However, such a case may be used for two other purposes. First, it may be used to implement cooperation and coordination with foreign courts and representatives under the provisions of the Model Law. Second, such a case may administer assets not in the host country, where the host country’s law provides that such assets should be administered in a bankruptcy case in that country. In other words, the secondary case is a formal mechanism, with the imprimatur of law, whereby courts involved in cross-border insolvency cases can communicate and cooperate with each other. Other provisions under the Model Law specifically exhort domestic courts to cooperate and communicate with foreign courts or their representatives and give them the ability to do so by various means formerly enjoyed only among domestic courts.<sup>199</sup> While U.S. bankruptcy courts have long enjoyed broad powers in adjudicating bankruptcy proceedings,<sup>200</sup> many foreign insolvency courts have vastly circumscribed powers. Numerous U.S. bankruptcy courts have experimented with, and have been partially successful in, the negotiation of protocols with foreign insolvency courts. However, these have only been done on a case-by-case basis, without clear rules of the limits of their jurisdiction, and only through the slow diplomatic process of consular agents and rogatory letters.<sup>201</sup>

In contrast, the Model Law provides the clear statutory authority and expectation that courts of countries who have adopted the Model Law can initiate and engage in direct communication, information sharing, and coordination with other courts. Thus, the creativity of U.S. courts in reaching solutions to cross-border insolvency issues is not inhibited but rather statutorily reinforced and expected. Foreign bankruptcy courts that otherwise were limited to diplomatic channels in their means of communication now have direct access to U.S. courts. This reduction of barriers serves to increase information flow, solidify coordination of proceedings, reduce administrative costs, and increase predictability.

## 2. Cooperative Territorialism

Cooperative territorialism attempts to address the same problems endemic to any cross-border insolvency case where courts in different countries have competing jurisdiction, namely: cost and efficiency, the protection of creditors, the interaction

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<sup>198</sup> *Model Law*, *supra* note 11, pmb. (a)–(b).

<sup>199</sup> *Id.* arts. 24–27.

<sup>200</sup> See 28 U.S.C. § 1334(b) (2000) (giving bankruptcy courts subject matter jurisdiction of civil proceedings “arising under,” “arising in,” or “related to” cases under title 11).

<sup>201</sup> Many major protocols are listed at [http://www.iiiglobal.org/component/option,com\\_jdownloads/Itemid,1080/task,viewcategory/catid,395](http://www.iiiglobal.org/component/option,com_jdownloads/Itemid,1080/task,viewcategory/catid,395) (last visited Oct. 23, 2008). As one can see, these protocols are all between countries that have a form of universalist system, not territorialist. Those listed on the website are between the United States and Canada and the United Kingdom, respectively.

with non-bankruptcy statutes, and the administration of corporate groups. This article will address the latter two issues in greater detail below. Essentially, those who advocate cooperative territorialism anticipate cooperation between judges of competing jurisdictions on an ad hoc basis and only when mutually beneficial. When a particular judge is not inclined to cooperate with a foreign insolvency proceeding, there is no particular expectation that she or he does so.

However, to facilitate cooperation when it becomes necessary, Professor LoPucki suggests five areas of cooperation: 1) procedures to replicate claims; 2) sharing of distribution lists; 3) coordination to dispose of assets; 4) voluntary participation by creditors in the foreign proceedings; and, 5) cooperation in the area of avoidable transfers.<sup>202</sup>

There is, however, no guarantee under the cooperative territorialism approach that numerous jurisdictions would cooperate.<sup>203</sup> In order to accept the contention that cooperative territorialism is the better solution, one must accept the premise that bankruptcy judges have perfect information ex ante regarding a corporate group's worldwide assets. The inducement that Professor LoPucki holds out for cross-border cooperation under this scheme is that judges will recognize situations where the bankruptcy estate will be enhanced by the sale of all the estate's assets as a whole rather than piecemeal. However, more often than not, bankruptcy judges concern themselves only with the assets they can immediately control and administrate (i.e., those assets within their own territory). Furthermore, without a statutory mandate, domestic judges, not trained in international law or commerce, view cases through the myopic lens of administering domestic assets they can understand rather than venturing into the unknown world of international business, whether or not this venture might be in the best interests of domestic creditors or the bankruptcy estate.<sup>204</sup>

### 3. International Judicial Cooperation in General

It is unrealistic to expect domestic judges, especially those who preside over politically charged, high-profile multinational bankruptcy cases, to be immune from domestic pressures and the bias inherent in the familiarity with one's own law. This is not to say that individual judges do not subscribe to a degree of international comity on a case-by-case basis. However, even where domestic statutes provide for a great deal of discretion in when to account for the insolvency practices of other countries, many national systems "tend to be universalistic, but only if they wish to attract foreign assets in favour of their insolvency proceedings,"<sup>205</sup> while maintaining "a strictly territorialistic attitude if they are asked to give away assets in favour of a

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<sup>202</sup> Farley, *supra* note 12, at 198.

<sup>203</sup> Cf. Perkins, *A Defense of Pure Universalism*, *supra* note 23, at 823 (stating that cooperative territorialism would encourage mutually beneficial cooperation among countries).

<sup>204</sup> Westbrook, *Global Solution*, *supra* note 26, at 2314–15 (stating that territorialism is less able to cope with the problems of international business life because "it turns upon a territorial model of economic conduct that is outdated . . .").

<sup>205</sup> Paul Volken, *Cross-Border Insolvency: Cooperation and Judicial Assistance*, in 19 FORUM INTERNATIONALE 21, 24 (1993).

foreign insolvency case.”<sup>206</sup> Thus we have the dual tensions of a judge, “who is caught between the temptations of international law and respect for the domestic law of his country,”<sup>207</sup> on the one hand and the judge, “who must apply foreign law, whether he is familiar with it or not.”<sup>208</sup> The choice of status of international law in a domestic system is a political one.<sup>209</sup> Thus, when a legislature instructs its judges to account for international law in its decision-making, the political class needs to give the judicial class a specific framework within which to make these decisions. This has been done for the most part in chapter 15. However, the legislature must also give judges the information and documentation that are essential for keeping up with the evolution of international law.<sup>210</sup> Only then can judges fully deliver on the administrative and economic efficiencies promised by the Model Law.

