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Procedural Incrementalism: A Model for  
International Bankruptcy

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# Procedural Incrementalism: A Model for International Bankruptcy

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## I. INTRODUCTION

The headline-grabbing business failures of late have brought increased attention to the relatively unresolved area of multinational bankruptcies. Parmalat, Global Crossing, and United Airlines are among the few international juggernauts that have foundered. In the financial meltdowns of these cross-border institutions, assets and creditors are dispersed throughout commercial environments that rarely end neatly at national borders. There has been heated debate, both in scholarly literature and the practical battlefield, over how best to resolve these transnational insolvencies, and there is nothing yet approaching a consensus. Reform efforts of various stripes have almost uniformly failed to gain meaningful international support.<sup>1</sup>

At the hub of this inability to generate international consensus is a theoretical rift. The essence of disagreement revolves around the competing theories of “territorialism” and “universalism” as the

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1. Treaties proved unavailing. See Jay L. Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L.J. 457, 487 (1991) (discussing the Strasbourg Convention and the failed Brussels Convention). So did other attempts. See Todd Kraft & Allison Aranson, *Transnational Bankruptcies: Section 304 and Beyond*, 1993 COLUM. BUS. L. REV. 329 (1993) (discussing the challenges facing adoption of the International Bar Association’s largely ignored Model International Insolvency Cooperation Act).

preferred normative models for resolving multinational failures.<sup>2</sup> While territorialism counsels following strict sovereign borders in allocating regulatory jurisdiction among nations over globally dispersed assets,<sup>3</sup> universalism embraces a one-law approach: the application of one “exporting” country’s law extraterritorially to other “receiving” jurisdictions.<sup>4</sup>

Given that this theoretical debate between territorialism and universalism remains ongoing and unresolved, we should be unsurprised at the historic inability to craft an international agreement among nations, by treaty or other means. Indeed, we should remain pessimistic in our prognosis. Nevertheless, an important and fresh development in international bankruptcy has recently defied our bearish expectations. After decades of disagreement, one recent attempt at reform has bucked the trend of failure and actually won widespread international support: the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency (Model Law).<sup>5</sup> Since the Model Law, there has been an explosion of international bankruptcy reform.<sup>6</sup> These efforts include UNCITRAL’s best practices Draft Legislative Guide, designed for countries seeking to revise their insolvency laws;<sup>7</sup> the American Law Institute’s (ALI’s) Transnational Insolvency Project (TIP), a series of proposals for cross-border insolvencies in the three NAFTA countries;<sup>8</sup> and the European

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2. See Ian F. Fletcher, *The European Convention on Insolvency Proceedings: Choice-of-Law Provisions*, 33 TEX. INT’L. L.J. 119, 124 (1998) (characterizing universalism and territorialism as “essentially rival schools of thought about the ‘correct’ way to govern transnational insolvency”). See generally Robert K. Rasmussen, *Colloquy, International Bankruptcy: Resolving Transnational Insolvencies Through Private Ordering*, 98 MICH. L. REV. 2252 (2000) [hereinafter *Colloquy*] (discussing difficulties with both theories).

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

4. See, e.g., Westbrook, *supra* note 1, at 461.

5. U.N. COMM. ON INT’L TRADE LAW, MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT, U.N. Sales No. E.99.V.3 (1999) [hereinafter MODEL LAW].

6. See, e.g., Bob Wessels, *The European Union Insolvency Regulation: An Overview with Trans-Atlantic Elaborations*, in ANNUAL SURVEY OF BANKRUPTCY LAW 494 (William L. Norton, Jr. ed., 2003) (describing the provisions and limitations of the recently adopted EU Insolvency Regulation).

7. UNCITRAL Draft Legislative Guide on Insolvency Law, 24th Sess., U.N. Doc. A/CN.9/WG.V/WP.54 (2001) [hereinafter UNCITRAL Draft Legislative Guide].

8. AM. L. INST., TRANSNATIONAL INSOLVENCY: COOPERATION AMONG NAFTA COUNTRIES. INTERNATIONAL STATEMENT OF UNITED STATES BANKRUPTCY LAW, GENERAL PRINCIPLES VOLUME (2003) [hereinafter ALI TIP], cited in Jay L. Westbrook, *Multinational Enterprises in General Default: Chapter 15, The ALI Principles, and The EU Insolvency*

Union's Insolvency Regulation, a legal enactment covering intra-European Union multinational bankruptcies.<sup>9</sup> Accordingly, these recent developments present something of a puzzle: why, in the face of so many false starts, and especially in the face of ongoing disagreement over the theoretical benefits of universalism compared to territorialism, did international bankruptcy reform finally take off? Was it simply a matter of fortuitous historical timing? Was there something specific about the mechanism of the UNCITRAL Model Law (perhaps its status as a model law, as opposed to a treaty, or perhaps its substantive content) that accounted for its ability to break the loggishness? What makes a mechanism such as a model law effective at galvanizing reform in international bankruptcy law?

This Article examines how international bankruptcy law changes. At one level, its scope is thus restricted to the peculiarities of insolvency law and its international challenges in particular. On another level, however, the model builds upon insights from conflicts literature and other theoretical tools of general applicability. What I am specifically trying to do in this study of how bankruptcy law changes is explore and explain what I call a "mechanism" of reform in international bankruptcy. By this I mean looking at a specific product of international bankruptcy reform—here the UNCITRAL Model Law—as a case study of sorts. The goal is to see if it has distinguishing characteristics that can explain its successful reception by the international community in an environment, such as bankruptcy, where international consensus remains elusive and mired in theoretical disagreement. Accordingly, I situate this project on a middle ground between a substantive critique of the universalism versus territorialism theories of international insolvency law more generally on the one hand,<sup>10</sup> and a process analysis of international commercial law on the other.<sup>11</sup> In focusing on a *mechanism* of reform, such as the UNCITRAL Model Law (which has just been enacted in the United States), I am thus trying to explain what made one project work where other putative reform mechanisms faltered. In doing so, I scrutinize both the substantive provisions of that

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*Regulation*, 76 AM. BANKR. L.J. 1, 41 n.109 (2002).

9. Council Regulation 1346/2000, On Insolvency Proceedings, 2000 O.J. (L 160) 0001-00013, available at [http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/l\\_160/l\\_16020000630en00010018.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/l_160/l_16020000630en00010018.pdf) (last visited Nov. 6, 2005).

10. See, e.g., Lucian Arye Bebchuk & Andrew T. Guzman, *An Economic Analysis of Transnational Bankruptcies*, 42 J. LAW & ECON. 775 (1999).

11. See, e.g., Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 VA. J. INT'L L. 743 (1999) (applying public choice analysis).

mechanism *and* the process by which it was created. My result is a theory of how international bankruptcy law can change most readily.

The principal contention of this Article is that international bankruptcy reform mechanisms such as UNCITRAL's Model Law succeed due to a synergistic combination of specific attributes, the most important of which are a modesty of scope and a procedural focus. By adopting an incrementalist and procedurally animated approach (what I call "procedural incrementalism" as a shorthand), the Model Law created an opportunity to bridge the theoretical gap between universalists and territorialists. This was accomplished obliquely: on the surface, the Model Law bridged it by appearing to be a hybrid of universalism *and* territorialism, with something seemingly for everyone. Beneath the surface, however, the Model Law actually advanced universalism, and in a way that caused minimal affront to territorialist jurisdictions. The Model Law's design thus allowed hesitant states to "acclimate" to a regime of universalism. This is the genius of the Model Law and makes it unprecedented in its effectiveness as a mechanism of international reform. Following years of failure in an environment where the comparative merits of territorialism and universalism remain hotly contested, the Model Law actually won support.

To make this claim, I must first lay several foundations, which naturally divides the Article into five sections. Section II sets the theoretical stage and outlines the continuing debate between universalism and territorialism. This is important in order to articulate the principles of universalism that are likely to be the sticking points for territorialists. Sections III and IV then explore UNCITRAL's Model Law. Rather than conduct a clause-by-clause exegesis,<sup>12</sup> Section III (the "surface" analysis) sketches a broad outline of how the Model Law seemingly operates vis-à-vis the theoretical debate presented in Section I. Section IV (the "subsurface" analysis) then explores several specific provisions of the Model Law in detail that operate more toward its periphery and belie its true location along the universalism axis. Building upon this scrutiny, Section V proposes a model for how the Model Law achieved its important advancements, namely, widespread international support and the partial acceptance of universalism, notwithstanding the ongoing disagreement presented in Section II. It

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12. This task has been conducted commendably elsewhere. See, e.g., Andre J. Berends, *The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview*, 6 TUL. J. INT'L & COMP. L. 309 (1998).

uses some insights of modern conflicts literature and contends that the Model Law's success lies not simply in its status as a model law, but from its attention to "low stakes," modest matters and concomitant focus on procedural issues. This procedural incrementalism holds the key to its effectiveness as a mechanism of reform. Finally, Section VI tentatively tests the model's consistency with subsequent reform efforts that have followed upon the Model Law in bankruptcy.

## II. THE TRANSNATIONAL INSOLVENCY DEBATE

In this Section, I sketch in broad strokes the outline of the theoretical debate regarding transnational insolvencies. I begin with the unique theoretical elements of domestic insolvency laws that only intensify in complexity at the international level.

### A. *Insolvency Law Generally*

There are at least four key features of a domestic insolvency system. First, a domestic insolvency system generally strives to be "market symmetric," i.e., co-extensive with an entire domestic economy's scope.<sup>13</sup> Thus, in a federal system such as the United States, one bankruptcy law operates at the federal level, superseding and hence unifying the laws of the several states. Accordingly, although property liens and contractual rights might be defined locally, the reordering of those rights to deal with general financial default occurs federally.<sup>14</sup>

Second, and relatedly, bankruptcy has been characterized as "meta-law" that swoops in and trumps pre-existing legal entitlements in a specifically defined context: when an entity experiences general financial default.<sup>15</sup> Accordingly, bankruptcy laws run "deep" and have the tendency to get in the way of and displace other laws and policies in the domestic system. The list of the activities exempted from the scope of the bankruptcy stay under American law is narrow.<sup>16</sup>

Third, when a debtor enters the bankruptcy system, the nature of the legal proceeding is in rem. In other words, if one of the principal

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13. See Jay L. Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276, 2283–84 (2000).

14. See G. Marcus Cole, *The Federalist Cost of Bankruptcy Exemption Reform*, 74 AM. BANKR. L.J. 227, 236–41 (2000).

15. See Frederick Tung, *Fear of Commitment in International Bankruptcy*, 33 GEO. WASH. INT'L L. REV. 555, 566–68 (2001) (attributing the term "meta-law" to Manfred Balz, *The European Union Convention on Insolvency Proceedings*, 70 AM. BANKR. L.J. 485, 486 (1996)).

16. See 11 U.S.C. § 362(b) (2000).

functions of an insolvency system is to distribute or reorganize the assets of a debtor, then all the stakeholders must be bound by the proceeding's outcome.<sup>17</sup> Consequently, it is difficult to consider the bankruptcy of an enterprise without also considering the jurisdiction of the bankruptcy system's legal institutions to bind all the participants in property-based actions.<sup>18</sup> This "breadth" of bankruptcy law is theoretically derived, in part, from its need to protect creditors from their potentially value-destructive impulses. Bankruptcy marshals creditors together in a compulsory dispute resolution process; no one gets to opt out.<sup>19</sup>

Fourth, the key substantive elements of an insolvency regime can be summarized as rules of priority and distribution,<sup>20</sup> and, to a lesser extent, the related rules of avoidance.<sup>21</sup> These rules are "prickly" because they are highly normative and driven by domestic policy.<sup>22</sup> As one country's top court summarized, "[n]ational bankruptcy laws express the policies and priorities of their enacting countries."<sup>23</sup> Therefore, although at a general level all bankruptcy regimes might find themselves aligned in overarching goals, such as "protection and maximization of the value of

17. The in rem nature of bankruptcy law and its need to bind all participants is underscored in the federalist system of the United States by bankruptcy's in rem abrogation of the sovereign immunity of states. See 11 U.S.C. § 106 (2000); *Tenn. Student Assistance Corp. v. Hood* (*In re Hood*), 541 U.S. 440 (2004).

18. See Westbrook, *supra* note 1.

19. THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* 12–13 (1986).

20. Barry E. Adler, *Bankruptcy Primitives*, 12 AM. BANKR. INST. L. REV. 219, 234 (2004). This characterization implicitly assumes that bankruptcy law—at least part of it—may be called "substantive." Others may disagree, but I am willing to classify both the distributive decision of who gets what when a debtor cannot satisfy all of its creditors and the extinguishment of legal debts "substantive" by whatever criterion one might use. To the extent that bankruptcy law contains both substantive elements and procedural elements, I contend that priority rules lie at the substantive end of the spectrum. I therefore refer to these elements throughout this paper as "substantive" bankruptcy law.

21. See Jay Lawrence Westbrook, *Choice of Avoidance Law in Global Insolvencies*, 17 BROOK. J. INT'L L. 499, 500 (1991) (noting that avoidance laws "have as their function the protection and vindication of the priorities set by each national distribution scheme"). The different policies of avoidance law clashed in one of the seminal transnational insolvency cases, *In re Maxwell Communication Corp.*, 170 B.R. 800 (Bankr. S.D.N.Y. 1994), *aff'd*, 186 B.R. 807 (S.D.N.Y. 1995), *aff'd*, 93 F.3d 1036, 1042 (2d Cir. 1996).

22. Some scholars argue that these normative matters of distributive justice are ill-situated in bankruptcy law. See Douglas G. Baird, *Bankruptcy's Uncontested Axioms*, 108 YALE L.J. 573, 580–88 (1998) (discussing academic debate). Even those tolerant of such provisions urge caution. See Westbrook, *supra* note 21, at 510 (observing that each country's priority and avoidance laws must balance statutory entitlements against the costs and risks of unsettling otherwise normal commercial transactions).

23. *Antwerp Bulkcarriers, N.V. v. Holt Cargo Sys.*, [2001] 3 S.C.R. 951, 964 (Can.).



[a] debtor's assets,"<sup>24</sup> consensus dissolves soon after that. The more specific provisions of domestic insolvency laws reflect an array of normative value judgments, such as which creditors should be accorded priority and how strongly secured credit requires protection.<sup>25</sup> Some consider these distributive provisions important vindications of social policy;<sup>26</sup> others deem them the spoils of "domestic rent seeking contests."<sup>27</sup> Whatever the view, these laws are "public and regulatory."<sup>28</sup> Accordingly, perhaps the most challenging substantive consequence of domestic bankruptcy laws are their varying distributive policy determinations of who should bear the most pain in a situation in which, by definition, a debtor has insufficient funds to satisfy all creditors fully.<sup>29</sup>

In sum, bankruptcy laws are broad, deep, and prickly. They are expansive, both in terms of encompassing all of a debtor's assets and in terms of displacing other domestic substantive laws in the event of financial crisis.<sup>30</sup> They are also policy-laden and distributive, determining which creditors warrant special treatment in distribution. To be maximally effective, bankruptcy laws must bind as many stakeholders in the debtor's assets as possible, commensurate with the debtor's commercial market. Given this invasive character of a law that tends to contain deep normative content and that varies substantially jurisdiction by jurisdiction, a greater recipe for an international conflict of laws in the cross-border setting might be difficult to imagine.

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24. MODEL LAW, *supra* note 5, pmb1.

25. Professor Guzman examines employee priorities and finds that the seeming divergence across jurisdictions may actually be overstated. Andrew T. Guzman, *International Bankruptcy: In Defense of Universalism*, 98 MICH. L. REV. 2177, 2197–98 (2000) (canvassing different countries' employee priority laws). Professor Tung, however, notes that labor seems to have heightened lobbying power (and thus heightened bankruptcy priority) in Germany, France, Mexico, and South Korea. See Frederick Tung, *Passports, Private Choice, and Private Interests: Regulatory Competition and Cooperation in Corporate, Securities, and Bankruptcy Law*, 3 CHI. J. INT'L L. 369, 375–76 (2002).

26. See WORLD BANK, PRINCIPLES AND GUIDELINES FOR EFFECTIVE INSOLVENCY AND CREDITOR RIGHTS SYSTEMS ¶ 148 (2001) [hereinafter WORLD BANK PRINCIPLES] ("Legislators should...create...priority classes based on...widely embraced social policies.").

27. Frederick Tung, *Is International Bankruptcy Possible?*, 23 MICH. J. INT'L L. 31, 55 (2001).

28. Fletcher, *supra* note 2, at 123.

29. See Bob Wessels, *Current Developments Towards International Insolvencies in Europe*, 13 INT. INSOLV. REV. 43, 46 (2004) ("Even the more recent European insolvency laws continue to show substantial differences in underlying policy considerations, both in structure and in content.").

30. This is especially so in the reorganization context. See *Stonington Partners, Inc. v. Lernout & Hauspie Speech Prods. N.V.*, 310 F.3d 118 (3d Cir. 2002).

### B. *The International Perspective*

An increasing number of businesses have begun to transcend national boundaries in recent decades.<sup>31</sup> When a transnational firm encounters financial crisis, it thus presumptively engages the regulatory scope of more than one country's bankruptcy regime. This presents a classic conflict of laws situation, replete with the traditional choice-of-law concerns. Of particular interest are the legitimacy of the extraterritorial reach of one country's laws to govern the distribution of assets located in another jurisdiction, the actual or constructive expectations of stakeholders regarding the applicable laws, and the balance between comity and the assertion of sovereign entitlement.<sup>32</sup>

Conflicts in bankruptcy situations are inevitable due to the expansive reach of the laws. They are also prickly, due to the policy-rich norms implicated. The theoretical possibilities for resolution are therefore numerous. For example, one might argue that because a debtor firm is more closely tied to Country A, Country A's bankruptcy laws should govern, even with regard to assets located in Country B.<sup>33</sup> On the other hand, one might well say that as co-equal sovereigns, neither Country A nor Country B has a greater claim to govern the assets in the other's jurisdiction.<sup>34</sup> Or one might take an entirely different approach and argue that both countries' assets should be governed by an external,

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31. There remains empirical disagreement over whether the exemplar multinational is a mega-conglomerate or a smaller firm located near a border. 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, 771 (2000) (describing Japanese pachinko parlors owned by Koreans). Professor Westbrook laments these smaller firms as "invisible to scholarship." Jay Lawrence Westbrook, *The Lessons of Maxwell Communication*, 64 FORDHAM L. REV. 2531, 2532 n.5 (1996).

32. See generally Westbrook, *supra* note 21. The Supreme Court has recently chastised overstepping regulatory bounds when dealing with solely domestic antitrust matters. See *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 124 S.Ct. 2359, 2367 (2004) ("Why should American law supplant, for example, Canada's, or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers from anticompetitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?").

33. See, e.g., MODEL LAW, *supra* note 5, art. 2 (proposing "centre of...main interests" test).

34. Larry Kramer, *Return of the Renvoi*, 66 N.Y.U. L. REV. 979, 1019 (1991) ("The whole problem in a true conflict is that different states have made different judgments about what is just, and it is axiomatic that...states are coequal sovereigns entitled to make their own value judgments.").

substantive law created by some form of international agreement.<sup>35</sup> A rich theoretical literature explores the possibilities.

In a critical respect, the “problem” of transnational insolvencies, at least at one level, might be nothing more than an admittedly challenging choice-of-law issue: whose (policy-rich) laws of distribution, priority, and avoidance should govern the insolvency of the multi-jurisdiction debtor? One response, accordingly, might be to craft a uniform jurisdiction-selecting protocol based on contacts.<sup>36</sup> Another approach, following more modern conflicts literature, might seek to find which of a competing set of rules better forwards more abstracted values, such as an efficient international commercial system.<sup>37</sup> I refer to both of these types of solutions as “pluralist,” because they countenance the validity of myriad bankruptcy regimes around the world, each of which could legitimately govern a given cross-border insolvency. Therefore substantive harmonization of these various regimes, at least initially, appears unnecessary.

To be sure, pluralism is not the only theoretical paradigm available to address cross-border insolvency, but it remains dominant. In so doing, pluralism has splintered into two primary theoretical models: territorialism and universalism.<sup>38</sup>

### C. *The Tradition: Territorialism*

Finding its roots in the choice-of-law situs rule,<sup>39</sup> the traditional approach to transnational bankruptcy has been one of “territorialism.” Country A insolvency proceedings may only reach assets located in

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35. Cf. Robert K. Rasmussen, *A New Approach to Transnational Insolvencies*, 19 MICH. J. INT’L L. 1, 22–27 (1997) (proposing opt-out rights from default legislative rules for privately contracting commercial actors).

36. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. c (1971) (articulating the principle that the law of the jurisdiction with the “most significant relationship” to a dispute should govern).

37. See Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277 (1990); see also Hannah L. Buxbaum, *Rethinking International Insolvency: The Neglected Role of Choice-of-Law Rules and Theory*, 36 STAN. J. INT’L L. 23, 30 (2000) (speculating on the potential for transnational bankruptcy to move from jurisdictional fixation to content-based rules).

38. Professor Rasmussen’s alternative of maximal private ordering (“contractualism”) is an important contribution to this robust academic discussion but beyond the scope of this Article’s focus. See generally *Colloquy*, *supra* note 2 (discussing efficacy of contractual solutions to transnational insolvencies).

39. See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 223, 226, 228, 234–36, 239, 241 (1971). That the situs rule is well followed does not, of course, mean that it is well received. See, e.g., Russell J. Weintraub, *An Inquiry Into the Utility of “Situs” as a Concept in Conflicts Analysis*, 52 CORNELL L.Q. 1, 11 (1966).

Country A. To the extent a debtor has assets in Country B, only Country B's courts—applying Country B's bankruptcy laws—may govern them. Good jurisdictional borders make for good neighbors in international regulatory relations, and there is always the backdrop of comity.

This system, while arguably clear, proves cumbersome when implemented. Bankruptcy proceedings can be opened in multiple countries covering various assets with the only hope of coordination coming from principles of comity.<sup>40</sup> Complicating matters further, some countries, such as the United States, assert broad jurisdiction over a debtor's worldwide assets,<sup>41</sup> in essence inviting a conflict of laws regarding the assets located abroad. At the other end of the spectrum, countries like South Korea<sup>42</sup> and the Netherlands<sup>43</sup> sharply constrain the scope of their own bankruptcy proceedings to domestic assets. In the latter group of countries, foreign orders seeking to affect domestic assets—such as might be generated in an American bankruptcy proceeding—are rendered void if challenged domestically. An international debtor with assets in multiple jurisdictions is thus exposed to an array of potentially conflicting bankruptcy laws, such as Dutch and French law applying to Dutch-situated assets of a French-domiciled debtor in bankruptcy in one or both countries.<sup>44</sup>

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40. See *Hilton v. Guyot*, 159 U.S. 113 (1895).

41. See 11 U.S.C. § 541(a) (2000).

42. See Anderson, *supra* note 31, at 729–34. See Samuel L. Bufford & Kasuhiro Yanagida, *Japan's New Laws on Business Reorganization: An Analysis*, 39 CORNELL INT'L L.J. 1, 59 n.353 (2005) (discussing Daewoo Motor Bankruptcy proceedings in Korea and Japan). I have been advised by e-mail from Benjamin Wagner, research assistant to Professor Soogeum Oh of Ewha Womans University in Seoul, Korea, that as of March 2005, South Korea has amended its insolvency laws (to take effect March 2006), which will add a cross-border insolvency section “modeled largely after the UNCITRAL Model Law.”

43. See Berends, *supra* note 12, at 315. Japan has recently amended its laws to drop its territorialist approach. See Bufford & Yanagida, *supra* note 42; see also Bob Wessels, *The Comity Principle in Amice*, LIBER AMICORUM ROB RUTGERS, KLUWER, DEVENTER, 347–59 (2005) (arguing that the principle of territoriality is being diminished under Dutch private international law, but acknowledging a difference of scholarly opinion within the Netherlands); Sumant Batra, *Indian Insolvency Reforms: An Update*, Forum on Asian Insolvency Reform, 6 (2004), available at <http://www.insol.org> (lamenting the failure of Indian legislative reforms to depart from territorialism as proposed by the Eradi Committee).

44. See *C./De Vleeschmeesters B.V.*, HR 31 mei 1996, NJ 108 (ann. ThMdB) (refusing to recognize French discharge of the debtor and allowing Dutch proceedings to be opened because, under Dutch law, French discharge could not affect Dutch claims or assets). For an English description of the case, see *Discharging a Bankruptcy in France and the Recovery of an Undischarged Claim Against a Debtor in the Netherlands*, 43 N.I.L.R. 390, 390–92 (1996).

Even with crisp respect for jurisdictional boundaries, territorialism has problems. Such a system encourages creditors to race to file local bankruptcy proceedings at the first signs of distress—“grabbing” local assets—and to distribute them quickly under local law before they can leave the jurisdiction. The internationally dispersed assets of the multinational debtor are thus divided and conquered under multiple proceedings without any semblance of coherent, enterprise-wide adjudication.<sup>45</sup> This undermines the very market-symmetric and orderly disposition of a debtor’s assets that is one of the theoretical foundations of domestic insolvency regimes. In fact, it maximizes the chances of a fractious resolution. Accordingly, as lamented by some scholars, a lender trying to measure financial risk and to price credit to multinational debtors faces an unenviable (and costly) task of predicting how many of its debtor’s assets will be located in different jurisdictions around the world—and for how long—and what the substantive insolvency rules of each such jurisdiction will be in the event a debtor defaults.<sup>46</sup>

Who then supports territorialism? Presumably not rationally acting multinational businesses, who want to avoid the above-postulated uncertainty cost and its concomitant increase in ex ante capital pricing. Nor would we expect support from international lenders (other than those who can price adjust perfectly). But territorialism does have proponents. Supporters are drawn from two main camps. First, there may be debtors or lenders who simply doubt that territorialism wreaks havoc for multijurisdictional insolvencies. These skeptics may believe that the unfailing clarity of territorialism’s allocation of regulatory jurisdiction outweighs any increased costs of monitoring imposed by the potential application of multiple bankruptcy laws.<sup>47</sup> Second, the model

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45. In corporate regulation, Philip Blumberg has contrasted an “enterprise” approach with an “entity” approach in addressing multinational business entities. See Philip I. Blumberg, *THE MULTINATIONAL CHALLENGE TO CORPORATION LAW*, 63, 89 (1993). The “enterprise” approach corresponds in the bankruptcy context with universalism and accords with bankruptcy law’s preference for market-symmetric administration.

