

AN OVERVIEW, SURVEY, AND CRITIQUE OF ADMINISTRATING CROSS-BORDER INSOLVENCIES

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I. INTRODUCTION

Globalization is ever increasing in our society and based upon the economic success of the United States in the twentieth century, capitalism is a driving force behind globalization.¹ The size and scope of the world market, along with the power of capitalism, are evidenced by recent international trade statistics.² In September of 2003, the United States exported \$82.3 billion in goods and services.³ Imports were even greater at \$118.9 billion.⁴ Additional evidence of the pervasive power of globalization and the world market is demonstrated by the interdependency of multinational corporations and foreign markets.⁵

Cross-border commerce represents significant revenue and

¹ See Larry J. Obhof, *Why Globalization? A Look at Global Capitalism & Its Effects*, 15 U. FLA. J.L. & PUB. POL'Y 91, 93 (2003) (arguing the benefits of global capitalism).

² Press Release, U.S. Census Bureau, FT-900: U.S. International Trade in Goods and Services 4 (July 13, 2004), available at <http://www.census.gov/foreign-trade/Press-Release/2003pr/09/exh1.pdf>.

³ *Id.*

⁴ *Id.* To put these numbers in perspective, the total gross domestic product of the United States is approximately \$9.2 trillion. See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES, THE NATIONAL DATA BOOK 451 (120th ed. 2000), available at <http://www.census.gov/prod/2001pubs/statab/sec14.pdf>.

⁵ See Obhof, *supra* note 1, at 115 (arguing the "growing economic interdependence makes countries more subject to the moral imperatives of others").

profit to some stalwarts of the U.S. economy.⁶ The Coca-Cola Company, an icon of American culture and a member of the Dow Jones Industrial Index,⁷ reported in 2002 that 66.9% of its net operating revenue was generated outside of North America.⁸ A full 50.0% of Coke's capital expenditures occurred outside of North America in 2002,⁹ while nearly 86.0% of its operating income was generated from business segments in Africa, Europe, Eurasia, the Middle East, Latin America, and Asia in 2002.¹⁰ Arguably, this type of expansion raises the standard of living throughout the world by increasing economic growth for people at all income levels.¹¹ This increase in economic growth has diffused economic and political power resulting in greater international stability.¹²

Today's multinational conglomerates, however, face a world economy depressed by business cycles, political uncertainty, terrorism, and a post-investment "bubble."¹³ These factors can combine to make seemingly the most financially sound companies become unstable. In fact, thirteen of the largest corporate bankruptcies since 1980 were filed in this decade, including the three largest bankruptcies in history.¹⁴

6 See, e.g., THE COCA-COLA CO., 2002 ANNUAL REPORT 45 (2003) [hereinafter COKE ANNUAL REPORT], available at http://www2.coca-cola.com/investors/annualreport/2002/pdfs/ar02_download8.pdf.

7 The Dow Jones Industrial Average is a stock price average of thirty American companies. JEFFREY B. LITTLE & LUCIEN RHODES, UNDERSTANDING WALL STREET 56 (3d ed. 1991). An updated listing of the Dow Jones Industrial Average can be found on the world wide web. The Dow Jones Industrial Average, http://www.djindexes.com/downloads/selectionlists/DJDow510_Selection.xls (last modified Sept. 30, 2004).

8 COKE ANNUAL REPORT, *supra* note 6, at 60.

9 *Id.* at 66. Capital expenditures are asset purchases that are expected to benefit more than the current accounting year. CHARLES T. HORNGREN ET AL., INTRODUCTION TO FINANCIAL ACCOUNTING 286 (7th ed. 1999).

10 COKE ANNUAL REPORT, *supra* note 6, at 62.

11 Obhof, *supra* note 1, at 93 (arguing the benefits of global capitalism).

12 See *id.*

13 "Bubble" is a term used to describe stock market prices of the mid- to late-1990s. Victoria Thieberger, *Economy May Be Hooked On Low Interest Rates*, HOUS. CHRON., Feb. 19, 2004, at 1B.

14 *The Largest Bankruptcies 1980 - Present*, at http://www.bankruptcydata.com/Research/15_Largest.htm (last visited Oct. 17, 2004) [hereinafter *Largest Bankruptcies*]. The thirteen bankruptcies included: Worldcom, Inc.; Enron Corp.; Consec, Inc.; Global

As an example of how the mighty can fall quickly, now infamous, Enron Corporation (Enron) was named America's Most Innovative Company by *Fortune Magazine* for six consecutive years from 1996–2000.¹⁵ Enron also placed eighteenth on *Fortune's* list of Most Admired Companies for the year 2000.¹⁶ This information was touted in an Enron press release on February 6, 2001.¹⁷ Later that year on December 2, 2001, Enron petitioned for protection under Title 11 of the Bankruptcy Code.¹⁸

As the discussion above illustrates, international trade affects a multitude of businesses. But what happens to these multinational companies when they turn to the bankruptcy system for protection? What is the choice of law when companies have assets, creditors, vendors, customers, and stakeholders that span the globe? Surprisingly, there is not an all-encompassing international bankruptcy law.¹⁹ There are, however, a number of methods and proposals concerning how to most effectively administrate a bankruptcy proceeding.²⁰ This Comment will survey and critique the various approaches including: 1) the U.S. Bankruptcy Code § 304, 2) territorialism, 3) universalism, 4) contractualism, and 6) the UNCITRAL model. Throughout the discussion, this Comment will highlight the positive and negative aspects of the various approaches to

Crossing Ltd.; UAL Corp.; Adelphia Communications; Pacific Gas & Electric Co.; Mirant Corp.; Kmart Corp.; FINOVA Group, Inc.; NTL, Inc.; Reliance Group Holdings, Inc.; and Federal-Mogul Corp. *Id.* The three largest bankruptcies were filed by Worldcom, Inc. (pre-petition assets of \$103,914,000,000); Enron Corp. (pre-petition assets of \$63,392,000,000); and Consec, Inc. (pre-petition assets of \$61,392,000,000). *Id.*

15 Press Release, Enron Corporation, Enron Named Most Innovative For Sixth Year (Feb. 6, 2001), available at <http://www.enron.com/corp/pressroom/releases/2001/ene/docs/15-MostInnovative-02-06-01-LTR.pdf>.

16 *Id.*

17 *Id.*

18 *Largest Bankruptcies*, *supra* note 14.

19 Robert K. Rasmussen, *Resolving Transnational Insolvencies Through Private Ordering*, 98 MICH. L. REV. 2252, 2252 (2000) [hereinafter Rasmussen, *Private Ordering*].

20 See Roland Lechner, Note, *Waking From the Jurisdictional Nightmare of Multinational Default: The European Council Regulation on Insolvency Proceedings*, 19 ARIZ. J. INT'L & COMP. L. 975, 979–80 (2002).

administering cross-border insolvencies and use recent case law to demonstrate the complexity and difficulty of developing a coherent system for transnational bankruptcy. Ultimately, however, this Comment concludes that none of the proposed theories or solutions provide a sufficient resolution to the transnational bankruptcy problem. Therefore, the current state of international bankruptcy law will continue indefinitely.

II. INTERNATIONAL PROVISION WITHIN THE U.S. BANKRUPTCY CODE: SECTION 304

A. *Limited Jurisdiction of a Bankruptcy Court*

Before delving into the international provision contained in the United States Bankruptcy Code (the Code), one should have a general understanding of the context in which a bankruptcy court sits. Bankruptcy courts, in general, are courts of equity because “they characteristically proceed in summary fashion to deal with the assets of the bankrupt they are administering.”²¹ In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, the U.S. Supreme Court held that congressional delegation of sweeping jurisdiction to the bankruptcy courts was unconstitutional.²²

Faced with the possibility that all matters previously delegated to bankruptcy courts would again be borne by the . . . overburdened Article III courts, Congress enacted [the Bankruptcy Amendments of 1984] “to conform the bankruptcy statute to the dictates of *Marathon*” by excluding from bankruptcy court jurisdiction subject matter that is not specifically derived from the bankruptcy laws.²³

Title 28 of the U.S. Code § 1334 is the source of subject matter jurisdiction in bankruptcy matters.²⁴ This section gives bankruptcy courts jurisdiction of civil proceedings “arising

21 *Grandfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 57 (1989) (quoting *Katchen v. Landry*, 382 U.S. 323 (1966)).

22 458 U.S. 50, 87 (1982).

23 *Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d 824, 831 (5th Cir. 1993) (quoting *In re Wood*, 825 F.2d 90, 95 (5th Cir. 1987)).

