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INTRODUCTION

The influence of transnational corporations on domestic and international economies continues to grow. An inevitable consequence of the expansion of transnational enterprises is transnational bankruptcy. The recent crisis in the Asian economic markets, and the devaluation of the Brazilian currency, are but two examples of the potential terrors of the "new economic order" in which transnational corporations operate and in which we now live. The most spectacular cross-border insolvencies involve billions of dollars in debts and assets. The many smaller cases may in the aggregate, however, comprise more cross-border financial chaos than their more famous counterparts.

1 There are as many views on the merits of transnational corporations as there are trees in the proverbial forest. See Seymour J. Rubin, Transnational Corporations and International Codes of Conduct: A Study of the Relationship Between International Legal Cooperation and Economic Development, 10 AM. U. J. INT'L L. & POL'Y 1275, 1276-77 (1995). Although the passion of earlier writers—from those hailing the transnational corporation as the engine of progress to those predicting dissemination of poverty and cultural dissolution in their wakes—may have diminished with the collapse of the Soviet Union and the triumph of the market economies, the issues surrounding the treatment of transnational corporations still command international attention. See id. Related to questions surrounding the proper treatment of transnational corporate growth are the inevitable questions regarding the proper administration of transnational corporate demise.


5 See id. In fact, according to Professor Westbrook, “[a]t both land borders of the United States... it appears that hundreds of United States–Mexican and United States–Canadian insolven­cies—both liquidations and reorganizations—are pending in the U.S. courts at any given time.” Id.
Scholars and practitioners agree that the realm of cross-border insolvency law is one of anarchy and chaos. Although numerous reparative suggestions have been proposed, none have met with approval by a majority of States, much less with universal acceptance. The most promising solution to the cross-border insolvency fiasco is a recent, well-crafted piece of model legislation from the United Nations Commission on International Trade Law ("UNCITRAL") appropriately titled the Model Law on Cross-border Insolvency.

Part I of this note examines the existing state of cross-border insolvency law which sets the stage for the UNCITRAL Model Law and will emphasize the most pressing needs and the present philosophical approaches to their resolution. Part II provides a brief history of the United Nations Commission on International Trade Law, followed by an exposition of its Model Law on Cross-Border Insolvency in Part III. Part IV of this note analyzes the hypothetical effects of the Model Law in operation. This note concludes that the Model Law is a necessary and effective step towards managing the failure of transnational corporations in a global economy.

I. MANAGING CROSS-BORDER INSOLVENCY: RECURRENT THEMES

A. When Transnational Businesses Fail: Critical Needs

A transnational insolvency issue arises whenever a multinational individual or commercial entity falls into general default on its obligations. In the area of transnational insolvencies all parties have an interest in increasing predictability in commercial transactions, enhancing efficiency in administration of the debtor's estate, and promoting fairness in claims adjudication. In achieving these goals, parties seek

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6 See, e.g., Booth, supra note 2, at 135.
7 Even attempts at a unified approach between Canada and the United States, two States with similar common-law legal systems and parallel economic concerns, have failed. See, e.g., Westbrook, supra note 4, at 745; Jay Lawrence Westbrook, The American Law Institute NAFTA Insolvency Project, 23 BROOK. J. INT'L L. 7 (1997).
to avoid extensive litigation and protracted appeals; unnecessary costs and expenses to the debtor’s estate; undue delay and inequality in the distribution of assets to creditors; and needless duplication of effort by courts and other parties. Although details vary from case to case, several needs are common to any cross-border insolvency.

1. The Need to Harmonize the Effect of Insolvency Proceedings Initiated in One State on Assets Located in Another

Most States have legislation that expressly or implicitly intends insolvency proceedings commenced in that State to have effect over all the debtor’s assets, including those located abroad. The underlying rationale is that all of the debtor’s assets should be available to the administrator for establishing a pool of proceeds from which the creditors can be paid. The problem arises when States that claim a universal effect for their own insolvency proceedings nevertheless deny such effect to foreign insolvency proceedings. A parallel issue arises when States limit the effect of their own bankruptcy proceedings to assets located within their jurisdiction, a self-imposed restriction that hinders the access of all creditors to the debtor’s assets. Even when a State is ready to recognize foreign insolvency proceedings, a usual pre-condition for such recognition is the existence of a substantial link between the insolvent debtor and the State of the insolvency proceedings. Furthermore, some States require the foreign bankruptcy administra-

Just as the fall of a row of dominoes is predictable, so too is the inexorable consequence of fuller and freer world trade, and increasing credit expansion: there will inevitably be nonpayment by reason of optimistically miscalculated expectations. Such a development calls into question the obstacle to international trade and finance occasioned by the anarchy prevailing in transnational insolvencies.


12 See id. at 4, ¶ 12.

13 See id. at 4, ¶¶ 12–13.

14 See id. at 4, ¶ 12.

15 See id. at 4, ¶¶ 8, 14.
tor to obtain formal recognition in the State’s own court in order for the foreign insolvency proceeding to be given any local effect.\textsuperscript{16}

The inability to coordinate or harmonize the effects of insolvency proceedings initiated in one State on assets located in another has serious practical consequences. Fundamental bankruptcy principles, such as a moratorium on creditor action (known as a “stay” in U.S. vernacular), although present in most national bankruptcy systems, fail as between States.\textsuperscript{17} Some scholars have argued that the adoption of an automatic or nearly automatic moratorium procedure in each State in response to a foreign bankruptcy filing is the single most important reform that could be achieved in transnational insolvency cases.\textsuperscript{18} Such a moratorium would ensure court control in each country.\textsuperscript{19} It would prevent piece-meal dismemberment of the debtor’s estate, allow time for vital communication between the courts involved (assuming courts are permitted to communicate) and provide a quiet opportunity in which private agreements—subject to court approval—could be negotiated between various creditors, and between the creditors and the debtor.\textsuperscript{20} Absent an international convention, bilateral treaty, or uniform legislation adopted by many States the effectiveness of one State’s moratorium on a debtor’s assets is limited to assets within its own territory.\textsuperscript{21} Universal application of even basic bankruptcy principles depends on the often unpredictable level of cooperation granted by a foreign State’s judiciary.\textsuperscript{22}

\textsuperscript{16} See UNCITRAL 26th Sess., supra note 11, at 4, ¶ 15.

\textsuperscript{17} See Westbrook, supra note 4, at 754. (“Generally, the moratorium halts lawsuits and other legal actions against the debtor and its property, although secured creditors and other favored parties are allowed to proceed in some jurisdictions.”).

\textsuperscript{18} See id.

\textsuperscript{19} See id.

\textsuperscript{20} See id.; see also Union Bank v. Wolas, 502 U.S. 151, 161 (1991) (permitting trustee to avoid prebankruptcy transfers discourages creditors from racing to courthouse to dismember debtor during his slide into bankruptcy); In re Johnson, 8 B.R. 371, 374 (Bankr. D. Minn. 1981) (purpose of bankruptcy is providing equal opportunity for all creditors to share in the assets of the debtor available for distribution; stay designed to prevent piecemeal dismemberment of the debtor’s assets by creditors); In re Lykes Bros. Steamship Co., 207 B.R. 282, 284 (Bankr. M.D. Fla. 1997) (fundamental principles of Chapter 11 include desire to maximize value of estate for benefit of all creditors, to promote equal distribution among creditors, and to avoid piecemeal, preferential dismemberment of a debtor’s assets); In re Axona Int’l Credit and Commerce, Ltd., 88 B.R. 597, 609 (Bankr. S.D.N.Y. 1988) (granting of comity to foreign bankruptcy proceeding enables assets of debtor to be dispersed in equitable, orderly, and systematic manner, rather than in a haphazard, erratic or piecemeal fashion).

\textsuperscript{21} See Westbrook, supra note 4, at 754; see, e.g., UNCITRAL 26th Sess., supra note 11, at 3–4, ¶¶ 11–16.

\textsuperscript{22} See Westbrook, supra note 4, at 746; see generally In re Axona, 88 B.R. at 609.
The lack of uniform effect of bankruptcy proceedings initiated in one State on assets located in another creates other serious problems. The standing and title of the liquidator, administrator, or trustee of the bankruptcy estate is uncertain. In several nations, the process of obtaining standing is time-consuming and complex. Furthermore, a liquidator’s appearance in a foreign court may expose the liquidator to personal jurisdiction. In a transnational insolvency proceeding, if the liquidator from one State seeks to enjoin action against the debtor in a foreign State, the cumbersome recognition process may mean the loss of valuable assets for general distribution as the liquidator loses the race to the courthouse stairs, waiting patiently for consular recognition of her future standing.

A closely related issue concerns the extent of the liquidator’s powers once she has obtained the right to bring suit in the foreign court. In almost all bankruptcy systems, the liquidator acquires important rights to the debtor’s property as a result of the bankruptcy filing. The liquidator generally obtains some control over the debtor’s property, and also, the right to defend pre-existing lawsuits against the debtor and its estate. The extent to which a liquidator’s powers under one bankruptcy system are transferable to actions in another State’s jurisdiction relating to the same debtor is unresolved.

23 See UNCITRAL 26th Sess., supra note 11, at 4, ¶ 15; Westbrook, supra note 4, at 754.
24 See UNCITRAL 26th Sess., supra note 11, at 4, ¶ 11.
25 In fact, this very issue was one of the precipitating factors of the U.S. adoption of § 304 of the Bankruptcy Code. See Booth, supra note 10, at 1. Prior to the Bankruptcy Reform Act of 1978 (the “Code”), the U.S. courts responded inconsistently over the years to issues involving the recognition of foreign insolvency proceedings and the claims of foreign representatives. See id. at 1–3; Stuart A. Krauss et al., Relief Under Section 304 of the Bankruptcy Code: Clarifying the Principal Role of Comity in Transnational Insolvencies, 64 FORDHAM L. REV. 2591, 2594 (1996). Following the 1973 oil embargo, the need for reform became obvious in the aftermath of the insolvency of three major international financial players. See Krauss et al., supra, at 2594–95. The first of the three cases involved Bankhaus I.D. Herstatt K.G.a.A. (“Herstatt”), a major West German commercial bank with millions of dollars on deposit in the United States. See id. When Herstatt failed, Chase Manhattan Bank froze more than $50 million of Herstatt’s assets. See id. A mad scramble for Herstatt’s assets ensued as the German liquidator stayed out of the United States to avoid being subject to personal jurisdiction, and withering pretrial discovery followed. See id. The parties eventually settled without a final decision on their pending bankruptcy appeal, leaving the distinct impression that the system surrounding transnational insolvencies needed urgent reform. See id.
26 See Westbrook, supra note 4, at 755.
27 See id. at 754–55.
28 See id. at 755. This ensures that default judgments and collusion are avoided. See id.
29 See generally id.
2. The Need to Promote Cross-border Judicial Cooperation and to Share Information

At present, there is no uniform set of rules or practices relating to court assistance in cross-border insolvencies.\textsuperscript{30} When insolvency proceedings are initiated in one State, the liquidator of the debtor’s assets, or an interested creditor, may require assistance from a foreign court.\textsuperscript{31} Some States do not entertain formal requests for assistance by foreign liquidators, necessitating the filing of a full-blown local bankruptcy.\textsuperscript{32} Other States have rules that specifically address court assistance.\textsuperscript{33} Yet other States have no specific rules and judicial cooperation proceeds on an unpredictable, \textit{ad hoc} basis.\textsuperscript{34} The efficient and equitable administration of a transnational debtor’s estate, and concomitantly, the terms of international trade and finance, are adversely affected by this lack of uniformity (or anarchy, as some commentators have more boldly stated) in judicial rules and procedure.\textsuperscript{35}

