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The Extraterritorial Reach of the Bankruptcy Code's Automatic Stay: Theory vs. Practice

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THE EXTRATERRITORIAL REACH OF THE BANKRUPTCY CODE'S AUTOMATIC STAY: THEORY VS. PRACTICE

INTRODUCTION

One does not normally have any positive associations with filing for bankruptcy—and for good reason. After all, being bankrupt means lacking sufficient funds to pay debts, manage expenses, run a functioning business, or otherwise meet financial obligations;[1] clearly, then, this predicament is neither comfortable nor enjoyable. However, the bright side of filing for bankruptcy in the United States—if it can be thought of as such—is that the U.S. justice system affords many rights and protections to debtors so that they do not have to face the perils of bankruptcy unaided. One such protection is the automatic stay provided for by § 362 of the United States Bankruptcy Code.[2] Whenever a debtor files for bankruptcy, an estate consisting of all the debtor's property is

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1. BLACK'S LAW DICTIONARY 59–60 (2d pocket ed. 2001).
2. 11 U.S.C. § 362(a) (2005). This section states that:

> [A] petition filed under section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities, of—(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title; (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title; (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate; (4) any act to create, perfect, or enforce any lien against property of the estate; (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title; (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title; (7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and (8) the commencement or continuation of a proceeding before the United States Tax Court concerning a corporate debtor's tax liability for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

Id.

created.[3] The automatic stay then operates to protect this property by prohibiting anyone from making a claim against the property in the estate.[4] Put simply, once a debtor properly files for bankruptcy in a U.S. court, no creditor may initiate or continue a suit seeking to acquire any of the debtor's assets.[5]

At first blush, the automatic stay seems like the perfect protection mechanism for any given debtor; if a creditor acts to seize or lay claim to the assets of an individual who has filed a bankruptcy petition, the court can hold the creditor in violation of the automatic stay and declare the creditor's actions void. However, while the automatic stay may operate flawlessly in theory, various problems can and do arise in its practical application. For example, what happens if a debtor owns property or assets that lie outside the boundaries of the United States? The language of 11 U.S.C. § 541(a) does indicate that the debtor's estate is comprised of all of the debtor's property, "wherever located."[6] Moreover, similar language is found in 28 U.S.C. § 1334(e).[7] This statute, combined with 28 U.S.C. § 157(a),[8] operates to give the bankruptcy court, through the district court in which the case is proceeding, "exclusive jurisdiction . . . [over] all of the property, *wherever located* . . . ."[9] The plain meaning of this language would seem to imply that "wherever located" means "wherever in the world," but does it in actuality? Realistically, can it? What if the property in question is located in a foreign country such that it lies outside of the U.S. court's *in rem* jurisdiction? Can the U.S. court still, in fact, control the property? Alternatively, what if the creditor mak-

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3. 11 U.S.C. § 541(a) (2005).

4. 11 U.S.C. § 362(a)(1) (2005). The exceptions to this rule are enumerated in 11 U.S.C. § 362(b) (2005).

5. 11 U.S.C. § 362(a) (2005).

6. 11 U.S.C. § 541(a) (2005).

7. 28 U.S.C. § 1334(e) (2005). This section states that:

> the district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction--
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> > (1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate; and
> >
> > (2) over all claims or causes of action that involve construction of section 327 of title 11, United States Code, or rules relating to disclosure requirements under section 327.

Id.

8. 28 U.S.C. § 157(a) (2005) (Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district).

9. 28 U.S.C. § 1334(e) (2005) (emphasis added).

ing a claim on a debtor's property is a foreign entity such that the U.S. court lacks *in personam* jurisdiction? Without *in personam* jurisdiction, how can a U.S. court take actions against a creditor who violates the automatic stay? Worse still, what if a foreign court makes a ruling that operates to seize or compromise the property in question? How then could a U.S. court possibly declare such a ruling or action void?

This Note will examine the extraterritorial application of the automatic stay—both in theory and in practice. Specifically, it will discuss and analyze the problems of holding that the automatic stay applies extraterritorially in all situations, especially if the courts continue to hold that all acts which violate the automatic stay are void. While the rule that the automatic stay applies extraterritorially operates nicely in theory, the practical applications of such a holding have proven problematic, at least insofar as U.S. courts hold that extraterritorial violations of the automatic stay are void.[10] Looking forward, this Note will suggest that the United States should explore the possibility of pursuing an international convention with other countries that also have stay provisions in their insolvency codes.[11]

Part I of this Note sets forth background information regarding the automatic stay and its extraterritorial application. Part II examines the practical problems that arise from holding that the automatic stay applies extraterritorially in all situations. Part III then discusses principles of international comity and questions of deference. Part IV goes on to examine stay provisions in foreign jurisdictions. Part V evaluates various aspects of both the United Nations Commission on International Trade Law's ("UNCITRAL") Model Law on Cross Border Insolvency and the European Community Insolvency Regulation ("EC Regulation"). Finally, Part VI compares the benefits and drawbacks of the two systems described in Part V and concludes that the best course of action for the

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10. *See* Sinatra v. Gucci (*In re* Gucci), 309 B.R. 679, 683 (Bankr. S.D.N.Y. 2004), stating that:

> The fact that Congress granted the district courts . . . power to enter orders affecting assets of the debtor, wherever located, does not preclude foreign courts from exercising jurisdiction over estate property located in their countries, a matter that raises such questions as to the extraterritorial effect of the automatic stay and the personal jurisdiction of the United States courts over the entity at whose behest the foreign court acts.

Id.

11. While the U.S. Bankruptcy Code and the insolvency codes of many other countries provide for an automatic stay, some other countries' insolvency codes only allow for non-automatic stays—stays that are entered after a given action occurs, at the request of one of the parties, or at the discretion of the presiding court. *See infra* Part IV.A.

United States to undertake would be to pursue a convention similar to the EC Regulation.

I. THE AUTOMATIC STAY

Whenever an individual or other entity files a bankruptcy petition under Title 11 of the Untied States Code, an estate is created that embodies all of the debtor's property, "wherever located and by whomever held."[12] Additionally, the filing of such a petition triggers an automatic stay that prohibits any individual or entity from commencing or continuing any action or proceeding against the debtor.[13] In effect, the automatic stay seals the debtor's estate[14] such that all of the debtor's assets are protected from creditors for the duration of the stay.

The automatic stay has several functions, one of which is to protect the debtor during his or her bankruptcy proceedings.[15] Primarily, the automatic stay serves to "prevent the debtor's estate from being picked to pieces by creditors"[16] so that the bankruptcy court can distribute the debtor's assets in a fair and equitable manner.[17] The interests of the debtor are best served if all matters related to the bankruptcy are siphoned into one proceeding, thus avoiding a "chaotic and uncontrolled scramble for the debtor's assets in a variety of uncoordinated proceedings in different courts."[18] Additionally, the automatic stay works to protect the estate and preserve it for the creditors' benefit[19] so that creditors are not forced to compete in a race to the courthouse, with the winner taking home the bulk of the assets. Finally, the automatic stay also "serves to protect and preserve the jurisdiction of the bankruptcy court so that the court can administer the debtor's estate in an orderly fashion."[20]

The first court to consider the question of whether the automatic stay applies extraterritorially was a bankruptcy court in the Southern District

12. 11 U.S.C. § 541(a) (2005).

13. 11 U.S.C. § 362(a)(1) (2005).

14. 11 U.S.C. § 541(a) (2005).

15. Nakash v. Zur (*In re* Nakash), 190 B.R. 763, 768 (Bankr. S.D.N.Y. 1996).

16. Underwood v. Hillard (*In re* Rimsat), 98 F.3d 956, 962 (7th Cir. 1996) (citing Martin-Trigona v. Champion Federal Savings & Loan Ass'n, 892 F.2d 575, 577 (7th Cir. 1989)).

17. GMAM v. Globo Comunicacoes E Participacoes S.A. (*In re* Globo Comunicacoes E Participacoes S.A.), 317 B.R. 235, 251 (Bankr. S.D.N.Y. 2004).

18. *In re Rimsat*, 98 F.3d at 961 (quoting *In re* Holtkamp, 669 F.2d 505, 508 (7th Cir. 1982)); *see also In re* Falls Bldg., Ltd., 94 B.R. 471, 480–81 (Bankr. E.D. Tenn. 1988).

19. *In re Nakash*, 190 B.R. at 768.

20. *Id.*

of New York.[21] There, the *McLean*[22] court held that the automatic stay does indeed apply extraterritorially such that foreign entities, in addition to domestic entities, are bound by the language of 11 U.S.C. § 362(a).[23] Since 1987, United States courts have uniformly upheld the extraterritorial application of the automatic stay.[24] This trend, however, marks a departure from the general presumption that United States statutes do not apply outside the boundaries of the United States without express congressional intent.[25] In *E.E.O.C. v. Arabian American Oil Co.* ("*Aramco*"), Chief Justice Rehnquist reiterated the "long-standing presumption against extraterritoriality and validated it as a means by which to effectuate the unexpressed congressional intent that its laws are designed first and foremost to address domestic conditions."[26] Rehnquist upheld the importance of this presumption as a means to prevent U.S. law from inadvertently clashing with laws of other nations, thus avoiding "international discord."[27] In deciding *Aramco*, Rehnquist reasoned that courts

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21. *In re* McLean Industries, 74 B.R. 589 (Bankr. S.D.N.Y. 1987). It is surprising that this question never arose until 1987, but that is apparently the earliest discussion of this problem. Additionally, since the *McLean* court does not cite to previous authority for the proposition that the automatic stay applies extraterritorially, it seems likely that this was indeed an issue of first impression in 1987.

