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UNCITRAL'S Model Law on Cross-Border Insolvency: A Workable Protection for Transnational Investment at Last

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I. INTRODUCTION

The steady growth of transnational lending and the tendency of largely held corporations to possess foreign assets combine to foster growth of industry and technology while indirectly contributing to an overall higher standard of living. "Nearly a third of U.S.-based, large, publicly held companies own property in foreign countries and these companies usually separately incorporate those foreign holdings in the particular foreign countries."[1] Similarly, modern bankruptcy cases increasingly involve assets located in various countries.[2] However, the current state of international bankruptcy law presents foreign investors with a great deal of risk and uncertainty, and is unacceptable if cross-border commerce is expected to flourish. While creditors continue to suffer losses resulting from preferential treatment in foreign bankruptcy courts,[3]

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1. Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post Universalist Approach*, 84 CORNELL L. REV. 696, 723 nn.147-48 (1999).

> An examination of cases in the Bankruptcy Research Database reveals that of 266 large, public companies filing for bankruptcy reorganization in the United States from 1980 through 1997, 83 (31%) indicated in their 10-Ks that they owned property outside the United States. Of the 68 companies in the Bankruptcy Research Database with foreign property that disclosed where their subsidiaries were incorporated, 64 (94%) named one or more foreign countries. Of the 65 that indicated the number of foreign countries involved, 49 (75%) had corporations in at least the number of countries in which they had property.

Id. (citing Lynn M. LoPucki, Bankruptcy Research Database (1999)) (unpublished database, on file with author).

2. NATIONAL BANKRUPTCY REVIEW COMMISSION, NATIONAL BANKRUPTCY REVIEW COMMISSION REPORT 351 (vol. I, Oct. 20, 1997). *See also* Leslie A. Burton, *Toward an International Bankruptcy Policy in Europe: Four Decades in Search of a Treaty*, 5 ANN. SURV. INT'L & COMP. L. 205 (1999).

3. *See* Noel Fung, *Jakarta Bankruptcy Court Rejects Foreign Banks' Claim on BII Unit*, ASIAN WALL ST. J., Aug. 4, 1999, at 3. "This decision is another setback for foreign creditors, who so far have had limited success in retrieving their loans through the bankruptcy court . . . ." *Id. See also Chinese Government Not to Bail*

higher risks[4] are needlessly placed on transnational investors: risks which increase the cost of international trading and stifle the emergence of an otherwise burgeoning world-wide economy.[5] While the international community has attempted to respond to the need for global, uniform bankruptcy rules,[6] it has not failed to come up with an acceptable solution.[7] The most recent attempt at providing an international mechanism for dealing with cases of cross-border insolvency is the Model Law on Cross-Border Insolvency (Model Law), adopted by the United Nations Commission on International Trade Law (UNCITRAL), in 1997.[8] Although still in its infancy, the Model Law already has been criticized as yet another failed attempt

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Out ITICs: Banker, CHINA BUS. INFORMATION NETWORK, Jan. 20, 1999. "The terms of the GITIC bankruptcy provided for payment to some 25,000 individual Chinese creditors, but did not give international creditors any assurances that they would be repaid." *Id. See generally China: Court Promises Fair Treatment of Debt Repaying*, CHINA BUS. INFORMATION NETWORK, Apr. 23, 1999 (discussing bankruptcy of Guangdong International Trust and Investment Corp (GITIC)). GITIC is a company owned by the Chinese government. *See id.* Three of its subsidiaries faced claims from 175 foreign creditors for 32.341 billion Yuan and 365 mainland creditors for 14.68 billion Yuan.

4. *See infra* Part II.B. These risks ultimately will result in the inequitable distribution of assets. Acknowledging creditors' fears of inequitable distribution in transnational insolvency cases, Li Qi, deputy judge of the Guangdong Provincial People's High Court in China, felt the necessity to assure creditors that "[a]ll debts, whether on the mainland or outside the country, will be equally compensated." *China: Court Promises Fair Treatment of Debt Repaying*, *supra* note 3.

5. *See* Hon. Justice J.M. Farley, *A Judicial Perspective on International Cooperation in Insolvency Cases*, 17 AM. BANKR. INST. J. 12 (1998). "We must avoid becoming bogged down in non-productive diversions that are destructive to the value of the enterprise." *Id. See also* Burman and Westbrook, *infra* note 10, at 1386. "Progress in this area of the law will have a significant effect on international commercial finance and investment." *Id.*

6. Examples of such attempts include the International Bar Association, Cross-Border Insolvency Concordat, June 1, 1996 [hereinafter Concordat]; European Union Convention on Insolvency Proceedings, Nov. 23 1995, 35 I.L.M. 1223, 1226 [hereinafter EU Convention]; Scandinavian Convention, Nov. 7, 1933, 155 L.N.T.S. 133, 138.

7. *See* David H. Culmer, *The Cross-Border Insolvency Concordat and Customary International Law: Is it Ripe Yet?*, 14 CONN. J. INT'L L. 563, 566 (1999). "The domestic swing toward cooperation with foreign proceedings has not been accompanied by the formation of treaties aimed at cross-border cooperation." *Id.* "In Europe, decades of work has yielded little fruit in terms of a cross-border bankruptcy regime." *Id.* For a further discussion of "failed attempts," see Burton, *supra* note 2.

8. U.N. Commission on International Trade Law's Model Law on Cross-Border Insolvency, G.A. Res. 52/158, UNCITRAL, 30th Sess., Supp. No. 17, Doc. A/52/17 (May 30, 1997), 36 I.L.M. 1386 [hereinafter Model Law].

at filling the vacuum in cross-border insolvency law.[9] While the Model Law may not solve every problem in international bankruptcy, this Note asserts that it is a promising step toward alleviating a substantial number of the significant obstacles to cooperation and the equal distribution of assets. This Note further urges United Nations Member States to incorporate the Model Law into their existing domestic bankruptcy law. The national uniform bankruptcy code in the United States has taken almost 100 years to develop,[10] and the Code has been in a perpetual state of amendment ever since. Given some time to develop, this Note asserts that the Model Law will prove to be a substantial and necessary step toward reducing risks faced by foreign investors and multinational corporations. Not only will the Model Law increase cooperation between courts involved in transnational liquidation and reorganization proceedings, but it will also maximize the equal distribution of assets to creditors in cross-border insolvency proceedings and provide foreign investors with greater predictability. This, in turn, will promote the increase of cross-border trading and the emergence of a single, world-wide market.

Part II of this Note will address the two general theories of transnational insolvency law: universalism and territorialism, and discuss their various flaws. Part III will address the international community's attempts to resolve these issues by creating various transnational insolvency agreements including the Cross-Border Insolvency Concordat[11] adopted by the International Bar Association, the European Convention on Certain International Aspects of Bankruptcy,[12] and the European Union Convention on Insolvency Proceedings,[13] which was accepted by the 15 European Union national governments in 1995, but "collapsed due to Britain's last-minute refusal to sign."[14] This part of the Note also will

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9. *See* John A. Barret, *Various Legislative Attempts With Respect to Bankruptcies Involving More Than One Country*, 33 TEX. INT'L L.J. 557 (1998).

10. *See* Harold Burman & Jay Lawrence Westbrook, Introductory Note to Model Law, 36 I.L.M. 1386, 1387 (1997).