Basic communication between the courts involved in a transnational insolvency is clearly important for the efficient administration of the debtor’s estate.\textsuperscript{36} Most countries require extensive disclosures from the debtor, especially regarding the nature of its financial affairs, which for the sake of administrative expediency should be available to the courts (and parties) in each interested jurisdiction.\textsuperscript{37} Along similar lines, adequate notice to interested parties, including foreign creditors, is a necessary element of any efficient administration of a global insolvency.\textsuperscript{38} A reliable mechanism for the dissemination of such basic information is needed.\textsuperscript{39}

\textsuperscript{30} See id. at 745; see also UNCITRAL 26th Sess., \textit{supra} note 11, at 4, ¶ 18.
\textsuperscript{31} See UNCITRAL 26th Sess., \textit{supra} note 11, at 4, ¶ 17. The assistance requested will vary from case to case and may include turning over assets to the foreign liquidator; publicizing foreign insolvency proceedings; suspending a creditor’s legal action against the debtor that would, contrary to the principle of equality among creditors, diminish the debtor’s estate; or challenging preferential transfers of property or transfers alleged to be fraudulent. See id.
\textsuperscript{32} See id. at 5, ¶ 18.
\textsuperscript{33} See id.
\textsuperscript{34} See id. at 5, ¶ 19.
\textsuperscript{35} See Dunne, \textit{supra} note 9, at 99.
\textsuperscript{36} See Westbrook, \textit{supra} note 4, at 755.
\textsuperscript{37} See id.
\textsuperscript{38} See id.
\textsuperscript{39} See id.
3. The Need for Creditor Participation

Because resolution and payment of creditor claims is fundamental to every State's insolvency proceeding, nearly every State has devices for creditor involvement in the process. The greatest challenge to creditor involvement in cross-border insolvencies stems from the differential treatment of local and foreign creditors, often to the foreign creditor's detriment. Discriminatory treatment is most evident when a foreign creditor's claim is relegated to a lesser priority regardless of its status under the domestic law, or in its home State, merely because it is a foreign claim. The reasons for this treatment are apparent. Insolvency regimes are closed systems of loss allocation that distribute insolvency proceeds according to a pre-determined hierarchy. This means that every cent paid to one party translates into one cent less for another. Basic principles of national self-interest dictate a discriminatory attitude towards non-domestic claims, i.e., any State could determine under its domestic law that foreign creditors are entitled to be paid last, if at all, from the proceeds of a domestic insolvency proceeding. A nondiscriminatory rule on the treatment of foreign creditors so that foreign creditors are treated like local creditors in all respects in cross-border insolvencies may be a noble, but elusive, goal.

The issues with claim status and priority, however, extend beyond blatant discrimination based on the nationality of the particular creditor. The challenge in cross-border insolvencies arises because the

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40 See id.; Glosband & Katucki, supra note 9, at 477.
41 See Westbrook, supra note 4, at 755; Gaa & Garzon, supra note 9, at 280–81; Glosband & Katucki, supra note 9, at 480. ("Bankruptcy proceedings of a multinational debtor add a refractive layer of issues to the consideration of claims. Assets and creditors may be located in countries which have different laws regarding the avoidance of preferential or fraudulent transfers to creditors, the recognition of certain types of liens, priority accorded certain unsecured claims, or the recognition of foreign bankruptcy proceedings or foreign creditors.") Issues relating to the method and timing of the notice that must be given to foreign creditors by the court at the commencement of a bankruptcy proceeding, for example, are unresolved. See Gaa & Garzon, supra note 9, at 281. The status of foreign tax claims and social security authorities has also presented fundamental problems. See id. States naturally balk at having to pay a foreign State's revenue claims from proceeds of a local liquidation at the expense of its local creditors. See id. 42 See Gaa & Garzon, supra note 9, at 281; Glosband & Katucki, supra note 9, at 481.
44 See id.
45 See Glosband & Katucki, supra note 9, at 481.
46 See Gaa & Garzon, supra note 9, at 281; Glosband & Katucki, supra note 9, at 480–81.
definitions and priority ranking of claims vary greatly from State to State.\textsuperscript{47} Thus, even if a foreign claim were admitted to the same or equivalent class in a local proceeding as the foreign creditor would have enjoyed in its home State, treatment of the foreign creditor may nevertheless be substantially different if the class to which it is admitted is less favored in the local proceeding.\textsuperscript{48} The United States Bankruptcy Code, for example, divides claims into three general categories—secured, priority, and unsecured.\textsuperscript{49} Each category is defined and paid according to a specified priority ranking that reflects United States social and political objectives.\textsuperscript{50} It is unlikely that another State will share the same policy goals in its insolvency distribution scheme. Thus a creditor’s claim that enjoys high priority and consequently substantial likelihood of payment under the U.S. Code may have no priority and nominal dividend in a foreign proceeding.\textsuperscript{51} And as one commentator remarked, “[i]t is important to note that this priority/preference problem includes as a major component the question of the rights of secured creditors.”\textsuperscript{52}

4. The Need for Consistent Application of Choice of Law and Choice of Forum Rules

Most States lack a formally articulated choice of law and choice of forum for resolving cross-border insolvencies.\textsuperscript{53} Choice of law and forum are the basis for the two threshold decisions any State encounters when resolving a cross-border insolvency case: (1) what is the national body of law that will govern the financial consequences of the default? and (2) what public institution in one or more countries will govern the default?\textsuperscript{54}

\textsuperscript{47} See Gaa & Garzon, \textit{supra} note 9, at 281. The U.S. Bankruptcy Code, for example, unlike many other systems, recognizes contingent claims. See 11 U.S.C. § 101(4) (1994) (definition of claim). Thus a U.S. creditor’s contingent claim would be valid in a U.S. proceeding, but may not be recognized abroad. If the debtor files in a jurisdiction that does not recognize contingent claims, the U.S. creditor, absent the initiation of a domestic proceeding, is left with little or no recourse.

\textsuperscript{48} See Gaa & Garzon, \textit{supra} note 9, at 281. Thus for example, a claim by a commercial fisherman debtor who enjoys special priority in a U.S. proceeding and who is likely to receive a high dividend on his or her claim, may be relegated to non-priority in a foreign proceeding that has no special rule promoting the debtor’s interest. See 11 U.S.C. § 507(a)(6) (1994).


\textsuperscript{50} See Glosband & Katucki, \textit{supra} note 9, at 478–79.

\textsuperscript{51} See \textit{id}.

\textsuperscript{52} Westbrook, \textit{supra} note 4, at 756.

\textsuperscript{53} See Westbrook, \textit{supra} note 2, at 459.

\textsuperscript{54} See \textit{id}.
The insolvency of a multinational entity will routinely require several choices of law and fora. The most significant choice of law issues are: (1) formal versus informal resolution of the financial crisis; (2) liquidation versus reorganization of the entity; (3) distribution of the estate; and (4) avoidance of certain transactions. Similarly, management of a transnational insolvency proceeding will invoke choice of forum issues because assets in various jurisdictions cannot be managed without the assistance, or acquiescence, of a local authority in each jurisdiction.

Presently no reasoned choice of law analysis governs and cooperation between States is rare. Debtors and creditors use the lack of established choices as strategic devices to maximize their interests in bankruptcy. Thus even in a case such as In re Maxwell Communications Corp., cited for its high level of international cooperation and harmonization, choice of law and forum issues remain unresolved. It involved the dissolution of the global publishing empire of Robert Maxwell. The corporation was unusual in that it had its true "seat" of operation in London, where it was administered and where nearly all of its financial affairs were managed, but its principal assets were located in the United States. This corporate structure resulted in dual proceedings: an insolvency administration in the United Kingdom and a chapter 11 bankruptcy in the United States. Although the United States bankruptcy judge refused to dismiss the chapter 11 proceedings, she did provide unprecedented cooperation to the British administrators. One significant piece of litigation, however, involved a classic choice of law (and forum) issue notwithstanding a negotiated forum selection clause in the parties' trade contracts.

The choice of law issue concerned the burden of proof in a preference action. The British liquidator sought to avoid several transfers

55 See id.
56 See id. at 459–60.
57 See id. at 460.
58 See Westbrook, supra note 8, at 2534.
59 See 93 F.3d 1036 (2d Cir. 1996).
60 See Westbrook, supra note 8, at 2534 (citing In re Maxwell as "one of the most important transnational insolvencies of modern times").
61 See In re Maxwell, 93 F.3d at 1040.
62 See id.
63 See id.
64 See Westbrook, supra note 8, at 2534.
65 See In re Maxwell, 93 F.3d at 1040–41.
made by the debtor to British banks prior to bankruptcy.\textsuperscript{66} Although the transfers were within the United Kingdom, were made to British banks and to the London branch of a French bank, and were made by a debtor with its principal place of business in Britain, the liquidator sought to apply United States bankruptcy preference law.\textsuperscript{67} The strategic reason was straightforward: establishing that the transfers were preferential payments involved a lesser burden of proof under U.S. law.\textsuperscript{68} Even though it appeared evident that British law should have applied to the transfers, the liquidators argued that (1) most of the debtor's assets were in the United States; and (2) certain of the moneys paid in the transfers had come from liquidation of U.S. assets.\textsuperscript{69} The U.S. court dismissed the preference action holding that the debtor's contacts with the United States were insufficient to overcome the many elements of the transaction connected with the United Kingdom.\textsuperscript{70} Although the court reached the "right" outcome based on a conflicts of law analysis,\textsuperscript{71} the question of which law to apply to a simple bankruptcy preference involved extensive litigation in both U.S. and U.K. courts. A clear choice of law rule incorporated into the State's insolvency system could have avoided the expense and delay of the litigation.\textsuperscript{72} This has proved to be sufficiently intricate so that even the drafters of the Model Law have chosen not to address it directly.

The lack of substantial progress in the choice of law and choice of forum areas imposes significant costs on transnational enterprise.\textsuperscript{73} In

\textsuperscript{66} See id. at 1042–43.

\textsuperscript{67} See id. at 1043; Westbrook, \textit{supra} note 8, at 2537.

\textsuperscript{68} See \textit{In re Maxwell}, 93 F.3d at 1043. Under U.S. law, a trustee may avoid certain transfers to outside creditors made within ninety days before the filing of a bankruptcy petition. See 11 U.S.C. \textsection 547(b) (1994). Transfers that place transferees, if left unchecked, in a better position than other creditors upon the debtor's insolvency are referred to as preferences, and may be avoided by the trustee for the benefit of all creditors generally. See \textit{In re Maxwell}, 93 F.3d at 1043. According to the court, the corresponding provision in English law is similar to the U.S. law but imposes an additional condition—it limits avoidance to those situations where placing the transferee in a better position was something the debtor intended. See id. The U.K. liquidators in \textit{In re Maxwell} sought to litigate the debtors' transfers under U.S. law because the intent requirement in English law would have presented a significant or insurmountable obstacle. See id.

