

International Insolvency

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Preface

This monograph was conceived by the International Law Relations Committee of the National Conference of Bankruptcy Judges while Judge Marcia S. Krieger was chair of the committee. The purpose of this monograph is to provide a ready reference for federal judges, including federal bankruptcy judges, on the law governing insolvency cases with transnational dimensions and, where appropriate, to provide some guidance. With the growing internationalization of economic relations and business empires, these issues arise with increasing frequency in the federal courts.

This monograph summarizes the statutory and case-law authority on international insolvency. The sources of law on this subject are undergoing rapid change. While U.S. statutes and case law traditionally have been the primary sources of law in this area, they are being supplemented by a model law in many countries and by regulation in the European Union.

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I. Introduction

The insolvency or reorganization of a multinational enterprise facing financial difficulties can present extremely complex international legal problems. This monograph deals with transnational or cross-border insolvencies and the legal regime that governs the resolution of these controversies.

A. Nature of International Insolvencies

In its simplest form, a transnational insolvency may involve an insolvency proceeding in one country, with creditors located in at least one additional country. In the most complex case, it may involve subsidiaries, assets, operations, and creditors in dozens of nations.¹

One of the most noteworthy features of international bankruptcy law is the lack of legal structures, either formal or informal, to deal with an insolvency that crosses national borders. In addition, problems unique to transnational insolvency cases require special consideration.

A number of large international insolvencies in recent years have brought to the forefront the importance of developing a system for dealing with such insolvencies. For example, *Maxwell Communication Corp. v. Société Générale (In re Maxwell Communication Corp.)*² involved a media empire headquartered and managed in England with corporate entities and assets in the United Kingdom, the United States, and Canada, and thus involved numerous insolvency proceedings in both

1. See, e.g., *Maxwell Communication Corp. v. Société Générale (In re Maxwell Communication Corp.)*, 93 F.3d 1036 (2d Cir. 1996) (involving two main proceedings, one in the United States and one in the United Kingdom). See also *United States v. BCCI Holdings (Luxembourg) S.A.*, 48 F.3d 551 (D.D.C. 1995) (involving subsidiary banks operating in some 75 countries and proceedings in the United Kingdom and the United States); *In re Olympia & York Dev. Ltd.*, [1993] 12 O.R.3d 500 (Ont. Gen. Div.) (proceedings in Canada and the United States); *In re Maruko Inc.*, 160 B.R. 633 (Bankr. S.D. Cal. 1993) (proceedings in the United States, Japan, and Australia); *In re Axona Int'l Credit & Commerce Ltd.*, 88 B.R. 597 (Bankr. S.D.N.Y. 1988) (proceedings in Hong Kong and the United States).

2. 93 F.3d 1036 (2d Cir. 1996).

the United Kingdom and the United States.³ *United States v. BCCI Holdings (Luxembourg) S.A.*⁴ involved the liquidation of a parent bank headquartered in Luxembourg with banking establishments in some seventy-five countries.⁵ *In re Olympia & York Developments Ltd.*⁶ involved real estate empires in both the United States and Canada. *In re Maruko*⁷ involved a Japanese corporation with businesses in Japan, Australia, and the United States, and insolvency proceedings in each of those countries. In each of these cases, and in many others, the existing insolvency regimes of the applicable countries were insufficient to deal with the transnational legal problems.

Cross-border insolvency problems are not limited to the failure of major international businesses. Even in small cases, assets may be located in various countries, for good or for bad reasons. A domestic business may have foreign branches or subsidiaries, or a foreign business may have domestic branches or subsidiaries. Property located in a foreign country may provide security for a debt so that domestic assets can be used to pay unsecured creditors. Foreign creditors may have valid claims in domestic bankruptcy cases, and domestic creditors may have valid claims in foreign bankruptcy cases. Any one of these situations raises a transnational insolvency problem.

The increase in transnational insolvencies arises from the growth in international trade. Traditionally, banking institutions financed international transactions through letters of credit and resolved any problems that arose when particular debtors were unable to settle their international accounts. The growth of multinational businesses in the twentieth century has largely bypassed the banking system and created the possibility of transnational insolvencies.