46. See, e.g., Rasmussen, *supra* note 35, at 17–18. A further possible cost of territorialism is that it skews investment toward suboptimal decisions by inclining a debtor to seek credit based not only on expected financial return, but also on comparatively favorable priority treatment for subsequent creditors under bankruptcy law (thus sharing the rent with the subsequent creditors and transferring the costs onto subsidizing preexisting creditors). See Bebchuk & Guzman, *supra* note 10, at 779. This argument has been challenged by others. See, e.g., Westbrook, *supra* note 8, at 16; see also LoPucki, *supra* note 3, at 708 n.56 (citing the example of Nestlé’s international financing discussed in Alan C. Shapiro, *MULTINATIONAL FINANCIAL MANAGEMENT* 767–69 (5th ed. 1996)).

47. See LoPucki, *supra* note 3.

finds support among sovereigntists, especially nations concerned that they may have to subordinate their own bankruptcy laws and policies under a one-law approach.<sup>48</sup> These jurisdictions enjoy the certainty of knowing their own laws will apply to at least the local assets within their territorial borders. To be sure, there are other related issues, including worries of hegemony,<sup>49</sup> creditor endowments,<sup>50</sup> and “vested” property rights.<sup>51</sup> The chief concern, however, seems to be a deep-seated sense of sovereign entitlement animated by a reluctance to apply foreign bankruptcy law to domestic assets and claimants.<sup>52</sup>

#### D. *The Promised Land: Universalism*

Many bankruptcy theorists disfavor the potential chaos of multiple bankruptcy laws governing a cross-border proceeding. Accordingly, the dominant theory of an ideal international insolvency regime, “universalism,” advocates one law to control a bankrupt’s worldwide assets, regardless of their location. Universalists contend that such uniformity will reduce the confusion associated with territorialism’s competing domestic priority rules,<sup>53</sup> reduce monitoring costs incurred by lenders otherwise forced to police asset location constantly,<sup>54</sup> enhance overall asset value, and minimize administrative difficulties.<sup>55</sup> Professor Westbrook aggregates these predicted benefits under the label of “Transactional Gain.”<sup>56</sup> He posits that Transactional Gain creates a much bigger pie to be distributed for all creditors. To entice creditors

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48. See Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy*, 98 MICH. L. REV. 2216 (2000); Charles W. Mooney, Jr., *Insolvency Law as Credit Enhancement: Insolvency-Related Provisions of the Cape Town Convention and the Aircraft Equipment Protocol*, 13 INT. INSOLV. REV. 27 n.106 (2004); see also Reuven S. Avi-Yonah, *National Regulation of Multinational Enterprises: An Essay on Comity, Extraterritoriality, and Harmonization*, 42 COLUM. J. TRANSNAT’L L. 5, 8–9 & 12 n.22 (2003) (“Countries may object to having the law of another country apply within their territory as a matter of sovereignty, even if they agree with the policy of the law in question.”).

49. See Tung, *supra* note 15, at 576–77.

50. See *infra* Westbrook, note 72.

51. See *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, [2001] S.C.R. 907, ¶ 33.

52. Professor Fletcher summarizes this well when he candidly discusses the need for international bankruptcy reform efforts to “appease” the powerfully held “base, national instincts” of policy-defensive sovereign states. Ian F. Fletcher, *The European Union Convention on Insolvency Proceedings: Choice-of-Law Provisions*, 33 TEXAS INT’L L.J. 119, 124 (1998).

53. See Westbrook, *supra* note 1, at 462.

54. See Guzman, *supra* note 25, at 2179–81.

55. See Westbrook, *supra* note 13, at 2292–93.

56. See Westbrook, *supra* note 1, at 466.

who might enjoy a higher ratio of domestic assets covering domestic claims than the worldwide average (and who would thus rationally prefer to grab those assets under a territorialist system rather than share them on a global level under one law), Westbrook anticipates a “Rough Wash,” whereby such creditors are cautioned *ex ante* that they are equally likely to find themselves in a “deficit” bankruptcy, where the local assets to local claims ratio is lower than the global average and hence there is less to grab, as they are to be in a “surplus” situation.<sup>57</sup> Universalism tells these creditors that while its regime might change the size of their pieces from bankruptcy to bankruptcy, the overall pie is enhanced by Transactional Gain and the potentially differing size of those pieces is likely to be a Rough Wash.<sup>58</sup>

In its purest conceptual form, universalism aspires to the harmonization of one worldwide, substantive law of bankruptcy.<sup>59</sup> The most common model of universalism, however, follows a pluralist route. Sidestepping the issue of which substantive provisions the ideal bankruptcy law would possess, it simply selects from one of the pre-existing bankruptcy regimes *ex post*.<sup>60</sup> To the extent that other courts are needed (to give legal force to the orders of the courts of the governing jurisdiction), such courts could convene ancillary proceedings designed to effectuate the controlling court’s orders.<sup>61</sup> The current universalist paradigm thus concedes the divergence of present domestic bankruptcy laws and advocates only a pluralist system of choice-of-law; its theory does not envision (or rely upon) substantive harmonization of those bankruptcy laws.<sup>62</sup>

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57. *Id.* at 471.

58. See ALI TIP, *supra* note 8, at 40 (“Thus the loss in today’s case will be an investment in larger returns in future cases, on top of the general transactional gain that will arise from multinational cooperation.”) (footnote omitted). A more aggressively utilitarian version of this argument might be that even if some subgroup of local creditors is routinely and systematically disadvantaged under universalism, the majority of local creditors enjoy sufficient rough wash to make the transactional gain of universalism worthwhile: a “Kaldor-Hicks wash” so to speak.

59. See *Colloquy*, *supra* note 2 (referring to “substantive universalism”). Others have used the term “unity” to refer to one forum governing an entire insolvency proceeding (which presumably, but not necessarily, would be applying one substantive bankruptcy law). See Berends, *supra* note 12, at 315–16.

60. I refer to this model as “pluralist universalism.” In a recent article, Professor Westbrook summarizes at least four templates for universalism, including single or multiple fora, applying single or multiple laws. See Westbrook, *supra* note 13, at 2315–19.

61. See, e.g., 11 U.S.C. § 304 (1978), discussed *infra* at 18. Local proceedings in cross-border insolvencies may either be “ancillary” (assisting a primary jurisdiction) or “plenary” (rivaling one and insisting on parallel jurisdiction).

62. Professor Avi-Yonah offers an elegant model of when transnational legal regimes should aspire toward a pluralist, extraterritorialist path (as advocated by the universalists) and when

The choice-of-law rule most commonly proposed to operationalize universalism involves a content-neutral designation of “home court” based on contacts with the debtor.<sup>63</sup> Thus each country, at least in theory, is equally entitled to be the controlling jurisdiction in a transnational dispute. For example, if the choice-of-law rule for determining the controlling jurisdiction is the place of the debtor’s incorporation, then universalism implicitly assumes that for each Country A-incorporated firm holding assets in Countries A and B, there is probably an equal and opposite Country B-incorporated firm holding assets in Countries B and A. This secondary order of “Rough Wash” makes states in a universalist bankruptcy willing to subordinate the application of their bankruptcy laws in favor of the primary jurisdiction’s on the theory that they, in turn, will another day be the primary jurisdiction entitled to deference from other states.<sup>64</sup>

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instead they should seek substantive harmonization of domestic laws (in a cooperative spirit of comity) for instances such as bankruptcy that ideally require enterprise-wide adjudication under one substantive law. *See* Avi-Yonah, *supra* note 48, at 7–13, 20–23 & 31. Avi-Yonah aligns with the universalists in deciding that bankruptcy requires an enterprise approach. He contends that territorialists accept implicitly that resolution by one law is desirable but advocate territorialism because the pragmatic forces of the substantive and normative differences among bankruptcy laws make states unlikely to accept universalism. *See id.* at 20–23. In a sense he is correct, but I think it is not so much that the universalists ignore or downplay the normative differences between bankruptcy laws, rather that they are more optimistic for the capacity of states that hold these different laws to appreciate the offsetting benefits of Transactional Gain inherent in enterprise-wide resolution. Moreover, “modified” universalism, discussed below, recognizes the need for an element of harmonization, which bleeds into another cell of Avi-Yonah’s theoretical matrix. I am not sure the international consensus is as yet so strong toward universalism as Avi-Yonah’s analysis might suggest, because I think different countries ascribe differing levels of disutility to the acceptance of outcome differences, although this is a dynamic situation in flux to be sure.

63. *See, e.g.*, MODEL LAW, *supra* note 5, arts. 2, 16(3). A “contacts” rule is not the only tool universalism could use. For example, a first-to-file rule would accord equal if not greater predictability at determining the primary jurisdiction to govern the global insolvency. Some criticize a “home country” rule on the basis that countries anticipating they are likely to be homes to multinationals (such as the United States) will disproportionately export their bankruptcy laws to countries (such as Eritrea) that are less likely to be homes and hence likely to be net importers of bankruptcy policy under universalism. Engagement of this point is beyond the scope of this Article, but I note that Eritrea has adopted the Model Law. *See* Ian Fletcher, *Update on INSOL Model Law*, International Association of Restructuring, Insolvency & Bankruptcy Professionals, available at <http://www.insol.org/newinsolworld/jul99/jul99uml.html>.

64. *See, e.g.*, *Colloquy*, *supra* note 2, at 2274 (“In a universalist regime, one country’s law will govern, but the other countries have no basis for complaining—their law will govern in other situations....”). Universalists have not always made this implicit assumption clear, although it seems lurking in their writings. For example, the premise seems inherent in Westbrook’s notion of “critical-mass reciprocity.” *See* Westbrook, *supra* note 1, at 467. Absent an assumption of even distribution of jurisdictional primacy, it would be less likely for rational states to participate, let



Almost as strong as the academic support for universalism as the ideal and most efficient method of dealing with a transnational financial default is the consensus that it is largely impractical at present.<sup>65</sup> No treaty exists or has even been seriously proposed to support such a system, which would, among other things, rest strongly upon a realistically enforceable choice-of-law provision. Indeed, at least one scholar has argued (using game theory modeling and international relations ideas) that universalism is likely impossible given rationally acting states interacting with counterparts over repeated bankruptcy “events.”<sup>66</sup> Despite this gloominess,<sup>67</sup> however, many theorists agree

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alone reciprocate, in a universalist system, assuming they have an interest in seeing their own laws govern disputes within their jurisdictions. *Cf. id.* at 425 n.26 (recognizing creditors in states who predict that they would routinely end up with a higher territorial assets to territorial claims ratio than the worldwide average would likely chafe against universalism). The premise might also be part of Westbrook’s overarching theme of “rough justice.” *See id.* at 458.

Professor Tung chastises universalists for not making the assumption of even distribution of jurisdictional primacy (and hence equal *ex ante* disposition by states toward universalist cooperation) more transparent. FREDERICK TUNG, SKEPTICISM ABOUT UNIVERSALISM: INTERNATIONAL BANKRUPTCY AND INTERNATIONAL RELATIONS, 29 n.93 (Berkeley L. & Econ. Working Papers: Vol. 2001: No. 1, art. 7), available at <http://www.bepress.com/blewp/default/vol2001/iss1/art7>. He also challenges the assumption itself as “counterfactual for many states.” *Id.* at 24. For example, referring to a “home country” choice-of-law rule, Tung notes that under universalism, less developed countries would routinely find themselves deferring to the industrial country housing a multinational debtor’s headquarters. *See id.* at 29 n.93. For the purposes of this Article, Tung adopts a “responding” assumption of universalism to this argument: that the model of transnational insolvency only works for “countries with significant commercial relations and for whom mutual advantage from universalist cooperation would seem to exist.” *Id.* at 30 n.93; *cf.* Westbrook, *supra* note 13, at 2298–99 (suggesting that universalism might apply only to companies of a certain size or certain economic activity, which might eschew the need for even distribution of jurisdictional primacy by convincing deficit states that they are not forfeiting significant sovereignty by routinely deferring). This is an ongoing question beyond the scope of this Article, but the reader, again, is encouraged to reflect upon Eritrea’s enactment of the Model Law.

65. *See* Westbrook, *supra* note 13, at 2283–94.

66. *See* Tung, *supra* note 64, at 24–31. Professor Tung notes that even states committed to universalism would have a hard time confronting the inherent prisoner’s dilemma for the ancillary domestic jurisdiction, which must trust in the cooperative future cession of sovereignty by the foreign jurisdiction when the dominant position reverses. He argues that the fuzzy nature of cooperation in universalism (specifically in modified universalism, discussed *infra*) and difficulty in transparently communicating cooperation messages in the international arena set the stage for a highly noisy and error-prone game play environment. *See id.* Additionally, judges have their own agenda of interest to public choice scholars that might well undermine international cooperation even when their respective countries are so inclined. *See* Erin A. O’Hara and Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1158–60 (2000).

67. *See* Douglass G. Boshkoff, *The Washington University Interdisciplinary Conference on Bankruptcy and Insolvency Theory: Some Gloomy Thoughts on Cross-Border Insolvencies*, 72 WASH. U. L.Q. 931, 936 (1994) (likening substantial international cooperation to the probability that pigs could learn to fly).

that universalism is a desirable ultimate goal toward which international commercial law reform should strive. Indeed, it seems safe to say that the majority view, at least among academic circles, is that universalism is normatively superior as an efficient and fair model to resolve cross-border defaults, notwithstanding the ongoing preference for territorialism among many country's policymakers.<sup>68</sup> Practice does not appear yet to follow theory.

A critical problem that universalism faces (assuming a workable choice-of-law rule can be designed)<sup>69</sup> stems from the ongoing allure of territorialism to sovereignty-conscious states. Many states will be happy to apply their own bankruptcy laws broadly to the resolution of an international dispute, but few want to cede their sovereignty over the same dispute when they are deemed to be in the ancillary position. This returns to the distinguishing characteristics of a bankruptcy regime described above. When one state cedes jurisdiction to another to facilitate a market-wide resolution of the default, it must fully subjugate its broad-reaching, deep-cutting, and policy-rich bankruptcy laws to those of the controlling state.<sup>70</sup> This is a hard pill to swallow. It is very difficult for a court in Country B to tell a group of Country B employees who have worked in a branch office in Country B for years that they will not enjoy the special priority distribution rule accorded to workers under Country B's bankruptcy laws, even though there are plentiful assets in Country B to cover such a payout, because their employer's bankruptcy will be governed under the laws of Country A, which grants no such priority.<sup>71</sup> As Professor LoPucki muses:

Could the [foreign bankruptcy] court void an otherwise valid collective bargaining agreement? Relieve the debtor of the burdensome effects of environmental laws? Suspend the payment

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68. See Tung, *supra* note 27, at 32–23.

69. That in itself is no mean feat. Choice of law rules are “notoriously imprecise and indeterminate.” Tung, *supra* note 27, at 65 (citing Michael Whincorp, *The Recognition Scene: Game Theoretic Issues in the Recognition of Foreign Judgments*, 23 MELB. U. L. REV. 416, 427–28 (1999) (contending that the reason international recognition of judgments is not predicated upon choice of law rules is because of these rules' inherent indeterminacy)).

70. See *id.* at 45–48 (suggesting that attempts to harmonize insolvency law must overcome cultural differences and divergent legal codes).

71. See LoPucki, *supra* note 3, at 711 (“Yet in a universalist system, the priority of Mexican workers' employment claims against a U.S. firm operating in Mexico would be determined by U.S. rules of priority—much to the disappointment of the affected Mexican workers.”). Professor Westbrook also has concerns for such local creditors. See Westbrook, *supra* note 1, at 489 (suggesting exemptions from universalism for tort victims and consumers).

of pensions to retired workers? Risk the pension fund in a reorganization attempt? Delete from a shopping center lease provisions restricting the purposes for which the debtor-lessee can use the premises?<sup>72</sup>

Thus the theoretical core of universalism, in its pluralist mode, must confront two fundamental challenges. The first is the design of a viable choice-of-law rule that subscribing nations will agree to and honor. The second is what Professor Westbrook calls the “acceptance of outcome differences,”<sup>73</sup> that is, the commitment of rationally selfish states—which generally prefer to see their own substantive bankruptcy laws govern—to cede sovereignty when another state has been chosen to control an international bankruptcy dispute, even though such a concession may produce a different substantive outcome to the bankruptcy for the deferring state’s participants. These are the two anchors of universalism’s theory that must hold for the model to work.

#### *E. Modifications*

Because the universalists recognize the quixotism of their model and the territorialists the grottness of theirs, each camp proposes a “modified” version to bolster appeal.<sup>74</sup> Mindful of the substantial concession that the acceptance of outcome differences requires of the states on the deferring end of a transnational insolvency, so-called “modified universalism” replaces the “must” of the application of one state’s bankruptcy law with a “may.”<sup>75</sup> It gives a deferring court a choice, saying that the court may—perhaps should—capitulate to the controlling jurisdiction’s bankruptcy proceeding, but the decision is subject to the discretion of the deferring court. If, for example, it would be contrary to Country B’s policies to implement Country A’s bankruptcy laws, the Country B court may refuse to defer to Country A as the controlling jurisdiction and thus block Country A’s bankruptcy laws from governing the Country B assets.<sup>76</sup>

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72. LoPucki, *supra* note 48, at 2237.

73. Westbrook, *supra* note 1, at 458.

74. For simplicity, I have characterized Professors Westbrook and LoPucki as exemplars of universalism and territorialism respectively. In fact, each supports the modified analogues of those respective theories. See *Colloquy*, *supra* note 2.

75. See ALI TIP, *supra* note 8, at 11.

76. Professor Westbrook uses the examples of the United States’ likely consternation at a country that distributed bankruptcy assets on a first-come, first-served basis, Westbrook, *supra* note 1, at 475, and a country that distributed according to birth, *id.* at 485. Note that this “modification” of universalism to accommodate such concerns is actually nothing more than the

Although some nations accept this compromise and try to be “modified universalists” (either because they settle for this as a second best to universalism or because they retain residual risk aversion over the potentially unforeseen consequences of a fully universalist regime), their implementing laws and judicial interpretations contain great slippage. Moreover, the subset of these states that have statutorily dealt with how and when to defer to foreign proceedings have usually considered the dissimilarity between the foreign and domestic bankruptcy laws as a proxy for violations of public policy.<sup>77</sup> An example of such a statute is 11 U.S.C. § 304, which creates a mechanism for American courts to defer to a foreign bankruptcy proceeding and which provides a list of statutory factors to guide a court in deciding when it may defer.<sup>78</sup> This list includes a provision permitting

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standard so-called “escape clause” found in most choice of law regimes. *See, e.g.*, Symeon C. Symeonides, *The Need for a Third Conflicts Restatement (and a Proposal for Tort Conflicts)*, 75 IND. L.J. 437, 452 (2000) (“Indeed the need for an escape is too obvious to need any defense here.”) (citing Symeon C. Symeonides, *Exception Clauses in American Conflicts Law*, 42 AM. J. COMP. L. 813, 815–18, 864–65 (Supp. 1994) [hereinafter Symeonides, *Exception Clauses*]); *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 90.

77. Even this may be a charitable characterization, by assuming the laws are at least trying to balance policy explicitly. *See* Buxbaum, *supra* note 37 (criticizing 11 U.S.C. § 304 as allowing for unprincipled, or at best unsystematic, applications).

78. Section 304 of the U.S. Code permits an ancillary case to be brought in the United States to assist a foreign proceeding, and § 304(b)(2) permits the turnover of American assets to the foreign proceeding (for distribution under foreign substantive bankruptcy laws), but only if the factors of § 304(c) militate in favor of deference. 11 U.S.C. § 304 (2000). Section 304(c) provides:

In determining whether to grant relief under subsection (b) of this section, the court shall be guided by what will best assure an economical and expeditious administration of such estate, consistent with—

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

*Id.* at § 304(c). For a helpful discussion of § 304(c), including its legislative history, see Stuart A. Krause, Peter Janovsky & Marc A. Lebowitz, *Relief Under Section 304 of the Bankruptcy Code: Clarifying the Principal Role of Comity in Transnational Insolvencies*, 64 FORDHAM L. REV. 2591 (1996). For caselaw, see, for example, *In re Culmer*, 25 B.R. 621, 629 (Bankr. S.D.N.Y. 1982) (noting that consideration of the § 304(c) factors constitutes a comity inquiry, and interpreting comity to require deference to the foreign proceeding absent evidence that the application of foreign law “would be wicked, immoral, or violate public policy”), and

assessment of whether the other country's bankruptcy laws are similar to U.S. law. Taken to its extreme, then, the discretionary safety valve of modified universalism has the potential simply to "modify" universalism back into territorialism, because a state may refuse to defer to the controlling state when its laws are different, i.e., when there is a true conflict of laws.<sup>79</sup>

Accordingly, at least as currently implemented, modified universalism inescapably confronts the issue of substantive harmonization. This sits in tension with universalism's theoretical premise of pluralism.<sup>80</sup> But such tension is nevertheless inherent when universalism is instrumentally "modified" to rely upon discretionary compliance and when that discretion in turn varies as a function of the substantive similarity of bankruptcy laws.

Territorialists also refine their theory to a modified form. First, they espouse departure from the strict baseline of territorial sovereignty by encouraging "cooperation" by nations on an ad hoc basis if and when a cross-border dispute arises.<sup>81</sup> Thus, rather than requiring ex ante commitment to universalism, which is likely to scare off sovereignty-sensitive states, this "cooperative" territorialist approach accords case-by-case consideration of the cession of jurisdictional control ex post. If a state determines that its best interests are enhanced by allowing the foreign state's laws to control a domestic bankruptcy proceeding, it may

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Philadelphia Gear Corp. v. Philadelphia Gear de Mexico, S.A., 44 F.3d 187, 192 (3d Cir. 1994) ("Comity should be withheld [in transnational bankruptcies] only when its acceptance would be prejudicial to the interest of the nation called upon to give it effect."). An excellent discussion of cases struggling with § 304(c) is presented in Buxbaum, *supra* note 37, at 42–43, an article advocating the explicit adoption of conflicts doctrine and theory in American bankruptcy jurisprudence under § 304(c). The new bankruptcy law has technically repealed § 304 and adopted the Model Law's framework, but the old § 304(c) factors have survived in new § 1507, which provides bankruptcy courts with the factors to consider in determining whether to offer "additional assistance" (i.e., discretionary relief) to international proceedings under the Model Law. As part of the revision, former § 304(c) was also amended to elevate comity to the preamble (from its former position as subsection (c)(5)). It is likely commentators will continue for some time to refer to new § 1507 as embodying the § 304(c) factors.

79. See LoPucki, *supra* note 48, at 2221.

80. What little comparative work has been done suggests that different doctrinal constructs perhaps mask overarching similarities of function. See Lynn M. LoPucki & George G. Triantis, *A Systems Approach to Comparing U.S. and Canadian Reorganization of Financially Distressed Companies*, 35 HARV. INT'L L.J. 267 (1994) (conducting comprehensive "systems" comparison of American and Canadian bankruptcy laws and practices); see also ALI TIP, *supra* note 8, at 17–21 (discussing commonalities of three NAFTA members' bankruptcy laws). *But cf.* LoPucki, *supra* note 48, at 2251 (discussing "sharp differences that exist among the bankruptcy systems of the various countries").

81. See LoPucki, *supra* note 3, at 750; LoPucki, *supra* note 48, at 2219–20.

elect to defer and let those laws apply. The second modification territorialists offer intends to combat the potential for mischief inherent in the bright-line situs rule (eve-of-bankruptcy manipulation through relocation of assets to havens).<sup>82</sup> To combat this weakness, “cooperative territorialists” recommend international conventions to govern the return of assets to their proper jurisdictions in the event of improper last minute relocations.<sup>83</sup>

In summary, both universalists and territorialists propose modifications to their theories to tone down their potentially unpalatable elements. But the modifications reveal important concessions of theory. First, cooperative territorialists agree that universalism is an economically superior way to regulate cross-border insolvencies; they quarrel about whether modified universalism or modified territorialism represents a more practical, pragmatic model for the interim.<sup>84</sup> Thus the theoretical debate now involves an element of pragmatics as well as principles. Second, it appears that more discussion is taking place at the academic level than treaty negotiation or other forms of more official international dialogue. Accordingly, “modified” versions appear to be more creations of academic theory than positive descriptions of extant law. To be sure, the U.S. Bankruptcy Code endorses modified universalism (the deference is discretionary rather than mandatory), but there do not yet seem to be corresponding “cooperative territorialist” countries.<sup>85</sup> By contrast, “territorialism” remains vibrant as a matter of

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82. See Fletcher, *supra* note 2, at 123. “Havenism” is of course also a risk under universalism if the choice of law rule is sufficiently bright. See Bob Wessels, *International Jurisdiction to Open Insolvency Proceedings in Europe, in Particular Against (Groups of) Companies* 11–12 (Inst. for Law and Finance, Johann Wolfgang Goethe-Universität, Working Paper No. 17, 2003), at [http://www.ilf-frankfurt.de/publications/ILF\\_WP\\_017.pdf](http://www.ilf-frankfurt.de/publications/ILF_WP_017.pdf) (last visited Nov. 6, 2005) (supporting EU Insolvency Regulation’s rejection of place of incorporation as overly strict jurisdiction-selecting rule).

83. LoPucki, *supra* note 3, at 749 (“Implementing this rule would necessitate treaties that require the return of fleeing assets, but negotiating these treaties should not be difficult.”). Professor LoPucki also adds that large (presumably “adjusting”) creditors can protect themselves with loan covenants even in the absence of such cooperative territorialism treaties, *id.* at 758, but Professor Guzman cautions that such restrictions on capital mobility would come at great social and private cost. Guzman, *supra* note 25, at 2209. I have my doubts whether such conventions will be forthcoming, let alone adhered to, by countries otherwise likely to style themselves as asset havens. For an excellent debate to be published contemporaneously with this Article (that I have only seen preliminary drafts of), see Samuel L. Bufford, *Global Venue Controls Are Coming: A Reply to Professor LoPucki*, 79 AM. BANK. L.J. 105.

84. See LoPucki, *supra* note 48, at 2217 (“The issue is what to do while we are waiting for the ‘new world’ society—essentially, a world government—to arrive.”).

85. That is, states that start from a territorialist base but nevertheless subscribe to international

domestic policy in many countries.<sup>86</sup> Thus, whatever convergence may be emerging in the academic community, no sort of international consensus has been reached at the legal policymaking level.

