Vanderbilt Journal of Transnational Law

Volume 48
Issue 5 *November 2015*

Article 3

2015

Recognition and Enforcement in Cross-Border Insolvency Law: A Proposal for Judicial Gap-Filling

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ABSTRACT

The globalization of business activity necessarily entails contacts with a diverse array of national laws and legal systems, and insolvencies in this context often have transnational consequences. In such situations, there is a clash of competing national laws on weighty questions including the recognition of security interests, processes related to the disbursal of assets, and different policy preferences underlying the protection of different kinds of creditors. These clashes pose difficulties because each country has framed its insolvency laws in response to particular political exigencies and the policy preferences of its citizens, reflecting different bargains between creditor and debtor protection. Despite its enormous financial importance and academic complexity, cross-border insolvency law remains in a state of confusion. This Article analyzes the recognition and enforcement of cross-border insolvency judgments from the United States, United Kingdom, and Australia to determine whether the UNCITRAL Model Law's goal of modified universalism is currently being practiced, and subjects the Model Law to analysis through the lens of international relations theories to elaborate a way forward. We posit that courts could use the express language of the Model Law text to confer recognition and enforcement of foreign insolvency judgments. The adoption of our proposal will reduce costs, maximize recovery for creditors, and ensure predictability for all parties.

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I. INTRODUCTION

The globalization of business activity necessarily entails contacts with a diverse array of national laws and legal systems. It is no accident then that when multinational businesses become insolvent, such insolvencies often have transnational consequences and cross the boundaries of domestic jurisdictions.[1] A recent illustration of the

1. *See Cross-Border Insolvency Bill 2007* (Cth) outline (Austl.) (recognizing that insolvency laws are some of the most important laws governing market operations), http://www.austlii.edu.au/au/legis/cth/bill_em/cib2007284/ memo_0.html [http://perma.cc/TD84-2N4E] (archived Sept. 19, 2015); *see also* IAN F. FLETCHER, INSOLVENCY IN PRIVATE INTERNATIONAL LAW 5–6 (2nd ed. 2005) ("Many different factors are capable, either singly or in combination, of imparting a cross-border dimension to a case of insolvency. The debtor may have had dealings with one or more

scale, complexity, and financial significance of the issues involved is provided by the insolvency of Lehman Brothers, a firm that conducted business in over forty countries through the instrumentality of about 650 legal entities outside the United States.[2] In such situations, there is a clash of competing national laws on questions including the recognition of security interests, processes related to the disbursal of assets, and different policy preferences underlying the protection of different kinds of creditors.

These clashes pose difficulties because each country has framed its insolvency laws in response to particular political exigencies and the policy preferences of its citizens, reflecting different bargains between creditor and debtor protection. Alongside this variety of legal rules is the competition among creditors to maximize their private benefit to the exclusion of others. The result has been summed up by one author as triggering "diverse and uncoordinated legal proceedings in various countries connected to the affairs of [a multinational] enterprise."[3] Inevitably, as private actors compete to secure their interests via a multiplicity of proceedings across the world, costs rise.[4] In this milieu, it is clear that the primary beneficiaries are the debtor, and some creditors who possess deep pockets, because small creditors may not be able to afford the costs of participating in multiple proceedings in different jurisdictions. In sum, the problems thrown up by cross-border insolvency include (1) lack of clarity as to applicable laws, (2) uncertainty about participation in proceedings in foreign courts, (3) language, (4) ensuring procedural fairness, (5)

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parties from other countries, or may own or have interests in property not all of which is exclusively within the jurisdiction of a single state. Liabilities may be owed to parties whose forensic connections are predominantly with a different country to that with which the debtor is associated; or the relevant obligations may be governed by foreign law, may have been incurred outside the debtor's home country, or may be due to be performed abroad."); ROY GOODE, PRINCIPLES OF CORPORATE INSOLVENCY LAW 780 (4th ed. 2011) ("An international insolvency is typically characterised by one or more of the following features: the debtor's business is conducted in different countries; the assets are located in different countries; there are parallel proceedings in different countries.").

2. ALVAREZ & MARSAL, LEHMAN BROTHERS HOLDINGS INC., INTERNATIONAL PROTOCOL PROPOSAL (Feb. 11, 2009), http://dm.epiq11.com/LBH/Document/GetDocument/1131024 [http://perma.cc/WBU9-VTWT] (archived Sept. 17, 2015).

3. Hannah L. Buxbaum, *Rethinking International Insolvency: The Neglected Role of Choice-of-Law Rules and Theory*, 36 STAN. J. INT'L L. 23, 23 (2000).

4. The Legislative Guide to the UNCITRAL Model Law notes that, "national insolvency laws by and large have not kept pace with the trend, and they are often ill-equipped to deal with cases of a cross-border nature. This frequently results in inadequate and inharmonious legal approaches, which hamper the rescue of financially troubled businesses, are not conducive to a fair and efficient administration of cross-border insolvencies, impede the protection of the assets of the insolvent debtor against dissipation and hinder maximization of the value of those assets." U.N. COMM'N ON INT'L TRADE LAW (UNCITRAL), LEGISLATIVE GUIDE ON INSOLVENCY LAW (2005) [hereinafter LEGISLATIVE GUIDE], https://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf [https://perma.cc/N9XW-44N9] (archived Sept. 19, 2015) (recommending common features for effective and efficient insolvency law).

equal treatment of creditors, (6) uncertainty about the validity and enforceability of security, (7) protecting the interests of employees and other vulnerable groups,[5] (8) increased borrowing costs owing to uncertainty faced by creditors,[6] (9) delays in disbursement of assets, and (10) difficulty in protecting a diverse array of national public policy goals.

Clearly, for many practitioners and scholars, the solution to these problems would be to subject the insolvency to one proceeding with global reach to cover all assets worldwide and with the responsibility for disbursing assets to claimants. This view—universalism—is one pillar of the tripod that divides academic opinion about cross-border insolvency law.[7] The alternative approach to cross-border insolvency is where each country applies its own laws within its own jurisdiction to the assets of the insolvent debtor and distributes the proceeds to local creditors. This is referred to as territorialism, [8] a system characterized by a multiplicity of proceedings and resulting inefficiencies.[9] Currently, insolvency law has not been subjected to a global mandatory harmonization process, and there is no international law to limit diverse and uncoordinated proceedings. Instead, the international legal landscape is characterized by a patchwork of national laws that seek to accommodate cross-border insolvencies, often owing their provenance

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5. "To the extent that there is a lack of communication and coordination among courts and administrators . . . it is more likely that assets would be dissipated, fraudulently concealed, or possibly liquidated . . . not only is the ability of creditors to receive payment diminished, but so is the possibility of rescuing financially viable businesses and saving jobs." *Id.* at 21.

6. The Legislative Guide notes that "the absence of predictability in the handling of cross-border insolvency cases can impede capital flow and be a disincentive to cross-border investment." *Id.*

7. *See* Jay Lawrence Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276, 2292–98 (2000) (discussing what is necessary for a universalist approach to international bankruptcy).

8. *See* Samuel L. Bufford, *Global Venue Controls Are Coming: A Reply to Professor LoPucki*, 79 AM. BANKR. L.J. 105, 108 (2005) (noting that through the territorialism approach "the courts in each national jurisdiction seize the property physically within their control and distribute it according to local rules").

9. Jay Lawrence Westbrook, *Theory and Pragmatism in Global Insolvencies: A Choice of Law and Forum*, 65 AM. BANKR. L.J. 457, 460 (1991) (stating that a territorialism approach adds to the cost of every international transaction because of the unpredictability of the results of a default). It is arguable that territorialism actually reflects the expectations of creditors and debtors because the lender is able to factor in the risks better within the local insolvency law where the assets are located. *See* Kent Anderson, *The Cross-Border Insolvency Paradigm: A Defense of the Modified Universal Approach Considering the Japanese Experience*, 21 U. PA. J. INT'L ECON. L. 679, 698 (2000) ("[C]reditors extend credit based on the assets available in, and the insolvency laws of, the local jurisdiction . . . ."). Anderson notes that "the territorial approach arguably better reflects the fact that global businesses are largely organized by independent incorporation in each country where the debtor is doing business." In other words, companies are already opting for the territorial approach on a de facto basis by limiting corporate entities to political regions. *Id.*

to a different commercial age. For instance, until recently, Australia's laws in relation to cross-border insolvency derived from the bankruptcy laws developed in the United Kingdom in the nineteenth century.[10]

During the twentieth century, a number of countries developed bilateral and multilateral agreements to govern the processes involved in cross-border insolvencies between them.[11] Although these agreements work between individual nation states that are party to those agreements, they are necessarily limited in their application. While these regional initiatives were being developed, other world bodies were developing protocols to provide a better framework for global insolvencies. [12] More recently, academics, judges, and practitioners have sought to develop a harmoized that would govern cross-border insolvencies on a global basis as a potential cure for this lack of consistency in approach and application. These efforts reached their apogee when on May 30, 1997, the United Nations Commission on International Trade Law (UNCITRAL) adopted its Model Law on Cross-Border Insolvency (Model Law).[13] The Model Law subscribes partially to the universalist approach to cross-border insolvency. Among other things, it

- sets out the conditions under which persons administering a foreign insolvency proceeding have access to local courts;
- sets out the conditions for recognition of a foreign insolvency proceeding and for granting relief to the representatives of such a proceeding;

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10. *See infra* Part II.

11. *See* FLETCHER, *supra* note 1, at chapters 5–8 (outlining various international attempts to moderate cross-border insolvencies).

12. On the efforts of the World Bank and International Monetary Fund, see Rosalind Foote Mason, Insolvency and Private International Law: Principal Interests in the Resolution of Multistate Insolvency Issues chapter 1 (n. 35), chapter 8 (2003) (unpublished Ph.D. Thesis, University of Queensland) (on file with the T.C. Beirne School of Law, The University of Queensland). Both of these bodies have now effectively endorsed the UNCITRAL Model Law as the means by which countries should facilitate cross-border insolvencies. UNCITRAL, MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION (2014), https://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf [https://perma.cc/8SAJ-QN5C] (archived Sept. 19, 2015); *see also* WORLD BANK, PRINCIPLES AND GUIDELINES FOR EFFECTIVE INSOLVENCY AND CREDITOR RIGHTS SYSTEMS 52, Principle 24 (2001), http://www.worldbank.org/ifa/ipg_eng.pdf [http://perma.cc/5HWG-5X79] (archived Sept. 19, 2015); Int'l Monetary Fund (IMF), *Report on Orderly & Effective Insolvency Procedures* (1999), http://www.imf.org/external/pubs/ft/orderly/ [http://perma.cc/7GAF-Y8R2] (archived Sept. 19, 2015).

13. UNCITRAL, *supra* note 12; *see also* Jenny Clift, *The UNCITRAL Model Law on Cross-Border Insolvency—A Legislative Framework to Facilitate Coordination and Cooperation in Cross-Border Insolvency*, 12 TUL. J. INT'L & COMP. L. 307 (2004).

- permits foreign creditors to participate in local insolvency proceedings;
- permits courts and insolvency practitioners from different countries to cooperate more effectively; and
- makes provision for coordination of insolvency proceedings that are taking place concurrently in different States.[14]

A number of developed countries (including the United States, Canada, Britain, Japan, and Australia) have adopted the Model Law, and it has become the law that governs cross-border insolvency in some of the world's most economically powerful nations. It was the aim of its drafters that most countries in the world would adopt it as law, paving the way for incremental harmonization of the law in this area.[15] However, an inherent flaw in the model law approach is that the longer it takes to achieve adoption on a global level, the more open it is to the generation of uncertainty derived from inconsistent application and interpretation.

Moreover, until September 10, 2015, only twenty-two countries in total had adopted the law in the seventeen years since it was developed. [16] Very few developing countries [17] had adopted it. However, on September 10, 2015, seventeen African countries, member states of OHADA (the Organisation pour l'Harmonisation en Afrique du Droit des Affaires) adopted the Model Law.[18] Before that, the last three countries to adopt the Model Law were Seychelles,

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14. *Cross-Border Insolvency Bill 2008* (Cth) outline (Austl.), http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/s606_ems_02d36ed0-4ef7-41ee-ae22-85ad26c42619/upload_pdf/0801720em.pdf;fileType=application%2Fpdf [http://perma.cc/K5Q3-DR3W] (archived Sept. 19, 2015).

15. The Legislative Guide notes that "inadequate and inharmonious legal approaches, which hamper the rescue of financially troubled businesses, are not conducive to a fair and efficient administration of cross-border insolvencies, impede the protection of the assets of the insolvent debtor against dissipation and hinder maximization of the value of those assets. Moreover, the absence of predictability in the handling of cross-border insolvency cases impedes capital flow and is a disincentive to cross-border investment. Fraud by insolvent debtors, in particular by concealing assets or transferring them to foreign jurisdictions, is an increasing problem, in terms of both its frequency and its magnitude." LEGISLATIVE GUIDE, *supra* note 4, at 310.

16. UNCITRAL, *supra* note 12.

17. *See* Steven T. Kargman, *Emerging Economies and Cross-Border Insolvency Regimes: Missing BRICs in the International Insolvency Architecture*, 6 INSOLVENCY & RESTURCTURING INT'L, no. 2, Sept. 2012, at 8, http://www.kargmanassociates.com/pdf/IBA--Insolvency_and_Restructuring_International--S.Kargman_article_(Sept._'12).pdf [http://perma.cc/J46E-QCKV] (archived Sept. 19, 2015) ("[V]ery few of the major emerging economies—and none of the BRIC countries . . . have adopted the UNCITRAL Model Law on Cross-Border Insolvency . . . .").

18. Those countries are: Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Republic of the Congo, Côte d'Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Senegal, Togo, and Democratic Republic of the Congo.

Vanuatu, and Chile in 2013.[19] The Model Law represents the third pillar—modified universalism—under which a diversity of national laws is allowed to exist with an emphasis on cooperation.[20] Modified universalism has the virtue of flexibility and acknowledges deeply held divisions between nation states about the applicability of their policy preferences to assets located within their jurisdiction.[21] The approach has been criticized for not providing sufficient certainty, failing to reduce transaction costs, being inefficient, and for possessing all of the vices of territorialism.[22]

The various avenues available to resolve cross-border insolvencies have been supplemented more recently with less formal processes based on contracts between creditors and debtors. Those processes include cross-border insolvency agreements in which the parties cooperate and coordinate insolvency proceedings in multiple

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19. *See* UNCITRAL, *Status, Model Law on Cross-Border Insolvency (1997)*, http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html [http://perma.cc/J9WN-KAKS] (archived Nov. 12, 2015); Timothy Lemay, *OHADA Enacts Legislation Based on UNCITRAL Model Law on Cross-Border Insolvency* (Sept. 28, 2015), http://www.unis.unvienna.org/unis/en/pressrels/2015/unisl222.html [http://perma.cc/V263-AQVS] (archived Nov. 12, 2015).

20. *See* Westbrook, *supra* note 7, at 2302 ("[M]odified universalism permits the court to view the default and its resolution . . . from a worldwide perspective and to cooperate with other courts to produce results as close to those that would arise from a single proceeding as local law will permit."); *see also* In re Maxwell Communication Corp., 170 B.R. 800 (Bankr. S.D.N.Y. 1994) (opining that "[T]he United States in ancillary bankruptcy cases has embraced an approach to international insolvency which is a modified form of universalism accepting the central premise of universalism, that is, that assets should be collected and distributed on a worldwide basis, but reserving to local courts discretion to evaluate the fairness of home country procedures and to protect the interests of local creditors."); Anderson, *supra* note 9, at 690 ("Under a modified universal regime, a country does not try to coordinate its legislation with another country but rather creates a system that is open to cooperation while seeking the broadest impact possible for its own laws . . . . it allows for the *possibility* of full foreign enforcement."); Anne Nielsen et al., *The Cross-Border Insolvency Concordat: Principles to Facilitate the Resolution of International Insolvencies*, 70 AM. BANKR. L.J. 533, 534 (1996) ("'Modified universality recognizes the difficulty, given strong national interests in the preservation of sovereignty and the absence of treaties, in creating truly unified proceedings.' The result under the modified universality theory is a central administrative forum located in one country, supplemented by ancillary, or secondary, proceedings located in other countries. The modified universality theory represents a realistic solution to the conflict inherent in the principles of universality and territoriality. It combines both principles, maximizing the advantages and minimizing the disadvantages of both.").

21. *See* Anderson, *supra* note 9, at 691 (stating that modified universalism allows for flexibility and accommodates those who are concerned about losing national sovereignty: "modified regime does not achieve the administrative efficiencies of pure universality, but it limits duplicative administrative expenses while allowing for coordinated liquidation and reorganization. In addition, the modified regime also accommodates those who are concerned about relinquishing national sovereignty, since ancillary courts retain the power to refuse to subvert those aspects of the insolvency over which they have direct control.").