22. *Id.* The debtor, a U.S. entity, owned twelve Econoships used to transport goods internationally. When the debtor filed a Chapter 11 petition, eight of the Econoships were returned to the United States, but four were arrested overseas in Singapore and Hong Kong. Courts of those countries issued arrest warrants for the vessels notwithstanding the automatic stay. *Id*. at 590–94.

23. *Id.* at 601 (citing *In re* McLean Industries, Inc, 68 B.R. 690, 694 (Bankr. S.D.N.Y. 1986)).

24. Hong Kong and Shanghai Banking Corp. v. Simon (*In re* Simon), 153 F.3d 991, 996 (9th Cir. 1998); Underwood v. Hillard (*In re* Rimsat), 98 F.3d 956, 961 (7th Cir. 1996); *In re* Yukos Oil Co., 321 B.R. 396, 406 (Bankr. S.D. Tex. 2005); Sinatra v. Gucci (*In re* Gucci), 309 B.R. 679, 683–84 (Bankr. S.D.N.Y. 2004); *In re* Artimm, 278 B.R. 832, 841 (Bankr. C.D. Cal. 2002); Hobson v. Travelstead (*In re* Travelstead), 227 B.R. 638, 657–58 (Bankr. D. Md. 1998); Lykes Bros. Steamship Co., Inc., v. Hanseatic Marine Service (*In re* Lykes Bros. Steamship Co., Inc.), 207 B.R. 282, 287 (Bankr. M.D. Fla. 1997); Nakash v. Zur (*In re* Nakash), 190 B.R. 763, 768 (Bankr. S.D.N.Y. 1996).

25. David M. Green and Walter Benzija, *Spanning the Globe: The Intended Extraterritorial Reach of the Bankruptcy Code*, 10 AM. BANKR. INST. L. REV. 85, 85 (2002) (citing E.E.O.C. v. Arabian American Oil Co., 499 U.S. 244, 248 (1991); Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949); American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909)).

26. Green, *supra* note 25, at 88 (citing *Arabian American Oil Co.*, 499 U.S. at 248). In *Aramco*, a U.S. citizen (Boureslan) was working for a U.S. corporation, Arabian American Oil Co. ("Aramco") in Saudi Arabia. Boureslan was fired and he sued in the United States under Title VII of the Civil Rights Acts of 1964. The question then arose as to whether this statute, and U.S. statutes in general, apply extraterritorially.

27. *Id*. (quoting *Arabian American Oil Co.*, 499 U.S. at 248).

must assume that Congress legislates "against the backdrop of the presumption against extraterritoriality," and set forth the rule that laws apply domestically unless Congress made a clear affirmative expression to the contrary.[28] That being established, this Note will now explore the language of the automatic stay provision that portrays Congress's intent that the provision apply extraterritorially.

Beginning more broadly, some have argued that Congress intended that the entire Bankruptcy Code have extraterritorial reach.[29] The Ninth Circuit, for example, adopted this view in *HSBC v. Simon* (*In re Simon*) and held there that the bankruptcy discharge operated extraterritorially.[30] One of the major factors that contributed to this holding is the specific language of 11 U.S.C. § 541(a). This statute states that when a debtor files a petition for bankruptcy under Title 11, an estate is created composed of all of the debtor's property, "*wherever located and by whomever held*."[31] The *Simon* court found this language to be a clear expression of Congress's intent that the Code should apply extraterritorially.[32] Moreover, it seems necessary that the Bankruptcy Code should have extraterritorial reach in order to "effectuate its principle goals of asset preservation" and ensure fair distribution of the debtor's property.[33] Especially in today's global marketplace, it defies logic that Congress intended strict guidelines and fair distribution of assets when U.S. entities were involved, but that these rules and guidelines should evaporate as soon as foreign entities come into the picture.

That Congress intended the automatic stay to apply extraterritorially is even more apparent. The language of the automatic stay provision itself demands that no entity commence or continue any action seeking to acquire property from the debtor,[34] and 28 U.S.C. § 1334(e) puts all of the debtor's property[35] under the control of the district court in which the

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28. *Id.* (quoting *Arabian American Oil Co.*, 499 U.S. at 248).

29. *Id.* at 92 ("The language, structure and legislative history of the Bankruptcy Code all suggest that Congress fully intended for it to have extraterritorial application.").

30. Hong Kong and Shanghai Banking Corp. v. Simon (*In re* Simon), 153 F.3d 991, 996 (9th Cir. 1998) ("Congress clearly intended the extraterritorial application of the Bankruptcy Code."). Here, the debtor filed for Chapter 7 and received a discharge order. Afterwards, a foreign creditor who participated in the Chapter 7 proceeding sought to collect on the discharged debt outside of the United States. The question arose as to whether a U.S. Bankruptcy Court could sanction the foreign creditor, and the court held that the discharge operated extraterritorially. *Id*.

31. 11 U.S.C. § 541(a) (2005) (emphasis added).

32. 153 F.3d at 996.

33. Green, *supra* note 25, at 93.

34. 11 U.S.C. § 362(a)(1) (2005).

35. 11 U.S.C. § 541(a) created an estate comprised of all of the debtor's property.

case is proceeding.[36] This control is then passed to the bankruptcy court through 11 U.S.C. § 157(a).[37] The report from the House of Representatives that accompanied the predecessor to 28 U.S.C. § 1334 "states that the intent of the statute was to ensure that '[t]he bankruptcy court is given *in personam* jurisdiction as well as *in rem* jurisdiction to handle everything that arises in a bankruptcy case.'"[38] The language of 28 U.S.C. § 1334 and 11 U.S.C. § 541, viewed in light of their relationships to the automatic stay provision and coupled with the House report, seem to rebut the presumption against extraterritoriality and satisfy the standard set down by the Supreme Court in *Aramco*.[39] However, even though many courts have held that the automatic stay applies extraterritorially, practical enforcement of the extraterritorial application has proven difficult. The next section will examine some decisions that have dealt with such problems.

II. PROBLEMS WITH HOLDING THAT THE AUTOMATIC STAY APPLIES EXTRATERRITORIALLY

In domestic bankruptcy disputes, the case law is clear that "the automatic stay 'is effective immediately upon the filing of the petition, and any proceedings or actions described in section 362(a)(1) are void and without vitality if they occur after the automatic stay takes effect.'"[40] If actions that violate the automatic stay are void and the automatic stay applies extraterritorially, logic dictates that extraterritorial actions that violate the automatic stay are likewise void. However, while many courts have held that the automatic stay applies extraterritorially,[41] the practical reality is that the extraterritorial effect of the automatic stay may depend on whether a U.S. court has *in personam* jurisdiction over the violators or

36. 28 U.S.C. § 1334(e) (2005).

37. 28 U.S.C. § 157(a) (2005). Since 28 U.S.C. § 1334(e) specifically gives the district court jurisdiction over the debtor's estate, the bankruptcy court would have no jurisdiction over the debtor's assets without 28 U.S.C. § 157. Because section 157 passes jurisdiction of the debtor's estate to the bankruptcy court in the district in which the district court sits, the bankruptcy court is able to administer the debtor's estate.

38. GMAM v. Globo Comunicacoes E Participacoes S.A. (*In re* Globo Comunicacoes E Participacoes S.A.), 317 B.R. 235, 251 (Bankr. S.D.N.Y. 2004) (quoting H.R. Rep. No. 95-595 at 445 (1977), reprinted in 1978 U.S.C.C.A.N. 5787, 6400) (alteration in original).

39. 499 U.S. 244, 248 (1991).

40. Eastern Refractories Co. Inc. v. Forty Eight Insulators Inc., 157 F.3d 169, 172 (2d Cir. 1998) (quoting Rexnord Holdings, Inc. v. Bidermann, 21 F.3d 522, 527 (2d Cir. 1994)).

41. *See supra* note 24.

whether a foreign court will choose to enforce the U.S. court's orders.[42] As a court must first tackle jurisdictional issues before delving into the merits of a claim, an analysis of those jurisdictional issues which are prevalent in automatic stay cases follows below.

In order for a bankruptcy court to adjudicate a dispute, it (like any other court) must have appropriate jurisdiction. Specifically for cases involving the automatic stay, a court must have *in personam* jurisdiction over relevant parties and *in rem* jurisdiction over the property or assets in question. While 28 U.S.C. § 1334(e) confers upon a bankruptcy court *in rem* jurisdiction over all of the debtor's property "wherever located,"[43] this exercise of custody "creates a fiction that the property—regardless of its actual location—is *legally* located within the jurisdictional boundaries of the district court in which the court sits."[44] Here, it seems that the Ninth Circuit hit the nail on the head: exercising *in rem* jurisdiction through 28 U.S.C. § 1334(e) creates only a fiction that the bankruptcy court can control the debtor's property if that property lies outside the territorial boundaries of the United States. In actuality, the courts of the country in which the property is physically located are the only entities that can determine what will happen to that property.[45] Moreover, if foreign creditors violate the automatic stay, U.S. bankruptcy courts cannot protect the debtor's assets unless the courts can exercise *in personam* jurisdiction over the violating entities.[46] This has often caused courts to "[strain] to find a basis for personal jurisdiction over foreign actors by relying on the legal fiction of *in rem* jurisdiction."[47] Because of this straining, courts that technically have *in personam* jurisdiction over offending foreign creditors may nonetheless find their sanctions or orders

42. *See, e.g.*, Sinatra v. Gucci (*In re* Gucci), 309 B.R. 679, 684 (Bankr. S.D.N.Y. 2004) ("As the property in question here is located in Rome, its fate ultimately will be determined by Italian courts, which will give such weight as they think appropriate to the decision below."); Lykes Bros. Steamship Co., Inc., v. Hanseatic Marine Service (*In re* Lykes Bros. Steamship Co., Inc.), 207 B.R. 282, 288 (Bankr. M.D. Fla. 1997) (ordering sanctions and rulings against Hanseatic without a realistic enforcement mechanism); Nakash v. Zur (*In re* Nakash), 190 B.R. 763, 771 (Bankr. S.D.N.Y. 1996) (finding that the Israeli receiver violated the stay but refusing to impose sanctions at the time of the decision).