In order to analyze the influence of either paradigm on legal reforms, both of their two fundamental theoretical differences must be considered. First, because it is a pluralist rather than a fully harmonized system, universalism requires a content-neutral choice-of-law rule to designate which country's substantive bankruptcy law will (or should, under modified universalism) govern a cross-border financial default. Territorialism already has such a content-neutral rule, the *situs* rule, which is well ingrained in the conflicts of law. Second, because the purported efficiency (and plausibly fairness) gains from universalism flow from one law applying to an entire global dispute, the enforcing courts of ancillary jurisdictions must accept outcome differences in the distribution of bankruptcy assets brought about by the application of foreign (norm-laden) law. This is so even if vivid local claimants might be treated better under the application of domestic law. Territorialists contend this "acceptance of outcome differences" is also unattainable, absent a radical harmonization of substantive bankruptcy laws.<sup>87</sup>

Yet these two conceptual foundations of universalism theory rebuffed by the territorialists—a viable choice-of-law rule and the acceptance of outcome differences—are the very elements that are advanced by the UNCITRAL Model Law on Cross-Border Insolvencies, which is the focus of Section III of this Article. Given the ongoing lack of consensus between countries, with some favoring universalism and others territorialism, the fact that the Model Law was able to secure advancements on both of these elements of universalism, and yet still

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conventions of asset return. Although the EU Regulation's secondary proceeding approach might seem quasi-territorialist, European scholars resist the territorialist label. *See* Wessels, *supra* note 6, at 494 (preferring "coordinated universalism").

86. *See, e.g.,* Antwerp Bulkcarriers, N.V. v. Holt Cargo Systems Inc., [2001] 3 S.C.R. 951 (purporting to eschew strict territorialism but in fact insisting upon the application of Canadian law due to outcome differences); *see also* Batra, *supra* note 43 (India).

87. Professor Westbrook's third, pragmatic point of "rough similarity" is subordinated to these two primary theoretical matters because it is a tactical advantage, not a structural necessity, to the adoption of modified universalism. *See* Westbrook, *supra* note 1, at 468–69 (arguing that such similarity is not necessary in principle but "in practice...very important" to establishing an international regime of modified universalism). Moreover, harmonization (or unification) of discrete areas of commercial laws occur within a broader framework of legal unification, as Mr. Eric Bergsten, retired Secretary of UNCITRAL, reminded me by email in response to a draft of this Article. *See* E-mail from Eric Bergsten to author (April 6, 2005) (on file with author).

receives widespread acceptance by universalist and territorialist states alike, is both remarkable and puzzling.

### III. UNCITRAL MODEL LAW: WHAT IT PURPORTS TO DO

#### A. *Previous International Attempts at Reform*

It is commonly noted that it took the United States a century to formulate its first permanent federal bankruptcy legislation, so it perhaps should not be surprising that there have been some false starts in the international realm.<sup>88</sup> Indeed, even Canada and the United States were unable to agree upon a bilateral treaty for cross-border insolvency.<sup>89</sup> The Europeans likewise were unable to harmonize their myriad disparate laws. The Brussels Convention of September 27, 1968, on enforcement and recognition of judgments specifically excluded insolvency proceedings from its scope.<sup>90</sup> Follow-up attempts to propose a draft convention on insolvency in 1982 collapsed because the draft's adoption of universalism could not garner support from territorialist states.<sup>91</sup> The Council of Europe's Istanbul Convention of June 5, 1990, also failed, ratified only by Cyprus.<sup>92</sup> Even the European Union Convention of Insolvency Proceedings was unable to be fully ratified by its 1996 expiration date (although it has now found an outlet as a Regulation).<sup>93</sup>

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88. See, e.g., *Colloquy*, *supra* note 2.

89. This failure is discussed in Harold S. Burman, *Harmonization of International Bankruptcy Law: A United States Perspective*, 64 *FORDHAM L. REV.* 2543, 2556 (1996). The only meaningful multistate treaty of even moderate success appears to be the Convention Regarding Bankruptcy, Nov. 7, 1933, Den.-Fin.-Ice.-Nor.-Swed., 155 *L.N.T.S.* 115 (revised 1977 and 1982), and even that is riddled with exceptions. See Tung, *supra* note 15, at 565 n.42; see also Michael Bogdan, *International Bankruptcy Law in Scandinavia*, 34 *INT'L & COMP. L.Q.* 49 (1985). An excellent survey, which covers recent African and Asian efforts, is in Bob Wessels, *Comparative and International Insolvency Law: Current Positions and Future Trends from a Continental European Perspective*, at 5–8 (INSOL Conference Paper, Sydney 2005) (on file with author).

90. See Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, *done* Sep. 27, 1968, art. 1(2), 29 *I.L.M.* 1417–18.

91. See Berends, *supra* note 12, at 316–17.

92. See European Convention on Certain International Aspects of Insolvency, *opened for signature* May 6, 1990, art. 14, *Europ. T.S. No. 136*, 30 *I.L.M.* 165 [hereinafter Istanbul Convention].

93. See European Union: Convention on Insolvency Proceedings, Nov. 23, 1995, 35 *I.L.M.* 1223, *adopted in relevant part* by Council Regulation 1346/2000 of 29 May 2000 on Insolvency Proceedings, O.J. (L 160), *available at* <http://Europa.eu.int/eur-lex/>. This Regulation became effective in May 2002 for all members except Denmark. See Westbrook, *supra* note 13, at 2280.



Moreover, the failures at international reform were not limited to conventions. The International Bar Association promulgated the Model International Insolvency Cooperation Act (MIICA) in 1989, an ambitious attempt to establish a universalist regime by enacting states.<sup>94</sup> Its staunch universalism likely alienated territorialists, and it never received widespread acceptance.<sup>95</sup> On the other hand, the less threatening Cross-Border Insolvency Concordat, formally adopted by the International Bar Association on June 1, 1996, offers only “general principles” to assist participants of transnational insolvencies,<sup>96</sup> and appears to have been embraced somewhat more favorably.<sup>97</sup>

Analyzing the Model Law’s less successful predecessors, it becomes apparent that the universalism-territorialism debate of how to design an international bankruptcy regime remained too volatile to permit meaningful convergence on one approach. The more affiliated a proposal was with one extreme, such as the European attempt and the MIICA model law of the 1980s—both of which pushed universalism aggressively—the more likely it was doomed to failure.<sup>98</sup> By contrast, the ten non-binding principles of general applicability from the

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The implementation of this agreement as a regulation instead of a convention has to do with the United Kingdom’s touchiness over mad cow disease, a matter well beyond the scope of this Article. See E. Bruce Leonard, *The International Scene, The International Year in Review*, 2001 AM. BANKR. INST. J. 34, 34 (2001).

94. MIICA’s text can be found in 12 CROSS-BORDER INSOLVENCY: COMPARATIVE DIMENSIONS (THE ABERYSTWYTH INSOLVENCY PAPERS) 287–96 (Ian Fletcher ed., United Kingdom National Committee of Comparative Law 1990) [hereinafter MIICA].

95. MIICA’s future is discussed in IAN F. FLETCHER, *INSOLVENCY IN PRIVATE INTERNATIONAL LAW: NATIONAL AND INTERNATIONAL APPROACHES* 325–26 (1999). Although MIICA was strongly universalist in its deference to a primary jurisdiction’s substantive bankruptcy laws, it curiously provided no choice of law rule for determining the primary jurisdiction. It did, however, confront the issue of deference to non-enacting jurisdictions by mandating “unilateral” deference to non-enacting states if to do so would be to the general benefit of all creditors. See MIICA, *supra* note 94, § 1(a).

96. The Concordat does, however, make clear its universalist proclivity. See International Bar Association Cross-Border Insolvency Concordat, Principle 1 (1995), at <http://www.ibanet.org/images/downloads/Cross-Border%20Insolvency%20Concordat%201995.pdf> (last visited Nov. 6, 2005).

97. *In re Everfresh*, 238 B.R. 558 (Bankr. S.D.N.Y. 1995), involved a Canadian-U.S. cross-border insolvency. The Concordat was relied upon heavily by both courts and found its way into the joint protocol. See Anne Nielsen et al., *The Cross-Border Insolvency Concordat: Principles to Facilitate the Resolution of International Insolvencies*, 70 AM. BANKR. L.J. 533, 557–61 (1996).

98. The comparison of the European proposal and MIICA is noteworthy, because there is a natural experiment of “public” vs. “private” legislatures trying to reform international bankruptcy law. Both failed. No state has tried to codify the status quo of territorialism into a treaty, which is indirect evidence that the unresolved nature of the debate would preclude such a codification; universalists would balk.

Concordat achieved at least marginal success, doubtless due to their vagueness. Therefore the explicit decision of the Model Law's drafters to avoid taking a firm stance on the unsettled universalism-territorialism debate is one of the Law's central and distinguishing characteristics.

## B. *UNCITRAL Model Law*

### 1. *Introduction*

The Model Law is a suggested template for domestic legislative reform, for states to adopt either wholesale or with minor modifications.<sup>99</sup> It was completed with the input of thirty-six member and forty observer states of UNCITRAL, as well as thirteen international organizations.<sup>100</sup> Most participants were esteemed bankruptcy practitioners, judges, and academics.<sup>101</sup> A final version was adopted in 1997, and a Guide to Enactment (Enactment Guide) was published in 1998.<sup>102</sup> The Model Law has been proposed for adoption in numerous jurisdictions, including the United States, where it has just become (in April 2005) Title 15 of the Bankruptcy Code. The national delegations have roundly advocated the law's adoption in their

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99. Cf. Matthew T. Cronin, *UNCITRAL Model Law on Cross-Border Insolvency: Procedural Approach to a Substantive Problem*, 24 J. CORP. L. 709, 711 (1999) (noting that an amendment to Canada's Bankruptcy and Insolvency Act is "comparable" to the Model Law "in many important respects" but that its difference still creates "quite dissimilar 'uniform' law" from the Model Law).

100. See *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, ¶ 8, reprinted in 6 TUL. J. INT'L & COMP. L. 415 (1998) [hereinafter *Enactment Guide*].

101. *Id.* ¶ 5. Professor Stephan worries that "the use of [these] technical experts at the center of an international process result[s] in [the] kind of legislation that we might expect from the most venal of domestic political bodies." Stephan, *supra* note 11, at 768. Stephan's concern employs Bob Scott and Alan Schwartz's political economy analysis of private legislative bodies (such as NCCUSL and the ALI) to predict that such technocratic, private lawmaking efforts either produce vague, standard-like provisions offensive to no constituency of meaningful lobbying power or bright, specific rules that inure to the benefit of such meaningfully powerful constituencies. See Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595, 630-37 (1995). Professor Stephan and Professors Schwartz and Scott seem to disagree mildly over the comparative expertise of these technocratic institutions, with Stephan acknowledging their faculties and Schwartz questioning their ability to engage in better fact-finding than a public legislature. Compare Stephan, *supra* note 11, at 755-56, with Schwartz & Scott, *supra*, at 651. Although Stephan worries that countries "rarely...impose...political constraints" on their international delegates, *supra* note 11, at 756, at least one national delegate was conscious of his status as a mere agent representing the views of his country. See Berends, *supra* note 12, at 321 (noting that he "d[id] not agree with everything that is in the Model Law").

102. See generally *Enactment Guide*, *supra* note 100 (providing a description of the process of adopting the UNCITRAL Model Law).

respective jurisdictions.<sup>103</sup> Thus the Model Law's reception can be characterized as a success in several ways. First, the Model Law succeeded at garnering the approval of an important international quasi-legislative body, UNCITRAL, where its adoption was strongly supported by delegates from territorialist and universalist states alike. Promulgation of *anything*, even if only a "model" rather than binding law, is a tremendous advancement in its own right given international bankruptcy's disappointing track record.

Second, the Model Law is not just a model but is actually becoming adopted as real, domestic "hard" law in countries around the world as they engage in piecemeal reform efforts of their own bankruptcy legislations: Japan, Mexico, South Africa, the United Kingdom, the United States, and New Zealand, among others, have led the way.<sup>104</sup> While the Model Law has not been enacted verbatim in these countries, and while there has been some foot-dragging, the trajectory appears positive. This promising trend of domestic enactment is another way of characterizing the Model Law as a success.

We might still further call the Model Law a success on a normative level because it appears to promote universalism as the prescriptive model for resolving international bankruptcy disputes (and universalism, for the reasons a majority of scholars acknowledge, is the better road). My focus on the Model Law moves beyond the normative discussion, however, which I take as a given, into an analysis of what about the Model Law led to its success after so many false starts. It is this final level of success—unexpected success in the face of repeated failure—that is most worthy of exploration.

The Model Law's most important feature is that its scope is self-consciously constrained.<sup>105</sup> It does not settle the universalism-territorialism question. On the contrary, the drafters seemed to sidestep this core issue altogether. They did this in two ways: by cutting a "middle ground" between universalism and territorialism on those

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103. See Westbrook, *supra* note 13; see also, Cronin, *supra* note 99, at 712 (discussing National Bankruptcy Review Commission). For a comprehensive summary of the enactment process in the first countries to consider the Model Law, see Westbrook, *supra* note 8, at 24–30.

104. See generally Westbrook, *supra* note 8 (describing domestic reform efforts in various nations).

105. See *Enactment Guide*, *supra* note 100, ¶ 3 (describing the Model Law as "modest"); Jay L. Westbrook, *Creating International Insolvency Law*, 70 AM. BANKR. L.J. 563, 571 (1996) ("Given the difficulty of the subject and the primitive state of international bankruptcy law as it is, the aim of the UNCITRAL initiative is to establish just a small number of key improvements, with the hope of building further on that achievement in the future.").

matters where it had to engage the debate,<sup>106</sup> and by focusing the bulk of the provisions on matters of procedure where the debate could be seemingly avoided altogether.<sup>107</sup> In the words of its Enactment Guide, the Model Law's "scope [is] limited to some procedural aspects of cross-border insolvency cases."<sup>108</sup> The Model Law "does not...set forth a complete framework for the resolution of cross-border bankruptcies; instead, it creates [merely] a set of procedural rules to be integrated into the substantive bankruptcy law of each state that adopts the Model Law."<sup>109</sup>

The Model Law's limited provisions can be clustered into two broad areas, "administrative" and "substantial." The first cluster, administrative provisions, might be divided further into two subsidiary categories: first, provisions related to international cooperation and communication, and second, antidiscrimination rules. The first category includes, for example, Articles 25 through 27 and Article 30, in which the Model Law codifies a series of rules built from the fledgling precedents of ad hoc sovereign cooperation and international protocols.<sup>110</sup> Article 25 ("Cooperation and direct communication

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106. The Enactment Guide and Model Law do not even use the words "territorialism" or "universalism," although traditional commentators recognize the compromise. *See, e.g.*, Claudia Tobler, Note, *Managing Failure in the New Global Economy: The UNCITRAL Model Law on Cross-Border Insolvency*, 22 B.C. INT'L & COMP. L. REV. 383, 410 (1999) ("The Model Law balances universality goals against the needs of territoriality based regimes.").

107. *See* Cronin, *supra* note 99, at 709–10. These two elements of the Model Law—neutrality and procedural focus—are conceptually related if one characterizes the theoretical debate between territorialism and universalism as "substantive." *See, e.g.*, Buxbaum, *supra* note 37, at 33 n.66 (characterizing a move from territorialism to universalism as "substantive"). Accordingly, the Model Law's neutrality (its attempt to avoid picking sides in the universalism-territorialism debate) is seemingly complemented by its focus on procedural matters (avoiding the subject matter of topics likely to implicate the debate altogether).

108. *Enactment Guide*, *supra* note 100, ¶ 20. The Model Law might fit within the philosophical paradigm of functionalism, which advocates technocratic minimalism as the path toward substantive unification. *See* ERNST B. HAAS, *THE UNITING OF EUROPE* (1958), *discussed in* Westbrook, *supra* note 13, at 2288 n.58.

109. Buxbaum, *supra* note 37, at 34. Indeed, the very title of one commentator's piece, "A Procedural Approach to a Substantive Problem," underscores the entrenched premise of the Model Law's modest, procedural focus in the literature. *See* Cronin, *supra* note 99, at 711 ("The Model Law does not seek to unify or change the substantive insolvency laws of the enacting State. Rather, the Model Law seeks to change only the procedural law of the enacting State by encouraging and facilitating cooperation between States."); *see also* Tobler, *supra* note 106, at 408, 410 (noting law's focus on "procedural means" and judging it to "balance" between universalism and territorialism as a "political necessity").

110. The use of ad hoc protocols, which are addressed in the Model Law, is prevalent in international bankruptcies. *See, e.g.*, *In re Maruko*, 200 B.R. 876 (Bankr. S.D. Cal. 1996) (Japan); *In re Nakash*, 190 B.R. 763 (Bankr. S.D.N.Y. 1996) (Israel); *In re Everfresh* 238 B.R. 558

between a court of this State and foreign courts or foreign representatives”) is illustrative. It mandates court cooperation “to the maximum extent possible,”<sup>111</sup> and makes explicit a domestic court’s entitlement to “communicate directly with, or to request information or assistance directly from, foreign courts.”<sup>112</sup> These changes are especially important in civil law jurisdictions where such power may not be inferred as easily from inherent judicial authority as at common law,<sup>113</sup> but unremarkable beyond their confirmation of the general aspiration for international cooperation. They do not speak to the ongoing issues of contention in the universalist-territorialist debate. If anything, they simply reinforce the characterization of the Model Law as a “feel good” document concerned mostly with procedural matters.

Similarly, the second category of administrative changes also pertains to issues regarding which there is developing universal consensus. Provisions under this category would include Article 9 (“Right of direct access”); Article 12 (“Participation of a foreign representative in a [domestic insolvency]”); Article 13 (“Access of foreign creditors to a [domestic insolvency proceeding]”); and Article 24 (“Intervention by a foreign representative in proceedings in this State”). These provisions may be seen as antidiscrimination rules that generally require a state to accord full access and treatment to foreign bankruptcy representatives and creditors.<sup>114</sup> Again, these provisions, while important, likely

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(Bankr. S.D.N.Y. 1995) (Canada). *See generally* Evan D. Flaschen & Ronald J. Silverman, *Cross-Border Insolvency Cooperation Protocols*, 33 TEX. INT’L L.J. 587 (1998) (discussing and reproducing protocols). Economically inclined scholars delight in the efficiency gains of private ordering from these protocols. *See, e.g.*, Rasmussen, *supra* note 35, at 31 (“In effect, the two parties [in Maxwell Communication] negotiated a treaty for this case.”). Others note that it is more precisely the courts that are negotiating their jurisdiction “through the medium of the parties.” Jay L. Westbrook, *International Judicial Negotiation*, 38 TEX. INT’L L.J. 567, 573 (2003). For historical treatment, see Thomas M. Gaa, *Harmonization of International Bankruptcy Law and Practice: Is it Necessary? Is it Possible?*, 27 INT’L LAW. 881, 899–900 (1993) (noting that ad hoc cooperation in financial default could be traced back to Pope Boniface VIII in 1302).

111. MODEL LAW, *supra* note 5, art. 25(1).

112. *Id.* art. 25(2).

113. *See, e.g.*, ALI TIP, *supra* note 8, at 5 n.6 (noting that Mexico’s civil law tradition requires greater reliance on statutory enactments).

114. Article 13(2), while addressed to antidiscrimination, does not require full “national treatment” of foreign creditors. *See* Jay L. Westbrook, *Universal Priorities*, 33 TEX. INT’L L.J. 27, 29 (1998). Instead, it ensures only the (arguably dubious) protection that foreign creditors may not be relegated below domestic general unsecured creditors. *See* MODEL LAW, *supra* note 5, art. 13(2) (permitting substantive bankruptcy laws of priority to discriminate against foreign creditors “except that the claims of foreign creditors shall not be ranked lower than [general non-preference creditors]”). This preserves protectionist quirks such as 11 U.S.C. § 507(a)(5)(B) (giving priority preference to claims of “United States fisherm[e]n”). Note that even the Model Law, however, countenances the intractability of discrimination against certain mainstays, such as

memorialize emerging practice.<sup>115</sup> They only tangentially involve the deep, broad, and prickly elements that constitute domestic bankruptcy laws.

Having thus flagged the administrative cluster of provisions that codify current trends of ad hoc cooperation and antidiscrimination, I wish to focus on the second, more “substantial” cluster. These are the parts that engage (but then seek neutrality on) the ongoing theoretical debate about universalism. These are found principally in Chapter III of the Model Law, which is entitled “Recognition of a Foreign Proceeding and Relief.” This focus of inquiry is supported by the conclusion of one drafter that “Chapter III contains the most important provisions of the Model Law.”<sup>116</sup>

## 2. *Core Provisions of the Model Law*

### a. One Part Universalism

The core provisions of the Model Law address a request made to a domestic court by a foreign representative (such as a bankruptcy trustee) to “recognize” domestically a bankruptcy proceeding already afoot in a foreign state. For example, the representative may seek an enforcement order by the recognizing court to carry out the effects of an order entered by the foreign court that regards assets or parties within the recognizing jurisdiction. Most significantly, from the universalist perspective, the foreign representative—if coming from the jurisdiction that a neutral choice-of-law rule would determine to be the controlling jurisdiction—would likely request the domestic court to “turn over” local assets to the representative’s control for administration in the foreign proceeding according to the priority and distribution rules of the foreign bankruptcy laws. Before even getting to a request for turnover, however, the foreign representative will first and foremost seek a stay of

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foreign tax claims, although it disfavors such discrimination. *See* MODEL LAW, *supra* note 5, art. 9 & cmt. 105 (alternative version of art. 9 allowing for discrimination against foreign tax claims). In terms of the substance-procedure distinction discussed later in this paper, *see infra* Section V.C, it is unsurprising that the Model Law stops short of a full antidiscrimination injunction on priority rules (the substantive heart of a domestic insolvency law) and instead reserves its clearest antidiscrimination mandate for more traditionally procedural matters, such as access to courts (art. 12) and standing to intervene (art. 24).

115. *See* ALI TIP, *supra* note 8, at 34 n.46 (“[F]ew countries practice active discrimination on the basis of citizenship or residence....”).

116. Berends, *supra* note 12, at 349.

all activities in the domestic country or, if a worldwide stay has been ordered in the foreign proceeding already, a domestic order enforcing the foreign-issued stay.<sup>117</sup>

Anticipating this prototypical international scenario of stay and turnover, the Model Law prescribes a set of rules for domestic courts when they are presented with a request to “recognize” a foreign bankruptcy. The Model Law—in probably its most legally significant provision—directs a domestic court to determine first whether the request emanates from a “main” or “non-main” foreign bankruptcy proceeding.<sup>118</sup> The foreign representative’s request emanates from a “foreign main proceeding” if the foreign bankruptcy is in the country where “the debtor has the centre of its main interests.”<sup>119</sup> If it does not come from such a focal point, the request is categorized as coming from a “foreign non-main proceeding.”<sup>120</sup> The distinction, based on where the debtor has the center of its main interests, is fundamental to the structure of the Model Law.

From the foreign representative’s perspective, the most crucial distinction is the imposition of a stay. If the bankruptcy is recognized as a “foreign main proceeding,” a domestic stay enters (in accordance with domestic bankruptcy law) *automatically* under Article 20 of the Model Law, as if the debtor had filed for bankruptcy domestically.<sup>121</sup> (While a foreign non-main proceeding may also earn a stay under Article 21,

117. The protective force of the stay is recognized as central to most insolvency proceedings. See ALI TIP, *supra* note 8, General Principle III & Cmt. (recognizing that a moratorium helps prevent fraud, achieve court control, enhance the value of the debtor’s assets, and even promote “social order”).

118. See MODEL LAW, *supra* note 5, art. 2 (defining “foreign main proceeding” and “foreign non-main proceeding”).

119. *Id.* art. 2(b). This test is used in other international documents, such as the EU Regulation.

120. *Id.* art. 2(c). Indeed, to be more precise, the request may come from neither a foreign main proceeding nor a foreign non-main proceeding, because even a “foreign non-main proceeding” has requirements. To be a foreign non-main proceeding, the proceeding must be in a country where the debtor has an “establishment” (i.e., “any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services,” *Id.* art. 2(f)). See *id.* art. 2(c). For analysis of “establishment,” see Wessels, *supra* note 82, at 11–12.

121. See MODEL LAW, *supra* note 5, art. 20(1) (“Upon recognition of a foreign proceeding that is a foreign main proceeding, (a) Commencement or continuation of individual actions or individual proceedings concerning the debtor’s assets, rights, obligations or liabilities is stayed; (b) Execution against the debtor’s assets is stayed; and (c) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.”). Section 20(2) clarifies that the scope of such stay is congruent with the bankruptcy stay under the domestic law of the recognizing state. *Id.* art. 20(2).

such a stay is purely discretionary.)<sup>122</sup> The automatic stay enjoyed by a foreign main bankruptcy is then followed by a request for more permanent relief, under Article 21.<sup>123</sup> Assuming the prototypical request in a liquidation is for turnover, Article 21(1)(e) permits turnover of domestic assets to the foreign proceeding for distribution, subject to certain constraints to be discussed below.<sup>124</sup> But, again, the distinction between the foreign proceeding as “main” or “non-main” affects the result. While assets may presumptively be turned over to a foreign main proceeding (provided certain statutory safeguards are met), only limited assets may be sent to a foreign non-main proceeding: those assets that the domestic court’s choice-of-law rules determine should be administered in the foreign proceeding under foreign law.<sup>125</sup> Thus, even if uncontested by any opposing creditors, a request for turnover to a non-main proceeding is statutorily prohibited if the non-main proceeding should not be governing the assets under domestic choice-of-law rules. Therefore, the Model Law can be said to discriminate, overtly, in favor of foreign main proceedings over foreign non-main proceedings.

Taking these two key provisions—automatic stay and turnover—together, the designation of a foreign proceeding as a “main proceeding” captures the first theoretical pillar of universalism. It is a content-neutral rule (the “centre of the debtor’s main interests”) that chooses the jurisdiction (the state of a “foreign main proceeding”) of presumptive entitlement to control the distribution of a debtor’s assets.<sup>126</sup> This presumptive entitlement is demonstrated by the

122. *See id.* art. 21(1)(a), (b), and (c).

123. *See id.* art. 21 (“Relief that may be granted upon recognition of a foreign proceeding.”).