22. *See* Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 CORNELL L. REV. 696, 696 (1999).

jurisdictions, usually by way of agreed protocols.[23] Other scholars have proposed that the most efficient means of governing cross-border insolvencies can be achieved through the use of contract ex ante, allowing creditors and debtors to agree beforehand on the approach to be taken in the event of insolvency.[24] The proponents of an agreed contractual position, in relation to choice of forum and law between creditors and debtors, gained some credence in the 1990s. These advocates have typically argued from a law and economics perspective about the economic benefits to creditors from certainty in the event of insolvency, but opponents decry its narrow focus and failure to meet other normative goals of insolvency law.[25]

In this uncertain legal environment, the growth in the number of cross-border insolvencies in recent years has heightened interest in the question of recognition and enforcement of cross-border insolvency judgments. As is obvious, absent recognition and enforcement, there is no effective remedy, and decisions are confined to territorial limits. UNCITRAL noted the difficulties presented by the absence of specific legal rules:

> Approaches based purely on the doctrine of comity or on exequatur do not provide the same degree of predictability and reliability . . . . For example, in a given legal system general legislation on reciprocal recognition of judgements, including exequatur, might be confined to enforcement of specific money judgements or injunctive orders in two-party disputes, thus excluding decisions opening collective insolvency proceedings. Furthermore, recognition of foreign insolvency proceedings might not be considered as a matter of recognizing a foreign "judgement", for example, if the foreign bankruptcy order is considered to be merely a declaration of status of the debtor or if the order is considered not to be final. [26]

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23. *See* Rosalind Mason, *Cross-border Insolvency and Legal Transnationalisation*, 21 INT'L INSOLVENCY REV. 105, 107–8 (2012) ("[D]ebtors, creditors, financiers and others through their professional advisers are utilising cross-border insolvency agreements."); *see also* UNCITRAL, PRACTICE GUIDE ON CROSS-BORDER INSOLVENCY COOPERATION (2010) Ch. III, http://www.uncitral.org/pdf/english/texts/insolven/Practice_Guide_Ebook_eng.pdf [http://perma.cc/M4DU-G5BC] (archived Sept. 19, 2015) (stating that insolvency agreements facilitate cooperation and coordination of insolvency proceedings in different states).

24. *See* Alan Schwartz, *A Contract Theory Approach to Business Bankruptcy*, 107 YALE L.J. 1807, 1811 (1998); ALAN SCHWARTZ, A NORMATIVE THEORY OF BUSINESS BANKRUPTCY 36–50 (American Law & Economics Association Annual Meetings, Paper 32) (2004) [hereinafter SCHWARTZ, NORMATIVE THEORY] (discussing the benefits of ex ante contracting).

25. For the proponents' view, see Robert K. Rasmussen, *A New Approach to Transnational Insolvencies*, 19 MICH. J. INT'L L. 1, 4 (1998) [hereinafter Rasmussen, *Approach*], and Robert K. Rasmussen, *Resolving Transnational Insolvencies Through Private Ordering*, 98 MICH. L. REV. 2252, 2255 (2000). For a counter view, see Elizabeth Warren, *Bankruptcy Policymaking in an Imperfect World*, 92 MICH. L. REV. 336, 385–86 (1994).

26. UNCITRAL, *supra* note 12, at 21.

Despite this recognition early on in the drafting process, the Model Law does not specifically deal with the enforcement of judgments, and there has been significant controversy in recent years on this topic. [27] Moreover, although international efforts at harmonizing the law on recognition and enforcement in general have been ongoing for a long time, progress has been scant. Even when treaties have been signed to recognize and enforce specific types of judgments, insolvency judgments have typically been excluded.[28] In 2014, UNCITRAL gave Working Group V the mandate to commence work on a model law or provisions on the enforcement of foreign insolvency derived judgments.[29] In its work on developing these rules, Working Group V had to wrestle with the question of jurisdiction:

> One approach might be to focus, as a starting point, on judgements issued by courts of the jurisdiction in which the debtor has its COMI or an establishment. Those two concepts are already used in the cross-border context and the Guide to Enactment and Interpretation of the UNCITRAL Model Law would provide a source of relevant explanatory material. Such an approach could lead, however, to the exclusion of judgements from courts with no jurisdictional claim over main or non-main insolvency proceedings concerning the debtor (within the meaning of the Model Law), including judgements entered by a court with jurisdiction over insolvency proceedings concerning the debtor, but commenced on the basis of presence of assets or the place of the debtor's registration. Since judgements from those courts might also be relevant to the goal of any instrument to be developed, a wider formulation might be required using some of the more general criteria above such as jurisdiction over the debtor. [30]

Clearly, despite its enormous financial importance and academic complexity, cross-border insolvency law remains in a state of confusion. This Article seeks to tackle one significant aspect of that confusion by analyzing the recognition and enforcement of cross-border insolvency judgments from the United States, United

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27. See the discussions on the subject by Lord Hoffmann in Cambridge Gas Transport Corp. v. Official Committee of Unsecured Creditors (of Navigator Holdings Plc) [2006] B.C.C. 962 (PC), and Lord Collins in Rubin v. Eurofinance SA [2012] UKSC 46.

28. HAGUE CONFERENCE ON PRIVATE INT'L LAW, CONVENTION ON CHOICE OF COURT AGREEMENTS (June, 30 2005), http://www.hcch.net/upload/conventions/txt37en.pdf [http://perma.cc/XF27-HV89] (archived Sept. 18, 2015). Article 2, subparagraph 2(e) provides that it does not apply to "insolvency, composition and analogous matters." *Id.*

29. This was because there is "some uncertainty concerning the ability of some courts, in the context of recognition proceedings under the UNCITRAL Model Law on Cross-Border Insolvency (the UNCITRAL Model Law), to recognize and enforce judgments given in the course of foreign insolvency proceedings, such as judgments in transaction avoidance proceedings, on the basis that neither article 7 nor 21 of the Model Law explicitly provides the necessary authority." UNCITRAL, INSOLVENCY LAW: RECOGNITION AND ENFORCEMENT OF FOREIGN INSOLVENCY–DERIVED JUDGMENTS 2 A/CN.9/WG.V/WP.126, 2 (Oct. 6, 2014).

30. UNCITRAL, *supra* note 29, at 9.

Kingdom, and Australia to determine whether the UNCITRAL Model Law's goal of modified universalism is currently being practiced. Having determined that the position is unsatisfactory, we subject the Model Law to analysis through the lens of international relations theories to elaborate a way forward. The drafters of the Model Law chose a non-legal form to embody their agreement due to the deeply held divisions between national insolvency laws. Further, the drafters preserved a high degree of interpretive latitude for courts because of these divisions and the uncertainty associated with particular insolvency settings. Therefore, we posit that courts could use the express language of the Model Law text to confer recognition on and make decisions about the enforcement of foreign insolvency judgments. In order to check the inappropriate use of interpretive discretion, we subject enforcement to the test of fairness and real and substantial connection. The adoption of our proposal will reduce costs, maximize recovery for creditors, and ensure predictability for all parties.

This Article is organized as follows: Part II provides an overview of cross-border insolvency law in Australia and outlines the key provisions following the enactment of the Model Law. It also discusses some issues presented by the implementation and interpretation of the Model Law by courts, and illustrates potential problems. Parts III and IV discuss the position in the United States and United Kingdom, respectively, illustrating the confusion created by conflicting decisions on recognition and enforcement in cross-border settings. In Part V, an argument is set forth for courts to harmonize the recognition and enforcement of cross-border insolvency judgments in order to effectuate the normative foundations of the Model Law and provide certainty for international business. Part VI concludes.

II. CROSS-BORDER INSOLVENCY LAW IN AUSTRALIA

Oliver Wendell Holmes famously claimed that:

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries . . . .[31]

Until recently, the laws that governed cross-border insolvencies in Australia relied on three main approaches: (1) the limited

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31. OLIVER WENDELL HOLMES, THE COMMON LAW 1–2 (Little, Brown, and Company, 1881).

statutory powers available under Chapter 5 of the *Corporations Act 2001*, (2) comity, and (3) the various contractual remedies that parties were able to negotiate either ex ante or ex post insolvency. This Part will focus on the statutory remedies and the recent developments that accompany Australia's adoption of the Model Law in 2008. Firstly though, as directed by Holmes, in order to gain a better picture of the operation of statutory provisions, it is necessary to understand the general history of how the sections developed.

A. *Bankruptcy Laws*

In Australia, "bankruptcy" refers to personal insolvency, which is governed under the *Bankruptcy Act 1966* (Cth),[32] while "insolvency" is the term used for corporate insolvency, which is governed by the *Corporations Act 2001* (Cth).[33] Modern Australian insolvency laws derive from, and are still in some cases redolent of, nineteenth century English bankruptcy statutes. For example, a direct line can be drawn from § 74 of the *Bankruptcy Act 1869* (United Kingdom) to § 581 of the *Corporations Act 2001* (Cth). Section 74 of the 1869 United Kingdom statute provided:

> The London Bankruptcy Court, the local Bankruptcy Court, the Courts having jurisdiction in bankruptcy in Scotland and Ireland, ***and every British Court*** *elsewhere* having jurisdiction in bankruptcy or insolvency, and the officers of such Courts respectively, ***shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy***, and an order of the Court seeking aid, together with a request to another of the said Courts, shall be deemed sufficient to enable the latter Court to exercise, in regard to the matters directed by such order, the like jurisdiction which the Court which made the request, as well as the Court to which the request is made, could exercise in regard to similar matters within their respective jurisdictions (emphasis added).[34]

By the end of the nineteenth century, all Australian colonies had developed their own bankruptcy legislation based on the English *Bankruptcy Acts*.[35] Upon the Federation of Australia in 1901, the

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32. *Bankruptcy Act 1966* (Cth) s 7 (Austl.).

33. *Corporations Act 2001* (Cth) pt 5.4 (Austl.), https://www.comlaw.gov.au/Details/C2015C00336/Html/Volume_2 [https://perma.cc/GMJ2-G9KM] (archived Sept. 19, 2015).

34. That section was substantially re-enacted as s 118 of the *Bankruptcy Act 1883* and again as s 122 of the *Bankruptcy Act 1914*. *See* M.D. CHALMERS, M.A. & E. HOUGH, THE BANKRUPTCY ACT 1883 84 (1883); Bankruptcy Act 1914, 4 & 5 Geo. 5 C. 59, § 122 (Eng.), http://www.legislation.gov.uk/ukpga/1914/59/pdfs/ukpga_19140059_en.pdf [http://perma.cc/3VFK-ZFAG] (archived Sept. 20, 2015).

35. *See* Rosalind Mason, *Insolvency Law in Australia*, *in* INSOLVENCY LAW IN EAST ASIA 464–65 (Roman Tomasic ed. 2006). However, the relevant section requiring courts to act in aid of and be auxiliary to each other was not included in the *Bankruptcy Act 1887* (NSW) (Austl.), http://www5.austlii.edu.au/au/legis/

Commonwealth Government was given power under the Constitution to make laws "with respect to bankruptcy and insolvency." [36] However, it was only in 1924 that the Commonwealth Government enacted the *Bankruptcy Act 1924* (Cth), albeit that Act did not contain the relevant section. It was not until the *Bankruptcy Act 1966* was enacted that a similar provision was included.[37] Section 29 of the 1966 Act required all Australian courts with jurisdiction under the Act and the judges and officers of those courts to "act in aid of and be auxiliary to each other in all matters of bankruptcy." Section 29(2) stated that "[n]othing in this Act shall be taken to affect the operation of section 122 of the Imperial Act known as the Bankruptcy Act, 1914" (that is, the English *Bankruptcy Act 1914*, which contained the section excerpted above and which continued to have force in Australia).[38] In 1980, the *Bankruptcy Act 1966* was amended by adding the following subsections to § 29:

> (2) In all matters of bankruptcy, the Court-
>
> (a) shall act in aid of and be auxiliary to the courts of the external Territories, and of prescribed countries, that have jurisdiction in bankruptcy; and
>
> (b) may act in aid of and be auxiliary to the courts of other countries that have jurisdiction in bankruptcy.
>
> (3) Where a letter of request from a court of an external Territory, or of a country other than Australia, requesting aid in a matter of bankruptcy is filed in the Court, the Court may exercise such powers with respect to the matter as it could exercise if the matter had arisen within its own jurisdiction.
>
> (4) The Court may request a court of an external Territory, or of a country other than Australia, that has jurisdiction in bankruptcy to act in aid of and be auxiliary to it in any matter of bankruptcy.
>
> (5) In this section, 'prescribed country' means-
>
> (a) the United Kingdom, Canada and New Zealand;
>
> (b) a country prescribed for the purposes of this sub-section; and

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nsw/num_act/ba1887n30169.pdf [http://perma.cc/S86D-T6LV] (archived Sept. 20, 2015).

36. *Commonwealth Constitution* s 51(xvii) (Austl.), http://www.austlii.edu.au/au/legis/cth/consol_act/coaca430/s51.html [http://perma.cc/DXM5-ALB7] (archived Sept. 19, 2015).

37. *Bankruptcy Act 1966* (Cth) s 29 (Austl.).

38. *Id.* It was not until the enactment of the *Australia Act 1986* (Cth) that the power of Parliament of United Kingdom to legislate for Australia was terminated. Australia Act 1986, §1 (UK).

> (c) a colony, overseas territory or protectorate of a country specified in paragraph (a) or of a country so prescribed.[39]

The explanatory memorandum to the *Bankruptcy Amendment Act 1980*, which enacted the amendments, explained the scope of the section as follows:

> Australian Courts exercising jurisdiction in bankruptcy will act in aid of the Bankruptcy Courts of the External territories, Canada, New Zealand and the United Kingdom (which have similar bankruptcy legislation to Australia) and of other prescribed countries and may act in aid of the Bankruptcy Courts of non-prescribed countries. They may also request Bankruptcy Courts in other countries to act in their aid.[40]

B. *Corporations and Insolvency*

Laws relating to the governance of companies were developing at around the same time. Mason notes that the development of the law of corporate insolvency is "related to the law of personal insolvency in that bankruptcy concepts have consistently been included in corporate insolvency legislation, although in recent years there has been an increasing divergence between the two."[41] Again, the history of company law in Australia generally followed that outlined above for bankruptcy laws. That is, the various states enacted *Company Acts* prior to Federation in 1901. The Constitution gave the Federal Parliament power to make laws with respect to "foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth."[42] As in the case of bankruptcy legislation, the Commonwealth government did not immediately attempt to introduce laws relating to corporations. In fact, the government did not attempt to create legislation governing companies until the

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39. *Bankruptcy Amendment Act 1980* (Cth) s 18 ss (2)–(5) (Austl.).

40. MINISTER FOR BUS. & CONSUMER AFFAIRS, BANKRUPTCY AMENDMENT BILL 1979 EXPLANATORY MEMORANDUM (Nov. 11, 1979) (UK), http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Browse_by_Topic/law/explanmem/1978a [http://perma.cc/4HBS-Q7ZU] (archived Sept. 18, 2015); *see also* CORPORATE LAW ECONOMIC REFORM PROGRAM (CLERP), CROSS-BORDER INSOLVENCY: PROMOTING INTERNATIONAL COOPERATION AND COORDINATION (2002), http://archive.treasury.gov.au/documents/448/PDF/CLERP8.pdf [http://perma.cc/X7R6-47FX] (archived Sept. 18, 2015) (Austl.) ("Countries are prescribed where analogous provisions are a feature of their own laws."); *see, e.g.*, 11 U.S.C. § 304 (repealed 2005) (covering the procedures for foreign representatives to utilize United States' Bankruptcy Courts); Insolvency Act 1986, § 426 (UK) (relating to company and individual insolvency).

41. Mason, *supra* note 35, at 465.

42. *Commonwealth Constitution* s 51(xx) (Austl.), http://www.austlii.edu.au/au/legis/cth/consol_act/coaca430/s51.html [http://perma.cc/DXM5-ALB7] (archived Sept. 19, 2015).

1980s.[43] At that time, both state and federal legislation contained provisions for the winding up of companies in liquidation. In an attempt to create a standardized law that governed companies, each state enacted uniform legislation in 1961, and again in 1981. To overcome the constitutional limitations on the federal power to make laws in relation to incorporation, each state enacted a *Corporations Act* in 1990 and adopted the Commonwealth Corporations Law as the law of the state. The Corporations Law (as it was known) then had effect as a uniform law throughout Australia. It was not until the Corporations Law was enacted that any of the company legislation required courts to act in aid of and auxiliary to other courts in the insolvency of a corporation. The wording of the clause, as it was in the Corporations Law, was similar to that contained in the *Bankruptcy Act 1966* as amended in 1980. The relevant section § 581 was as follows:

> (1) All courts having jurisdiction in matters arising under this Act, ... shall severally act in aid of, and be auxiliary to, each other in all external administration matters.
>
> (2) In all external administration matters, the Court:
>
> (a) shall act in aid of, and be auxiliary to, the courts of the excluded Territories, and of prescribed countries, that have jurisdiction in external administration matters; and
>
> (b) may act in aid of, and be auxiliary to, the courts of other countries that have jurisdiction in external administration matters.
>
> (3) Where a letter of request from a court of an excluded Territory, or of a country other than Australia, requesting aid in an external administration matter is filed in the Court, the Court may exercise such powers with respect to the matter as it could exercise if the matter had arisen within its own jurisdiction.
>
> (4) The Court may request a court of an excluded Territory, or of a country other than Australia, that has jurisdiction in external administration matters to act in aid of, and be auxiliary to, it in an external administration matter.[44]

An external administration matter is a matter that relates to the winding up or the insolvency of an Australian or a foreign company whether inside or outside Australia. [45] Despite some minor

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43. *See Companies Act 1981* (Cth) s 3 (Austl.), http://www.austlii.edu.au/au/legis/cth/num_act/ca1981107/ [http://perma.cc/9ZTT-KR6N] (archived Sept. 19, 2015).

44. *Corporations Act 2001* (Cth) § 581(1)-(4) (Austl.), https://www.comlaw.gov.au/Details/C2015C00336/Html/Volume_2 [https://perma.cc/GMJ2-G9KM] (archived Sept. 19, 2015).

45. *Id.* § 580.

amendments to clarify its meaning, § 581 remains essentially in the same form.

Under § 581 of the *Corporations Act 2001*, Australian courts must act in aid of and be auxiliary to the courts of prescribed countries that have jurisdiction in external administration matters. The prescribed countries are the Bailiwick of Jersey, Canada, the Independent State of Papua New Guinea, Malaysia, New Zealand, the Republic of Singapore, Switzerland, the United Kingdom, and the United States of America.