24 NORTON BANKRUPTCY LAW AND PRACTICE 2D., § 4:27 (1997).

under,” “arising in,” or “related to” cases under title 11.²⁵

For the purpose of determining whether a particular matter falls within bankruptcy jurisdiction, it is not necessary to distinguish between proceedings “arising under,” “arising in a case under,” or “related to a case under,” title 11. These references operate conjunctively to define the scope of jurisdiction. Therefore, it is necessary only to determine whether a matter is at least “related to” the bankruptcy.²⁶

“Related to” proceedings are those whose outcome could conceivably have an effect on the bankruptcy estate and that involve either causes of action owned by the debtor that became property of a title 11 estate, or suits between third parties that, in the absence of bankruptcy, could have been brought in a district court or a state court.²⁷

In an international proceeding, a bankruptcy court’s subject matter jurisdiction is less clear; but, a bankruptcy court has the power to:

(1) enter a nationwide injunction for purposes of gathering information and protecting the foreign estate’s property, (2) preside over a turnover action based on foreign law and (3) order discovery on behalf of a foreign debtor that has no assets in the United States so long as the nexus created by the debtor’s business in the United States is not frivolous.²⁸

Note that in the case of an international debtor, the bankruptcy court’s jurisdiction is not limited to situations in which there is debtor-owned property in the United States.²⁹

B. The International Provision in the Code: Scope and Purpose

²⁵ 28 U.S.C. § 1334(b) (2000).

²⁶ *Id.*

²⁷ See 1 COLLIER ON BANKRUPTCY ¶ 3.01[4][c], at 3-24 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2004) [hereinafter COLLIER]; see also *Pacor, Inc. v. Higgins*, 743 F.2d 984, 988 & n.6, 994 (3d Cir. 1984) (discussing the threshold determination for bankruptcy jurisdiction is whether the action “could have a tangible effect” on a bankruptcy estate); *In re Wood*, 825 F.2d at 93 (determining scope of bankruptcy jurisdiction).

²⁸ 2 COLLIER, *supra* note 27, ¶ 304.02[5].

²⁹ *Id.*

of Section 304.

Under title 11 of the U.S. Code § 304, a foreign representative involved in a foreign bankruptcy case may file an ancillary proceeding in a U.S. bankruptcy court as opposed to initiating a full bankruptcy case against a debtor.³⁰ Under § 304, the qualifications of a foreign representative are broadly construed.³¹ “The purpose of [an ancillary] case is to assist a foreign court in its administration of a foreign proceeding of liquidation or reorganization.”³² A case ancillary to a foreign proceeding “serves as a jurisdictional aid for a foreign representative to facilitate the administration of a bankruptcy or similar proceeding pending abroad. It allows 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.”³³ As mentioned earlier, however, § 304 is not limited only to foreign proceedings that concern assets within the United States.³⁴ In *Haarhuis v. Kunnan Enterprises, Ltd.*, the court utilized the broad scope of § 304 to obtain jurisdiction over an ancillary proceeding where a Taiwanese debtor did not have assets within the United States.³⁵

C. Why Section 304 Works: Positive Aspects of Section 304

Now that § 304 is defined, one question is, does it work? The answer to that question lies in the functionality and application of § 304.

Section 304 is “designed to give the [bankruptcy] court the maximum flexibility in handling ancillary cases,’ and in applying its provisions, courts should ‘be guided by what will best assure an economical and expeditious administration of the estate.’”³⁶ Bankruptcy judges, therefore, presiding over courts of

30 ALAN N. RESNICK, BANKRUPTCY LAW MANUAL, § 3:18 (5th ed. 2003).

31 *In re Artimm*, S.r.l., 278 B.R. 832, 839 (Bankr. C.D. Cal. 2002) (finding that a trustee involved in an Italian bankruptcy proceeding qualified as foreign representative).

32 *Id.* at 836.

33 2 COLLIER, *supra* note 27, ¶ 304.03[1].

34 *Id.* ¶ 304.02[5]

35 177 F.3d 1007, 1012 (D.C. Cir. 1999).

36 *Evans v. Hancock (In re Evans)*, 177 B.R. 193, 197 (Bankr. S.D.N.Y. 1995)

equity, have tremendous power and authority to do justice under § 304.³⁷ Section 304(b)(3) allows a bankruptcy court to “order other appropriate relief.”³⁸ In determining whether to grant such relief, the court must consider six factors.³⁹ These factors include:

- 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.⁴⁰

The fair and equitable “treatment of all creditors . . . is considered important for the development of international commerce and cooperation among nations. This goal is [achieved] in Section 304(c)(1), which plainly seeks to insure the fair distribution of assets among all creditors of a debtor.”⁴¹ In the context of whether a domestic creditor is being treated fairly in a foreign jurisdiction, the § 304(c)(1) requirement is met when the applicable provisions of foreign law provide “a

(quoting S. REP. NO. 95-989, at 35 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5821 and H. REP. NO. 95-595, at 324–25 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6281).

37 See 11 U.S.C. §§ 304(b)(3), 304(c)(1)–(6) (2000).

38 *Id.* § 304(b)(3) (2000).

39 *Id.* § 304(c)(1)–(6) (2000).

40 *Id.*; Comity refers to “a rule of courtesy by which one court defers to the concomitant jurisdiction of another.” BARRON’S LAW DICTIONARY 79 (1984). “The doctrine of comity, rather than full faith and credit, is applicable when a state is asked to honor a judgment . . . of a foreign country.” *Id.*

41 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).

comprehensive procedure for the orderly and equitable distribution of assets among all its creditors.”⁴² Similarly, when applying the criteria of § 304(c)(2), courts have examined: “[1] whether 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.”⁴³

Section 304(c)(3) is satisfied when the law of a foreign jurisdiction voids fraudulent transfers.⁴⁴ The requirements of “section 304(c)(4), which direct[] th[e] court to consider whether the distribution of proceeds of the estate will be substantially in accordance with that of the [U.S.] Bankruptcy Code,” are met when the law of a foreign jurisdiction “is generally in harmony with the Code.”⁴⁵ To be in harmony, the law of the foreign jurisdiction “need not be a carbon copy of the Code[,] ‘rather it must be of a nature that is not repugnant to the American laws and policies.’”⁴⁶ The last factor in Section 304(c) that courts must consider is the doctrine of comity.⁴⁷

Comity has been considered the most important of the six factors listed in § 304(c).⁴⁸ Recognizing this importance, many courts have emphasized “deference to foreign insolvency proceedings [to] facilitate ‘equitable, orderly, and systematic’

42 *In re Culmer*, 25 B.R. 621, 629 (Bankr. S.D.N.Y. 1982).

43 *Id.*

44 *In re Blackwell*, 270 B.R. 814, 829 (W.D. Tex. 2001).

45 *Id.*

46 *Id.* (quoting *Universal Cas. & Sur. Co. v. Gee (In re Gee)*, 53 B.R. 891, 904 (Bankr. S.D.N.Y. 1985)). The Court commented that this element should not be read too strictly. *See id.* 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. *See id.*

47 11 U.S.C. § 304(c)(5) (2000). Section 304(c)(6) is not considered here as it is generally not relevant in corporate bankruptcy cases. *See Haarhuis v. Kunnan Enters., Ltd.*, 177 F.3d 1007, 1013 (D.C. Cir. 1999) (defining comity as a doctrine that encourages deference to foreign laws if certain factors in bankruptcy are present).

48 *In re Blackwell*, 270 B.R. at 828; *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.”).

distribution of a debtor's assets."⁴⁹ As the court stated in *Maxwell Communication Corp. v. Societe Generale*, where a U.S. Bankruptcy Court deferred to an insolvency proceeding commenced in England,

bankruptcy courts may best be able to effectuate the purposes of the bankruptcy law by cooperating with foreign courts on a case-by-case basis. Congress contemplated this approach when it provided for "ancillary" proceedings under 11 U.S.C. § 304. Although comity analysis admittedly does not yield the commercial predictability that might eventually be achieved through uniform rules, it permits the courts to reach workable solutions and to overcome some of the problems of a disordered international system.⁵⁰

As the foregoing discussion illustrates, courts have been able to use § 304 to accomplish "economical and expeditious administration" of bankruptcy proceedings.⁵¹ Although, as discussed below, some commentators have noted the inadequacies of § 304,⁵² in a number of cases the courts have used the provisions of § 304 to form a unitary administration in a foreign proceeding.⁵³ When considered together, "the cases [decided] under section 304 and related provisions continue the practice of courts in the United States of deferring, on grounds of international comity, to foreign bankruptcy proceedings unless particular circumstances suggest that deference would be inappropriate."⁵⁴ "Courts have granted comity and section 304 relief to foreign representatives [of] the following countries,

49 *Maxwell Communication Corp. v. Societe Generale*, 93 F.3d 1036, 1048 (2d Cir. 1996) (quoting *Cunard S.S. Co. v. Salen Reefer Servs. AB*, 773 F.2d 452, 458 (2d Cir. 1985)).

50 *Id.* at 1053.

51 11 U.S.C. § 304(c) (2000).

52 See Todd Kraft & Allison Aranson, *Transnational Bankruptcies: Section 304 and Beyond*, 1993 COLUM. BUS. L. REV. 329, 340 (1993); see also Peter J. Murphy, Article, *Why Won't the Leaders Lead? The Need For National Governments to Replace Academics and Practitioners in the Effort to Reform the Muddled World of International Insolvency*, 34 U. MIAMI INTER-AM. L. REV. 121, 128-29 (2002) ("It remains unclear as to whether the adoption of the Model Law by these countries will provide an impetus to other countries who are currently studying its adoption.").