## VII. THE U.S. EXPERIENCE

The efficacy of territorialist provisions’ predictability and statutory expectations of cross-border dialogue among courts is borne out in a comparison of the Bankruptcy Code’s old 304 with the new chapter 15. Prior to the enactment of chapter 15, the former title 11 U.S.C. 304 was the provision of the U.S. Bankruptcy Code that, in part, dealt with international proceedings. The comity provision of 304 gave U.S. bankruptcy judges the broad powers to reach equitable decisions and to cooperate with the law of other jurisdictions. However, such cooperation occurred inconsistently and led to an inefficient and unpredictable administration of international liquidations or restructurings.<sup>211</sup> The new chapter 15 was intended to address these concerns.<sup>212</sup>

### A. *The Former Section 304*

Under section 304, a foreign representative involved in a foreign bankruptcy case could file an ancillary proceeding in a U.S. bankruptcy court as opposed to initiating a full bankruptcy case against a debtor.<sup>213</sup> Under 304, the qualifications of a foreign representative were broadly construed.<sup>214</sup> “The purpose of [an ancillary] case

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<sup>206</sup> *Id.*

<sup>207</sup> Multilateral Meeting of the Council of Eur. Legal Co-operation with Cent. and E. Eur. Countries, Bucharest, Rom., Nov. 28–30, 1995, *Presentation by Dinu Ianculescu, Dir. of Int’l Jud. Rel. and Eur. Integration, Ministry of Justice, Romania*, in *THE JUDGE AND INTERNATIONAL LAW* 165 (Council of Eur. Pub. 1998).

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 166.

<sup>210</sup> Multilateral Meeting of the Council of Eur. Legal Co-operation with Cent. and E. Eur. Countries, Bucharest, Rom., Nov. 28–30, 1995, *Conclusions*, in *THE JUDGE AND INTERNATIONAL LAW* 169, 170 (Council of Eur. Pub. 1998).

<sup>211</sup> David Neiman, *supra* note 39, at 825 n.193 (citing FELSENFELD, *supra* note 8, at 1–27).

<sup>212</sup> For a comparison with the EU Regulation, see the discussion of the *Eurofood* and *Daisytek* cases in Bufford, *Global Venue Controls*, *supra* note 11, at 126–131. See also *Eurofood*, 2006 E.C.R. I-3813 (in a victory for a territorialist interpretation of COMI, holding that the COMI of a subsidiary registered in a different country than the parent can only be rebutted by objective and ascertainable facts, and the mere fact that the parent can control the subsidiaries’ economic choices is not enough to rebut the Regulation’s presumption of the place of residence as the COMI).

<sup>213</sup> NANCY C. DREHER & JOAN N. FEENEY, *BANKRUPTCY LAW MANUAL* § 3:18 (5th ed. 2003).

<sup>214</sup> *In re Artimm*, 278 B.R. 832, 839 (Bankr. C.D. Cal. 2002) (finding that a trustee involved in an Italian bankruptcy proceeding qualified as foreign representative).

[was] to assist a foreign court in its administration of a foreign proceeding of liquidation or reorganization.”<sup>215</sup> A case ancillary to a foreign proceeding “serve[d] as a jurisdictional aid for a foreign representative to facilitate the administration of a bankruptcy or similar proceeding pending abroad. It allow[ed] a foreign representative to marshal U.S. assets and eventually repatriate them, to obtain discovery and to otherwise protect and facilitate the administration of the foreign proceeding.”<sup>216</sup> However, 304 cases were not limited only to foreign proceedings that concerned assets within the United States.<sup>217</sup> Courts could utilize the broad scope of 304 to obtain jurisdiction over ancillary proceedings where the debtor did not have assets within the United States.<sup>218</sup>

### 1. Process

Section 304(b)(3) allowed a bankruptcy court to “order . . . appropriate relief” and thus gave bankruptcy judges tremendous authority over the equities of insolvency cases.<sup>219</sup> Judges were to “be guided by what w[ould] best assure an economical and expeditious administration of the estate.”<sup>220</sup> In determining what relief, if any, was appropriate, the court had to weigh six factors:<sup>221</sup> 1) “just treatment of all holders of claims against or interests in such [bankrupt] estate;” 2) “protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;” 3) “prevention of preferential or fraudulent dispositions of property of such [bankrupt] estate;” 4) “distribution of proceeds of such [bankrupt] estate substantially in accordance with the order prescribed by this title [11];” 5) “comity;” and 6) “if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.”<sup>222</sup>

The goal of section 304(c)(1) was to ensure the fair distribution of assets among all creditors of a debtor.<sup>223</sup> In the context of whether a domestic creditor was being treated fairly in a foreign jurisdiction, the 304(c)(1) requirement was met when the applicable provisions of foreign law provided “a comprehensive procedure for the orderly and equitable distribution of . . . assets among all its creditors.”<sup>224</sup> Similarly, when applying the criteria of 304(c)(2), courts would examine, *inter alia*: 1) whether

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<sup>215</sup> *Id.* at 836.

<sup>216</sup> 2 ALAN N. RESNICK & HENRY J. SOMMER, *COLLIER ON BANKRUPTCY*, ¶ 304.03[1] (15th ed. 2004).

<sup>217</sup> *Id.* ¶ 304.02[5].

<sup>218</sup> See *Haarhuis v. Kunnan Enters., Ltd.*, 177 F.3d 1007, 1012 (D.C. Cir. 1999).

<sup>219</sup> See 11 U.S.C. §§ 304(b)(3), 304(c)(1)–(6) (2000), Pub. L. 95–598, 92 Stat. 2560 (1978) (repealed 2005).

<sup>220</sup> *In re Evans*, 177 B.R. 193, 197 (Bankr. S.D.N.Y. 1995) (quoting S. Rep. No. 95–989, at 35 (1978), as reprinted in 1978 U.S.C.C.A.N. 5787, 5821 and H. Rep. No. 95–595, at 324–25 (1977), as reprinted in 1978 U.S.C.C.A.N. 5963, 6281).

<sup>221</sup> 11 U.S.C. § 304(c)(1)–(6) (2000), Pub. L. 95–598, 92 Stat. 2560 (1978) (repealed 2005).

<sup>222</sup> *Id.*; see also *Hilton v. Guyot*, 159 U.S. 113, 164 (1895) (defining comity as the “recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws”).

<sup>223</sup> Anne Norby Nielsen, Comment, *Section 304 of the Bankruptcy Code: Has It Fostered the Development of an “International Bankruptcy System?”*, 22 COLUM. J. TRANSNAT’L L. 541, 554 (1984).