43. 28 U.S.C. § 1334(e) (2005).

44. Hong Kong and Shanghai Banking Corp. v. Simon (*In re* Simon), 153 F.3d 991, 996 (9th Cir. 1998) (citing Katchen v. Landy, 382 U.S. 323, 327 (1966)).

45. *In re Gucci*, 309 B.R. at 683–84.

46. Hobson v. Travelstead (*In re* Travelstead), 227 B.R. 638, 655 (Bankr. D. Md. 1998) ("[I]n personam jurisdiction is required before the court may restrain a defendant from interfering with that property.").

47. Green, *supra* note 25, at 109 (alteration added).

useless in preventing the foreign creditors from continuing to violate the automatic stay. An examination of cases that exemplify these issues follows below.

A. Exercising In Personam Jurisdiction over Foreign Entities

As stated above, when faced with the difficult question of whether the automatic stay applies extraterritorially, U.S. bankruptcy courts have been in complete agreement in answering affirmatively.[48] Moreover, when foreign entities violate the automatic stay by interfering with the debtor's property after a U.S. bankruptcy petition has been filed, U.S. bankruptcy courts have consistently held that they have *in personam* jurisdiction over the violator.[49] This holding is necessary because without *in personam* jurisdiction, the U.S. court would be unable to enforce its holding or in any way hold the violator accountable.[50] However, the case law has made it quite clear that even if a bankruptcy court asserts *in personam* jurisdiction over the foreign entity, it may nevertheless be unable to prevent that entity from interfering with the debtor's property without assistance from a foreign court. Examples of this phenomenon follow below.

1. *In re* Lykes Bros. Steamship Co., Inc.

Lykes, an international shipping company, filed a Chapter 11 petition in October of 1995.[51] Prior to the petition date, Lykes charted two vessels from non-U.S. companies: the M/V Altonia from Altonia Schiffahrtsgesellschaft mbh & Co. and the M/V Arabella from the Andrea Shipping (PTH) Ltd.[52] Lykes returned both ships to their respective owners before filing its bankruptcy petition, but both Altonia and Andrea claimed that Lykes owed them money based on pre-petition breaches of the charters.[53]

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48. *See supra* note 24.

49. GMAM v. Globo Comunicacoes E Participacoes S.A. (*In re* Globo Comunicacoes E Participacoes S.A.), 317 B.R. 235, 252 (Bankr. S.D.N.Y. 2004); Lykes Bros. Steamship Co., Inc., v. Hanseatic Marine Service (*In re* Lykes Bros. Steamship Co., Inc.), 207 B.R. 282, 285 (Bankr. M.D. Fla. 1997); Nakash v. Zur (*In re* Nakash), 190 B.R. 763, 767 (Bankr. S.D.N.Y. 1996).

50. *In re Travelstead*, 227 B.R. at 655 ("But even though the court may have *in rem* jurisdiction over the debtor's property, *in personam* jurisdiction is required before the court may restrain a defendant from interfering with that property.").

51. *In re Lykes Bros.*, 207 B.R. at 284.

52. *Id.* The text of the decision makes it clear that the M/V Arabella was chartered from a Singapore company, but it does not state from which country the M/V Altonia came.

53. *Id.* Altonia claimed that Lykes owes it approximately $130,000 and Andrea claimed that Lykes owes it about $30,000. *Id.*

Five days after Lykes had filed its Chapter 11 petition, Andrea and Altonia assigned their claims against Lykes to a German company called Hanseatic Marine Service GmbH; this action was held to violate the automatic stay.[54] About five months later, in March of 1997, Hanseatic truly broke the peace by procuring the arrest of another of Lykes' ships, the M/V Stella Lykes, in a court in Belgium "in order to compel payment of the pre-petition claims purportedly assigned by Andrea and Altonia."[55]

The *Lykes* court properly began its analysis with a discussion as to whether it could exercise *in personam* jurisdiction over the various defendants.[56] The court dispensed with Andrea very quickly, asserting that it "[c]learly . . . has personal jurisdiction over Andrea Shipping because Andrea filed a claim . . . and has therefore consented to the jurisdiction of the United States Bankruptcy Court."[57] While the case law may be clear on this point, the court still found it difficult to require Andrea to act according to the court's direction.[58] Because Andrea was not a U.S.-based entity, the U.S. court was limited with regard to the sanctions it could realistically enforce against Andrea.[59] Any sanctions that the court did impose would only be effective if Andrea had assets physically located in the United States—otherwise, Andrea (absent a court order from its country of incorporation) would have no incentive to submit to sanctions of a U.S. court.[60]

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54. *Id.* at 284–85. While the assignment of claims normally does not violate the automatic stay, the court found that Hanseatic was created for the sole purpose of avoiding the automatic stay seeing as it was actually created five days *after* the assignments were made. Therefore, the court held that this particular assignment did violate the stay.

55. *Id.* at 285.

56. *Id.*

57. If an individual files a claim in or invokes the aid/protection of a U.S. bankruptcy court, that individual has submitted itself to the jurisdiction of the bankruptcy court and must therefore abide by the consequences of the related bankruptcy proceedings. *In re Lykes Bros.*, 207 B.R. at 285–86 (citing Langenkamp v. Kulp, 498 U.S. 42, 111 S.Ct. 330, 112 L.Ed.2d 343 (1990)); Katchen v. Landy, 382 U.S. 323, 327 (1966); Gardner v. New Jersey, 329 U.S. 565, 573 (1947); *In re* Schwinn Bicycle Co., 182 B.R. 526, 530 (Bankr. N.D. Ill. 1995); *In re* Am. Exp. Group Int'l. Serv., Inc., 167 B.R. 311, 316 (Bankr. D.Colo 1994).

58. *In re Lykes Bros*., 207 B.R. at 286 ("Having voluntarily filed its proof of claim in this reorganization case, Andrea purposefully submitted itself to this Court's jurisdiction and was obligated to comply with its orders and with its procedures. Neither it nor its purported transferee did so.").

59. *See* Container Leasing International, LLC v. Navicon, S.A., No. CIV303CV00101, 2006 WL 861012 at *7 (D. Conn. Mar. 31, 2006); Global Marine Shipping (No. 10) Ltd. v. Finning Intern, Inc., No. CIV.A.101–1901, 2002 WL 126932 at *5 (E.D. La. Jan. 29, 2002).

60. *See Container Leasing International*, 2006 WL 861012 at *7; *Global Marine Shipping*, 2002 WL 126932 at *5.

The *Lykes* court found that it had *in personam* jurisdiction over Altonia as well, but for a different reason.[61] Here, the court relied on a minimum contacts analysis.[62] This analysis is more compelling than the analysis regarding Andrea,[63] but Altonia could also have chosen to disregard any orders made by this court unless Altonia owned assets that were physically located in the United States.[64] If Altonia owned no assets in the United States and decided it no longer needed the benefits of dealing with the United States courts, why would it accept sanctions?

The most troubling part of this opinion is the single sentence that this court devoted to establishing its *in personam* jurisdiction over Hanseatic.[65] Here, the court stated, "[w]hile nothing in the record warrants the conclusion that Haneastic is subject to the personal jurisdiction of this Court, it cannot be gainsaid that this Court's jurisdiction under 28 U.S.C. § 1334(d) grants this Court jurisdiction over all property of the estate wheresoever located."[66] In making this assertion, the court "acknowledged that there was no traditional basis upon which to base personal jurisdiction over [Hanseatic], ultimately relying on [Hanseatic's] continuing knowledge that its actions . . . would have the effect of disrupting the debtor's U.S. bankruptcy case and its property."[67] Based on this precariously justified assertion of *in personam* jurisdiction, the bankruptcy court went on to order that Hanseatic be enjoined from taking further steps to collect any assets from the debtor and that Haneastic must

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61. *In re Lykes Bros.*, 207 B.R. at 286.

62. *Id.* at 286–87. Here, the court discussed eight points from the record to demonstrate that Altonia did indeed have minimum contacts with the United States. Those points include the facts that Altonia: 1) entered into a charter with Lykes; 2) agreed to deliver the vessel to Lykes in New York; 3) agreed to accept re-delivery of the vessel in New York; 4) allowed the chartered vessel to call on ports in the United States; 5) agreed in the charter that all bills of lading issued under the charter be subject to the Carriage of Goods by Sea Act of the United States; 6) agreeing that Altonia would be bound by the U.S. Anti-Drug Abuse Act of 1986; 7) entered into a Certificate of Financial Responsibility with the United States Coast Guard, and; 8) agreed that Altonia would remain responsible for the navigation of the vessel, knowing that it would call on United States ports.