The equivalent section in the United Kingdom is § 426 of the *Insolvency Act 1986* (UK). That section states among other things that:

> The courts having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist the courts having the corresponding jurisdiction in any other part of the United Kingdom or any relevant country or territory.[46]

Lord Collins, Justice of the Supreme Court, observed in *Rubin v. Eurofinance* that "[a]ll the countries to which it currently applies are common law countries or countries sharing a common legal tradition with England."[47] It is interesting to note how two laws on ostensibly the same subject have evolved from the same root legislation but have taken different shape over time and have different effect. Nonetheless, despite the procession of years since these laws were created, their modern counterparts appear ill-equipped to deal with the demands of contemporary commercial practice.

1. Model Law

These divergences are an interesting historical note, but they also provide an example of the way transplanted laws can develop differently in different contexts. In contrast to other countries, Australia adopted the Model Law in its entirety in the *Cross-border Insolvency Act 2008* (Cth) (CBI Act).[48] Some recent Australian cases illustrate the practice of modified universalism in the country. The

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46. Insolvency Act 1986, § 426(4) (UK).

47. Rubin v. Eurofinance SA [2012] UKSC 46; *see also* Insolvency Act 1986, § 426(11) (UK) (stating a "relevant country or territory" means "any country or territory designated for the purposes of this section by the Secretary of State by order made by statutory instrument"). Those countries include Australia under the Co-operation of Insolvency Courts (Designation of Relevant Countries and Territories) Order 1986.

48. *Cross-Border Insolvency Act 2008* (Cth) s 6 (Austl.). For example, South Africa and Mexico have adopted the Model Law but will apply only if other countries reciprocate. In the United States, the alteration of one word from "proof" to "evidence" has caused large debates about the interpretation of a company's "centre of main interests." Even Australia, which adopted the Model Law in its entirety, has excluded banks and the insurance industry from its operation.

Model Law has been portrayed as a more universalist regime than the limited approach of local legislation, such as § 581 of the Corporations Act. However, as will be shown, the case law on the Model Law has not always borne this out.

C. *Judicial Interpretation of the Model Law*

1. *Ackers v. Saad Investments Company Ltd.*

A discussion of the case of *Ackers v. Saad Investments Company Ltd.*[49] illustrates one of the perils of harmonization: disharmony caused by the license domestic courts possess to interpret the provisions of the Model Law. This interpretative process itself has the potential to weaken the harmonization achieved in the text of the Model Law.

Saad Investments Ltd., a company whose center of main interests was in the Cayman Islands, held assets in Australia to the value of about USD$7 million from the proceeds of a share deal it had facilitated in 2008. It also had a tax liability to the Australian Tax Office of over AUS$83 million. It was common ground in the proceedings that there was no jurisdiction for the Commissioner for Taxation to wind up Saad Investments, as it did not "carry on business" in Australia and was not a "registered company" sufficient to bring it within the winding up of a foreign company provisions of the *Corporations Act 2001* (Cth). Without more then, the Commissioner could not commence proceedings in Australia to recover the outstanding tax debt. He did, however, lodge a proof of debt with the liquidator in the Cayman Islands. Unfortunately, under the Cayman Island's foreign judgments law, claims for tax from a foreign country are not recognized. This reflects the long-standing rule of public international law that claims by a foreign sovereign for taxes are unenforceable.[50] Therefore, the Commissioner would not receive anything in the distribution from the winding up in the Cayman Islands either. The Explanatory Memorandum to the CBI Act states that "with the exception contained in paragraph 2, Article 13 [of the Model Law] embodies the principle that foreign creditors, when they apply to commence an insolvency proceeding in Australia or file claims in such proceeding, should not be treated worse than local creditors."[51] Australia enacted the alternative wording in

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49. [2013] FCA 738 (30 July 2013) (Austl.). This decision was subject to an unsuccessful appeal by Akers to the Full Federal Court and an application for special leave to appeal to the High Court was refused on October 17, 2014.

50. *See id.* ¶ 16.

51. *Cross-Border Insolvency Bill 2008* (Cth) outline (Austl.), http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/s606_ems_02d36ed0-4ef7-41ee-ae22-85ad26c42619/upload_pdf/0801720em.pdf;fileType=application%2Fpdf [http://perma.cc/K5Q3-DR3W] (archived Sept. 19, 2015).

paragraph 2 to Article 13 as the relevant exception. The wording in the alternative paragraph recognizes the fact that Australia does not recognize foreign tax and social security claims in insolvency proceedings.

On September 18, 2009, the Grand Court of the Cayman Islands ordered that Saad Investments be wound up.[52] Mr. Ackers was appointed one of the liquidators of the company. He applied to the Federal Court of Australia under the CBI Act for orders recognizing him as a foreign representative and the Cayman Islands proceedings as "foreign main proceedings."[53] Under Article 20 of the Model Law, upon recognition of proceedings as foreign main proceedings:

> (a) *Commencement* or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed; (emphasis added)
>
> (b) Execution against the debtor's assets is stayed;
>
> (c) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.[54]

In 2010, Justice Rares of the Australian Federal Court granted the relief sought by the foreign representative under Article 20. Hence, the Commissioner was stayed from commencing any claim he might have had and was forced to argue under the CBI Act.

Under Article 21 of the Model Law, once a foreign proceeding has been recognized as a main or non-main proceeding, the foreign representative is entitled to approach the court to seek "any appropriate relief," which may include:

> (a) [s]taying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under paragraph 1(a) of article 20;
>
> (b) [s]taying execution against the debtor's assets to the extent it has not been stayed under paragraph 1(b) of article 20;
>
> (c) [s]uspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph 1(c) of article 20; delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;

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52. *See* Ackers [2013] FCA 738 ¶ 16. Due to a misspelling of the applicant's name in the first proceeding in 2010, the 2010 proceedings are referred to as *Ackers v. Saad* while subsequent proceedings and appeal proceedings refer to the applicant as *Akers v. Saad*.

53. *Id.* ¶ 1; *see* UNCITRAL, *supra* note 12, art. 2(b) (defining "[f]oreign main proceeding" as "a foreign proceeding taking place in the State where the debtor has the centre of its main interests").

54. UNCITRAL, *supra* note 12, art. 20.

> (e) [e]ntrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court;
>
> (f) [e]xtending relief granted under paragraph 1 of article 19; [or]
>
> (g) [g]ranting any additional relief that may be available to a liquidator under the laws of this State.[55]

Clause 2 of the Article authorizes the court to "entrust the distribution of all or part of the debtor's assets" in Australia to the foreign representative or a court appointed person as long as it "is satisfied that the interests of creditors" in the country are "adequately protected."[56]

In addition, Article 22 of the Act provides that in "granting or denying relief under article 19 or 21, or in modifying or terminating relief" under 22(3), the court is required to be satisfied that "*the interests of the creditors and other interested persons*, including the debtor, are adequately protected."[57] Further, the court is authorized to subject any relief it grants to appropriate conditions. It may also modify or terminate relief upon request by the foreign representative or any person affected by the grant of relief under Articles 19 and 21. The court may also modify or terminate of its own motion.

Unsurprisingly, in 2013, the foreign representative attempted to remit the assets out of Australia in order for it to be included in the distribution in the liquidation in the Cayman Islands. The Commissioner sought injunctive relief under Article 22(3) to prevent the foreign representative from doing so. As discussed, without that avenue being open to him, the Commissioner's rights as an Australian creditor of the foreign company were limited.

In his decision in the proceedings in July 2013, Justice Rares considered the universalist intent of the Model Law outlined previously.[58] However, he also noted that one of the objectives of the Model Law was the "fair and efficient administration of cross-border insolvencies that protects the interest *of all creditors* and other interested persons, including the debtor."[59] He considered that the Commissioner's interests were not adequately protected by orders he had made in the 2010 proceedings under Article 21. He stated that:

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55. *Id.* art. 21.

56. *Id.*

57. *Id.* art. 22.

58. Ackers, [2013] FCA 738 ¶¶ 25–30 (citing *In re HIH Insurance Ltd* [2008] 1 WLR 852, 861-62 ¶ 30 for the proposition that foreign courts should cooperate with the local courts of the insolvent company so that its assets may be distributed to creditors under a single system).

59. *Id.* ¶ 38 (emphasis added).

> [I]f the Australian assets of Saad Investments were remitted without the Commissioner being allowed to prove for his unsecured debt here or be paid here his *pari passu* entitlement, the other unsecured creditors will receive a windfall to the extent that his *bona fide* claim is irrecoverable outside Australia. That result would be contrary to the fair or efficient administration of Saad Investments' insolvency. That is because, effectively, Saad Investments would benefit from its insolvency since it would cease to be subject to the incidents of Australian taxation and insolvency laws in respect of taxable capital gains and penalties imposed in respect of its profit making activities in this country.[60]

Consequently, Justice Rares considered that Art 22(1) gave the court:

> [T]he forum jurisdiction to make orders enabling the payment of taxation and penalty liabilities to be made from the debtor's assets held by it, or a foreign representative appointed under Arts 19 or 21 before those assets are removed from the local forum and sent to the debtor's centre of main interests...[61]

He ordered that the Commissioner could "recover from Saad Investments' assets in Australia up to the *pari passu* amount that he would be entitled to receive as a dividend were he entitled to be admitted to prove for the tax debts as an unsecured creditor in the Cayman Islands liquidation"[62]—an entitlement he did not own absent the Model Law.

This decision illustrates the discretion available to judges deciding cases commenced under the CBI Act. Although the Model Law aims to instill a universalist approach to the recovery of assets globally, the territorialist tendencies of sovereign states threaten to overwhelm that ideal.

The next case also demonstrates the flexibility inherent in the Model Law to accommodate claims by local creditors in proceedings commenced under the CBI Act.

2. *Yu v. STX Pan Ocean Co Ltd.*

In *Yu v STX Pan Ocean Co Ltd. (South Korea),*[63] Justice Buchanan in the Federal Court held that the foreign insolvency proceedings were "foreign main proceedings" under the CBI Act. The foreign representative applied for orders that sought to prevent any person from enforcing a charge on any of the insolvent company's property.[64] The property in question consisted of ships owned by the debtor company that continued to sail and trade around the world. The foreign representative sought court orders to prevent creditors in

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60. *Id.* ¶ 40.
61. *Id.* ¶ 42.
62. *Id.* ¶ 53.
63. [2013] FCA 680 ¶ 23 (Austl.).
64. *See id.* ¶ 29 (providing the text of the foreign representative's order).

Australia from arresting the ships as they docked in Australian waters.[65] Section 16 of the CBI Act mandates the Corporations Act 2001 as the appropriate law to which the stay and suspension granted in Article 20(1) of the Model Law are subject.[66]

Justice Buchanan confirmed that under maritime law, "the arrest of individual vessels to enforce the security of a maritime lien (e.g. for damage done by a ship, for seamen's wages, for salvage etc) is an important facility."[67] The judge was not prepared to make all of the orders sought by the foreign representative on the basis that to do so would impinge on what, under maritime law, are equivalent to the rights of a secured creditor. The judge said that "[t]hose potential rights may require assessment according to the circumstances of particular cases but, to take a simple example, there may be a very good reason why a claim for seamen's wages, normally enforceable as a maritime lien, should not be affected by recognition of the foreign main proceedings."[68]

His Honor underlined that "Article 21(2) requires consideration of the interests of creditors in Australia before an order such as proposed order 5 is made."[69] He also said that "Article 22(1) contains a similar requirement."[70] But recall that Article 22(1) requires that the "interests of *the* creditors," not merely local creditors, are adequately protected. A consideration of creditors under Article 22 would entail a broader and more universalist consideration of the interests of all creditors than was necessary under Article 21. It was unfortunate that Article 22 of the Model Law was dragooned to assist the argument, as it clearly requires an assessment of the rights of *all* creditors, not only local creditors. This interpretation of Article 22 of the Model Law in *Yu* again muddied the waters. It also left the foreign representative empty-handed.

3. *Moore, as Debtor-in-Possession of Australian Equity Investors v. Australian Equity Investors*[71]

The defendants were Arizona limited partnerships constituted under the Uniform Limited Partnership Act as adopted by Arizona. Gregory Moore Real Estate Company, Inc. is a 1 percent general partner in both of the defendant limited partnerships. In 2003, the

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65. *Id.* ¶ 30.

66. *See* UNCITRAL, *supra* note 12, s 16 (explaining that the scope and modification or termination of stay or suspension of international insolvency proceedings mentioned in Article 1 of the Model Law are still subject to Chapter 5 (other than Parts 5.2 and 5.4A) of the *Corporations Act 2001*).

67. Yu, (NSW) [2013] FCA 680 ¶ 40.

68. *Id.* ¶ 41.

69. *Id.* ¶ 33.

70. *Id.*

71. [2012] FCA 1002 (Austl.).

first defendant, AEI, became an investor in a property development project in Sydney. Thereafter, it transferred the property to the second defendant, 258 Nest, after default by the owner. They then commenced proceedings against Colliers International (NSW) Pty Ltd (Colliers). In 2011, it was held that Colliers had engaged in misleading or deceptive conduct under the Trade Practices Act. In 2012, the defendants applied under Chapters 3 and 11 of the Bankruptcy Code in the United States Bankruptcy Court in Arizona. Mr. Gregory Moore, who was appointed as debtor-in-possession for the defendants, applied to the court for recognition of the U.S. proceedings. Colliers resisted recognition and public policy was one of the grounds canvassed. The judge was not impressed:

> I have some difficulty in understanding the propositions advanced in reliance upon article 6. The proposition is that the cause of action that AEI and 258 Nest have asserted against Colliers is a statutory right that is not capable of assignment. The argument is that the effect of the proceedings in the US Bankruptcy Court is that the cause of action has become, or may become, part of the estate of the two limited partnerships being administered in bankruptcy.
>
> Whether or not the cause of action is capable of assignment, and whether there has been an assignment, appears to me to be irrelevant in terms of the question of the public policy of Australia. There is nothing in the recognition of the two proceedings in the US Bankruptcy Court that, in my view, is contrary to the public policy of Australia. What the consequences of that recognition may be will no doubt be the subject of argument. That, however, is not presently to the point. It is an argument for another day.[72]

From the review of these cases, decided under the Model Law in Australia, it is apparent that, even though it was adopted with a universalist spirit, the way it is interpreted and implemented has limited its effectiveness as an instrument of universalism.

III. CROSS-BORDER INSOLVENCY LAW IN THE UNITED STATES

The United States adopted the Model Law in 2005, and enacted it as Chapter 15 of the Bankruptcy Code following the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act. The explicit objective of Chapter 15 is to provide effective mechanisms in cross-border cases by promoting (1) cooperation between U.S. and foreign courts, (2) greater certainty in international trade, (3) fairness and efficiency in order to protect all creditors and other stakeholders, (4) protection and maximization of the value of the debtor's assets, and (5) protection and preservation of investment and employment by enabling the rescue of businesses in financial trouble.[73]

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72. *Id.* ¶¶ 13–14.
73. 11 U.S.C.A. § 1501(a) (West 2015).

The scope of application of Chapter 15 requires that there is a foreign proceeding[74] and assistance is sought by a foreign court or representative in the United States, or in a foreign court under this title.[75] The trigger is the filing of a petition for recognition of a foreign proceeding.[76] There are two types of foreign proceedings under the statute: a foreign main proceeding, which is "a foreign proceeding pending in the country where the debtor has the center of its main interests,"[77] and a foreign non-main proceeding, which is defined as "a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment."[78] The court is required to decide on a petition to recognize a foreign proceeding at the earliest time.[79]

Upon the grant of recognition, the court is authorized to grant to the foreign representative additional assistance under Chapter 15 or under other U.S. law, as long as such assistance, "consistent with the principles of comity, will reasonably assure—

> (1) just treatment of all holders of claims against or interests in the debtor's property;
>
> (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
>
> (3) prevention of preferential or fraudulent dispositions of property of the debtor;
>
> (4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and
>
> (5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.[80]

In interpreting Chapter 15, § 1508 states that the court "shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions."

Section 1509 provides the foreign representative with direct access to the court for purposes of seeking recognition.[81] If the court

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74. *See id.* § 101(23) (defining a foreign proceeding as a "collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.").

75. *Id.* § 1501(b).

76. *Id.* § 1504.

77. *Id.* § 1502(4).

78. *Id.* § 1502(5).

79. *See id.* § 1517(c).

80. *Id.* § 1507(b)(1)–(5).

grants recognition under § 1517, the foreign representative has the right to sue and be sued in courts in the United States, and apply directly to a court for appropriate relief granted by that court.[82] In addition, U.S. courts are required to grant comity and cooperation to the foreign representative.[83] If the foreign representative seeks comity or cooperation in a U.S. court other than that which granted recognition, a certified copy of the order granting recognition under § 1517 has to be filed before that court.[84] Equally, if recognition is denied, the court may make any appropriate order to deny comity and cooperation.[85] In any case, and subject to §§ 306 and 1510 of the Bankruptcy Code, the foreign representative is subject to otherwise applicable non-bankruptcy law of the United States.[86] Any failure by the foreign representative to file a case for recognition is not prejudicial to its ability to sue in a U.S. court to collect or recover any claim owed to the debtor.[87]

Filing a claim for recognition does not subject the foreign representative to the jurisdiction of the U.S. courts for other purposes. In other words, the jurisdiction is limited to the purpose for which the filing was made.[88] Upon recognition, the foreign representative may commence an involuntary case under § 303, or if the foreign proceeding is a foreign main proceeding, a voluntary case under § 301 or 302. If the foreign representative intends to commence a case under this provision, it must communicate such intent to the court granting recognition.[89]

Section 1513 provides that foreign creditors have the same rights as domestic creditors with regard to commencement of and participation in proceedings.[90] Section 1513(b) protects foreign creditors from discrimination merely from the fact that they are foreign: "(1) Subsection (a) does not change or codify present law as to the priority of claims under section 507 or 726, except that the claim of a foreign creditor under those sections shall not be given a lower priority than that of general unsecured claims without priority solely because the holder of such claim is a foreign creditor." The section also maintains the embargo against foreign tax claims or other public law claims, with the proviso that such claims are subject to any treaties entered into by the United States with foreign countries.[91]

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81. *Id.* § 1509(a).
82. *See id.* § 1509(b)(1)–(2) (describing the jurisdictional rights and consequences of the foreign representative under 11 U.S.C. § 1507).
83. *Id.* § 1509(b)(3).
84. *See id.* § 1509(c).
85. *See id.* § 1509(d) (stating the consequences if recognition is denied).
86. *Id.* § 1509(e).
87. *Id.* § 1509(f).
88. *Id.* § 1510.
89. *See id.* § 1511(b).
90. *Id.* § 1513(a).
91. *Id.* § 1513(2)(A)–(B).