11. Concordat, *supra* note 6.

12. European Convention on Certain International Aspects of Bankruptcy (Istanbul Convention), opened for signature, June 5, 1990, 30 I.L.M. 165 (1991).

13. EU Convention on Insolvency Proceedings, *supra* note 6.

14. *European Union: European Lawmakers Seek Common Rules Governing Bankruptcy*, BNA INTERNATIONAL BUSINESS & FINANCE DAILY NEWS, May 11, 1999

consider the extent to which these agreements have remedied the flaws existing under territorialism and universalism. Part IV of this Note will evaluate the potential success of the Model Law in reconciling the underlying concepts of territoriality (state sovereignty) and universalism (international cooperation). Part IV further will analyze the Model Law's provisions and assess the extent to which they address the weaknesses characteristic of the current state of transnational insolvency law. Part V will then conclude that the Model Law is an acceptable solution to the current weaknesses with the existing territorialist state of transnational insolvency and urge United Nations Member States to enact the Model Law promulgated by UNCITRAL, so that nations may assume their obligations under international law and contribute to a cooperative transnational insolvency environment.

II. TERRITORIALITY AND UNIVERSALISM: TWO THEORIES OF TRANSNATIONAL INSOLVENCY

A. Where We Are Now: Territoriality and the "Grab Rule"

The present lack of international cooperation in transnational bankruptcies has been referred to as the "grab rule,"[15] but is most often defined as the territorialist theory of transnational insolvency. Under this theory, a debtor's assets in each country are essentially "grabbed" by local courts and distributed only to those creditors who appear at (and are aware of) the local proceeding.[16] Naturally, such creditors tend to be primarily local.[17] Under the territorialist approach, foreign insolvency proceedings are seldom recognized by other states.[18] Territorialism is premised on respecting the sovereignty of individual states,[19] and reflects the notion that one country's bankruptcy proceedings only have legal effect in that country.[20] As such, courts of territorialist countries refuse to

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at d5.

15. *See* Culmer, *supra* note 7, at 575 (asserting that the international community has yet to embrace universalism).

16. *See id.*

17. *See id.*

18. *See* NATIONAL BANKRUPTCY REVIEW COMMISSION REPORT, *supra* note 2, at 351.

19. *See* LoPucki, *supra* note 1, at 742.

20. *See* X/Schenkius, Rb., 6 July 1993 KG, 42 NETH. INT'L L. REV. 121 (1995),

recognize foreign orders from outside their national borders.[21] Thus, even if a creditor fully has recovered from a debtor in one state, that creditor still may race with other creditors to yet another state to seize more of the debtor's assets. Today, nearly all countries refuse to help each other in the settlement of claims unless such help has been previously provided for by contract.[22] The ultimate result of the "grab rule" is to create an environment that places unnecessary risks[23] on those conducting multinational business transactions. Every creditor who deals with a foreign corporation impliedly subjects himself to the laws of the foreign government of the corporation with which he voluntarily contracts.[24] As such, creditors investing in foreign countries are required to take frightening risks, including the risk that a return on that investment may never come. These risks result from the major disadvantages of the territorialist approach to transnational insolvency, which may be grouped into four categories.

B. Four General Problems Generated by Territorialism

Perhaps the largest drawback of territorialism is that it encourages a race of the diligent around the world wherever creditors can find and seize assets belonging to the debtor. Thus, international insolvency proceedings involving one debtor and multiple creditors often run concurrently in a variety of states, with creditors competing with one another to seize a debtor's assets. The failure to recognize foreign insolvency proceedings defeats the goal of equal distribution of a debtor's assets, lowers the return to all creditors, and makes reorganization of a corporation virtually impossible.[25] Territorialism also results in favoritism of local creditors[26] (to the detriment

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(in which a Netherlands court held that a bankruptcy commenced in the Netherlands only applies in the Netherlands out of respect for the sovereignty of other countries). *Id.*

21. *See* Burton, *supra* note 2, at 209.

22. *See European Union: European Lawmakers Seek Common Rules governing Bankruptcy*, *supra* note 14.

23. These risks include the possibility that a creditor will not recover any of its debts, or that recovery will be inequitable.

24. Canada S. Ry v. Gebhard, 109 U.S. 527 (1883).

25. *See* Felixistow Dock & Ry Co. v. U.S. Lines, Inc., [1987] 2 Lloyd's Rep. 76.

26. *See China: Court Promises Fair Treatment of Debt Repaying*, *supra* note 3.

of foreign creditors) by domestic courts and an overall lack of cooperation among courts, trustees and creditors in the international community. For purposes of this Note, these pervasive and overlapping problems may be more accurately studied by grouping them into four general categories: 1) lack of notice to foreign creditors; 2) little predictability for international investors; 3) inefficient multiple proceedings; and 4) parochialism.

1. Lack of Notice to Foreign Creditors

A major problem with territorialism is that of notice.[27] Creditors involved in a race for the assets attempt to "beat" other creditors to the goods. Debtors have no legal obligation to notify foreign creditors. Consequently, creditors are often left with little or no right to receive notice of foreign proceedings which ultimately either reorganize or liquidate a debtor's assets.[28] Further, a debtor's assets already may have been depleted by those creditors who won the race.[29] Losing creditors are frequently prevented from recovering equitable distributions, and in some cases, from realizing any recoveries whatsoever.[30] Consequently, cross-border investments may be discouraged and increased risks will result in higher interest rates.

2. Little Predictability for International Investors

An efficient international bankruptcy system needs to act predictably so that lenders can accurately price loans to multinational debtors[31] and corporations with multinational subsid-

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27. For example, Australian law does not require court appointed trustees to provide creditors with any notice prior to the institutionalization of agreements between the trustees and any other creditors. *See* Interpool Ltd. v. Certain Freights of the M/V Venture Star, 102 B.R. 373 (D.N.J. 1988). In this case, U.S. creditors were not notified before an Australian court ratified an agreement between a foreign creditor and an Australian debtor. *Id.*

28. *See* NATIONAL BANKRUPTCY REVIEW COMMISSION REPORT, *supra* note 2, at 351.

29. *See In re* McLean Industries, 68 B.R. 690 (Bankr. S.D.N.Y. 1986) (in which a Greek creditor brought suit in both Hong Kong and Singapore, seizing assets (ships) belonging to a U.S. debtor, the proceeds of the sale of which would have otherwise been distributed among the Greek creditor and several other creditors).

30. *See id.*

31. *See* LoPucki, *supra* note 1, at 702, 703.

iaries can better decide where to incorporate. Prior to involvement in cross-border transactions, lenders and other multinational investors have a strong interest in knowing which court will have jurisdiction and which country's bankruptcy law will govern in the event of insolvency proceedings. The current state of transnational insolvency law, under the territorialist approach, affords little predictability to such creditors in that it provides answers to neither of these questions. Instead, creditors are often left guessing as to what their rights, and the rights of their debtors, will be in the event of insolvency. Substantive areas of bankruptcy law bearing extreme importance to creditors and multinational investors include priorities of creditors in a proceeding distributing a debtor's assets, legal requirements for reorganization and liquidation, and the avoidance of prepetition transfers.[32]

Interpool Ltd. v. Certain Freights of the M/V Venture Star illustrates these existing uncertainties.[33] *Interpool* was a U.S. case involving an Australian company undergoing insolvency proceedings in Australia.[34] In this global case, a U.S. court refused to allow Australian liquidators to administer an Australian company's assets located within the United States.[35] The case involved an Australian debtor with both foreign and U.S. creditors.[36] The U.S. court's decision ultimately would determine not only the question of which court would have jurisdiction of the insolvency proceeding, but also, which law would apply in distributing the assets. This case illustrates the uncertainty of the parties to the litigation regarding which law would ultimately govern the distribution of assets in this insolvency proceeding.