124. *Id.* art. 21(1)(e) provides that a domestic court, upon recognizing a foreign proceeding, may order any appropriate relief, including “[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.”

125. *See id.* art. 21(3) (“In granting relief under this article to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.”).

126. “Centre of main interests” is a rule. Whether it is a good rule depends upon its comparison to the status quo situs rule that anchors territorialism. Whether either such rule affects forum shopping depends upon, among other factors, the remoteness of the bankruptcy payoff on ex ante credit pricing, a topic upon which there are volumes of academic literature already. For a recent offering, *see* Alan Schwartz, *A Normative Theory of Business Bankruptcy*, 91 VA. L. REV. 1199 (2005). Bankruptcy’s compulsory jurisdiction over multiple stakeholders makes “racing” analysis more complicated than the general corporate law context because there is greater



imposition of the automatic stay under Article 20 against all domestic actions, coupled with the turnover relief a domestic court may—and presumably should—order under Article 21(1)(e).<sup>127</sup> Without more, the Model Law would clearly be a pluralist universalist vehicle: a regime for promoting the worldwide distribution of international assets under one state’s substantive bankruptcy law pursuant to a jurisdiction-selecting choice-of-law rule.

#### b. One Part Territorialism

It is of course not that simple. Were it so, the Model Law would have been denounced by territorialists and declared a victory by universalists. Therefore, the Model Law offsets this potential adoption of universalism with three powerfully territorialist caveats. First, the Model Law contains an escape clause in Article 6 permitting general non-compliance;<sup>128</sup> second, it contains a safeguard clause constraining Article 21(1)(e)’s universalist turnover power;<sup>129</sup> and third, it contains a mechanism to preserve the “pre-eminence” of local proceedings over any foreign proceeding (including a foreign main proceeding) under Articles 28 and 29.<sup>130</sup>

Article 6 of the Model Law is a general escape clause that permits refusal of cooperation when to do so would be “manifestly contrary” to the domestic state’s “public policy.”<sup>131</sup> This on its own is unexceptional.

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mischief, at least theoretically, for third-party rent extraction from non-adjusting creditors if debtors and their lenders can shop for bankruptcy forums.

127. The text of Article 21 simply says “may,” which is neutral. MODEL LAW, *supra* note 5, art. 21(1). The “should” is implied by the Model Law’s overall structure and purpose.

128. *See id.* art. 6 (“Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State.”).

129. *See id.* art. 21(2) (restricting the domestic court’s power to order turnover of domestic assets to administration in a foreign proceeding to situations when “the court is satisfied that the interests of creditors in this State are adequately protected”).

130. *See id.* art. 28 (“After recognition of a foreign main proceeding, a proceeding under [domestic insolvency laws] may be commenced....”); *id.* art. 29 (“Where a foreign proceeding and a [domestic proceeding] are taking place concurrently regarding the same debtor...(a)(i) Any relief granted under article 19 or 21 [to the foreign representative] must be consistent with the [domestic proceeding]; and (ii) If the foreign proceeding is recognized in this State as a foreign main proceeding, [the automatic stay of] article 20 does not apply....”); *see also id.* art. 20(4) (“[The automatic stay of] Paragraph 1 of this article does not affect the right to request the commencement of a proceeding under [domestic insolvency law]....”). The Enactment Guide accordingly concludes that Article 29 “maintains a pre-eminence of the local proceeding over the foreign proceeding” in numerous ways. *Enactment Guide, supra* note 100, ¶ 190.

131. MODEL LAW, *supra* note 5, art. 6. The Enactment Guide makes clear that Article 6 is intended to be used sparingly. *See Enactment Guide, supra* note 100, ¶¶ 88–89 (emphasizing that

In fact, it simply codifies pre-existing conflicts law.<sup>132</sup> Seen another way, Article 6 does no more than embrace modified universalism.

The greater problem with calling the Model Law universalist comes from the safeguard clause of Article 21(2). While turnover of all domestic property is in theory permitted to a foreign main proceeding under Article 21(1)(e), Article 21(2) explicitly incorporates a retrenchment. Specifically, Article 21(2) provides:

[T]he court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court, *provided that the court is satisfied that the interests of creditors in this State are adequately protected.*<sup>133</sup>

By expressly constraining the turnover power to instances where “the interests” of domestic creditors are “adequately protected,” Article 21(2) invites, at least on one plausible reading, the domestic court to conduct a substantive review of the foreign bankruptcy law, just as some courts did under Section 304(c) of the U.S. Code.<sup>134</sup> A domestic creditor can always argue its “interests” are not “adequately protected” if its priority status is lowered by being subjected to less-favorable foreign substantive bankruptcy law.<sup>135</sup> Thus far from fostering the

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clause should be “interpreted restrictively” and used only in “exceptional circumstances” of “fundamental importance”).

132. See generally Symeonides, *Exception Clauses*, *supra* note 76. Berends, *supra* note 12, at 336, explains that Dutch law distinguishes between garden-variety “domestic” public policy, and less restrictive “international” public policy. Thus Dutch courts will not demand the same level of public policy comportment of a foreign proceeding as they would with a domestic proceeding. This suggests, for example, that a foreign contract that would be void under Dutch law might well be enforced in a Dutch court out of international comity; see also *Enactment Guide*, *supra* note 100, ¶ 88 (recognizing this trend of distinguishing “domestic” and “international” standards of public policy in a “growing number of jurisdictions”).

133. MODEL LAW, *supra* note 5, art. 21(2) (emphasis added).

134. See, e.g., *In re Toga Mfg. Ltd.*, 28 BR 165, 167–69 (Bankr. E.D. Mich. 1983).

135. A strain of this argument was tried in *In re Treco*, 240 F.3d 148, 159 (2d Cir. 2001), where the court reversed the lower court’s deference to a Bahamian main proceeding under § 304(c)(4), on the appeal of a secured creditor who, under American law, would receive full recovery, but under Bahamian law, would recover only after the administrative expenses were paid. In holding that the secured creditor’s complaint was well grounded, the court seemed to be guided not so much by the dissimilarity of payout per se (secured creditors coming after administrative expenses under Bahamian law) but by the startling fact that the Bahamian administrators had devoured \$8 million (USD) in fees on an estate of \$10 million, with more expenses still to come. See *id.* at 161. Thus a procedural impropriety argument was likely lurking within the court’s acceptance of the secured creditor’s protest of differential payout. My interpretation of *Treco* appears to be supported by at least subsequent decision. See *In re* Petition

acceptance of substantive outcome differences, a first principle of universalism, Article 21(2) of the Model Law seems at best to discourage it and at worst to forbid it.

The final nail in the coffin for a universalist interpretation of the Model Law—and an explicit assertion of the Law’s territorialism—is found in Articles 28 and 29, which confirm the “pre-eminence” of local proceedings. According to these provisions, the recognition of a foreign main proceeding does not impede the filing of a full-blown “plenary” insolvency action in a domestic bankruptcy tribunal. This is potentially fatal to universalism. Consider an American-based debtor that holds minimal assets in a Canadian warehouse and that has filed a liquidation proceeding in a United States bankruptcy court. The American trustee would file an application under the Model Law in a Canadian court for recognition of the American proceeding under Article 15(1) (“Application for recognition of a foreign proceeding”) as a “foreign main proceeding” and for consequent invocation of a stay under Article 20(1) in accordance with Canadian law.<sup>136</sup> She would then seek turnover of the Canadian assets under Article 21(1)(e) for distribution in the American main proceeding under American bankruptcy law.<sup>137</sup>

Articles 28 and 29, nevertheless, permit a Canadian insolvency proceeding to be opened in a Canadian court (for example, by a sophisticated American creditor who realizes it would enjoy higher priority payout under Canadian bankruptcy law, even if its priority is applied only to the smaller pool of Canadian assets). The stay accorded the American proceeding in Canada under Article 20(1) is dissolved under Article 29(b)(ii), as if the Model Law had never imposed a stay at all.<sup>138</sup> The result reverts the insolvency to the status quo: a territorialist system where the freshly opened Canadian proceeding has control over the Canadian assets under Canadian law and the American proceeding over the American assets under American law, with cooperation and deference depending on the pre-existing comity practices of each jurisdiction.<sup>139</sup>

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of Bd. of Directors of Compania General de Combustibles S.A., 269 B.R. 104, 114 (Bankr. S.D.N.Y. 2001).

136. MODEL LAW, *supra* note 5, arts. 15(1), 20(1).

137. *Id.* art. 21(1)(e).

138. *Id.* art. 29(b)(ii).

139. Full plenary proceedings are available under the U.S. Bankruptcy Code. *See* 11 U.S.C. § 304 (2005). This may be subsumed by Model Law Articles 28 and 29 (as enacted at 11 U.S.C. §§ 1528–29). The EU Regulation is closer to the Articles 28–29 “local proceeding” approach.

In sum, it is understandable why the Model Law is characterized as modest and as not settling the universalist-territorialist debate. True, it embraces one of the two theoretical cores of universalism: a jurisdiction-selecting choice-of-law rule (“centre of main interests”). It even backs up that rule with an automatic stay and potential turnover power. Despite the universalist features, it makes that rule effectively voluntary by allowing the adversely affected parties the opportunity to undermine the stay by filing a domestic (territorialist) proceeding.<sup>140</sup> This clashes with the second theoretical foundation of universalism: forcing unhappy states and creditors to accept the difference of outcomes inevitably flowing from the application of the selected jurisdiction’s laws. Therefore the Model Law, on the surface, appears to be a hybrid of sorts: partially universalist in outreach, but partially territorialist in retrenchment. It is this compromise approach, which some might say is anchored more in pragmatics than principle,<sup>141</sup> that should make both territorialists and universalists equally happy (or sad).<sup>142</sup> Likely due to the feel-good administrative provisions about facilitating international communication and cooperation, the overall consensus has trended toward happiness.<sup>143</sup> The Model Law, like anything else that tries to compromise and seems to do nothing,<sup>144</sup> earns self-congratulation from drafters and internationally minded policymakers, but exasperation from scrutinizing commentators.<sup>145</sup>

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140. See, e.g., Tobler, *supra* note 106, at 409–10.

141. Writing about the EU Convention that ultimately spawned the EU Regulation, Professor Fletcher observed, with equal applicability to the Model Law,

Although the resulting mix of principles may draw the wrathful ire of purists who happen to adhere to one or other of the dogmatic theories [of universalism or territorialism], the Convention represents a triumph of the “art of the possible” in the delicate field of international treaty negotiation...whereby the best can become the enemy of the good.

Fletcher, *supra* note 2, at 124.

142. See Berends, *supra* note 12, at 320–21 (underscoring compromises required to complete the Model Law and noting that, as a key drafter, he did “not agree with everything that is in the Model Law”).

143. See generally Westbrook, *supra* note 13.

144. Perhaps the Model Law could be seen as an illustration of the hypothesized proclivities of “private legislatures” to prefer in most circumstances vague standards to clear rules in reformist projects. See Robert E. Scott, *The Rise and Fall of Article 2*, 62 LA. L. REV. 1009, 1042 (2002) (“These [vague] rules will result, not from their intrinsic merits, but from the compromises that reformer-dominated [bodies] will accept in order to secure enactment.”).

145. See Buxbaum, *supra* note 37, at 35–36 (“Thus, in explicitly recognizing and deferring to a court’s ability to implement a territorial approach, the [Model Law] not only falls short of its promise of universality but also gives new vitality to territoriality.”); Liza Perkins, Note, *A*

## IV. UNCITRAL MODEL LAW: WHAT IT REALLY DOES

Of the scholarly analyses of the Model Law to date, most have discussed the Model Law's modesty and "middle ground" between the theories of territorialism and universalism.<sup>146</sup> These conventional assessments do not reflect sufficiently the true nature of the Model Law, which is to advance the agenda of universalism. Universalism is advanced not by express adoption of a full-fledged universalism regime, where countries defer to one controlling jurisdiction on all elements of the bankruptcy pursuant to a choice-of-law rule. Rather, universalism is advanced incrementally, by building upon its first principles. That is, the Model Law embraces universalism's two foundations: it proffers a viable and neutral jurisdiction-selecting choice-of-law rule, and it fosters the introduction, albeit on a fledgling scale, of the acceptance of outcome differences in transnational insolvencies.

A. *Jurisdiction-Selecting Choice-of-Law Rule*

The Model Law develops a workable choice-of-law rule, embodied in Articles 2, 20, and 21. As explained above, Article 2 defines "foreign main proceeding" as a "proceeding taking place in the State where the debtor has the centre of its main interests."<sup>147</sup> Article 20(1) puts this into force by imposing an automatic stay in the recognizing jurisdiction that operates instantaneously upon determination that the request for deference emanates from a foreign main proceeding.<sup>148</sup> Article 21(1)(e) builds upon this choice of law by enabling domestic asset turnover to the main proceeding for distribution under foreign bankruptcy law.<sup>149</sup>

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*Defense of Pure Universalism in Cross-Border Corporate Insolvencies*, 32 N.Y.U. J. INT'L L. & POL. 787, 828 (2000) ("[The Model Law] do[es] not go far enough. In fact, the UNCITRAL Model Law, even if widely enacted, may do little to change the dreadful state of affairs in international bankruptcy law."); see also Fletcher, *supra* note 2, at 124 (acknowledging compromise approaches "draw the wrathful ire of purists").

146. See Section III.B.2, *supra*. The Model Law's attempt to cut a neutral path between universalism and territorialism has unsurprisingly led to some confusion with a few authors. Compare Cronin, *supra* note 99, at 711 ("The Model Law adopts what one could call a cooperative territorial approach.") with Perkins, *supra* note 145, at 803 ("[T]he Model Law...would essentially codify a U.S.-style regime of 'modified universalism' for the enacting nation(s)..."). Most, however, simply recognize the middle-roading for what it is. See Tobler, *supra* note 106, at 410 ("The Model Law balances universality goals against the needs of territoriality based regimes.").

147. MODEL LAW, *supra* note 5, art. 2(b); see also *id.* art. 17(2)(a) (dictating that a foreign main proceeding is recognized if it takes place in the state where the debtor has its center of main interests).

148. See *id.* art. 20(1).

149. See *id.* art. 21(1)(e).

The Model Law therefore picks the “centre of main interests” to decide which foreign bankruptcy proceedings should enjoy greater legal force (automatic vs. discretionary stays) in the recognizing jurisdiction.<sup>150</sup> This ascribes fundamental significance and superior regulatory entitlement to one and only one jurisdiction: that of the center of the debtor’s main interests.<sup>151</sup> That the Model Law does so regarding the imposition of an automatic stay is important, because the stay of proceedings triggered by the initiation of an insolvency action is a core element of many insolvency regimes.<sup>152</sup> Thus even though Article 21(2) waters down the turnover power of the domestic court and stops short of complete universalism, Article 20(1) on its own suffices to implement the theoretical concession of sovereigns that one jurisdiction is “more important” than others: universalism’s theoretical focus on one law.<sup>153</sup> (Furthermore, as discussed below, it is far from clear that the exceptions of Article 21(2) are quite so lethal to the Model Law’s nascent universalism as conventional analysis suggests.)

In conflicts parlance, the Model Law’s adoption of a center of main interests test is a multilateralist choice-of-law rule, because it recognizes the possibility of several interested states and attempts to find the nexus of greatest connection between one jurisdiction and the worldwide insolvency.<sup>154</sup> While the Model Law only implements the choice-of-law

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150. The pros and cons of the “centre of main interests” test have been analyzed elsewhere. For a critical discussion, see LoPucki, *supra* note 48, at 2226–29. For a legislative history of other contenders, see Berends, *supra* note 12, at 330.

151. See Buxbaum, *supra* note 37, at 45 (noting that the Model Law’s “deference to foreign main proceedings sketches the outlines of a true jurisdiction-selecting rule based on a notion of the ‘proper seat’ of the insolvency proceeding”).

152. See ALI TIP, *supra* note 8, at 36–37, 56–67. Note that even in jurisdictions that do not embrace as broad-sweeping an automatic stay as the United States, a moratorium plays an important role. For example, in Canada, where secured creditors are nominally immune from the automatic stay, there is at least some interim breathing relief of ten days’ notice before foreclosure and a routine practice of court-ordered discretionary relief. See LoPucki & Triantis, *supra* note 80, at 279 n.32. Countries that do not stay some liquidations automatically will routinely grant asset-specific or proceeding-specific protection measures. See Anderson, *supra* note 31, at 705 (discussing Japanese order of *hozen shobun*).

153. Professor Buxbaum agrees. See Buxbaum, *supra* note 37, at 45 n.123 (“While this arrangement does operate as a concession to territoriality, it does not undermine the impact of the initial recognition [of the foreign bankruptcy].”).

154. See *id.* at 38–41, 47–48 (canvassing conflicts literature and contrasting paradigms of unilateralism and multilateralism). The Model Law’s rule also seems to be an interest-based analysis, because it tries to apply the substantive law of the state with the greatest interest in regulating the conduct at issue. See generally Brainerd Currie, *Married Women’s Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958). While some modern conflicts scholars build upon interest analysis, see Kramer, *supra* note 37, at 279 (suggesting that Currie’s

rule for individualized, discrete issues (such as the automatic application of the stay), it lays the groundwork that is conceivably extendable to the selection of the substantive rules of priority and distribution, i.e., to the adoption of universalism. The Model Law thus drops the first shoe of universalism's theory, by providing the choice-of-law rule. That the Model Law does not go all the way, by requiring the recognizing court to let the main jurisdiction's substantive bankruptcy laws govern, diminishes neither the conceptual significance of the Law's multilateralism, nor the advancement of hammering out a specific choice-of-law rule. Indeed, as discussed below, that may be its brilliance.

Furthermore, it is not clear that the purportedly stay-unraveling provisions of Article 21(2)'s safeguard clause and Articles 28 and 29's local proceedings provisions are anywhere near so fatal to the impact of the choice-of-law rule as initially implied. First, while Article 21(2)'s insistence on "adequate protection" of domestic creditors as a condition of turnover appears to import territorialist considerations, it is by no means a compelled conclusion of statutory interpretation. As discussed above, certainly one possible way to interpret "adequate protection" is to require substantive judicial scrutiny of the foreign bankruptcy law and construe any deviation from domestic priorities to render a domestic creditor "inadequately protected." An equally plausible interpretation, however, would be to construe the phrase procedurally, and permit turnover as a remedy only if a domestic creditor is accorded sufficient notice and time to file a claim in the foreign main proceeding.<sup>155</sup> Indeed, substantive comparison of domestic bankruptcy laws seems an unlikely intent of the drafters, who were clearly familiar with the U.S. Code's Section 304(c)(4) and declined that route.<sup>156</sup> If anything, the Model

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basic insights are still relevant to the choice of law process), others reject it, see O'Hara & Ribstein, *supra* note 66 (arguing that interest analysis improperly focuses on state interests rather than private actor interests).

155. Cf. *Interpool, Ltd. v. Certain Freights*, 102 B.R. 373 (D.N.J. 1988) (refusing to defer to an Australian proceeding because of, among other reasons, the entry of an ex parte order approving a settlement). For a critique of this case, and of this argument in particular as a makeweight, see Westbrook, *supra* note 1, at 475-76. See also *Canadian S. Ry. Co. v. Gebhard*, 109 U.S. 527 (1883) (according comity to foreign judgment where party to be bound had notice and opportunity to intervene). For a focus on procedural protections in comity analysis and their role in rendering potential substantive differences in litigation outcomes acceptable, see *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in Dec. 1984, 634 F. Supp. 842 (S.D.N.Y. 1986). As discussed above, this procedural protection interpretation is also a plausible reading of the *Treco* case. See *supra* note 135.

156. This conclusion is strengthened by the inclusion of an adequate protection clause in § 304(c) already, under § 304(c)(2) (providing "protection of claim holders in the United States

Law's repeated insistence that it focuses on procedural matters perhaps suggests a procedural lens through which to interpret Article 21(2).<sup>157</sup> Thus it is far from a foregone conclusion that this provision fully revives territorialism in its reference to "adequate protection" of domestic creditors.

Articles 28 and 29 present more of a real challenge to the nascent choice-of-law rule regarding the automatic stay. Nevertheless, there are still several reasons to suspect the effects of these provisions have also been overstated. Article 28 provides that after a foreign main proceeding has been recognized, a domestic bankruptcy proceeding may nevertheless be opened with regard to the domestic assets. Furthermore, Article 29 says that in such a situation, "the automatic stay and suspension referred to in [Article 20(1)] shall be modified or terminated...if inconsistent with the [domestic] proceeding."<sup>158</sup> The Model Law thus allows a domestic creditor rights to file a full domestic insolvency proceeding, even in the face of a proceeding underway in the state of the center of the debtor's main interests. It further allows that local proceeding to vitiate the principal recognition effect of the foreign main proceeding (the automatic application of a stay).

Articles 28 and 29 are not so dire to the universalist potential of the Model Law's automatic stay as this summary suggests for at least three reasons. First, Articles 28 and 29 only apply when the domestic proceeding is recognized on record as being a non-main proceeding. That is, to invoke Articles 28 and 29 to "undo" the effects of the automatic stay of Article 20, the domestic court must have already decided under Article 15 that the center of the debtor's main interests falls outside its jurisdiction. Indeed, structurally, Article 28 states that its operation occurs "[a]fter recognition of a foreign main

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against prejudice and inconvenience in the processing of claims in [a] foreign proceeding") 11 U.S.C. § 304(c)(2) (2005). An *expressio unis* argument can be made that the Model Law's safeguard of "adequate protection" would more likely map to § 304(c)(2)'s prejudice and inconvenience concerns than to § 304(c)(4)'s similarity of laws concerns.

157. See Berends, *supra* note 12, at 373–74 (suggesting "corruption" concerns prompted safeguard clause). Consider also the theoretical goals of a bankruptcy regime discussed earlier in this Article—specifically, the broad jurisdictional reach of bankruptcy laws to bind all stakeholders to a compulsory resolution procedure. Presumably, a creditor required to relinquish assets to a proceeding that does not guarantee collective debt resolution—the core of bankruptcy—would be inadequately protected.

158. MODEL LAW, *supra* note 5, art. 29(b)(ii). If an application for recognition of a foreign main proceeding has been filed but not yet granted, Article 29 blocks such a stay preemptively. See *id.* art. 29(a)(ii) (instructing that in such a situation Article 20 "does not apply").



proceeding.”<sup>159</sup> This puts a domestic court more clearly on record in deciding whether to frustrate a foreign proceeding that it concedes is taking place in the center of the debtor’s main interests. While it is arguably easy for courts to give comity short shrift in fuzzy situations,<sup>160</sup> it is surely a different matter where the necessarily subordinate nexus to the worldwide bankruptcy must be openly acknowledged.<sup>161</sup> Accordingly, even if Articles 28 and 29 permit the “pre-eminence” of a local proceeding, that local proceeding may well—in the interests of comity that pre-exist and survive the Model Law—ultimately defer to the foreign proceeding, perhaps self-conscious of an inferior regulatory entitlement.<sup>162</sup>

Second, while the point may seem straightforward, Articles 28 and 29 only apply if and when a local proceeding is actually filed. Thus the default scenario is for the automatic stay to enjoy full effect unless and until a local proceeding is opened. This may be cold comfort if in practice local proceedings are always filed by opportunistic creditors—and there is some support for this likelihood.<sup>163</sup> Nonetheless, the point

159. *Id.* art. 28.

160. See Tung, *supra* note 27, at 72, 100; *cf. In re Starcom Servs. Corp.* (Bankr. W.D. Wa. 1998) (converting a U.S. plenary proceeding into § 304 ancillary proceeding and entering injunction requiring all creditors to pursue claims in Canadian plenary proceeding of Washington state subsidiary of North American telecom company).

161. Professor Tung’s game theory approach suggests that ambiguity and its concomitant “fuzzy commitments” create a heightened risk of defection and even enhance the “error noise.” See *id.* at 80–82. Exposing “defection,” by removing ambiguity regarding which home state is entitled to deference, reduces this noise.

162. Article 29 requires “cooperation and coordination” with the foreign court, and the Enactment Guide makes clear that the initiation “of a local proceeding does not prevent or terminate the recognition of a foreign proceeding. This principle is essential for achieving the objectives of the Model Law in that it allows the court in the enacting State in all circumstances to provide relief in favour of the foreign proceeding.” *Enactment Guide, supra* note 100, ¶ 189. There is thus no reason why universalist states cannot fully defer to foreign main proceedings under Article 29. Indeed, it is not even clear that the stay would dissolve automatically if the foreign proceeding had been already recognized. Article 29(b)(ii) only provides that “the stay...shall be modified or terminated...if inconsistent with the [local] proceeding.” MODEL LAW, *supra* note 5, art. 29(b)(ii). A universalist state may well find an automatic stay, when it is an ancillary jurisdiction, purely “consistent” with its local proceeding. Universalist states consequently may remain universalist under Articles 28 and 29, just as territorialists may dig in. The interesting case is the countries at the margin that could go either way. Such a country may feel more pressure to defer if it must first recognize the foreign proceeding as being in the center of the debtor’s main interests.

163. For example, most of the seminal cases involved filings in the relevant jurisdictions. See, e.g., *In re Toga Mfg. Ltd.*, 28 B.R. 165 (Bankr. E.D. Mich. 1983); *Interpool, Ltd. v. Certain Freights*, 102 B.R. 373 (D.N.J. 1988); *In re Maxwell Communication Corp.*, 170 B.R. 800 (Bankr. S.D.N.Y. 1994), *aff’d*, 186 B.R. 807 (S.D.N.Y. 1995), *aff’d*, 93 F.3d 1036 (2d Cir. 1996); *Re BCCI, Banque Arabe Internationale d’Investissement SA v. Morris* [2001] 1 BCLC 263. We

remains that, absent local interjection, a domestic automatic stay arises by operation of a foreign bankruptcy, a novel concept to traditionally territorialist jurisdictions. Furthermore, even if a local proceeding is filed, the effects of recognizing the foreign main proceeding and any orders (e.g., for turnover of assets) are not necessarily undone. They are simply reassessed to check for “consistency” with the local proceeding. As discussed above regarding adequate protection, the term “consistency” is undefined and might be subject to varying interpretations, including ones fostering international cooperation and deference.