<sup>224</sup> *In re Culmer*, 25 B.R. 621, 629 (Bankr. S.D.N.Y. 1982).



adequate notice of the foreign proceeding is required; 2) the time limits within which a creditor must file a claim; and 3) whether a creditor whose claim is rejected may appeal the decision to a foreign court.<sup>225</sup>

The voiding of transfers by a foreign jurisdiction satisfied section 304(c)(3).<sup>226</sup> The requirements of “section 304(c)(4), which direct[ed] th[e] court to consider whether the distribution of proceeds of the estate [would] be substantially in accordance with that of the [U.S.] Bankruptcy Code,” were met when the law of a foreign jurisdiction was “generally in harmony with the Code,”<sup>227</sup> i.e., “not repugnant to the American laws and policies.”<sup>228</sup>

Section 304(c)(5) required the consideration of comity, which had been considered the most important of so-called 304(c) factors.<sup>229</sup> Comity was defined as a doctrine that encouraged deference to foreign laws if certain factors in bankruptcy were present.<sup>230</sup> Recognizing this importance, under section 304, many courts emphasized “deference to foreign insolvency proceedings [to] facilitate ‘equitable, orderly, and systematic’ distribution of [a] debtor’s assets.”<sup>231</sup>

## 2. Why It Didn’t Work

Section 304(c), however, was plagued with internal inconsistencies that undermined its purpose of “foster[ing] cooperation among countries by encouraging a United States court to forbear its jurisdiction over the property [of a bankrupt estate] in favor of allowing one foreign nation to administer the bankruptcy proceeding.”<sup>232</sup> Not surprisingly, without a clear expectation of international judicial cooperation, 304(c)(2) and 304(c)(4) were often used to favor the interests of American creditors over those interests of foreign creditors and a foreign debtor.<sup>233</sup> Furthermore, U.S. courts “acted inconsistently in their decisions of whether to grant relief . . . to foreign representatives and what type of relief to grant.”<sup>234</sup>

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<sup>225</sup> *Id.*

<sup>226</sup> Section 304(c)(3) was satisfied when the law of a foreign jurisdiction voided fraudulent transfers.

<sup>227</sup> Farley, *supra* note 12, at 189.

<sup>228</sup> *Universal Casualty & Surety Co. v. Gee (In re Gee)*, 53 B.R. 891, 904 (Bankr. S.D.N.Y. 1985) (citing *In re Culmer*, 25 B.R. at 621). The Court commented that this element should not be read too strictly. It would be a mistake to construe this provision to mean that a court must find effective congruence between the distribution schemes of the United States and the country in which the foreign proceeding is pending.

<sup>229</sup> *In re Blackwell*, 270 B.R. 814, 828 (Bankr. W.D. Tex. 2001); *see also In re Bullmore*, 300 B.R. 719, 732 (Bankr. D. Neb. 2003) (“Comity will be granted to the decision or judgment of a foreign court if it is shown that the foreign court is a court of competent jurisdiction, and that the laws and public policy of the forum state and the rights of its residents will not be violated.” (quoting *In re Gee*, 53 B.R. at 901)).

<sup>230</sup> *Haarhuis*, 177 F.3d at 1013.

<sup>231</sup> *Societe Generale*, 93 F.3d at 1048 (quoting *Cunard S.S. Co. v. Salen Reefer Servs. AB*, 773 F.2d 452, 458 (2d Cir. 1985)).

<sup>232</sup> *See* Todd Kraft & Allison Aranson, *Transnational Bankruptcies: Section 304 and Beyond*, 1993 COLUM. BUS. L. REV. 329, 340 (1993); Nielsen, *supra* note 223, at 554.

<sup>233</sup> *See* Kraft & Aranson, *supra* note 232, at 341–43; Nielsen, *supra* note 223, at 554–56.

<sup>234</sup> *See* Perkins, *A Defense of Pure Universalism*, *supra* note 23, at 796.

U.S. courts granted comity to a number of foreign courts in the bankruptcy setting.<sup>235</sup> However, in quite a few cases, courts denied the relief requested by foreign representatives.<sup>236</sup> In particular circumstances, the denial of relief prevented the unfair treatment of U.S. creditors in foreign proceedings.<sup>237</sup> This fails to explain, however, why U.S. courts failed to grant comity to foreign proceedings conducted in the same countries in which the U.S. courts had granted comity in the past, including Canada and Australia.<sup>238</sup>

This lack of consistency allowed bankruptcy courts to apply 304 in a fashion that cut both ways, giving bankruptcy courts broad discretion “to mold appropriate relief in near ‘blank-check’ fashion.”<sup>239</sup> However, such judicial discretion often favored the interests of American creditors over those interests of foreign creditors and foreign debtors.<sup>240</sup>

### B. *The New Chapter 15*

#### 1. Scope

Section 304 was a unilateral creation of the U.S. and did not have the advantages of the Model Law, with its international nature and its potential to harmonize the treatment of cross-border insolvency. Chapter 15 notes its universal foundations in section 1508: “In interpreting this chapter, the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions.”<sup>241</sup>

By replacing former section 304 of the Bankruptcy Code, *Cases Ancillary to Foreign Proceedings*, with Model Law-based chapter 15, *Ancillary and Other Cross-border Cases*, title VIII of the 2005 Act encourages cooperation between the U.S. and foreign countries with respect to transnational insolvency cases. Title VIII also amends other sections of the Bankruptcy Code and of title 28 of the U.S. Code (*Judiciary and Judicial Procedures*) to fully implement chapter 15.

Chapter 15 is more pervasive than section 304 and, with its accompanying amendments, modifies the venue rules for ancillary cases, provides outbound authority for representatives of U.S. bankruptcy cases to seek relief from foreign courts, addresses the management of simultaneous foreign and domestic proceedings

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<sup>235</sup> RESNICK & SOMMER, *supra* note 216, ¶ 304.08[5][b].

<sup>236</sup> *Id.* (citing, among others, *In re Lineas Aereas de Nicaragua, S.A.*, 13 B.R. 779, 779–80 (Bankr. S.D. Fla. 1981) (utilizing U.S. court to set several conditions favorable to U.S. creditors)).

<sup>237</sup> *Id.* (citing, among others, *In re Toga Mfg., Ltd.*, 28 B.R. 165 (Bankr. E.D. Mich. 1988) (U.S. court denied petition of foreign bankruptcy trustee on grounds that U.S. creditor would lose secured creditor status in foreign proceeding) and *In re Hourani*, 180 B.R. 58 (Bankr. S.D.N.Y. 1995) (U.S. court would not defer to foreign proceeding wherein the special procedures for liquidation lacked minimal protections to assure fair treatment of all creditors)).

<sup>238</sup> RESNICK & SOMMER, *supra* note 216, ¶ 304.08[5][b].

<sup>239</sup> *Haarhuis*, 177 F.3d at 1012 (quoting 3 COLLIER BANKRUPTCY MANUAL ¶ 304.07 (1998)).

<sup>240</sup> See Kraft & Aranson, *supra* note 232, at 340–41; Nielsen, *supra* note 223, at 554.

<sup>241</sup> 11 U.S.C.A. § 1508 (2005).

involving the same debtor, and assures fair notice and treatment of foreign creditors of U.S. debtors.<sup>242</sup>

## 2. Venue Choices Under Chapter 15

Unlike section 304, chapter 15 narrows venue choices and requires that a petition for recognition of a foreign proceeding be granted under chapter 15 before a foreign representative can obtain relief in a U.S. court.<sup>243</sup> The recognition procedure of section 1515 is the sole entry point for access by a foreign representative to the state and federal court systems in the U.S.<sup>244</sup> (except for the limited purpose of collecting the debtor's accounts receivable). Venue for recognition under chapter 15 is also narrowed to the single entry point where the debtor has its COMI. If recognition is denied, the foreign representative cannot attempt to proceed in another court.<sup>245</sup> After recognition has been granted, the foreign representative, armed with a certified copy of the order granting recognition, can seek relief in another court if necessary.