\textsuperscript{69} See \textit{In re Maxwell}, 93 F.3d at 1054–55; Westbrook, \textit{supra} note 8, at 2537.

\textsuperscript{70} See \textit{In re Maxwell}, 93 F.3d at 1054–55.

\textsuperscript{71} The court's conflict of laws analysis is sufficiently esoteric to be beyond the scope of this note. See \textit{id.} at 1046–47. For a more detailed analysis see generally Westbrook, \textit{supra} note 8, at 2538.

\textsuperscript{72} A fixed choice of law rule may prejudice local interests in particular cases. Theoretically, however, such a rule would increase values available to all local interests over time in all general defaults so as to offset the losses that a particular local interest might suffer in one case. See Westbrook, \textit{supra} note 2, at 465–66.

\textsuperscript{73} See \textit{id.} at 460.
addition to direct litigation expenses, the inability to predict the results of default imposes costs. This capricious state of affairs adds to the cost of international transactions, particularly to the cost of international financings. Another significant cost arises in the insolvency process itself. The present incoherent system destroys values that would otherwise be available to claimants in the enterprise. Piecemeal dismemberment of a multinational enterprise, without regard to the natural economic units of sale, may greatly lessen the prices obtained for the assets and may lower the return available to claimants.

5. Other Unresolved Needs in Cross-Border Insolvencies

Choice of law and choice of forum issues are intensified by avoidance powers. Unlike ordinary choice of law conflicts regulating the scope of any given transaction, the question of what law should apply to determine whether a certain transaction is avoidable is inextricably tied to the legal governance of the entire proceeding. The laws governing avoidance powers—the ability of the bankruptcy administrator to undo certain transactions to increase the assets available for distri-

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74 See id.
75 See id.; see also Robert K. Rasmussen, A New Approach to Transnational Insolvencies, 19 Mich. J. Int'l L. 1, 1 (1997) (arguing that lack of consistency in choice of law issues decreases efficiency and is detrimental to social welfare).
76 See Westbrook, supra note 2, at 460-61.
77 See id. at 460-61; Rasmussen, supra note 75, at 4-5.
78 See Westbrook, supra note 4, at 756. Like choice of law issues in general, the Model Law largely avoids the issue of avoidance powers, although it does grant standing to raise the issue. See infra note 234 and accompanying text.
79 A case illustration demonstrates the distinction. In In re Koreag, a Swiss company filed for bankruptcy in Switzerland. See Koreag, Controle et Revision S.A. v. Refco F/X Assocs., Inc. (In re Koreag, Controle et Revision, S.A.), 961 F.2d 341, 344-46 (2d Cir. 1992). The Swiss firm, Mebco, was engaged in currency transactions with a U.S. party, Refco, at the time of the filing. See id. A suit initiated by the Swiss liquidator ensued in the U.S. bankruptcy court regarding the transfer of certain monies in Mebco’s New York accounts, including monies that would have been paid to Refco absent the bankruptcy. See id. at 346-47. Although arguably relying on the wrong choice of law and forum, see Westbrook, supra note 4, at 748, the U.S. Court had to resolve general issues regarding property and title of the disputed funds. See In re Koreag, 961 F.2d at 348, 350-52. The question of ownership, which laws regulate the effect of contracts, and which State’s procedures for perfecting security interests should be followed are standard choice of law issues that arise in almost every cross-border insolvency case. See Westbrook, supra note 4, at 748. In In re Koreag, the U.S. court remanded the case for a determination of whether a constructive trust—under New York law—should be imposed upon the disputed funds, thereby removing them from jurisdiction of the Swiss proceedings. See 961 F.2d at 355.
80 See Westbrook, supra note 4, at 748, 756.
bution to general creditors—reflect domestic beliefs and values. The priority granted to perfected security interests in the United States, for example, is not present in many European insolvency laws. Deciding which State’s avoidance powers to apply, therefore, invokes policy decisions that are absent in standard choice of law decisions regarding simple contracts and property rights. All avoidance powers, including fraudulent transfer laws and preference laws, raise policy concerns not just limited to the preference issues raised in the In re Maxwell case.

Another unresolved issue in cross-border insolvency law is what type of entity should be covered by cross-border insolvency legislation. Are natural persons (i.e., human beings) or only legal persons (e.g., corporations) eligible for relief? One commentator has noted that:

The bankruptcies of natural persons implicate virtually every aspect of a nation’s laws and social policies, far more than do proceedings involving corporations. The financial failure of human beings may be deeply intertwined with domestic and family laws, including divorce, custody, and support. Questions of exempt property and personal discharge inevitably arise, along with problems of criminal responsibility. These and many other issues are treated very differently under the laws of different countries and the policies underlying them are both fundamental and fraught with the deepest emotional and moral concerns.

The effect States give to bankruptcy discharges granted in another State, whether for an individual or business filing, is also unsettled. Similarly, controversy surrounds the determination of whom should run the debtor’s affairs during (and after) a bankruptcy proceeding. States take different approaches regarding who controls the day-to-day decision-making process while the entity is in bankruptcy, how to treat incomplete contracts which have not been fully performed, and the

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81 See id.
82 See id.
83 See, e.g., Rasmussen, supra note 75, at 13.
84 Westbrook, supra note 4, at 757.
85 See id. at 756. In a recent German case, a German court gave legal effect in Germany to the discharge of a Swiss citizen. See Decision of May 27, 1993, IX ZR 254/92, discussed in Cristoph G. Paulus, A New German Decision on International Insolvency Law, 41 Am. J. Comp. L. 667 (1994). The discharge had been granted in a Swiss bankruptcy proceeding under the new Swiss insolvency law; the German court’s recognition of the foreign State’s discharge was unprecedented. See id.
86 See, e.g., Rasmussen, supra note 75, at 14.
source of compensation for administrative and legal expenses. Corporate reorganization, a concept that the U.S. takes for granted, is by no means accepted as sound policy in other States. And even if two States could agree on the criteria under which a business is allowed to reorganize, the question of who should manage the reorganization remains unclear. Under U.S. law, for example, absent a court order to the contrary, the debtor’s current managers are left in charge of its affairs while the entity attempts to restructure. English law, in contrast, allows for the appointment of an administrator who has the power to displace the current management if he so chooses.

The creation of a cross-filing or marshaling provision would also benefit cross-border insolvency cases. Such a rule would limit a creditor’s recovery in any given proceeding by factoring in amounts the creditor has already recovered in a proceeding in another jurisdiction. Cross-filing would permit the liquidator in each proceeding to file in every other proceeding on behalf of all creditors represented by the liquidator in the initial proceeding.

B. Existing Approaches to Cross-border Insolvencies: Universality and Territoriality

There are essentially two analytical theories of cross-border insolvency: the “universality” approach, and the “territoriality” approach.

87 See id.
88 See id.
89 See id.
90 See id.
91 See Westbrook, supra note 4, at 755.
92 See id. Thus for example, in a cross-border insolvency case, if Debtor X owed Bank B a total of $100,000, Bank B would be limited to recovering no more than other creditors in its class, regardless of the jurisdiction in which Bank B pursued Debtor X. If Bank B were able to recover $20,000 on its claim in the United States, and $40,000 on its claim in the United Kingdom, and the total dividend for creditors similarly situated is $60,000, then Bank B would not be allowed to recover an additional $40,000 in a German court, merely because it filed suit faster than other creditors. See 11 U.S.C. § 508 (1994).
93 See Westbrook, supra note 4, at 755–56.
94 See Todd Kraft & Allison Aranson, Transnational Bankruptcies: Section 304 and Beyond, 1993 Colum. Bus. L. Rev. 329, 336–38 (1993) (citing territoriality and universality as two approaches); Krauss et al., supra note 25, at 2592–93 (arguing that universality and territoriality are subservient to primary question of whether to extend comity under U.S. bankruptcy code); Glosband & Katucki, supra note 9, at 479–82 (doctrine of territoriality, also known as pluralism, and doctrine of universality are two primary extant philosophies of transnational insolvency); Booth, supra note 10, at 4 (scholars have developed two approaches to cross-border insolvency issues, the universality approach which includes “personalist” and “unity,” and the territoriality approach
The universality approach favors a single, unified distribution of the debtor’s assets from one central forum.\textsuperscript{95} One jurisdiction retains the primary duty to resolve the debtor’s financial difficulties and additionally coordinates the actions in other jurisdictions in aid of its centralized proceeding.\textsuperscript{96} The territorially approach emphasizes the rights of local creditors and follows the strict rule of sovereignty.\textsuperscript{97} The doctrine interprets the rule of sovereignty to require that the authority of one State, including its bankruptcy laws and proceedings, should be confined to its own territory.\textsuperscript{98} Under strict application of this theory, each State conducts its own bankruptcy proceeding with respect to the assets located within its jurisdiction and disregards any parallel proceedings in foreign jurisdictions.\textsuperscript{99} Although some modern cases reflect a strong and growing momentum towards universality,\textsuperscript{100} territoriality is historically the predominant philosophy espoused by States, and even States which exhibit support of universality\textsuperscript{101} apply territorial principles on an \textit{ad hoc} basis.\textsuperscript{102}

1. Territoriality—Its Scope and Application

Under a territorial system, when a transnational business entity files bankruptcy, each State distributes the value of the debtor’s property located within its own jurisdiction.\textsuperscript{103} Territoriality-based States do not recognize the legitimacy of foreign insolvency proceedings, or recognize them in limited respects with minimal effect.\textsuperscript{104} The court in each State grabs the assets within its borders and administers those assets with little regard to any foreign proceeding involving the same debtor.\textsuperscript{105} The territoriality approach is based on numerous factors, includ-

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\textsuperscript{95} See Burman, \textit{supra} note 94, at 2549; Krauss et al., \textit{supra} note 25, at 2591–92.

\textsuperscript{96} See Burman, \textit{supra} note 94, at 2549; Krauss et. al., \textit{supra} note 25, at 2591–92.

\textsuperscript{97} See Burman, \textit{supra} note 94, at 2552; Glosband & Katucki, \textit{supra} note 9, at 480.

\textsuperscript{98} See Burman, \textit{supra} note 94, at 2552; Glosband & Katucki, \textit{supra} note 9, at 480.

\textsuperscript{99} See Glosband & Katucki, \textit{supra} note 9, at 480.

\textsuperscript{100} See Westbrook, \textit{supra} note 4, at 750–51.

\textsuperscript{101} Such as, arguably, the United States in § 304 of the Bankruptcy Code. See 11 \textit{U.S.C} § 304 (1994).

\textsuperscript{102} See Burman, \textit{supra} note 94, at 2551–52; Westbrook, \textit{supra} note 4, at 748.

\textsuperscript{103} See Kraft & Aranson, \textit{supra} note 94, at 337.

\textsuperscript{104} See Burman, \textit{supra} note 94, at 2551.