Finally, even if the automatic stay is modified or terminated by initiation of a local proceeding under Articles 28 and 29, the effect of recognizing the foreign proceeding as a main proceeding remains part of the landscape of the ongoing transnational dispute. This has both a direct and indirect consequence. Directly, it means that other provisions of the Model Law that turn on the “main proceeding” designation still remain in effect. For example, the presumption of insolvency created by Article 31, (discussed in Section IV.B.1, *infra*), remains in force. Indirectly, the ongoing effect of recognition reinforces the awkwardness issue just discussed: it casts a pall over any subsequent judicial order of the domestic court, which now emanates from a tribunal that has acknowledged its inferior sovereign claim to control the global insolvency dispute.<sup>164</sup>

The third reason the scope of Articles 28 and 29 might be overstated is that the preserved “pre-eminence” of local proceedings is qualified, not absolute. Specifically, while Article 28 accords the territorialist creditor the right to initiate a plenary domestic insolvency proceeding in the face of a foreign main proceeding, that right is constrained. Article 28 by its own terms limits the domestic proceeding in such a case to covering *only* “the assets of the debtor that are located in [the local state].”<sup>165</sup> Thus, an Article 28 proceeding may only be territorialist in its

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do not know, however, how many unremarkable cases with lower stakes there are.

164. In an earlier draft of the EU Regulation, which adopts a secondary proceeding approach reminiscent of Articles 28 and 29, there was a proposed requirement that the foreign representative from the foreign main proceeding authorize any filing of a secondary, local proceeding. See Wessels, *supra* note 6, at 497.

165. MODEL LAW, *supra* note 5, art. 28. To be precise, Article 28 permits the local proceeding to reach beyond domestic assets, but only to aid foreign proceedings. *Id.*

reach, even in a domestic jurisdiction with universalist bankruptcy laws.<sup>166</sup>

On the one hand, this result might seem expected. After all, Article 28 is invoked only when a (presumably local) creditor resists the universalist reach of a foreign main proceeding and seeks to shield domestic assets from the ambit of the foreign proceeding's (presumably unfavorable, at least for that creditor) substantive bankruptcy laws. On the other hand, if such a creditor is sufficiently advantaged by the substantive priority rules of local law to bring a local proceeding under Articles 28 and 29, then there is no reason why that creditor would not want the reach of those favorable rules to be as expansive as possible and thus encompass the debtor's worldwide assets.<sup>167</sup>

In sum, a closer analysis of the Model Law reveals that the supposedly unraveling effects of Articles 28 and 29 may be somewhat overstated in their purported negation of the universalist choice-of-law potential of Articles 2 and 20. Accordingly, the Model Law's choice-of-law rule—"centre of main interests," which is presumed to be at the debtor's "registered office"—is a content-neutral rule that accords important regulatory entitlements to the selected jurisdiction.<sup>168</sup> While it does not implement full-fledged universalism by compelling distribution of global assets in accordance with the selected jurisdiction's substantive bankruptcy provisions under a "one law" approach, the Model Law nevertheless provides a functioning choice-of-law rule for transnational insolvency disputes, the starting theoretical foundation of a universalist regime.

### B. *Acceptance of Outcome Differences*

The second way in which the Model Law foments universalism is by embracing the paradigm's other theoretical anchor, namely, pushing enacting states into accepting some cession of regulatory sovereignty in

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166. Bob Wessels makes this observation regarding the EU Regulation's analogues to Articles 28 and 29. Wessels, *supra* note 6, at 499.

167. This happened in *Stonington Partners, Inc. v. Lemout & Hauspie Speech Prods. N.V.*, 310 F.3d 118, 126 (3d Cir. 2002), where a U.S. creditor argued, to an American court, that its claim should be subjected to (favorable) Belgian bankruptcy law when there were two parallel bankruptcy proceedings opened in the United States and Belgium. *See id.* (reversing injunction that barred U.S. creditor from pursuing this claim in Belgium). Compare this case with *In re Maxwell Communication Corp.*, 170 B.R. 800 (Bankr. S.D.N.Y. 1994), *aff'd* 186 B.R. 807 (S.D.N.Y. 1995), *aff'd* 93 F.3d 1036 (2d Cir. 1996) where British administrators sought the application of American avoidance law in an American proceeding to transfers otherwise valid under British law.

168. MODEL LAW, *supra* note 5, art. 16(3).

the transnational insolvency realm. I offer two examples of this from the Model Law: Articles 31 and 14. What is significant about these articles is that they are *not* part of the core provisions of the Model Law discussed above that pertain to the stay upon recognition of a foreign proceeding. Rather, they are more to the periphery of the Law.

### 1. *Article 31*

Article 16 of the Model Law adopts certain presumptions. Some of these presumptions affect purely procedural matters. For example, Article 16(2) empowers recognizing courts to presume that documents submitted in support of an application for recognition are authentic without resort to cumbersome methods of legalization.<sup>169</sup> Other presumptions are more substantive. Significant for the choice-of-law rule is Article 16(3), which provides that the debtor's registered office is presumed to be its center of main interests.<sup>170</sup>

The Model Law also contains another, arguably hidden presumption that curiously is not located with the other presumptions in Article 16. It is in Article 31.<sup>171</sup> This presumption does not apply universally, but only to foreign main proceedings. It provides: "In the absence of evidence to the contrary, recognition of a foreign main proceeding is, for the purpose of commencing a [domestic insolvency proceeding], proof that the debtor is insolvent."<sup>172</sup> This presumption is significant because in many jurisdictions some threshold degree of financial distress must be shown before a debtor may enjoy the benefits of insolvency protection.<sup>173</sup> These range from the "cessation of payments" test in the Netherlands,<sup>174</sup> to the more traditional "balance sheet insolvency" test in Canada.<sup>175</sup> By contrast, the American system allows for debtor self-

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169. *Id.* art. 16(2) ("The court is entitled to presume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalized.").

170. *Id.* art. 16(3) ("In the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests.").

171. Berends suggests that this is because the presumption only takes effect after recognition. See Berends, *supra* note 12, at 392–95.

172. MODEL LAW, *supra* note 5, art. 31.

173. See *Enactment Guide*, *supra* note 100, ¶ 194 (canvassing different tests).

174. See Berends, *supra* note 12, at 393 (discussing the Dutch Insolvency Act's two unpaid debts test).

175. See ALI TIP, *supra* note 8, at n.71 (discussing § 2(1) of the Canadian Bankruptcy & Insolvency Act's definition of a "bankrupt").

filing, policed indirectly by a good-faith requirement.<sup>176</sup> Article 31's presumption of insolvency thus speaks to the eligibility of a debtor to enter the insolvency system.<sup>177</sup>

By creating this eligibility-related presumption, Article 31 mandates a domestic state—at least to the extent of a rebuttable presumption—to accept a foreign state's decision that the requirements of “protection-worthiness” have been met.<sup>178</sup> Indeed, the compelled decision reinforces the choice-of-law rule central to the Model Law, because the sovereignty-suppressing presumption is only enjoyed by foreign states where the pending bankruptcy is a foreign main proceeding under Article 2's center of main interests test.

What makes the presumption still more remarkable is that it is enjoyed by *any* primary jurisdiction under the center of main interests test, even those jurisdictions that have no threshold insolvency requirement for filing under domestic law. It is one thing for a Canadian court to suppress its balance sheet insolvency test for the Dutch cessation of payments test: they are arguably two roads to the same goal of ensuring a state of financial distress has been demonstrated. It is quite another thing for a Canadian court to suppress its entire eligibility requirement—by “presuming” that the debtor is insolvent and hence eligible for Canadian bankruptcy protection—by virtue of an American proceeding that requires no such showing. To be sure, an easy answer is that the presumption is only an inference that can be deflated with “evidence to the contrary” by a skeptical Canadian suitor.<sup>179</sup> But the

176. 11 U.S.C. § 1129(a)(3) requires that a reorganization plan be proposed “in good faith” as a precondition to confirmation. *See, e.g., In re Manville Forest Prods. Corp.*, 31 B.R. 991 (S.D.N.Y. 1983); Lawrence Ponoroff & F. Stephen Knippenberg, *Legal Theory: The Implied Good Faith Filing Requirement: Sentinel of an Evolving Bankruptcy Policy*, 85 NW. U. L. REV. 919 (1991).

177. *See* UNCITRAL Draft Legislative Guide on Insolvency Law, Part II, 24th Sess., U.N. Doc. A/CN.9/WG.V/WP.54/ADD.1 (2001), paras. 103–11 (discussing various eligibility screens used in bankruptcy systems) [hereinafter Draft Legislative Guide, Part II].

178. MODEL LAW, *supra* note 5, art. 31. To be precise, it foists this acceptance upon states that have “insolvency” as an eligibility threshold to bankruptcy protection. States such as the United States sacrifice little with such a concession. *See Enactment Guide, supra* note 100, ¶ 196 (“For the national laws where proof that the debtor is insolvent is not required for the commencement of insolvency proceedings, the presumption established in article 31 may be of little practical significance.”).

179. MODEL LAW, *supra* note 5, art. 31. The comment on the rebuttable nature of this presumption in the *Enactment Guide, supra* note 100, ¶ 197, seems almost defensive about Article 31's incursion onto sovereignty and reminds that “the court of the enacting state is not bound by the decision of the foreign court, and local criteria for demonstrating insolvency remain operative, as is clarified by the words ‘in the absence of evidence to the contrary.’” That local criteria remain active does not mean that they survive intact. An interesting corpus of European

easy answer ignores the effects of presumptions in creating evidentiary hurdles to bias preferred outcomes.<sup>180</sup> There is also arguably an expressive function to delineating the status quo.<sup>181</sup>

The theoretical import of Article 31 is difficult to overstate. Its message is unabashedly universalist: one state should accept another state's assessment that eligibility for bankruptcy filing has been met, even from those jurisdictions that do not invest great stock in a financial distress requirement.<sup>182</sup> Moreover, Article 31's scope is broad. Even a "pre-eminent" local proceeding under Articles 28 and 29 does not escape its reach. Although Articles 28 and 29 permit the filing of a local proceeding in the face of a concession that another jurisdiction houses the center of the debtor's main interests, that otherwise plenary local proceeding is partially constrained by being required to accept the main jurisdiction's assessment that eligibility for filing has been met under Article 31.

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litigation is unfolding on when and how "evidence to the contrary" can rebut the presumption, which is also contained in the EU Regulation. *See, e.g., Enron Directo SL* ((High Ct. Ch. Div., July 4, 2002) (oral decision of Lightman, J.) (holding Spanish-incorporated subsidiary of the Enron Group that had all its activities conducted and headquarters situated at Enron House in London had its center of main interests in the United Kingdom rather than Spain), *discussed in* Ian F. Fletcher, *The Challenge of Change: First Experiences of Life Under the EC Regulation on Insolvency Proceedings in the U.K.* (INSOL Working Paper (2003) (on file with author).

180. *See Note, Shifting Burdens of Persuasion in Employment Discrimination Litigation*, 109 HARV. L. REV. 1579 (1996). This observation can be cast as a corollary of the Coase Theorem. Note that the burden of this specific issue is important. The assignment of risk in demonstrating insolvency implicates complex valuation and accounting issues in many bankruptcy cases.

181. *See* Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 608 n.144 (2003) ("[C]ourts tend to regard state-created defaults as presumptively fair or efficient.").

182. By framing Article 31 as an insolvency presumption, as opposed to a more explicit "eligibility" presumption, the Model Law might be making a further, even stronger normative statement on the triviality of the insolvency requirement as an eligibility screen. This is because Article 31 does not foist a presumption upon recognizing states with regard to all eligibility screens. For example, the recognition of a foreign main proceeding does not generate a presumption that the debtor has filed in good faith. The Model Law has thus arguably created a hierarchy of bankruptcy eligibility screens, necessarily classifying the insolvency requirement as "more suppressible" than other eligibility screens. This possibility is reinforced by the disdain of the NAFTA reformers toward the insolvency screen. *See* ALI TIP, *supra* note 8, at 17 ("Technical details of insolvency and 'entrance requirements' aside, the law in each country is concerned with situations in which the debtor is (or threatens shortly to be) not paying its debts as they become due."). On the other hand, UNCITRAL's Draft Legislative Guide endorses eligibility screens in insolvency laws. *See* Draft Legislative Guide, Part II, *supra* note 177.

## 2. Article 14

While Article 31 provides a direct example of universalism in the Model Law by suppressing one state's laws in deference to the main state's, Article 14 goes even further. It compels an actual harmonization of important notice provisions of domestic bankruptcy laws. If universalism requires temporary cession of sovereignty by ancillary jurisdictions, harmonization arguably requires absolute relinquishment. This is because universalism rotates which jurisdiction's substantive bankruptcy laws will govern. Compelled harmonization, by contrast, requires all jurisdictions to follow one invariable rule. The jurisdictions that do not subscribe to the eventual victor rule must forever give up their own policy views on the matter.<sup>183</sup>

Article 14 of the Model Law covers the notice to foreign creditors that must be given when an insolvency proceeding is commenced in an enacting jurisdiction. The provision begins innocuously enough as an antidiscrimination injunction requiring states to give notice to foreign creditors when notice is given to domestic creditors.<sup>184</sup> The article continues, however, to impose the requirement that notice be given *individually* to the foreign creditors: "Such notification shall be made to the foreign creditors individually, unless the court considers that, under the circumstances, some other form of notification would be more appropriate."<sup>185</sup>

This is significant. Some domestic regimes require individual notice to creditors, but others permit common publication.<sup>186</sup> By mandating individual notice, the Model Law takes a stance in the debate over offsetting costs and benefits of differing forms of notice. Again, in keeping with the expected and repeated agnosticism of the Model Law towards harmonization, one would have expected Article 14 simply to

183. Strictly speaking, harmonization does not require suppression of sovereignty if the subscribing states agree spontaneously to a new, harmonized standard. But the Model Law's "adjunct" status—that it can be enacted alongside a country's preexisting domestic insolvency code—anticipates that enacting states may not want to change their preexisting laws.

184. MODEL LAW, *supra* note 5, art. 14(1):

Whenever under [domestic insolvency law] notification is to be given to creditors in this State, such notification shall also be given to the known creditors that do not have addresses in this State. The court may order that appropriate steps be taken with a view to notifying any creditors whose address is not yet known.

185. *Id.* art. 14(2). The "discretion [reserved] to allow other forms of notification" permits flexibility for situations where, for example, "another way of notifying foreign creditors...is equally effective but less cumbersome." Berends, *supra* note 12, at 347.

186. See *Enactment Guide*, *supra* note 100, ¶ 107 (noting domestic notice laws ranging from individual notice to local publication to affixing notices on courthouse doors).

have required the same degree of notice that all other creditors enjoy under domestic bankruptcy law, respecting the sovereign rights of each state to select its notice system of preference. Article 14(2)'s decision to mandate individual notice is striking, almost pushy.<sup>187</sup>

Furthermore, Article 14(3) goes a step further and actually spells out specific items for inclusion in that individual notice.

[The] notification shall: (a) [i]ndicate a reasonable time period for filing claims and specify the place for their filing; (b) [i]ndicate whether secured creditors need to file their secured claims; and (c) [c]ontain any other information required to be included in such a notification to creditors pursuant to the law[s] of [the enacting] State.<sup>188</sup>

The structure of Article 14(3) clarifies that subsections (a) and (b) are additive, harmonized notice requirements to domestic notice law already incorporated under subsection (c). Article 14(3) foists these notice requirements onto all enacting states, regardless of their pre-existing laws, thus forcing further harmonization. Remarkably, Article 14 applies to *any* domestic proceeding involving foreign creditors, even the insolvency of a domestic debtor with all its assets located within the domestic state's jurisdiction.<sup>189</sup> This expands the Model Law's reach beyond the paradigmatic conception of a "transnational" insolvency.<sup>190</sup> If the purpose of the Model Law is to facilitate resolution of potential conflicts of laws among nations with competing claims to regulate an insolvency, then Article 14 has no place in applying to a "purely domestic" insolvency, i.e., one in which only one sovereign's laws

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187. The Enactment Guide invokes fairness and pragmatism to justify the forced harmonization, noting that the more inexpensive and parochial forms of notice, such as posting on the courthouse door, prejudice distant creditors (as international creditors are wont to be). *See id.* ¶ 107. The aggressiveness of Article 14 is striking in light of approaches taken by other procedural international instruments, such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

188. MODEL LAW, *supra* note 5, art. 14(3).

189. *See id.* arts. 1(d), 14(1).

190. *Cf.* CAPE TOWN CONVENTION, CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT, INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT), U.N. Doc. A/AC.105/C.2/2002/CRP.3 (2001), art. 50(1) [hereinafter CAPE TOWN CONVENTION] (permitting states not to apply the Convention to "internal transactions"). Professor Mooney thinks international reforms should not shy away from revising purely domestic law. *See Mooney, supra* note 48, at 32–33 & n.51.



could possibly govern.<sup>191</sup> Article 14 does precisely that by covering notice to foreign creditors in such purely domestic proceedings.

This seemingly unprincipled extension of the Model Law's scope is actually fully consonant with the first principles of universalism theory: it fosters the increased acceptance of outcome differences by requiring the suppression of regulatory sovereignty over bankruptcy notice laws (at least within those jurisdictions whose pre-existing laws do not match Article 14's prescriptions). Moreover, the effects of Article 14's harmonization may be dynamic. If certain notice rules are mandated for foreign creditors in all proceedings, there may well be a spillover effect into domestic creditor notice provisions.<sup>192</sup> Some domestic provisions may well be upgraded to comport with the higher standard of notice enjoyed by the foreign creditors in domestic proceedings compelled by the Model Law.<sup>193</sup> Thus, Article 14 constitutes a brazen example of the Model Law creeping well beyond its purportedly sovereignty-respecting effects into the realm of harmonization.

Articles 14 and 31 are just two examples of the Model Law's universalist leanings, and they are not unique. The Model Law contains myriad other instances of latent harmonization. The Preamble, for example, includes a pronouncement of normative policy.<sup>194</sup> It states that

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191. Article 1(d) of the Model Law expressly extends its scope to otherwise domestic proceedings where "creditors or other interested persons in a foreign state have an interest," which provides the doctrinal foundation for Article 14(3). The Enactment Guide sheds little light on this jurisdictional stretch, which sits in tension with the theoretical justification of resolving competing claims to regulatory jurisdiction by co-equal sovereigns.

192. Indeed, UNCITRAL's Draft Legislative Guide, Part II endorses such a heightened notice standard. See Draft Legislative Guide, Part II, *supra* note 177, rec. 18.

193. See *Colloquy*, *supra* note 2, at 2274 ("[C]ountries could learn from the experiences of other nations and update their law accordingly."); cf. Charles W. Mooney, Jr., *Extraterritorial Impact of Choice-of-Law Rules for Non-United States Debtors Under Revised U.C.C. Article 9 and a New Proposal for International Harmonization*, in CROSS-BORDER SECURITY AND INSOLVENCY (eds. Michael Bridge and Robert Stevens) 195 (2001) (supporting such a harmonizing potential in secured transactions reform that will encourage minority view states to "wake up, smell the coffee, and reach some of the [superior] conclusions that lawmakers reached in [majority view states] many years ago"). Professor Tung discusses a related idea of "passport" extraterritorial transnational regimes, where a form of pluralist universalism is followed (which he and others call a "passport" system) in which a multinational commercial actor carries the substantive regulatory laws of its "home" jurisdiction when it "travels" abroad (like carrying a passport), but insists that there be some degree of baseline harmonization among the participating states. See Tung, *supra* note 25, at 379. This is another expression of the "rough similarity" that Professor Westbrook says is likely required for there to be meaningful cession of sovereignty by deferring jurisdictions under modified universalism. See Westbrook, *supra* note 13, at 2291.

194. Inherent in this assessment is the contention that by including matters of normative policy, enacting states that disagree with those policies (unless they delete them from the version of the text they enact) have modified their own policies, yielding once again a degree of

the goals of the Model Law include promoting the objectives of: cooperation between domestic and foreign courts in cross-border insolvencies; greater legal certainty for trade and investment; fair and efficient administration; protection and maximization of the value of the debtor's assets; and facilitation of the rescue of financially troubled businesses.<sup>195</sup> These goals could safely be characterized as uncontroversial, even accurate summaries reflecting general principles of many of the world's insolvency laws.<sup>196</sup> The Preamble's further insistence that the objective of the last goal (rescue) is to "preserv[e] employment" strays into the normative.<sup>197</sup> It touches on a hotly contested debate of substantive bankruptcy policy: whether insolvency laws should seek to save otherwise economically inefficient firms from failure for salutary collateral purposes such as promoting full employment.<sup>198</sup> Needless to say, there is no international consensus here.

In summary, while not overtly trumpeting its universalist proclivities—and wisely so, given the consensus-dooming touchiness of the ongoing debate—the Model Law actually contains several provisions, albeit at the margin, which begin to “nudge” states along the way to ceding some sovereignty. On these limited matters, they accept the outcome differences that accompany forced deference to the home

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regulatory sovereignty. Although of course a Preamble is usually not law itself, states may accord it some force. For example, in the enactment of the Model Law in the United States, Congress incorporated the Preamble as a legislative declaration. 11 U.S.C.S. § 1501 (2005).

195. Preamble to MODEL LAW, *supra* note 5.

196. *See generally* UNCITRAL Draft Legislative Guide, *supra* note 7.

197. Preamble to MODEL LAW, *supra* note 5, subs. (e).

198. *See* Baird, *supra* note 22, at 580–88. Professor Baird charts a fundamental divide between economically focused bankruptcy scholars (whom he calls proceduralists) and more traditional bankruptcy scholars. The latter embrace the distributional potential for bankruptcy laws, while the former do not. Illustrating this divide, Baird distinguishes between “economic” distress, which indicates a firm's inefficient deployment of assets, and “financial distress,” which implicates an otherwise healthy firm's temporary dislocation due to an inopportune capital structure. The former group of scholars, Baird contends, see bankruptcy law's proper goals as limited to financial distress, whereas the latter group accepts both financial and economic distress as within the legitimate purview of bankruptcy.

One of the Model Law's drafters has recognized this potential for dispute with subsection (e) of the Preamble. *See* Berends, *supra* note 12, at 323–24 (noting that Dutch law, according to recent precedent, would likely accord higher protection to preserving employment than maximizing value of the debtor's assets, by realizing a lower value for a business in a manner that preserves full employment, a notion that translates roughly as a protection of “social interests”). Baird would see this as clearly embracing a traditionalist approach to bankruptcy policy and thus on one side of a possibly unbridgeable chasm. The Enactment Guide, *supra* note 100, makes no specific comment on this normative component of the Preamble.

jurisdiction's laws, and in some instances harmonize their discrepant laws outright. Moreover, the trigger for at least one of these areas of nudging is the choice-of-law rule (the center of the debtor's main interests). The interactive combination of these two constructs—choice of law and acceptance of outcome differences—reveals the Model Law's embrace, despite its purported neutrality, of both of universalism's conceptual foundations. Therefore at a theoretical level of inquiry, although it requires some probing below the surface, we can see the Model Law as universalist.

#### V. MODELING TRANSNATIONAL REFORM: PROCEDURAL INCREMENTALISM

The previous Section demonstrated that the Model Law fosters a nascent form of universalism. This “proto-universalism” exhibits two important characteristics. First, it is not a direct adoption of the universalist model but rather an indirect embrace of universalism's theoretical underpinnings. Second, the universalism of the Model Law is not overt. Indeed, it has eluded most academic commentary to date. Accordingly, the Model Law's proto-universalism can be described as operating below the radar. This Section builds upon this characterization and constructs a model to explain the Model Law's success at garnering international consensus. As mentioned above, the Model Law's success can be found both in the creation of a coherent model law for cross-border insolvencies, an accomplishment in its own right, and in the actual passage of domestic legislation in several countries. Both of these demonstrate reform qua reform (something where before there was nothing). But the Model Law also advances universalism when, paradoxically, there remains ongoing vitality to the universalism-territorialism debate and continuing skepticism over universalism. We might call this “unlikely” or “surprising” reform: consensus in a state of flux. It is both these levels of success of the Model Law that I seek to explain.<sup>199</sup>

##### A. *The Appeal of the Model Laws*

The Model Law appears to be enjoying a warm reception from enacting states, a marked departure from the coolness offered most of its

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199. Again, I defer participation in the normative debate for another day, but I will note the majority position of scholars in favor of universalism and thus add the further label of “happy” to the reform. See *supra* note 62 and accompanying text.

predecessors. One explanation of the Model Law's comparative success might be the use of the mechanism of a model law itself. A model law permits provision-by-provision treatment. This in turn escapes the all-or-nothing rigidity of treaty adoption. While of course the terms of a treaty are negotiated and tailored by the international parties involved, the difficulty of drafting a comprehensive treaty is multiplied when one moves from the bilateral to the multilateral context.<sup>200</sup> By contrast, a model law permits the myriad differences of opinion that might otherwise render the negotiation of a multinational treaty impossible to be deferred to the enactment stage.<sup>201</sup> Moreover, the opus of the model law exists on its own as a discrete document of potential law,<sup>202</sup> even if each state ends up rejecting a provision or two. As Professor Mooney has observed:

In many respects the process of harmonization through an international convention is much more cumbersome and unwieldy than the model law paradigm. An international convention normally would be sponsored by an inter-governmental organization, with all the usual formality and delay. The road from an idea, to a study, to successful meetings of governmental experts, and eventually to a diplomatic conference may be long, winding, and rocky. A model law, on the other hand, need not have explicit or unqualified approval of any governmental or intergovernmental organization, inasmuch as it is itself not a law at all but only a "model."<sup>203</sup>

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200. See, e.g., Andrew T. Guzman, *The Cost of Credibility: Explaining Resistance to Interstate Dispute Resolution Mechanisms*, 31 J. LEGAL STUD. 303 (2002).

201. See Westbrook, *supra* note 105, at 570–71 (noting that UNCITRAL decided to opt for a model law because “[t]he achievement of a treaty would be a greater accomplishment, but much more difficult”). I leave aside, as do the other bankruptcy commentators, the issue of reservations in the treaty ratification process.

202. “A model law is better than an unratified convention.” Berends, *supra* note 12, at 319 (noting the hesitance of the Model Law’s drafters to push for an international treaty in light of the failure of the Istanbul Convention).