## 3. Procedure and Relief

As noted above, the foreign representative commences a case by filing a petition for recognition of a foreign proceeding directly with the bankruptcy court.<sup>246</sup> The petition must be accompanied by documents evidencing the foreign proceeding and the appointment and authority of the foreign representative.<sup>247</sup> Designed to make the process efficient, the statute requires that the petition be decided at the earliest possible time and allows several facilitating presumptions.<sup>248</sup> The accompanying documents are presumed to be authentic both as to the form and substance of establishing the qualification of the foreign proceeding and representative.<sup>249</sup> In addition, for the purposes of determining whether the foreign proceeding is main or non-main, the debtor's registered office is presumed to be the center of its main interests.<sup>250</sup>

The foreign representative may commence a case by filing a petition for "recognition of a foreign proceeding" directly with the bankruptcy court.<sup>251</sup> If the court grants recognition, and subject to whatever limitations the court may impose, (1) the foreign representative (a) has the capacity to sue and be sued in a U.S. court and (b) may apply directly to a U.S. court for appropriate relief in that court; and (2) the U.S. court shall grant comity or cooperation to the foreign representative.<sup>252</sup>

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<sup>242</sup> Daniel Glosband, *Chapter 15: U.S. Insolvency Reform Explained*, INT'L FIN. L. REV. 1, 1-3 (2005), available at <http://www.goodwinprocter.com/Publications/FindaPublication.aspx> (search for Daniel Glosband; then follow hyperlink for article in results) (last visited Sept. 22, 2008).

<sup>243</sup> See 11 U.S.C.A. § 1504 (2005).

<sup>244</sup> See 11 U.S.C.A. § 1515 (2005).

<sup>245</sup> See 11 U.S.C.A. § 1509(d) (2005).

<sup>246</sup> 11 U.S.C.A. § 1515 (2005).

<sup>247</sup> *Id.*

<sup>248</sup> 11 U.S.C.A. §§ 1516, 1517(c) (2005).

<sup>249</sup> 11 U.S.C.A. § 1516.

<sup>250</sup> *Id.*

<sup>251</sup> 11 U.S.C.A. § 1509(a) (2005).

<sup>252</sup> 11 U.S.C.A. § 1509(b) (2005).

Upon recognition, the foreign representative (1) may commence an involuntary case under section 303 or, under certain circumstances, a voluntary case under section 301 or 302,<sup>253</sup> (2) may participate as a party in interest in a case regarding the debtor under the other chapters of the Bankruptcy Code,<sup>254</sup> or (3) may intervene in any proceeding in a state or federal court in the United States to which the debtor is a party.<sup>255</sup>

Under chapter 15, foreign creditors have the same rights with respect to the commencement of or participation in a case under the Bankruptcy Code as afforded to U.S. creditors, and claims of a foreign creditor may not be given lower priority than those of other general unsecured claims solely because such claims are held by a foreign creditor.<sup>256</sup> Further, whenever notice is to be given to creditors in a case under the Bankruptcy Code, it must also be provided to creditors with foreign addresses, and the court may order appropriate steps to notify foreign creditors whose addresses are unknown.<sup>257</sup> Such notification must be given individually, unless the court finds that, under the circumstances, some other form of notification is more appropriate.<sup>258</sup> When the notice of the commencement of a case under the Bankruptcy Code is given to foreign creditors, the notice must 1) indicate the time and place for filing proofs of claim; 2) indicate whether secured creditors have filed proofs of claim; and 3) contain any other information generally required to be included.<sup>259</sup> Any rules or orders issued by the bankruptcy court with respect to notice or the filing of proofs of claim shall provide additional time to creditors with foreign addresses as is reasonable under the circumstances.<sup>260</sup>

#### 4. Recognition of Foreign Proceeding and Relief

A case under chapter 15 begins with the filing of a petition for recognition<sup>261</sup> of a foreign proceeding in which the foreign representative has been appointed.<sup>262</sup> The petition for recognition must be accompanied by an English translation of either a certified copy of the decision by the foreign court commencing the foreign proceeding and appointing the representative or a certificate from that foreign court affirming that such proceeding is pending and the representative has been appointed.<sup>263</sup> After notice and a hearing, the bankruptcy court must enter the order of recognition as long as (i) the foreign proceeding for which recognition is sought is the foreign main or foreign non-main proceeding, (ii) the foreign representative is a

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<sup>253</sup> 11 U.S.C.A. § 1511 (2005).

<sup>254</sup> See 11 U.S.C.A. § 1512 (2005). While the statutory language is not clear, it is a reasonable assumption that because the foreign representative has the authority to commence a case under section 301, 302, or 303, this section must refer to cases pending at the time of recognition.

<sup>255</sup> 11 U.S.C.A. § 1524 (2005).

<sup>256</sup> 11 U.S.C.A. § 1513 (a), (b) (2005). Section 1513 also specifically provides that it does not change or codify present law as to the priority of claims under § 507 or § 726.

<sup>257</sup> 11 U.S.C.A. § 1514(a) (2005).

<sup>258</sup> 11 U.S.C.A. § 1514(b) (2005).

<sup>259</sup> 11 U.S.C.A. § 1514(c)(1)–(3) (2005).

<sup>260</sup> 11 U.S.C.A. § 1514(d) (2005).

<sup>261</sup> 11 U.S.C.A. § 1502(7) (2005) defines recognition as the “entry of an order granting recognition of a foreign . . . proceeding under this chapter.”

<sup>262</sup> See 11 U.S.C.A. § 1515 (2005); see also 11 U.S.C.A. § 1504 (2005).

<sup>263</sup> 11 U.S.C.A. § 1515(b), (d) (2005).