63. The reasoning with regard to Altonia is more compelling because the court had jurisdiction over Altonia independent of the instant bankruptcy proceedings—this seems more legitimate the "jurisdiction by ambush" to which Andrea was subject.

64. *See Container Leasing International*, 2006 WL 861012 at *7; *Global Marine Shipping*, 2002 WL 126932 at *5.

65. *In re Lykes Bros.*, 207 B.R. at 287.

66. *Id.* Note that here the court cited to 28 U.S.C. § 1334(d) for the "wherever located" provision, but 28 U.S.C. § 1334(e) currently holds this language. In fact, § 1334(d) did contain the "wherever located" provision until the code was amended in 1994. This provision appears in § 1334(e) today.

67. Green, *supra* note 25, at 109 (alterations added).

immediately drop any open actions against the debtor anywhere in the world.[68]

How can this be? Under what set of bizarre and improbable circumstances would Hanseatic actually submit to the jurisdiction of the bankruptcy court and decide to follow its orders? At least Andrea and Altonia are companies that had previously had dealings with the United States, either through voluntary court proceedings or minimum contacts in business transactions.[69] Because of these previous dealings, it is conceivable—if not probable—that these companies had assets in the United States and would therefore have agreed to comply with orders of the bankruptcy court.[70] Hanseatic, however, is a completely different story. If the *Lykes* court was right—and it seems that it was—Hanseatic was created solely for the purpose of contravening the automatic stay and pursuing the debtor's assets despite the previously filed Chapter 11 petition.[71] Essentially, Hanseatic was only subject to the personal jurisdiction of the *Lykes* court because Hanseatic was in possession of Lykes's vessel, as provided for by 28 U.S.C. § 1334(e).[72] Only by relying on the fiction that the bankruptcy court can exercise *in rem* jurisdiction over the property,[73] and by straining this fiction to an extreme degree in order to exercise *in personam* jurisdiction over the violator,[74] could the bankruptcy court claim that it had the proper jurisdiction to issue orders to Hanseatic. This reasoning is dubious at best.

2. *In re* Nakash

Joseph Nakash was a member of the board of directors of an Israeli banking institution called The North American Bank, Ltd.[75] The institution was declared insolvent, and Nakash filed a voluntary petition under Chapter 11 in the United States in October 1994. He filed this petition in response to a $160 million judgment entered against him in Israel in December 1993.[76] In order to enforce the judgment, the Official Receiver of the State of Israel (the "receiver") commenced an action in the Eastern

68. *In re Lykes Bros.*, 207 B.R. at 288.
69. *Id.* at 285–87.
70. *See Container Leasing International*, 2006 WL 861012 at *7; *Global Marine Shipping*, 2002 WL 126932 at *5.
71. *In re Lykes Bros.*, 207 B.R. at 285.
72. *Id.* at 287.
73. Hong Kong and Shanghai Banking Corp. v. Simon (*In re* Simon), 153 F.3d 991, 996 (9th Cir. 1998) (citing Katchen v. Landy, 382 U.S. 323, 327 (1966)).
74. Green, *supra* note 25, at 109.
75. Nakash v. Zur (*In re* Nakash), 190 B.R. 763, 766 (Bankr. S.D.N.Y. 1996).
76. *Id.*

District of New York, seeking an order of attachment.[77] The district court granted the order.[78] Then, on January 16, 1995, the receiver filed an involuntary petition in Israel against Nakash.[79] Nakash responded by filing an adversary proceeding, claiming that the receiver had violated the automatic stay by filing the involuntary petition in Israel.[80]

Like the *Lykes* court, this court began with a discussion of jurisdiction.[81] And, as in *Lykes*, the bankruptcy court quickly established that it had *in personam* jurisdiction over the receiver because the receiver had "submitted himself to the courts of the United States, including this court, by, *inter alia*, seeking attachment in the Eastern District of New York . . . ."[82] This exercise of jurisdiction is similar to that which the *Lykes* court exercised over Andrea, but with one important distinction: Andrea was a foreign company whereas the receiver was an agent of a foreign government.[83]

This raises the question of whether a bankruptcy court can sanction an agent of a foreign government.[84] It seems clear that with Andrea, the U.S. court could have been able to lay some sanctions on its own, but with the receiver, the U.S. court is powerless to enforce any punishment at all (short of physically apprehending the receiver) without the assistance and approval of the Israeli government.[85] Here, the differences be-

77. *Id.* at 767.

78. *Id.*

79. *Id.* This was the second involuntary petition that the receiver filed against Nakash in Israel. The first was in January 1993, but the Israeli court dismissed that proceeding. The receiver appealed and the Supreme Court of Israel reversed and remanded, but no hearing date was set. *Id*. at 766–67.

80. *In re Nakash*, 190 B.R. at 767.

81. *Id.*

82. *Id.* at 767–78 (citing Fotochrome, Inc v. Copal Co., Ltd., 517 F.2d 512 (2d Cir. 1975)); *See also In re* Deak & Co., Inc., 63 B.R. 422, 433 (Bankr. S.D.N.Y. 1986). The Nakash court also sought to strengthen its assertion by stating that in the process of seeking the attachment, the receiver appeared through New York counsel, filed pleadings, filed a proof of claim, and participated in a discovery exchange program.

83. Lykes Bros. Steamship Co., Inc., v. Hanseatic Marine Service (*In re* Lykes Bros. Steamship Co., Inc.), 207 B.R. 282, 284 (Bankr. M.D. Fla. 1997); *In re Nakash*, 190 B.R. at 765.

84. While there are definitely Act of State and Foreign Sovereign Immunities Act issues lurking here, a discussion of these issues is beyond the scope of this Note. This discussion assumes that the Foreign Sovereign Immunities Act does not bar jurisdiction and that the Act of State Doctrine does not prohibit the U.S. court from sitting in judgment of the acts in question.

85. GMAM v. Globo Comunicacoes E Participacoes S.A. (*In re* Globo Comunicacoes E Participacoes S.A.), 317 B.R. 235, 250 (Bankr. S.D.N.Y. 2004) ("[T]he bankruptcy court may not be able to secure compliance with such orders except to the degree that it may either assert personal jurisdiction . . . or obtain cooperation from courts in foreign

tween the theoretical and practical approaches to handling the extraterritorial application of the automatic stay are glaringly evident; holding that the stay applies extraterritorially works well in theory, but ensuring that such a holding is respected is another matter entirely. Especially in this case, it seems extremely unlikely that an Israeli court would have approved of sanctions against the receiver in light of the fact that the Jerusalem court endorsed a motion by the receiver in which he requested permission from that court to file the 1995 involuntary petition notwithstanding the Chapter 11 proceedings.[86] While the *Nakash* court did find that the receiver violated the automatic stay, it could not declare the receiver's actions void and chose to leave the issue of sanctions and damages for another time.[87] This decision, unlike that of the *Lykes* court, avoided a scenario in which a U.S. court issues an order that it cannot effectively enforce.

B. Exercising In Rem Jurisdiction Over Property Located Abroad

As noted above, 28 U.S.C. § 1334(e) gives the district court—and ultimately the associated bankruptcy court—jurisdiction over all of the debtor's assets, "wherever located."[88] It is from this statute that U.S. courts derive the fiction that the debtor's property sits within the reach of the court and thus the power to exercise *in rem* jurisdiction over that property.[89] The major problem which emerges here is that this idea that 28 U.S.C. § 1334(e) actually gives a U.S. court *in rem* jurisdiction is just what the *In re Simon* court said it is: a fiction.[90] But what happens when a foreign court—a court in the country in which the debtor's property actually sits—disagrees with the U.S. court and issues orders affecting the property? This was one major issue that surfaced in *In re Gucci*.[91]

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jurisdictions. . . . Furthermore, a foreign court might hypothetically issue conflicting orders . . . pursuant to the foreign court's own view of its jurisdiction . . . ."); Hobson v. Travelstead (*In re* Travelstead), 227 B.R. 638, 655 (Bankr. D. Md. 1998) ("[A] U.S. court order would be enforceable in another country (in the absence of a treaty or convention) only to the extent that the foreign courts" are compelled to enforce it.) (citing *In re* Mctague, 198 B.R. 428, 430 (Bankr. W.D.N.Y. 1996)).

86. *In re Nakash*, 190 B.R. at 767.

87. *Id.* at 771.

88. 28 U.S.C. § 1334(e) (2005); 28 U.S.C. § 157(a) (2005).

89. Hong Kong and Shanghai Banking Corp. v. Simon (*In re* Simon), 153 F.3d 991, 996 (9th Cir. 1998) (citing Katchen v. Landy, 382 U.S. 323, 327 (1966)).

90. *Id. See also* Green, *supra* note 25, at 98.