\textsuperscript{105} See Kraft & Aranson, \textit{supra} note 94, at 336; Rasmussen, \textit{supra} note 75, at 2.
ing the court’s perceived duty to protect local creditors or the debtor, the need to protect the local jurisdiction of the courts, administrators and trustees, and the historically grounded general objections to extraterritorial application of foreign laws and recognition of foreign representatives. 106

Local creditors favor territoriality because it produces predictable results that preserve the integrity of the local system. 107 Claims, liens and priorities are applied according to local laws and policies, and local creditors do not have to travel far to attach property. 108 Application of the territoriality principle, however, often results in the unfair and uneven treatment of creditors. 109 Moreover, it sacrifices international cooperation, 110 rejects the principle of equality of distribution in favor of a regime that rewards the fastest moving creditor, 111 and generates a multiplicity of bankruptcy proceedings and duplicative administrative expenses. 112

A modern application of territoriality appears in In re Toga Manufacturing (“Toga”), a case in which the U.S. bankruptcy court failed to recognize the laws of a foreign proceeding in favor of local interests. 113 In Toga, a Canadian debtor petitioned the U.S. court for an injunction against all the debtor’s creditors in the United States, and a turnover order for certain funds that were held in a Michigan bankruptcy court

106 See Booth, supra note 10, at 138; Burman, supra note 94, at 2552.
107 See Dunne, supra note 9, at 99 (“First to be settled should be the conflict between territoriality and centrality—hopefully in favor of the former”); Glosband & Katucki, supra note 9, at 480; Rasmussen, supra note 75, at 5–6.
108 See Glosband & Katucki, supra note 9, at 480–81.
109 See id. at 481.
110 See id.
111 See Booth, supra note 10, at 5.
112 See id.; Glosband & Katucki, supra note 9, at 481. A classic illustration of the territoriality approach is that advocated by Chief Justice Marshall in Harrison v. Sterry, 9 U.S. 289 (1809). Justice Marshall based his holding favoring the domestic creditors on the fact that the “bankruptcy law of a foreign country is incapable of operating a legal transfer of property in the United States.” Id. at 302. The conclusion followed from the territorial principle that the “United States [is] not deprived of . . . priority [in applying its laws] . . . by the circumstance that the contract was made in a foreign country.” Id. at 299; see also Booth, supra note 10, at 7–8 (complete analysis and development of classical territoriality). The prevailing classic view of territoriality was justified by the potentially prejudicial effects on the interests of local creditors by the operation of foreign laws under the universality approach. See id. at 7–8. Under this view, transnational insolvency problems should be resolved in accordance with principles of comity, but “only so far as may be done without impairing the remedies, or lessening the securities, which [domestic] laws have provided for [domestic] citizens.” Id. (quoting J. Story, Commentaries on the Conflict of Laws §§ 403–409, at 565–75 (8th ed. 1883)).
subject to an attachment lien by a local U.S. creditor.\textsuperscript{114} The bankruptcy court denied the debtor's motion.\textsuperscript{115} The \textit{Toga} court reasoned that relief was not available because the U.S. creditor's claim under U.S. law would be one of the first to receive payment, in contrast to the creditor's treatment under Canadian law where it would most likely be just an "ordinary creditor" without secured status.\textsuperscript{116} Although the court recognized the universality principles embodied in the U.S. Bankruptcy Code,\textsuperscript{117} it relied on classic territoriality-based doctrines to reach its holding favoring the U.S. creditor.\textsuperscript{118} "Under this theory," the court stated, "any country is free to entertain proceedings pursuant to their [sic] bankruptcy laws without regard to any foreign judgment."\textsuperscript{119} The court concluded that it "must protect United States citizens' claims against foreign judgments inconsistent with [the U.S.'s] well-defined and accepted policies," and that the Canadian debtor's request therefore had to be denied.\textsuperscript{120}

Although most scholars agree that universality is the preferable approach to resolving cross-border insolvency issues,\textsuperscript{121} at least one author (and creditors) argue in favor of territoriality.\textsuperscript{122} One modern territoriality-based theory suggests that the choice of applicable insolvency law should be determined by the owners of the firms, i.e., placed in the private domain.\textsuperscript{123} The following beliefs underlie this hypothesis: (1) private international law is built on the concept of voluntary agreement between parties; (2) contracting parties are often allowed more freedom in the international realm than in the domestic realm; and (3) this principle of private contractual choice should be extended to the selection of insolvency rules.\textsuperscript{124} Thus, because existing private international law generally recognizes the validity of forum-selection

\textsuperscript{114} See id. at 167. For a thorough discussion of the \textit{Toga} case, see generally Booth, \textit{supra} note 2, at 184-192.

\textsuperscript{115} See \textit{In re Toga}, 28 B.R. at 170-71.

\textsuperscript{116} See id. at 170.

\textsuperscript{117} See id. at 167-68 ("Section 304 of the Code . . . embodies universal theory of conflicts of laws with some qualifications").

\textsuperscript{118} See id. at 167.

\textsuperscript{119} Id.

\textsuperscript{120} \textit{In re Toga}, 28 B.R. at 170.

\textsuperscript{121} See, e.g., Booth, \textit{supra} note 2, at 5; Burman, \textit{supra} note 94, at 2549; Glosband & Katucki, \textit{supra} note 9, at 479-82; Kraft & Aranson, \textit{supra} note 94, at 336-38; Krauss et al., \textit{supra} note 25, at 2592-93.

\textsuperscript{122} See generally Dunne, \textit{supra} note 9; Rasmussen, \textit{supra} note 75.

\textsuperscript{123} See Rasmussen, \textit{supra} note 75, at 4-6.

\textsuperscript{124} See id.
clauses and choice of law clauses in private contracts, extending such recognition notwithstanding an insolvency proceeding is justified because it generates greater predictability in international trade and maximizes firm efficiency and social welfare. Under this approach to cross-border insolvency, firms would have a menu of insolvency regimes from which they could choose, a choice that would be made at incorporation and which could be amended as the structure of the firm changed over time. Although businesses may differ as to which set of insolvency rules are most efficient, under this menu-based system, market forces would, over time, produce optimal diversity.

Under this menu-based bankruptcy theory, the resolution of the cross-border insolvency problem should not focus on the contours of the optimal menu or on which single default insolvency rule should govern all proceedings, but rather, should focus on the question of which set of insolvency rules should be offered to multinational firms. Firm choice would, and should, replace government mandate. “For many firms the territorial approach may actually provide a superior set of insolvency rules. Moreover, the territorial approach may be able to replicate procedural universality when it is appropriate to do so. On balance, one cannot conclude that one approach dominates the other. Empirical evidence is needed to ascertain the types of multinational firms which encounter financial distress.”

125 See id. “The owners of firms, not governments, are better positioned to select the insolvency rule which best maximizes firm value.” Id. at 4-5.

126 See id. at 5, 19-22.

127 Accordingly, the choice of insolvency law to be applied should be left to market forces because legislatures are limited in their ability to generate efficient solutions. See Rasmussen, supra note 75, at 5. Legislatures must pass laws affecting a broad range of interests and are therefore unable to engage in the critical cost-benefit analysis used by individual firms assessing the efficiency of any set of insolvency rules. See id. This theoretical approach assumes that there are essentially two institutions which are potential candidates for selecting insolvency rules, i.e., the market represented by the owners of businesses, and the government, represented by the legislature; the market has a clear advantage over the government because it alone can accurately ascertain the price of different insolvency rules. See id.

128 See Rasmussen, supra note 75, at 26.

129 See id. Such a general rule fulfills the expectations of the parties and allows them to ascertain with relative certainty what their rights will be under the contract. See id. This theory is territoriality-based because it condones the application of local substantive law to assets located within a State’s jurisdiction, rather than promoting the concept of a centralized forum. Firm choice, although ideally left unfettered to the greatest extent possible, would not be completely unregulated. See id. A corporation would not be allowed to select one country as the forum for the dispute, and then be able to specify the application of another country’s bankruptcy law. See id. Subject to this restriction, however, a corporation would be allowed to specify which country or countries should administer its affairs if it encounters financial distress. See id. at 26-27.

130 Rasmussen, supra note 75, at 26.
2. Universality—Its Scope and Application

There are several variations of the universality approach. In its most pristine form, the pure universality approach has as its objective the development of a common insolvency regime among nations. This would result in a single administrator for a cross-border proceeding, or a principal administrator who would coordinate the actions of all forums. The debtor's assets and interests would be administered under this unified regime, thereby vitiating the need for multiple proceedings, duplicative administrative expenses, and unequal treatment of similarly situated classes of creditors. Although such a unified approach sounds like an attractive panacea, as a practical matter, it would require that the bankruptcy laws of all States be substantially similar, if not identical, or that each secondary State defer entirely to the primary State's insolvency proceeding. Both events are unlikely to occur in the near future.

Under a pragmatically modified universality approach, the goal is to simplify and unify a cross-border insolvency to the greatest extent possible. A central bankruptcy proceeding, often referred to as the "main proceeding," is initiated in the jurisdiction in which the debtor is domiciled or has its principle place of business. The bankruptcy trustee or liquidator from the main proceeding attempts to collect all of the debtor's assets worldwide, and seeks the turnover of all such assets to the main proceeding. To do so, the trustee travels abroad and commences ancillary proceedings in each State in which the debtor's assets are located. In each of the ancillary proceedings, the foreign State's court gives effect to the declaration of bankruptcy in the main proceeding, recognizes the claims of the trustee, orders the turnover of all local assets to the main proceeding, and applies the substantive laws of the country in which the main proceeding is being

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131 See id. at 16; see also sources cited supra note 94.
132 See Burman, supra note 94, at 2550–52. Imagine, if you will, a unified law on bankruptcy, comparable to Article 9 of the U.C.C. with regards to its effects, but with global application, adopted uniformly by all nations.
133 See Booth, supra note 2, at 5; Glosband & Katucki, supra note 9, at 481–82.
134 See Booth, supra note 2, at 5; Glosband & Katucki, supra note 9, at 481–82.
135 See Booth, supra note 2, at 5; Glosband & Katucki, supra note 9, at 481–82.
136 See Booth, supra note 2, at 5; see also sources cited supra note 94.
137 See Booth, supra note 2, at 4.
138 See id.
139 See id.
administered. All creditors worldwide should submit claims solely in the main proceeding.

One of the primary advantages of the universality approach is that creditors of the same class would be treated alike. Because all claims are resolved and all distributions to creditors are made from a unified estate, creditors of the same class would be treated alike, regardless of nationality. Other advantages of the universality approach include the forbearance of duplicative proceedings and litigation, a limitation on debtor and creditor forum-shopping, and lower administrative costs. The disadvantage most often charged against the universality approach is that certain creditors who would have benefited from local priority or preference schemes in their home countries under a territorial system are disadvantaged. These creditors may suffer hardship that could be exacerbated by the need to travel abroad to realize dividends on their claims. In fact, the increased cost of pursuing litigation abroad may deter smaller claim-holders from pursuing their rights altogether. This could be the result notwithstanding voluntary agreements to the contrary, for example, through forum-selection clauses incorporated into international contracts.