“person or body,” and (iii) the petition is accompanied by the appropriate supporting documentation described above.<sup>264</sup> Under chapter 15 the foreign representative need not satisfy requirements, such as those found under section 304(c), before relief may be granted. Nevertheless, the bankruptcy court may refuse to take any action under chapter 15 if the action would be “manifestly contrary to the public policy of the United States.”<sup>265</sup>

Similarly to a section 304 proceeding, a case under chapter 15 may be commenced in the district court for the district (1) in which the debtor has its principal place of business or principal assets in the United States; or, (2) if there are no assets or place of business in the United States, in the district in which there is a pending action against the debtor.<sup>266</sup> Unlike section 304, however, even when there are no assets, place of business, or pending litigation, a chapter 15 case may still be commenced in a district “in which venue will be consistent with the interests of justice and convenience of the parties, having regard to the relief sought by the foreign representative.”<sup>267</sup>

## 5. Substantive Relief

Under section 304 the court may grant interim relief for the period between the filing of the petition for recognition and the granting of the petition by the court if relief is urgently needed to protect the assets or interests of the debtor and/or the interests of creditors. This interim relief may include (1) staying any execution against the debtor’s assets; (2) entrusting the administration or realization of the debtor’s assets located in the United States to the foreign representative or another person authorized by the court; (3) suspending the right to transfer, encumber, or otherwise dispose of any assets of the debtor; (4) granting discovery concerning the debtor’s assets or affairs; or (5) granting any additional relief that may be available to a trustee (with certain limitations).<sup>268</sup> Such interim relief may be denied if it interferes with the foreign main proceeding.<sup>269</sup> The granting of interim relief is governed by the standards and limitations generally applicable to preliminary injunctions.<sup>270</sup> In addition, unless otherwise extended, interim relief terminates when the petition for recognition is granted.<sup>271</sup>

In probably the most significant departure from section 304, chapter 15 provides that upon recognition of a foreign proceeding, the automatic stay under section 362 applies with respect to the debtor and the property of the debtor within the territorial

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<sup>264</sup> 11 U.S.C.A. § 1517 (2005).

<sup>265</sup> 11 U.S.C.A. § 1506 (2005). Although the granting of recognition does not require the bankruptcy court to consider comity, this provision gives the court the right to deny relief under chapter 15 if the court believes comity should not be granted based on public policy.

<sup>266</sup> See 28 U.S.C. § 1410(1)–(2) (2000).

<sup>267</sup> 28 U.S.C. § 1410(3) (2000).

<sup>268</sup> 11 U.S.C.A. § 1519(a) (2005). Avoiding powers are not available in ancillary proceedings. See *In re* Petition of Kojima, 177 B.R. 696, 703 n.35 (Bankr. D. Colo. 1995) (applying the rule to section 304). Additionally, the court may not enjoin a police or regulatory act of government, including a criminal action or proceeding. 11 U.S.C.A. § 1519(d) (2005).

<sup>269</sup> 11 U.S.C.A. § 1519(c) (2005).

<sup>270</sup> 11 U.S.C.A. § 1519(e) (2005).

<sup>271</sup> 11 U.S.C.A. § 1519(b) (2005).

jurisdiction of the United States.<sup>272</sup> Although injunctive relief previously available under section 304 may be similar to the automatic stay under section 362, chapter 15 effectively eliminates the need for the foreign representative to satisfy any non-bankruptcy standards (to the extent applicable) for injunctive relief or any of the gate-keeper standards of section 304(c) before such relief can be granted.<sup>273</sup>

A grant of any relief under 304 was discretionary with the court and conditioned on satisfaction of the so-called section 304(c) factors. Under section 304 no relief was granted without court approval based on satisfaction of the statutory list of criteria. In contrast, recognition of a foreign main proceeding (under section 1517)—the expedited validation that the foreign proceeding and the foreign representative satisfy the definitional requirements—imposes automatic effects, including an automatic stay of actions against the debtor and its assets and an automatic grant of authority to the foreign representative to operate the debtor’s business.<sup>274</sup>

Chapter 15 also provides that, upon recognition of a foreign main or non-main<sup>275</sup> proceeding, if the court finds that it is necessary to effectuate the purpose of chapter 15 and to protect the debtor’s assets and the interests of creditors, the court may grant “appropriate” relief (supplemental relief) including: 1) staying the commencement or continuation of any action or proceeding concerning the debtor’s assets, rights, obligations, or liabilities (to the extent not already stayed under section 362); 2) staying execution against the debtor’s assets (to the extent not already stayed under section 362); 3) suspending the right to transfer, encumber, or otherwise dispose of any assets (to the extent not already stayed under section 362); and 4) extending the interim relief.<sup>276</sup> In addition, the court may a) grant discovery concerning the debtors assets, affairs, rights, obligations, or liabilities; b) entrust the administration or realization of the debtor’s assets located in the United States to the foreign representative or another person authorized by the court; and c) grant any additional relief that may be available to a trustee (with certain limitations).<sup>277</sup>

Similar to section 304 in its granting of the ability to request turnover, chapter 15 authorizes the court to entrust the distribution of the debtor’s assets located in the United States to the foreign representative (or some other person authorized by the court), provided that the court is satisfied that the interests of creditors in the United States are sufficiently protected.<sup>278</sup> The court may condition the granting of supplemental relief (as well as interim relief) to whatever conditions it deems

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<sup>272</sup> 11 U.S.C.A. § 1520(a) (2005).

<sup>273</sup> See, e.g., *Schimmelpenninck v. Byrne* (*In re Schimmelpenninck*), 183 F.3d 347, 366 (5th Cir. 1999) (holding that declaratory and injunctive relief sought through proceedings that are ancillary to a foreign bankruptcy in a country whose laws are compatible with those of the United States should be analyzed under section 304, not section 362, of the Bankruptcy Code).

<sup>274</sup> See 11 U.S.C.A. § 1520 (2005).

<sup>275</sup> If it is a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the laws of the United States, should be administered in the foreign non-main proceeding or concerns information required in that proceeding. See 11 U.S.C.A. § 1521(c) (2005).

<sup>276</sup> 11 U.S.C.A. §§ 1521(1)–(3), (6) (2005).

<sup>277</sup> 11 U.S.C.A. §§ 1521(4), (5), (7) (2005).

<sup>278</sup> 11 U.S.C.A. § 1521(b) (2005).

appropriate, including, but not limited to, the giving of security or the posting of a bond.<sup>279</sup>

## 6. Cooperation with Foreign Courts

Consistent with the goal of cross-border cooperation, the court is required to cooperate, to the extent possible, with a foreign court or a foreign representative and is entitled to communicate directly with, or request information from, a foreign court or foreign representative, subject to the rights of parties in interest to notice and participation.<sup>280</sup>

## 7. Concurrent Proceedings

Once a foreign main proceeding has been recognized under chapter 15, the foreign representative may commence a case under one of the other chapters of the Bankruptcy Code only if the debtor has assets in the United States.<sup>281</sup> If a bankruptcy case is commenced, the case will affect only assets of the debtor within the territorial jurisdiction of the United States and extend to other assets of the debtor to the extent necessary to allow cooperation and coordination between the bankruptcy court and the foreign court.<sup>282</sup> If the case under one of the other chapters of the Bankruptcy Code is already pending at the time the petition for recognition is filed, (1) any interim or supplemental relief granted in the chapter 15 case must be consistent with the relief granted in the bankruptcy case; and (2) the provisions of section 1520 (making sections 362, 363, 549, and 552 applicable to chapter 15 cases) will not apply even if the foreign proceeding is recognized.<sup>283</sup> If a bankruptcy case is commenced after the recognition of the foreign proceeding, any interim or supplemental relief (and, if the foreign proceeding is a foreign main proceeding, any relief granted under section 1520) is subject to modification or termination if such relief is inconsistent with the relief granted in the bankruptcy case.<sup>284</sup>