3. Inefficient Multiple Proceedings

Multiple proceedings give rise to a third problem with territorialism concerning the lack of cooperation and coordination of proceedings. Under territorialism, there is no required judicial recognition of foreign proceedings.[37] Additionally,

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32. *See* LoPucki, *supra* note 1, at 709.
33. *See Interpool*, 102 B.R. 373 (D.N.J. 1988).
34. *See id.*
35. *See id.*
36. *See id.*
37. *See Interpool*, 102 B.R. at 377 (concluding that actions taken by a foreign

courts of one state rarely permit the courts of another to administer a debtor's assets in a single proceeding. Not only does this make reorganization virtually impossible, but it also tends to result in multiple recoveries for some creditors at the expense of others.[38] Under the "grab rule," creditors race from state to state to be the first to seize a debtor's assets, and although creditors may have fully recovered their debt in one state, no international law prevents them from recovering again in another state; despite the fact that the debtor's other creditors have yet to recover anything.[39] This practice prevents the equitable distribution of assets among creditors. Though some courts have attempted to minimize the race-for-the-assets problem, their efforts are unable to force reciprocity from other states. Cooperation among courts allows insolvency matters to be dealt with both efficiently and effectively.[40]

In re McLean Industries, Inc. further illustrates the problem.[41] In this case, a U.S. court held that a foreign creditor was subject to U.S. Bankruptcy Court proceedings because the creditor "continually transacts business in the U.S."[42] The purpose of this decision was to bind a foreign creditor to a stay of proceedings issued by the U.S. court, thereby preventing a U.S. debtor's domestic assets from being seized by any creditors.[43] However, the foreign creditor in this case had already seized the U.S. debtor's assets in Hong Kong and Singapore,[44] and the only effect this ruling had on the foreign creditor was to punish him with a contempt citation for knowingly violating an automatic stay.[45] In a subsequent proceeding,[46] the same court held that "instead of taking steps to discontinue those

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court in a foreign bankruptcy proceeding are to be given deference "if and only if" there would be no substantial violation of the law that would be applied in the U.S.). The U.S. Bankruptcy Court ultimately refused to defer to simultaneous proceedings in an Australian court because procedural protections available to creditors in the U.S. were not given to U.S. creditors in Australia. *Id. See also* Concordat, *supra* note 6.

38. *See McLean, 68 B.R. 690.*
39. *See id.*
40. *See* Farley, *supra* note 5, at 12.
41. *See McLean,* 8 B.R. 690.
42. *Id.* at 692.
43. *Id.*
44. *Id.*
45. *Id.* at 694.
46. *See id.*

arrest proceedings [in Hong Kong and Singapore] as the contempt decree required, [that same foreign creditor] took the active steps of ensuring their continuation."[47] Thus, the U.S. Bankruptcy Court's decision was ineffective in deterring multiple recoveries by a foreign debtor. Although the court ordered the foreign creditor to pay additional and previously issued sanctions to the debtor's estate,[48] nothing in its decision effectively prohibited the foreign creditor from continuing to pursue recoveries in foreign jurisdictions, or courts in other jurisdictions from distributing the U.S. debtor's foreign assets to this creditor.

4. Parochialism

Despite efforts toward international cooperation in recent years, the insolvency field has been characterized by extreme parochialism.[49] Resulting in the unequal distribution of assets, parochialism reflects the tendency of courts to "heavily favor local interests,"[50] (including the preservation of jobs and payment of taxes),[51] and to rarely permit the courts of one country to administer the debtor's worldwide assets and claims. "Most countries give priority to their own taxes but refuse even to enforce the taxes of other countries unless a treaty requires it."[52] *Felixistowe Dock & Railway Co. v. U.S. Lines, Inc.*[53] is an excellent example of a country's fear of parochialism and why states are reluctant to put their domestic creditors at the mercy of a foreign proceeding. In *Felixistowe*, an English court refused to lift its injunction enjoining a U.S. debtor from removing its assets located in England while the U.S. debtor was undergoing reorganization in a U.S. Bankrupt-

47. *Id.* at 293.

48. *See id.*

49. *See* Burman & Westbrook, *supra* note 10, at 1386.

50. NATIONAL BANKRUPTCY REVIEW COMMISSION REPORT, *supra* note 2, at 351.

51. *See China: Court Promises Fair Treatment of Debt Repaying, supra* note 3. Discussing the Chinese high court's upcoming adjudication of the Guangdong International Trust and Investment Corporation, (GITIC), the high court acknowledged that "the law gives priority to paying salaries owed to employees and taxes due to the government ahead of repayments to creditors." *Id.* This priority is likely to influence the consideration of the GITIC insolvency, which involves 175 foreign creditors with an aggregate claim of 32.341 billion Yuan. *See id.*

52. LoPucki, *supra* note 1, at 709.

53. [1987] 2 Lloyd's Rep. 76.

cy Court.[54] Noting that to lift the injunction would subject English creditors to "deliberately preferential treatment" in U.S. courts, the English court concluded that the injunction would remain. The English Court's chief concern was protecting its creditors from prejudicial treatment, including U.S. courts' tendencies to favor their own creditors.[55]

C. Universalism

The universalist theory of transnational insolvency proposes a system in which all countries would defer to, and cooperate with, one another in a single home-country insolvency proceeding, so that assets could be distributed or a company could be reorganized in a single proceeding, on a world-wide basis.[56] Under the universalism approach, states more frequently recognize the authority of other states' insolvency proceedings.[57] *In re Culmer* illustrates the comity accorded one state by another and the level of cooperation under this theory.[58] *Culmer* involved a debtor corporation organized under the laws of The Bahamas, currently undergoing bankruptcy proceedings in that state.[59] The issue before the U.S. court was whether to allow the debtor's assets located within the U.S. court's jurisdiction to be transferred to The Bahamas and distributed according to the bankruptcy laws of The Bahamas.[60] Despite requests made by the debtor's U.S. creditors, and pursuant to U.S. bankruptcy law,[61] the Court allowed the transfer, thereby recognizing the foreign proceedings.[62]

The two most widely-discussed forms of universalism include pure universalism and modified universalism. Under a pure form of universalism, the home country court[63] would have exclusive jurisdiction over all of the debtor's assets, wher-

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54. *See id.*

55. *See id.*

56. *See* LoPucki, *supra* note 1, at 704. "Under universalism, one court plays the tune, and everyone else dances." *Id.* at 699.

57. *See* Burton, *supra* note 2, at 210.

58. 26 B.R. 621 (Bankr. S.D.N.Y. 1982).

59. *Id.*

60. *See id.*

61. See 11 U.S.C. § 304 (c)(2) (1998).

62. *See Culmer*, 26 B.R. 621.