3. *Maxwell* presents perhaps the most innovative solution to these problems: The U.S. bankruptcy judge appointed an examiner to harmonize the British and U.S. proceedings to permit a reorganization under U.S. law that would maximize the return to creditors. *Maxwell*, 93 F.3d at 1042. The examiner ultimately succeeded in negotiating a joint plan of reorganization under U.S. law and a scheme of administration under English law that provided for the partial reorganization and partial liquidation of the Maxwell empire.

4. *BCCI Holdings*, 48 F.3d at 551.

5. *Id.*

6. *In re Olympia & York Devs. Ltd.*, [1993] 12 O.R.3d 500 (Ont. Gen. Div.).

7. *In re Maruko Inc.*, 160 B.R. 633 (Bankr. S.D. Cal. 1993).

I. Introduction

The impact of international insolvency law is not limited to the legal issues involved in the pathology of failed and failing businesses. International insolvency law is also a major front-end factor in international investment and the extension of international credit. The availability and effectiveness of insolvency procedures is an important point in assessing nonmarket risk:⁸ It is thus an important investment consideration for both private investors and public institutions such as the World Bank and the International Monetary Fund.

The legal rules governing insolvency law and practice are rooted deeply in the legal traditions of individual countries.⁹ In part this arises because insolvency law preempts and supersedes many rules of both substantive and procedural law. Moreover, the importance of national economic interests varies from country to country, resulting in very different insolvency laws.

B. *Universality vs. Territoriality*

Multinational insolvency proceedings frequently result in competing interests among the jurisdictions involved. The two dominant models for addressing international insolvency problems are universality and territoriality. Under the universality approach, toward which U.S. courts are moving, an international insolvency case is treated, insofar as possible, as a single case and the creditors treated equally wherever they might be located. Under the territoriality approach, each country looks out for its own creditors before contributing assets to pay creditors in other countries.

Under the territoriality approach, each nation conducts its own insolvency proceeding with respect to the assets located within its jurisdiction and disregards any parallel proceedings in a foreign nation. The court uses “local assets to satisfy local claimants in local proceedings with little regard for proceedings or parties elsewhere”¹⁰ Territoriality takes the pessimistic view that local

8. See Harold S. Burman, *Private International Law*, 32 Int'l Law. 591, 592 (1998).

9. See Manfred Balz, *The European Union Convention on Insolvency Proceedings*, 70 Am. Bankr. L.J. 485, 486 (1996) [hereinafter Balz].

10. *Maxwell Communication Corp. v. Barclays Bank* (*In re Maxwell Communication Corp.*), 170 B.R. 800, 816 (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). See generally Charles Booth, *Recognition of Foreign Bankruptcies: An*

claimants ultimately will not receive their fair share of the assets in a foreign insolvency. Consequently, under this approach a local court must provide for these creditors as well as possible, given the assets within the court's jurisdiction.

Under the universality approach, a single forum should apply "a single legal regime to all aspects of a debtor's affairs on a worldwide basis."¹¹ Universality is based on the assumption that, without coordination of laws and courts of different jurisdictions in transnational cases, the optimal use and distribution of assets cannot be accomplished, and asset waste and turmoil are certain to result.¹²

In practice, no country applies either the universality or territoriality approach without modification.¹³ United States bankruptcy law follows a modified form of universality, which accepts as its central premise that assets should be collected and distributed on a worldwide basis.¹⁴ This view rests on the assumption that, in a system of international cooperation, any loss to local interests in one case will be roughly balanced by a gain in another case, while commerce in general will benefit greatly from the application of predictable rules.¹⁵ However, U.S. law reserves to local courts the discretion to evaluate the fairness of home country procedures and to protect the interests of local creditors in certain circumstances.¹⁶ The enactment of Bank-

Analysis and Critique of the Inconsistent Approaches of United States Courts, 66 Am. Bankr. L.J. 135, 137-38 (1992); Lawrence J. Westbrook, *Choice of Avoidance Law in Global Insolvencies*, 17 Brook. J. Int'l L. 499 (1991).

11. See *Maxwell*, 170 B.R. at 816; see also *In re Hourani*, 180 B.R. 58, 63 n.9 (Bankr. S.D.N.Y. 1995).

12. See *Hourani*, 180 B.R. at 63-64.

13. See André J. Berends, *The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview*, 6 Tul. J. Int'l & Comp. L. 309, 314 (1998) [hereinafter Berends].