203. Mooney, *supra* note 193, at 202. Curiously, Professor Mooney then backs away from his endorsements of model laws, over fear that they can be altered excessively (perhaps distorted) at the domestic enactment stage. He thus prefers the “take it or leave it” approach of an international convention. *Id.* He raises a good point, but even if I shared this preference for tough love, I am not sure the traditional alternatives will solve his concerns. For example, an international convention on secured transactions “will find it necessary to provide alternatives to accommodate local, domestic interests that may vary from jurisdiction to jurisdiction,” as he himself concedes. *Id.* Thus I am not sure conventions, at least as he envisions, will have any more agenda-setting power than model laws. His other concern of model laws goes more generally to the interests of

One might argue that the Model Law's reliance on follow-up enactment largely undermines its binding potential.<sup>204</sup> But this analysis is too quick, for several reasons. First, one can empirically look to jurisdictions that have begun the enactment process to see how much of the Model Law becomes adopted. These initial results look promising. For example, in the United States, freshly enacted Title 15 of the U.S. Bankruptcy Code codifies the scheme of the Model Law virtually verbatim.<sup>205</sup> And other countries that have completed domestic enactment have, with some inevitable exceptions, left the core terms of the Model Law for the most part undisturbed.<sup>206</sup>

Second, one can repeat the observation that the enactment of something is better than the enactment of nothing.<sup>207</sup> The all-or-nothing

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the "private legislatures" that design them. *See id.* at 12 (distrusting the use of model laws to harmonize secured transactions legislation over fear that local bankruptcy professors and practitioners will "have little interest in reforms that would render obsolete their lifelong efforts to master the esoteric").

204. *See generally* Scott, *supra* note 144, at 1031 ("The ALI and NCCUSL believed that this consolidation of commercial law into a single statutory scheme would enable them to sell the entire project to the states on a 'take it or leave it' basis thus avoiding the selective enactment that had occurred with earlier uniform acts.") (citation omitted).

205. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, S.256, 109th Cong. Tit. 14 (2005).

206. *See generally* Westbrook, *supra* note 13 (discussing the approach most countries have taken to adopt the Model Law provisions). For example, Eritrea has adopted the Model Law virtually wholesale. United Nations Commission on International Trade Law, Status: 1997—Model Law on Cross-border Insolvency, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/insolvency/1997Model\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html) (last visited Nov. 6, 2005). New Zealand is poised to do the same (the Model Law's adoption having been recommended by the Law Commission of New Zealand to the Ministry of Justice). *See* Westbrook, *supra* note 8, at 30. The United Kingdom also appears ready to follow suit. *Id.* South Africa's adoption had a qualifier injected about reciprocity. *Id.* at 29. Most interesting has been the "sticking points" in Japan and Mexico. In Japan, a traditionally territorialist jurisdiction, a reciprocity requirement was not added, but two noteworthy changes were included. First, the Japanese blanch at the messy idea of parallel proceedings and so in the event of an Article 28 parallel proceeding arising after a recognition of a foreign main proceeding, the Japanese version of the Model Law requires dismissal of either the foreign recognition or the main petition. *Id.* at 24–25. Second, the stay under article 20 is not automatic (a potential blow for universalists), but the stay affecting secured creditors under article 27 is to be in accordance with the main jurisdiction's laws (a boon for universalists—exportation of the center of main interest's stay laws). *Id.* at 25–26. As for Mexico, the alterations are less marked than Japan, except, for purposes of this analysis, the retention of the insolvency "verification visit" that is triggered in all Mexican bankruptcies. "Decreto por el que se aprueba la Ley de Concursos Mercantiles reforma el artículo ochenta y ocho de la Ley Organica del Poder Judicial de la Federacion," D.O., 12 May 2000, art. 293 [hereinafter Mexican Insolvency Law]. Yet Mexico adopted article 31 of the Model Law, so its interaction with the verification visit practice under preexisting Mexican law is, in the understatement of Professor Westbrook, "not clear." Westbrook, *supra* note 8, at 28. Perhaps the verifier must presume insolvency in her visit if an ancillary proceeding is opened in Mexico and a foreign main proceeding is recognized.

207. Berends, *supra* note 12, at 319.

nature of treaty ratification poses considerable risk of nothing (or ominous signals through reservations). A model law's reliance on provision-by-provision scrutiny may allow for substantial deviation, but at least reduces the risk of outright rejection.<sup>208</sup> Finally, one can point to the agenda-setting effect of the Model Law's structured template. By emphasizing a strong desire for complete enactment,<sup>209</sup> and by singling out specific prescriptions where alternative rules are proposed,<sup>210</sup> the Model Law both signals an intention for minimal deviation and cabins the areas on which objectively reasonable disagreement might be anticipated.<sup>211</sup> A state may wish to deviate from the proposed majority text and adopt one of the alternative provisions for those areas where the Model Law's drafters provide variations. That state might be respected as exercising its rights to take the minority view. A state seeking to deviate from one of the provisions for which the Model Law proposes one and only one text faces a more internationally face-threatening act. It must go on record as finding infirmity in one of the Model Law's provisions that was not deemed worthy of preparing alternatives. Such a dissenting state must accordingly fight an implicit assumption that reasonable states could not (or should not) have disagreed.<sup>212</sup> This peer pressure casts considerable doubt on the first-blush concern that a model law leaves states truly "free" to incorporate or reject each provision at will. Therefore it is certainly possible that the Model Law's status, *qua* model law, may well in significant part account for its success at

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208. *Id.* ("A convention is an 'all-or-nothing' instrument, a 'take-it-or-leave-it' text. The risk that too many countries would not 'take it' was too great [for the drafters of the Model Law].")

209. *See Enactment Guide, supra* note 100, ¶ 12 ("Therefore, in order to achieve a satisfactory degree of harmonization and certainty, it is recommended that the States make as few changes as possible in incorporating the model law into their legal systems.")

210. *See, e.g., id.* at 449–50 (proposing an alternative version of Article 13(2)—the substantive antidiscrimination clause against foreign creditors—permitting discrimination against foreign tax and social security claims, as do several domestic insolvency laws).

211. In fairness, this approach is not exclusive to model laws. The Aircraft Equipment Protocol, discussed *infra*, has an Alternative A and Alternative B regarding article XI, which its commentary describes as the "hard" and "soft" alternatives. *See* Mooney, *supra* note 48, at 37–38. These alternatives are helpful where, for example, there are structural differences between legal systems, such as a common law versus civil law approach.

212. UNCITRAL's Draft Legislative Guide does not propound a full model law, but does offer more abstracted provision-by-provision legislative proposals, and occasionally resorts to "minority" recommendations in areas where there is a strong tradition of legal difference. *See generally* UNCITRAL Draft Legislative Guide, *supra* note 7.

garnering international support. But there may be something more at work.<sup>213</sup>

### B. *Acclimation*

The Model Law's status qua model law cannot be the sole reason for its success, because the model law format had been tried in the past and failed. Accordingly, there must be something about the specific scope and nature of the Model Law that facilitated its success in an environment where the universalism–territorialism disagreement survives.<sup>214</sup> What distinguishes the Model Law is that it chose an incrementalist approach, whereas other, less successful predecessors pursued a more ambitious agenda.<sup>215</sup> Under the modest approach of the Model Law's proto-universalism, skeptical territorialist states might not have been overwhelmed by the complete subjugation of regulatory sovereignty and acceptance of outcome differences demanded by universalism. Instead, the Model Law accords states the chance to desensitize gradually to other states' bankruptcy systems; acclimation is permitted.<sup>216</sup>

My chief claim is therefore that the Model Law takes the soft sell of incrementalism over the harder core, one-step plunge into universalism that was tried, and failed, with previous international efforts such as MIICA. Recall that the universalism model rests upon a tolerance for the acceptance of outcome differences by reluctant sovereign states. If that is so, then there are at least two possible routes a universalist reform

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213. Model laws and treaties need not necessarily be exclusive in format. For example, the Organisation for Economic Co-operation and Development (OECD) proposes “model bilateral treaties” in the tax context and has had some success with this approach. OECD, Article 26 of the OECD Model Tax Convention on Income and Capital, at [http://www.oecd.org/document/53/0,2340,en\\_2649\\_33747\\_33614197\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/53/0,2340,en_2649_33747_33614197_1_1_1_1,00.html) (2004) (last visited Nov. 6, 2005) (“Article 26 of the OECD Model Tax Convention provides the most widely accepted legal basis for bilateral exchange of information for tax purposes. More than 2,000 bilateral treaties are based on the Model Convention.”).

214. As one court's testy comments reminded in rejecting a universalist request for turnover (preceding the Model Law), “[a Canadian court's] function is not simply to rubber stamp commands issuing from the foreign court of the primary bankruptcy.” *Holt Cargo Sys. v. ABC Containerline N.V.* (Trustees of), [2001] 3 S.C.R. 907, ¶ 33.

215. See, e.g., MIICA, *supra* note 94 (proposing a full-fledged universalist regime).

216. Writing about what became the EU Regulation (a cousin of the Model Law), Professor Fletcher underscores the sensitivity over sovereignty that inclines many states against universalism. The Regulation's approach was thus “pragmatic—in that it recognizes the limits beyond which sovereign states are unlikely to be prepared to go at the present stage of European integration, even for the sake of procuring a more structured approach to handling cross-border insolvencies in an EU context....” Fletcher, *supra* note 2, at 124.

effort might have taken. The first is a flooding approach, where the state that is anxious about giving up regulatory sovereignty over a bankruptcy is inundated with foreign policies and required to capitulate on all matters at once when a foreign jurisdiction is chosen to govern. In bankruptcy, this would mean ceding controlling law to the “prickly” avoidance, distribution, and priority rules of the foreign jurisdiction. Reformers would thus hope for the best, gambling that the flooded state would emerge from this cathartic relinquishment of sovereignty and see the light of Transactional Gain and other such theorized benefits of universalism.<sup>217</sup> The enlightened state should swim toward the universalist shore as a new convert. The downside, of course, of such an approach is that the inundated state may simply be overwhelmed by yielding complete control to the potentially strange bankruptcy laws of a foreign country with highly different normative content. Following the analogy, this would mean that the state drowns and withdraws from the universalist project altogether, seeking refuge in the familiar comfort of territorialism, and the reform effort collapses.<sup>218</sup>

The second, less risky but more protracted path is one of systematic desensitization, where the cold water of universalism is adjusted to gradually with baby steps. Under this approach, universalism is presented with regard to discrete matters, with a choice-of-law rule requiring relinquishment of control over some, but not all, elements of a transnational dispute. This is the route taken by the Model Law. To be sure, it is a less direct approach to reform, because it requires time, patience, and quite probably multiple stages of increasing exposure to its paradigm, as opposed to the potentially more satisfying but more volatile all-or-nothing approach.<sup>219</sup>

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217. See Mooney, *supra* note 48, at 30 (admonishing reform-sensitive states to wake up, smell the coffee); see also Fletcher, *supra* note 2, at 124 (acknowledging that compromise approaches may “draw the wrathful ire of purists”).

218. Consider the skittishness of states over discussing avoidance rules in bankruptcy. Deliberately omitting them from the Cape Town Convention on Immovable Equipment, Professor Mooney explains:

As an active participant in the drafting and negotiation process for the Convention over several years, I clearly recall that the decision not to attempt to define [preferences and fraudulent transfers] was a deliberate one. The consensus view was that insolvency systems so differed from one another that it would not be feasible to fashion definitions that would adequately mesh with all systems.

Mooney, *supra* note 48, at 36 n.85. Consider also that the UNCITRAL Model Law on International Credit Transfers followed the U.S. approach of Article 4A of the Uniform Commercial Code so closely that it alienated non-American participants. No state has enacted it.

219. Even those who prefer to jump into the lake and get it over with, and who denigrate their



This gradual route also learns from the unique theoretical characteristics of bankruptcy law discussed earlier that make it especially contentious at the international level. The deeply invasive, broadly reaching, and thornily normative nature of a bankruptcy regime is divided and conquered by this incrementalism. While the Model Law goes for the first two dimensions (by displacing pre-existing bankruptcy laws and binding all creditors and property) it deliberately falls short on the third axis (by avoiding the normative priority rules and pushing only on matters at the periphery of bankruptcy). Thus it permits some acclimation as an interim measure before pursuing subsequent reforms, and it does so by picking the easier battles first.<sup>220</sup>

Furthermore, the oblique nature of this incrementalist approach allows the potential to capture some skeptical territorialist states at the margin. These marginal territorialists fall into two camps. The first camp holds the putative reformer territorialists—the territorialists who are dubious at giving up their sovereignty and who worry that universalism’s theorized benefits may be overstated, but who nevertheless might be willing to give it a try, if it were possible to do so without going all in. These states can subscribe to the Model Law’s limited universalism, confident in the knowledge that if the water gets too cold they can always stop where they are and go back. If they go back, the universalists are arguably no worse off, and if they go on—because upon exposure they find the water not so bad—then the universalists have gained another convert, a convert who may well have never considered conversion had it required an all-or-nothing leap.<sup>221</sup>

The second camp that might be swept in by the Model Law’s indirectness are the diehard territorialists who refuse to even try universalism, convinced of its undesirability. Here, then, the Model Law’s design of fostering universalism in tangential sections somewhat removed from its core provisions may well be deliberately conceived to

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slowpoke colleagues who prefer to wade in, must concede that a latent danger with their more dramatic approach is the occasional heart attack.

220. This is especially why the Model Law might be considered “functionalist.” Its gradual advancement is on arguably more technical matters.

221. Indeed, there may even be a subset of these universalism experimenters who wish their experimentation to remain secret, perhaps because of being locked into previously stated positions defending territorialism. This group would enjoy the convoluted and ambiguous interaction between Article 20 and Articles 28 and 29. Because of the “one hand-other hand” granting and taking away of universalism by the interaction of these articles, the outwardly territorialist state could always point to Articles 28 and 29 to assert the supremacy of sovereignty and preeminence of local proceedings while at the same time experimenting with the Model Law’s universalism. MODEL LAW, *supra* note 5, arts. 20, 28–29.

have an obfuscating or distracting effect. Such states may not appreciate the latent universalism embedded within the Model Law until after they have been subjected to it at a mild level (and then may find that it is not that bad after all, or, to remain within the ongoing analogy, that after allowing themselves to be lightly splashed through lack of attention, the water is not nearly so cold as had at first been feared). Had the Model Law's foray into universalism been on a more central matter—say, the bankruptcy priority rules—then this distracted camp of states might have sat up, paid more attention, and dug into their territorialist roots.<sup>222</sup>

The success of the Model Law in the second, “surprising” sense—at advancing universalism in the face of continuing support for territorialism by some states—might be explained in part by looking at these marginal states. Their approval of the Model Law through their respective UNCITRAL delegates and presumable follow-up enactment as domestic legislation evinces a willingness to accept a limited exposure to universalism as a good-faith experiment (or a mild deception) for their own benefit. This perhaps is how the Model Law was able to advance the agenda of universalism in the face of unsettled consensus. To be clear, I am not suggesting that territorialists were hoodwinked into enacting the Model Law. Whatever one's views of legislators, I am skeptical that a law premised upon widespread international deception is likely to prove stable. As Llewellyn observed, covert tools are never reliable ones.<sup>223</sup> (In any event, I have now just “outed” the Model Law by publishing this Article.) Rather, my proposition is that there may be some states that let their guards down because of the non-threatening nature of the universalist provisions in the Law—states that may well be surprised to find themselves moved slightly more along the universalism continuum and, upon realizing where they are, unlikely to move back.<sup>224</sup>

To summarize the initial theoretical model, my primary claim is that the Model Law's success at receiving warm international reception

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222. See *supra* note 62 and accompanying text.

223. KARL LLEWELLYN, *THE COMMON LAW TRADITION* 363 (1960).

224. Cf. Tung, *supra* note 27, at 60–65 (arguing that rational states will become stuck in a prisoner's dilemma and never embrace universalism even if they want to). Indeed, were the Model Law more brazenly universalist, it is unlikely the states' guards would have been lowered sufficiently. Belaboring the analogy, one might be able to distract someone afraid of cold water long enough to splash them lightly; it is unlikely one could distract them sufficiently to have them accidentally walk into a lake. Their guards will lower in non-threatening or confusing environments—but only so far. The benefits of obfuscation are extant but marginal.

stems not exclusively from its status as a model law qua model law, but rather from the incrementalism inherent in its overall design and scope. Rather than seeking complete universalism, the Model Law retained some territorialist components, but ultimately inserted some baby steps—in discrete, unassuming areas—towards universalism. This seemingly convoluted design and unambitious scope was actually the key to breaking the reform loggerhead in international bankruptcy. The back-and-forth interaction between Article 20 and Articles 28 and 29 signaled a sensitivity to the concerns of both universalists and territorialists alike, implicitly legitimizing each. This cued enacting states that the Model Law was thus a middle ground that all should be able to agree upon. This non-threatening presentation permitted the tag-along injection of some proto-universalist provisions to be accepted by territorialists, who doubtless would have balked at a more aggressive presence of universalism. Accordingly, the gentle incrementalism regarding indirect, non-core areas of the law likely assuaged some hesitant, territorialism-inclined states skeptical about universalism's benefits, and perhaps even tricked (to their paternalistic betterment) some troglodyte states prejudiced against universalism altogether.<sup>225</sup>

### C. *The “Procedural” Character of the Model Law*

Building upon the contentions of the previous subsection, I want to refine the account of the Model Law's success. My further claim is that the Model Law's incrementalist nudge toward universalism was not just randomly situated in tangential areas of the Law unrelated to its core provisions, but rather that it was deliberately directed at targeted matters. The selection of those issues was influenced by the hoary legal distinction between substance and procedure and its role in conflicts of law theory.<sup>226</sup>

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225. Professor Westbrook, a universalist instrumental in the drafting of the Model Law, candidly acknowledged that the concession to territorialists embedded in Articles 28 and 29 was the “sine qua non of achieving the Model Law.” Westbrook, *supra* note 8, at 17.

226. See, e.g., Russell J. Weintraub, “At Least, to Do No Harm”: *Does the Second Restatement of Conflicts Meet the Hippocratic Standard?*, 56 MD. L. REV. 1284, 1300 (1997) (discussing the RESTATEMENT (SECOND) OF CONFLICT OF LAWS chapter on “procedural” rules and the general rule of conflicts jurisprudence to apply forum procedural law). Professor Weintraub also discusses an outcome-determinative approach to defining procedure, whereby a rule is truly procedural if does not rise to the level of affecting the choice of forum, and then rescutinizes the Restatement (Second) under this approach. *Id.* (citing Walter Wheeler Cook, *Substance and Procedure in the Conflict of Laws*, 42 YALE L.J. 333, 344 (1932)). See also *Hanna v. Plumer*, 380 U.S. 460, 468–74 (1965) (applying federal procedural rules in federal diversity actions but applying state substantive laws). The precise definitions of and the distinctions

When a true conflict of laws exists, co-equal sovereigns have presumptively equal entitlement to exert their regulatory might.<sup>227</sup> The traditional approach is to resolve these conflicts with reference to a content-neutral, jurisdiction-selecting rule, such as the Model Law's Article 2.<sup>228</sup> More recent scholarship explores the idea of content-focused inquiries based not on the jurisdictional clash, but on the policy clash.<sup>229</sup> In addition to weeding out false conflicts, such an approach might generate a hierarchical ranking of policy interests. Needless to say, these instances of consensus are not clearly delineated; Dean Kramer of Stanford Law School proposes that they can at best be shaped into canons rather than rules.<sup>230</sup> One such canon, he submits, rests upon the time-honored distinction between substance and procedure.<sup>231</sup> Kramer contends that if a conflict involves one state's procedural interests clashing with another's substantive laws, the community of sovereigns will generally agree that the substantive rule should govern.<sup>232</sup> Viewed another way, under this theory states should

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between "substance" and "procedure" are not critical to this Article. For the reader insistent upon an example, Dean Kramer defines procedural laws as ones chiefly aimed at regulating the conduct of litigation, which explains the deference to a forum's procedural laws in conflicts situations. Dean Kramer's definition implicitly (and likely correctly) assumes that procedure is more discrete and identifiable, and leaves substance to be the definitional residuum. Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 324-26 (1990). While the precise definition may be elusive, its entrenchment in conflicts jurisprudence cannot be seriously questioned. *See, e.g.*, RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 585 (1934) (applying forum's procedural laws in conflicts situation); *see also* FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., CIVIL PROCEDURE I (3d ed. 1985) ("Courts have many occasions to distinguish between substantive law and procedure.... [O]ver-all definitions of the distinction would be both futile and misleading."). For a recent attempt that does not heed this advice, see Lawrence B. Solum, *Procedural Justice*, Univ. of San Diego Sch. of L., Pub. L. & Legal Theory Research Paper Series, No. 04-02, at pt. II., at <http://ssrn.com/abstract=508282> (Feb. 23, 2004).

227. *See* Kramer, *supra* note 34, at 1019 ("The whole problem in a true conflict is that different states have made different judgments about what is just, and it is axiomatic that...states are coequal sovereigns entitled to make their own value judgments.").

228. *See, e.g.*, Weintraub, *supra* note 226 (discussing RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 142-43 (1971)).

229. *See, e.g.*, Kramer, *supra* note 34, at 1015-21 (arguing for "policy-selecting" rules); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(3) (1987) (comparing and ranking the interests of states with overlapping claims to prescriptive jurisdiction).

230. Kramer, *supra* note 37, at 318-22 (explaining that such "canons" represent rules that hypothetically negotiating sovereigns would agree to by compact, which at the very least must leave them better off ex ante than application of forum law to a conflict).

231. *Id.* at 324.

232. *Id.* at 324-29. The application of this principle is somewhat confusing as notions of "procedure" have evolved over time. Dean Kramer proposes following the "Erie" approach,

be routinely more willing to cede regulatory authority on matters of procedure than on matters of substance.<sup>233</sup> Dean Kramer's theory finds some doctrinal support, for example in the U.S. federal court system's jurisdictional rules.<sup>234</sup>

Accordingly, the Model Law's success may have stemmed from exploiting the procedure–substance continuum on two different levels. At a general, overarching level, the Model Law marketed itself, and was in fact widely perceived, as a vehicle addressing chiefly “procedural” matters. This likely assuaged hesitant states to let their guards down, or at least err on the side of giving the law a chance.<sup>235</sup> Any state diffusely committed to showing some good faith at international cooperation in insolvency law—but deeply hesitant to relinquish completely its more substantive commitment to either universalism or territorialism—might readily sign onto an international agreement like the Model Law purporting to govern “mere procedure.” Additionally, at a secondary level, the Model Law also employed the procedure–substance

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which has federal procedural law govern in federal forum diversity cases when state substantive law applies, unless the conflicting state “procedural” rule can be said to contain a substantive purpose, in which case it will trump the federal rule. *Id.* at 327 & n.173 (collecting cases). Kramer prefers this interpretation to the approach of some contemporary conflicts scholars that would permit the forum law to govern in the event of hybrid substantive-procedural laws. *Id.* at 327–28. The nuances are less relevant than the broader recognition of a procedure-substance distinction in which states are more concerned with having their substantive policies enforced in a conflicts situation than their procedural policies. *Id.* at 328. Other commentators agree. *See* Bergsten email, *supra* note 87 (“You have emphasized the distinction between procedure and substance. I would have to agree with you that countries are very tolerant of differences in procedure when it comes to actions taken in another country.”).

233. It is important to be clear on the scope of this claim. States' perceptions of procedure as comparatively low-stakes matters should not be confused with the core notions of due process in constitutional systems and natural justice in common law systems that are routinely concerned with “procedural” protections. Issues such as notice, opportunity to be heard, and having an impartial decision-maker are matters of critical importance to most legal systems and central in deciding whether to defer to foreign judgments. *See* *Interpool, Ltd. v. Certain Freights*, 102 B.R. 373 (D.N.J. 1988) (declining deference due to purported concerns with an *ex parte* order). These procedural concerns are better characterized as “constitutional” matters, even though they pertain to procedural issues. Few states readily defer on constitutional matters in conflicts. On the contrary, they will likely hold constitutional issues to be of the highest legal order as matters of “fundamental” policy. *Cf.* MODEL LAW, *supra* note 5, art. 6 (allowing refusal of recognition of foreign proceedings to protect violations of fundamental public policy).

234. Under American law, the Supreme Court of the United States may accord lesser deference to the jurisdictional supremacy of a state court of final appeal's pronouncement on state law in the event that the state law at issue is one of procedure. This is the so-called “procedural default” doctrine. *See* *Brown v. Allen*, 344 U.S. 443, 486–87 (1953).

235. *Cf.* Schwartz & Scott, *supra* note 101, at 636 (“[Private legal reform bodies] react more conservatively to proposals that would work significant reform than to proposals that alter the status quo only slightly.”).

distinction in selecting the specific areas in which to nudge its proto-universalism. That is, the provisions where the Law pushes its foray into universalism, namely, Articles 14 and 31, are arguably both matters of procedure, or at the very least, toward the procedural end of a procedure-substance continuum.<sup>236</sup> It is on both this general and more specific level that the Model Law sought to focus on matters of procedure and thereby, following Dean Kramer's theory, minimized the likelihood it would be perceived as a substantial threat to sovereignty. Yet again, this focus harkens back to the unique theoretical attributes of bankruptcy laws that make them internationally challenging. The procedural aspects (breadth and depth of reach) were pushed more aggressively in the Model Law than the substantive aspects (differing normative priorities of distributive justice). Moreover, those limited areas where differing norms were confronted squarely, such as the notice provisions of Article 14, were themselves procedural. This is why I refer to the Model Law as a reform mechanism premised upon not just "incrementalism" but "procedural incrementalism."

The greater willingness of states to defer on matters of procedure did not limit the Model Law's import to fostering the acceptance of outcome differences as such. To be sure, by signing onto the Model Law, states took the first step toward subordinating their policies and accepting outcome differences, albeit on comparatively minor matters in the grand scheme of conflicts of law (procedure). But states' comfort in so doing also led them to accept the creation of a comparatively clear choice-of-law rule, the second consequence of the Model Law's focus on procedure. Some scholars have suggested that the clarity of a choice-of-law rule to which sovereigns will submit correlates with the level of commitment they are willing to make to the resulting decision.<sup>237</sup> The clearer the rule, the harder plausible deniability becomes for a state seeking ex post defection.<sup>238</sup> Because the perceived stakes of the Model

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236. To return once again to the aquatic analogy of the previous subsection, the fact that the matters were low stakes on which the hesitant territorialist states were acquiescing to testing the waters of universalism makes it only a toe they were placing in the water; experimentation with a higher stakes, more substantive bankruptcy provision, such as, for example, the avoidance rules of a bankruptcy code, would be like testing the waters by dipping in one's face.