53 2 COLLIER, *supra* note 27, ¶ 304.08.

54 *Id.*

among others: Australia; The Bahamas; Bermuda; Canada; Cayman Islands; Ecuador; Finland; Germany; Great Britain; Hong Kong; Israel; Japan; Taiwan; Sweden; and Russia.”⁵⁵ Clearly, bankruptcy courts and judges have been able to utilize § 304 to achieve foreign legal harmony to a significant extent in cross-border insolvency cases.

D. Why Does the U.S. Bankruptcy Code Need Anything More Than Section 304?: The Negative Aspects of Section 304

Many critics of § 304 claim that § 304(c) is rife with internal inconsistencies that undermine § 304’s noble purpose, “which is to foster cooperation among countries by encouraging a U.S. court to forbear its jurisdiction over the property [of a bankrupt estate] in favor of allowing one foreign nation to administer the bankruptcy proceeding.”⁵⁶ These critics primarily point to two provisions, § 304(c)(2) and § 304(c)(4), as favoring the interests of American creditors over those interests of foreign creditors and a foreign bankrupt.⁵⁷ “Not surprisingly, [those critics argue,] U.S. courts have acted inconsistently in their decisions of whether to grant relief . . . to foreign representatives and what type of relief to grant.”⁵⁸

Certainly, there have been cases in which courts have made the determination not to grant the relief requested by a foreign representative.⁵⁹ In particular circumstances, to grant such relief would result in unfair treatment to U.S. creditors in a foreign proceeding.⁶⁰ Also, granting such relief may be contrary to a strong national policy that required certain claims to be adjudicated in a U.S. court.⁶¹ Some criticisms of § 304 have been

55 *Id.* ¶ 304.08[5][b].

56 Kraft & Aranson, *supra* note 52, at 340; Nielsen, *supra* note 41, at 554.

57 See Kraft & Aranson, *supra* note 52, at 341–43; Nielsen, *supra* note 41, at 554–56.

58 Liza Perkins, Note, *A Defense of Pure Universalism in Cross-Border Insolvencies*, 32 N.Y.U. J. INT’L L. & POL. 787, 796 (2000).

59 2 COLLIER, *supra* note 27, ¶ 304.08 (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)).

60 *Id.*

61 *Id.*

far too harsh.⁶² One commentary has argued that unfair treatment extends to inconvenient travel.⁶³ *In re Lineas Areas de Nicaragua, S.A.* is cited in support of this proposition.⁶⁴ In *Lineas Areas de Nicaragua*, the debtor was a Nicaraguan airline, owned by the Nicaraguan government, that operated between Nicaragua and the United States.⁶⁵ A creditor in that case merely requested an independent trustee be appointed to administrate the case in conjunction with the foreign representative.⁶⁶

In considering this request, the bankruptcy judge commented, “[i]f [the U.S. creditor] has a valid claim and if no other asset of any substance can be located here, the U.S. creditors of the debtor may have to look to Nicaragua for payment, an alternative to be avoided if possible under § 304(c)(2).”⁶⁷ This comment is the only part of the two-page opinion that could be construed as “travel.”⁶⁸ In no way did the Court in this case comment on the inconvenience of travel as a reason for appointing an independent trustee.⁶⁹ Rather, the court concluded that an independent trustee was necessary to intervene on the debtor’s behalf to require the U.S. authority that granted the operating license to the Nicaraguan airline to renew that license, contingent upon satisfying the debtor’s obligation to the creditor.⁷⁰

This is not to say that courts have always been consistent in applying § 304. As noted above, U.S. courts have granted comity

62 *Cf.* Kraft & Aranson, *supra* note 52, at 341 (arguing strict reading of Section 304 would strip it of any meaning).

63 *See id.*

64 *Id.* (citing *Lineas Areas de Nicaragua*, 13 B.R. at 779).

65 *Lineas Areas de Nicaragua*, 13 B.R. at 779–80.

66 *Id.* at 780.

67 *Id.* Recall that in 1981 the U.S. government did not have a close relationship with the Nicaraguan government. *See* LAWRENCE E. WALSH, 1 FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN CONTRA MATTERS xiii (1993), available at <http://www.fas.org/irp/offdocs/walsh/>. Later this led to the Iran-Contra affair of the Reagan Administration. *Id.*

68 *See* Kraft & Aranson, *supra* note 52, at 341.

69 *See* *Lineas Areas de Nicaragua*, 13 B.R. at 780.

70 *Id.* at 780–81.

to a number of foreign courts in the bankruptcy setting.⁷¹ However, U.S. courts have not granted comity in a bankruptcy context to foreign courts from a number of countries, including: Dubai, Federation of St. Christopher and Nevis, Jordan, Luxembourg, and Spain.⁷² Somewhat confusingly, U.S. courts have failed to grant comity to a foreign proceeding conducted in the same countries in which the U.S. courts had granted comity in the past, including Canada and Australia.⁷³

In the Canadian case, an American company had successfully obtained a judgment against a Canadian company.⁷⁴ Later, the Canadian company was involuntarily forced into bankruptcy under Canadian law.⁷⁵ The trustee of the Canadian bankruptcy filed an ancillary case according to § 304 in an effort to obtain a stay against the American firm from proceeding in the U.S. court system.⁷⁶ The trustee also sought the funds from the judgment obtained by the American firm.⁷⁷ The U.S. judge then correctly determined that, under the U.S. Bankruptcy Code, the American firm held the position of a judgment creditor and was entitled to secured status under 11 U.S.C. § 506.⁷⁸ Therefore, the American company would be one of the first creditors to receive payment under the U.S. Bankruptcy Code.⁷⁹ Under the Canadian Code, however, the American firm would be considered a mere “ordinary creditor,” and would not be recognized as holding security for its claim.⁸⁰ This, the court held, would violate § 304(c)(4), because it is not “substantially in accordance with the order prescribed by this title.”⁸¹ The court, therefore, denied comity and denied the relief requested by the

71 2 COLLIER, *supra* note 27, ¶ 304.08[5][b].

72 *Id.* ¶ 304.08[5][b].

73 *See id.*

74 *In re Toga Mfg. Ltd.*, 28 B.R. 165, 165–66 (Bankr. E.D. Mich. 1983).

75 *Id.* at 166.

76 *Id.* at 167.

77 *Id.*

78 *Id.* at 168.

79 *Id.*

80 *Id.* at 168–69.

81 *Id.* at 169 (quoting 11 U.S.C. § 304(c)(4) (2000)).

Canadian trustee.⁸²

This lack of consistency allows bankruptcy courts to apply § 304 in a fashion that cuts both ways, giving bankruptcy courts broad discretion “to mold appropriate relief in near blank check fashion.”⁸³ Further, § 304 can be legitimately criticized as favoring the interests of American creditors over those interests of foreign creditors and foreign debtors.⁸⁴

E. Conclusion Regarding Section 304: It Works

The present trend, however, is to recognize international comity in foreign bankruptcy proceedings.⁸⁵ This trend seemingly would satisfy some of the critics of § 304 because the rights of both domestic and foreign parties are more likely to be given equal consideration. Moreover, bankruptcy proceedings involving foreign parties and foreign assets can be quite complex. The broad discretion § 304 grants to bankruptcy judges is consistent with the purpose of the bankruptcy system that is to “provide a system where judges with experience and expertise in bankruptcy matters can handle bankruptcy claims.”⁸⁶

III. TWO CONCEPTS AT ODDS: TERRITORIALISM AND UNIVERSALISM

Every well-developed legal system in the world employs a scheme dedicated to the resolution of bankruptcy or insolvency.⁸⁷

⁸² *Id.* at 170–71.

⁸³ *Haarhuis v. Kunnan Enters., Ltd.*, 177 F.3d, 1007, 1012 (D.C. Cir. 1999) (quoting 3 COLLIER BANKRUPTCY MANUAL ¶ 304.07 (1998)).

⁸⁴ See *Kraft & Aranson*, *supra* note 52, at 340; *Nielsen*, *supra* note 41, at 554.

⁸⁵ Felix D. Strebler, *The Enforcement of Foreign Judgments and Foreign Public Law*, 21 LOY. L.A. INT'L & COMP. L. REV. 55, 77 (1999); see also Stacy Allen Morales & Barbara Ann Deutchsh, *Bankruptcy Code Section 304 and U.S. Recognition of Foreign Bankruptcies: The Tyranny of Comity*, 39 Bus. Law. 1573, 1579 (1984) (“The new trend favors recognizing foreign proceedings and judgments in international insolvencies, as well as the rights of foreign debtors under U.S. law.”).

⁸⁶ *In re U.S. Airways Group, Inc.* 296 B.R. 673, 683 (E.D. Va. 2003) (quoting *In re Jaritz Indus., Ltd.*, 151 F.3d 93, 107 (3d Cir. 1998)).

⁸⁷ 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*

Each scheme is organized under or combines two theoretical positions—territorialism or universalism.⁸⁸ It may help the reader to think of territorialism and universalism as opposite ends of the same continuum.⁸⁹ Territorialism could be placed on the far right of the continuum representing complete sovereign power, where bankruptcy rules are made and enforced state-by-state, while universalism could be placed on the far left end of the continuum representing one, all-encompassing bankruptcy law for all jurisdictions.⁹⁰ As one moves along the continuum, the two theoretical positions begin to intersect and overlap in areas referred to as cooperative territorialism and modified universalism.⁹¹ These aspects are discussed below.