91. Sinatra v. Gucci (*In re* Gucci), 309 B.R. 679 (Bankr. S.D.N.Y. 2004).

1. *In re* Gucci

Paolo Gucci, the debtor, owned a store in Rome, Italy.[92] In February 1994,[93] he filed a Chapter 11 petition in the United States.[94] A month later, his cousin, Maurizio, obtained an arbitration award against Paolo in Switzerland and registered a lien against the Rome property.[95] Several years later, in May 2000, the trustee of Paolo's estate filed suit against Maurizio's estate alleging that Maurizio had violated the automatic stay by obtaining the Swiss award and registering the lien after Paolo had filed for Chapter 11.[96] The bankruptcy court ruled for the trustee because "[t]he lien was registered pursuant to a decision of an Italian court after the automatic stay was in effect . . . ."[97] Defendants appealed to the district court on several grounds, one of which being that the automatic stay should not have been applied in this case.[98]

In analyzing this issue, the district court followed the model that other courts dealing with the extraterritorial application of the automatic stay had set forth and thus began with a jurisdictional discussion.[99] Like many courts have done before, this court cited 28 U.S.C. § 1334(e)[100] and 28 U.S.C. § 157(a),[101] emphasizing the "wherever located" language.[102] The court then went on to proclaim that this case did not involve—contrary to the defendants' assertions—a conflict between the bankruptcy court and

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92. *Id.* at 681.

93. *In re* Gucci, No. 06-0496-bk, 2006 WL 2671970 at *1 (2d Cir. Sept. 18, 2006). This is an appellate decision that took place after the above-cited case (309 B.R. 679) was remanded and decided again by the district court. I cite to the appellate decision here because the above-cited case omitted background facts and the district court's opinion on remand made an error as to the date of the Chapter 11 filing. That opinion stated that Paolo filed in February 2005, which cannot be correct. I believe February 1994 to be the correct date of the Chapter 11 filing as it makes sense in the timeline and because the courts that recount the background facts agree on all other dates.

94. The cases give no indication as to why Paolo Gucci, who owned property in Rome, filed Chapter 11 in the United States. One can only assume that he owned assets in the United States as well.

95. *In re* Gucci, No. 05-Civ-4444(DC), 2005 WL 3150709 at *1 (S.D.N.Y. Nov. 28, 2005).

96. *Id.* at *2.

97. 309 B.R. at 681.

98. *Id.*

99. *Id.* The only discussion here was about *in rem* jurisdiction—because of the nature of the claim, a discussion of *in personam* jurisdiction was not necessary. Specifically, the court was only concerned with being able to exercise jurisdiction over the store in Rome (*in rem*), and not a person or other legal entity requiring *in personam* jurisdiction. *Id*.

100. 28 U.S.C. § 1334(e) (2005).

101. 28 U.S.C. § 157(a) (2005).

102. *In re Gucci*, 309 B.R. at 681–82.

the Italian court.[103] Here, defendants claimed that by ruling for Gucci below, the bankruptcy court declared an act of the Italian court void *ab initio*.[104] However, the district court disagreed; it stated that the bankruptcy court declared void "the *registration* of the Italian judgment lien," as a matter of U.S. law only.[105] In other words, the only thing that the bankruptcy court declared void was the registration of this lien in the United States as it related to Gucci's Chapter 11 case. The bankruptcy court—or any U.S. court for that matter—could not declare the judgment lien itself void because that lien was the result of an act of an Italian court.[106] The court then went on to explain in greater detail:

> The Bankruptcy Court neither purported to alter, nor could have altered, ownership interests in the Italian real estate in the same sense as in cases in which the property is within the physical power or territorial jurisdiction of an *in rem* court. The fact that Congress granted the district courts, and via their referral, the bankruptcy courts power to enter orders affecting assets of the debtor, wherever located, does not preclude foreign courts from exercising jurisdiction over estate property located in their countries, a matter that raises such questions as to the extraterritorial effect of the automatic stay and the personal jurisdiction of the Untied States courts over an entity at whose behest a foreign court acts.[107]

Finally, the district court concluded that since "the property in question here is located in Rome, its fate will ultimately be determined by Italian courts, which will give such weight as they think appropriate to the decision below."[108]

This decision is extremely important because the court acknowledged and embraced the problem with holding that the automatic stay applies extraterritorially,[109] unlike other courts, which simply held that the automatic stay does apply across borders without citing the difficulties and

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103. *Id.* at 683.

104. *Id.*

105. *Id.* (emphasis in original).

106. *Id.*

107. *Id.* at 683–84 (citing 1 KING, ET AL., COLLIER ON BANKRUPTCY ¶ 3.01[5], at 3-32 to 3-33 (15th ed. rev. 2003)) ("[T]he extraterritorial jurisdiction of the United States courts for these purposes is *in personam* rather than *in rem*. If a creditor causes property of a title 11 estate to be seized in a foreign country, that creditor has violated the automatic stay. Whether that creditor can be punished, however, is a function of that creditor's amenability to the United States process. By the same token, a United States court cannot control the action of the foreign court irrespective of section 1334(e).").

108. *In re Gucci*, 309 B.R. at 684.

109. *Id.*

consequences that invariably accompany such a holding.[110] Once courts realize that the exercise of *in rem* jurisdiction over property located abroad truly is a fiction,[111] and that a holding predicated on that fiction may prove futile,[112] U.S. courts and legislatures may begin to think about what can be done to avoid this unfavorable situation.

III. International Comity and the Question of Deference

Upon being sued for allegedly violating the automatic stay, foreign creditors often defend themselves by asserting that the automatic stay should not apply to them for reasons of international comity.[113] The Supreme Court defined the term "comity" over a century ago, and that classic definition is still consistently cited today:

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.[114]

Under principles of comity, U.S. courts normally "refuse to review acts of foreign governments and defer to proceedings taking place in foreign countries, allowing those acts and proceedings to have extraterritorial effect in the United States."[115] However, comity is not a strict rule of law—rather, it is a rule of "practice, convenience and expediency."[116] Therefore, in instances in which extending comity to a foreign entity would mandate a result contrary to U.S. policy, the U.S. court should decline the foreign entity's request.[117] According to the Second Circuit, U.S. courts are not obligated to extend comity if doing so would be con-

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110. *See, e.g.*, Nakash v. Zur (*In re* Nakash), 190 B.R. 763, 768 (Bankr. S.D.N.Y. 1996); Lykes Bros. Steamship Co., Inc. v. Hanseatic Marine Service (*In re* Lykes Bros. Steamship Co., Inc.), 207 B.R. 282, 287 (Bankr. M.D. Fla. 1997).

111. Hong Kong and Shanghai Banking Corp. v. Simon (*In re* Simon), 153 F.3d 991, 996 (9th Cir. 1998).

112. *See In re Gucci*, 309 B.R. at 683–84. *See also* Green, *supra* note 25 at 98.

113. *See, e.g.*, Hobson v. Travelstead (*In re* Travelstead), 227 B.R. 638, 654–56 (Bankr. D. Md. 1998); *In re Nakash*, 190 B.R. at 770.

114. Hilton v. Guyot, 159 U.S. 113, 164–65 (1895).

115. Pravin Banker Associates, Ltd. v. Banco Popular Del Peru, 109 F.3d 850, 854 (2d Cir. 1997).

116. *Id.*

117. *Id.*

trary to strong public policy.[118] So the question then arises: should U.S. courts grant comity to foreign laws or proceedings if it means allowing a foreign entity to violate the automatic stay?

A. *In re* Travelstead

Mr. Travelstead (the debtor) and Ms. Hobson had acquired a Dutch corporation called Blockless in which Travelstead owned an eighty percent interest and Hobson a twenty percent interest.[119] In December 1995, the debtor borrowed AUS$4,900,000[120] from Blockless (with Hobson's consent), but then failed to repay the loans when they were due.[121] In May 1996, Hobson sued the debtor in the Netherlands to compel repayment, and a Dutch court ordered the debtor to repay immediately.[122] Instead of repaying the loans, the debtor filed for Chapter 11 in the United States.[123] Subsequently, Hobson petitioned the Dutch court to order the debtor to purchase all of her shares in Blockless, and the Dutch court complied.[124] Travelstead then sued Hobson in the United States, alleging that her attempts to compel payment and her pursuit of the buyout order violated the automatic stay.[125] In her defense, Hobson claimed that the U.S. court should abstain from hearing the case based on principles of international comity.[126]

After an examination of U.S. case law setting forth the principles of international comity, the court addressed Hobson's claim that the debtor's Chapter 11 reorganization plan conflicted with the Dutch order.[127] Specifically, Hobson asserted that the Dutch order required that the debtor repay Blockless immediately and that the debtor buy Hobson's shares at the same time that she tendered them.[128] The plan, on the other hand, provided that the debtor repay Blockless within two years and that the

118. *Id.* (quoting Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 937 (D.C. Cir. 1984).

119. Hobson v. Travelstead (*In re* Travelstead), 227 B.R. 638, 642 (Bankr. D. Md. 1998).

120. On December 1, 1995, AUS$4,900,000 amounted to USD$3,612,280. *See* http://www.jeico.co.kr/cnc57aus.html (last visited Aug. 1, 2007).

121. *In re Travelstead*, 227 B.R. at 642.

122. *Id.*

123. *Id.* The case does not specify why the debtor was able to file a U.S. Bankruptcy petition in this instance, but foreign debtors can file in the United States if they have a domicile in the United States or if they have assets located in the United States.

124. *Id.* at 643.

125. *Id.*

126. *In re Travelstead*, 227 B.R. at 654–58.

127. *Id.* at 656.