237. See Guzman, *supra* note 200, at 309 (observing that in "high stakes" international issues states are less likely to sign onto binding dispute resolution provisions).

238. *Id.* at 304 (predicting that a state's willingness to sign on to a binding dispute resolution clause in an international agreement will vary directly as a function of its inclination to honor the implicated international commitment). Thus when states are inclined to comply, they are inclined to box themselves into more on-record positions, such as a binding dispute resolution clause.

Law were low, that is, because the areas on which the Model Law would require some cession of sovereignty pertained to such procedural matters as a presumption of insolvency, participating states became willing to expose themselves to an unusually clear (at least by conflicts standards)<sup>239</sup> choice-of-law rule.<sup>240</sup>

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When they want to be able to renege, they eschew such clauses and rely upon the vaguer forum of the international community and reputational enforcement mechanisms. The extrapolation of this principle to a choice of law rule would be that if states anticipate wanting to renege on the outcome of a choice of law decision and not be bound by it, they would logically press for a minimally clear rule that accords maximal possible evasion.

239. I say a “clear” choice of law rule to describe the “centre of main interests” test as aided by the presumption of registered office in the Model Law, *see* MODEL LAW, *supra* note 5, arts. 2(b), 16(3), because choice of law rules are traditionally amorphous. The reader need go no further than the Restatement (Second) for an illustration. *See also* Tung, *supra* note 64, at 32–33 (characterizing choice of law rules as “notoriously imprecise and indeterminate”). O’Hara & Ribstein, *supra* note 66, attribute this phenomenon to the desire of courts to leave themselves escape room for the application of domestic law when they find foreign law substantively objectionable, which accounts for the rejection of the rule-based approach of the Restatement (First) of Conflict of Laws in the Restatement (Second), where “choice-of-law ‘rules’ are only baseline presumptions that courts can ignore if a multifactored, contact-based analysis indicates that another state’s law most appropriately applies.” *Id.* at 1183; *see also id.* at 1182 (“Although judges began with a rule-based approach that might have deterred them from indulging in their own preferences by making departures more obvious, the courts have developed more open-ended, standard-based approaches that facilitate more discretionary judicial decisionmaking.”).

240. For a healthy disagreement on this conclusion, *see* Tung, *supra* note 27, at 70–82. Tung denigrates what he contends is the fuzzy, standard-oriented nature of the “centre of main interests” rule and decries its *ex post* reliance upon judicial interpretation. He marshals support from Professor Fletcher’s comments that the EU Regulation’s center of main interests test, even with its rebuttable presumption of registered office, did not delineate the manner of rebutting this presumption or the degree of proof needed. *See id.* at 77 (quoting IAN F. FLETCHER, *INSOLVENCY IN PRIVATE INTERNATIONAL LAW: NATIONAL AND INTERNATIONAL APPROACHES* 253 n.21, 260 (1999)). Professor Fletcher has subsequently written on how European courts have quickly decided litigation involving this standard since the Regulation’s coming into force and generated holdings for other states to follow, focusing upon the principle of reasonable expectations in commercial settings and objective identifiability to third parties (including, interestingly, instances where the presumption of registered office has been rebutted, such as in BRAC and Enron). *See* *Re BRAC Rent-A-Car Inc.*, [2003] 2 All E.R. 201, 207–08 (Ch. App.); *Enron Directo SL* ((High Ct. Ch. Div., July 4, 2002) (oral decision of Lightman, J.) (holding that the Spain-incorporated subsidiary of the Enron Group that had all its activities conducted and headquarters situated at Enron House in London had its center of main interests in the United Kingdom rather than Spain), *discussed in* Fletcher, *supra* note 179, at 11. While I agree in principle with Tung’s concerns with fuzziness, I think he may be setting the bar too high; in my opinion, “centre of main interests” seems no less manipulable than “principal place of business,” and that standard, while to be sure triggering litigation at the margins, has enjoyed robust efficacy in American civil procedure. *See* John B. Oakley, *Prospectus for the American Law Institute’s Federal Judicial Code Revision Project*, 31 U.C. DAVIS L. REV. 855, 882–84 (1998). *See also* Miguel Virgós & Etienne Schmit, Report on the Convention on Insolvency Proceedings, EU Council Doc. 6500/96 DRS 8 (CFC) (May 3, 1996) [hereinafter Virgós-Schmit Report].

As discussed above, one of the key developments of the Model Law was the implementation of a choice-of-law rule. This was important for settling on a unified international standard and reinforcing that one country's law should presumptively govern a cross-border bankruptcy. What was equally if not more important was the Model Law's setting in which that rule was designed, because it contributed to the rule's content. By offering its choice-of-law rule in a seemingly low-stakes, non-threatening vehicle, the Model Law was able not simply to propound a rule qua rule, but also to make that rule comparatively crisp.<sup>241</sup> The choice-of-law rule in the Model Law is "centre of main interests." That rule was crafted to dictate the country that would enjoy, among other legal consequences, the application of an automatic stay to its debtors' assets located in a recognizing jurisdiction, as well as a presumption of the debtor's insolvency. Had the Model Law, by contrast, sought to entitle the selected jurisdiction to enjoy all substantive control of the global bankruptcy, the choice-of-law rule would almost certainly have slipped into a more malleable standard, such as, for example, "the state with most appropriate contacts with the dispute."<sup>242</sup> Indeed, the MIICA, which sought to effect complete universalism, did not even contain a choice-of-law provision, consistent with the proportionate relationship between substantive reach of an instrument (stakes) and ambiguity of its choice-of-law rule (deniability).

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241. More skeptical commentators disparage the choice of law rules suggested by universalists in the literature. See Tung, *supra* note 64, at 31–33. The critiques of others are more nuanced. For example, Wessels concedes the potential for mischief within a standard like center of main interests but "nevertheless" contents himself that the courts seem to be working it out by providing predictable guidance in their judicial interpretations. Wessels, *supra* note 82, at 25.

242. As an example of such indeterminacy in an international document, consider the Convention on Contracts for the International Sale of Goods. See United Nations Convention on Contracts for the International Sale of Goods (1980), *reprinted in* U.S. Ratification of 1980 United Nations Convention on Contracts for the International Sale of Goods: Official English Text, 52 Fed. Reg. 6262, 6264–80 (Mar. 2, 1987) (based in part upon UNIDROIT's Uniform Law on the International Sale of Goods) [hereinafter CISG]. An ambitious agreement seeking to spell out substantive rules for contracts borrowed from Article 2 of the American Uniform Commercial Code and the domestic sales laws of other countries (and one that has received impressive international adoption, see Stephan, *supra* note 11, at 774), the convention applies only to "parties [of signatory states] whose places of business are in different states." *Id.*, art. 1(1). But "place of business" for a multinational that conducts "business" in multiple jurisdictions turns on the business "which has the closest relationship to the contract and its performance"—scarcely a model of clarity. *Id.*, art. 10. This is consistent with my thesis: the scope of the convention pertains to a rich panoply of substantive rights and obligations that flow from an international sales contract, which is a "higher stakes" matter than certain procedures used in bankruptcy—hence the offsetting reduction in clarity of its choice of law rule.



Moreover, if the choice-of-law rule proves not only clear but durable, i.e., it blazes a path upon which future universalist reform efforts will build, then the final, universalist result will end up having a much clearer anchoring rule than would have otherwise resulted by using a one-step reform mechanism.<sup>243</sup>

Therefore, some insights from modern conflicts literature suggest that in an area where international disagreement abounds and where states hold high normative stakes, such as international bankruptcy, sovereign actors will more readily coalesce around areas such as procedure, where they will more willingly cede their sovereignty. This conclusion builds upon the argument that when a conflict exists between substance and procedure, states would prefer to yield on procedure from an *ex ante* perspective than yield on substance. Injecting this sovereign disposition into the international insolvency realm, where states have been trying for years to reach some form of agreement, then the success of the Model Law at garnering support might be thus explained. By effectively channeling a cooperative international impulse into the (universalist) acceptance of cession of sovereignty on matters of procedure, the Model Law produced an end product of seemingly modest scope but profoundly important effect. In following an approach of procedural incrementalism, the Model Law not only succeeded in winning international support where other proposals failed, but also locked in a relatively clear choice-of-law rule in the process.<sup>244</sup>

Some qualification is necessary. Strictly speaking, my overall argument does not rest upon the categorization of Articles 14 and 31 (or the Model Law for that matter) as “procedural.” That is, the primary proposition borrowed in part from Dean Kramer’s conflicts theory—that states will cede sovereignty more willingly on “lower stakes” matters—simply requires branding Articles 14 and 31 as “low stakes.” Such a

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243. Professor Stephan disagrees with my positive assessment of the Model Law’s potential for clarity in a passing analysis, *see* Stephan, *supra* note 11, at 784–87, and instead suggests that the Model Law counterproductively “decrease[s] the predictability of outcomes in international bankruptcies,” *id.* at 785. His conclusion appears to rest upon a belief, asserted in greater depth by territorialists such as LoPucki, *see* LoPucki, *supra* note 48, at 2225–39, that the bright line of the *situs* rule (in the presence of lending covenants) offers greater clarity than universalism, at least as implemented by the Model Law—a contention which universalists like Professor Westbrook have already engaged. *See, e.g.*, Westbrook, *supra* note 13, at 2309.

244. The first step, moreover, is the hardest. Subsequent efforts that build upon the Model Law, such as UNCITRAL’s Draft Legislative Guide, should have an easier time following an already-blazed path. *Cf.* Schwartz & Scott, *supra* note 101, at 636 n.82 (“Revisions of existing statutes are seen as ‘technical’ exercises—correcting minor flaws or updating a statute” and are thus more likely to advance passage of clear status-quo altering rules).

case can be made. Although at one level, the gatekeeping nature of insolvency status might seem to invoke high stakes (whether or not you get into the bankruptcy system), it seems reasonable when comparing it to, for example, the distribution and priority rules (who gets what of the limited money in the bankruptcy pot once you are in), to call it a low, or at least lower, stakes matter. Similarly, the notice provisions for commencement of a case are surely not core provisions of a bankruptcy code. Thus I could rest my argument on showing that these low stakes matters allowed states to let their guards down and sign onto a comparatively non-renegable choice-of-law rule without trying to shoehorn them into a substance-procedure taxonomy.

Nevertheless, I do want to contend that these provisions, if stratified along a substance-procedure continuum (assuming away the difficulty of articulating the principles for distinguishing substance from procedure), fall more to the procedural end of the spectrum. The reason I take this further step is not because I find Dean Kramer's theory irrefutable, although I do find it accords with my own intuition, but because, at least in bankruptcy, there is a preoccupation with procedure. For example, there is a whole school of bankruptcy scholars who believe that bankruptcy law is nothing more than a procedural device for facilitating a collective action discussion.<sup>245</sup> Indeed, one of the focal points of many bankruptcy regimes—a moratorium on the individual collection of payments—is fairly characterized as a matter of procedure: the right to seek collection of a debt is not cancelled; the remedy of vindicating that right is merely channeled into a group resolution.<sup>246</sup> Moreover, the distinguishing components of a bankruptcy regime outlined at the beginning of this Article in part revolve around the jurisdictional reach of the bankruptcy laws and their preclusive and invasive effects (breadth and depth of scope), which also can be called matters of procedure.<sup>247</sup> Therefore it is not surprising that a transnational bankruptcy law, drafted by blue ribbon international bankruptcy practitioners and scholars, might be anchored, if even at a subconscious

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245. See JACKSON, *supra* note 19, at 7–19.

246. See Adler, *supra* note 20, at 234 (breaking the concept of a bankruptcy claim into its two component parts: a debt (substantive) and the right to collect on that debt (procedural, enjoined by the moratorium)).

247. The third component, normative content of distributive provisions such as the priority rules, is the area where the Model Law makes its most ginger inroads, consistent with the theory that yielding on procedures is more palatable than yielding on substance for sovereigns.

level, in a procedural-substantive mindset.<sup>248</sup> Indeed, the Model Law has repeatedly been described as a “procedural” reform project, and many of its provisions, while not the focal point of this Article, pertain to facilitating the procedures by which courts and parties can communicate across different jurisdictions. Thus I am inclined to suggest, at least as a first level of description, that the areas such as Articles 14 and 31 where the Model Law pushes its tentative universalism are matters of procedure, or, more precisely, toward the procedural end of a procedure-substance continuum.

In summarizing the previous two subsections of this Article, I claim that the Model Law employed a model of gentle incrementalism to nudge some initial foray into universalism and allow acclimation by otherwise territorially inclined states that would balk were universalism proposed more aggressively. This was successful at garnering international support, even among these territorialist jurisdictions, because of the seemingly tangential nature of the areas on which universalism was sought and the indirect and possibly “subsurface” way in which that universalism was sought. This approach contrasted with the all-or-nothing approach of a comprehensive regime of full-fledged universalism that doomed previous international reform efforts. Furthermore, the specific areas at which this incrementalism was directed were situated toward the procedural end of a procedure-substance continuum. By taking this approach of procedural incrementalism, the drafters of the Model Law sought to capitalize upon the theorized willingness of states to be more likely to accept outcome differences on matters of procedure than on matters of substantive law. This explains not only the specific areas where the Model Law pushes universalism, but also the broader characterization of the Model Law as a “modest” document that is concerned, on the whole, with “procedural matters.” This heightened willingness to accept outcome differences on matters of procedure likely explains the Model Law’s ability to introduce some limited universalism notwithstanding ongoing international disagreement. It also explains the Model Law’s surprisingly clear choice-of-law rule, which was enacted with regard to seemingly low stakes matters. Thus the Model Law, as a successful mechanism of international bankruptcy reform, relies upon much more

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248. UNCITRAL’s Draft Legislative Guide lends further support for this point. See UNCITRAL Draft Legislative Guide, *supra* note 7, ¶ 30 (“Notwithstanding the variety of substantive issues that must be resolved, insolvency laws are highly procedural in nature.”).

than its status as a model law. It builds on a procedurally focused mode of graduated acclimation.

## VI. DEPLOYING THE MODEL: ANALYZING SUBSEQUENT INSOLVENCY REFORM

The above argument that the Model Law fosters pluralist universalism by embracing its two conceptual cores (by adopting a choice-of-law rule and by promoting the acceptance of at least some outcome differences) and the model I offer to explain its success at doing so (by pursuing incremental reform, along a discernable procedural-substantive continuum) can each be tested by analyzing the subsequent direction of transnational insolvency reform. First, if the Model Law advances universalism by deploying a robust jurisdiction-selecting choice-of-law rule, then we should expect to see the roll out of that rule in subsequent reforms. Second, if the Model Law advances universalism by fostering some cession of regulatory sovereignty and concomitant acceptance of outcome differences, and if (as I assume and discuss below) the acceptance of some outcome differences begets the more ready acceptance of further outcome differences in a “snowballing” effect, then we should expect an accelerating trend toward the acceptance of outcome differences, and perhaps even a move toward substantive harmonization. Finally, if the model propounded above accurately describes the Model Law’s success, we might predict the path of both these developments (the areas in which the center of main interests test is being used and the areas in which there will be increasing acceptance of outcome differences) to be matters sliding up the procedural-substantive scale. Each of these hypotheses is supported by at least some evidence.

### A. *Center of Main Interests Test*

Recent reform experiences around the world support the notion that “centre of main interests” is catching on in the insolvency realm. The EU Regulation on Insolvency (EU Regulation), which came into force in 2002, uses the same test to determine the primary jurisdiction of an intra-Union, cross-border insolvency.<sup>249</sup> The EU Regulation is a kindred

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249. See Wessels, *supra* note 6, at 494. Although the EU Regulation came into force in 2002 (after the Model Law), it was actually the resuscitation of an earlier convention that was initiated well before the Model Law. So it might be fairer to say that the Model Law drew the center of

spirit to the Model Law, although it adopts a secondary proceeding approach along the lines of Articles 28 and 29.<sup>250</sup> Similarly, the ALI's TIP, a compilation of general principles and of restatement summaries of domestic insolvency laws of the three NAFTA countries, also uses the center of main interests test.<sup>251</sup> The UNIDROIT Cape Town Convention Protocol on Matters Specific to Aircraft Equipment uses center of main interests to trigger the choice of law regarding the possessory rights of lessors or secured parties of collateral in the event of bankruptcy.<sup>252</sup> Center of main interests thus seems to be moving well beyond the Model Law,<sup>253</sup> and is finding explication in judicial decisions and scholarly analyses.<sup>254</sup>

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main interests tests from (what was to become) the EU Regulation rather than vice-versa. *See* Westbrook, *supra* note 8, at 2. Accordingly, Professor Westbrook suggests the Regulation template "heavily influenced" the Model Law. *Id.* at 3. Given the typical pace of international legal reform, *see* Wessels, *supra* note 6, at 505–06 ("Given the complexity of the issues and the diversities in countries' insolvency laws, the development over a period of less than a decade is quite remarkable."), it might be even more accurate to consider these European and UNCITRAL reforms as occurring roughly contemporaneously. (Parenthetically, it is quite clear that the ALI TIP followed both these projects, and represents, in the words of Professor Westbrook, "the next generation of reform," so at least its sequencing is clear. Westbrook, *supra* note 8, at 2.)

250. For a more detailed summary than space permits here, refer to Wessels, *supra* note 6, at 491–93. It is beyond the scope of this Article to explain in detail, but the secondary proceeding approach of the EU Regulation is conceivably "worse" than the territorialism lurking in Articles 28 and 29. *See* Westbrook, *supra* note 8, at 33–38. Indeed, Professor Tung disparages the EU Regulation as "essentially a territorial system with universalist pretensions." Tung, *supra* note 27, at 77. Some European commentators disagree with this pessimism. *See, e.g.,* Wessels, *supra* note 6, at 499 ("[M]odified territorialism"...in my opinion does not reflect the Regulation's model" and "[i]t is for this reason I use the description of 'coordinated universalism.'"). I accord the Europeans deference in characterizing their own laws.

251. The formation of the general principles in the ALI TIP was strongly consensus-driven, with no principle included if there was a "significant division of opinion along national lines." Westbrook, *supra* note 8, at 32.

252. Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, *adopted* Nov. 11, 2001, § XI, *available at* <http://www.unidroit.org/english/conventions/mobile-equipment/aircraftprotocol.pdf> (last visited Nov. 6, 2005).

253. It also arises in UNCITRAL's Draft Legislative Guide, Part II, *supra* note 177, and in the WORLD BANK PRINCIPLES, *supra* note 26, ¶¶ 180–81.

254. *See, e.g.,* Fletcher, *supra* note 179 (summarizing recent case law discussing center of main interests); Wessels, *supra* note 82, at 4–10. Although there are no official *travaux préparatoires* to the EU Regulation, there is a quasi-official report, the Virgós-Schmit Report, which was supporting documentation to the failed treaty. *See* Virgós-Schmit Report, *supra* note 240. The report found outlet by being partially codified in a long list of recitals that appears at the beginning of the EU Regulation. Regarding center of main interest, Recital 13, originally from the Virgós-Schmit report, provides some interpretive guidance: "The 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable to third parties." *Id.* Courts implementing this new law have relied upon this language. *E.g.,* Re BRAC Rent-A-Car Inc., [2003] 2 All E.R. 201, 207–08 (Ch.).

What is even more interesting is the test's robustness. There are at least two levels on which center of main interests could have been modified around the world. First, subsequent reform efforts might have tinkered with the test itself. The rule could have elevated "place of registered office" to a bright-line rule rather than a mere rebuttable presumption. Indeed such a neutral jurisdiction-selecting rule has precedent in Article 9 of the U.S. Uniform Commercial Code.<sup>255</sup> Alternatively, subsequent efforts could have softened the rule, along the lines of the amorphous standards found in the U.S. Restatement on the Conflicts of Laws.<sup>256</sup> Neither occurred. Consensus converged on center of main interests as an appropriate choice-of-law rule with an appropriate degree of specificity.<sup>257</sup>

Another way the center of main interests test might have been altered would have been to translate it into "local speak." For example, when the United States adopted the Model Law, it could have converted center of main interests into a more nationally recognizable standard, such as "principal place of business."<sup>258</sup> This would have captured the essence of center of main interests, but in a legal parlance more familiar to American lawyers. Yet the Americans intentionally used the "foreign" language of center of main interests to acclimate local bankruptcy professionals to a different, international lexicon.<sup>259</sup> Thus center of main interests' robustness seems to be well grounded, both in ongoing international reforms and parallel domestic enactments.

## B. *Acceptance of Outcome Differences*

### 1. *Acceptance of Outcome Differences Begetting Further Acceptance*

A second extrapolation from my model posits that there should be an increasing acceptance of outcome differences as the Model Law is

255. U.C.C. §§ 9-301, 9-307 (1998) and commentary.

256. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 6 (1971) (articulating a "most significant contacts" test).

257. The center of main interests test has now become entrenched enough to lead Bob Wessels to call it the "magic words." Wessels, *supra* note 82, at 4. The path, thus blazed, perhaps proved dependence-inducing.

258. *E.g.*, 28 U.S.C. § 1332(c)(1) (2000).

259. Westbrook, *supra* note 8, at 19 (discussing the Congressional hearings on the proposed Chapter 15 of the U.S. Bankruptcy Code, the recommendation of a minority of commentators that the committee use American phraseology, and the ultimate decision of the committee to track the Model Law's language verbatim).

rolled out and the first instances of outcome difference are felt. But this prediction itself rests upon a proposition that the initial acceptance of outcome differences will beget the further acceptance of outcome differences along an accelerating path. The support for this embedded assumption is the intuition that what lies at the root of territorialist states' aversion to outcome differences is often nothing more than free-floating concerns of sovereignty and discomfort with foreign laws.<sup>260</sup>

If that is so, then the best solution for easing this distrust may be simple exposure to foreign laws. The educational benefit of such exposure has been well noted:

Perhaps the most important benefits of comparative law are educational. It is true that many of these benefits can be generated by looking only at foreign national systems: experiencing the variety and contingency of law, learning tolerance toward other legal cultures, critically looking back at one's own rules, and so forth. Here, exactly what other legal system students are exposed to is actually of secondary importance; what is crucial is that they step outside of their own legal system at all.<sup>261</sup>

If what holds many states back from embracing universalism and its acceptance of outcome differences is in part a fear of "different" foreign law, then mere exposure to those different systems, and their potentials for different outcomes, may desensitize insolvency participants and prompt a more critical reexamination of the perceived evils of those foreign laws. Recall that the Model Law's administrative provisions remove procedural barriers to communication between insolvency tribunals in different countries.<sup>262</sup> Consequently, judges (and litigants) in

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260. Avi-Yonah, *supra* note 48, at n.22 ("Countries may object to having the law of another country apply within their territory as a matter of sovereignty, even if they agree with the policy of the law in question.")

261. Mathias Reimann, *Beyond National Systems: A Comparative Law for the International Age*, 75 TUL. L. REV. 1103, 1113 (2001). *See also* Mooney, *supra* note 48, at n.106

(While I cannot prove it, my participation in and observations of the process of negotiation and debate convinced me that the *only* reason for the objections to including the substance of Alternative A alone as a choice for a Contracting State is that Alternative A follows closely United States law—section 1110 of the Bankruptcy Code. Having witnessed the Convention and Protocol being modeled on the substance and policies of U.C.C. Article 9 and the Canadian personal property security acts, perhaps borrowing from United States bankruptcy law was simply 'too much' for the objecting states.)

262. MODEL LAW, *supra* note 5, art. 25. Indeed, facilitating discussion should in and of itself reduce the collective action problem that some contend is the main reason for an insolvency

cross-border proceedings will now be able to interact more directly and easily than ever before.<sup>263</sup> The dynamic reassessment of domestic bankruptcy laws by states under such a regime may well make territorially disposed states less nervous about foreign bankruptcy law and more amenable to the acceptance of outcome differences.<sup>264</sup> Moreover, because the defining theoretical attributes of a bankruptcy regime (broad, invasive reach of jurisdiction involving redistributive norms) lend themselves to a noisy international environment of conflicting and overlapping claims, the Model Law's facilitation of judicial dialogue may well reduce the noise and create situations where orderly communication can find more common ground than initially anticipated. Accordingly, it seems plausible that the initial acceptance of outcome differences will in turn beget the further acceptance of outcome differences.<sup>265</sup>

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system in the first place. The EU Regulation actually imposes an affirmative “duty to cooperate,” although the duty is directed at bankruptcy representatives rather than courts themselves. *See* Wessels, *supra* note 6, at 493; *see also* Jay Lawrence Westbrook, *The Duty to Seek Cooperation in Multinational Insolvency Cases*, ANNUAL REV. OF INSOLV. L., 187 (2005) (arguing for an affirmative duty on courts to cooperate “actively” in multinational insolvencies with proceedings in multiple countries).

263. *See* Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1113–14 (2000) (discussing the increased cross-border “dialogue” of appellate courts with their international peers). Professor Westbrook has already noted the significant challenges on matters as simple as using a common lexicon. Westbrook, *supra* note 105, at 567–68 (explaining the need for exposure to both foreign terms and foreign constructs of insolvency law, such as the American notion of a “debtor-in-possession” who may act within the “ordinary course of business”) (citing 11 U.S.C. §§ 363(c), 1107).

264. An illustration of this phenomenon might be in the alteration of domestic notice requirements in the wake of the Model Law. *See* Wessels, *supra* note 6, at 505 (“This Model Law aims to urge and inspire in a way to adapt the national insolvency law.”). *Cf. Colloquy*, *supra* note 2, at 2274 (“Indeed, to the extent that the different laws are just different attempts to reach the same goals, countries could learn from the experiences of other nations and update their law accordingly.”).

265. One of the recurring concerns of transnational insolvency is the information costs of gaining familiarity with different countries' laws. The participants in the ongoing debate differ sharply in their assessments. *Colloquy*, *supra* note 2, at 2261–62 (“The largest potential cost is getting a handle on the law of the country selected [under a contractarian approach to transnational insolvency].”). Professor Rasmussen might be troubled at the point made in the text—that the Model Law would promote and perhaps require exposure to multiple states' laws—given his prediction that a menu approach would more efficiently sharpen the international focus onto understanding the laws of only a few. *Id.* But the point I wish to make is that the Model Law is helpful as a stepping stone to a future adoption of universalism. It promotes exposure to foreign laws even in the non-universalist parallel proceedings, which will make the eventual jump to full-fledged universalism at a future time less costly, when legal education becomes a sort of sunk cost. Put another way, I suppose I anticipate the direct and indirect benefits from a robust comparison of laws outweighing the costs of learning those laws.