Under section 304, the U.S. had a provision in the bankruptcy code that addressed the issue of cross-border insolvency, provided a structure for cooperation and coordination, and gave courts wide discretion in fashioning equitable relief. However, this wide discretion meant that section 304 was applied inconsistently thus vitiating any predictability territorialistic rules provided. Chapter 15 begins with the instruction to U.S. bankruptcy judges that cooperation and coordination are the rule and not the exception and then provides a structure within which judges can operate. Multinational concerns and their creditors can now predict the actions of a U.S. bankruptcy court and plan accordingly. This universalist mandate is tempered by sections 1506, 1515, 1516, and others whereby U.S. bankruptcy judges still retain a wide amount of control over the administration of domestic assets and creditors'

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<sup>279</sup> See 11 U.S.C.A. § 1522(b) (2005).

<sup>280</sup> See 11 U.S.C.A. § 1525 (2005).

<sup>281</sup> 11 U.S.C.A. § 1528 (2005).

<sup>282</sup> See *id.*

<sup>283</sup> See 11 U.S.C.A. § 1529(1) (2005).

<sup>284</sup> See 11 U.S.C.A. § 1529(2) (2005) (A court can also order dismissal or suspension of proceedings after recognition of a foreign proceeding if the purposes of chapter 15 "would best be served by such dismissal or suspension.") 11 U.S.C.A. § 305(a) (as amended), 11 U.S.C.A. § 1529(4) (2005).

rights. It is, in fact, these territorialistic provisions that will enable domestic judges to feel comfortable cooperating and coordinating with foreign proceedings. It is also these territorialistic provisions that will encourage domestic creditors to invest in foreign concerns and foreign creditors to invest in U.S. concerns.

#### VIII. INTERNATIONAL VENUE SHOPPING

A significant problem of insolvencies of international entities is the opportunity to venue shop with its attendant potential to create far more harms than domestic forum shopping. With multinational entities having a presence in a variety of domestic legal systems, many of which use a simple place of establishment (territorialist) standard, entities can choose which domestic law they would like to have applied to all or part of an insolvency process. While this choice allows companies to maximize benefits they receive from bankruptcy proceedings, such an unfettered system may be of significant detriment to domestic creditors, and it allows multinational entities with economic characteristics similar to domestic entities to receive vastly different treatment. Furthermore, it contributes to a “race to the bottom” wherein a multinational entity can file bankruptcy in a country where it has few creditors.<sup>285</sup> Here again, an international insolvency regime with elements of both territorialism and universalism provides an imperfect, but most effective, solution to issues created by the differences of domestic laws.

Under a territorialist system, whereby jurisdiction is determined by corporate residence only, forum shopping is easy because an entity can forum shop simply by moving assets of a single company to another forum. Other domestic laws may limit such actions, but these domestic laws are of no comfort to the secured domestic creditor who now finds his security interest in a foreign country that lacks the domestic legal machinery sufficient to afford him any significant relief. In a pure universalist system, on the other hand, the elimination of a local court’s discretion to deny the enforcement of a foreign bankruptcy order provides a similar incentive to forum shop among those courts that are most favorable to the debtor’s interests.<sup>286</sup> An unregulated universalism has led to courts’ deciding to keep cases that should be sent to the courts of another country.<sup>287</sup>

Modified universalism partially solves this problem by creating a hybrid set of rules designed to balance certainty of application with legal expectations of cooperation. The Model Law looks at the debtor’s COMI, but it presumes that a multinational concern’s COMI is its place of registration. Professor LoPucki claims that these standards are highly subjective.<sup>288</sup> While the application of each of these concepts depends on the facts of each particular case, both case law and commentaries have developed a host of guides for their application. European

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<sup>285</sup> See Rasmussen, *A New Approach*, *supra* note 31, at 4–5, (explaining that contractualist theorists believe that allowing multinationals to choose their place of bankruptcy is the most preferable option).

<sup>286</sup> See LoPucki, *Global and Out of Control*, *supra* note 42, at 209–10.

<sup>287</sup> *Id.* at 223–24.

<sup>288</sup> See LoPucki, *Universalism Unravels*, *supra* note 94, at 153–54.



countries have used the standard in their tax systems for years, and European courts are well versed in the analysis even in the context of bankruptcy.<sup>289</sup>

### IX. ADDRESSING THE DEFECTS OF THE MODEL LAW

Despite its incorporation of the advantages of both territorialism and universalism, the modified universalism of the Model Law has some serious procedural deficiencies with major substantive effects. Critics and supporters alike have noted two areas of weakness in the Model Law that require correction: the separation of the decision to open an insolvency case from the determination of when an insolvency case is the main case, and the problem of corporate groups.

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

The conflict of the individual decision to open a bankruptcy case and the decision to recognize a foreign bankruptcy proceeding as a main proceeding only arises in a universalist system, where these decisions usually are made on the same day.<sup>290</sup> Under a territorialist regime a foreign case has no status or recognition, and problems of international coordination are left to treaties and private initiative to solve.<sup>291</sup>

As was seen in the *Eurofood* case, the decision whether a case is a main case is too important an issue in a transnational insolvency case to decide at the outset before all of the parties in interest have been provided notice and given an opportunity to be heard.<sup>292</sup> The recognition of a main case is essentially a choice of forum and a determination of the law that will govern the rights and obligations of parties in the case.

The Model Law fails to provide a procedure to assure notice to the interested parties and an opportunity to be heard before the decision on this issue is made. The Model Law focuses on the recognition of foreign cases and the treatment of domestic cases thereafter in the recognizing state. However, the Model Law also does not provide a procedure for recognizing a foreign case as a main case; nor does it provide a procedure for determining whether a domestic case is a main case.<sup>293</sup> Judge Bufford recommends that UNCITRAL propose procedures that Model-Law countries could adopt to assure that a decision recognizing a foreign case as a main case, or determining that a domestic case is a main case, is made only after the due process rights of the parties in interest have been respected.<sup>294</sup> A UNCITRAL-guided

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<sup>289</sup> See, e.g., *Eurofood*, 2006 E.C.R. I-3813 (holding also that the evidence presented did not overcome the presumption in the EU Regulation that the debtor's COMI is its place of registration).

<sup>290</sup> See Bufford, *Global Venue Controls*, *supra* note 11, at 132.

<sup>291</sup> See LoPucki, *Global and Out of Control*, *supra* note 42, at 225–26 (arguing that in a territorial system countries would find it in their common interests to enter into treaties requiring the return of assets fleeing imminent bankruptcy cases).