63. The nebulous definition of the "home country," and the problems surrounding its uncertainty will be addressed in Part II.D of this note.

ever located, and the sheriffs, marshals, or other law enforcement officers of other countries would enforce that court's orders.[64] This approach requires creditors throughout the world to file their bankruptcy claims in a single court, which would have exclusive jurisdiction over the debtor's entire insolvency case.[65] Likewise, all other courts would recognize the jurisdiction of the court hearing the case, abide by and even enforce that court's decisions.[66] Modified universality, on the other hand, "attempts to bridge the chasm between [pure] universality and territoriality. Under modified universality, one forum hosts [a] central or primary insolvency proceeding, which is supplemented by ancillary or secondary proceedings in other jurisdictions."[67] These ancillary proceedings may be considered useful in handling local issues and providing a link between the primary proceeding in the main forum and the distribution of the debtor's assets in another forum.[68] Under modified universalism, ancillary proceedings function only to aid the main proceeding.[69] Since this Note agrees with the majority of scholars in the field of transnational insolvency that universalism in its pure form is an unrealistic goal,[70] the scope of this note in discussing universalism henceforth will be limited to the theory of modified universalism.

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64. *See* LoPucki, *supra* note 1, at 705.
65. *See Culmer*, 26 B.R. 621.
66. *See id.* at 565.
67. *See Culmer*, 26 B.R. 621.
68. *See id.*
69. *See* LoPucki, *supra* note 1, at 733.
70. *See Culmer*, 26 B.R. 621. "Pure universality does not work." *Id. See also* LoPucki, *supra* note 1, at 969. "Universalism is unworkable." *Id. See also* Draft European Economic Community Bankruptcy Convention, EC Doc. III/72/80 (1990),(EEC Convention]). Under the EEC Convention, one insolvency proceeding would be established to handle all of a debtor's insolvency proceedings, one liquidator would be responsible for administering the proceeding both within and outside of the debtor's country, and a universal set of insolvency laws would apply. *Id.* The EEC Convention never gained enough support to be opened for signature. *See also* Burton, *supra* note 2, at 212. The major criticism of the EEC Convention was that "it would be unworkable for one forum to administer one centralized insolvency estate, given the enormous range of differences in countries' insolvency laws." Manford Balz, *The European Union Convention on Insolvency Proceedings*, 70 AM. BANKR. L.J. 485, 491 (1996).

D. Problems Generated Under the Universalist Approach

The universalist theory is often referred to as the most cooperative system of transnational insolvency.[71] Upon application, however, cooperation is not always characteristic of this approach. While the theory proposes that a main proceeding be held in the debtor's "home country," the determination of which state is a debtor's home country is often unclear.[72] A debtor's home country may be the court of the country designated in the debtor's articles of incorporation, the court of the country in which the debtor is incorporated, where the debtor owns its most valuable assets, where the debtor has its headquarters, where the debtor owes the largest debts, or where the debtor has the bulk of its assets or operations.[73] Essentially, the two main flaws with the application of a universalist system of transnational insolvency include the ambiguity surrounding which forum will host the central proceeding and the question of which law will govern main and ancillary proceedings. The second question is often answered by the first. As such, the two weaknesses with this theory will be discussed in conjunction.

Most states claiming to embrace the universalism view often cooperate with foreign proceedings only when the courts in that jurisdiction are certain that the foreign court will provide equal protection to both domestic and foreign creditors.[74] The majority of courts are primarily interested in assuring that creditors located within their jurisdiction will at least receive the same protections by a foreign court as they would at home.[75] Courts often refuse to grant comity unless the two states are politically alligned and have very similar substantive and procedural bankruptcy rules.[76] Accordingly, the wide

71. Used in this context, this note equates cooperation with the extent to which foreign insolvency proceedings are recognized and enforced by domestic courts.

72. *See* LoPucki, *supra* note 1, at 696.

73. *See* Burton, *supra* note 2, at 206.

74. *See, e.g., Interpool,* 102 B.R. at at 377 (stating that actions taken by a foreign court in a foreign bankruptcy proceeding are to be given deference if, and only if, there would be no substantial violation of the law that would be applied in the United States).

75. *See id.* at 379 ("Protection of US creditors is of utmost importance to this court.").

76. *See* 11 U.S.C. § 304(c), listing factors influencing a U.S. court's decision whether to grant comity to foreign insolvency proceeding. One factor is whether

level of discretion left to courts serves to undermine the level of required judicial cooperation in insolvency proceedings under universalism. Several cases illustrate these weaknesses.

Interpool Ltd. v. Certain Freights of the M/V Venture Star is a U.S. case concerning assets located in the United States but owned by an Australian debtor.[77] While the debtor currently had been undergoing an involuntary liquidation proceeding in Australia, the Australian court-appointed liquidator requested that the U.S. court allow the Australian liquidator to administer these assets.[78] U.S. creditors, on the other hand, requested that the court refuse to grant comity to the Australian proceedings, and thereby prevent the Australian liquidator from administering the assets.[79] While recognizing the need for comity, the U.S. court ultimately refused to allow the Australian court jurisdiction over the Australian debtor's assets, concluding that U.S. creditors would not be given the protection they would receive in a U.S. court under U.S. law in Australia.[80] The court noted that both the laws and public policy of the United States would be violated if the case was permitted to proceed under Australian law.

Felixistowe Dock & Railway Co. v. U.S. Lines, Inc. further illustrates a court purporting to adopt the universalism theory of transnational insolvency, while refusing to allow a foreign court to administer domestically located assets of a foreign debtor.[81] In *Felixistowe Dock & Railway*, a U.S. debtor had been undergoing reorganization proceedings in a U.S. court.[82] The issue before the English court was whether to allow the British assets to be subject to the U.S. reorganization proceeding.[83] The court noted that the general rule is to ascertain the domicile of the company in liquidation and to let the Court of the country of domicile to act as the principal court to govern the liquidation.[84] Nevertheless, the court went on to reason

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assets will be distributed substantially in accord with the order prescribed in the U.S. Bankruptcy Code. *Id.*

77. 102 B.R. 373.
78. *See Id.*
79. *See id.*
80. *See id.*
81. 1987, 2 Lloyd's Rep. 76.
82. *See id.*
83. *See id.*
84. *See id.*

that, "the desire to act as ancillary to the court where the main liquidation is going on will not ever make the court give up the forensic rules which govern the conduct of its own liquidation."[85] After concluding that subjecting British creditors to U.S. jurisdiction would lead to a preferential distribution, the English court refused to recognize the U.S. proceedings.[86]

III. ATTEMPTS AT RESOLVING WEAKNESSES EXISTING UNDER TERRITORIALISM AND UNIVERSALISM THEORIES OF TRANSNATIONAL INSOLVENCY

The existing disadvantages under the current state of transnational insolvency law include lack of notice to creditors of foreign insolvency proceedings, little predictability for international investors stemming from the fact that creditors are unable to determine which state will have jurisdiction over insolvency proceedings and which state's substantive and procedural rules will govern, inefficient multiple proceedings, and parochialism.[87] The international community has attempted to resolve these issues by creating various transnational insolvency agreements and proposals, including[88] the Cross-Border Insolvency Concordat (Concordat),[89] the European Convention on Certain International Aspects of Bankruptcy (Istanbul Convention),[90] and the European Convention on Insolvency Proceedings (EU Convention).[91] A review of these agreements illustrates mistakes to be avoided and offers a framework for shaping future resolutions.

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85. *Id.*

86. *See id.*

87. *See supra* Part II.