128. *Id.*

debtor could choose not to pay Hobson at the time she tendered her shares.[129] Although the court recognized these differences, it ultimately decided that "the Plan defers to the Dutch Judgments far more than it conflicts with them," because the claims themselves were preserved and determined under Dutch law.[130] Therefore, the court determined that it was not proper or necessary to abstain from hearing the debtor's case based on considerations of international comity.[131]

B. In re Nakash

The Israeli receiver, who filed an involuntary bankruptcy case against Nakash (the debtor) in Israel after the debtor filed for Chapter 11 in the United States,[132] defended his case by asserting that even if the automatic stay applied extraterritorially, principles of international comity required that the U.S. court find that the he did not violate the automatic stay.[133] Specifically, the receiver asserted that subjecting him to the automatic stay would create a direct conflict between American and Israeli law.[134] The court, however, chose to focus on the acts of the receiver himself rather than on the Israeli court's ruling.[135] The court ultimately ruled that comity did not require it to "respect or defer to the acts of a judgment creditor."[136]

In reaching these decisions, the courts did not spell out their policy reasons for declining to grant comity with regard to the automatic stay. However, when one considers the primary purpose of the automatic stay—to "prevent the debtor's estate from being picked to pieces by creditors"[137] so that the bankruptcy court can distribute the debtor's assets in a fair and equitable manner,[138]—one can readily surmise that extending comity by disregarding the automatic stay would be contrary to the policy of protecting a U.S. debtor and preserving the debtor's estate for the benefit of the creditors. Therefore, since courts should not extend comity in instances in which doing so would be contrary to U.S. pol-

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129. *Id.*
130. *Id.* at 657.
131. *In re Travelstead*, 227 B.R. at 658.
132. Nakash v. Zur (*In re* Nakash), 190 B.R. 763, 766–67 (Bankr. S.D.N.Y. 1996).
133. *Id.* at 770.
134. *Id.*
135. *Id.*
136. *Id.*
137. Underwood v. Hillard (*In re* Rimsat), 98 F.3d 965, 961 (7th Cir. 1996) (citing Martin-Trigona v. Champion Federal Savings and Loan Ass'n, 892 F.2d 575, 577 (7th Cir. 1989)).
138. GMAM v. Globo Comunicacoes E Participacoes S.A. (*In re* Globo Comunicacoes E Participacoes S.A.), 317 B.R. 235, 251 (Bankr. S.D.N.Y. 2004).

icy,[139] they should not extend comity to foreign actors when doing so would allow the actor to avoid the automatic stay.

IV. AUTOMATIC STAY PROVISIONS AROUND THE GLOBE: A COMPARATIVE EXERCISE ENABLING DEVELOPMENT TOWARDS FEASIBLE SOLUTIONS

A. Automatic Stay Provisions in Foreign Jurisdictions

The United States is not the only country in the world whose bankruptcy code has adopted an automatic stay provision—far from it. In particular, many European Union ("EU")[140] countries have incorporated automatic stay provisions into their bankruptcy codes.[141] Others have adopted stay provisions that are not automatic, but are triggered by an action or at the discretion of the court or one of the parties.[142] Some of these provisions are similar to the U.S. automatic stay, while others are very different with regard to scope, duration, and severity.[143] Before addressing a solution to a problem, one must understand all aspects of that problem. Since international insolvency is a two-way street, understanding how foreign countries treat their bankruptcy proceedings is essential to developing an international solution that foreign countries will receive favorably.

1. France

In order to better enable businesses to restructure while continuing to operate, France instituted a new preservation procedure in its Commercial Code.[144] Similar to Chapter 11 of the U.S. Bankruptcy Code, the preservation procedure provides for a restructuring plan to be drawn up by the debtor so that the debtor can repay its liabilities and continue to

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139. Pravin Banker Associates, Ltd. v. Banco Popular Del Peru, 109 F.3d 850, 854 (2d Cir. 1997).

140. The European Union consists of twenty-seven member states: Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom. For more information, *see* EUROPA, http://europa.eu/abc/european_countries/index_en.htm (last visited Aug. 1, 2007).

141. *See* CHARLES D. SCHMERLER & JAMES R. SILKENAT, THE LAW OF INTERNATIONAL INSOLVENCIES AND DEBT RESTRUCTURINGS 228, 259, 370, 397 (Charles D. Schmerler ed., Oxford University Press 2006) [hereinafter SCHMERLER & SILKENAT].

142. *Id.* at 150, 337, 384.

143. *Id.*

144. *Id.* at 150.

operate simultaneously.[145] According to the Code, the preservation procedure is available to any debtor who can show that he is in a situation that will probably lead to a suspension of payments.[146] In order to best protect the debtor during his period of restructuring, "the institution of a preservation proceeding triggers a stay of proceedings."[147] Specifically, the opening of a procedure begins with an "observation period," during which secured creditors are not entitled to enforce their security.[148] This is similar to U.S. law in that a stay is automatically triggered, but differs in that the French stay will not last indefinitely.[149]

2. Ireland

Under Ireland's Companies Act of 1990, the issuing of a bankruptcy petition immediately triggers a "protection period."[150] Under this protection period, no proceedings can be opened or continued against the debtor without permission from the court.[151] This protection period begins on the date the petition is filed and lasts for a maximum of one hundred days.[152] As with France's stay provision, Ireland's is similar to the U.S. automatic stay in that other proceedings are stayed automatically and immediately, but the stay does not last for the entire length of the insolvency proceedings.[153] Additionally, it is significant that Ireland's stay provision states that proceedings already in motion cannot be continued.[154] This idea is also found in U.S. law, but it is not prevalent in the bankruptcy laws of many other EU countries.

3. Italy

Italian bankruptcy proceedings are similar to U.S. Chapter 7 actions in that they are aimed at liquidating the debtor's assets and paying off creditors on a priority basis.[155] One of the main effects of an Italian bankruptcy petition is a "stay of enforcement proceedings," under which

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145. *Id.* at 150–51.
146. *Id.* at 151.
147. SCHMERLER & SILKENAT, *supra* note 141, at 151.
148. *Id.* at 153. This "observation period" lasts for six months, and it can be extended for an additional six months if the bankruptcy court grants leave. However, it is unclear how this stay affects proceedings that are already underway.
149. 11 U.S.C. § 362(a) (2005).
150. SCHMERLER & SILKENAT, *supra* note 141, at 228.
151. *Id.*
152. *Id.*
153. 11 U.S.C. § 362(a) (2005).
154. SCHMERLER & SILKENAT, *supra* note 141, at 228.
155. *Id.* at 259.

"creditors are not entitled to start or continue any enforcement proceedings over the assets of the company."[156] Like U.S. and Irish law, the Italian stay is also automatic and covers actions already in motion.[157]

4. The Netherlands

The stay provision in the Netherlands is much less stringent than are stay provisions of most other countries. Primarily, a stay will not automatically go into effect upon the filing of a bankruptcy petition; rather, a stay will only be entered at the request of the receiver or an interested party.[158] Secondly, if the court does issue a stay order, the order will only last for a maximum of two months, with one possible two-month extension.[159] Lastly, the stay order will not completely bar creditors from acting against the debtor; instead, it will prevent third parties from taking "recourse against any asset falling within the bankruptcy estate" or "claim any assets which are in control of the debtor or the receiver" without permission from the court.[160] Unlike the other stays that have been discussed thus far, this stay still enables creditors to act against the debtor—just not without court permission.

5. Spain

Spain's stay provision, like some others discussed above, operates much more as a "waiting period" than an actual stay of proceedings.[161] Specifically, once a bankruptcy petition is filed, secured creditors are prevented from enforcing their security until the earlier of one of two dates: the date when the debtor allows secured creditors to act, or the date one year from when the petition was filed if liquidation has not yet begun.[162] The purpose of this waiting period, just as we have seen in other jurisdictions, is to "protect the viability of the debtor's business" while the insolvency proceedings are underway.[163] However, it is important to note that this waiting period only applies if the assets in question relate to the "debtor's ordinary business." If they do not, secured creditors can institute enforcement proceedings at any time.[164] This is a direct contrast with U.S. law, under which an estate comprised of all the

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156. *Id.*
157. *Id.*
158. *Id.* at 345.
159. *Id.*
160. SCHMERLER & SILKENAT, *supra* note 141, at 345.
161. *Id.* at 370.
162. *Id.*
163. *Id.*
164. *Id.*

debtor's assets is created, and creditors are stayed from acting against any asset in the estate.[165]

6. The United Kingdom

Once an insolvency administration begins in the United Kingdom, a statutory moratorium goes into effect.[166] This moratorium, like many other stay provisions discussed above, has the effect of preventing creditors from reaching the debtor's assets for the duration of the moratorium.[167] Specifically, the moratorium mandates that creditors may not take any steps towards enforcing any security held by the debtor.[168] As with the U.S. automatic stay, the U.K. moratorium remains in effect for as long as the debtor remains in its bankruptcy administration.[169]

B. U.S. Case Law Dealing with Foreign Automatic Stay Provisions

Given the fact that many countries other than the United States have stay provisions—some automatic—in their bankruptcy codes, an obvious question arises: if foreign states claim extraterritorial application of their stay provisions, will and should U.S. courts respect those claims of extraterritorial reach? This question has been answered affirmatively by *In re Artimm*[170] and *In re Rosacometta*.[171]

Both *Artimm* and *Rosacometta* delt with the extraterritorial application of the Italian automatic stay.[172] In both cases, bankruptcy proceedings were already underway in Italy, and the Italian trustee for the debtor brought an ancillary case in the United States under § 304 of the U.S. Bankruptcy Code[173] in order to prevent U.S. creditors from acting on assets that the debtor possessed in the United States.[174] The *Artimm* court began its discussion of the Italian automatic stay by citing that stay provision and finding that Italian law maintains that the Italian automatic

165. 11 U.S.C. § 541(a) (2005).