14. See *id.*; *Bank of New York v. Treco (In re Treco)*, 240 F.3d 148, 154 (2d Cir. 2001). But see *Hong Kong & Shanghai Banking Corp. v. Simon (In re Simon)*, 153 F.3d 991, 998 (9th Cir. 1998) (taking the view that the U.S. Bankruptcy Code adopts neither a universalist nor a territorialist theory, but instead adopts a flexible approach dependent on the circumstances of each individual case), *cert. denied*, 525 U.S. 1141 (1999).

15. See *Hourani*, 180 B.R. at 64-67; Jay Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 Am. Bankr. L.J. 457, 464-66 (1991).

16. See *Hourani*, 180 B.R. at 64-70; *Simon*, 153 F.3d at 998.

I. Introduction

ruptcy Code § 304¹⁷ was a substantial step in the direction of the universality approach.¹⁸

17. 11 U.S.C. § 304 (2000).

18. See *Treco*, 240 F.3d at 154.

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II. Domestic Cases and Proceedings with Transnational Aspects

Two kinds of bankruptcy proceedings are available in the United States for transnational insolvency cases. The most typical case is a main bankruptcy case, which may be filed under any chapter of the U.S. Bankruptcy Code. Such a case invokes all of the provisions of the Bankruptcy Code applicable to the case under the chapter selected. Transnational issues typically arise in such a case where there are foreign creditors or estate assets located abroad.

The second kind of proceeding is an *ancillary proceeding* under Bankruptcy Code § 304¹⁹—such a proceeding is designed to be ancillary to a main insolvency case pending in another country.²⁰ A proceeding under section 304 permits a domestic court to take a wide variety of actions in aid of a foreign insolvency proceeding. However, a section 304 proceeding is not a bankruptcy “case” in the United States, and the range of applicable Bankruptcy Code provisions is limited.

While there is substantial case law interpreting this statute, there are few secondary sources to alert a judge or lawyer to the issues arising thereunder.

A. Domestic Subject-Matter Jurisdiction for Main Case

A U.S. court has its greatest power in a transnational case when the main case is filed in a U.S. court. Such a case may arise under U.S. bankruptcy law or under a U.S. nonbankruptcy insolvency system for banking institutions or insurance companies that are not eligible for relief under the Bankruptcy Code.²¹

19. 11 U.S.C. § 304 (2000); *In re International Admin. Servs., Inc.*, 211 B.R. 88 (Bankr. M.D. Fla. 1997). See *infra* text accompanying notes 125–47.

20. The term *ancillary proceeding* describes an auxiliary or subordinate proceeding that aids or attends upon another proceeding considered as principal. See *Black’s Law Dictionary* 86 (6th ed. 1990).

21. An insolvent banking institution is put into receivership in federal or state court (depending on whether the bank is chartered by the federal or a state government) and adminis-

1. Assets in the United States

Any person who resides or has a domicile, place of business, or property in the United States is eligible to file a main bankruptcy case in the United States.²² Even minimal connections with the United States are sufficient to meet these standards, absent bad faith.²³ United States jurisdiction may be based on a single bank account in the United States.²⁴ A “dollar, a dime or a peppercorn” may even provide a sufficient basis for U.S. jurisdiction for a main case.²⁵

If the debtor engages in bad faith, however, minimum contacts may not suffice. For example, the opening of a bank account in the United States in an effort to create U.S. bankruptcy court jurisdiction may not provide a sufficient basis for U.S. jurisdiction.²⁶ In addition, the ownership of property, such as a vacation home in the United States, may not provide a sufficient basis for jurisdiction if the debtor is engaging in a bad faith effort to avoid choice-of-forum and choice-of-law clauses in contracts with the principal creditors.²⁷

tered by the Federal Deposit Insurance Corporation. 12 C.F.R. §§ 300–312 (2000). An insolvent insurance company is taken over by its state insurance commissioner and administered in a state court receivership. *See, e.g.*, Cal. Ins. Code §§ 1010–1062 (West 2000).

22. *See* 11 U.S.C. § 341(a) (2000).

23. *But see In re Phoenix Summus Corp.*, 226 B.R. 379, 381 (Bankr. N.D. Tex. 1998) (dismissing case because debtor had no assets in the United States or abroad).