Section 1515 provides the process for seeking recognition, which is by filing a petition before the court. This petition is to be accompanied by—

> (b)(1) a certified copy of the decision commencing such foreign proceeding and appointing the foreign representative;
>
> (2) a certificate from the foreign court affirming the existence of such foreign proceeding and of the appointment of the foreign representative; or
>
> (3) in the absence of evidence referred to in paragraphs (1) and (2), any other evidence acceptable to the court of the existence of such foreign proceeding and of the appointment of the foreign representative.
>
> (c) A petition for recognition shall also be accompanied by a statement identifying all foreign proceedings with respect to the debtor that are known to the foreign representative.

The above documents have to be translated into English if they are in a different language.[92]

Section 1516 creates three presumptions. The court is entitled to presume that the person is a foreign representative and that the foreign proceeding is a foreign proceeding if the decision or certificate accompanying the filing indicates that fact. The court may also presume that the documents are authentic without the need for legalization. It is presumed that the debtor's registered office or the place of habitual residence, in the case of an individual debtor, is the center of main interests in the absence of any evidence to the contrary.

There are crucial differences between foreign main proceedings and non-main proceedings that follow upon recognition. In the former case, § 1520 provides that (1) provisions of the Bankruptcy Code with respect to adequate protection and automatic stay apply to the debtor and its property located within the territorial jurisdiction of the United States;[93] "(2) sections 363, 549, and 552 apply to a transfer of an interest of the debtor in property that is within the territorial jurisdiction of the United States to the same extent that the sections would apply to property of an estate; (3) unless the court orders otherwise, the foreign representative may operate the debtor's business and may exercise the rights and powers of a trustee under and to the extent provided by sections 363 and 552; and (4) section 552 applies to property of the debtor that is within the territorial

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92. *Id.* § 1515(b)–(d).

93. *See id.* § 1520(a)(1) (citing sections 361 and 362, which cover automatic protection and automatic stay); *see also* LEGISLATIVE GUIDE, *supra* note 4, at 314 ("The stay of actions or of enforcement proceedings is necessary to provide 'breathing space' until appropriate measures are taken for reorganization or liquidation of the assets of the debtor.").

jurisdiction of the United States." [94] In contrast, in non-main proceedings, there is no automatic stay; the foreign representative has to request it, and the court has discretion whether to award it. Broadly, the foreign representative is entitled to relief upon recognition of a foreign proceeding, including:

> (1) staying the commencement or continuation of an individual action or proceeding concerning the debtor's assets, rights, obligations or liabilities to the extent they have not been stayed under section 1520(a);
>
> (2) staying execution against the debtor's assets to the extent it has not been stayed under section 1520(a);
>
> (3) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under section 1520(a);[95]
>
> (4) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;
>
> (5) entrusting the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of the United States to the foreign representative or another person, including an examiner, authorized by the court.[96]

Under this provision, the court is authorized to "entrust the distribution of all or part of the debtor's assets located in the United States to the foreign representative" or any court appointed person as long as the court "is satisfied that the interests of creditors in the United States are sufficiently protected."[97] An important limitation is that the court is only authorized to award such relief if it "relates to assets that, under the law of the United States, should be administered in the foreign nonmain proceeding or concerns information required in that proceeding."[98]

It is also noteworthy that the court is authorized to grant urgent provisional relief in order to ensure that the creditors do not attack the debtor's assets prior to the determination as to foreign main proceedings. Such relief includes a stay and an order entrusting the

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94. 11 U.S.C. § 1520(2)–(4).

95. *See* LEGISLATIVE GUIDE, *supra* note 4, at 314 ("The suspension of transfers is necessary because in a modern, globalized economic system it is possible for a multinational debtor to move money and property across boundaries quickly. The mandatory moratorium triggered by the recognition of the foreign main proceeding provides a rapid "freeze" essential to prevent fraud and to protect the legitimate interests of the parties involved until the court has an opportunity to notify all concerned and to assess the situation.").

96. 11 U.S.C.A § 1521(a) (West 2012).

97. *Id.* § 1521(b).

98. *Id.* § 1521(c).

foreign representative with the administration of the debtor's assets located in the United States.[99] The granting of provisional relief is subject to the same standards and processes as applicable to injunctions.[100]

The chapter operates a presumption that a debtor's registered office is the center of main interests in order to determine a foreign main proceeding. This was further elucidated in the *Bear Stearns* case where the court also adverted to the following factors as being salient: "the location of the debtor's headquarters; the location of those who actually manage the debtor (which, conceivably could be the headquarters of a holding company); the location of the debtor's primary assets; the location of the majority of the debtor's creditors or of a majority of the creditors who would be affected by the case; and/or the jurisdiction whose law would apply to most disputes."[101]

Section 1506 authorizes the court to refuse to take action under Chapter 15 if it would be "manifestly contrary to the public policy of the United States."[102] Crucially, in common with other harmonizing legislation, the court is obligated to have due regard to its international origins and consider the application of similar laws by foreign countries.[103]

A. Judicial Interpretation of the Model Law

1. *In re Betcorp Ltd.*[104]

Betcorp Ltd. was a publicly listed company regulated by the Australian Securities and Investments Commission. Its main business was in the online gaming sector directed at customers in the United States. The passage of the Unlawful Internet Gambling Enforcement Act by the U.S. Congress proved to be a game changer for Betcorp because it prevented the company from receiving fund transfers from U.S. customers. Shortly thereafter, in 2007, Betcorp's members commenced a voluntary winding-up of the company's operations by appointing liquidators to administer the company. In 2008, 1st Technology LLC sued Betcorp in a Nevada court claiming that Betcorp's gambling operations infringed a patent it held on a data transmission system. The Australian liquidator sought recognition of the liquidation proceedings under Chapter 15. This was resisted by 1st Technology on the ground that the Australian

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99. *Id.* § 1519(a).
100. *Id.* § 1519(e).
101. In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 374 B.R. 122, 128 (Bankr. S.D.N.Y. 2007).
102. 11 U.S.C.A. § 1506 (West 2012).
103. *Id.* § 1508.
104. In re Betcorp, Ltd., 400 B.R. 266 (Bankr. D. Nev. 2009).

liquidation did not qualify as a "foreign proceeding."[105] It argued that "(i) there is no lawsuit or legal proceeding pending in an Australian court (or anywhere else except the United States) involving any of Betcorp's creditors; (ii) Betcorp is not bankrupt or in administration under Australian bankruptcy laws, or any other bankruptcy laws; and (iii) there is no lawsuit or other legal process by which a judge or other judicial officer directly supervises the liquidators' actions in the winding up."[106]

The court commenced its analysis by identifying "seven criteria or elements, each of which must be satisfied before Betcorp's winding up can be called a 'foreign proceeding.' These elements are:

> (i) a proceeding;
>
> (ii) that is either judicial or administrative;
>
> (iii) that is collective in nature;
>
> (iv) that is in a foreign country;
>
> (v) that is authorized or conducted under a law related to insolvency or the adjustment of debts;
>
> (vi) in which the debtor's assets and affairs are subject to the control or supervision of a foreign court; and
>
> (vii) which proceeding is for the purpose of reorganization or liquidation.[107]

In relation to the first element, the court opined that "the word 'proceeding' requires a broader definition in order to achieve the statutory directive of interpretation consistent with the understandings and the usages of international law and the UNCITRAL Model Law."[108] It explained that:

> [T]he hallmark of a "proceeding" is a statutory framework that constrains a company's actions and that regulates the final distribution of a company's assets. In this case, that framework is provided by the Australian *Corporations Act (Cth)* 2001. Under Australian law, this Act governs voluntary winding up, as well as a multitude of other procedures used to end a corporation's existence. Chapter 5 of the *Corporations Act*, entitled "External Administration," governs the termination of businesses through the appointment of an administrator or liquidator, and is applicable to Betcorp.[109] (emphasis added)

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105. *Id.* at 275.
106. *Id.*
107. *Id.* at 276–77.
108. *Id.* at 277.
109. *Id.* at 278.

The court was not persuaded by the lack of a petition to a court and held that "an Australian voluntary winding up is a 'proceeding' under section 101(23) and, by extension, chapter 15."[110] Elements 2, 3, and 4 were relatively easily satisfied on the facts. In relation to element 5, the court relied upon two facts: "(1) the unified structure of the external administration provisions of the Corporations Act; and (2) the Australian Parliament's own interpretation that Australia's company laws qualify under the Model Law."[111] In relation to the first fact, the court observed that:

> [S]everal sub-parts of Chapter 5 [of the Australian Corporations Act] contain provisions that deal with corporate insolvency and allow for the adjustment of debts. See Parts 5.3, 5.4A, and 5.4B of Chapter 5 of the *Corporations Act*. These facts, combined with the statutory ability to shift among various forms of dissolution given changing circumstances, demonstrate that winding up is achieved under a law relating to insolvency or the adjustment of debts.[112]

With regard to the second fact, the court quoted from the Australian Explanatory Memorandum to the Model Law's enacting legislation:

> Many articles of the Model Law require an insertion for 'laws of the enacting State relating to insolvency' (or similar). It is intended that the Model Law will apply to collective judicial or administrative proceedings pursuant to a law relating to bankruptcy or corporate insolvency. As such, the relevant Australian laws are the Bankruptcy Act and Chapter 5 (other than Parts 5.2 and 5.4A) of the Corporations Act, and also section 601CL of the Corporations Act [Part 2, clause 8].[113]

The court explained that:

> A voluntary winding up is governed by Part 5.5 of Chapter 5 of the *Corporations Act*. It is telling that this is not one of the sub-parts excluded in the *Explanatory Memorandum*. Accordingly, based upon the Australian legislature's interpretation of the UNCITRAL Model Law and Australian domestic law, a company engaged in a voluntary winding up is being administered under a law relating to insolvency.[114]

The decision has been criticized by Look Chan Ho, who points out that the Australian legislative history is contrary to the court's assertions. He quotes from the Corporate Law Economic Reform Program (CLERP) 8 Discussion Paper that:

> [T]he scope of the Model Law would extend to liquidations arising from insolvency, reconstructions and reorganisations under Part 5.1 and voluntary

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110. *Id.* at 280.
111. *Id.* at 282.
112. *Id.*
113. *Id.* at 282–83.
114. *Id.* at 283.

> administrations under Part 5.3A. It would not extend to receiverships involving the private appointment of a controller. *It would also not extend to a members' voluntary winding up or a winding up by a court on just and equitable grounds as such proceedings may not be insolvency related.*[115]

The author notes that the policy objectives of the Model Law are contrary to the interpretation favored by the court:

> A members' voluntary winding-up is a mechanism to return value to shareholders and a common solvent restructuring method to improve efficiency. Recognising a foreign members' voluntary liquidation could entail an automatic stay on all litigations against the company, as demonstrated in *Betcorp*. It is hard to see why a proceeding primarily aimed at conferring benefit on the shareholders should have the effect of stymieing creditors' legitimate litigations against the company.[116]

In this connection, reference may also be made to the Guide:

> A judicial or administrative proceeding to wind up a solvent entity where the goal is to dissolve the entity . . . are not insolvency proceedings within the scope of the Model Law. Where a proceeding serves several purposes, including the winding up of a solvent entity, it falls [within] the Model Law only if the debtor is insolvent or in severe financial distress.[117]

2. *ABC Learning Centres*[118]

The case concerned the liquidation of an Australian business that provided childcare facilities in the United States and Australia. Upon the commencement of voluntary administration prior to the eventual liquidation, the secured creditors appointed receivers to protect their assets in accordance with their rights under Australian law. Thereafter, the administrators delegated their power to the receivership. The liquidators filed a Chapter 15 action in order to obtain a stay on an enforcement action commenced by a judgment creditor in the United States. The latter objected to recognition on the grounds that there were no collective proceedings in Australia and that ABC had no interest in the U.S. assets being managed by the receivership. The bankruptcy court rejected these arguments and recognized the Australian proceedings as a foreign main proceeding. The district court affirmed, and the judgment creditor appealed. The Third Circuit court ruled that

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115. Look Chan Ho, *Recognising an Australian Solvent Liquidation Under the UNCITRAL Model Law:* In re Betcorp, 24 J. INT'L BANKING L. & REG. 418, 421 (2009) (quoting *Corporate Law Economic Reform Program, Proposals for Reform: Paper No. 8 2002* (Cth) p. 23 (Austl.)).

116. *Id.* at 423.

117. UNCITRAL, *supra* note 12, at 33.

118. In re ABC Learning Ctr., Ltd., 728 F.3d 301 (B.A.P. 3d Cir. 2013), *cert. denied*, 134 S. Ct. 1283 (2014).

> Chapter 15 embraces the universalism approach. The ancillary nature of Chapter 15 proceedings "emphasizes the United States policy in favor of a general rule" that our courts "act . . . in aid of the main proceedings, in preference to a system of full bankruptcies . . . in each state where assets are found." Congress rejected the territorialism approach, the "system of full bankruptcies," in favor of aiding one main proceeding."[119]

The judgment creditor argued that recognition under Chapter 15 would only benefit the receivership because all of the assets of ABC were leveraged and nothing would be left to the unsecured creditors.[120] The court did not find this persuasive:

> Chapter 15 makes no exceptions when a debtor's assets are fully leveraged . . . . We do not find any exception to recognition based on the debtor's debt to value ratio at the time of insolvency. Moreover, we find such an exception could contravene the stated purposes of Chapter 15 and the mandatory language of Chapter 15 recognition.[121]

With regard to the applicability of the public policy exception under Chapter 15, the court said:

> [W]e are unconvinced the Australian insolvency proceeding conflicts with our own rules. The United States Bankruptcy Code prioritizes secured creditors, as does Australia's Corporations Act . . . . The sole difference here is that Australian law allows secured creditors to realize the full value of their debts, and tender the excess to the company, whereas secured creditors in the United States must generally turn over assets and seek distribution from the bankruptcy estate.[122]

It concluded that "Australian law established a different way to achieve similar goals. Recognition of the Australian liquidation proceeding does not manifestly contravene public policy. On the contrary, allowing RCS to use U.S. courts to circumvent the Australian liquidation proceedings would undermine the core bankruptcy policies of ordered proceedings and equal treatment."[123]

3. *In Re Metcalfe*[124]

This case concerned Metcalfe and Mansfield, which were investment vehicles designed to participate in the Canadian asset-backed commercial paper market. Following the financial crisis, amid concerns about transparency and liquidity, a petition was filed on behalf of Metcalfe in a court in Ontario for the restructuring of all

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119. *Id.* at 306 (alterations in original) (citations omitted) (quoting H.R. REP. NO. 109-31(I), at 109 (2005)).

120. *Id.* at 308.

121. *Id.* at 308–09.

122. *Id.* at 310 (citations omitted).

123. *Id.* at 311.

124. In re Metcalfe & Mansfield Alt. Inv., 421 B.R. 685 (Bankr. S.D.N.Y. 2010).

outstanding non-bank sponsored asset-backed commercial paper obligations totaling about $32 billion.[125] A creditor-backed plan was voted on and approved, and the Ontario court entered an order implementing it.[126] The plan became effective in 2009 after the Canadian Supreme Court denied a review petition.[127] The disputed issue concerned releases and injunctions granted to third parties.

Thereafter, a Chapter 15 petition was filed by the court appointed Monitor seeking recognition and enforcement of the global releases and injunctions.[128] The bankruptcy court noted that it was being asked to provide "additional assistance" under § 1507 and make an order enforcing the Canadian releases in the United States.[129] It acknowledged that the release and injunction provisions treated all claimants in the Canadian Proceedings similarly. The court cited *Bear Stearns* for the proposition that "relief [post-recognition] is largely discretionary and turns on subjective factors that embody principles of comity."[130] It then went on to consider the contours of the public policy exception in respect of the enforcement of relief.[131] Crucially, the court held that:

> relief granted in the foreign proceeding and the relief available in a U.S. proceeding need not be identical. A U.S. bankruptcy court is not required to make an independent determination about the propriety of individual acts of a foreign court. The key determination required by this Court is whether the procedures used in Canada meet our fundamental standards of fairness.[132] (emphasis added)

In coming to this conclusion, the court was conscious of the limited meaning attributable to public policy given the inclusion of the word "manifestly" in the statute.[133] The court also considered enforcement under comity principles and opined that "[t]he [United States] and Canada share the same common law traditions and fundamental principles of law. Moreover, Canadian courts afford creditors a full and fair opportunity to be heard in a manner

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125. *See id.* at 687.
126. *See id.*
127. *See id.* at 687, 692.
128. *See id.*
129. *See id.* at 696
130. *Id.* at 697 (quoting In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 389 B.R. 325, 333 (Bankr. S.D.N.Y. 2008)).
131. *See id.* at 697 (finding that the public policy exception limited recognition "if [recognition] is manifestly contrary to U.S. public policy" and should be narrowly construed because it applies only where the most fundamental policies of the United States are implicated).
132. *See id.* (citations omitted); *see also* In re Ephedra Prods. Liability Litig., 349 B.R. 333 (S.D.N.Y. 2006); In re Grant Forest Prod., Inc., 440 B.R. 616, 622 (Bankr. D. Del. 2010).
133. In re Metcalfe & Mansfield Alt. Inv., 421 B.R. 685, 697 (Bankr. S.D.N.Y. 2010).

consistent with standards of U.S. due process. U.S. federal courts have repeatedly granted comity to Canadian proceedings."[134] It concluded that:

> Principles of comity in chapter 15 cases support enforcement of the Canadian Orders in the United States whether or not the same relief could be ordered in a plenary case under chapter 11. Therefore, the Court will enter an order recognizing this case as a foreign main proceeding and enforcing the Canadian Orders.[135]

4. *In re Qimonda*[136]

The case concerned a German company that manufactured semiconductor chips that underwent insolvency proceedings in Germany.[137] The German liquidator filed a Chapter 15 petition in Virginia and, upon determination that the German proceeding was the foreign main proceeding, sought to terminate the use of 4,000 U.S. patent licenses, which was a substantial portion of the main assets of the company.[138] License holders objected to this, and the bankruptcy court held that § 365(n) would apply and that "deferring to German law, to the extent it allows cancellation of the U.S. patent licenses, would be manifestly contrary to U.S. public policy."[139]

The decision was appealed to the Fourth Circuit. One of the key grounds concerned the test to be applied under § 1522. The court relied upon the Model Law's *Guide to Enactment* and stated "the Model Law makes '[t]he 'turnover' of assets to the foreign representative discretionary,' adding that 'the Model Law contains several safeguards designed *to ensure the protection of local interests* before assets are turned over to the foreign representative.'"[140] Chief among those "safeguards" is Article 22 of the Model Law, which is largely codified as § 1522."[141] Further, the court noted that "the Guide states, "[i]n addition to [Article 22's] specific provisions,"

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134. *Id.* at 698.