166. SCHMERLER & SILKENAT, *supra* note 141, at 397. *See also* England's Insolvency Act, 1986, c. 45, sched. B1, para. 44 (Eng.), *available at* http://www.iiiglobal.org/country/united_kingdom/England_1986_Insolvency_Act_Complete_2004.pdf (last visited Aug. 1, 2007).

167. SCHMERLER & SILKENAT, *supra* note 141, at 397.

168. *Id.*

169. *Id.*

170. *In re* Artimm, 278 B.R. 832 (Bankr. C.D. Cal. 2002).

171. Rosacometta S.R.L. v. Empire Marble and Granite, Inc. (*In re* Rosacometta), 336 B.R. 557 (Bankr. S.D. Fla. 2005).

172. *In re Rosacometta*, 336 B.R. at 562; *In re Artimm*, 278 B.R. at 840.

173. Section 304 no longer exists because it was placed by Chapter 15 in October 2005.

174. *In re Rosacometta*, 336 B.R. at 559; *In re Artimm*, 278 B.R. at 835.

stay applies extraterritorially.[175] The court then went on to discuss the applicable EU law and found that under that law, the Italian automatic stay would apply throughout the European Union.[176] The court reasoned that the EU law supported the determination that the Italian automatic stay should apply extraterritorially, and also added that

> [i]t is particularly appropriate that a United States Bankruptcy court recognize the extraterritorial reach of the Italian automatic stay [because] . . . the United States cannot expect that foreign courts will recognize the extraterritorial reach of its own automatic stay . . . if its courts do not equally recognize the impact in the United States of a foreign automatic stay.[177]

In *In re Rosacometta*, decided three years after *In re Artimm*, the court relied heavily upon the *Artimm* decision in order to arrive at the same conclusion.[178] This cooperative attitude within the realm of international insolvencies is essential in order to handle these insolvencies in our increasingly global marketplace.[179]

V. WORKING TOWARDS SOLUTIONS: EC REGULATION 1346/2000 AND UNCITRAL'S MODEL LAW ON CROSS-BORDER INSOLVENCY

Having already recognized this problem, various international bodies within our global community have begun proposing legislation to facilitate extraterritorially-applicable automatic stay provisions. Two legislative acts that have already been implemented could provide viable solutions: the European Union's EC Regulation 1346/2000 and UNCITRAL's Model Law on Cross-Border Insolvency.

A. EC Regulation 1346/2000

On May 29, 2000, the European Union passed Council Regulation No. 1346/2000 ("EC Regulation").[180] The European Union realized that cross-border insolvencies were becoming more and more prevalent in the increasingly global market, and it therefore took measures to promote

175. *In re Artimm*, 278 B.R. at 840.

176. *Id.* at 841.

177. *Id.*

178. *In re Rosacometta*, 336 B.R. at 563.

179. *See* Judith Elkin & Autumn Smith, *Chapter 15 of the U.S. Bankruptcy Code: New Procedures for Cross Border Insolvencies*, 888 PLI/COMM 9, 31 (2006); Lynn P. Harrison 3rd & Jerrold L. Bregman, *Chapter 15 of the U.S. Bankruptcy Code: A Hands-On Guide to the New World Order of Ancillary and Cross-Border Cases*, 887 PLI/COMM 869, 873 (2006).

180. Council Regulation 1346/2000, 2000 O.J. (L160) 1 (EC) [hereinafter EC Regulation].

efficient operation of international insolvencies.[181] Under this regulation, there are two kinds of insolvency proceedings that can be opened: main proceedings and secondary proceedings.[182] Main proceedings can only be opened in the member state in which a debtor has the center of his interests, and secondary proceedings can be opened in any other member state in which "the debtor has an establishment."[183] While secondary proceedings may run parallel to main proceedings, a secondary proceeding can only affect the assets located in the member state in which it is opened.[184]

In order to maintain stability among the various proceedings, the court which has jurisdiction over a main proceeding is able to "order provisional and protective measures from the time of the request to open proceedings."[185] This ability includes the power to order protective measures as to assets belonging to the debtor that are located in another member state.[186] The regulation has clearly stated the purpose and import of these provisions: "to guarantee the effectiveness of the insolvency proceedings."[187]

Perhaps the most important section of the EC Regulation is Article 4: Law Applicable. This section sets forth provisions describing which member state's laws predominate in situations in which the laws of multiple member states conflict with one another.[188] Specifically, this article grants power to the member state in which a main proceeding is open to determine which assets make up the debtor's estate and "the effects of the insolvency proceedings on proceedings brought by individual creditors."[189] The effect of this article is that if the member state in which the main proceeding is taking place has a stay provision (automatic or otherwise), that stay applies in every other member state. The only exception to this rule is with regard to lawsuits already pending.[190] Under Article 15 of the EC Regulation, if a lawsuit is pending in one state and a main proceeding opens in another, the law of the first state shall apply with regard to the pending proceeding.[191]

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181. *Id.* Recital (2).
182. *Id.* Recital (12).
183. *Id.*
184. *Id.*
185. *Id.* Recital (16).
186. EC Regulation, *supra* note 180, Recital (16).
187. *Id.*
188. *Id.* art. 4.
189. *Id.* art. 4(2)(b), 4(2)(f).
190. *Id.* art. 4(2)(f).
191. *Id.* art. 15.

B. UNCITRAL

In 1997, UNCITRAL adopted its Model Law on Cross-Border Insolvency ("Model Law").[192] In adopting this Model Law, UNCITRAL, in keeping with its "mandate to further the progressive harmonization and unification of the law of international trade,"[193] sought to "provide effective mechanisms for dealing with cases of cross-border insolvency."[194] Specifically, the Model Law is designed to encourage cooperation among bankruptcy courts from different countries, promote "fair and efficient administration" of international insolvencies, and maximize the value of the debtor's assets for the benefit of all interested parties.[195]

According to Article 1, the Model Law should apply in two situations: when a foreign court or representative is seeking the assistance of the state which has enacted the law, or when the state which has enacted the law is seeking assistance in a foreign state.[196] The Model Law, like the EC Regulation, is based on the premise that there are two kinds of foreign proceedings: foreign main proceedings and foreign non-main proceedings.[197] These definitions are virtually the same as those provided by the EC Regulation: a foreign main proceeding is a proceeding in a foreign state in which the debtor has the "centre of its main interests,"[198] whereas a foreign non-main proceeding is a proceeding (aside from the main proceeding) in a state in which "the debtor has an establishment."[199]

The crux of UNCITRAL's Model Law, as relevant to international automatic stay enforcement, is that the Law allows a representative of a foreign main proceeding to apply for recognition within a state that has adopted the Model Law.[200] Most importantly, once a State operating under the Model Law recognizes a foreign main proceeding, an automatic stay goes into effect and prohibits the commencement or continuation of actions against the debtor, as well as any other act of "execution against the debtor's assets."[201] This idea seems to be at the heart of what the

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192. UNCITRAL Model Law on Cross-Border Insolvency, available at http://www.uncitral.org/pdf/english/texts/insolven/insolvency-e.pdf (last visited Aug. 1, 2007) [hereinafter UNCITRAL Model Law].

193. *Id.* Annex para. 1, at 76.

194. *Id.* Preamble at 7.

195. *Id.* Preamble (c) at 7.

196. *Id.* art. 1(a)–(b).

197. *Id.* art 2(a)–(c).

198. UNCITRAL Model Law, *supra* note 192, art 2(b).

199. *Id.* art 2(c). The term "Establishment" is defined in Article 2(f) as "any place of operations where the debtor carries out a non-transitory economic activity with human beings and good or services."

200. *Id.* art.15.

201. *Id.* art. 20(1).

United States is looking for in claiming extraterritorial application of its automatic stay. However, it is crucial to note than an important exception exists in Article 6 of the Model Law which allows a country to decline to recognize a foreign proceeding or afford it rights regarding a stay if doing so would be contrary to the policy considerations of that country.[202]

VI. AN ANSWER FOR THE UNITED STATES?

A. The Adoption of UNCITRAL's Model Law: 11 U.S.C. §§ 1501–1527

It seems obvious that the United States views UNCITRAL's Model Law as a step in the right direction based on the recent addition of Chapter 15 to the United States Bankruptcy Code.[203] This chapter, entitled "Ancillary and Other Cross-Border Cases,"[204] is directly based on UNCITRAL's Model Law.[205] Like the Model Law, the purpose of Chapter 15 is to "provide effective mechanisms for dealing with cases of cross-border insolvency."[206] Chapter 15 applies in four situations: 1) when a foreign court or representative seeks assistance in the United States in connection to a foreign insolvency; 2) when a foreign court or representative seeks assistance in connection with a case proceeding under U.S. bankruptcy law; 3) when foreign and domestic bankruptcy cases concerning the same debtor are proceeding concurrently; or 4) when interested parties in a foreign country have some interest in participating in or requesting the commencement of a case under Chapter 15.[207] There are also several exceptions set out in section 1501(c),[208] but the bottom line is that "a foreign corporation that is not a railroad or a banking institution and that has a residence, domicile, place of business, or property in the United States can obtain relief under Chapter 15."[209]