The case most often cited as the essence of the universality approach is In re Maxwell Communications Corp., discussed earlier. The In re Maxwell case involved the dissolution of billionaire Robert Maxwell’s international publishing empire. With its principal seat of business located in London, England, but most of its assets distributed throughout the United States, the administration of the debtor’s affairs re-

140 See id.
141 See id.
142 See Booth, supra note 2, at 4; Glosband & Katucki, supra note 9, at 481.
143 See Booth, supra note 2, at 5; Glosband & Katucki, supra note 9, at 481.
144 See Booth, supra note 2, at 5; Glosband & Katucki, supra note 9, at 481; Kraft & Aranson, supra note 94, at 336.
145 See Booth, supra note 2, at 5; Glosband & Katucki, supra note 9, at 481; Kraft & Aranson, supra note 94, at 336.
146 See Booth, supra note 2, at 5; Glosband & Katucki, supra note 9, at 481; Kraft & Aranson, supra note 94, at 336.
147 Although one could argue that this increased cost is a risk inherent in international trade transactions, and that a creditor should not engage in international transactions unless it is able and willing to pursue its rights in a foreign jurisdiction, such a position may generate an unequal playing field that favors large international entities to the exclusion of smaller enterprises.
148 See Rasmussen, supra note 75, at 5.
150 See In re Maxwell Communications Corp., 186 B.R. at 813–14.
resulted in the filing of two bankruptcy proceedings, an administration proceeding in the U.K. and a chapter 11 proceeding in the U.S.\textsuperscript{151} The U.S. bankruptcy judge, in one of the first instances of significant judicial cooperation, appointed a U.S. examiner with the explicit instructions to cooperate with the U.K. administrators.\textsuperscript{152} The joint administration of the estate resulted in what was "perhaps the first worldwide plan of orderly liquidation ever achieved."\textsuperscript{153} As described by U.S. bankruptcy Judge Tina Brozman:

the joint [U.K] administrators, with the concurrence of the [U.S.] examiner, filed their plan of reorganization . . . and scheme of arrangement. Although separate plan and scheme documents exist, the plan and scheme are mutually dependent and, in their effect, constitute a single mechanism, consistent with the laws of both countries, for reorganizing [Maxwell Communications Corporation] through the sale of assets as going concerns and for distributing assets to creditors . . . . Rather than carving up the assets for distribution by the two courts to different groups of creditors, the plan and scheme set up a single "pot" for distribution to all creditors. In keeping with the single distribution mechanism, creditors were permitted to submit a claim in either jurisdiction which would suffice for participation under both the plan and the scheme.\textsuperscript{154}

Although a universality approach is arguably the ideal, application of the universality doctrine has been inconsistent and unpredictable.\textsuperscript{155} The doctrine appears most successful in application between two States sharing similar legal systems and economic policies, as for example, the United States and the United Kingdom. But even between States as closely linked as the U.S. and Canada, or the U.S. and Australia, application of the universality doctrine is inconsistent.\textsuperscript{156} And as the

\textsuperscript{151}See id.
\textsuperscript{152}See Westbrook, \textit{supra note} 8, at 2535.
\textsuperscript{153}Id.
\textsuperscript{154}In \textit{re Maxwell} Communications Corp., 170 B.R. at 803.
\textsuperscript{155}See generally Booth, \textit{supra note} 2; Burman, \textit{supra note} 94.
similarities between the States lessen, the application of the doctrine likewise weakens.\textsuperscript{157}

III. THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

A. Origin, Mandate and Composition

The United Nations General Assembly established the U.N. Commission on International Trade Law (UNCITRAL) in 1966.\textsuperscript{158} The General Assembly created UNCITRAL in response to the growth of international trade and the obstacles with which it was besieged, in particular, the divergencies arising from the laws of different States relating to trade matters.\textsuperscript{159} Although the U.N. recognized efforts made by intergovernmental and non-governmental organizations towards progressive harmonization and unification of international trade law, the General Assembly noted that progress in the area was not commensurate with the importance and urgency of the problem.\textsuperscript{160} Based on its belief that the process of harmonization and unification of international


\textsuperscript{160} See id. The Secretary-General's report on international trade law defined the expression "law of international trade" as "the body of rules governing commercial relationships of a private law nature involving different countries." Id. Topics falling within the scope of the law of international trade include the international sale of goods, the formation of contracts, agency arrangements, exclusive sale arrangements, insurance, transportation, carriage of goods by sea or air, commercial arbitration, and industrial property and copyright. See id. The scope of international trade law does not extend to international commercial relations on the level of public law, such as transactions involving the attitude and behavior of States when regulating the conduct of trade affecting their territories, in the exercise of their sovereign powers (e.g., the General Agreement on Tariffs and Trade ("GATT") or TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Feb. 7, 1992, O.J. (C 224) 1 (1992), [1992] I C.M.L.R. 573 (1992) [hereinafter EC Treaty]). See id.
trade law should be substantially coordinated, systematized and accelerated, and that the United Nations should play a more active role in reducing and removing legal obstacles to the flow of international trade, the General Assembly established UNCITRAL as the vehicle through which it could meet its perceived obligations.\(^{161}\)

UNCITRAL’s mission is the promotion of the progressive harmonization and unification of the law of international trade.\(^{162}\) Since its inception, the Commission has become the core legal body of the U.N. system in the field of international trade law.\(^{163}\) It is composed of thirty-six member States elected by the General Assembly.\(^{164}\) Membership is designed to be representative of the world’s diverse geographic regions and its principal economic and legal systems.\(^{165}\)

B. **UNCITRAL Sessions and Working Groups**

The Commission carries out its work at annual sessions at which member and non-member States as well as interested international organizations are invited to attend.\(^{166}\) UNCITRAL has established three working groups to perform the substantive preparatory work on topics within its work program.\(^{167}\) Areas in which the Commission has worked or is working include: the international sale of goods and related matters,\(^{168}\) the international transport of goods,\(^{169}\) international com-

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\(^{161}\) See UNCITRAL 26th Sess., supra note 11.

\(^{162}\) G.A. Res. 2205, supra note 159.

\(^{163}\) See ITL Information, supra note 158.

\(^{164}\) See id.

\(^{165}\) Members of the Commission are elected for terms of six years, with terms of half the members expiring every three years. See id.

\(^{166}\) The annual sessions are held in alternate years at the U.N. Headquarters in New York and at the Vienna International Centre at Vienna. Non-member States and international organizations attend sessions as observers. Observers are permitted to participate in discussions at sessions of the Commission and its working groups to the same extent as members. See ITL Information, supra note 158.

\(^{167}\) See id. (each of the working groups is composed of all member States of the Commission).


mmercial arbitration and conciliation, public procurement, international payments, and electronic commerce.

C. Creation of the UNCITRAL Working Group on Insolvency Law and the Model Law on Cross-Border Insolvency

In 1992, UNCITRAL held a Congress under the theme "Uniform Commercial Law in the Twenty-first Century." An urgent topic at the 1992 Congress was the unpredictability and disharmony arising from international insolvencies, and the international community's lack of a coherent legal framework through which to manage the failure of multinational corporations. In 1993, the Commission requested an in-depth study on the desirability and feasibility of uniform rules for transnational insolvencies. Prior to the decision to undertake work on transnational insolvency, UNCITRAL and the International Association of Insolvency Practitioners (INSOL) held a Colloquium on Cross-Border Insolvency at Vienna in April, 1994.

One of the suggestions arising from the Colloquium was that work by UNCITRAL should initially be limited to the goals of facilitating judicial cooperation, court access for foreign insolvency administrators and recognition of foreign insolvency proceedings. Following these suggestions, an international meeting of judges was held to elicit their views on the specific subject. The participating judges and govern-


174 See UNCITRAL 30th Sess., *supra* note 8, at 5, ¶ 12.

175 See id.

176 See id.

177 See id.

178 See id.

179 See UNCITRAL 30th Sess., *supra* note 8, at 5, ¶ 12.
ment officials agreed that it would be worthwhile for UNCITRAL to provide a legislative framework through which to meet these goals.\textsuperscript{180}

In May, 1995, at its twenty-eighth session, UNCITRAL committed itself to the task of preparing uniform provisions on judicial cooperation in cross-border insolvencies, court access for foreign insolvency administrators and recognition of foreign insolvency proceedings.\textsuperscript{181} The project was entrusted to one of UNCITRAL's intergovernmental working groups predictably named the Working Group on Insolvency Law.\textsuperscript{182} The Working Group devoted four two-week sessions to work on the project from which the UNCITRAL Model Provisions on Cross-Border Insolvency arose.\textsuperscript{183} The Commission adopted the Model Law on Cross-Border Insolvency on May 30, 1997, after spending most of its Commission meeting debating and refining the draft produced by the Working Group.\textsuperscript{184}

III. IN FAVOR OF A UNIVERSAL SOLUTION: THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY

A. Development of the Act

The Final Draft of the Model Law on Cross-Border Insolvency (the "Model Law") was officially adopted after four two-week Working Group meetings between October 1995 and January 1997, and a three week meeting of the full United Nations Commission on International Trade Law.\textsuperscript{185} Adoption of the Model Law at the May, 1997 Commission meeting was anything but certain.\textsuperscript{186} Last minute negotiations at the January, 1997 Working Group meeting revolving around several key

\textsuperscript{180} See id.

\textsuperscript{181} See id. at 5, ¶ 13.

\textsuperscript{182} See id.

\textsuperscript{183} See id. (The sessions were held (1) from October 30 - November 10, 1995, in Vienna; (2) from April 1 - 12, 1996, in New York; (3) from October 7 - 18, 1996, in Vienna; and (4) from January 20 - 31, 1997, in New York. The full Commission meeting at which the Model Law was adopted was held from May 12 - 30, 1997, in Vienna.).

\textsuperscript{184} See UNCITRAL 30th Sess., supra note 8, at 5, ¶ 16.


\textsuperscript{186} See id.
components almost resulted in arrested progress and failure. Nevertheless, at the full commission meeting in May, over forty attendant countries adopted the Model Law as drafted.

The UNCITRAL Model Law on Cross-border Insolvency is primarily the result of private initiative, strongly supported by judges, judicial administrators and government officials. The UNCITRAL venture was a response to the observation that the old methods of dealing with cross border insolvency were insufficient to address the needs of parties and courts when faced with the difficulties of rescuing a corporate enterprise operating simultaneously in two or more States. In the hopes of achieving flexibility in application and expedition in enactment, the Commission opted to prepare model legislation in lieu of a model treaty. The Commission promoted model legislation and reserved consideration of model treaty provisions on judicial cooperation in cross-border insolvency for a later date because treaty negotiations and ratification are often more involved than individual enactment of legislation directed towards unifying an area of international law.

When an insolvency proceeding involves more than one country, the Model Law should produce essentially the following salutary results: creditors, regardless of country, will receive equal, non-discriminatory treatment; courts and representatives of insolvency estates will communicate and cooperate with each other to coordinate the administration of such estates and the conduct of concurrent proceedings involving a common debtor; and persons or bodies authorized to administer reorganizations or liquidations will have expeditious access to foreign courts and to the relief they need to protect the assets of the debtor or the interests of the creditors.