24. *In re Iglesias*, 226 B.R. 721, 722–23 (Bankr. S.D. Fla. 1998) (bank account containing \$522); *Bank of Am. v. World of English, N.V.*, 23 B.R. 1015, 1022 (N.D. Ga. 1982) (bank account); *In re Spanish Cay Co.*, 161 B.R. 715, 721–22 (Bankr. S.D. Fla. 1993) (storage of marketing information, advertising materials, and equipment on a sailboat, together with maintaining a bank account).

25. *See In re McTague*, 198 B.R. 428, 431–32 (Bankr. W.D.N.Y. 1996) (finding that bank account of \$194 was sufficient to support U.S. jurisdiction for a bankruptcy case filed by a Canadian citizen, where the debtor had other transactions in the United States). *But see In re Head*, 223 B.R. 648 (Bankr. W.D.N.Y. 1998) (finding Canadian citizens with insubstantial U.S. ties could not invoke U.S. bankruptcy court jurisdiction to avoid choice-of-law and choice-of-forum clauses in contracts with Lloyds of London. The fact that all parties were doing business in the United States, in the court’s view, was not a sufficient basis for U.S. jurisdiction.).

26. *See Head*, 223 B.R. at 652.

27. *See id.* The court found that the debtor had engaged in bad faith, based on the following factors: (1) Canadian nonbankruptcy litigation with Lloyds of London was going badly for the debtor, and (2) similarly situated U.S. citizens had lost similar nonbankruptcy litigation in U.S. circuit courts in six circuits. Lloyds is one of the oldest and most prominent insurance associations in the world. Very significant amounts of its insurance were backed on an unlimited liability basis by wealthy investors (who became known as Lloyds “Names”). Lloyds experi-

II. Domestic Cases and Proceedings with Transnational Aspects

2. Foreign Affiliates

A question that frequently arises in a transnational insolvency is whether a foreign affiliate of an entity eligible for bankruptcy in the United States can be brought into the U.S. bankruptcy courts. Two requirements must be met to bring such an entity into a U.S. bankruptcy court: First, the affiliate must have sufficient minimum contacts with the United States to satisfy Fifth Amendment due process concerns;²⁸ second, if the affiliate does not voluntarily appear in the bankruptcy court, it must be capable of being brought there through the service of process under Federal Rule of Bankruptcy Procedure 7004(a), which incorporates by reference Federal Rule of Civil Procedure 4(f).

3. Sharing Jurisdiction: District and Bankruptcy Courts

United States district courts, not the bankruptcy courts, have original and exclusive jurisdiction over all bankruptcy cases.²⁹ A district court is authorized to refer bankruptcy cases to the bankruptcy court in its district,³⁰ and in fact each judicial district has issued a general order referring all bankruptcy cases to the bankruptcy court of the district. A district court has the power to withdraw this reference for an individual case or a portion thereof, and thereafter the case or proceeding is heard in the district court rather than in the bankruptcy court.³¹ A district court may also withdraw its general order of reference, but no court has done so since a general order of reference was authorized in 1984.³²

enced a period of major claims, and looked to its Names to cover the losses on their particular policies. This led to significant litigation, and ultimately the bankruptcy of some of the Names.

28. *Levant Line, S.A. v. Marine Enters. Corp. (In re Levant Line, S.A.)*, 166 B.R. 221, 233–34 (Bankr. S.D.N.Y. 1994).

29. *See* 28 U.S.C. § 1334(a) (2000).

30. *See id.* § 157(a); *see also In re Kingscroft Ins. Co.*, 138 B.R. 121, 123 (Bankr. S.D. Fla. 1992).

31. *See* 28 U.S.C. § 157(d) (2000).

32. In 1997 the District of Delaware withdrew its general order of reference as to Chapter 11 cases only, and thereafter has referred such cases to the bankruptcy court in the district on a case-by-case basis. The general order of reference was reinstated effective February 1, 2001, was again withdrawn as to Chapter 11 cases on April 6, 2001, and was reinstated again effective October 6, 2001.