A. *Territorialism: Wherever an Asset May Be Is Where It Will Stay*

Territorialism, or the “grab rule,”⁹² has been cynically defined as each country taking possession of “local assets and apply[ing] them for the benefit of local creditors, with little or no regard for foreign proceedings.”⁹³ Territorialism, however, is the time honored “behavior of nations in exercising jurisdiction over assets and parties within their borders [T]erritoriality is and has always been the dominant practice” in international insolvency.⁹⁴ Furthermore, territorialism in international

Countries, 2003 AM. BANKR. INST., 5th Ann. N.Y. City Bankr. Conf., May 5, 2003, at 2003 WL 050503 ABI-CLE 11.

88 *Id.*

89 Lucian Arye Bebchuk & Andrew T. Guzman, *An Economic Analysis of Transnational Bankruptcies*, 42 J.L. & ECON. 775, 778 n.13 (1999).

90 *See id.* at 777–78.

91 *See* Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 CORNELL LAW REV. 696, 728, 742–43 (1999) [hereinafter LoPucki, *Post-Universalist Approach*].

92 Elizabeth J. Gerber, Note, *Not All Politics Is Local: The New Chapter 15 to Govern Cross-Border Insolvencies*, 71 FORDHAM L. REV. 2051, 2058 (2003).

93 Jay Lawrence Westbrook, *Multinational Enterprises in General Default: Chapter 15, the ALI Principles, and the EU Insolvency Regulation*, 76 AM. BANKR. L.J. 1, 5 (2002) [hereinafter Westbrook, *General Default*]. Professor Westbrook is a leading scholar on bankruptcy reform and the leading proponent of a universalist approach to international insolvency. *See* Frederick Tung, *Is International Bankruptcy Possible?*, 23 MICH. J. INT'L L. 31, 41 (2001) [hereinafter Tung, *Possible*].

94 Tung, *Possible*, *supra* note 93, at 39–40.

bankruptcy proceedings simply resembles the standard choice of law dilemma that faces courts in any jurisdiction.⁹⁵

Generally, under the federal choice of law rule “the court is required to evaluate all of the various contacts each jurisdiction has with the controversy in terms of their relative importance with respect to a particular issue and make a reasoned determination as to which jurisdiction’s laws and policies are implicated to the greatest extent.”⁹⁶ In other words, the court must “apply the law of the jurisdiction having the greatest interest in the controversy.”⁹⁷

1. *Criticisms of Territorialism: Why Not Act Selfishly?*

Despite remaining dominant in practice and seemingly consistent with other choice of law scenarios, territorialism receives a great deal of criticism.⁹⁸ Critics have articulated at least five disadvantages of territorialism.⁹⁹ First, critics suggest that financial reorganization is difficult or impossible under territorialism because each jurisdiction will attempt to maximize the return to its local creditors.¹⁰⁰ Second, critics argue that “[e]ven in liquidation, assets may be sold at higher prices if they can be packaged to maximize returns without regard to national boundaries.”¹⁰¹ Third, detractors of territorialism suggest it “may lead to inequitable returns to . . . creditors [because individual] countries have [conflicting] priority rules and, [individual countries have] control over different assets.”¹⁰² Fourth, critics imply that shrewd, swift-moving debtors are difficult to control under a territorial approach because “debtors

95 See *Barclays Bank v. Maxwell Communication Corp. (In re Maxwell Communication Corp.)*, 170 B.R. 800, 816 (Bankr. S.D.N.Y. 1994).

96 *Id.* (citing *In re Koreag, Controle et Revision S.A.*, 961 F.2d 341, 350 (2d Cir. 1992)).

97 *Id.* (citing *Koreag*, 961 F.2d at 350 n.10).

98 Robert K. Rasmussen, *A New Approach to Transnational Insolvencies*, 19 MICH. J. INT’L. L. 1, 2 (1997).

99 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, 825 (2003).

100 *Id.* at 825 n.193.

101 *Id.*

102 *Id.*

can move assets among countries in order to favor certain creditors.”¹⁰³ Fifth, critics point out that “[f]oreign creditors often lose against domestic interests. This is [caused] less [by] the demands of any system than it is [by the lack] of notice given internationally, and the difficulties in making one’s presence known to foreign courts.”¹⁰⁴

Based upon these shortcomings, “[t]he bankruptcy literature generally disparages territoriality.”¹⁰⁵ At least one scholar, however, has written contrary to the tide against territorialism.¹⁰⁶

2. *Cooperative Territoriality: An Area of Compromise*

Professor Lynn M. LoPucki of the UCLA Law School is one of the few voices speaking out in favor of some form of territorialism.¹⁰⁷ Professor LoPucki refers to cooperative territoriality.¹⁰⁸ Under his cooperative territoriality approach, “bankruptcy courts of a country will administer the assets of a multinational debtor within the borders of that country as a separate estate.”¹⁰⁹ He best illustrates this approach with an example—suppose “the United States is the home country of a debtor with worldwide operations.”¹¹⁰ In the event of bankruptcy, “[t]he debtor would file . . . in each of the countries in which it had operations.”¹¹¹ According to Professor LoPucki’s approach, “[e]ach of the filings would be of equal dignity”.¹¹² Then, 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

103 *Id.*

104 *Id.*

105 LoPucki, *Post-Universalist Approach*, *supra* note 91, at 701.

106 *See id.* at 702.

107 *See id.*

108 *Id.*

109 *Id.* at 742.

110 *Id.* at 743.

111 *Id.*

112 *Id.*

and shareholders under local law.”¹¹³

This example, however, does not seem markedly different from pure territorialism. Professor LoPucki admits that due to a lack of attention paid to territorialism in the international insolvency literature, unanswered questions remain concerning how territorialism would work.¹¹⁴ The key to Professor LoPucki’s approach, however, lies in the cooperative element.

Professor LoPucki suggests five areas of cooperation that would eliminate “the tension between countries by vesting each with bankruptcy power congruent with its sovereignty.”¹¹⁵ 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.¹¹⁶ 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.”¹¹⁷ 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.”¹¹⁸ Fourth, Professor LoPucki recommends “the voluntary investment by [parties] in one country[, to] the debtor’s reorganization effort in [other countries].”¹¹⁹ Lastly, he suggests various jurisdictions cooperate with respect to “the seizure and return of assets that have been the subject of avoidable transfers.”¹²⁰

Of course, these areas of cooperation would certainly facilitate the efficient disposition of a modern transnational bankruptcy. There is, however, no guarantee under the cooperative territoriality approach that numerous jurisdictions would cooperate.¹²¹ Moreover, in certain instances, one could

113 *Id.*

114 *Id.*

115 *Id.* at 750.

116 *Id.*

117 *Id.*

118 *Id.*

119 *Id.*

120 *Id.*

121 *Cf. Perkins, supra* note 58, at 823 (stating that cooperative territoriality would

argue that the U.S. Bankruptcy Code in its current form accomplishes much of what Professor LoPucki advocates.¹²²

Professor LoPucki's cooperative territoriality approach seems to side-step the glaring issue of cooperation by proposing that countries agree to cooperate through the adoption of a convention.¹²³ In large part, however, cooperative territoriality is pragmatic in realizing that an all-encompassing, global law of bankruptcy is impractical because the world is seemingly unwilling to adopt a global solution.¹²⁴ Professor LoPucki's assertion, then, seems to be caught in a dichotomy—the world is unwilling to agree on an international bankruptcy law; however, the world is ready to agree to apply various bankruptcy regimes to accomplish a unified goal.¹²⁵

Regardless of the criticisms of cooperative territoriality, Professor LoPucki's work is "full of ideas that are contrarian, surprising, interesting, and useful."¹²⁶ As one of the few voices advocating a non-universal approach, Professor LoPucki's ideas may be the most realistic alternative to international insolvency.¹²⁷

B. Universalism: The Holy Grail of International Insolvency

"Universalism [hypothesizes] that a single country's reorganization laws should govern the insolvency of a

encourage "mutually beneficial cooperation" among countries).

122 *Cf.* Barclays Bank v. Maxwell Communication Corp. (*In re* Maxwell Communication Corp.), 170 B.R. 800, 816–17 (Bankr. S.D.N.Y. 1994) (stressing the flexibility of the current American legal approach).

123 Jay Lawrence Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276, 2308 (2000) [hereinafter Westbrook, *A Global Solution*] ("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.").