The Model Law seeks to accomplish its goals through a legal regime that reconciles three related concepts: recognition of a foreign insolvency proceeding by a State that has enacted the Model Law (referred

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187 See id.
188 See id. Completion of the drafting in the six U.N. languages, debate over one remnant article and completion of the official report occupied the final week of the three-week Commission meeting. See id.
189 See UNCITRAL 30th Sess., supra note 8, at 6, ¶ 18, 19.
190 See id. at 6, ¶ 22.
191 See id. at 7, ¶ 26.
192 See id.
193 Glosband Memo II, supra note 185, at 1. "Historically, most countries have locked their doors against entry by foreign insolvency proceedings." Id.
to as an "Enacting State"); access to judicial proceedings in the Enacting State by duly appointed foreign representatives; and the availability of specified relief upon recognition.\textsuperscript{194} The available relief is based on protecting the debtor's and creditors' interests in an orderly administration of the bankruptcy estate, including the assets situated in the Enacting State.\textsuperscript{195} The scope of relief varies and attempts to promote fairness for both local and foreign creditors in the claims adjudication process.\textsuperscript{196} As the Model Law is enacted by various States, its procedural mechanisms and forms of relief would become incorporated into the domestic law of the Enacting States, thereby increasing overall harmonization of cross-border insolvency law and practice generally.\textsuperscript{197}

B. Provisions of the Act

1. Policy and Scope

As stated in the Preamble, the purpose of the Model Law is to provide "effective mechanisms" for dealing with cross-border insolvency cases.\textsuperscript{198} This focus on procedural means through which to promote its objectives, rather than changes to substantive bankruptcy law, reflects the Model Law's private practitioner roots.\textsuperscript{199} International business is ultimately more concerned with predictable outcomes and stability than with "the best" substantive bankruptcy law.\textsuperscript{200} The Preamble continues to detail the specific objectives it seeks to achieve:

- cooperation between the courts and other competent authorities of the [Enacting] State and foreign States;
- greater legal certainty for trade and investment;
- 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

\textsuperscript{194} See Gaa & Garzon, supra note 9, at 274.
\textsuperscript{195} See id.
\textsuperscript{196} See id.
\textsuperscript{197} See id.
\textsuperscript{199} See Gaa & Garzon, supra note 9, at 273.
\textsuperscript{200} See e.g., Rasmussen, supra note 75, at 19–20.
facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.\textsuperscript{201}

The stated order of objectives is not determinative of actual priority, although to some degree it reflects the source of the Model Law: private practitioners, lenders, judges and judicial administrators.\textsuperscript{202} Facilitating judicial cooperation and providing improved court access for foreign insolvency administrators are the two suggested goals derived from the March, 1995 Judicial Colloquium on Cross-Border Insolvency that initially inspired the UNCITRAL Model Law project.\textsuperscript{203} Given UNCITRAL's private international law mission, promoting legal certainty for trade and investment is consistent with the Commission's fundamental goals and addresses the primary complaint by international lenders and businessmen.\textsuperscript{204} The fair and efficient administration of cross-border insolvencies,\textsuperscript{205} the protection and maximization of the debtor's assets, and the potential reorganization of the debtor's business,\textsuperscript{206} naturally and to some extent inevitably, follow from these first two objectives.\textsuperscript{207}

The Model Law lays the foundation for a universality-based legal regime but retains key territoriality provisions.\textsuperscript{208} Thus, the Model Law strives for cooperation between States in order to maximize harmonization between concurrent proceedings.\textsuperscript{209} To this extent it generates a universality-oriented system. However, the Model Law does not create a regime in which one insolvency proceeding necessarily dominates.\textsuperscript{210} Instead, the Model Law anticipates concurrent proceedings which it attempts to coordinate.\textsuperscript{211} Local parties in interest always retain the option of retreating to the familiar territory of a local proceeding.\textsuperscript{212}

\textsuperscript{201} Model Law, supra note 198, Preamble.

\textsuperscript{202} See UNCITRAL 30th Sess., supra note 8, at 5–6, ¶¶ 12, 17.

\textsuperscript{203} See id. at 5, ¶ 12.

\textsuperscript{204} See Dunne, supra note 9, at 99 (criticizing lack of certainty); Rasmussen, supra note 75, at 20–21.

\textsuperscript{205} See Model Law, supra note 198. The Model Law defines this, in part, by the protection of the interests of all creditors and the debtor. See id.

\textsuperscript{206} The inclusion of reorganization as a legitimate objective is actually remarkable, because many countries traditionally focus on liquidation. See Glosband Memo II, supra note 185, at 2 ("The nod to rescues which enhance investment and employment signals a nascent awareness by many countries that their traditional focus on liquidation may be anachronistic.").

\textsuperscript{207} See Model Law, supra note 198, Preamble, §§ (c)-(e).

\textsuperscript{208} See Glosband, supra note 158, at A7.

\textsuperscript{209} See id. at A7.

\textsuperscript{210} See id.

\textsuperscript{211} See id.

\textsuperscript{212} See id. at A9.
This deference to local proceedings was a political necessity and accommodates concerns about potentially over-intrusive foreign proceedings dominating local insolvency systems.\textsuperscript{213}

The Model Law balances universality goals against the needs of territoriality based regimes. A representative of a foreign insolvency proceeding can seek recognition and assistance in any State that enacts the Model Law,\textsuperscript{214} concurrent proceedings regarding the same debtor may be coordinated through provisions in the Model Law,\textsuperscript{215} and interested parties (including creditors) have a means to participate in a domestic proceeding.\textsuperscript{216} Enacting States may, however, choose to exclude certain insolvency proceedings involving special kinds of debtors, such as domestically regulated banks or insurance companies.\textsuperscript{217} Any conflicting treaty will supersede the Model Law,\textsuperscript{218} and courts retain the power to refuse action under the Model Law if it should be manifestly contrary to the public policy of the Enacting State.\textsuperscript{219}

2. Effects of and Relief Under the Model Law

Perhaps the most remarkable provision of the Model Law is its automatic creation of a limited stay upon recognition of a foreign insolvency proceeding in an Enacting State.\textsuperscript{220} Recognition of a foreign main proceeding enjoins (1) the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities;\textsuperscript{221} (2) execution against the debt-

\textsuperscript{213} See id; see also, e.g., Model Law, supra note 198, art. 21 (2) (allowing court to entrust the distribution of all or part of the debtor's assets located in the Enacting State to the foreign representative, "provided that the court is satisfied that the interests of [local creditors] are adequately protected"); art. 6 (allowing the court to refuse to take action under the Model Law if contrary to the public policy of the State); art. 20(4) (no automatic stay of commencement on local bankruptcy proceedings). If for example, a foreign proceeding has been recognized or an application for recognition has been filed and a subsequent local proceeding is commenced, any relief by the local court must be reviewed and will be modified if it is inconsistent with the local proceeding. See Glosband, supra note 158, at A7-A9.

\textsuperscript{214} Model Law, supra note 198, art. 1, §§ (a)-(b).

\textsuperscript{215} Id. § (c).

\textsuperscript{216} See Glosband Memo II, supra note 185, at 2-3; Gaa & Garzon, supra note 9, at 274-75.

\textsuperscript{217} See Model Law, supra note 191, art 1, § 2; Glosband Memo, supra note 178, at 3.

\textsuperscript{218} Model Law, supra note 198, art. 3.

\textsuperscript{219} Id. art. 6. ("Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State.").

\textsuperscript{220} See Model Law, supra note 198, art. 20, § (1); Gaa & Garzon, supra note 9, at 277; Glosband, supra note 158, at A7.

\textsuperscript{221} Model Law, supra note 198, art. 20, § (1)(a).
or’s assets; and (3) a debtor’s right to transfer, encumber or otherwise dispose of any assets. The stay does not bar the commencement of local insolvency proceedings, or the commencement or continuation of actions to the limited extent necessary to preserve claims under local law. In addition, the scope of the stay and its modification and termination are subject to any exceptions, limitations, modifications or termination that exist in the Enacting State’s existing insolvency laws. The effect of incorporating such exceptions is that enacting the Model Law will not require substantial modification of existing law because the established exceptions and conditions in domestic law are imported directly into the Model Law when enacted.

In addition to the automatic stay upon recognition of a foreign main proceeding, a foreign bankruptcy administrator may request emergency relief pending recognition of the main proceeding. Such relief is at the court’s discretion, and must be “urgently needed” to protect the assets of the debtor or interests of creditors. Relief may include a stay of execution against the debtor’s assets, administration or realization of perishable or devaluing assets to the foreign administrator, and a potential freeze on assets. Broad, non-emergency relief is also available at the court’s discretion, on recognition of a foreign main proceeding, and includes remedies ranging from stays of specific actions and asset disposition to discovery and turnover of assets to the foreign representative.

All forms of relief are subject to conditions imposed by the court. Generally, relief must protect the debtor’s assets or the interests of creditors.

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222 Id. at § (1)(b).
223 See id. at § (1)(c).
224 See id. at § (2).
225 See id. art. 20, § (2)-(4); Glosband & Katucki, supra note 9, at 6–7.
226 See Glosband Memo II, supra note 185, at 6–7. Thus, for example, exceptions for police power enforcement, alimony and support available under the U.S. Bankruptcy Code would be imported directly into the provisions of the Model Code. See id. The “import” provision also works in tandem with another provision to permit modification or termination of the stay, or of recognition in those States that treat recognition and its effects as a unitary judgment not susceptible to alteration other than by appeal or for mistake. See id. In some States, recognition creates a separate status with predetermined effects. See id. In those States, effects are not viewed as orders which can be modified. It is for this reason that the Model Law does not reference the article creating the stay effects (article 20) to the article dealing with modification or termination of relief (art. 22). See id.
227 See Model Law, supra note 198, art. 19; Glosband Memo II, supra note 185, at 7.
228 See Model Law, supra note 198, art. 19.
229 See id.
230 See Model Law, supra note 198, art. 21; Glosband Memo II, supra note 185, at 7.
231 See Model Law, supra note 198, art. 21; Glosband Memo II, supra note 185, at 7.
The court may modify or terminate relief on its own initiative, or at the request of a foreign representative or a person affected by the relief. A foreign representative, upon recognition of the foreign insolvency proceeding, may also have standing to bring avoidance actions of the type available under the Enacting State’s insolvency law. A final relief provision that stops short of substituting the foreign representative for the debtor, nevertheless allows a foreign representative to intervene in judicial proceedings as a third party in a proceeding in which the debtor has an interest.

3. Recognition of Foreign Insolvency Proceedings and Foreign Access to Domestic Courts

The Model Law distinguishes between “foreign main” and “foreign non-main” insolvency proceedings, a distinction that affects the type of available relief and reflects its underlying vision. The Model Law does not strive to create a pure universality regime in which one set of substantive law applies to all cross-border insolvencies, and wherein one administrator collects and distributes all of the debtor’s assets. Rather, the Model Law seeks to facilitate the operation of existing State laws by removing procedural barriers to judicial cooperation, increasing a court’s authority to grant relief to foreign representatives, and creating a global quiet time in which bankruptcy administrators can organize the debtor’s affairs. The Model Law seeks to address the realities of existing cross-border insolvency law. It is designed to prevent the common situation wherein a multi-national corporation files bankruptcy in State A, a filing that inevitably unleashes a mad scramble to the courthouse stairs in multiple jurisdictions throughout the world, and which results in the piecemeal dismemberment of the debtor’s

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232 See Model Law, supra note 198, art. 22, § (1).
233 See Model Law, supra note 198, art. 22, §§ (2), (3).
234 See Model Law, supra note 198, art. 23. This article apparently was added over the strong objection of the United State delegation. See Glosband Memo II, supra note 185, at 7–8. As drafted, the article does not address choice of law issues, nor does it create any substantive rights. See id. A U.S. objection rested primarily on the unresolved policy and choice of law problems which the article introduced. See id. The article’s inclusion, however, was strongly supported by most of the other delegates who believed the type of relief was essential. See id.
235 See Model Law, supra note 198, art. 24. The foreign representative must meet the requirements of the Enacting State applicable to third party intervention proceedings. See id.
236 See Model Law, supra note 198, art. 2.
237 See id.
238 See Model Law, supra note 198, art. 2; see generally Glosband Memo II, supra note 185.
affairs. Under the Model Law, the bankruptcy filing in State A empowers State A’s bankruptcy administrator ("foreign representative" in Model Law parlance)\textsuperscript{239} to stay actions in another State and to seek additional relief from such States to facilitate the fair and efficient administration of the debtor’s estate.\textsuperscript{240}