135. *Id.* at 700.

136. *See* Jaffe v. Samsung Elec. Co., 737 F.3d 14 (4th Cir. 2013) (discussing the district court decisions regarding Qimonda's bankruptcy proceedings on appeal, for which Jaffe served as the bankruptcy trustee).

137. *See* Elizabeth Buckel, *Curbing Comity: The Increasingly Expansive Public Policy Exception of Chapter 15*, 44 GEO. J. INT'L L. 1281, 1301 (2013).

138. *See Jaffe*, 737 F.3d at 17.

139. *Id.* at 23 (quoting *In re Qimonda AG*, 462 B.R. 165, 185 (Bankr. E.D. Va. 2011)).

140. *Id.* at 28 (quoting GUIDE TO ENACTMENT AND INTERPRETATION, *supra* note 12, at 88).

141. *Id.* The court quoted from the UNCITRAL Legislative Guide: "The idea underlying [A]rticle 22 is that there should be a balance between relief that may be granted to the foreign representative and the interests of the persons that may be affected by such relief. This balance is essential to achieve the objectives of cross-border insolvency legislation." LEGISLATIVE GUIDE, *supra* note 4.

Article 6 of the Model Law "in a general way provides that the court may refuse to take an action governed by the Model Law if the action would be manifestly contrary to the public policy of the enacting State."[142]

Having summarized the legislative history, the court concluded that "Chapter 15 does not require a U.S. bankruptcy court, in considering a foreign representative's request for discretionary relief under § 1521, to blind itself to the costs that awarding such relief would impose on others under the rule provided by the substantive law of the State where the foreign insolvency proceeding is pending." [143] In addition, it clarified the limits of cooperation envisaged by the Model Law:

> [Chapter 15] represents a full commitment of the United States to cooperate with foreign insolvency proceedings, as called for by the U.N.'s Model Law on Cross-Border Insolvency. And at bottom, such cooperation will provide greater legal certainty for trade and business to the benefit of the global economy. But the United States' commitment is not untempered, as is manifested in both Chapter 15 and the Model Law.[144]

The court went on to consider the public policy exception and affirmed the decision of the bankruptcy court ruling that it had correctly conducted a balancing test under section 1522(a). The court recognized that in affirming, it too would "further the public policy inherent in and manifested by § 365(n)."[145] The *Qimonda* decision has been criticized as an expansive interpretation of the public policy exception.[146]

5. *In re Vitro*[147]

Vitro and its subsidiaries were the largest glass manufacturers in Mexico.[148] During a period from 2003–2007, it borrowed a sum of about $1.2 billion from various U.S. lenders by way of three series of unsecured notes. The unsecured loan was guaranteed by virtually all of the subsidiaries and contained a provision that the guarantors

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142. *Id.*
143. *Id.* at 29.
144. *Id.* at 32.
145. *Id.* The Bankruptcy court had ruled that if the rights holders were denied protection under section 365(n) it would "slow the pace of innovation" in the United States and cause detriment to the U.S. economy.
146. *See* Buckel, *supra* note 137, at 1306. ("If each nation claims that their patent law best reflects their policy of technological innovation, and thus claims that their law would be applicable, each patent licensed by Qimonda will be treated in different ways, and will result in 'different and inconsistent results throughout the world.'")
147. In re Vitro S.A.B. de C.V. v. Ad Hoc Group of Vitro Noteholders, 701 F.3d 1031, 1037 (5th Cir. 2012).
148. *See id.* at 1036.

would not be released, discharged, or affected in any way by any settlement or release by virtue of the insolvency of Vitro. The guarantees were governed by New York law and provided that privileges under Mexican law were not applicable.

In 2009, Vitro entered into various restructuring transactions with the objective of restructuring obligations under the above notes. The effect was that Vitro now had obligations to its subsidiaries amounting to about $1.5 billion.

At the end of 2010, Vitro commenced a concurso[149] proceeding in Mexico under the Mexican Business Reorganisation Act. In 2011, a foreign representative filed a Chapter 15 petition in the United States seeking recognition of the concurso as a foreign proceeding.[150] In December 2011, a proposed restructuring plan was submitted to the concurso whereby the original notes would be extinguished, obligations of the guarantors would be discharged, new notes with a principal amount of $814,650,000 payable in 2019 would be issued to the creditors, etc.[151]

Under Mexican law, the plan could be approved with the votes of 50 percent of the total principal amount of unsecured debt. Relying solely upon the votes of its subsidiaries, which owned $1.5 billion of debt, the concurso plan was approved by the creditors and subsequently affirmed by the Mexican court.[152] It went into effect in February 2013. Thereafter, Vitro sought recognition and enforcement of the plan in the United States. The bankruptcy court refused enforcement, and the matter was appealed to the Fifth Circuit. The appellate court noted that Chapter 15 embodies that notion of comity and reflects the principle that "the interests of the United States, the interests of the foreign state or states involved, and the mutual interests of the family of nations in just and efficiently functioning rules of international law,"[153] and that "it is not necessary, nor to be expected, that the relief requested by a foreign representative be identical to, or available under, United States law."[154]

In order to determine if a foreign order is to be enforced, the court engages in a three-step process: (1) a court should consider the specific relief set forth in Bankruptcy Code §§ 1521(a) and (b);[155] (2) if the relief is not explicitly provided for in the statute, the court should consider whether the relief is otherwise "appropriate relief" under §

149. A concurso proceeding is the first stage of a bankruptcy proceeding for the purpose of restructuring similar to a Chapter 11 proceeding.

150. *See id.* at 1041.

151. *Id.* at 1039.

152. *See id.*

153. *Id.*

154. *Id.*

155. *See id.* at 1054 (outlining the three-step process the court takes when determining if a foreign order is to be enforced).

1521(a);[156] and (3) if the relief is otherwise unavailable under Bankruptcy Code § 1521, a court may consider whether the relief is suitable as additional assistance under § 1507.[157] In this case, the court found that the concurso order was not within the types of relief provided by §§ 1521(a) and (b). Under the second limb, the court ruled that the standard was whether the concurso order was "appropriate relief" under § 304 of the Bankruptcy Code or relief that was otherwise available in the United States. It ruled that non-debtor discharges were generally unavailable and did not reflect an appropriate balance between the interests of Vitro, its creditors, and its guarantors. Therefore, it was not "appropriate relief."[158] The court also found that enforcement was not possible under the third limb because Vitro's arguments did not show that nonconsensual third-party discharges were available in nonexceptional circumstances. Vitro had not shown what the exceptional circumstances were, and the court indicated that it had to meet the U.S. standard for extraordinary circumstances in order for the foreign order to be enforced. This conclusion is seemingly contrary to previous statements about the need for the foreign relief to be similar to relief available in the United States.

IV. RECOGNITION AND ENFORCEMENT IN THE UNITED KINGDOM

The United Kingdom is a leading jurisdiction for cross-border insolvencies both due to the influence its law has on the development of legal principles in other common law countries and due to the popularity of London as a major commercial litigation hub.

The United Kingdom has six potential legal regimes that operate in cross-border insolvency situations. The first is the common law, which enables courts to provide assistance to foreign insolvency proceedings. English courts are authorized to act as they would in domestic insolvency proceedings.[159] The second regime is provided by the previously referred to § 426 of the Insolvency Act 1986, which authorizes the courts to provide assistance to designated countries in respect of proceedings commenced in those jurisdictions.[160] Designated countries include Anguilla, Australia, the Bahamas, Bermuda, Botswana, Canada, the Cayman Islands, the Falkland Islands, Gibraltar, Hong Kong, Ireland, Montserrat, Malaysia, New Zealand, South Africa, Saint Helena, Turks and Caicos Islands,

156. *Id.*
157. *Id.*
158. *Id.* at 1059–60.
159. Rubin v. Eurofinance SA [2012] UKSC 46, [29] (elaborating on the authority of English courts to recognize and grant assistance to foreign insolvency proceedings).
160. Insolvency Act 1986 § 426 (UK).

Tuvalu, and the Virgin Islands.[161]The third regime is offered by the Cross Border Insolvency Regulations, 2006 (UK). This legislation enacted the UNCITRAL Model Law and enables the recognition of foreign proceedings.[162] Fourth, the Foreign Judgments (Reciprocal Enforcement) Act, 1933[163] applies to the enforcement of foreign money judgments from seventeen designated countries.[164] Fifth, the European Council Regulation (EC) 1346/2000 on insolvency proceedings (Insolvency Regulation) applies when the debtor's center of main interests is in the European Union and trumps other regimes when its scope of application is triggered.[165] Finally, there is the European Economic Area Directives on the winding-up and reorganization of credit institutions and insurers.[166]

A. *Judicial Interpretation*

Recent years have witnessed a number of controversial developments in the UK courts. We analyze the key cases below.

1. *Cambridge Gas*

The Privy Council decision in *Cambridge Gas Transport Corp v. Official Committee of Unsecured Creditors of Navigator Holdings, PLC* heralded a trend driven by Lord Hoffman that has continued to spark controversy to this day.[167] The case concerned the insolvency of a shipping company whose individual ships were owned by a group of separate Isle of Man companies that were subsidiaries of a management company. The shares in the management company were owned by Navigator Holdings. In turn, 70 percent of the issued share capital of Navigator was owned by Cambridge, which was a Cayman company. The company experienced financial difficulties and approached the court for relief under Chapter 11. The bankruptcy court in New York rejected the proposal of the shipping company for the sale of its assets and approved a creditor's proposal to take over the company's assets.[168] Thereafter, it sent a request to the High Court in the Isle of Man for assistance, and the creditors petitioned for an order vesting the shares of Navigator Holdings in their

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161. Designation of Relevant Countries and Territories Order 1986 SI 1986/2123.

162. Cross-Border Insolvency Regulations 2006, 2.

163. Foreign Judgments (Reciprocal Enforcement) Act, 1933 (UK).

164. The countries are France, Belgium, Pakistan, India, Germany, Norway, Austria, the Netherlands, Israel, Guernsey, Isle of Man, Jersey, Italy, Tonga, Suriname, Canada, and Australia.

165. McGrath v. Riddell (In re HIH Cas. & Gen. Ins. Ltd.), [2008] UKHL 21, [36].

166. See *id.* (mentioning the European Economic Directive).

167. [2006] 3 All ER 829; [2006] UKPC 26.

168. *Id.* at [4].

representative. This was resisted by Cambridge which asked that the plan not be recognized or enforced on the grounds that it had not submitted to the jurisdiction of the New York court.[169] The High Court agreed. Upon appeal, the English Court of Appeal held that since Navigator, the parent of Cambridge, had submitted to the jurisdiction of the New York court, the order giving effect to the creditors' plan was enforceable.[170] Cambridge argued before the Privy Council that since the Court of Appeal had held that the New York order was a judgment in personam, it could not be enforced against it because it was separate from Navigator, which was the persona that had submitted to the jurisdiction of the New York court.

Lord Hoffman wrote the opinion of the Privy Council in what has become perhaps the most frequently quoted paragraphs in cross-border insolvency law:

> [B]ankruptcy proceedings do not fall into either category [in rem or in personam]. Judgments in rem and in personam are judicial determinations of the existence of rights: in the one case, rights over property and in the other, rights against a person. When a judgment in rem or in personam is recognised by a foreign court, it is accepted as establishing the right which it purports to have determined, without further inquiry into the grounds upon which it did so. The judgment itself is treated as the source of the right.
>
> The purpose of bankruptcy proceedings, on the other hand, is not to determine or establish the existence of rights, but to provide a mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established . . . .
>
> The important point is that bankruptcy, whether personal or corporate, is a collective proceeding to enforce rights and not to establish them . . . . [I]t may incidentally be necessary in the course of bankruptcy proceedings to establish rights which are challenged: proofs of debt may be rejected; or there may be a dispute over whether or not a particular item of property belonged to the debtor and is available for distribution . . . But these again are incidental procedural matters and not central to the purpose of the proceedings.[171]

He went on to describe the applicable law in universalist terms:

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169. Lord Hoffman described the argument in these words: "This submission bore little relation to economic reality. The New York proceedings had been conducted on the basis that the contest was between rival plans put forward by the shareholders and the creditors. Vela, the parent company of Cambridge, participated in the Chapter 11 proceedings and arranged the finance which was to have been the cornerstone of the shareholders' plan. It is therefore not surprising that the New York court did not trouble to ask whether the voluntary petition presented by Navigator had the formal consent of its own stockholder company when that company was the creature of the real parties in interest who were actively participating in the proceedings. For Cambridge, which was no doubt administered by lawyers in Cayman on the instructions of Mr Mahler, the claim that it had not submitted to the jurisdiction was technical in the highest degree." *Id.* at [8].

170. *Id.* at [42].

171. *Id.* at [13]–[15].

> English common law has traditionally taken the view that fairness between creditors requires that, ideally, bankruptcy proceedings should have universal application. There should be a single bankruptcy in which all creditors are entitled and required to prove. No one should have an advantage because he happens to live in a jurisdiction where more of the assets or fewer of the creditors are situated.[172]

Further, Lord Hoffman observed that "universality of bankruptcy has long been an aspiration, if not always fully achieved, of United Kingdom law. And with increasing world trade and globalisation, many other countries have come round to the same view."[173]

The judge also explored the limits of assistance that may be offered to the foreign court, stating that although it was not permissible to apply foreign legal principles that do not form part of domestic law, the local court ought to be "able to provide assistance by doing whatever it could have done in the case of a domestic insolvency."[174] He explained that the objective of recognition is to eliminate the need for creditors "to start parallel insolvency proceedings and to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum."[175]

Lord Hoffman concluded that even though "Cambridge did not technically submit to the jurisdiction in New York, it had no economic interest in the proceedings and ample opportunity to participate if it wished to do so. It would therefore not be unfair for the plan to be carried into effect."[176]

2. *In re HIH*

Lord Hoffman's path-breaking approach received further elucidation in *re HIH*. The case concerned the collective insolvency of four Australian insurance companies, which entered winding-up proceedings in Australia.[177] Some part of HIH's assets was located in England. In order to ensure that those assets were protected, provisional liquidators were appointed in the United Kingdom. The Australian court made a request to the English court under § 426(4) of the Insolvency Act that the English provisional liquidators be directed to remit assets to the Australian liquidators for distribution. [178] Notably, the Australian order of priority for

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172. *Id.*
173. *Id.*
174. *Id.* at [22].
175. *Id.*
176. *Id.* at [26].
177. McGrath v. Riddell (In re HIH Cas. & Gen. Ins. Ltd.), [2008] UKHL 21, [36].
178. *Id.* at [3].

disbursement of assets was different to that under English law, although both systems were committed to the pari passu distribution of assets among ordinary creditors. The House of Lords had to decide whether the assets could be remitted for distribution in Australia given this difference. Lord Hoffmann issued his oft-quoted speech:

> The primary rule of private international law . . . applicable to this case is the principle of (modified) universalism, which has been the golden thread running through English cross-border insolvency law since the eighteenth century. That principle requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution. That is the purpose of the power to direct remittal . . . . the application of Australian law to the distribution of all the assets is more likely to give effect to the expectations of creditors as a whole than the distribution of some of the assets according to English law.[179]

In coming to this conclusion, Lord Hoffman was conscious of the commercial expectations of the parties. He wrote:

> [P]olicy holders and other creditors dealing with an Australian insurance company are likely, so far as they think about the matter at all to expect that in the event of insolvency their rights will be determined by Australian law. Indeed, the preference given to insurance creditors may have been seen as an advantage of a policy with an Australian company.[180]

3. *Rubin* and *New Cap Re*

The United Kingdom's universalist trend elucidated above was brought to a halt by the UK Supreme Court in the recent appeals of *Rubin* and *New Cap*.[181] This development has sent shock waves in international insolvency circles. The facts in *Rubin* are as follows: Eurofinance established an entity known as The Consumers Trust (TCT), which appears to have been part of a scam. The entity's modus operandi was to offer customers in the United States vouchers that promised a 100 percent rebate of the purchase price of various goods upon the meeting of certain conditions.[182] The company designed the scheme on the premise that these conditions were impossible to satisfy, calculated to ensure that most consumers would not meet them. The sellers of the vouchers paid TCT 15 percent of the moneys received, and TCT retained 40 percent of that amount to cover the possibility of the vouchers being redeemed. Obviously, this was a trivial amount and was unlikely to cover a situation where many customers presented vouchers for redemption. While this money was

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179. *Id.*
180. *Id.* at [33].
181. Rubin v. Eurofinance SA [2012] UKSC 46.
182. *Id.* at [56].

held in the United States, the rest was distributed to Eurofinance and others.