124 Tung, *Possible*, *supra* note 93, at 37.

125 See Westbrook, *A Global Solution*, *supra* note 123, at 2307.

126 *Id.*

127 See LoPucki, *Post Universalist Approach*, *supra* note 91, at 701–02 (advocating a system of cooperative territoriality in which international cooperation in bankruptcy is grounded in territoriality); see also Lynn M. LoPucki, *The Case For Cooperative Territoriality in International Bankruptcy*, 98 MICH. L. REV. 2216 (2000) [hereinafter LoPucki, *Cooperative Territoriality*] (questioning whether an international convention could establish a traditionally universalist system of bankruptcy in a world in which the bankruptcy and priority laws of countries vary).

transnational firm.”¹²⁸ A single law, administered by a single court is the “holy grail” for those following this theory.¹²⁹ Under universalism, a primary bankruptcy proceeding is held in the “home country” or “center of gravity” of the debtor.¹³⁰ In turn, “all countries in which assets of the . . . debtor are located apply the substantive [bankruptcy scheme] of the [home] country” to facilitate a financial reorganization or liquidation.¹³¹ “The final adjudication [of the primary bankruptcy proceeding] is to be respected by all [other parties in all other jurisdictions].”¹³² What is it, then, that makes an all-encompassing law so desirable? For the proponents of universalism the answer lies in stability, predictability, and efficiency.¹³³

1. *The Virtues of Universalism*

The U.S. Supreme Court rejected the territorial approach to cross-border insolvency in 1883.¹³⁴ Even in the nineteenth century, courts and commentators recognized the value of

128 Rasmussen, *Private Ordering*, *supra* note 19, at 2254.

129 *Id.* at 2255.

130 Charles D. Booth, *Recognition of Foreign Bankruptcies: An Analysis and Critique of the Inconsistent Approaches of United States Courts*, 66 AM. BANKR. L.J. 135, 137–38 (1992); LoPucki, *Post-Universalist Approach*, *supra* note 91, at 704–05. These two articles combine to illustrate that a debtor’s home country is generally thought of as where the debtor is domiciled or where the debtor’s principal place of business is located. However, the concept of home country is difficult to define for a multinational corporation with assets potentially dispersed throughout the world. Booth, *supra* note 130, at 137–38; LoPucki, *Post-Universalist Approach*, *supra* note 91, at 704–05; *see also In re Aerovias Nacionales de Colombia S.A.*, 303 B.R. 1, 17–18 (Bankr. S.D.N.Y. 2003) (“[A]lthough courts will generally defer to the “center of gravity” of multiple proceedings if one can be ascertained, a court may also choose to proceed jointly with a foreign court or to “exercise its power to the full extent of its jurisdiction in an appropriate case.”).

131 Booth, *supra* note 130, at 137–38; *see also* Sara Isham, Note and Comment *UNCITRAL’S Model Law On Cross-Border Insolvency: A Workable Protection For Transnational Investment at Last*, 26 BROOK. J. INT’L L. 1177, 1186 (2001).

132 Booth, *supra* note 130, at 138. As discussed below, a form of universalism provides that the court with primary jurisdiction seek assistance from foreign courts in which the debtor has assets. Lechner, *supra* note 20, at 984.

133 Gerber, *supra* note 92, at 2084–85; Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883, 934 (2002).

134 *Barclays Bank v. Maxwell Communication Corp. (In re Maxwell Communication Corp.)*, 170 B.R. 800, 816 (Bankr. S.D.N.Y. 1994) (citing *Canadian S. Ry. v. Gebhard*, 109 U.S. 527, 536 (1883)).

having a single unified approach to international bankruptcy.¹³⁵

It is obvious that, in the present state of commerce and of communication, it would be better in nine cases out of ten that all settlements of insolvent debtors with their creditors should be made in a single proceeding, and generally at a single place; better for the creditors, who would thus share alike, and better for the debtor, because all his creditors would be equally bound by his discharge.¹³⁶

In a recent article for the *Fordham Law Review*, Elizabeth Gerber presented the major advantages touted by universalists.¹³⁷ First, international cohesion and cooperation lower transaction costs, and, therefore, increase the flow of international trade.¹³⁸ Further, 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.¹³⁹ This, in turn, would presumably assist the international business community by moving all parties toward obtaining perfect information, thereby reducing the inefficiency in the international credit market.¹⁴⁰ Lastly, a unified 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.”¹⁴¹

Of course, all of these positive characteristics of universalism sound like the panacea for cross-border insolvency. What, then, is the problem with universalism?

135 See *id.*; Douglass G. Boshkoff, *Some Gloomy Thoughts Concerning Cross-Border Insolvencies*, 72 WASH. U.L.Q. 931, 939 (1994) (citing John Lowell, *Conflict of Laws as Applied to Assignments for Creditors*, 1 HARV. L. REV. 259, 264 (1888)).

136 Boshkoff, *supra* note 135, at 939.

137 Gerber, *supra* note 92, at 2084–85.

138 *Id.* at 2084 (citing Brian M. Devling, Note, *The Continuing Vitality of the Territorial Approach to Cross-Border Insolvency*, 70 UMKC L. REV. 435, 447 (2001)).

139 *Id.* at 2084–85.

140 See *id.* at 2085; ROBERT A. HAUGEN, MODERN INVESTMENT THEORY 641–42 (4th ed. 1997) (stating market efficiency theory suggests that in a market where investors have perfect information, assets will be accurately priced).

141 Gerber, *supra* note 92, at 2085 (citing Isham, *supra* note 131, at 1177–79).

2. *The Downside to Universalism*

Possibly the biggest drawback to a unified approach to international bankruptcy is, despite the fact that universalism has “near-unanimous support [in] the academic community, policymakers have chosen not to adopt [it].”¹⁴² One possible explanation for this is the various proposals that attempt to “harmoniz[e] insolvency law strike[] at the heart of deep-seated cultural differences and legal codes founded on quite different principles.”¹⁴³ In general, countries are unwilling to have the laws of another country encroach on their sovereignty.¹⁴⁴ This is especially true in a bankruptcy context, because “bankruptcy law is ‘meta-law’ . . . [it] overrides contract-, property-, and other legal rights that exist outside of bankruptcy” such as commercial and family law.¹⁴⁵

As an example of a situation in which a country would be reluctant to submit to the law of another nation, consider the merger of Daimler-Benz and Chrysler Corporation.¹⁴⁶ Imagine the combined company, with its headquarters in Germany, filing for bankruptcy protection under German insolvency law.¹⁴⁷ Under a universalism approach, Chrysler plant workers in Detroit would have to file in a German court to claim their wages and benefits.¹⁴⁸ Moreover, the fate of the workers’ claims

142 Tung, *Possible*, *supra* note 93, at 37 (quoting Andrew T. Guzman, *International Bankruptcy: In Defense of Universalism*, 98 MICH. L. REV. 2177, 2184 (2000)).

143 Boshkoff, *supra* note 135, at 936.

144 Tung, *Possible*, *supra* note 93, at 46.

145 *Id.* at 47 (citing Manfred Balz, *The European Union Convention on Insolvency Proceedings*, 70 AM. BANKR. L.J. 485, 486 (1996)); *see also* Boshkoff, *supra* note 135, at 936 (commenting that “pigs might . . . learn to fly” before all of the branches of the law are applied in unison).

146 Interview by Jim Lehrer with David Cole, Director, Office for the Study of Automobile Transportation, U. Mich. (May 7, 1998), *available at*, http://www.pbs.org/newshour/bb/business/jan-june98/benz_5-7.html. Daimler-Benz and Chrysler Corporation announced their merger on May 7, 1998, prompting David Cole of the University of Michigan to comment, “[the merger] is in the context of the new world that we have where the boundaries are vanishing. We are in a true global environment as far as the industry is concerned.” *Id.*

147 LoPucki, *Cooperative Territoriality*, *supra* note 127, at 2223.

148 *Id.*

would be determined solely on the basis of German law—not the law of the United States.¹⁴⁹ This result is likely to be highly unacceptable to people of any sovereign nation.¹⁵⁰

Another possible reason universalism has not been adopted by policy makers is its potential to discriminate against lesser developed countries.¹⁵¹ Most multinational companies have their principle place of business in industrial, developed countries.¹⁵² 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 country.¹⁵³ This situation would seemingly perpetuate a systematic bias against creditors and other parties in lesser developed countries not dissimilar from the Daimler-Chrysler example discussed above.¹⁵⁴

Finally, one of the biggest criticisms of universalism is the uncertainty surrounding how to determine the home country of a multinational corporation.¹⁵⁵ 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.)*.¹⁵⁶ Judge Brozman 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 . . . one 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.¹⁵⁷

149 *Id.*

150 *See id.*

151 Frederick Tung, *Fear of Commitment in International Bankruptcy*, 33 GEO. WASH. INT’L L. REV. 555, 576–77 (2001) [hereinafter Tung, *Fear of Commitment*].

152 *Id.*

153 *Id.* at 577.

154 *See id.*; LoPucki, *Cooperative Territoriality*, *supra* note 127, at 2223.

155 *See Barclays Bank v. Maxwell Communication Corp. (In re Maxwell Communication Corp.)*, 170 B.R. 800, 817 & n.22 (Bankr. S.D.N.Y. 1994).

156 *Id.* at 817.