Under the Model Law, therefore, a foreign representative may apply directly to the appropriate court (the “Recognizing Court”) in the Enacting State for recognition of the foreign proceeding.\textsuperscript{241} This abrogates the need for formal recognition procedures currently \textit{de rigueur} in most States, including application for recognition through diplomatic or consular channels (e.g., exequatur actions).\textsuperscript{242} The foreign representative is entitled to go to court in the same manner that any local party in interest might, while retaining the additional benefit of not subjecting himself to personal jurisdiction beyond the scope of the insolvency proceeding.\textsuperscript{243} "In most countries, such open access is quite simply revolutionary."\textsuperscript{244} In addition to the right to appear directly in the court of an Enacting State, a foreign representative has the concomitant right to initiate a local insolvency proceeding if all conditions other than standing are otherwise met.\textsuperscript{245}

Of equal novelty is the Model Law’s provision granting foreign creditors the same rights as local creditors to participate in insolvency proceedings.\textsuperscript{246} Local laws will continue to govern the rank or priority of claims, with the caveat that a foreign claim cannot be ranked lower than a general unsecured claim unless an equivalent local claim would also be downgraded.\textsuperscript{247} To ensure that the foreign creditors’ have a meaningful right to participate in local proceedings, the Model Law mandates that all notices given to local creditors must also be given to foreign creditors.\textsuperscript{248} Individual notice, not notice by publication in a

\textsuperscript{239} See Model Law, supra note 198, art. 1 (“definitions”).

\textsuperscript{240} See id., Preamble.

\textsuperscript{241} See Gaa & Garzon, supra note 9, at 275; Glosband Memo II, supra note 185, at 5.

\textsuperscript{242} See Gaa & Garzon, supra note 9, at 275; Glosband Memo II, supra note 185, at 5.

\textsuperscript{243} See Model Law, supra note 198, art. 9 ("Right of Direct Access"); art. 10 ("Limited Jurisdiction").

\textsuperscript{244} Glosband Memo II, supra note 185, at 5.

\textsuperscript{245} See Model Law, supra note 198, Chapter 5 ("Concurrent Proceedings").

\textsuperscript{246} See Model Law, supra note 198, art. 13.

\textsuperscript{247} See id.; Glosband Memo II, supra note 185, at 3. A footnote to article 13 provides an alternate option to countries who wish to exclude foreign tax or social security claims, a practice which many countries presently follow and would probably insist on maintaining. See Glosband Memo II, supra note 185, at 3.

\textsuperscript{248} See Model Law, supra note 191, art. 14; Glosband Memo, supra note 185, at 3.
journal or posted in court, is required. 249 Furthermore, if the notice advises creditors of the commencement of the insolvency proceedings, the notice must indicate a reasonable time for filing claims, specify the place of filing, indicate whether secured creditors must file claims at all, and provide any other information ordinarily given to local creditors. 250

For a foreign representative to avail himself of many of the Model Law's powers, the proceeding in which he was appointed must be "recognized" by the court of the Enacting State. 251 To be "recognized," the foreign proceeding must be "a collective judicial or administrative proceeding in a foreign state, pursuant to a law relating to insolvency, in which proceeding the debtor's assets and affairs are subject to the control or supervision by a foreign court for the purpose of reorganization or liquidation." 252 This definition excludes actions by individual creditors, such as a receivership. 253 Recognizing administrative as well as judicial proceedings acknowledges the extra-judicial approach that some countries adopt for insolvencies. 254 The reference to "a law relating to insolvency" recognizes that many countries, unlike the United States, require a formal determination of economic insolvency prior to the initiation of a full bankruptcy proceeding. 255 Similarly, the express inclusion of "interim" proceedings and representatives accommodates British Commonwealth countries in which some proceedings pass through a provisional stage prior to becoming permanent or complete. 256

As noted, the Model Law distinguishes between "main" and "non-main" foreign proceedings. 257 The distinction reflects the underlying goal of resolving cross-border insolvency by establishing one primary proceeding that is accompanied by various secondary, or ancillary, proceedings in other jurisdictions. Thus, a foreign proceeding is a "foreign main proceeding" if it takes place in the "centre of the debtor's main interests." 258 Following logically, a foreign representative's

249 See Model Law, supra note 198, art. 14; Glosband Memo II, supra note 185, at 3–4.
250 See Model Law, supra note 198, art. 14; Glosband Memo II, supra note 185, at 3.
251 See Gaa & Garzon, supra note 9, at 275; Glosband Memo II, supra note 185, at 4.
252 Model Law, supra note 198, art. 2, § (a).
253 See id.; Glosband Memo II, supra note 185, at 4.
254 See Model Law, supra note 198, art. 2, § (a); Glosband Memo II, supra note 185, at 4.
255 See Model Law, supra note 198, art. 2, § (a); Glosband Memo II, supra note 185, at 4.
256 See Model Law, supra note 198, art. 2, § (a); Glosband Memo II, supra note 185, at 4.
257 See Model Law, supra note 198, art. 2.
258 Id. art. 2(c).
powers are greater in an Enacting State if he is seeking relief in favor of a main proceeding rather than in favor of a non-main proceeding.\(^{259}\) A foreign non-main proceeding is defined essentially as any proceeding "other than a foreign main proceeding," with the condition that the debtor must have an "establishment," i.e., more than solely assets, involved in such a proceeding.\(^{260}\)

Recognition of a foreign proceeding is not automatic under the Model Law.\(^{261}\) The foreign representative must file a petition in the Enacting State that documents the commencement of a foreign proceeding and the representative’s proper appointment by the foreign court.\(^{262}\) A foreign representative’s application is assisted by a presumption of authenticity.\(^{263}\) The factual determination of where the debtor’s main interests are located is likewise assisted by a presumption that the debtor’s "habitual residence" or "registered office" constitutes its main location.\(^{264}\) Recognition of a foreign main proceeding is also proof that the debtor is insolvent under the Enacting State’s insolvency law, absent evidence to the contrary.\(^{265}\)

4. Judicial Cooperation and Coordination of Multiple Proceedings

The final major component of the Model Law is its provision for mandatory judicial cooperation in cross-border insolvency cases.\(^{266}\) In matters within the scope of the Model Law, courts and estate representatives in the Enacting State must "cooperate to the maximum extent possible" with foreign courts and foreign representatives.\(^{267}\) And just to make matters clear, and in some jurisdictions to allow expansion

\(^{259}\) Compare Model Law, supra note 198, art. 20 ("Effects of recognition of a foreign main proceeding") with art. 21 ("Relief that may be granted upon recognition of a foreign proceeding").

\(^{260}\) Id. art. 2, § (c) ("Foreign non-main proceeding"); art. 2, § (f) (establishment).

\(^{261}\) See Gaa & Garzon, supra note 9, at 275.

\(^{262}\) See Model Law, supra note 198, art. 11; art. 15.

\(^{263}\) See id. art. 16.

\(^{264}\) See id.

\(^{265}\) See id. art. 31. The provision addresses potential variance in what constitutes insolvency as between States. For example, a debtor may be insolvent under the laws of State A but not under the laws of State B, thereby leaving the liquidator of State A without remedy in State B under State B’s insolvency laws. Under the Model Law, the very fact that an insolvency proceeding was initiated in State A against the debtor establishes that the debtor is insolvent under the bankruptcy law of State B, thereby empowering State A’s liquidator under State B’s insolvency law.

\(^{266}\) See Model Law, supra note 198, Chapter 4 ("Cooperation with Foreign Courts and Foreign Representatives"); Gaa & Garzon, supra note 9, at 281; Glosband Memo II, supra note 185, at 4.

\(^{267}\) Glosband Memo II, supra note 185, at 4.
of a court’s authority beyond its immediate territory, the Model Law entitles courts to “communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.”268 The court can implement such cooperation by “any appropriate means” including, e.g., the appointment of persons to act at the direction of the court, coordination of administration and supervision of the debtor’s assets and affairs, use of coordination agreements or protocols, and the coordination of concurrent proceedings.269

The Model Law also promotes the coordination of concurrent proceedings.270 Consensus exists that multiple proceedings in a cross-border insolvency case should be minimized, and the Model Law attempts to limit the inefficiency of duplicative filings.271 Two sets of coordination provisions exist. The first deals with coordination between a local proceeding and a foreign proceeding. The second addresses the coordination of more than one foreign proceeding.272 In the first instance, if a local proceeding is already taking place and an application for recognition is filed by a foreign representative in the same jurisdiction, then any relief the court grants must be consistent with the local proceeding.273

In this scenario, the automatic effects of recognition, such as the stay of actions and execution, do not apply.274 Similarly, if an Enacting State

268 Model Law, supra note 198, art. 25 (1). The extent to which an interested party may compel a court to so cooperate or communicate is, however, not as clear.

269 See Model Law, supra note 191, art. 27 ("Forms of cooperation"); Glosband Memo II, supra note 185, at 4. The examiner appointed by the U.S. Bankruptcy Judge in In re Maxwell is an example of the type of cooperation envisioned under the Model Law.

270 See Model Law, supra note 198, Ch. 5.

271 See Gaa & Garzon, supra note 9, at 282–83; Glosband Memo II, supra note 185, at 8.

272 See Glosband Memo II, supra note 185, at 8–9. ("As the January 1997 Working Group Session approached its conclusion, it became apparent that the relationship among concurrent proceedings had to be addressed clearly in the Model Law. For example, what would be the effect of a commencement of a local proceeding on the stays imposed by prior recognition of a foreign main proceeding? If a local proceeding were already pending, could a foreign proceeding be recognized? If so, what effects would it have and what relief could be granted? To address these issues, a small group of delegates met on the Saturday following the first week of the January session and drafted a set of Principles to be taken into account in the formulation of provisions on concurrent proceedings. There was barely time at the end of the January session to begin discussion of the Principles and no time to draft the necessary Legislative provisions. Consequently, this critical unfinished topic jeopardized the prospects for adoption of the Model Law at the May, 1997 Commission meeting. Delegate initiative again rode to the rescue, with a group meeting in Vienna over the weekend prior to the Commission meeting to draft provisions consistent with the Principles.").