88. This is not a comprehensive list of all of the international agreements and proposals attempting to resolve the existing flaws of cross-border insolvency. Further attempts include The Convention Between Denmark, Finland, Iceland, Norway and Sweden Regarding Bankruptcy, Nov. 7, 1933, 155 L.N.T.S. 133 (Nordic Convention). Although this Convention has been generally regarded as successful, it is beyond the scope of this article. "The Nordic countries historically have had similar traditions and laws, making it somewhat simpler for them to enter into a treaty." Ian F. Fletcher, *International Insolvency: A Case for Study and Treatment*, 27 INT'L LAW 429, 437 (1993).

89. *See* Concordat, *supra* note 6.

90. *See* Istanbul Convention, *supra* note 12.

91. *See* EU Convention, *supra* note 6.

A. *Cross-Border Insolvency Concordat*

In 1996, the International Bar Association[92] adopted the Cross-Border Insolvency Concordat[93] as a "framework for harmonizing cross-border insolvency proceedings"[94] and serves merely as a guideline.[95] The Concordat reflects the aspirations of pure universalism; yet acknowledges the reality of modified universalism.[96] It requires common claims to be filed in a main forum,[97] yet provides rules governing ancillary proceedings.[98] It also enjoins discriminatory treatment of creditors[99] and provides for the recognition in other jurisdictions of the main forum's discharge of the debtor's obligations.[100]

The Concordat successfully addresses the lack of notice to foreign creditors problem in Principle 3, which provides that

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92. The Concordat was "developed using bench and bar resources from 25 countries." Farley, *supra* note 5, at 12. For a more detailed look at the application of the Concordat, see *In re* Everfresh Beverages Inc., Ontario Court of Justice, Toronto (Court File No. 32-077978: December 20, 1995) and U.S. Bankruptcy Court, S.D.N.Y. (Case No. 95 B 45405: Dec. 20 1995).

93. *See* Concordat, *supra* note 6.

94. Kurt H. Nadelmann, *Solomons v. Ross and International Bankruptcy Law*, 9 MOD. L. REV. 154, 167-68 (1946).

95. A concordat is neither a law nor a treaty, but rather a set of principles providing guidance, and may be implemented in insolvency proceedings only by court orders. *See* Burton, *supra* note 2, at 230.

96. *See* Concordat, *supra* note 6, at 4. Principle 4(C) dictates that a claim should be filed in one, and only one, Plenary Forum at the election of the holder of the claim. *Id.* However, the Principle continues: "If a claim is filed in more than one plenary forum, distribution must be adjusted so that recovery is not greater than if the claim were filed in only one forum." *Id.* While the Concordat has aspirations reflecting pure universalism, it acknowledges that modified universalism is more realistic and provides for the flexibility required in transnational insolvency agreements. Thus, the Concordat suggests that there ought to be one forum but recognizes that this rarely will be the case. *See* Culmer, *supra* note 7, at 573-74.

97. *See* Concordat, *supra* note 6. "If an entity or individual with cross-border connections is the subject of an insolvency proceeding, a single administrative forum should have primary responsibility for coordinating all insolvency proceedings relating to such entity or individual." *Id.*

98. *See* Concordat, *supra* note 6, at Principle 2(B). "*After* payment of Secured Claims and Privileged Claims, as determined by local law, assets in any forum other than in the Main Forum, shall be turned over to the Main Forum for Distribution." (emphasis added).

99. *See id.* at Principle 2(D) and 4(E). Principle 4(E) requires that "[c]lassification of Common Claims should be coordinated among Plenary Fora. Distributions to Common Claims should be pro-rata regardless of the forum from which a claim receives a Distribution."

100. *See id.* at Principle 2(F).

"[i]f there is more than one forum, the Official Representatives appointed by each forum shall receive notice of, and have the right to appear in, all proceedings in any fora."[101] This provision also helps to resolve the problem of inefficient multiple proceedings by limiting a debtor's insolvency proceeding to as few proceedings as possible. Nevertheless, the Concordat does not explicitly address the recognition of one jurisdiction's decisions by another jurisdiction, other than in Principle 2, which states that "[a] Discharge granted by the Main Forum should be recognized in any forum."[102] This leaves open the question whether restraining orders and stays will be enforced in foreign jurisdictions, and whether states will cooperate with the distribution of assets and in reorganization proceedings. Moreover, the Concordat does not resolve the difficulties surrounding unpredictability for cross-border investors, which stem from the fact that creditors are unable to determine which state will have jurisdiction over insolvency proceedings and which state's substantive and procedural bankruptcy rules will govern. The Concordat provides minimal guidance for creditors by merely stating that the main forum should take place in the state of the debtor's "nerve center."[103] The "nerve center," according to the Concordat, is to be in that jurisdiction where the board of directors or management are or "where the laws will be applied to which the firm's creditors will look."[104] This ambiguity leaves open the possibility that debtors will "forum shop,"[105] and permits a great deal of uncertainty for creditors attempting to predict which substantive law will apply in the event of an insolvency. Finally, the Concordat expressly prohibits parochialism in Principle 2, by stating that the Main Forum may not discriminate against Non-Local Creditors.[106]

In sum, while the Concordat reflects aspirations of universalism, it appears that it has attempted to gain support by its generality, and as such, has failed to offer a practical solution to the existing weaknesses surrounding transnational insolvency. It has sacrificed effectiveness for flexibility. While the Con-

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101. *Id.* at art. 3(A).

102. *See* Concordat, *supra* note 6, at Principle 2(F).

103. *See id.* at 9.

104. Culmer, *supra* note 7, at 575.

105. Debtors may look for a country whose laws are most favorable to them, and establish that country as their nerve center.

106. *See* Concordat, *supra* note 6, at Principle 2(D).

cordat requires that all creditors be notified of and have the right to appear in insolvency proceedings, it fails to prevent disputes over jurisdiction, and does not provide sufficient guidance to creditors attempting to predict which law will govern an insolvency proceeding.

B. European Convention on Certain International Aspects of Bankruptcy (Istanbul Convention)

The Istanbul Convention[107] is another example of an attempt at achieving an international insolvency agreement with universalist aims which ultimately failed due to its excessive flexibility. Nevertheless, examining the proposals of the Istanbul Convention enables one to better evaluate the likely success of UNCITRAL's Model Law.

The Istanbul Convention was proposed as a multilateral treaty by the Council of Europe at Strasbourg in 1989.[108] Only six nations signed the Convention, which was never ratified.[109] While the Istanbul Convention rejected the single forum approach, it retained ideals of the more realistic, modified universalism. It provided that one main proceeding may be supplemented by secondary proceedings in any state in which the debtor had an "establishment."[110] Certain claims filed in secondary proceedings would be paid first, from any assets within the jurisdiction of that state.[111] Any remainder then would be forwarded to the main proceeding for further distribution.[112] Articles 11 and 21 provide that creditors holding priority and secured claims would be permitted to file their claims in secondary proceedings in their own state, so long as

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107. Istanbul Convention, *supra* note 12.

108. *Id.*

109. *See id.* The signing nations include Belgium, France, Germany, Greece, Luxembourg, and Turkey.

110. *See id.* at art. 17.