Under this same sharing of jurisdiction, federal district courts and bankruptcy courts have original but not exclusive jurisdiction over all civil proceedings arising under the Bankruptcy Code or arising in or related to a bankruptcy case.³³

If a proceeding (i.e., a dispute or controversy) in a bankruptcy case arises under the Bankruptcy Code, or arises in a bankruptcy case, it is a “core” proceeding, and the bankruptcy court has full jurisdiction to adjudicate the proceeding.³⁴ The adjudication is subject to review only by appeal. In contrast, in a proceeding that is only “related” to a bankruptcy case, the bankruptcy judge must submit proposed findings of fact, conclusions of law, and a judgment to the district court, which reviews *de novo* any matters to which a timely objection has been made.³⁵ A proceeding is “related” to a bankruptcy case if the proceeding could have been filed in another court absent the bankruptcy case but its outcome could conceivably affect the estate being administered in bankruptcy,³⁶ or it could alter the debtor’s rights, liabilities, options, or freedom of action (either positively or negatively).³⁷ A U.S. bankruptcy court has no subject-matter jurisdiction over a matter that is neither a core matter in a bankruptcy case nor a related matter.³⁸

B. Creditors Abroad

The most common form of transnational reach in a domestic bankruptcy case occurs where a domestic debtor has foreign creditors. In such a case, the main problems arise in connection with giving notice to these creditors and giving them a meaningful opportunity to make claims in the case.³⁹

33. See 28 U.S.C. § 1334(b) (2000).

34. See *id.* § 157(b)(1).

35. See *id.* § 157(e)(1).

36. See, e.g., *Honigman, Miller, Schwartz & Cohn v. Weitzman (In re DeLorean Motor Co.)*, 155 B.R. 521, 525 (B.A.P. 9th Cir. 1993); *American Hardwoods, Inc. v. Deutsche Credit Corp. (In re American Hardwoods, Inc.)*, 885 F.2d 621, 623 (9th Cir. 1989).

37. See, e.g., *American Hardwoods*, 885 F.2d at 623.

38. See, e.g., *Congress Credit Corp. v. AJC Int’l, Inc.*, 42 F.3d 686, 690 (1st Cir. 1994); *Gallucci v. Grant (In re Gallucci)*, 931 F.2d 738, 741 (9th Cir. 1991).

39. For a more detailed discussion of notice, see *infra* text accompanying notes 575–77.

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Notice to domestic creditors of the filing of a bankruptcy case is normally given by U.S. mail.⁴⁰ For most U.S. bankruptcy cases, this notice is generated by the Bankruptcy Noticing Center in Northern Virginia and mailed to all creditors named on the list provided by the debtor at the time the case is filed. This notice also informs creditors of the date, time, and location of the meeting of creditors, where the debtor must appear to be examined under oath.⁴¹ Similarly, the Noticing Center sends notices of the deadline for filing claims and for a number of other purposes.

The notice to creditors of the filing of a bankruptcy case is sent only in English, even though the foreign creditor may have no knowledge of the language. Thus a foreign creditor may have to obtain a translation of the notice (which is quite lengthy) in order to learn about the creditor's rights. By the time the notice is translated it may be too late to participate in the meeting of creditors⁴² and perhaps even too late to file a timely claim.⁴³

C. Assets Abroad

The filing of a bankruptcy case in the United States creates an estate,⁴⁴ which is a separate legal entity that owns (with minor exceptions) all of the property belonging to the debtor at the time of filing,⁴⁵ including assets located outside the United States.⁴⁶ However, the trustee (or the debtor in possession in a Chapter 11 case) may have diffi-

40. See Fed. R. Bankr. P. 2002.

41. See 11 U.S.C. § 341(a) (2000).

42. The meeting of creditors must be scheduled between 20 and 40 days after the filing of the bankruptcy case (except in a Chapter 13 case, where the meeting may be scheduled as late as 50 days after the filing of the case). See Fed. R. Bankr. P. 2003.

43. The deadline for filing a claim in a Chapter 7, 12, or 13 case is 60 days after the date first set for the meeting of creditors. See Fed. R. Bankr. P. 3002. In a Chapter 11 case, the deadline is set by court order individually in each case. A late claim in a Chapter 7 case is subordinated to all timely filed claims. A plan in a Chapter 11, 12, or 13 case usually provides for the non-payment of any late claim.