<sup>292</sup> See Lucio Ghia, *The Italian Legislation Provided for the Parmalat Case Under a Critic's Point of View*, available at [http://www.iiiglobal.org/component/option,com\\_jdownloads/Itemid,646/%20task,viewcategory/catid,184/](http://www.iiiglobal.org/component/option,com_jdownloads/Itemid,646/%20task,viewcategory/catid,184/) (last visited Oct. 21, 2008) (arguing that Parmalat creditors were deprived of their rights in the statute enacted in response to the Parmalat insolvency).

<sup>293</sup> See Berends, *supra* note 27, at 352.

<sup>294</sup> See Bufford, *Global Venue Controls*, *supra* note 11, at 133.

resolution will maintain the domestic court's decision-making primacy; however, procedural rules crafted for the Model Law will provide that the international framework has a base expectation of due process and fairness.

### *B. Corporate Groups*

Modified universalist regimes such as the Model Law and the EU Regulation currently require the treatment of each legal entity separately for the purpose of determining the location of its COMI, which in turn determines the proper location of its main insolvency case. Such a structure, while having the territorialist advantages of predictability, creates vast economic inefficiencies when multiple courts administer what are essentially multiple main cases. A legal framework that allows for the reorganization or liquidation of an entire economic unit will be more efficient than one that deals with its corporate parts separately.

Virtually all multinational corporate empires are corporate groups, not single corporations, and indeed there are often hundreds of legally separate entities.<sup>295</sup> Such corporate arrangements run the gamut from independent subsidiaries to branch operations.<sup>296</sup> In order to balance the competing demands of domestic courts and an international legal system, the most efficient approach seems to be to administer economically integrated group members in the home country of the integrated group, and to administer economically independent group members separately in their own home countries.<sup>297</sup>

Given the fact that most multinational corporate entities contain multiple groups of companies, it is surprising that the Model Law and EU Regulation have not provided for insolvency proceedings that address the corporate group as a whole. The assumptions of each are that the court will evaluate each legal entity based on its COMI to determine the proper venue and that that COMI should correspond with where each entity "conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties."<sup>298</sup> The main factors one is supposed to look at in determining the COMI of a multinational concern are transparency and objective ascertainability.<sup>299</sup> Thus, those who deal with a debtor are assumed to found their expectations on the reasonable conclusions to be drawn from systematic conduct and arrangements, and it ought not to be possible for the debtor to gain advantages, at creditor's expense, by using evasive or confusing techniques to hide the true location from which interests are systematically administered.<sup>300</sup> The default COMI is decidedly territorialist: the place of incorporation is the individual company's presumed COMI.<sup>301</sup>

However, this approach does not address all issues because "a corporate group that is an integrated economic unit can only be reorganized or liquidated efficiently

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<sup>295</sup> See LoPucki, *Global and Out of Control*, *supra* note 42, at 221.

<sup>296</sup> *Id.*

<sup>297</sup> See *id.* at 222–23 (LoPucki has developed the term "economically integrated.").

<sup>298</sup> Virgos & Schmit, *supra* note 128, at 51.

<sup>299</sup> See *Id.*

<sup>300</sup> *Id.* at 70–75.

<sup>301</sup> *Id.*

if it is done collectively for the entire group.”<sup>302</sup> Here is one area where the territorialist-based systems need to cede some ground to a more universalist approach. “The universalist solution is to modify the COMI definition to provide that the corporate group venue decision be based on the collective COMI of all of the legal entities that operate together as an integrated economic unit.”<sup>303</sup> Thus, the critical question under a universalist approach would be the degree of economic integration of an economic group: where there is economic integration, the COMI of the corporate group will displace the COMIs of individual entities, but where there is no economic integration the court will decide the COMI of each individual economic unit.<sup>304</sup> This approach places a higher burden on creditors and judges, but the end result of a more economically efficient insolvency proceeding justifies the burden. Creditors will be forced to make a reasonable inquiry into current, functional realities of the debtor’s corporate administration. Judges will need specialized training in corporate and financial structures. However, the time and administration costs to judges and creditors will be far outweighed by the efficiencies created by a single bankruptcy structure. Furthermore, domestic business will gain because foreign participants in economic activities within a given member state will be subject to equal rules and conditions.<sup>305</sup>

Unquestionably, it is much harder to manipulate the COMI of a corporate group than it is to manipulate the COMI of a particular corporation.<sup>306</sup> Any attempt at manipulation involving assets diversion or the use of affiliates to manipulate the group’s financial resources can be ameliorated through a pooling mechanism, especially if remote affiliates are included.<sup>307</sup>

The determination of a COMI for a group of multinational entities will require a more sophisticated judiciary and a more complex economic analysis. However, bankruptcy courts are used to such challenges, and a legislature that requires such determinations in the interest of greater economic efficiency should be willing to provide the resources that judges need to acquire such sophistication. Here, as elsewhere in the consideration of a better multinational insolvency regime, short-term administrative costs are outweighed by long-term gains to the international economic system as a whole.

### C. Residency Rule

The problem of international venue-shopping still exists under the Model Law and chapter 15. A multinational enterprise’s COMI is presumed to be its place of

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<sup>302</sup> See Bufford, *Global Venue Controls*, *supra* note 11, at 136.

<sup>303</sup> *Id.*

<sup>304</sup> *Id.* at 136–37.

<sup>305</sup> See Virgos & Schmit, *supra* note 128, at 44; see also PRESIDENT’S ADVISORY PANEL ON FEDERAL TAX REFORM, FINAL REPORT 104 (2005), available at <http://www.taxreformpanel.gov/final-report/> (last visited Oct. 12, 2008) (using the same fairness argument to advocate for a territorial-based tax system using COMI to determine U.S. tax jurisdiction).

<sup>306</sup> See Guzman, *Defense of Universalism*, *supra* note 17, at 2214.

<sup>307</sup> See Irit Ronan-Mevorach, *The Road to a Suitable and Comprehensive Approach to Insolvencies within Multinational Corporate Groups*, Int’l Insolvency Inst. 90 (2005), available at [http://www.iiiglobal.org/component/option,com\\_jdownloads/Itemid,99999999/task,viewcategory/catid,56/5/](http://www.iiiglobal.org/component/option,com_jdownloads/Itemid,99999999/task,viewcategory/catid,56/5/) (follow “2005 Gold Medal” hyperlink) (last visited Oct. 31, 2008).

registration or incorporation, and thus suffers from the same territorialist defects, i.e., the ease with which an enterprise can change its official residency for purposes of filing bankruptcy in a more favorable venue. A partial solution to the problem would be to require a “residency rule” like that required in countries seeking to mollify the effects of their territorialist systems, which would require that an international business enterprise have its COMI in a country for a minimum period of time before qualifying to file a domestic enterprise-wide bankruptcy case.<sup>308</sup> While this rule change would not prohibit venue shopping, it would make such shopping more difficult.