157 *Id.*

Recently, another decision was taken in the Southern District of New York that highlights the problems of the home country rule and universalism in general. In *In re Aerovias Nacionales de Colombia S.A. Avianca*, Aerovias Nacionales de Colombia S.A. Avianca (Avianca), the leading airline of the Republic of Colombia, and its wholly owned American subsidiary, Avianca, Inc. (Avianca, Inc.), separately filed individual bankruptcy cases in the Southern District of New York.¹⁵⁸ Avianca's administrative office was located in Bogota, Colombia.¹⁵⁹ "Avianca leased its entire fleet of . . . aircraft . . . from lessors located or doing business within the United States."¹⁶⁰ "Avianca employ[ed over 4,000] employees in Colombia, [while it employed only] 28 [employees] in the United States."¹⁶¹ Finally, "[Avianca] derive[d] more than 50[%] of its revenues from [its] domestic market [in Colombia, while it derived] 24[%] of its [revenues from its] international air service . . . between Colombia and the United States."¹⁶²

Both bankruptcy cases were opposed by certain creditors by filing a motion to dismiss for each case.¹⁶³ In support of their motions, the creditors argued Avianca, Inc.'s case was completely dependent upon Avianca's case; thus Avianca should be forced to file for bankruptcy protection under the law of its home country, Colombia.¹⁶⁴ Other creditors argued that "the Debtors' largest creditors are subject to jurisdiction in the United States, not in Colombia, and would not likely agree to submit to a Colombian proceeding, thus making an effective restructuring there unlikely."¹⁶⁵

Notice how this tension between the two jurisdictions

158 *In re Aerovias Nacionales de Colombia S.A. Avianca*, 303 B.R. 1, 3 (Bankr. S.D.N.Y. 2003).

159 *Id.*

160 *Id.*

161 *Id.* at 4.

162 *Id.*

163 *Id.* at 3, 5 n.3 (some of the creditors renegotiated their agreements with the debtors and withdrew their motion; however, a few creditors persisted that the cases be dismissed).

164 *See id.* at 8.

165 *See id.*

highlights each of the criticisms of universalism, as discussed above. In terms of sovereignty, as in the Daimler-Chrysler example, if these cases are allowed to proceed under jurisdiction of the United States, then the more than 4,000 Avianca employees in Colombia would be required to file claims for wages and benefits with the Bankruptcy Court for the Southern District of New York.¹⁶⁶ Moreover, if this case is allowed to go forward in the United States, it looks to be a classic example of a developed country imposing extraterritorial jurisdiction on a lesser developed country.¹⁶⁷ Finally, this case also demonstrates the difficulty in determining a company's home country. Just as Judge Brozman stated in *In re Maxwell Communication Corp.*, "the home country rule . . . lack[s] predictability in many cases where the debtor had significant contacts with more than one jurisdiction."¹⁶⁸ Ultimately, the *In re Aerovias* court, exercised territoriality by determining "[t]his is an appropriate case for the exercise of jurisdiction."¹⁶⁹ In so deciding, the court recognized that it may appear "unseemly" for a U.S. court to exercise jurisdiction over the reorganization of a company whose "center of main activities" lies abroad.¹⁷⁰ The court, however, chose to "exercise its power to the full extent of its jurisdiction."¹⁷¹

The criticisms of universalism discussed above and illustrated by the *In re Aerovias* decision have led at least one commentator to proclaim "[a]t best, universalism is premature.

166 LoPucki, *Cooperative Territoriality*, *supra* note 127, at 2223 ("The workers in a Chrysler plant in Detroit do not expect to have to clam their wages and benefits in a German bankruptcy court and they do not expect the German law of creditor priorities to determine whether they will be paid."). *Cf.* Tung, *Possible*, *supra* note 93, at 46 ("Universalism resolves this conflict by requiring the local court to defer to the home country court and its bankruptcy law.").

167 See Tung, *Fear of Commitment*, *supra* note 151, at 576-77; *cf.* Int'l Fed'n of Library Ass'ns and Insts., *Survey of Scientific and Technological Information Needs in Less-Developed and Developing Countries*, Less-Developed and Developing Countries List, at <http://www.ifla.org/VII/s7/projects/countrylist.htm> (last visited Oct. 15, 2004) (listing Colombia as a lesser developed or developing country).

168 Barclays Bank v. Maxwell Communication Corp. (*In re Maxwell Communication Corp.*), 170 B.R. 800, 817 & n.22 (Bankr. S.D.N.Y. 1994).

169 *Aerovias*, 303 B.R. at 18.

170 *Id.* at 17.

171 *Id.* at 18.

At worst, it is futile.”¹⁷²

3. *Modified Universalism: Another Form of Compromise*

Modified universalism embraces universalism in general, while reserving to local courts the power to exercise discretion with respect to “the fairness of the home country procedures[,] and” with respect to protecting the interests of local creditors.¹⁷³ In essence, “modified universalism is universalism tempered by what is practical at the current stage of international legal development.”¹⁷⁴

As previously discussed, this is the approach the United States adopted in 11 U.S.C. § 304.¹⁷⁵ 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.”¹⁷⁶ Arguably, such wide acceptance makes modified universalism the most widely used approach to cross-border insolvency around the world.¹⁷⁷ This wide acceptance is due in large part to the advantages of modified universalism.

“[One] advantage of the . . . modified [universalism] is that it retains some of the efficiencies of pure universalism while incorporating the flexibility and discretion of the . . . territorial approaches described [above].”¹⁷⁸ The modified approach does not accomplish all of the benefits of universalism explained above; however, it does allow for a coordinated liquidation or

¹⁷² Tung, *Possible*, *supra* note 93, at 44.

¹⁷³ 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).

¹⁷⁴ Neiman, *supra* note 99, at 826 (quoting AM. LAW INST., Transnational Insolvency Project: Principles Of Cooperation In Transnational Cases Among the Members of the North American Free Trade Agreement (Tentative Draft, 2000)).

¹⁷⁵ Paul L. Lee, *Ancillary Proceedings Under Section 304 and Proposed Chapter 15 of the Bankruptcy Code*, 76 AM. BANKR. L.J. 115, 123 (2002); *see supra* Part II.

¹⁷⁶ 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).

¹⁷⁷ *Id.* at 691–92. *But see* Tung, *Possible*, *supra* note 93, at 39–40 (“Analysts agree that territoriality is and has always been the dominant practice.”).

¹⁷⁸ Anderson, *supra* note 176, at 691.

reorganization.¹⁷⁹ 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.¹⁸⁰ Overall, the most positive aspect of modified universalism may be that “its pragmatic flexibility 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.”¹⁸¹

Of course modified universalism has its detractors. As one might expect, Professor Lopucki has been critical of the modified approach.¹⁸² Professor Lopucki’s criticisms have been summarized as:

(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 intercountry 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.”¹⁸³

Of course, all of the various methods to administer transnational bankruptcy have their advantages and

179 *Id.*

180 *Id.*

181 Westbrook, *A Global Solution*, *supra* note 123, at 2277.

182 Perkins, *supra* note 58, at 803 n.69 (citing LoPucki, *Post Universalist Approach*, *supra* note 91, at 728–30, 732). Note that footnote 69 of the Perkins’ article refers to criticisms of modified territoriality. This is clearly an oversight by the author as the section of Professor LoPucki’s paper in which she is citing plainly refers to modified universalism.

183 *Id.*

disadvantages, and one would do well to keep in mind the continuum referred to above because the criticisms of modified universalism may apply to territorialism as well.¹⁸⁴

4. *An Example of Modified Universalism: Applying the Compromise*

In *In re Treco*, a bank incorporated in the Bahamas filed for bankruptcy protection under Bahamian law.¹⁸⁵ In an ancillary proceeding filed in the U.S. Bankruptcy Court for the Southern District of New York, in accordance with 11 U.S.C. § 304, representatives of the Bahamian bank sought turnover of funds held by the Bank of New York Company and JCPL Leasing Corporation (collectively “Bank of New York”).¹⁸⁶ Both the bankruptcy court and the U.S. District Court for the Southern District of New York directed the Bank of New York to turn over the funds to the Bahamian representatives.¹⁸⁷ The Court of Appeals, however, saw this case differently.¹⁸⁸

For purposes of the appeal, the Court of Appeals assumed the Bank of New York had a secured claim against the debtor.¹⁸⁹ The Bankruptcy Code defines a secured claim as:

An allowed claim of a creditor secured by a lien on property in which the estate has an interest, . . . is a secured claim to the extent of the value of such creditor’s interest in the estate’s interest in such property, . . . Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan

184 Cf. Gerber, *supra* note 92, at 2099 n.54 (stating that “territorialism may seem similar to modified universalism”).

185 *In re Treco*, 240 F.3d 148, 151 (2d Cir. 2001).