The state attorney general of Missouri sued TCT for breach of consumer protection legislation. The trustees settled the action by paying $1.65 million and $200,000 in costs. Thereafter, with the prospect of further suits by other states, TCT filed a petition under Chapter 11 in New York.

In December 2007, Eurofinance and the other respondent were hit with "adversary proceedings" in order to avoid and recover payments made to them. Although they were served personally with the complaint commencing the adversary proceedings, Eurofinance did not submit to the jurisdiction of the New York court and did not participate in the proceedings. In 2008, judgments were entered against them, and the appellants sought both recognition of the Chapter 11 case in England, under the Cross-Border Insolvency Regulations of 2006, and enforcement of the judgments.[183] The lower court granted recognition but refused enforcement of the judgments against the respondents.[184] The England and Wales Court of Appeal reversed the denial of enforcement by relying upon Lord Hoffmann's opinions in *Cambridge Gas* and *HIH*. [185]

In *New Cap*, the case concerned the recognition and enforcement of a judgment of the New South Wales Supreme Court for $8 million for unfair preferences under Australian law. The question was whether the judgment could be enforced under the CBIR or § 426 of the Insolvency Act. [186] New Cap was an Australian insurance company that conducted insurance business solely in that country. There were reinsurance contracts between New Cap and Lloyd's Syndicate in respect of losses, and commutation payments had been made by the former from a Sydney bank. When the company went into winding up, the liquidator alleged that these commutation payments were voidable transactions under Australian law.[187] The Lloyd's Syndicate did not submit to the Australian court's jurisdiction and did not enter an appearance.

On appeal, Lord Collins wrote the majority opinion for the UK Supreme Court. He affirmed that "[t]here is no international unanimity or significant harmonisation on the details of insolvency law."[188] In his judgment, he gave a detailed history and background of the common law, statutory, and other methods of resolving cross-border insolvencies that have developed in the United Kingdom since

183. *Id.* at [65]–[67].
184. *Id.* at [66].
185. Rubin v Eurofinance SA [2010] EWCA Civ 895 at [62].
186. *See id.* at [44]–[45] (explaining the court's decision to rely on section 426(4) of the Insolvency Act).
187. *Id.* at [74].
188. *Id.* at [15].

around 1764.[189] He opined that there are now "four main methods under English law for assisting insolvency proceedings in other jurisdictions, two of which are part of regionally or internationally agreed schemes":[190] (1) § 426 of the *Insolvency Act 1986* (UK); (2) European Union Regulation 1346/2000 on cross-border insolvencies (Regulation 1346/2000); (3) the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency (Model Law); and (4) the common law.

With regard to the enforcement of foreign insolvency judgments, Lord Collins wrote:

> [T]he CBIR (and the Model Law) say nothing about the enforcement of foreign judgments against third parties. As Lord Mance pointed out in argument, recognition and enforcement are fundamental in international cases. Recognition and enforcement of judgments in civil and commercial matters (but not in insolvency matters) have been the subject of intense international negotiations at the Hague Conference on Private International Law, which ultimately failed because of inability to agree on recognised international bases of jurisdiction . . . .
>
> It would be surprising if the Model Law was intended to deal with judgments in insolvency matters by implication. Articles 21, 25 and 27 are concerned with procedural matters. No doubt they should be given a purposive interpretation and should be widely construed in the light of the objects of the Model Law, but there is nothing to suggest that they apply to the recognition and enforcement of foreign judgments against third parties.[191]

Notably, although the issue was not raised in argument before the court, Lord Collins opined that *Cambridge Gas* was wrongly decided.[192] He went on to write that there was to be no special treatment for insolvency judgments and the normal Dicey rule on enforcement was applicable. Further, in the judge's opinion, it was up to the legislature to make provision for the universal operation of insolvency law if it wanted to.[193] Lord Collins also pointed out that it

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189. *Id.* at [532]–[37].

190. *Id.* at [25].

191. *Id.* at [142]–[143].

192. According to Lord Collins, "It follows that, in my judgment, *Cambridge Gas* was wrongly decided. The Privy Council accepted (in view of the conclusion that there had been no submission to the jurisdiction of the court in New York) that Cambridge Gas was not subject to the personal jurisdiction of the US Bankruptcy Court. The property in question, namely the shares in Navigator, was situate in the Isle of Man, and therefore also not subject to the in rem jurisdiction of the US Bankruptcy Court. There was therefore no basis for the recognition of the order of the US Bankruptcy Court in the Isle of Man." *Id.* at [132]. In a separate concurring judgment, Lord Mance opined that *Cambridge Gas* was distinguishable. *Id.* at [178]. Lord Clarke's dissenting opinion noted that the case was both correctly decided and distinguishable. *Id.* at [192].

193. Lord Collins stated, "A change in the settled law of the recognition and enforcement of judgments, and in particular the formulation of a rule for the identification of those courts which are to be regarded as courts of competent jurisdiction (such as the country where the insolvent entity has its centre of interests

would be disadvantageous to English parties if default judgments were to be enforced in the United Kingdom.[194]

There was a crucial difference in the facts of *New Cap* that resulted in a different outcome from *Rubin*. In that case, the Lloyd's Syndicate had submitted proofs of unpaid debt at the initial stages of the winding up with respect to matters unrelated to the reinsurance contracts at issue in the avoidance proceedings.[195] They had also participated in creditors' meetings and voted in favor of a scheme of arrangement.[196] On the basis of these facts, Lord Collins came to the conclusion that the Syndicate had submitted to the jurisdiction of the Australian court, and therefore the default judgment was enforceable in England.[197]

V. HARMONIZED FRAMEWORK FOR RECOGNITION AND ENFORCEMENT

A. *The Model Law is Insufficient*

As is clear from the preceding paragraphs, the Model Law in its various manifestations in the three countries has not succeeded in delivering on the goal of certainty and predictability for creditors or debtors in relation to the enforcement of insolvency judgments. Creditors remain uncertain about how to protect their investments, and debtors are unsure about the consequences of participating in foreign proceedings or abstaining from them. Interestingly, in several of the cases, debtors chose to not participate based upon legal advice only to be confronted with surprising consequences. In one case—*New Cap*—even the Australian judge was surprised that the UK court had found that the party had submitted to his jurisdiction. He was of the view that there had been no submission, only to read later that in the

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and the country with which the judgment debtor has a sufficient or substantial connection), has all the hallmarks of legislation, and is a matter for the legislature and not for judicial innovation. The law relating to the enforcement of foreign judgments and the law relating to international insolvency are not areas of law which have in recent times been left to be developed by judge-made law." *Id.* [129].

194. Lord Collins continued, "[T]he introduction of judge-made law extending the recognition and enforcement of foreign judgments would be only to the detriment of United Kingdom businesses without any corresponding benefit. I accept the appellants' point that if recognition and enforcement were simply left to the discretion of the court, based on a factor like "sufficient connection," a person in England who might have connections with a foreign territory which were only arguably "sufficient" would have to actively defend foreign proceedings which could result in an in personam judgment against him, only because the proceedings are incidental to bankruptcy proceedings in the courts of that territory." *Id.* at [130].

195. *See id.* at [158] (stating relevant facts that distinguished Lloyd Syndicate's case).

196. *Id.*

197. *See id.* at [167] (holding that the Syndicate cannot benefit from the proceeding without the burden of also complying with the orders given at the proceeding).

view of the UK Supreme Court, the party had submitted to the Australian court's jurisdiction by lodging proofs of debt. In such circumstances, parties are effectively taking a lottery in making serious decisions.

B. *Universalism is the Solution*

The substantial literature about cross-border insolvency in the last twenty years has examined the benefits and detriments of the competing ideas of universalism and territoriality. [198] Under universalism, the liquidation of an insolvent debtor with assets in multiple countries is carried out in the country where the debtor has its center of main interests (COMI). The court in the COMI would have global reach to cover the debtor's assets worldwide. The law that would apply would also be the law of that country. Conversely, under territoriality, creditors in each country where the debtor's assets are located commence proceedings within their own jurisdiction using their own laws. This is often called the "grab rule" because local creditors race to grab the assets that are situated in the local jurisdiction (often to the detriment of other creditors in other parts of the world) before international liquidation proceedings can reach the far-flung assets. Under territoriality, not only is it likely that creditors as a whole receive less in the winding up than under a universalist structure, but the inconsistent application of multiple laws across the world arguably also results in excessive costs and impinges on the willingness of creditors to extend credit to those companies exposed to potential cross-border insolvency.[199] This has the flow-on effect of limiting investment and restricting international trade to the detriment of global welfare.[200]

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198. *See, e.g.*, Rasmussen, *Approach*, *supra* note 25; *see also* Edward S. Adams & Jason K. Fincke, *Coordinating Cross-Border Bankruptcy: How Territorialism Saves Universalism*, 15 COLUM. J. EUR. L. 43 (2008) (examining the territorialist and universalist aspects of the Model Law); Lucian Arye Bebchuk & Andrew T. Guzman, *An Economic Analysis of Transnational Bankruptcies*, 42 J.L. & ECON. 7759 (1999) (comparing the effect of territoriality with universality on international bankruptcies); Nigel John Howcroft, *Universal vs Territorial Models for Cross-Border Insolvency: The Theory, the Practice, and the Reality that Universalism Prevails*, 8 U.C. DAVIS BUS. L.J. 366 (2007) (arguing that the universal approach is more preferable under existing law than territorial approach); LoPucki, *supra* note 22 (concluding a cooperative form of territoriality works best); Robert K. Rasmussen, *Where Are All the Transnational Bankruptcies? The Puzzling Case for Universalism*, 32 BROOK. J. INT'L L. 983 (2006) (comparing the paradigms of international bankruptcy); Frederick Tung, *Is International Bankruptcy Possible?*, 23 MICH. J. INT'L L. 31 (2001) (arguing that universalism is impossible in practice).

199. *See* Bebchuk & Guzman, *supra* note 198, at 802–04.

200. *See id.*; John Armour, *The Law and Economics of Corporate Insolvency: A Review* (ESRC Ctr. for Bus. Research, Univ. of Cambridge, Paper No. 197, 2001); Tung, *supra* note 198; *see also* Hon. J. J. Spigelman, Chief Justice of New South Wales, Cross-

During the 1980s and 1990s, various international bodies worked on developing methods to resolve this perceived problem.[201] The methods were often piecemeal and reliant upon negotiations between nation states to develop hard and soft laws that operated between them. Among these international bodies, the United Nations Commission on International Trade Law (UNCITRAL) charged its Working Group V with developing a global solution. The debate between universalism and territoriality resulted in a partial victory when, on May 30, 1997, UNCITRAL promulgated its Model Law, which substantially subscribes to the universalist doctrine. However, only forty countries (including Australia)[202] have adopted the Model Law. It is interesting to note that very few developing countries[203] have done so although the position has improved in September 2015 with the adoption by seventeen OHADA member states. In a global context, this relative lack of participation leaves the world in only a slightly more certain position than before the Model Law was proposed. Companies whose business is conducted in those countries that did not adopt such a universalist structure are often subject to insolvency laws as they applied before the Model Law was developed—usually using a territorialist approach. The Model Law then, instead of creating a global law based on universalism, has become merely another tool in the armory of insolvency practitioners around the world—one that can only be used in countries that have adopted its text.

The debate on this topic appears to have settled for now. The universalists have "won" the debate in that many parts of the economically powerful world have now adopted a modified universalist approach. It seems that those that *would* be convinced *have* been. However, the universalism/territoriality debate, while it has captivated the literature in the field of cross-border insolvency, seems to have had marginal effect in many regions. The bulk of the world (vast tracts of Asia, South America, and Russia included) has remained unconvinced and uncommitted to the tenets of a global universalist approach for various reasons. Even though it is an UNCITRAL model law, the instrument has been seen as an initiative of the United States.[204]

While Japan was one of the first countries to adopt the Model Law in 2000 and the Republic of Korea followed in 2006, other parts of Asia have not done so. There are, no doubt, many different reasons

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border Insolvency: Co-operation or Conflict? (2009) (discussing the transaction costs of cross-border insolvency).

201. *See* FLETCHER, *supra* note 1 (outlining in chapters 5–8 various international attempts to moderate cross-border insolvencies); Mason, *supra* note 12.

202. *See* UNCITRAL, *supra* note 12, s 6 (adopting the Model Law in full).

203. *See* Kargman, *supra* note 17, at 8.

204. *See* Jacob Ziegel, *Canada–United States Cross-Border Insolvency Relations and the UNCITRAL Model Law*, 32 BROOK. J. INT'L L. 1041, 1062 (2007) (noting that the United States has a stronger incentive than Canada in adopting the Model Law).

for this, and those reasons must, for brevity's sake, remain outside the scope of this Article. Nonetheless, Chung argues that "universalism can only work if countries relax their exercise of national sovereignty."[205] He contends that "at its heart, universalism is about the displacement of national law in favor of foreign law."[206] This great leap of faith might be a leap too far for developing and emerging countries. However, one can also surmise that countries that continue to develop in the hope of matching the economic might of the United States might not be so quick to adopt a law that would see them, again, according to Bebchuk and Guzman at least, at a competitive disadvantage in world trade by adopting a universalist approach. Despite the attractiveness of the efficiency argument, perhaps the role of adverse interest groups or a distrust of the worldview of the United States underlies a more conservative approach by these nations toward adopting universalism. Tung argues that insolvency laws should reflect an "optimal blend of competition and cooperation across international borders [and] must take account of local custom, culture, and history. Likewise, universalism must give way to more nuanced and more textured approaches" [207] if it is to succeed in developing and emerging countries.

Retaining a territorialist approach is certainly a strategic choice for some states. Bebchuk and Guzman conducted an economic analysis of cross-border insolvency regimes and concluded that universalism is more efficient than territoriality to resolve cross-border insolvencies, but a country that maintains a territorialist approach to insolvency is in a superior economic position to one that subscribes to a universalist approach.[208] Tung also conducted a comparative study using game theory and predicted (presciently) in 2001 that most states would remain territorial.[209] Those forty countries that have adopted the Model Law then appear to have left themselves open to an economic disadvantage. This is being done largely on the hope that the Model Law is but the first step in a globalization of insolvency laws based on a universalist model. The argument is that these countries are taking a "leadership role" to encourage others on the cusp of implementing the Model Law to do so

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205. John J. Chung, *The New Chapter 15 of the Bankruptcy Code: A Step Toward Erosion of National Sovereignty*, 27 NW. J. INT'L L. & BUS. 89, 90 (2007).

206. *Id.* at 90.

207. Tung, *supra* note 198, at 101.

208. Bebchuck & Guzman, *supra* note 198, at 802–05. This analysis used a simple model with a limited range of options and multiple assumptions to prove an economic outcome. It may be criticized on the basis that it lacked a real-world practical view.

209. Tung, *supra* note 198, at 102. Again, game theory relies on assumptions being made, including about humans being rational actors who will choose the most efficient option open to them despite other competing normative claims. This does not necessarily reflect reality and is therefore a limitation of the approach.

and that the short-term losses are outweighed by longer term benefits from cooperation.[210]

While the arguments about the benefits of universalism and territoriality appear, for the time being, to have settled, the academic focus has shifted recently to the element of the control of cross-border insolvency. Rasmussen urges the next generation of cross-border insolvency scholars to "focus less on the relations between nations and more on the dynamics of control"[211] because, he argues, creditors have increasing input into the decisions made by companies in financial distress. A study of the control mechanisms of cross-border insolvency laws might transcend the focus on international relations, as Rasmussen urges.

C. *Harmonization of Cross-Border Insolvency Law: Why a Model Law?*

An examination of the design architecture and features of the Model Law could shed light on state behavior, subsequent implementation, and judicial interpretation. The choice of form is a critical element in designing a regime for international cooperation. It is widely assumed that international conventions are the preferred vehicle for harmonization of conflicting national laws because they are binding.[212] This can be misleading in the private law area because conventions are typically dispositive and allow parties to contract out of their application. The choice of non-convention instruments becomes relevant when the sponsoring organization does not intend the instrument to be binding directly, either because nation-states might be unwilling to commit support for such harmonization or because the subject matter does not require nation-states to enact implementing legislation in order to achieve the objectives of the sponsor.[213] Equally, sponsoring organizations elect non-convention vehicles when there are substantial divergences between national laws, and there is little prospect of reaching agreement on resolving these differences. In such situations, the sponsoring organization seeks to pursue a more modest goal and embarks on the pursuit of harmonization by adopting a gradual and incremental approach.

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210. *See* CORPORATE LAW ECONOMIC REFORM PROGRAM, *supra* note 40, at 13–14 (observing that New Zealand would only adopt the Model Law if Australia did so first).

211. Rasmussen, *supra* note 198, at 986.

212. Vienna Convention on the Law of Treaties, art. 26, May 23, 1969, 1155 U.N.T.S. 331 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith.").

213. *See generally* INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW, UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (2004). See M.J. Bonnell, *Do We Need a Global Commercial Code?*, 106 DICK. L. REV. 87–100 (2001), for scholarly commentary on the Principles.