As is the case with UNCTIRAL's Model Law, Chapter 15 operates largely on the premise that foreign proceedings must be classified either as foreign main proceedings or as foreign non-main proceedings.[210] The

202. *Id.* art 6.
203. Elkin, *supra* note 179 at 15. While Chapter 15 first became effective on October 17, 2005, it was signed into law on April 20, 2005 as part of the Bankruptcy Abuse, Prevention and Consumer Protection Act of 2005. *Id.*
204. 11 U.S.C. § 1501 (2005).
205. Elkin, *supra* note 179 at 15.
206. 11 U.S.C § 1501(a) (2005).
207. 11 U.S.C. § 1501(b)(1)–(4) (2005).
208. 11. U.S.C. § 1501(c) (2005).
209. Elkin, *supra* note 179 at 17. *See also* 11 U.S.C. § 1501(c) (2005).
210. 11 U.S.C. § 1502(4)–(5) (2005); Elkin, *supra* note 179 at 24 ("One of the most significant provisions of Chapter 15 adopted from the European Insolvency Regulation

definitions of foreign main proceeding and foreign non-main proceeding are the same under Chapter 15 as they are under UNCITRAL's Model Law.[211] Additionally, the stay provisions in Chapter 15 operate just as their counterparts do in the Model Law: under § 1519, a foreign representative can request a stay once a petition for recognition is filed,[212] and under § 1520, an automatic stay goes into effect as soon as recognition of a foreign main proceeding is granted.[213] This automatic stay "applies immediately with respect to the debtor and all property of the debtor that is located within the territorial jurisdiction of the United States.[214]

However, looking to the Model Law and Chapter 15 to ensure extraterritorial recognition of the U.S. automatic stay presents several major problems. Primarily, only twelve countries in addition to the United States have adopted the Model Law at this point in time.[215] With only twelve other countries signed on, proceedings against a U.S. debtor will only be stayed to any degree of certainty (assuming the U.S. proceeding is recognized as a foreign main proceeding) in those twelve countries. Moreover, there is nothing stopping even those countries that have adopted the Model Law from failing to grant a stay if doing so would be contrary to the public policy of that country.[216] Since foreign countries

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promulgated by the European Union . . . is the concept of determining whether a foreign proceeding is a 'main' or 'non-main' proceeding.").

211. *See* UNCITRAL Model Law, *supra* note 192, art. 2(a)–(c); 11 U.S.C. § 1502(4)–(5) (2005) (defining a foreign main proceeding as "a foreign proceeding pending in the country where the debtor has the center of its main interests" and a foreign non-main proceeding as "a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment." An establishment, as set out in 11 U.S.C. § 1502(2), means "any place of operations where the debtor carries out a nontransitory economic activity.").

212. 11 U.S.C. § 1519(a)(1) (2005).

213. 11 U.S.C. § 1520(a)(1) (2005). Note that this section imposes an automatic stay governed by 11 U.S.C. § 362—the same automatic stay provision that governs all domestic bankruptcy proceedings.

214. 11 U.S.C. § 1520, n.2 (2005). Unlike the automatic stay initiated by the filing of a domestic bankruptcy petition, this automatic stay specifically does not claim worldwide jurisdiction, but limits itself to the territorial jurisdiction of the United States. It seems that because a main proceeding has been recognized abroad and the Chapter 15 proceeding is merely ancillary, worldwide application of this automatic stay is unnecessary.

215. *See* UNCITRAL, Status, 1997—Model Law on Cross-Border Insolvency, http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html (listing Columbia (2006), Erita (no year specified), Japan (2000), Mexico (2000), New Zealand (2006), Poland (2003), Romania (2003), Montenegro (2002), Serbia (2004); South Africa (2000), Great Britain (2006), and British Virgin Islands, overseas territory of the United Kingdom of Great Britain and Northern Ireland (2005)) (last visited Aug. 1, 2007).

216. 11 U.S.C. § 1506 (2005); UNCITRAL Model Law, *supra* note 192, art. 6.

have vastly different insolvency codes and foreign and domestic value systems than does the United States, it seems evident that the "catch-all" policy exception will create inconsistency in the application of the Model Law from country to country. Because of this exception, the United States would be in essentially the same position it is now: it would need to rely on the discretion of foreign courts in order to attain extraterritorial recognition of its automatic stay. Since that is the unfavorable situation the United States is seeking to avoid, relying on UNCITRAL's Model Law—though a step in the right direction—is an inadequate solution.

B. Looking Further: A Convention is the Key

Another possible solution is for the United States to seek a treaty or convention resembling the EC Regulation discussed above.[217] If the United States became a party to such a treaty, its ultimate goal would be achieved: the § 362 automatic stay would apply within the boundaries of all other signing countries provided that the U.S. proceeding is the main proceeding in any given case.[218] While this approach also requires action on the part of foreign countries in that those countries would have to sign the convention, the United States would be taking an active role in soliciting signatures rather than the passive role of waiting for the rest of the world to adopt UNCITRAL's Model Law. Furthermore, it seems plausible that other countries would be amenable to such a convention given that the EC Regulation already exists, and various countries—as evidenced by the growing popularity of the UNCITRAL's Model Law—are now thinking more carefully about how to best handle cross-border insolvencies in our global marketplace.

However, this solution too is imperfect. The § 362 automatic stay is far more sweeping and inclusive than the stay provisions of many other countries, including most of the EU countries discussed above.[219] Therefore, it seems plausible that other countries with less-inclusive stay provisions may not want the United States as a member to such a treaty for fear of having a very broad stay provision thrust upon them should a main proceeding open in the United States. Additionally, the EC Regulation has an important exception for suits already pending: if a main proceeding were to open in the United States with a non-main proceeding already pending in another signing country, the laws of that other country would determine whether the pending proceedings should be stayed.[220]

217. EC Regulation, *supra* note 180.
218. *Id.* art. 4.
219. *See supra* Part IV.A.
220. EC Regulation, *supra* note 180, art. 15.

This notion is contrary to the § 362 automatic stay.[221] If the United States were to pursue an international convention to ensure extraterritorial recognition of its automatic stay, it would most likely have to be willing to compromise the rigidity and inclusiveness of § 362 so as to make the convention appealing to potential signers. However, even with these drawbacks, pursuing such a convention seems like a favorable option in order to ensure that U.S. debtors are protected when their insolvency proceedings reach beyond the territorial boundaries of the United States.

CONCLUSION

The automatic stay in 11 U.S.C. § 362(a) is an essential component of the U.S. insolvency process. The automatic stay mandates that once a debtor has filed a bankruptcy petition in the United States, no creditor may initiate or continue any proceedings against that debtor or otherwise make a claim to any of the debtor's property.[222] In order to best protect debtors and creditors in our expanding global marketplace, U.S. courts have continually held that the automatic stay applies even to foreign creditors and to property located outside the territorial boundaries of the United States.[223] However, this holding creates problems in situations in which either a foreign creditor seizes a U.S. debtor's assets such that a U.S. court cannot impose sanctions upon the creditor, or a foreign court refuses to recognize that property within its own territorial jurisdiction is subject to the control of U.S. courts.[224] In short, the extraterritorial reach of the automatic stay operates well in theory but can falter in its practical application.

Although there is no clear or perfect answer to this problem, several international bodies have adopted policies that could serve as a solution. One possibility is UNCITRAL's Model Law on Cross-Border Insolvency.[225] Relying on the Model Law seems like an attractive prospect because Article 20 states that once a state operating under the Model Law recognizes a foreign main proceeding, an automatic stay goes into effect that prohibits the commencement or continuation of actions against the debtor or any other act of "execution against the debtor's assets."[226] However, the Model Law's effectiveness in protecting the extraterritorial application of the U.S. automatic stay is wholly dependent on

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221. 11 U.S.C. § 362(a) (2005).
222. 11 U.S.C. § 362(a) (2005).
223. *See supra* note 24.
224. *See, e.g.,* Sinatra v. Gucci (*In re* Gucci), 309 B.R. 679, 684 (Bankr. S.D.N.Y. 2004); Nakash v. Zur (*In re* Nakash), 190 B.R. 763, 767 (Bankr. S.D.N.Y. 1996).
225. UNCITRAL Model Law, *supra* note 192.
226. *Id.* art. 20(1).

other countries opting to adopt the Model law; thus far, only twelve other countries have done so.[227] Furthermore, even if every other country in the world were to adopt the Model Law, it contains a catch-all provision enabling a country to decline to recognize a foreign proceeding or stay provision if doing so would be contrary to the policy considerations of that country.[228]

A more attractive prospective solution is for the United States to seek a treaty or convention resembling EC Regulation 1346/2000.[229] Under the EC Regulation, once a given proceeding is categorized as a main proceeding, the automatic stay of the country in which the main proceeding is pending applies in all other member states.[230] Under such a convention, if a main proceeding is pending in the United States, the § 362 automatic stay would apply in all other signing countries. There is an exception in the EC Regulation to this rule that excludes suits already pending,[231] but this may be a small price for the United States to pay in order to ensure extraterritorial recognition of its automatic stay in the vast majority of situations.

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227. *See supra* note 215.
228. UNCITRAL Model Law, *supra* note 192, art. 6.
229. EC Regulation, *supra* note 180.
230. *Id.* art. 4(2)(b), 4(2)(f).
231. *Id.* art. 4(2)(f).

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