186 *Id.*

187 *Id.*

188 *Id.*

189 *Id.* at 152, 155 n.3. The Bank of New York had a claim against the Bahamian bank, in part, as a result of a 1993 agreement in which the Bahamian bank pledged its present and future accounts with the Bank of New York as security for all of the Bahamian bank’s “present and future obligations and liabilities to” Bank of New York. *Id.*

affecting such creditor's interest.¹⁹⁰

“Under United States [bankruptcy] law, . . . ‘a secured creditor’s collateral may only be charged [under 11 U.S.C. § 506(c)] for administrative expenses, including attorney’s fees, to the extent these expenses directly benefited [sic] that secured creditor.’”¹⁹¹ Under Bahamian bankruptcy law, however, a secured creditor’s claim is subordinate to administrative expenses.¹⁹² In this instance, the administrative expenses had taken nearly \$8 million of the \$10 million in receivables collected by the debtor.¹⁹³ These fees—attorney’s fees, travel, and other expenses—were also “disbursed as a matter of bureaucratic routine . . . without notice to creditors,” or being approved by a judge.¹⁹⁴ For these reasons, the court stated, Bank of New York’s claim could be destroyed.¹⁹⁵ The court, therefore, vacated the district court’s decision and remanded the case.¹⁹⁶

Depending on one’s perspective, this case represents everything that is good and bad about modified universalism. Under the rulings of both the bankruptcy court and the district court, this case looked to be an example of comity (and universalism) where the laws of the United States would be subordinate to the insolvency laws of the Bahamas.¹⁹⁷ The stronger view here, however, is that the Court of Appeals took a territorial approach to modified universalism.

Nearly all of Professor Lopucki’s criticisms of modified territoriality were on point here. First, the court clearly acted to protect the interest of a U.S. creditor.¹⁹⁸ Second, the appellate court, by vacating the earlier decision and not subordinating

190 11 U.S.C. § 506(a) (2000).

191 *In re Treco*, 240 F.3d at 155 (quoting *In re Blackwood Assocs.*, 153 F.3d 61, 68 (2d Cir. 1998)).

192 *Id.* at 160.

193 *Id.* at 159.

194 *Id.*

195 *Id.* at 160.

196 *Id.* at 163.

197 See *In re Treco* 229 B.R. 280, 301 (Bankr. S.D.N.Y. 1999); *In re Treco*, 239 B.R. 36, 44 (S.D.N.Y. 1999), vacated by 240 F.3d 148, (2d Cir. 2001).

198 See *Treco*, 240 F.3d at 158–59; see also Perkins, *supra* note 58, at 803 n.69 (citing LoPucki, *Post Universalist Approach*, *supra* note 91, at 728–30, 732).

U.S. law to Bahamian law, created uncertainty about how the assets would be divided.¹⁹⁹ Third, the appellate court decision will most likely generate more than one bankruptcy proceeding—for example, a proceeding in both the Bahamas and the United States.²⁰⁰ Finally, although this is less clear, the Court of Appeals did not identify, nor did the court even consider, the Bahamian bank's home country.²⁰¹

This case certainly illustrates that under modified universalism there is substantial room to disagree as to which insolvency law to apply in a transnational bankruptcy.

IV. OTHER APPROACHES TO TRANSNATIONAL BANKRUPTCY

A. *Contractualism: Choice of Law by Contract*

The difficulties with territorialism and universalism have led to other methods of handling international insolvencies. Contractualism has been proposed as an alternative to pure territorialism or pure universalism.²⁰² Contractualism posits “that bankruptcy selection clauses can perform better from . . . an economic [and political] perspective[s] than can either [universalism or territorialism].”²⁰³ In general, the argument for contractualism is as follows: Contractualism provides that “a corporation may specify in its charter the jurisdiction that will administer its bankruptcy,”²⁰⁴ in turn, to attract the business of bankruptcy, nations will compete for companies to adopt the law of a particular state;²⁰⁵ the jurisdiction most successful at persuading businesses to adopt its particular insolvency law will

199 See Perkins, *supra* note 58, at 803 n.69 (citing LoPucki, *Post Universalist Approach*, *supra* note 91, at 728–30, 732).

200 See *id.*

201 See *id.*; *In re Treco*, 240 F.3d at 151, 155–61. This would have been a difficult case in which to identify a home country. As stated in the case, the Bahamian bank controlled a string of banks primarily located in Africa. *Id.*

202 See Rasmussen, *Private Ordering*, *supra* note 19, at 2254–55, 2273 (questioning the ability of any one body to draft a satisfactory international bankruptcy code).

203 *Id.* at 2255.

204 *In re Treco*, 240 F.3d at 153 n.2.

205 Rasmussen, *Private Ordering*, *supra* note 19, at 2273.

be the nation that handles insolvency most efficiently;²⁰⁶ this competition between various jurisdictions will ultimately result in improved international insolvency law.²⁰⁷

At least one commentator has criticized contractualism as promoting forum shopping and encouraging companies to select an insolvency jurisdiction in which they have no assets.²⁰⁸ If, however, one makes the comparison between selecting a forum for bankruptcy and selecting a state in which to incorporate, a stronger argument can be made for contractualism.²⁰⁹ Delaware is by far the most successful state in attracting publicly held corporations.²¹⁰ The flexibility of Delaware corporate law, under which Delaware incorporated firms operate, has arguably enhanced shareholder value.²¹¹ By extension, the ability of a multinational firm to select an insolvency regime under which to proceed in bankruptcy could also enhance the value of a firm.²¹²

B. The UNCITRAL Model Law: A Universal Law Once and For All

“UNCITRAL [United Nations Commission on International Trade Law] is the core legal body in the United Nations” designed to promote unification and harmonization of

206 See *id.* at 2255, 2273.

207 See *id.* at 2273.

208 David Costa Levenson, *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, 296 (2002).

209 See Theodore Eisenberg & Lynn M. LoPucki, *Shopping for Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganizations*, 84 CORNELL L. REV. 967, 975–76, 987 (1999); see also Barry E. Adler & Henry N. Butler, *On the “Delawarization of Bankruptcy” Debate*, 52 EMORY L.J. 1309, 1312 (2003) (“[S]ophisticated creditors often go along with the selection of Delaware, particularly in the case of prepackaged reorganizations. According to the Enthusiasts, the creditors would not agree to the selection of Delaware unless they anticipated it lowering the costs of bankruptcy.”).

210 MELVIN ARON EISENBERG, *CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS CASES AND MATERIALS* 101 (8th ed. 2000).

211 Katharina Pistor, et al., *The Evolution of Corporate Law: A Cross-Country Comparison*, 23 U. PA. J. INT’L ECON. L. 791, 829 (2002) (citing Robert Daines, *Does Delaware Law Improve Firm Value?*, 62 J. FIN. ECON. 525 (2001)).

212 See Eisenberg & LoPucki, *supra* note 209, at 993–94.

international trade law.²¹³ In an effort to encourage consistency in the field of international bankruptcy, UNCITRAL adopted a Model Law on cross-border insolvency on May 30, 1997.²¹⁴ The Model Law is not a large, convoluted document; rather, it “is a succinct, ten page, 32 Article text, that is procedurally focused.”²¹⁵

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:

- (a) Cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;
- (b) Greater legal certainty for trade and investment;
- (c) Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
- (d) Protection and maximization of the value of the debtor’s assets; and
- (e) Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.²¹⁶

These objectives are not dissimilar from the U.S. Bankruptcy Code that has “the central purpose of . . . marshal[ing] creditors and organiz[ing] distribution.”²¹⁷ The

213 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).

214 *UNCITRAL Model Law on Cross-Border Insolvency*, U.N. Commission on International Trade Law, 52d Sess., Supp. No. 17, Annex I, at 68, U.N. Doc. No.A/52/17 (1997), available at <http://www.uncitral.org/english/unc/unc-30/a-52-17.pdf> [hereinafter Model Law]; 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).

215 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).

216 Model Law, *supra* note 214, at 68.

217 Elizabeth Warren & Jay L. Westbrook, *Go Directly to Jail; Do Not Collect*

Model Law, therefore, does not seek to displace the substantive law of different locales; “rather, it provides a [method] for the . . . interdependent operation of various local laws, courts and court appointees.”²¹⁸ To accomplish the objectives of the Model Law, as well as to augment the insolvency laws of various jurisdictions, the drafters of the Model Law focused on nine general principles.²¹⁹ Those principles are:

- (1) The court of the enacting State shall recognize only one foreign proceeding as a foreign main proceeding.
- (2) The recognition of a foreign proceeding shall not restrict the right to commence a local proceeding.
- (3) A local proceeding shall prevail over the effects of a 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 a foreign proceeding.
- (4) When there are two or more proceedings, there shall be cooperation and coordination.
- (5) 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.
- (6) Upon recognition of a foreign proceeding as a foreign main proceeding, some types of relief will come into effect automatically. They will be in effect until modified or terminated by the court. Upon recognition of a foreign proceeding as a foreign main proceeding, some other types of relief may be granted by the court, but they will not 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

§200, 22 AM. BANKR. INST. J. 44, 44 (2004) (quoting *In re Simonini*, 69 Fed. Appx. 169 (unpublished 4th Cir. 2003)).

²¹⁸ Flaschen et al., *supra* note 214, at 18.

²¹⁹ See André J. Berends, *The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview*, 6 TUL. J. INT'L & COMP. L. 309, 320–21 (1998).

granted by the court.

(7) 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.