## 2. *Evidence of Increased Acceptance of Outcome Differences and Harmonization*

The evidence for an increased acceptance of outcome differences is harder to unearth than for the rollout of center of main interests. One illustration would be a rise in deference to foreign insolvencies under the Model Law than under pre-existing regimes such as Section 304(c) of the U.S. Code, but the domestic enactment of the Model Law is not yet widespread enough to test this. On the other hand, the EU Regulation, which is premised upon the same spirit as the Model Law, shows some promising trends in jurisdictional deference. In one early case decided under the Regulation (which only came into force in 2002), *Re Daisytek-ISA Ltd.*,<sup>266</sup> the High Court in the United Kingdom opened a main insolvency proceeding, finding that it was the center of main interests not only of the English debtor, but also of its French and German-incorporated subsidiaries.<sup>267</sup> This decision, in effect, rebutted the presumption of center of main interests being the country of registered office of the subsidiaries. The French trial court, as did the German analogue, disavowed this jurisdictional conclusion and opened a rival main proceeding for the French subsidiary, chafing at what it felt was the British court's aggrandizement of jurisdiction.<sup>268</sup> But the Appeals Court in Versailles reversed, clarifying that in international bankruptcies under the EU Regulation, cooperation is required and courts should not second-guess a prior court's determination of center of main interests.<sup>269</sup> To be sure, this evidence is at best correlational rather than causal regarding the role of the Model Law, but it is at least

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For a debate on the information costs of territorialism for lenders setting the price of credit, compare Guzman, *supra* note 25, at 2200–01 (predicting higher information costs under territorialism due to lenders' needs to understand multiple bankruptcy laws, not just the law of the debtor's home jurisdiction) with LoPucki, *supra* note 3, at 754 (challenging both the extent to which lenders need to incorporate insolvency law into pricing credit and the conclusion that territorialism will be more costly).

266. [Claim Nos. 861–76 of 2003], [2003] B.C.C. 562 (High Court of Justice (Ch. D.), Leeds, May 16, 2003).

267. For a detailed discussion, see Wessels, *supra* note 82, at 20–22.

268. See Trib. comm. pont., May 26, 2003, Cass. com.

269. See CA Versailles, 24eme ch., Sep. 4, 2003, arret no. 12, available at [http://www.iiiglobal.org/country/european\\_union/Daisytek\\_CA\\_Versailles.pdf](http://www.iiiglobal.org/country/european_union/Daisytek_CA_Versailles.pdf) (last visited Nov. 6, 2005). The French public prosecutor has appealed this decision to the French Supreme Court (Cour de cassation) on the grounds of public policy. This apparently was a violation of the Principle of Mutual Trust, a European cognate of full faith and credit with regard to jurisdictional decisions. See Wessels, *supra* note 6, at 503 n.39. For another European discussion—critical of the *Daisytek* outcome—see Christoph G. Paulus, *Zustandigkeitsfragen nach der Europäischeen Insolvenzverordnung* (working paper and English abstract on file with author).

consistent with the theoretical predictions of greater acceptance of foreign deference and cooperation in cross-border bankruptcy. Because at this nascent stage empirical claims are at best speculative, I present anecdotally the observation from conversations with European colleagues that a decade ago a French court would likely find it “unthinkable” that an English corporate affiliate could lead to the application of British insolvency law of an otherwise “French” debtor.

What might demonstrate further acceptance of outcome differences more strikingly would be if international harmonization were shown to be on the rise after the Model Law. Again, there is some tentative evidence here that is consistent with further movement building upon the Model Law’s base. The first development is UNCITRAL’s Draft Legislative Guide on Insolvency Law.<sup>270</sup> This enormous document, building on an earlier effort of the World Bank,<sup>271</sup> is an ambitious attempt to set out summaries and principles of domestic insolvency regimes, and it contains broad, standards-based recommendations for best practices for domestic bankruptcy codes. Multiple years in the drafting, the final text was adopted by UNCITRAL’s Working Group in 2004.<sup>272</sup> To be sure, many difficult questions are avoided in this document, but the distillation of general principles arguably begins the road to harmonization.<sup>273</sup>

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270. UNCITRAL Draft Legislative Guide, *supra* note 7.

271. See WORLD BANK PRINCIPLES, *supra* note 26.

272. U.N. COMM. ON INT’L TRADE LAW, UNCITRAL LEGISLATIVE GUIDE ON INSOLVENCY LAW (2004). The document is divided into two parts. Part One is a sort of preamble that propounds the “Key Objectives and Structure of an Effective and Efficient Insolvency Law.” Part Two breaks out those specific provisions and employs a tripartite structure: a survey of various approaches to the insolvency issue discussed; a recommendation based on those experiences; and contents of a model legislative provision to implement those recommendations. The recommendations are mostly soft. See, e.g., *id.* at 198 (“The law should protect a general right of set-off existing under general law that arose prior to the commencement of insolvency proceedings, subject to the application of avoidance provisions.”). On the other hand, and further supporting my model, the document gets specific on more technical (and arguably procedural matters), such as voting methods in reorganization proceedings. See, e.g., *id.* at 277:

To facilitate voting and recognize the increasing use of electronic means of communication, it may be desirable to permit voting to take place in person, by proxy and by electronic means. The majority should be calculated by reference to those actually voting, whether in person, by proxy or by other means.

Interestingly, the publication of the Draft Legislative Guide in September 2003 had to omit the choice of law recommendations, which came in January 2004. These recommended choice of law rules are messy, but struggle toward endorsing a form of universalism. See, e.g., *id.* at 89 (assuming that the center of main interests test would presumptively determine controlling insolvency law under rule of *lex fori concursus* in crafting regulated financial markets exception).

273. Building upon the reform of the EU Regulation, an apparently self-appointed “Working

A second indication toward harmonization is the focus on diminishing the special priority provisions that accord distributional preference. With each insolvency regime having its idiosyncratic provisions of special creditors who get paid ahead of the rank and file (the United States boasts no fewer than seventeen types of them),<sup>274</sup> the number of friction points between nations is high. Yet a trend is emerging toward downplaying these priorities. UNCITRAL's Legislative Guide begrudgingly countenances these domestic priorities, mindful of the normative, country-specific policies they embrace, but then admonishes countries to reduce reliance on them as much as possible.<sup>275</sup> And this call for diminution has been heard. In the 2002 revisions to the United Kingdom's Enterprise Act, there was an express reduction in the number of priority creditors in bankruptcy.<sup>276</sup> The elimination and reduction of priority provisions for special creditors provides fewer points for sovereigns to fight about when comparing the varying potential dispositions of a bankruptcy. With fewer areas on which the outcomes can differ, the fewer incidences there will be in which a state is called upon to cede regulatory sovereignty in an outcome-determinative manner. Thus there is preliminary evidence to indicate that the Model Law is correlated (and possibly causally connected) with an increase in the acceptance of outcome differences in bankruptcy.<sup>277</sup>

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Group on European Insolvency Law" presented "Principles of European Insolvency Law," in Brussels in 2003. This document is a collection of fourteen principles purporting to cull general trends of European substantive insolvency law. The Working Group has also followed the ALI TIP model and prepared summaries of domestic insolvency law of ten of the EU member states. See PRINCIPLES OF EUROPEAN INSOLVENCY LAW (Bob Wessels ed.), available at [http://www.iiiglobal.org/country/european\\_union/PEILABIjournal\\_appended.pdf](http://www.iiiglobal.org/country/european_union/PEILABIjournal_appended.pdf) (last visited Nov. 6, 2005).

274. 11 U.S.C. § 507(a) (2000).

275. See U.N. Comm. On Int'l Trade Law, Draft Legislative Guide On Insolvency Law ¶ 628, U.N. Doc. A/CN.9/WG.V/WP.70 (2004) [hereinafter UNCITRAL Draft Legislative Guide (2004)] ("The provision of priority rights has the potential to foster unproductive debate on the assessment of which creditors should be afforded priority and the justifications for doing so."). Nevertheless, the Draft Legislative Guide concedes cryptically that there may be a "need to strike a balance between private rights and public interests," in creating priority provisions, *id.* ¶ 631, and ultimately recommends that a bankruptcy law should "minimize priorities" and "set out clearly the claims" that will receive that priority, *id.* at 237. The World Bank is more forgiving and recognizes that countries may wish to accord priority status to employees to "ensur[e] employee security," WORLD BANK PRINCIPLES, *supra* note 26, ¶ 148, perhaps mindful of a different audience base.

276. See E. Bruce Leonard, *The International Year in Review*, AM. BANKR. INST. J. 22 (Dec/Jan 2004/2005) (discussing abolition of priority for governmental claims).

277. What is also interesting is the difficulty at cabinning areas of bankruptcy once international cooperation has begun. For example, although the EU Regulation thought it "best to

### C. *Vector of Reform*

As modeled above, the incrementalist path to transnational insolvency reform suggests that the areas on which sovereigns will be asked to yield will proceed from perceived lower-stakes matters to higher-stakes matters. This may move along a spectrum from more-procedural provisions to more-substantive provisions. Some subsequent efforts to the Model Law appear to fit this trend.<sup>278</sup>

Recall that Article 14 of the Model Law forced some acceptance of outcome difference regarding the standard and content of international notice.<sup>279</sup> In bankruptcy, notice likely falls at the procedural end of a spectrum. At the other end of the spectrum are the meatier provisions, such as the priority rules. Searching for a middle ground between these two elements of a bankruptcy law, one might consider the stay. The stay that operates at the outset of a case within many systems provides what conceivably is a “middle stakes” provision. On the one hand, a bankruptcy stay is simply a procedural order temporarily enjoining other actions.<sup>280</sup> On the other hand, the halting of individual collections is critical;<sup>281</sup> it forces joint resolution of the collective action problem that many contend is the theoretical anchor of a bankruptcy system.<sup>282</sup> So it might be fair to consider the bankruptcy stay as “procedure plus” when placed upon a procedural-substantive continuum.

Using the model of procedural incrementalism, we would be unsurprised if the next domain of sovereignty cession in bankruptcy came on matters of the stay. Recall that the Model Law already requires a recognizing state to impose a stay upon recognition of a foreign main bankruptcy proceeding; this stay operates coextensively with the stay, if any, that is imposed under domestic insolvency law.<sup>283</sup> The ALI’s TIP,

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postpone” the difficult issue of corporate groups, that matter became inevitable as cases had to make decisions over center of main interests in corporate bankruptcies. Wessels, *supra* note 82, at 18.

278. Although beyond the scope of this Article, a cursory review of UNCITRAL’s Draft Legislative Guide reveals greater specificity on more technical, procedural matters (such as majority-vote calculation rules) than on other, more substantive provisions (such as avoidance rules), consistent with my model. *See generally* UNCITRAL Draft Legislative Guide (2004), *supra* note 275.

279. MODEL LAW, *supra* note 5, art. 14.

280. The ALI TIP places matters of stays under the heading “Procedural Principles.” *See* ALI TIP, *supra* note 8, Procedural Principles 4–6; *see also* Adler, *supra* note 20, at 235–36.

281. *See* LoPucki & Triantis, *supra* note 80, at 333.

282. *See* JACKSON, *supra* note 19, at 7–19.

283. *See* MODEL LAW, *supra* note 5, art. 20(1). Strictly speaking, this is perhaps not so much

expressly noting its incremental extension of the Model Law,<sup>284</sup> and also employing the packaging of procedure,<sup>285</sup> goes a step further. It suggests that the NAFTA countries modify their domestic bankruptcy laws beyond the provisions of the Model Law to provide for the imposition of the domestic law stay to be automatic upon the *filing* of a foreign proceeding in a NAFTA country, rather than first requiring the *recognition* of that foreign proceeding as a foreign main proceeding by a domestic court.<sup>286</sup> Thus the ALI TIP pushes universalism even further than the Model Law, and does so, incrementally, with the stay.

A more striking acceptance of outcome differences would be to force the domestic state's courts to accord the automatic stay not simply a co-extensive scope with domestic law, as it does under the Model Law, but the scope a stay would receive under the *foreign state's* laws. At the extreme, this might force an "anti-stay" jurisdiction,<sup>287</sup> to enter a stay upon the recognition of a foreign main proceeding from a "pro-stay" jurisdiction.<sup>288</sup> This appears to be the step taken by the EU Regulation, and thus moves universalism a notch even further.<sup>289</sup> Accordingly, it does seem that other reform efforts are building upon the Model Law's foundation and moving, incrementally, along what could well be a procedural continuum.<sup>290</sup>

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an acceptance of outcome differences as it is an acceptance of the de facto foreign exercise of domestic legal authority, which is a related if perhaps lesser sovereign concession.

284. See ALI TIP, *supra* note 8, Recommendation 2: Automatic Stay & cmt. ("This recommendation again follows the Model Law, but goes further.")

285. See *id.* at 35, General Principle II ("This Project is primarily devoted to procedural questions.")

286. See *id.*, rec. 2 & cmt. ("It would mean that if the center of a debtor's main interests is in a NAFTA country, a bankruptcy filing in that country would produce a moratorium in all three countries immediately and automatically without any need for court action in the first instance.")

287. See Anderson, *supra* note 31, at 705; see also Bufford & Yanagida, *supra* note 42 (noting that under certain Japanese procedures pre-petition employee claims are not stayed). Possibly because of this extreme stance, Japan scaled back Article 20 in enacting the Model Law and restricted the scope of the automatic stay to enter upon recognition of a foreign main proceeding. See Leonard, *supra* note 276, at 22 (discussing domestic enactments). On the other hand, Japan's recent revision to its Corporate Reorganization Law institutes some stay-like restraints on creditors in a reorganization. See *id.*; see also Bufford & Yanagida, *supra* note 42.

288. See 11 U.S.C. § 363. Indeed, this seems not that much more conceptually disharmonious than Article 31's imposition of a presumption of insolvency by recognition of a foreign bankruptcy proceeding that has no insolvency screen.

289. The EU Regulation's convoluted secondary proceedings approach makes its overall "net universalism" vis-à-vis the Model Law's difficult to measure. Also, as discussed above in note 251 and accompanying text, the overlap between the EU Regulation and the Model Law is somewhat untidy from a chronological perspective.

290. UNCITRAL's Draft Legislative Guide gets a bit bolder in pushing for harmonization with regard to stays, suggesting that they comport with the key objectives of bankruptcy systems

## VII. CONCLUSION

Debate in commercial law has been proceeding as rapidly as international economic integration. High-profile collapses from Parmalat to Yukos have attracted increased focus to international financial default. Yet the field of transnational insolvency has remained—at least until the past few years—stubbornly resistant to reform.<sup>291</sup>

The UNCITRAL Model Law on Cross-Border Insolvency shattered that stalemate and received widespread enthusiastic reception. Indeed, it has just become Chapter 15 of the U.S. Bankruptcy Code. In doing so, it presented a puzzle: why was this mechanism of reform able to succeed in the face of such past failure? What unique theoretical characteristics of bankruptcy law did it tap into? This Article proposed a model of how the Model Law was able to win international acceptance even in the absence of theoretical and political consensus of how best to design a transnational insolvency regime. It argued that the Model Law's success lay in the need for incremental reform in bankruptcy, reform that allows sovereignty-sensitive states to acclimate to the extraterritorial reach of foreign laws. It further proposed that that success may in turn have relied upon the ability of the drafters to capitalize on the much-discussed distinction between substance and procedure in conflicts theory—a distinction that some scholars contend is canonical to the thorny challenges of international conflicts. Such appreciation and exploitation provided the key both to developing a workable choice-of-law rule and to fostering among sovereigns the acceptance of outcome differences in international bankruptcies, the two theoretical foundations of the universalist paradigm.

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and that they should even apply to secured creditors (which is not true in many jurisdictions), although the Guide then adds, with unusual specificity, that secured creditor stays should be short, perhaps between 30 to 60 days. See Draft Legislative Guide, Part II, *supra* note 177, at rec. 37(c) & n.52. Another example of moving up the procedural spectrum might be the doctrine of substantive consolidation, which is a cousin of piercing the corporate veil and permits the collapsing of independent corporate entities of an affiliated conglomerate into one bankruptcy proceeding. See, e.g., *Alexander v. Compton (In re Bonham)*, 229 F.3d 750, 762 (9th Cir. 2000) (“A substantive consolidation seriously affects the substantive rights of the involved parties. The bankruptcy rules recognize as much.”). The various *Daisytek* decisions under the EU Regulation have indirectly begun to articulate a European standard for this doctrine. See Wessels, *supra* note 82, at 20.

291. Academics have been calling for reform for quite some time. See, e.g., John Lowell, *Conflict of Laws as Applied to Assignments of Creditors*, 1 HARV. L. REV. 259, 264 (1888) (advocating universalism).

There is (at least) one serious concern one could have with my model. One could agree with all that I have said regarding the nature of incremental mechanisms of legal reform but then quarrel with the implicit conclusion that such reform in bankruptcy is part of a multi-staged journey from “proto” to “full” universalism. That is, one could have reservations about the momentum of this trajectory. Reform might stall in a position where it cannot proceed further.

This concern is not without merit. Indeed, if my model is premised upon states starting with low stakes matters on which it is comparatively easy to garner international support and then moving up a continuum toward more substantive matters, it might well be that as the cession of sovereignty gets increasingly painful, states will reach a balking point.<sup>292</sup> If this is so, then the full “reform” of a pluralist universalist regime may never come to fruition. Indeed, in a worst-case scenario, a Frankenstein interim regime might entrench a new status quo that is less efficient and desirable than might have otherwise been obtained under naked territorialism.<sup>293</sup>

I am not as yet so despondent. The principal reason for optimism stems from the discussion above pertaining to the increased acceptance of outcome differences fostered by the Model Law and its progeny.<sup>294</sup> The danger of reform stalling depends upon how willing states will be to countenance the increasing invasion of foreign bankruptcy laws on proceedings arguably within their sovereign jurisdiction.<sup>295</sup> As discussed above, those are unlikely to be static preferences, because the mere exposure itself to foreign systems may have a positive influence on states’ perceptions of the undesirability of ceding to other states’

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292. Conceivably, this is what happened with Japan’s modification of article 20 to scale back the universalist presumption of an automatic stay in accordance with the home state’s laws. Japan is an anti-stay jurisdiction and has a long tradition of territorialism.

293. A bankruptcy regime’s theoretical reliance upon a market-symmetric scope can be distorted by unpredictable stays based on differing controlling jurisdictions.

294. There will also always be academic pressure. See Mooney, *supra* note 193, at 204 (“Useful as harmonization efforts concerning procedural aspects of insolvency law for multinational debtors may prove, perhaps it is time to step up efforts to modernize and harmonize the substantive law...”). Interestingly, the first step Professor Mooney proposes to facilitate this harmonization in the secured transactions context is to begin with requiring an international public registry of security interests, i.e., a system of publicizing notice of security interests—arguably a procedural starting point.

295. Cf. Michael Schroeder, *New Role for SEC: Policing Companies Beyond U.S. Borders*, WALL ST. J., July 30, 2004, at A1 (detailing foreign securities agencies’ enthusiasm over the extraterritorial application of U.S. securities laws and deployment of SEC enforcement resources).

bankruptcy laws.<sup>296</sup> Moreover, participants of a transnational bankruptcy regime will grow increasingly versed in foreign states' laws, with British lawyers becoming conversant with "section 363 hearings" and Americans talking about "administrators" and "floating charges," making those foreign laws ultimately less threatening. More importantly, both users will start to talk about the "center of main interests" of a corporate bankrupt.<sup>297</sup> In short, I suspect nothing will succeed like success itself and that the pace of reform will only quicken.<sup>298</sup>

There are also at least two directions for future research that require mention. First, the model presented here for reform is not meant to be exclusive. There may be parallel mechanisms of international reform operating in concert with procedural incrementalism. One interesting possibility is substantively animated incrementalism. Under such an approach, commercial reformers might try to carve out a discrete area of insolvency regulation and propose a complete, comprehensive set of priority rights. Such an approach could still follow an incrementalist path, beginning with, say, multi-story commercial office buildings, then all commercial real estate, then all real estate, and so forth. And there is some evidence of this other road, such as the Cape Town Convention on International Interests in Mobile Equipment and the Protocol thereto on Matters Specific to Aircraft Equipment.<sup>299</sup> In these documents, a highly

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296. UNCITRAL's Draft Legislative Guide seems premised precisely upon this sort of dynamic model of exposure and harmonization in advocating the benefits of the Model Law. *See* Draft Legislative Guide, Part II, *supra* note 177, ¶ 166 ("[A]s the differences between insolvency laws increasingly narrow and greater convergence emerges, there are fewer reasons for maintaining the territorial approach.").

297. *See* Wessels, *supra* note 82, at 25 (advocating the creation of a database translating European caselaw interpreting the EU Regulation and arguing that such a device will further the goal of harmonization).

298. More generally, as Dean Kramer has discussed, states also derive their own utility from "diffuse reciprocity." *See* Kramer, *supra* note 34, at 1026–27 (discussing the term "diffuse reciprocity" coined by Robert Keohane in *INTERNATIONAL INSTITUTIONS AND STATE POWER*, 134–48 (1989) (Part II)). Diffuse reciprocity would fall under Kramer's broader label of "multistate policies." *See* Kramer, *supra* note 37, at 313. It refers to situations where a rough equivalence of interests will pull states toward cooperation by fostering mutual sacrifice and commitment for a greater good. *See* Kramer, *supra* note 34, at 1027 ("Note also that diffuse reciprocity alone will not generate cooperation. It is, rather, a force that comes into play when other factors, like self-interest, create incentives to cooperate but the full benefits and costs of doing so are not known with precision."). Kramer predicts this cooperative impulse will be strong in the commercial arena, which seeks to provide "a legal regime whose enforcement is uniform and predictable." *Id.* at 1016.

299. The convention and protocol were assembled by UNIDROIT. The convention was



discrete area of commercial practice (the financing of aircraft) has been carved out for some express harmonization. The draft convention spells out the actual priority for secured liens on aircraft and their treatment in bankruptcy.<sup>300</sup> Rich ground for further analysis exists regarding the interaction between such substantive carve-outs and procedural vehicles such as the Model Law.

A second issue has to do with the role of institutions in designing international law. The Model Law was the product of UNCITRAL, a quasi-legislative international body. Yet other projects of even greater ambition, such as the EU Regulation and the ALI TIP, operate at a regional level, suggesting that even more fruitful paths for reformers lie at the sub-global level. Intuitively, a smaller negotiating table surely enables more meaningful consensus. Does this mean that bilateral treaties, so popular in the cross-border taxation context, might provide an example for future reform? What about the successful “model” bilateral tax treaties promulgated by the OECD?<sup>301</sup> On the other hand, it seems like truly global institutions, such as the World Bank and International Monetary Fund, are always important. These international institutions play key roles in insolvency law by cross-referencing their own reform efforts and building upon the accelerating cooperative impetus. Concluding its 1999 Report on “Orderly and Effective Insolvency Procedures,” the IMF proposes that in the cross-border context its objectives can be best met by “[t]he adoption by countries of the Model Law on Cross-Border Insolvency prepared by UNCITRAL.”<sup>302</sup> Thus it seems that both regional and global institutions can serve as cheerleaders, taskmasters, and catalysts to encourage and

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opened for signature following a three-week diplomatic conference in Cape Town, South Africa in October-November 2001 and stemmed from an original proposal to the Governing Council of UNIDROIT by the Canadian government in 1988. *See generally* Charles W. Mooney, Jr., *The Cape Town Convention on International Interests in Mobile Equipment and the Aircraft Equipment Protocol: A New Era for Aircraft Financing*, 18 AIR & SPACE L. 4 (2003).

300. Article 30(1) of the Convention provides that a security interest registered under the international registry established under the Convention is to be “effective,” i.e., accorded priority, in a subsequent insolvency proceeding. CAPE TOWN CONVENTION, *supra* note 190, art. 30(1). As an interesting twist, certain procedural matters, such as the remedy to enforce a security interest created under the Protocol, are left to the domestic laws of the enacting state. *See id.*, art. 14. The structure of the Convention seems to anticipate the addition of further protocols beyond aircraft equipment. *See id.*, arts. 2(2), 49 & 51. Indeed, UNIDROIT is already in the process of drafting protocols for rail equipment and space equipment.

301. *See* OECD Model Tax Convention on Income and Capital, *supra* note 213.

302. INTERNATIONAL MONETARY FUND, LEGAL DEPARTMENT, ORDERLY & EFFECTIVE INSOLVENCY PROCEDURES, KEY ISSUES 15 (1999) at 82, *available at* <http://www.imf.org/external/pubs/ft/orderly/index.htm> (last visited Nov. 6, 2005).

assist countries in synchronizing their efforts to develop a coherent international system. The interaction between these institutions and the procedural mechanisms of bankruptcy reform would benefit from further exploration.

Reform in transnational insolvency law—both in explicit cross-border legal regimes and domestic legal regimes that have international reach—is exploding. Further efforts can be random and experimental, creating a natural laboratory. Or they can proceed with an eye to critical analysis of which mechanisms seem to work at securing positive international reception, such as the Model Law, and to try to understand why. Practitioners, regulators, and scholars will be well advised to follow the latter path. This Article offers the model of procedural incrementalism to assist them in their important task.<sup>303</sup>

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303. Also beyond the scope of this Article but worthwhile of future inquiry is the potentially unique nature of bankruptcy law within commercial law more generally. An initial distinguishing characteristic that comes to mind is the compulsory nature of the law that is not currently amenable to opt out through contractual arrangement, a point of some academic discussion already. See Rasmussen, *supra* note 35, at 17–19. This may render it inappropriate for the voluntary “private choice” of international jurisdictional competition advocated by some scholars. See, e.g., Stephan, *supra* note 11, at 788–96; John O. McGinnis, *The Political Economy of International Antitrust Harmonization*, 45 WM. & MARY L. REV. 549, 577–87 (2003) (preferring jurisdictional competition with an antidiscrimination rule to harmonization and the international regulatory regime espoused by, e.g., Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. REV. 343, 400 (1997)). Thus whether bankruptcy law can even enter a race, regardless of whether it is to the top or bottom, requires further discussion at another time. For the impatient reader, consult LYNN M. LOPUCKI, *COURTING FAILURE* (2005) (chronicling domestic and global trends in forum selection and purported “judicial competition” in bankruptcy).