Moreover, if harmonized texts are adopted in a non-convention form, they offer greater flexibility and adaptability, reduce contracting costs for nation states, consume fewer resources for drafting and adoption, and are more easy to amend.[214] These forms are often labeled as "soft law." Abbott and Snidal write that when the subject matter of the harmonization effort poses challenges to state sovereignty, the soft law option may be chosen as a "way station" to hard law.[215] They posit that hard law would result where the benefits of cooperation are great but the potential for opportunism and its costs are high, where noncompliance is not easy to detect, where states want to form clubs of very committed states, and where executive agencies within a state want to commit other domestic actors such as the legislature to the international agreement. [216] The laws that govern cross-border insolvency are largely procedural. However, this does not mean that they lack a normative foundation. That normative foundation reflects the mix of "social exigency, moral conflict[,] and political compromise" [217] that molds each society's insolvency laws. While Jackson,[218] Baird,[219] Bebchuk,[220] and others have sought to analyze and justify insolvency law on an economics and law basis, others such as Carlson,[221] Korobkin,[222] and Warren[223] have mined the deeper, philosophical normative foundations of bankruptcy law. Those that

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214. The Model Law's drafters were aware of the pitfalls of choosing a non-convention form: "In the case of a convention, the possibility of changes being made to the uniform text by the States parties is much more restricted . . . . The flexibility inherent in a model law is particularly desirable in those cases when it is likely that the State would wish to make various modifications to the uniform text before it would be ready to enact it as a national law . . . . This, however, also means that the degree of, and certainty about, harmonization achieved through a model law is likely to be lower than in the case of a convention." LEGISLATIVE GUIDE, *supra* note 4, at 309.

215. *See* Kenneth Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 423 (2000).

216. *See id.* at 429–30.

217. Donald R. Korobkin, *Contractarianism and the Normative Foundations of Bankruptcy Law*, 71 TEX. L. REV. 541, 543 (1993).

218. *See generally* Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 YALE L.J. 857 (1982) (exploring the role of bankruptcy in shaping distributional rules among creditors).

219. *See generally* Douglas G. Baird & Thomas H. Jackson, *Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequeate Protection of Secured Creditors in Bankruptcy*, 51 U. CHI. L. REV. 97 (1984) (analysing the legal protections afforded to secured creditors).

220. Bebchuk & Guzman, *supra* note 198.

221. *See* David Gray Carlson, *Philosophy in Bankruptcy*, 85 MICH. L. REV. 1341 (1987) (reviewing THOMAS JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW (1986)) (arguing that any book attempting to find a coherent philosophical structure in the Bankruptcy Code is doomed).

222. *See* Korobkin, *supra* note 217 (arguing that scholars can arrive at a normative foundation of bankruptcy law); *see also* Donald R. Korobkin, *The Role of Normative Theory in Bankruptcy Debates*, 82 IOWA L. REV. 75 (1996).

223. *See generally* Warren, *supra* note 25 (articulating a comprehensive explanation about competing goals in the bankruptcy system).

have pursued a purely law and economics argument have been criticized for too narrow a view of what is a complicated and often deeply personal legal and social area.[224] Despite the almost scientific approach of some law and economics scholars to insolvency laws,[225] there is a general consensus that favors a common pool approach. Jackson's hypothetical "creditors' bargain" modelled bankruptcy law as a system under which creditors negotiate among themselves ex ante, the position they would take in the event of bankruptcy.[226] Jackson proposed that if bankruptcy laws mirrored the creditors' bargain to pool the assets of the debtor and distribute them equally upon liquidation, then this would result in a "reduction of strategic costs; increased aggregate pool of assets; and administrative efficiencies."[227]

To be sure, the diversity in national insolvency laws evidences the fact that each state has designed its laws to suit its unique circumstances and policy preferences.[228] For example, Australia and other countries have structured their insolvency laws to give some protection to the blameless in insolvency matters.[229] Warren argues that Chapter 11 of the U.S. Bankruptcy Code is designed (albeit in a "derivative" and "limited" way) to protect as many noncreditors as possible. [230] Regardless of these differences, there might be a commonality in the design of insolvency laws around the world sufficient to be able to derive a more general theory and to underpin an argument for cooperation. Certainly, each country's insolvency law seeks to maximize the return to interested parties from the assets of insolvent debtors. To meet these legislated requirements of the insolvency process, there needs to be a system that aggregates the greatest pool of assets from which to distribute. If that pool is reduced, then each interested party will receive less on a distribution.

Virtually all the literature discussing cross-border insolvencies contains some assertion about the increasing magnitude of cross-

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224. *See, e.g.*, Carlson, *supra* note 218; Korobkin, *supra* note 217; Warren, *supra* note 25; *see also* Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981) (arguing that using an "efficiency" analysis is of limited use in law).

225. *See, e.g.*, SCHWARTZ, NORMATIVE THEORY, *supra* note 24, at 2.

226. Jackson, *supra* note 218, at 860.

227. *Id.* at 860–61.

228. As Professor Fletcher observed: "Since, by definition, insolvency impacts upon the entire patrimony of the debtor, the range of legal interests which are in some way affected is very extensive. This ensures that there is a profound and intimate correlation between insolvency—whether individual or corporate—and the very wellsprings of policy and social order from which national law ultimately draws its inspiration. For this reason, despite numerous general resemblances, national insolvency laws differ from one another almost infinitely in ways both great and small." FLETCHER, *supra* note 1, at 4.

229. *See, e.g.*, *Corporations Act 2001* (Cth) s 556 (Austl.) (protecting employee entitlements over other unsecured creditors by making it a priority payment).

230. Warren, *supra* note 25, at 355.

border insolvency claims in recent years. This assertion is usually tied to an increase in global trade and recent financial crises.[231] The data shows that global commerce has increased. [232] However, compared to the 40,075 business bankruptcy filings in the United States in 2012, [233] only 121 cases were filed that year under Chapter 15,[234] the Chapter of the U.S. Bankruptcy Code dealing with cross-border insolvencies. It is interesting to note that of the 577 filings reported by Westbrook under Chapter 15 between 2005 and 2011, by far the biggest proportion of cases come from Canada (282 cases, or 48 percent).[235] In the same period, there have only been twenty claims from Australia.[236] A Case-Base search for cases involving the equivalent Australian legislation, the *Cross-Border Insolvency Act* 2008 (Cth), lists only fifteen cases resolved in Australia since its inception.[237]

From the above, it is clear that risks arise because of the divergences in national insolvency laws, the different bargains they strike between the protection of creditors and debtors, and the varying degrees of protectionism afforded to domestic creditors. Creditors remain uncertain about how to price risk in these circumstances, and therefore it is logical that borrowing costs are at

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231. *See, e.g.*, Jay Lawrence Westbrook, *An Empirical Study of the Implementation in the United States of the Model Law on Cross Border Insolvency*, 87 AM. BANKR. L.J. 247, 248 (2013) ("The number of insolvency cases involving a multinational debtor has risen with increasing globalisation. The flow has been a torrent since the near collapse of financial markets in 2008, developments which have stirred interest in the management of these cases.").

232. *See* WTO, INT'L TRADE STATS. 2012, at 204, https://www.wto.org/English/res_e/statis_e/its2012_e/its2012_e.pdf [https://perma.cc/M9EN-Q7YF] (archived Sept. 20, 2015) (including figures on the increased volume of world merchandise exports and gross domestic product, from 1950–2011, which shows consistent growth from 1950–2011 except for a sharp decline in 2009).

233. The twenty-year average for business bankruptcies in the United States is 43,794 per year. The number of bankruptcies increased in 2009 (60,837) and 2010 (56,282) but had returned to slightly above average in 2011 (47,806) and below average in 2012 (40,075). THE 2013 BANKRUPTCY YEARBOOK & ALMANAC 4 (Kerry A. Mastroianni ed., 23rd ed. 2013).

234. In the seven years from 2006 to 2012 there were 632 filings under Chapter 15 of the US Bankruptcy Code. In the seven years before Chapter 15 was enacted (1999 to 2005), there were 456 filings under Section 304 of the U.S. Bankruptcy Code, the previous section dealing with Cross-border insolvency. In 2004–2005 there were 173 filings under Section 304. In 2011–2012 there were 179 filings under Chapter 15. *Id.* at 19.

235. Westbrook, *supra* note 231, at 253 (noting further that the figure rises to 65% when the United Kingdom claims are included).

236. *Id.* at 254.

237. For a discussion of the way that the Model Law has been applied in the Australian context, see also Rosalind Mason et al., *The Emerging Framework of Cross-Border Insolvency in and Around Australia: Saad Investments, Japan Airlines and Lehman Brothers—Part One*, 8 INT'L CORP. RESCUE 262 (2011), and Rosalind Mason et al., *The Emerging Framework of Cross-Border Insolvency in and Around Australia: Saad Investments, Japan Airlines and Lehman Brothers—Part Two*, 8 INT'L CORP. RESCUE 329 (2011).

suboptimal levels. It is also likely that many companies are unable to borrow from foreign lenders because creditors are unwilling to assume risks posed by the local insolvency regime.

Although the evidence is clear and there is recognition that cooperation in the form of a binding cross-border insolvency regime would be optimal, the reality is that states continue to be noncommittal to the tenets of a global universalist approach for various reasons.[238] In Canada, according to Ziegel, there was widespread apathy to adopting the Model Law.[239] Not only had the working relationship between the United States and Canada been successful and there was a perception that it did not need to be changed, but also:

> The United States is a global power and has many world-class companies that operate in many overseas jurisdictions. The United States therefore has strong economic and legal incentives to ensure that U.S. insolvency orders are recognized and enforced in other jurisdictions. In contrast, Canada has a very small number of world-class business enterprises and, up to now, most of its cross-border insolvency relations have been with the United States. This scenario is unlikely to change in the foreseeable future. What matters most, therefore, to Canadian insolvency practitioners is the treatment that Canadian bankruptcies and business reorganizations receive in the United States.[240]

Why then have the forty countries that have adopted the Model Law put themselves into, according to Bebchuk and Guzman, a position of economic disadvantage as against other countries that have maintained a territorialist approach? The real concern about cross-border insolvencies is not the number of them each year but the loss suffered by creditors in inefficiencies in time and cost and the flow-on effects to business confidence. The refusal of states to adopt the Model Law might be owed to path dependence and powerful interest groups; as Westbrook and LoPucki claim have shown, insolvency work is lucrative for law firms in the United States,[241] and control of large multinational cross-border insolvencies is a high stakes affair. Therefore, interest groups such as lawyers and other insolvency professionals might be engaging in rent-seeking behavior. The incentives for such behavior are clear: the professional services employed to control insolvencies alone can cost insolvent companies (or more accurately, their creditors) a lot of money. A study of 102 of the largest public company bankruptcies in the United States

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238. See the concerns raised by Professor Ian Fletcher in FLETCHER, *supra* note 1, at 486–89.

239. *See* Ziegel, *supra* note 204, at 1061–62 (noting a general "lack of enthusiasm").

240. *Id.* at 1062.

241. *See* LoPucki, *supra* note 22, at 713 ("[T]he liquidation or reorganization of a large company can generate hundreds of millions of dollars in professional fees."); Westbrook, *supra* note 7, at 2305.

between 1998 and 2007 found that bankruptcy professional fees and expenses alone cost $5.5 billion. [242] Another study estimated the direct costs of bankruptcy were on average "3.1% of the book value of the debt plus the market value of equity" of the company in the year before insolvency.[243] By way of example, in the five years since Lehman Brothers entered bankruptcy, it had paid its lawyers, accountants, and other insolvency professionals around $2.2 billion.[244] It is a complicated multiparty proceeding, and the Modified Third Amended Joint Chapter 11 Plan Of Lehman Brothers Holdings Inc. filed in the U.S. Bankruptcy Court for the Southern District of New York alone runs to some 390 pages. [245] Lehman Brothers' creditors are expected to receive eighteen cents on the dollar by 2016—eight years after the firm entered bankruptcy.[246] As a further example, in the Canadian Nortel Chapter 11 proceedings, which involve actions in the United States, Canada, and Europe, professional fees reached $1.3 billion (or around 14 percent of Nortel's global estate).[247]

D. *The Role of the Courts*

Despite the clear benefits of cooperation, legislative apathy and contrary pressures from interest groups obstruct the immediate prospects of an optimal binding legal regime. As such, is the cause of an efficient cross-border insolvency regime doomed? The answer lies in understanding the theoretical underpinnings of the Model Law form and the significant role assigned to the courts as agents of harmonization under its architecture.

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242. LYNN M. LOPUCKI & JOSEPH W. DOHERTY, PROFESSIONAL FEES IN CORPORATE BANKRUPTCIES: DATA, ANALYSIS, AND EVALUATION xiii (2011).

243. Lawrence A. Weiss, *Bankruptcy Resolution: Direct Costs and Violation of Priority Claims*, 27 J. FIN. ECON. 285, 299 (1990).

244. Erik Larson, *Lehman Recovery Seen as Justifying $2 Billion Bankruptcy*, BLOOMBERG BUS. (Sept. 11, 2013, 11:00 PM), http://www.bloomberg.com/news/2013-09-11/lehman-recovery-seen-as-justifying-2-billion-bankruptcy.html [https://perma.cc/SX3V-7XJB] (archived Sept. 20, 2015).

245. *See generally Lehman Brothers Holdings Inc. (Chapter 11)*, EPIQ SYSTEMS, http://dm.epiq11.com/lehman/Project# [https://perma.cc/ 5TZ2-LZHH] (archived Sept. 20, 2015).

246. Larson, *supra* note 244.

247. *See* Jim Christie, *Slim Odds for Clawback of Attorneys' Fees in Nortel Bankruptcy*, REUTERS (May 28, 2015, 7:10 AM), http://www.reuters.com/article/2015/05/28/bankruptcy-nortel-idUSL1N0YJ0J120150528 [https://perma.cc/6VLC-8HHH] (archived Sept. 19, 2015); *see also* Barry Critchley, *Will Nortel Professional Fees Finally Get Some Examination?*, FINANCIAL POST (November 27, 2013, 4:05 PM), http://business.financialpost.com/2013/11/27/will-nortel-professional-fees-finally-get-some-examination/ [https://perma.cc/QA3E-PME4?type=source] (archived Sept. 19, 2015) (quoting "independent financial analyst" Diane Urquhart as saying, "Had this [then] $1 billion been used for restructuring, Nortel would likely still be operating effectively and creating jobs for Canadian scientists and engineers").

International relations theories provide a framework for analyzing the choice of form and substance in harmonizing cross-border insolvency law. Liberal international relations theorists posit that international agreements affect state behavior in a multitude of ways unrelated to the narrow conception of agreements as binding contracts. Under this view, agreements influence the behavior of influential domestic actors who leverage state commitments in those agreements, reduce transaction costs, provide opportunities for monitoring, and create focal points.[248] States have to make decisions about which form they wish to commit to: hard law such as binding treaties, or soft forms such as the Model Law. Raustiala distinguishes between the former and latter by characterizing them as contracts and pledges, respectively. He notes that states choose pledges when (1) the subject matter is preliminary, (2) the states negotiating the agreements desire flexibility, (3) non-diplomatic entities are involved in the negotiations, and (4) ratification and legislation are not required following the adoption of the agreement.[249] Other authors have also noted that pledge-type agreements are more flexible and take less time to conclude.[250]

On the other side, states prefer to embody their agreements as contracts when they wish to ensure the credibility of their commitments. Abbott and Snidal develop a legalization framework to analyze agreements between states along a spectrum and write that states are likely to enter into agreements embodied in hard law with precise commitments evidencing higher forms of obligation when they intend those commitments to be credible.[251] Unsurprisingly, states are reluctant to commit to these sorts of agreements, and the drafting and negotiation of such agreements are likely to be protracted, resulting in higher ex ante transaction costs.[252] Equally, while states might be willing to enter into agreements that are largely hortatory and embody weak forms of obligation, they will be more apprehensive about concluding agreements that contain higher levels of obligation embodied in more precise legal language. One of the ways in which

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248. *See* Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205, 220 (1993); Sandeep Gopalan, *Demandeur-Centric Approach to Regime Design in Transnational Commercial Law*, 39 GEO. J. INT'L L. 327, 345 (2008).

249. Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581, 591 (2005).

250. *See, e.g.*, Abbott & Snidal, *supra* note 215, at 445 ("[Soft law] provides for flexibility in implementation, helping states deal with the domestic political and economic consequences of an agreement and thus increasing the efficiency with which it is carried out.") (alteration in original).

251. *See id.* at 443.

252. *See id.* at 434 ("Legal specialists must be consulted; bureaucratic reviews are often lengthy. Different legal traditions across states complicate the exercise. Approval and ratification processes, typically involving legislative authorization, are more complex than for purely political agreements.").

states factor in these initial transaction costs is by reducing the costs subsequent to the adoption of the agreement: precise agreements will reduce the possibility of opportunistic auto-interpretation by other states. In addition, such agreements typically contain provisions establishing monitoring and enforcement mechanisms such as independent tribunals. Abbott and Snidal also point to sovereignty costs (by which they mean incursions on state sovereignty in the subject area) as being a factor that can militate against hard legalization.[253]

It is useful to subject agreements in the commercial law area to analysis based on international relations frameworks. One of the immediate difficulties is that the choice of a convention form on the basis that it is a harder form of legalization might not have as much salience as in the public international law context because conventions in the private law area are largely dispositive.[254] Dispositive conventions authorize parties to render a convention non-binding in the context of their specific transaction. Parties are typically conferred with specific authority by a provision in the convention to exclude the text entirely or in part by the inclusion of a clause to that effect in their contractual documents. Therefore, although a convention is chosen by states in the above framework because it would enhance the "normative strength of the agreement and . . . a state's sense of obligation," the practical reality may be different because of the subsequent actions of private parties.[255] For instance, the UN Convention on Contracts for the International Sale of Goods, 1980, was ratified by the United States in 1986.[256] The convention was designed to minimize divergences between the national sales laws of states applicable to international sales transactions and promote international trade. It has had very little effect in the United States because most contracts contain exclusionary clauses making the CISG inapplicable to the transaction.[257] In contrast, the Hague Convention on the Law

253. *Id.* at 436.

254. *See* United Nations Convention on Contracts for the International Sale of Goods art. 6, April 11, 1980, 1489 U.N.T.S. 3 ("The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.").

255. Michael W. Gordon, *Some Thoughts on the Receptiveness of Contract Rules in the CISG and UNIDROIT Principles as Reflected in One State's (Florida) Experience of (1) Law School Faculty, (2) Members of the Bar with an International Practice, (3) and Judges*, 46 AM. J. COMP. L. 361, 374 (1998).