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

(9) If there are surplus proceeds of a local non-main proceeding, they shall be transferred to the main proceeding.²²⁰

1. *Effect of the Model Law Principles: Does the Model Law Substantially Change the Current Situation?*

The Model Law does not seem to overcome some of the persistent problems discussed above in the other approaches to transnational insolvencies.²²¹ For instance, the term “foreign main proceeding” is used in principle number one.²²² This is similar to the term home country that is used as the jurisdictional standard under universalism.²²³ In an effort to define the home country of a multinational debtor, the drafters of “the Model Law creat[ed] a rebuttable presumption that the debtor’s registered office is the [center] of its main interests.”²²⁴ Of course, this presumption is still open to the criticism that the home country is too difficult to define.²²⁵ As Judge Brozman stated in *In re Maxwell Communication Corp.*, “one [cannot] simply employ the nation of incorporation alone.”²²⁶

Principles two and three seem to imply that any local

220 *Id.* at 321–22.

221 Goffman & Michael, *supra* note 87.

222 Berends, *supra* note 219, at 321.

223 *In re Aerovias Nacionales de Colombia S.A. Avianca*, 303 B.R. 1, 15 n.17 (Bankr. S.D.N.Y. 2003).

224 Silverman, *supra* note 215, at 269.

225 See *Barclays Bank v. Maxwell Communication Corp. (In re Maxwell Communication Corp.)*, 170 B.R. 800, 817 (Bankr. S.D.N.Y. 1994).

226 *Id.*

proceeding prevails over the authority of a foreign proceeding.²²⁷ This, of course, is clearly territorialism.²²⁸ Other interpretations, however, view the Model Law as more universal.²²⁹ “[I]f secondary proceedings have taken place before the main proceeding has [begun], any relief granted in the secondary proceeding shall be reviewed by the court of the main proceeding.”²³⁰ The court in the main proceeding can then modify or terminate any relief previously granted if it is deemed inconsistent with the main proceeding.²³¹

Principles five and six demonstrate the importance of a foreign main proceeding versus that of a foreign non-main proceeding.²³² A foreign main proceeding is a foreign proceeding that takes place in the state where the debtor has its center of main interest.²³³ Regardless of the difficulties in determining a company’s center of main interest, if a proceeding is in the State of the debtor’s center of main interest then certain bankruptcy protections arise automatically by virtue of the Model Law²³⁴ — not the least of which is a mandatory stay, which halts all proceedings against the debtor and all transfers of the debtor’s assets.²³⁵ This type of relief is available in the other type of proceeding under the Model law, the foreign non-main proceeding, but the relief is merely permissive.²³⁶

Principles eight and nine speak to the rights of creditors.²³⁷

²²⁷ Berends, *supra* note 219, at 321–22.

²²⁸ Tung, *Possible*, *supra* note 93, at 39 (stating that territorialism is the time honored “behavior of nations . . . exercising jurisdiction over assets and parties within their borders”).

²²⁹ Goffman & Michael, *supra* note 87.

²³⁰ *Id.*

²³¹ *Id.*

²³² Berends, *supra* note 219, at 322.

²³³ Model Law, *supra* note 214, 69.

²³⁴ Berends, *supra* note 219, at 322–23.

²³⁵ Silverman, *supra* note 215, at 269–70; *see* 11 U.S.C. § 362 (2000) (providing an automatic stay).

²³⁶ Silverman, *supra* note 215, at 270. “A foreign non-main proceeding [is] a foreign proceeding, other than a foreign main proceeding, taking place in a [s]tate where the debtor maintains an establishment.” Berends, *supra* note 219, at 331 (quoting Model Law, *supra* note 214, at 69).

²³⁷ Berends, *supra* note 219, at 322.

Here, the Model Law seems to shift back toward territorialism, because a court can choose not to follow the Model Law.²³⁸ The Model Law contains a provision that simply lets the court opt out of the Model Law and enforce the law of its own jurisdiction if an action would be manifestly contrary to the public policy of that particular state.²³⁹ Furthermore, the Model Law leaves open the possibility of discrimination in the application of priorities when distributing assets to creditors.²⁴⁰ “Under [what is known as] the ‘hotchpot rule’, a creditor that . . . receive[s] a distribution in a foreign [bankruptcy] proceeding [cannot receive additional distributions at another 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].”²⁴¹

As “[t]he legal community’s response to the divide between territorialism and universalism”, the Model Law is a well written attempt to foster cooperation in international bankruptcy law.²⁴² It has, however, failed to be widely adopted.²⁴³ Mexico, South Africa, Japan, and Germany have adopted, at least in part, the Model Law.²⁴⁴ The United States has proposed amending the Bankruptcy Code to include the Model Law as Chapter 15 but, at present, has failed to do so.²⁴⁵ Because the Model Law is only effective if it is enacted by all relevant jurisdictions, it remains to be seen if the Model Law is an

238 Murphy, *supra* note 51, at 130.

239 *Id.* The U.S. Bankruptcy Code contains an absolute priority rule. See 11 U.S.C. § 1129(b)(2). Under the absolute priority rule, a bankruptcy reorganization plan can “be confirmed despite rejection by a class of unsecured creditors if the plan does not offer a junior claimant any property before each unsecured claims receives full satisfaction of its allowed claim.” *In re Exide Techs.*, 303 B.R. 48, 61 (Bankr. D. Del. 2003).

240 Goffman & Michael, *supra* note 87.

241 *Id.*

242 *Id.*

243 *See id.*

244 *Id.*; see also Alfried Heidbrink, *The New German Rules on International Insolvency Law*, AM. BANKR. INST. J., Nov. 2003, at 16 (noting that Germany adopted its first set of statutory rules governing cross-border insolvencies in 2003).

245 *In re Aerovias Nacionales de Colombia S.A. Avianca*, 303 B.R. 1, 15 n.17 (Bankr. S.D.N.Y. 2003); see Bankruptcy Abuse Prevention and Consumer Protection Act of 2003, H.R. 975, 108th Cong. § 801 (2003); Flaschen et al., *supra* note 214, at 19.

effective method to administer transnational bankruptcies.²⁴⁶

V. CONCLUSION

International bankruptcy presents a set of legal problems that are not unlike other traditional choice of law dilemmas. Title 11 U.S.C. § 304 is the provision in the U.S. Bankruptcy Code that, in part, deals with international proceedings.²⁴⁷ In general, § 304 allows bankruptcy judges broad authority to reach equitable decisions in cross-border cases.²⁴⁸ Under the comity provision in § 304, U.S. bankruptcy judges generally attempt to acquiesce, or at least cooperate, with the law of other jurisdictions.²⁴⁹ There are instances, however, in which U.S. courts usurp the authority of other jurisdictions and apply U.S. law to international proceedings.²⁵⁰ This can lead to inconsistent results, making an international liquidation or restructuring inefficient and unpredictable.²⁵¹

Remedying the problems in international bankruptcy is difficult. The analytical framework for evaluating transnational insolvency is described by territorialism and universalism.²⁵² Territorialism allows the bankruptcy court of a particular jurisdiction to apply its laws to the benefit of its jurisdictional creditors.²⁵³ This, arguably, is unfair to a number of parties in any international proceeding.²⁵⁴ Universalism, on the other hand, requires all involved jurisdictions to relinquish their sovereignty and apply the law of a foreign jurisdiction.²⁵⁵ This has many associated efficiencies; however, many courts are reluctant to do this, especially because bankruptcy law overrides almost all other forms of law.²⁵⁶

246 Goffman & Michael, *supra* note 87.

247 *See supra* Part II.B–E.

248 *Id.*

249 *See supra* Part II.C.

250 *See supra* Part III.A.1.

251 *Id.*

252 *See supra* Part III.

253 *See supra* Part III.A.1.

254 *Id.*

255 *See supra* Part III.B.

256 *See supra* Part III.

This stalemate has led to various forms of compromise including cooperative territorialism and modified universalism.²⁵⁷ Neither of these two conceptually similar ideas solves all of the problems inherent with territorialism or universalism.²⁵⁸ Specifically, under both cooperative territorialism and modified universalism, courts must consistently reach a level of unprecedented international legal cooperation.²⁵⁹ This problem has led some critics to propose other solutions outside of territorialism and universalism.²⁶⁰ For instance, contractualism allows corporations to specify in their charter which law will apply in the event of bankruptcy.²⁶¹ This alternative has not been the subject of much debate, but it proposes an interesting solution.²⁶²

Finally, an international organization, UNCITRAL, has developed a simple, straightforward answer to the international bankruptcy problem by proposing a Model Law.²⁶³ The Model Law, another effort at the territorialism-universalism compromise, attempts to capture the efficiencies of universalism, while leaving certain territorial provisions by which a court could opt-out of the Model Law.²⁶⁴ Although the Model Law has advantages and disadvantages, it cannot truly be evaluated because it has not been widely adopted.²⁶⁵ The Model Law can only be effective if it is widely adopted and consistently applied.²⁶⁶

None of the proposed theories or solutions provide a sufficient resolution to the transnational bankruptcy problem; therefore, the current state of international bankruptcy law will continue indefinitely.

257 *See supra* Part III.A.2, III.B.3.

258 *Id.*

259 *Id.*

260 *See supra* Part IV.

261 *See supra* Part IV.A.

262 *Id.*

263 *See supra* Part IV.B.

264 *Id.*

265 *Id.*

266 *Id.*

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