273 See Model Law, supra note 191, art. 9, § (a); Glosband Memo II, supra note 185, at 9.

274 See Model Law, supra note 198, art. 9, § (a); Glosband Memo II, supra note 185, at 9.
has recognized a foreign proceeding, and then a local proceeding is commenced, the court in the Enacting State must review any relief requested by the foreign representative and will modify or terminate such relief if it is inconsistent with the local proceeding.275

The Model Law therefore defers to local proceedings, notwithstanding its universality outlook. This homage to local proceedings is politically motivated and reflects the need to offer an escape from the potentially significant intrusion of a foreign proceeding into an Enacting State’s domestic legal landscape.276

The availability of local proceedings offers potential sanctuary from the feared predations of the newly admitted foreign representative.277 If access, recognition and relief prove too terrifying to a local party in interest, it can always retreat to the familiar territory of a local proceeding coupled with the mandate to the local court and local administrator to cooperate with the foreign court and foreign representative plus the statement of the universal purpose of the Model Law.278

In general, the coordination of multiple foreign proceedings seeking recognition in an Enacting State basically aims to recognize the primacy of a foreign main proceeding, if in fact, one exists.279

IV. HOW WELL THE NEEDS ARE MET: ANALYZING THE MODEL LAW IN HYPOTHETICAL APPLICATION

As noted, a cross-border insolvency presents at least four essential, unaddressed needs: (1) the need for harmonized effect of insolvency proceedings initiated in one State on assets located in another; (2) the need to share information and to promote cross-border judicial cooperation; (3) the need for creditor participation in insolvency proceedings; and (4) the need to predict which applicable law and which choice of forum will govern.280 Although the UNCITRAL Model Law on Cross-Border Insolvency is not the mythical panacea for which one might have wished, the Model Law does go a long way towards resolving many of the outstanding issues.

275 See Model Law, supra note 198, art. 9, § (a); Glosband Memo II, supra note 185, at 9.
276 See Model Law, supra note 198, art. 9, § (a); Glosband Memo II, supra note 185, at 9.
277 See Glosband Memo II, supra note 185, at 9.
278 See id.
279 See id.
280 See supra Part I.
A. Preamble and General Provisions

The stated purpose of the Model Law is broad and addresses most of the major criticisms lodged against the present state of cross-border insolvency chaos. Its objectives, however, are not necessarily independent. The question arises as to how much priority any one objective should enjoy in actual application. The Preamble's third objective, for example, the "fair and efficient administration of cross-border insolvencies," appears to be the controlling goal of the Model Law. Its placement as one factor on a list of several makes one wonder how a court would apply the objective in any given case. Similarly, is judicial cooperation a goal in its own right? Or is it coextensive with the other objectives, for example, with the goal of greater legal certainty for trade and investment? How do the objectives provide guidance in the event of conflict? According to what standard of priority should a court weigh the Model Law's objectives if greater legal certainty for a business means application of local laws to the detriment of foreign creditors, e.g., in the event of recognition of a negotiated forum-selection clause?

Because the Preamble does not provide substantive relief, prioritizing the objectives may amount to no more than an intellectual exercise in the majority of cases. However, when reading the objectives, the frustration of the U.S. courts in applying section 304(c) of the U.S. Bankruptcy Code comes to mind. This provision of the Code lists "comity" as one of several factors a court must consider when deciding whether to grant relief to a foreign representative in an ancillary U.S. proceeding. As suggested by the Honorable Burton R. Lifland, comity is the central theme of section 304, and its placement as but one factor on a list of factors usually cited to define the concept blurs the necessary centrality of the doctrine. The Model Law, by listing the fair and efficient administration of cross-border insolvencies as just one objective on a list of several, may similarly cloud its application in practice. Antithetically, the enumeration of equally compelling objectives may enable a court to accommodate a variety of cross-border

281 See supra notes 8–10 and accompanying text.
282 See Model Law, supra note 198, Preamble.
283 See supra notes 200–04 and accompanying text.
285 See id.
287 See Model Law, supra note 198, Preamble.
insolvency needs as they arise on a case-by-case basis. Thus a court may justify particular decisions by the most appropriate objective, rather than having to contort a singular objective to meet the particulars of the case.

One of the strongest aspects of the Model Law is its straightforward theoretical scheme. The Model Law makes possible a world in which there is one primary insolvency proceeding, the success of which is enhanced by coordinated global ancillary proceedings.\(^{288}\) Even if concurrent full-fledged local insolvency proceedings exist, the Model Law mandates judicial cooperation and harmonizes the proceedings as between States.\(^{289}\) This clearly promotes efficiency and is a significant improvement over the existing state of affairs in which one State’s judiciary may not even be aware of concurrent proceedings in a sister State.

Another attractive feature of the Model Law is its neutrality. The Model Law does not suggest that one State’s substantive law is superior to that of another; in fact, the Model Law is equally effective regardless of which substantive laws are applied.\(^{290}\) Because the Model Law strives for the harmonization of multiple proceedings, ideally but not necessarily with one main proceeding and supportive ancillary proceedings, there is no need to favor a particular substantive insolvency regime.\(^{291}\) In accord with this goal, the Model Law contains broad, non-preferential definitions that accommodate almost any State’s definition of insolvency proceeding, administrator, and court.\(^{292}\) This lack of national chauvinism makes the Model Law immediately appealing.

**B. Access of Foreign Creditors**

The ease of court access, by both foreign representatives and foreign creditors, is a commendable aspect of the Model Law.\(^{293}\) Given the interdependency of the international economy, the speed at which information travels, and the extent of international trade, antiquated procedures for gaining access to foreign courts clearly impede the efficient administration of a cross-border insolvency procedure. Even States with generally free access to court systems, such as the United

\(^{288}\) See *supra* notes 208–19 and accompanying text.

\(^{289}\) See *supra* notes 214–18 and accompanying text.

\(^{290}\) See *supra* notes 236–38 and accompanying text.

\(^{291}\) See *id*.

\(^{292}\) See *id*.

\(^{293}\) See *supra* notes 241–45 and accompanying text.
States, retain notions of personal and *in rem* jurisdiction whose application are arguably no longer appropriate for the modern world.\textsuperscript{294}

Universal access to all courts with jurisdiction limited to the issues of the insolvency proceedings goes a long way towards promoting the efficient and fair administration of a debtor’s estate. The ignominious events surrounding the dissolution of the Herstatt Bank in the late seventies, where the foreign administrator was trying to marshal the debtor’s U.S. assets without setting foot inside the U.S. for fear of exposing himself to personal jurisdiction, would thus become a thing of the past in all States.\textsuperscript{295} Even in the event that a race to the courthouse stairs ensues under the Model Law as it typically does without the law, at least the bankruptcy administrator will be on equal footing with the local creditors, rather than being forced to wade through diplomatic channels while the assets of the estate disappear before his eyes.\textsuperscript{296} In fact, a foreign representative may have advance notice of any bankruptcy filing, thereby enabling the representative to herald his forces and file before the competing creditors in most jurisdictions.

C. \textit{Recognition of a Foreign Proceeding and Relief}

In granting universal recognition of foreign proceedings, the Model Law creates an effective mechanism by which administration of cross-border insolvencies can become more efficient. The removal of procedural barriers will facilitate the coordination of insolvency proceedings. The Model Law provides relief from the current state of affairs where insolvency administrators from one State often cannot file for ancillary relief in another State simply because of archaic procedural barriers.\textsuperscript{297} A debtor’s assets may therefore be pooled for efficient and equitable distribution among creditors. The Model Law also improves the prospects that an insolvency proceeding in “the center of the debtor’s main interests” will be given universal effect in foreign jurisdictions, thereby minimizing duplicative filings and litigation.\textsuperscript{298}

The creation of an automatic moratorium on actions against the debtor and its assets upon recognition of a foreign main proceeding under the Model Law is also a significant achievement.\textsuperscript{299} This

\textsuperscript{294} See \textit{supra} notes 23–25 and accompanying text.
\textsuperscript{295} See \textit{supra} note 25.
\textsuperscript{296} See \textit{supra} notes 241–45 and accompanying text.
\textsuperscript{297} See id.
\textsuperscript{298} See \textit{supra} notes 257–65 and accompanying text.
\textsuperscript{299} See \textit{supra} notes 220–26 and accompanying text.
moratorium allows the main insolvency administrator the opportunity to herald and organize the debtor’s estate. It prevents piecemeal dismemberment of the debtor’s assets and encourages cross-border communication not only between judges, but between creditors as well. As with the stay under the U.S. Bankruptcy Code, the Model Law’s moratorium creates an environment that protects creditors from each other and that will hopefully encourage more efficient private settlements. However, the automatic moratorium under the Model Law only arises upon recognition of a foreign main proceeding. The practical effect of this limitation is that the foreign administrator must file for relief in all jurisdictions worldwide in which the debtor has assets. The inevitable lag in timing may result in lost assets, although the threat is probably insignificant in real world application and better than the current situation. In fact, the mandatory effects of the Model Law may give the foreign administrator a significant strategic advantage when planning the dissolution or reorganization of the debtor’s affairs. The foreign administrator, who may in some cases be the debtor’s existing management, can rely on the effects of the Model Law in Enacting States to determine how best to allocate its resources on an international level. In contrast to the existing state of affairs in which a foreign administrator may not even have access to another State’s legal system, let alone be able to predict the outcome of a particular course of action, under the Model Law, the foreign administrator can rely on a certain level of consistency in both legal effect and access. Furthermore, under the Model Law, the foreign administrator has the power to seek emergency relief pending recognition of the foreign main proceeding and as drafted, enjoys the same avoidance powers to undo preferential transfers as an administrator would under existing, domestic laws.

D. Mandatory Judicial Cooperation

Mandatory communication between courts involved in cross-border insolvencies also enhances the efficient administration of a debtor’s estate. If domestic courts can rely on foreign courts for information

300 See id.
301 See id.
302 See id.
303 See supra notes 23–25, 220–26 and accompanying text.
304 See supra note 234 and accompanying text.
305 See supra notes 30–39, 266–69 and accompanying text.
and cooperation, duplicative proceedings and unnecessary litigation may be reduced. Judicial cooperation also infuses the entire cross-border insolvency process with new stability because debtors and creditors no longer have to divine individual judicial reactions to foreign proceedings. The Model Law’s mandatory cooperation may frustrate those parties who rely on the existing state of miscommunication as a strategic device. The mandatory cooperation may also surprise small, local creditors who may not be aware that the debtor with whom they are dealing is a multi-national entity. However, in most circumstances, enhanced judicial cooperation will greatly increase the likelihood of equitable treatment of all parties.

As currently drafted, insolvency judges enjoy a fair amount of discretion and autonomy under the Model Law. The judiciary’s potentially dominant position in cross-border insolvencies raises interesting questions regarding the appropriate role of judges in managing international business affairs. The appropriateness of that result, however, is beyond the scope of this Note. Undoubtedly, the interaction of the various judicial systems and insolvency regimes under the Model Law will provide fertile ground for the generation of novel approaches to the management of transnational corporations in general.

CONCLUSION

The existing state of cross-border insolvency law is one of undifferentiated growth. Cases are increasing in number and complexity, and courts from all States are struggling to operate in the face of numerous impediments and in the absence of clear guidance. Enhanced cooperation between the courts of affected States operating within a unified but flexible procedural structure would promote the desired goal of fair and efficient administration of a transnational debtor’s estate. The UNCITRAL Model Law on Cross-Border Insolvency, a succinct piece of exemplary legislation drafted by those people most affected by the present state of international insolvency chaos, promises to provide the foundation for an ordered process. Under the Model Law, (1) creditors, regardless of nationality, will receive non-discriminatory treatment; (2) courts and representatives of insolvency estates will communicate and cooperate with each other to coordinate the administration of such estates and the conduct of concurrent proceedings involving the same debtor; and (3) persons authorized to administer reorganizations or liquidations will have expeditious access to foreign courts and to the relief they need to protect the assets of the debtor or the
interests of the creditors. The Model Law clearly improves on the current state of cross-border insolvency despair and should be expeditiously enacted by States interested in maximizing the returns to all parties when managing the failure of a transnational commercial enterprise.

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