256. *Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)*, UNITED NATIONS COMM'N ON INT'L TRADE LAW, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html [https://perma.cc/7EWH-C9DF] (archived Sept. 20, 2015).

257. *See* MICHAEL BRIDGE, THE INTERNATIONAL SALE OF GOODS: LAW AND PRACTICE, appendix (1999); John Coyle, *Rethinking the Commercial Law Treaty*, 45 GA. L. REV. 343, 365 (2011); *see also* Jan Smits, *Law Making in the European Union: On Globalization and Contract Law in Divergent Legal Cultures*, 67 LA. L. REV. 1181, 1187

Applicable to Certain Rights in Respect of Securities Held with an Intermediary ("Hague Convention")[258] creates a hard law agreement in an area with significant uncertainty for the global financial system.[259] The law was drafted based on a proposal by Australia, the United Kingdom, and the United States for the creation of a harmonized law on rules for securities held through intermediaries because of the inadequacy of the legal regime.[260] The convention was required because of the growth in transactions involving intermediaries who operate between the issuer and the holder of securities; under such an intermediary system the latter's interest is only recorded by the intermediary on its books with opacity as regards the issuer of the securities.[261] Empirical research showed

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(2007) ("[M]any general conditions set by . . . Federation of Oils, Seeds, and Fats ('FOSFA') and the Grain and Feed Trade Association ('GAFTA') [exclude the CISG]. A survey among some large Dutch companies showed that most of them exclude the applicability of the CISG . . . . Smaller Dutch companies often do not exclude the CISG, unless legal advice was sought by one of the companies involved."); Grain and Feed Trade Ass'n, *Gafta No. 100: Contract for Shipment of Feedingstuffs in Bulk: Tale Quale—CIF Terms*, ¶ 28 (2006), http://www.mega-tierernaehrung.com/upload/Gafta.pdf [https://perma.cc/BT36-JRDX] (archived Sept. 20, 2015) ("International Conventions[:] The following shall not apply to this contract . . . (a) the Uniform Law on Sales and the Uniform Law on Formation to which effect is given by the Uniform Laws on International Sales Act 1967; (b) the United Nations Convention on Contracts for the International Sale of Goods of 1980; and (c) the United Nations Convention on Prescription (Limitation) in the International Sale of Goods of 1974 and the amending Protocol of 1980.").

258. Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary, July 5, 2006, http://www.hcch.net/upload/conventions/txt36en.pdf [https://perma.cc/M67V-KHUW] (archived Sept. 20, 2015).

259. *See id.* ("The States . . . [a]ware of the urgent practical need in a large and growing global financial market to provide legal certainty and predictability . . . [h]ave resolved to conclude a Convention . . . and have agreed upon the following provisions.").

260. *Conclusions of the Special Commission of May 2000 on General Affairs and Policy of the Conference*, Hague Conference on Private International Law, Preliminary Document No. 10 of June 2000 for the Attention of the Nineteenth Session, at 30 (2000), http://www.hcch.net/upload/wop/genaff2000concl_e.pdf [https://perma.cc/B7AC-ZDW8] (archived Sept. 20, 2015).

261. *See Proposal by the Delegations of Australia, the United Kingdom, and the United States*, Hague Conference on Private International Law, Work Doc. No. 1 E, at 1 (May 8, 2000), http://www.hcch.net/upload/wop/genaff2000concl_ann6.pdf [https://perma.cc/PNN8-M2DM] (archived Sept. 20, 2015) (arguing that "[t]he need for a Convention is urgent because of the systemic risk implications and because the existing legal uncertainty in the area has the potential to impede the growth internationally of financial services industry arrangements for the transfer of securities through multiple tiers of intermediaries"); Philippe Dupont et al., *Regulatory Aspects of the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary*, INT'L MONETARY FUND 4 (2002), http://www.imf.org/external/np/leg/sem/2002/cdmfl/eng/dupont.pdf [https://perma.cc/FY5G-5SYX] (archived Sept. 20, 2015) ("At present, it is very common to find a scenario where a collateral provider in country A provides to a bank, as collateral taker, in country B a pledge over securities issued by issuers of three different nationalities and booked to one account with a central securities depositary (CSD) in country C and held physically in the vaults of a local depositary or by nominee registration for this CSD in different countries."); *ESF Securitisation Data Report: European Securitisation Issuance Surges to a New Record in 2003*, at 1 (2004), http://www.

that the national legal systems of many states needed to be modernized to accommodate these sorts of indirect holding systems.[262] The commercial practice demonstrated a high level of technical complexity and serious legal risks, requiring states to embody the law in the form of a binding convention.

Against this background, why did UNCITRAL choose the Model Law form for harmonizing cross-border insolvency law? As previously discussed, the choice of a non-binding instrument such as the Model Law is in recognition of the unwillingness of states to give up their deeply held policy preferences underpinning their national insolvency laws. In addition, states believed that they would lose by transferring domestic assets to foreign creditors without commensurate gain and were unlikely to commit to a binding regime. In such circumstances, the drafters of the Model Law believed that the flexibility afforded by the choice of a soft law form was desirable in order to give states the ability to move toward harmonization in a gradual way. In addition, there was recognition that many states may not have adequate legal regimes and that a model law would help to modernize domestic laws in developing nations.[263]

As the theory suggests, in subject areas where the divergences are significant and states cannot overcome them to agree on an acceptable text, non-binding instruments result in provisions that contain broader language. In addition, many of the gaps are assigned to the courts to fill in based upon the broadly expressed contours of the text. This is also the case where the subject matter of the instrument is capable of a high degree of uncertainty. If the Model Law and its enactments into domestic law are read in this light, it becomes apparent that the courts have a significant role to play in

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chinasecuritization.cn/upload/200604/20060412222906378.pdf [https://perma.cc/5LNX-J3NZ] (archived Sept. 20, 2015) ("New issuance in the European securitised debt set a new record in 2003 of €217.2 billion, up from the €157.7 billion issued in 2002."). *See generally* Klaus Lober, *The Harmonisation of the Legal Framework for Rights Evidenced by Book Entries: A Report by the European Financial Markets Lawyers Group*, 18 J. INT'L BANKING L. & REG. 413 (2003) (describing the absence of harmonization in the EU legal regime controlling securities).

262. *See generally* Christophe Bernasconi, *The Law Applicable to Dispositions of Securities Held Through Indirect Holding Systems,* Hague Conference on Private International Law, Preliminary Document No. 1 of Nov. 2000 for the Attention of Working Group of Jan. 2001, at 11 (2000), http://www.hcch.net/upload/sec_pd01e.pdf [https://perma.cc/V6HB-HQWS] (archived Sept. 20, 2015).

263. *See* United Nations Comm'n on Int'l Trade Law, UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation, at 13, U.N. Sales No. E.10.V.6 (2010), http://www.uncitral.org/pdf/english/texts/insolven/Practice_Guide_Ebook_eng.pdf [https://perma.cc/XS3V-UQRX] (archived Sept. 15, 2015) (noting the UN General Assembly "made clear its conviction that fair and internationally harmonized legislation on cross-border insolvency that respected the national procedural and judicial systems and was acceptable to States with different legal, social and economic systems would not only contribute to the development of international trade and investment, but would also assist States in modernizing their legislation on cross-border insolvency.").

giving effect to the letter and spirit of the harmonized instrument.[264] This is especially so in the context of recognition and enforcement of foreign judgments. Indeed, UNCITRAL recognized that the Model Law would be beneficial even in states with a history of recognizing foreign orders, where the need to expend resources on drafting and adopting a non-binding instrument might be questioned: "To the extent that cross-border judicial cooperation in the enacting State is based on principles of comity among nations, the enactment of articles 25–27 offers an opportunity for making this principle more concrete and adapting it to the particular circumstances of cross-border insolvencies."[265]

Following this analysis, we argue that decisions such as *Rubin*, *Qimonda*, and *Vitro* run contrary to the theoretical underpinnings of the Model Law form and do not reflect well on the expectations placed on the courts by the drafters. Specifically, Article 21 states that following recognition of a foreign proceeding, the court may "grant any appropriate relief" as long as it is "necessary to protect the assets of the debtor or the interests of the creditors." The Model Law conditions this relief in Article 22 by requiring that the court be "satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected." Moreover, Article 25 mandates the court to cooperate to the "maximum extent possible with foreign courts or foreign representatives."[266]

It is useful to make reference to an UNCITRAL document produced by eminent judges in 2012 that reiterated:

> Post-recognition relief under article 21 is discretionary. The types of relief listed in article 21, paragraph 1, are those most frequently used in insolvency proceedings; however, the list is not exhaustive. It is not intended to restrict the receiving court unnecessarily in its ability to grant any type of relief that is available and necessary under the law of the enacting State to meet the circumstances of a particular case.[267]

Moreover, in the Australian case of *Tucker v. Aero Inventory (UK) Ltd (No 2)*,[268] Justice Lindgren of the Federal Court of Australia elaborated on the provision of relief under Article 21:

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264. For instance, Article 27 lists the following forms of cooperation: "(a) Appointment of a person or body to act at the direction of the court; (b) Communication of information by any means considered appropriate by the court; (c) Coordination of the administration and supervision of the debtor's assets and affairs; (d) Approval or implementation by courts of agreements concerning the coordination of proceedings; (e) Coordination of concurrent proceedings regarding the same debtor." *Id.* at 17.

265. UNCITRAL, *supra* note 12, at 96.

266. *Id.* at 13.

267. United Nations Comm'n on Int'l Trade Law, UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective 58 (2014), http://www.uncitral.org/pdf/english/texts/insolven/Judicial-Perspective-2013-e.pdf [https://perma.cc/YHK2-MQXQ] (archived Sept. 20, 2015).

268. [2009] 181 FCR 374 (Austl.).

> Art 21(1) empowers the court to "grant any appropriate relief"—a power not confined to the forms of relief described in the lettered paras (a)–(g) of Art 21(1). Paragraphs (a), (b) and (c) of O 4 made on 30 November 2009 reflect §§ 440B (charge unenforceable), 440BA (liens and pledges) and 440C (owner or lessor unable to recover property used by company) of the Corporations Act. [269]

The judge opined that it would be:

> [A]ppropriate to grant the plaintiffs the same protections with respect to charges, liens and pledges and leased property as the voluntary administrator of an Australian company would enjoy as a matter of course. This approach promotes consistency and gives effect to the objectives set out in the preamble to the Model Law. [270]

In this regard, we propose that the national courts of states enacting the Model Law read the "grant any appropriate relief" language broadly to enforce foreign insolvency judgments in appropriate circumstances. To be sure, the due process rights of affected parties have to be protected, and there has to be some check on expansive interpretations of jurisdiction by foreign courts. However, it is no longer appropriate, as the *Rubin* court seems to imply, that the requirement to defend in foreign proceedings is necessarily always unfair or impermissibly onerous than participating in domestic proceedings.[271] We argue that the Canadian test of real and substantial connection might provide further reassurance. The *Currie* case is instructive: this was a class action litigation in Ontario and the United States against McDonald's in respect of a promotional campaign after a manager of the company conducting the promotion embezzled money set aside for prizes.[272] A settlement was entered into in the United States and included a release extending to Canadian residents.[273] Despite the objections of

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269. *Id.* at 378.

270. *Id.*

271. See, e.g., in the non-insolvency context, Chevron Corp. v. Yaiguaje, 2015 SCC 42, ¶55 where the Canadian Supreme court said: "no unfairness results to judgment debtors from having to defend against recognition and enforcement proceedings. In essence, through their own behaviour and legal non-compliance, the debtors have made themselves the subject of outstanding obligations. It is for this reason that they may be called upon to answer for their debts in various jurisdictions. Of course, principles of order and fairness are also protected by providing a foreign judgment debtor with the opportunity to convince the enforcing court that there is another reason why recognition and enforcement should not be granted." The court also opined that "Cross-border transactions and interactions continue to multiply. As they do, comity requires an increasing willingness on the part of courts to recognize the acts of other states. This is essential to allow individuals and companies to conduct international business without worrying that their participation in such relationships will jeopardize or negate their legal rights." *Id.* ¶75.

272. Currie v. McDonald's Restaurants of Canada Ltd. (2005), 74 O.R. 3d 321, 325 (Can. Ont. C.A.)

273. *Id.* at 325–26.

Canadian claimants, the U.S. court approved the settlement.[274] A Canadian class action was filed and the defendants moved to dismiss or stay based on the U.S. settlement order. The judge dismissed one of the actions on the basis that a party had participated in the U.S. proceeding but declined to stay the main litigation. The court of appeal concluded that the U.S. order should not be enforced against the Canadian residents who did not intervene in the U.S. litigation:

> [I]n my view, provided (a) there is a real and substantial connection linking the cause of action to the foreign jurisdiction, (b) the rights of non-resident class members are adequately represented, and (c) non-resident class members are accorded procedural fairness including adequate notice, it may be appropriate to attach jurisdictional consequences to an unnamed plaintiff's failure to opt out. In those circumstances, failure to opt out may be regarded as a form of passive attornment sufficient to support the jurisdiction of the foreign court. I would add two qualifications: First, . . . 'the exact limits of what constitutes a reasonable assumption of jurisdiction' cannot be rigidly defined and 'no test can perhaps ever be rigidly applied' as 'no court has ever been able to anticipate' all possibilities. Second, it may be easier to justify the assumption of jurisdiction in interprovincial cases than in international cases.[275]

The case of *Cavell* provides further guidance. It concerns a reinsurance company with operations in the United Kingdom, Canada, and Australia.[276] Although the company had ceased to write new contracts in the 1990s, it carried on making payments and administering older policies. In 2004, it decided to enter into a scheme of arrangement whereby it would undertake a valuation of all present, future, and contingent claims and pay those to its policyholders in exchange for a surrender of their policies.[277] This scheme was organized under the UK Companies Act 1985 and required approval of creditors representing 75 percent of the value of the claims.[278] The process was to be supervised by the High Court. Cavell did not provide notice to Canadian policyholders about the meeting with the required papers.[279] Shortly before the meeting to consider the scheme of arrangement, Cavell did write a letter to inform them of their intention to make an application.[280] None of the Canadian policyholders participated in the UK proceedings.[281] Cavell obtained the order of the UK court and sought enforcement in Ontario.[282] Recognition was awarded subject to the ability of Canadian insurers to come back to amend or modify the order.

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274. *Id.* at 326.
275. *Id.* at 334–35.
276. Re Cavell Insurance Co. (2006), 80 O.R. 3d 500, ¶ 5 (Can. Ont. C.A.)
277. *Id.* ¶9.
278. *Id.* ¶10.
279. *Id.* ¶12.
280. *Id.*
281. *Id.*
282. *Id.* ¶14.

Accordingly, Canadian parties sought to set aside the order. The court ruled that the notice issued in the UK proceedings was "not insufficient" and held that enforcement was proper.[283] The Court of Appeal affirmed. It held that the Canadian parties were aware of the UK proceedings and had chosen to do nothing after receiving the letter. It also held that the process was fair with regard to the Canadian parties.[284]

This pragmatic approach adopted by the Canadian courts is perfectly consistent with the exigencies of modern commercial practice and frees this area of the law from a dogmatic approach typified in cases such as *Rubin*. To recollect, in that case and in *Cambridge Gas*, the defendants were aware of the U.S. proceedings, had conducted business in that country, and had deliberately chosen to stay away from legal proceedings. In these circumstances, there was nothing unfair in recognizing and enforcing the U.S. judgment considering the actual relationships between the various corporate entities.

VI. CONCLUSION

Cross-border insolvencies are growing in economic significance, and the law is in a state of flux. Recent decisions in the *Rubin*, *Metcalfe*, and *Qimonda* cases exacerbate the current lack of certainty and predictability by introducing fresh complexity. Although the UNCITRAL Model Law has been enacted into law by the United States, United Kingdom, Australia, and other countries, the inherent weaknesses in that form of harmonization have been highlighted by the case law in these jurisdictions. As we acknowledge, given the deeply held divergences between the insolvency laws of nation-states, it is highly unlikely that there will be agreement over a binding mandatory instrument to harmonize cross-border insolvency law. In such circumstances, rather than fall back to a position of doom and gloom, this Article subjects the Model Law to analysis based upon insights from international relations theories and comparative case law. In this light, this Article shows that given the divergences between national insolvency laws, the different public policy choices embedded in those laws, and the uncertainties inherent in particular insolvency settings, the drafters embodied their agreement in a non-legal form for transmission into legality by way of subsequent state action. In making this choice, the drafters preserved freedom for states to make changes while exhorting them to adhere closely to the agreed text in order to preserve uniformity. They recognized that the

283. *Id.* ¶ 19.
284. *Id.* ¶ 57.

uncertainties and divergences would mean that the text would require a degree of supplementation.

Therefore, this Article argues that the gaps created by the form and substance ought to be filled by national courts acting within the mandate of the UNCITRAL Model Law to deliver outcomes within the letter and spirit of that instrument. Specifically, by recognizing and enforcing foreign insolvency judgments by reading the "any appropriate relief" and "maximum cooperation" language broadly, courts will be able to deliver much needed certainty to creditors and debtors. We propose that any mishaps from such a broad reading could be mitigated by the fairness and real and substantial connection tests, as articulated by Canadian courts, in the context of enforcing default foreign judgments in other circumstances. If these tests prevent injustice in other contexts as demonstrated by ample case law, there is no reason why they would not deliver justice in cross-border insolvency cases such as *Rubin*. Our proposal only requires courts to recognize the reasons for the design of the Model Law and grasp the mandate conferred upon them to fill in the gaps. Courts would then not be able to default to the position that enforcement of judgments is not possible because it is not specifically mentioned in the Model Law. Applying the appropriate test and enabling enforcement will facilitate the achievement of core goals of insolvency laws everywhere: maximization of the pool for recovery, procedural efficiency, and fairness and predictability in the disbursal of assets upon insolvency.