111. *See id.* at art. 22, 31. That is, certain creditors were permitted to file claims within their local jurisdictions, if the debtor had an "establishment" within that jurisdiction. The Istanbul Convention permitted courts to seize assets within their jurisdictions and distribute the proceeds to local creditors. If any money remained, it then would be forwarded to the main proceeding. This effectively permitted courts in secondary proceedings to assure that local creditors' claims were satisfied prior to turning over domestically located assets to the main proceeding for distribution among foreign creditors. Note the issues this presents regarding parochialism.

112. *See id.*

the debtor had assets located within that state.[113] While providing for flexibility, Articles 11 and 21 perpetuate problems surrounding parochialism in that they operate to allow courts to ensure that domestic creditors be paid in full before any assets are released to the main proceeding for distribution among foreign creditors.[114] The Istanbul Convention attempts to remedy this problem in Article 5, which provides that creditors who obtain partial payment of a claim in one insolvency proceeding may not receive a distribution from any other insolvency proceeding until the remaining creditors have received an equal, pro rata portion of their claims.[115] While this may prevent a "race for the assets,"[116] Article 5 applies only to unsecured creditors, and has no effect on the secured creditors receiving "first shot" at assets located within their domestic jurisdictions under Articles 11 and 21.[117] The Convention attempts further safeguards against inequitable distribution resulting from secondary proceedings in Articles 24 and 27. Article 24 provides that creditors in the main proceeding entitled to receive a dividend from assets coming from secondary proceedings shall be treated equally, regardless of any privileges or other exceptions to the bankruptcy rules of the main or secondary proceedings.[118] Rather, Article 27 provides that a distribution in the secondary proceeding may not take place without prior consent from the main proceeding's liquidator.[119] Such consent may not be withheld if creditors from the secondary proceeding requesting the distribution are able to prove that the financial interests of the creditors of the main proceeding are not affected by the distribution.[120] While this is not a foolproof method of preventing parochialism, Articles 5, 24, and 27 collectively offer a reasonable solution to minimize parochialism while providing flexibility to recognize the sovereignty of individual states conducting secondary proceedings.

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113. *See id.* at arts. 11, 21.
114. *See id.*
115. *See id.* at art. 5.
116. For a discussion of the "race for the assets" problem existing under territorialism, see Part II.B.2.
117. *See* Istanbul Convention, *supra* note 12.
118. *Id.* at art. 24.
119. *Id.* at art. 27.
120. *See id.*

The notice issue is resolved by Article 30 of the Convention, which provides that as soon as any proceedings are opened (either main or secondary), the competent authority of that proceeding or the liquidator appointed shall promptly and individually inform known creditors residing in other jurisdictions.[121] Such notice must contain appropriate details, including time limits and measures to be taken in the proceedings.[122]

The Istanbul Convention appears to have successfully addressed the inefficient multiple proceedings weakness existing under territorialism. Article 4 provides that "when the bankruptcy is opened in the central proceeding, the court which first gave judgment shall alone be considered competent."[123] Article 16 provides that any debtor declared bankrupt by the main proceeding is, "by virtue of this fact alone," to be declared bankrupt in all secondary proceedings.[124] Moreover, secondary proceedings are not permitted to take place until creditors have produced the decision opening insolvency proceedings in the main proceeding.[125]

The Istanbul Convention, however, has failed to provide adequate predictability to creditors attempting to determine which state would host the main proceeding. The forum for the main proceeding is referred to as the "centre of [the debtor's] main interests."[126] While Article 4 provides that "the place of the registered office shall be presumed to be the centre of their main interests,"[127] this merely creates a rebuttable presumption.[128] Under this provision, both creditors and debtors foreseeably may argue that the forum for the main proceeding may be either where the debtor is incorporated, where the debtor conducts the majority of its operations, (which may generate further disputes), the state of the debtor's headquarters, or any number of other jurisdictions. While debtors and creditors may have difficulty predicting the forum for the main proceeding, the Istanbul Convention enables secured creditors

121. *Id.* at art. 30.
122. *See id.*
123. Istanbul Convention, *supra* note 12, at art. 4(2)(b).
124. *Id.* at art. 16.
125. *See id.* at art. 17.
126. *Id.* at art. 4(1).
127. *Id.*
128. *See* Burton, *supra* note 2, at 213, n.41.

to predict which state's bankruptcy law will govern their insolvency proceedings, since secured creditors are permitted to file claims in their local jurisdictions provided that the debtor has assets and an "establishment" in that jurisdiction.[129] Moreover, Article 19 provides that secondary proceedings are governed by the bankruptcy law of the state conducting the proceeding.[130]

Perhaps the predominant weakness with the Istanbul Convention lies within the Convention's "opt-out" provisions, which enable states to refuse to recognize a foreign liquidator's powers.[131] The "opt-out" provisions further enable states to disregard proceedings in the main forum.[132] In these ways, the Istanbul Convention illustrates the difficulties in creating an international agreement which is not only flexible enough to be accepted by a sufficient number of states, but is also strong enough to resolve the existing weaknesses surrounding transnational insolvency.

C. European Union Convention on Insolvency Proceedings (EU Convention)

Utilizing most of the provisions from the Istanbul Convention as its framework, the EU Convention was intended to "ensure recognition and enforcement of judgments [and] to allow for secondary insolvency proceedings."[133] Thus, the EU Convention, like its predecessors, adopts the modified universalism theory and attempts to blend "a framework of member state cooperation with a recognition of the unique aspects of member state's laws."[134] Article 3(1) of the EU Convention reflects the modified universalism approach by providing that transnational insolvency proceedings shall be opened at a main proceeding,[135] while Article 3(2) allows secondary proceedings to be commenced in fora where the debtor "possesses an establishment."[136] Moreover, the secondary proceedings shall be

129. Istanbul Convention, *supra* note 12, at arts. 11, 21.
130. *Id.* at art. 19.
131. *Id.* at arts. 6-15.
132. *See id.* at arts. 16-28.
133. EU Convention, *supra* note 6.
134. Burton, *supra* note 2, at 218.
135. EU Convention, *supra* note 6, at art. 3(1).
136. *Id.* at art 3(2). *See also* art. 16(2). "Recognition of the proceedings referred to in Article 3(1) shall not preclude the opening of the proceedings referred to in

subordinate to the main proceedings,[137] as is characteristic of modified universalism. Unfortunately, Article 49 provided that the Convention shall not enter into force until it has been ratified by all the Member States of the European Union.[138] The EU Convention was agreed to in theory by all of the fifteen European Union Member States, but was signed by only fourteen of them.[139] The United Kingdom refused to sign at the last minute, when its beef exports were reduced due to mad cow disease.[140] Consequently, the EU Convention failed to take effect.

In evaluating the extent to which the EU Convention resolves the weaknesses existing under the current state of transnational insolvency law, one may begin by addressing the notice issue. Article 40 provides that as soon as an insolvency proceeding is opened in a Contracting State, "the court of that State having jurisdiction or the liquidator appointed by it shall immediately inform known creditors who have their habitual residences, domiciles or registered offices in the other Contracting States."[141] As such, the EU Convention adequately remedies the lack of notice problem. Unfortunately, it does not resolve the predictability issue.

The EU Convention possesses the same deficiencies as the Istanbul Convention regarding the ambiguity surrounding which state will host the main proceeding. Article 3(1) of the

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Article 3(2) by a court in another Contracting State. The latter proceedings shall be secondary proceedings within the meaning of Chapter III." *Id.* Under the EU Convention, proceedings only may proceed in jurisdictions of Contracting States. *See* arts. 3 and 16. An establishment is defined as "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods." *Id.* at art. 2(h).