Under the current version of the Model Law, a court recognizing a foreign proceeding decides whether the foreign proceeding is a main proceeding.<sup>309</sup> For the recognition of a foreign main proceeding, the Model Law requires that the foreign proceeding be held where the debtor “has the centre of its main interests” and implicitly gives courts flexibility as to when they make this determination.<sup>310</sup> A residency rule requiring a specified minimum amount of time for corporate residency before the filing of bankruptcy in the jurisdiction would give judges the power to look beyond COMI when the debtor has not met the minimum threshold.

Such a residency rule is similar to the approach that the United States takes today. Proper venue for a case in the United States is the district where venue was proper for the 180 days immediately preceding the filing of the case.<sup>311</sup> If the district where venue would be proper has changed during the 180-day period, the proper venue is the district that has qualified as the proper venue for a longer period of time during the 180-day window than any other.<sup>312</sup> Under a similar rule, a debtor would typically qualify for opening a main case only in a country where its COMI has been located for more than six months before its filing.<sup>313</sup>

## X. CONCLUSION

Remedying the problems in international bankruptcy is no easy task. The analytical framework for evaluating transnational insolvency is described by territorialism and universalism. Territorialism allows the bankruptcy court of a particular jurisdiction to apply its laws to the benefit of its jurisdictional creditors and gives a great deal of certainty, not only to creditors but also to corporate groups that rely on these laws.<sup>314</sup> This has the potential to be unfair to a number of parties in

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<sup>308</sup> See Bufford, *Global Venue Controls*, *supra* note 11, at 139.

<sup>309</sup> See *Model Law*, *supra* note 11, art. 17.

<sup>310</sup> See *id.*

<sup>311</sup> See 28 U.S.C. §1408 (2000).

<sup>312</sup> *Id.*

<sup>313</sup> See Wessels, *supra* note 120, at 12–13. Other authors have recommended that judges simply ignore any steps that have been taken to avoid the appropriate jurisdiction. Gabriel Moss recommends a different approach to this problem under the EU Regulation; in the case of undesirable forum shopping, he recommends that a court ignore steps taken purely to avoid the appropriate jurisdiction. See, e.g., Gabriel Moss, *Group Insolvency—Choice of Forum and Law: The European Experience Under the Influence of English Pragmatism*, 32 BROOK. J. INT’L L. 1005 (2007).

<sup>314</sup> See Hugh J. Ault, *International Taxation*, in COMPARATIVE INCOME TAXATION 349 (2004); see also PRESIDENT’S ADVISORY PANEL ON FEDERAL TAX REFORM, *supra* note 305 (discussing the residence issue of corporations as regards international taxation).

any international proceeding. Universalism, on the other hand, requires all involved jurisdictions to relinquish their sovereignty and apply the law of a foreign jurisdiction. This has many associated efficiencies; however, many courts are reluctant to do this, especially because bankruptcy law overrides almost all other forms of law. However, without universalism, creditors have distorted incentives when choosing between reorganization and liquidation because their decisions are made not based on economic principles but based on arbitrage inherent in a world of multiple legal systems.

The complex task of an insolvency grows even more complicated with the presence of international actors. Domestic judges often do not have the legal skills or the legal framework with which to approach a multinational bankruptcy. Chapter 15 gives U.S. bankruptcy judges a comprehensive legal framework with which to approach a bankruptcy process subject to multiple legal jurisdictions. The Code provides clear instructions on the circumstances in which a foreign bankruptcy proceeding should be recognized and clear expectations and guidelines regarding cooperation. In other words, where, by law or public policy, U.S. bankruptcy courts need to administer all or parts of an insolvency case, their judges can retain comfort in the familiarity of U.S. law, while at the same time receiving instruction on the coordination with foreign bankruptcy proceedings. While U.S. bankruptcy judges still need training in international aspects of bankruptcy, they at least have a foundation on which to base decisions.

Chapter 15 and the Model Law are not perfect, however. The most pressing unresolved question is the bankruptcy proceedings of the multiple entities of a multinational concern. While domestically the U.S. has much experience in consolidation of bankruptcy proceedings,<sup>315</sup> consolidation on an international scale has been of limited applicability.<sup>316</sup> In the past, successful consolidations of multinational concerns were conducted without the need to centralize the process to a single place by relying mainly on cooperation.<sup>317</sup> Yet these occasions were most notably a matter of parties' good will and courts' cooperation. Moreover, it may be difficult to achieve such cooperation when numerous parties are involved.<sup>318</sup> Given the initial complexity of an international bankruptcy proceeding and the added variables of the application of the laws of numerous countries, the ad hoc or bilateral treaty approach of cooperative territorialists is insufficient to address the interests of a multitude of actors whose interests in the bankruptcy proceeding may not be apparent at the initial stages when the ad hoc approach is cemented or addressed by a bilateral treaty.<sup>319</sup> In furtherance of modified universalist principles, an overall

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<sup>315</sup> See PHILIP J. BLUMBERG, PROBLEMS IN THE BANKRUPTCY OR REORGANIZATION OF PARENT AND SUBSIDIARY CORPORATIONS, INCLUDING THE LAW OF CORPORATE GUARANTIES 402–405 (1985).

<sup>316</sup> Jacob S. Ziegel, *Corporate Groups and Cross-border Insolvencies: A Canada-United States Perspective*, 7 FORDHAM J. CORP. & FIN. L. 367, 376 (2002) (explaining that procedural consolidation “is almost *de rigueur*” in Canada and U.S. corporate groups’ reorganizations).

<sup>317</sup> See, e.g., *In re Maxwell Comm’ns Corp.*, 170 B.R. at 800 (in which proceedings took place both in the United Kingdom and in the United States. The courts agreed on a joint administration of the estate facilitating a worldwide coordinated and harmonized solution.).

<sup>318</sup> See Ronan-Mevorach, *supra* note 307, at 3–10.

<sup>319</sup> See Westbrook, *Global Solution*, *supra* note 26, at 2314–15 (stating that territorialism is less able to cope with the problems of international business because of its dependence on a model that is uncooperative and outdated).

multinational procedural approach provides the flexibility needed when faced with the potential for numerous international actors and also allows for the administration of bankruptcy assets according to a territorialist system. Such an approach can further contribute to effective enterprise recovery if it will enforce rules of international jurisdiction and applicable law, thus enabling a unitary process with universal effects for the multinational concern with a single court that leads the entire process.<sup>320</sup> While chapter 15 is a huge step for the United States into international cooperation, current trends indicate that its main trading partners are adopting similar modified universalist provisions in their bankruptcy codes and that its domestic businesses and creditors will only be advantaged by the new approach.

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<sup>320</sup> See Ronan-Mevorach, *supra* note 307, at 24.