137. *See id.* at art. 33. "The court, which opened the secondary proceedings, shall stay the process of liquidation in whole or in part on receipt of a request from the liquidator in the main proceedings." *Id.* For restrictions on the ability of the main proceeding to issue a stay on the secondary proceeding, see art. 33.

138. EU Convention, *supra* note 6, at art. 49(2).

139. *See* Burton, *supra* note 2, at 208.

140. *See* Culmer, *supra* note 7, at 567. *See also* Burton, *supra* note 2, at 223-24. "The United Kingdom refused to sign the EU Convention in retaliation for the total beef ban which the EU had imposed on March 27, 1996, because British cattle were suffering from Bovine Spongiform Encephalopathy [more commonly referred to as Mad Cow Disease]. Four decades of working toward a European insolvency treaty thus came to a disappointing halt on the EU's May 23, 1996, deadline." *Id.*

141. EU Convention, *supra* note 6, at art. 40(1).

EU Convention provides that "the courts of the Contracting State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings."[142] While revisiting the dubious definition of a main proceeding, the EU Convention may be commended for explicitly providing that "the place of the registered office shall be *presumed* to be the centre of its main interests in the absence of proof to the contrary."[143] Although this creates a stronger definition of the main proceeding, the question of acceptable and sufficient proof for rebutting this presumption remains unanswered. Therefore, the jurisdiction of the main proceeding is not entirely provided for by the EU Convention. Nevertheless, once the forum of the main proceeding is agreed upon, unsecured creditors are assured that the bankruptcy law governing their proceedings will be that of the State where the main proceedings are opened.[144] Secured creditors filing claims in secondary proceedings are similarly assured that "the law applicable to secondary proceedings shall be that of the Contracting State within the territory of which the secondary proceedings are opened."[145]

Like the Istanbul Convention, the EU Convention successfully resolves the problem of inefficient multiple proceedings that stems from the lack of judicial recognition of foreign proceedings and results in the inequitable distribution of assets, namely, multiple recoveries by some creditors, and partial or no recoveries by others. Article 16 provides that proceedings in the main proceeding shall be recognized and given effect in all other Contracting States,[146] and Article 25 adequately provides for the recognition of secondary proceedings.[147] Moreover, Article 31 requires the liquidator in the main proceedings and the liquidators in the secondary proceedings to communicate any information which may be relevant to the other proceedings.[148] In addition, Article 20 ensures equal treatment of creditors by providing that "a creditor who has, in the course of insolvency proceedings, obtained a dividend on his claim shall

142. *Id.* at art. 3(1).
143. *Id.* (emphasis added).
144. *See id.* at arts. 3, 4.
145. EU Convention, *supra* note 6, at art. 28.
146. *Id.* at art. 16(1).
147. *Id.* at art. 25(1).
148. *Id.* at art. 31(1).

share in distributions made in other proceedings only where creditors of the same ranking or category have, in those other proceedings, obtained an equivalent dividend."[149]

In sum, the EU Convention, if ratified by all fifteen Member States, would have successfully resolved the issues regarding lack of notice and inefficient multiple proceedings. Lack of predictability regarding applicable jurisdiction and bankruptcy law would have been partially settled, and parochialism does not appear to have been explicitly addressed in the EU Convention. Moreover, the EU Convention would have been able to provide the flexibility integral to international insolvency agreements while preserving the strength necessary for resolving the majority of existing weaknesses in cross-border bankruptcy law. Unlike the Istanbul Convention, the EU Convention contained no "opt-out" provision. Instead, it provided that Contracting States may refuse to recognize or enforce insolvency proceedings opened in other Contracting States "where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy, in particular, its fundamental principles or the constitutional rights and liberties of the individual."[150]

IV. UNCITRAL'S MODEL LAW ON CROSS-BORDER INSOLVENCY

As a result of the historical failed attempts at drafting an insolvency treaty matching the ideals of modified universalism with the proper balance of flexibility and strength, the United Nations Committee on International Trade Law (UNCITRAL) chose instead to create a model law which would become effective only when voluntarily adopted by United Nations Member States as part of their domestic law.[151] Nevertheless, the prior "failed attempts," including the Concordat, the Istanbul Convention, and the EU Convention have provided a considerable foundation for the Model Law.[152]

Demonstrating an acceptance of modified universalism, the Model Law provides for main[153] and secondary proceed-

149. *Id.* at art. 20(2).
150. *Id.* at art. 26.
151. *See* Burman & Westbrook, *supra* note 10, at 1387.
152. *See id.*
153. Model Law, *supra* note 8, at arts. 2(b), 17(2)(a).

ings.[154] Like its ancestors, the Model Law places the main proceeding "in the State where the debtor has the centre of its main interests,"[155] and acknowledges secondary proceedings in states where the debtor has an establishment.[156] Unlike its predecessors, however, the Model Law provides that upon recognition of the main proceeding, commencement or continuation of individual proceedings in any other jurisdiction concerning the debtor's assets, rights, obligations, or liabilities may be stayed,[157] and the right to transfer, encumber or otherwise dispose of any of the debtor's assets may be suspended.[158]

A. The Successful Resolution of the Four Weaknesses in International Insolvency Law

Not only has the Model Law amply provided for the resolution of the four existing weaknesses with the current state of transnational insolvency law,[159] it has surpassed its predecessors in furthering a practical application of cooperation as well as the equitable distribution of assets. In fact, the Preamble acknowledges as its purpose the resolution of three of the weaknesses characteristic of the current vacuum in transnational insolvency law.[160]

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154. *See id.* at art. 17(2)(b).

155. *Id.*

156. *See id.* at 2(c). The definition of "establishment," provided in art. 2(f) is verbatim to the definition given to the same term by the EU Convention, except for the fact that the Model Law adds the words "or services" to the end of its definition. *See* EU Convention, at art. 2(h); Model Law at art. 2(f).

157. *Id.* at art. 20(1)(a-b).

158. *See id.* at art. 20(1)(c).

159. Again, these weaknesses include:

> 1. The inefficiency of multiple proceedings which stems from the lack of recognition of foreign proceedings;
> 2. The failure to provide creditors with notification of foreign proceedings;
> 3. Lack of predictability stemming from the fact that foreign investors will be unable to anticipate which state will have jurisdiction over insolvency proceedings and which state's bankruptcy rules will govern these proceedings; and
> 4. Parochialism, which reflects the tendency of courts to favor domestic creditors over foreign creditors.

See discussion *supra* Part II.B.

160. *See* Model Law, *supra* note 8, at Preamble (stating purposes of the Model Law to include: (a) promotion of cooperation between the courts of the enacting state and foreign states involved in cases of cross-border insolvency (inefficient

1. Lack of Predictability: Which Jurisdiction? Which Law?

While the Model Law uses the familiar ambiguous terms to define which state will host the main proceeding,[161] it provides additional safeguards that minimize the possibility of conflicting interpretations. Like the EU Convention, the Model Law explicitly provides that "in absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests."[162] In addition, Article 8 provides that when interpreting provisions of the Model Law, "regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith."[163] Thus, a variety of interpretations regarding the "centre of interests" state will not be tolerated if the Model Law is earnestly applied. While the Model Law does not explicitly dictate which state's bankruptcy rules will govern proceedings, it implies that each proceeding will be governed by the domestic law of the state having jurisdiction over the main proceeding.[164] Moreover, the Model Law provides some substantive and procedural rules to govern both main and secondary proceedings.[165] Collectively, these provisions provide international creditors and investors with sufficient information for predicting with a great degree of accuracy, which law will govern insolvency proceedings. Thus, the Model Law provides international investors and creditors with the greatest degree of predictability that is possible without providing overly-stringent and unworkable standards.

2. The Failure to Provide Creditors with Notification of Foreign Proceedings

The Model Law is equally successful at ensuring that

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multiple proceedings weakness); (b) greater legal certainty for trade and investment (predictability weakness); and (c) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors (parochialism weakness). *Id.* The remaining weakness, notice, is not listed as a purpose of the Model Law in its Preamble, but is expressly provided for throughout the Model Law.

161. *See id.* (referring to the "centre of the debtor's main interests).

162. *See* Model Law, *supra* note 8, at art. 16 (3).

163. *Id.* at art. 8.

164. *Id.* at arts. 13(1-2), 6, 7, 21(3).

165. *Id.* at arts. 21(1-2), 22.

foreign creditors will receive notice of insolvency proceedings. Article 14 provides that whenever notification is to be given to creditors in the enacting state, "such notification shall also be given to the known creditors that do not have addresses in this State."[166] Further notice requirements provide that the court may order appropriate steps to be taken with a view toward notifying any creditor whose address is not yet known.[167] The Model Law goes on to provide that such notification shall be made to the foreign creditors individually,[168] rather than by mere publication, shall indicate a reasonable time period for filing claims,[169] shall specify the place for filing,[170] and shall contain any other information required to be included in such notification to domestic creditors under domestic law.[171]

3. Inefficient Multiple Proceedings: Recognition and Coordination of Proceedings

The Model Law makes extensive provisions resolving the problem of inefficient multiple proceedings by requiring Member States to cooperate and provide good faith recognition of foreign proceedings.[172] Member States are *required* to recognize foreign proceedings if their courts are provided either with a certified copy of the decision commencing the foreign proceeding,[173] a certificate from the foreign court affirming the existence of the foreign proceeding,[174] or "any other evidence acceptable to the court of the existence of the foreign proceeding."[175] Not only does the Model Law empower courts to cooperate with foreign proceedings, but it *directs them to do so* to the maximum extent possible.[176] In addition, the Model Law demands that an application for recognition of a foreign proceeding be decided at the earliest possible time.[177]

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166. *Id.* at art. 14(1).
167. *See id.*
168. *See* Model Law, *supra* note 8, at art. 14(2).
169. *See id.* at art. 14(3)(a).
170. *See id.*
171. *See id.* at art. 14(3)(c).
172. *Id.* at arts. 8, 15-32.
173. *See* Model Law, *supra* note 8, at art. 15(2)(a).
174. *See id.* at art. 15(2)(b).
175. *Id.* at art. 15(2)(c).
176. *Id.* at art. 25(1).
177. Model Law, *supra* note 8, at art. 17(3).

Foreign representatives are entitled to apply directly to courts in Member States,[178] to commence proceedings in Member States,[179] and to participate in proceedings in Member States[180] with the same rights as creditors in that State.[181] Also, recognition of a foreign proceeding is proof that the debtor is insolvent.[182] The Model Law further provides that secondary proceedings must be consistent with foreign main proceedings,[183] and that if secondary proceedings have taken place before the main proceeding has been commenced, any relief granted in the secondary proceeding shall be reviewed by the court of the main proceeding and modified or terminated if inconsistent with the main proceeding.[184] In sum, UNCITRAL's Model Law has successfully resolved the problem of inefficient multiple proceedings.

4. Parochialism: The Tendency of Courts to Favor Local Creditors

The Model Law furnishes foreign creditors with satisfactory protection against parochialism. Article 13 provides that "foreign creditors have the same rights regarding the commencement of, and participation in" a proceeding as creditors residing in the State in which the proceeding is taking place.[185] In addition, Article 8 directs Member States who have enacted the Model Law to apply its provisions in good faith.[186]

B. Shortcomings Of The Model Law

While the Model Law has no explicit "opt out" provisions, it does provide Member States with a way out of compliance, to some extent. Article 6 provides that courts may refuse to take any action governed by the Model Law "if the action would be

178. *See id.* at art. 9.
179. *See id.* at art. 11.
180. *See id.* at art. 12.
181. *See* Model Law, *supra* note 8, at art. 13(1).
182. *See id.* at art. 31.
183. *Id.* at art. 30(a).
184. *Id.* at art. 29(b)(i).
185. Model Law, *supra* note 8, at art. 13(1).
186. *Id.* at art. 8.

manifestly contrary to public policy."[187] Moreover, Article 22 provides that a court may refuse to grant relief to a foreign creditor if the court is not satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected.[188] The Model Law also provides that Member States may refuse to entrust the distribution of any of the debtor's assets located within that state to the main proceeding, if the court is not satisfied that the interests of creditors within that state are adequately protected.[189] While some critics logically may view the combination of these provisions as undermining the goals of universalism, such a conclusion would be erroneous. The precepts surrounding the Model Law include cooperation to the maximum extent possible[190] and the good faith application of its provisions.[191] Although these provisions may be interpreted by some as allowing Member States great latitude in deciding whether to recognize foreign proceedings, this would not be within the spirit of the Model Law, and under Articles 8 and 25, likely would constitute a violation. Instead, it may be argued that these provisions allow states to cooperate with one another in administering bankruptcy proceedings, without sacrificing sovereignty or individual public policies, which would otherwise be applied in purely domestic proceedings.

V. A WORKABLE SOLUTION IN THE FIELD OF TRANSNATIONAL INSOLVENCY

While the Model Law may not resolve every problem with the existing state of international insolvency law, it is by far, the most promising step toward alleviating a majority of the existing obstacles. In light of UNCITRAL's Model Law, this note rejects "the hard reality of territorialism"[192] and along with the United States 106th Congress, urges United Nations Member States to embrace the Model Law as part of their domestic bankruptcy law. UNCITRAL's Model Law is the single transnational insolvency agreement providing the formula

187. *Id.* at art. 6.
188. *Id.* at art. 22(1).
189. *Id.* at art. 21(2).
190. Model Law, *supra* note 8, at art. 25.
191. *See id.* at art. 8.
192. Culmer, *supra* note 7, at 565.

for the proper balance of the requisite strength and flexibility. Its provisions earnestly command cooperation and its rigidity is realistic. Countries will always have verifiable concerns about the integrity and preservation of their jurisdiction. The Model Law delicately preserves this integrity while ensuring cooperation among courts that allows the administration of insolvency proceedings to be dealt with effectively, equitably and efficiently. Insolvency proceedings now affect investment and commercial interests well beyond the country in which they take place,[193] and nearly a third of U.S.-based, large, publicly held companies own property in foreign countries.[194] If we hope to continue as a prosperous global economy, the time to enact the Model Law is now. United Nations Member States have an obligation to protect foreign investment, and the Model Law presents them with an excellent opportunity to do so.

Sara Isham[*]

193. *See* Burman and Westbrook, *supra* note 10, at 1386.

194. *See* LoPucki, *supra* note 1.

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