44. See 11 U.S.C. § 541 (2000).

45. See *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 191 (1902).

46. See 11 U.S.C. § 541(a) (2000); 28 U.S.C. § 1334(e) (2000); *Lykes Bros. S.S. Co. v. Hanseatic Marine Serv. (In re Lykes Bros. S.S. Co.)*, 207 B.R. 282, 287 (Bankr. M.D. Fla. 1997); *Maxwell Communication Corp. v. Barclays Bank (In re Maxwell Communication Corp.)*, 170 B.R. 800, 811 (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).

culty in a foreign country obtaining recognition that the assets belong to the estate and are subject to administration in the U.S. bankruptcy court.

A bankruptcy case in the United States is essentially an *in rem* proceeding, involving the treatment of the assets of the estate created by the bankruptcy filing.⁴⁷ If the debtor is an individual, the debtor is entitled to exclude from the estate any property that is exempted from execution⁴⁸ to enforce a court judgment.⁴⁹

The recovery of assets located abroad poses a typical problem of jurisdiction over foreign entities. Because bankruptcy law provides for nationwide service of process,⁵⁰ minimum contacts with a particular state are not required to establish bankruptcy court jurisdiction.⁵¹ However, minimum contacts with the United States are required.⁵² In addition, process must be validly served,⁵³ which may require service abroad under Federal Rule of Civil Procedure 4(f).⁵⁴ If sufficient contacts with the United States do not exist, the estate representative must go to a country with sufficient jurisdictional grounds to proceed against the holder of the assets.⁵⁵ This country will usually be the country where the assets are located.

47. See *Hong Kong & Shanghai Banking Corp. v. Simon (In re Simon)*, 153 F.3d 991, 996 (9th Cir. 1998), *cert. denied*, 525 U.S. 1141 (1999).

48. "Execution" is the enforcement procedure by which a judgment creditor can force the judgment debtor to pay a money judgment.

49. United States exemption law is complex. The Bankruptcy Code sets forth a system of federal exemptions. See 11 U.S.C. § 522 (2000). However, it also permits states to opt out of the federal exemption system and to apply their state-law exemptions instead. Thirty-five states have opted out of the federal system. 14 *Collier on Bankruptcy*, Intro 4 (Lawrence P. King ed., 15th ed. 2000) [hereinafter *Collier*]. Thus, in most cases the exemptions that an individual debtor enjoys are those provided by the state of the debtor's domicile.

50. See Fed. R. Bankr. P. 7004(d).

51. See *Ace Pecan Co. v. Granadex Int'l Ltd. (In re Ace Pecan Co.)*, 143 B.R. 696, 698 (Bankr. N.D. Ill. 1992); see *infra* text accompanying notes 273–80.

52. See *id.* at 700.

53. While Fed. R. Bankr. P. 7004(b) authorizes service by mail on domestic defendants, this does not apply for defendants located abroad. See *Bonapfel v. Cascade Imperial Mills, Ltd. (In re All American of Ashburn, Inc.)*, 78 B.R. 355, 356 (Bankr. N.D. Ga. 1987). Instead, Rule 7004(a) incorporates by reference the international service provisions of Fed. R. Civ. P. 4(f).

54. See also Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 (Hague Convention).

55. See *All American*, 78 B.R. at 356.

II. Domestic Cases and Proceedings with Transnational Aspects

A special problem regarding assets located abroad has arisen with respect to “asset protection plans.”⁵⁶ Under an asset protection plan, a domestic entity transfers assets into a foreign jurisdiction with laws that make the recovery or collection of judgments or debt obligations extremely difficult. In such circumstances, it is usually necessary to proceed in the jurisdiction where the assets are located.

1. Extraterritorial Application of U.S. Bankruptcy Laws

Two canons of statutory construction are important in determining the extraterritorial application of U.S. bankruptcy laws.⁵⁷ First, there is a long-standing principle of U.S. law that congressional legislation is meant to apply only within the United States unless a contrary intent appears.⁵⁸ Contrary intent may appear in the statute itself, in its legislative history, or in any administrative interpretations of the statute.⁵⁹ If congressional intent concerning the extraterritorial application of a statute cannot be divined from these sources, the court may examine other factors to determine whether the presumption against extraterritorial application should be applied.⁶⁰

Two general exceptions to the rule of territorial applicability are recognized. First, the presumption generally does not apply “where the failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States.”⁶¹ Second, the presumption does not apply where the regulated conduct is “intended to, and results in, substantial effects within the United States.”⁶²

56. See, e.g., *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1238–43 (9th Cir. 1999) (describing asset protection plan where assets were deposited in Cook Islands trust, and affirming order holding parties in civil contempt for failure to repatriate funds pursuant to court order).

57. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813–15 (1993).

58. See *id.* at 813–14; see also *EEOC v. Aramco*, 499 U.S. 244, 248 (1991); *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949).

59. See *Aramco*, 499 U.S. at 248, 258–59 (statute or legislative history); *Foley*, 336 U.S. at 288–90.

60. See *Hong Kong & Shanghai Banking Corp. v. Simon (In re Simon)*, 153 F.3d 991, 995 (9th Cir. 1998), *cert. denied*, 525 U.S. 1141 (1999).

61. See *id.* (quoting *Environmental Defense Fund, Inc. v. Massey*, 986 F.2d 528, 531 (D.C. Cir. 1993)).

62. See *id.* (quoting *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 925 (D.C. Cir. 1984)).

If the presumption against extraterritoriality has been overcome or is otherwise inapplicable, a second canon of statutory construction comes into play: An act of Congress should never be construed to violate the law of nations if any other construction is possible.⁶³ This canon is wholly independent of the presumption against extraterritoriality.⁶⁴

There are a number of provisions of U.S. bankruptcy law that may apply outside the United States.⁶⁵ While case law has addressed a few of these provisions, many Bankruptcy Code provisions remain untested in this regard.

The most important Bankruptcy Code provision with extraterritorial effect is the definition of the bankruptcy estate, which includes all of the assets of the debtor, wherever the assets may be located, whether within the United States or abroad.⁶⁶ Therefore, the debtor's property located outside the United States constitutes property of the estate, and the bankruptcy court may exercise jurisdiction over it.⁶⁷ If the domestic court has sufficient personal jurisdiction over the party in possession of the property, the court may order the party in possession to transfer the property to the trustee (or the debtor in possession), or may order the transfer of the property to the United States.⁶⁸

It may be necessary to obtain the assistance of a foreign court in obtaining control of such property.⁶⁹ To obtain assistance, the do-

63. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 814–15 (1993); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

64. See *Aramco*, 499 U.S. at 264 (Marshall, J. dissenting).

65. See, e.g., *Simon*, 153 F.3d at 996 (stating generally that the Bankruptcy Code has extraterritorial application); see also *Maxwell Communication Corp. v. Société Générale (In re Maxwell Communication Corp.)*, 170 B.R. 800, 811 (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) (foreign bank defendants conceded that Congress has authority to enforce its laws beyond the territorial boundaries of the United States).

66. See 11 U.S.C. § 341(a) (2000); see also *Simon*, 153 F.3d at 996; *Hobson v. Travelstead (In re Travelstead)*, 227 B.R. 638, 654–55 (D. Md. 1998); *In re International Admin. Servs., Inc.*, 211 B.R. 88, 93 (Bankr. M.D. Fla. 1997); *In re National Safe Ctr., Inc.*, 41 B.R. 195, 196 (Bankr. D. Ha. 1984).

67. See, e.g., *International Admin. Servs.*, 211 B.R. at 93.

68. See, e.g., *id.*; *Travelstead*, 227 B.R. at 655.

69. See *International Admin. Servs.*, 211 B.R. at 93 (pointing out the necessity of obtaining foreign judicial assistance); *Travelstead*, 227 B.R. at 655 (same); see generally *infra* text accompanying notes 115–18.

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mestic trustee or debtor in possession would have to commence an appropriate proceeding in the foreign court. If the nation where the property is located has adopted the UNCITRAL Model Law on Cross-Border Insolvency,⁷⁰ this statute contains a number of provisions to facilitate such assistance. Alternatively, the domestic court may consider it appropriate to defer jurisdiction to a foreign court for the determination of the rights of the parties.⁷¹

If a creditor files a claim in a bankruptcy case in the United States, the creditor thereby submits itself to the general jurisdiction of the bankruptcy court. This gives the bankruptcy court the power to enforce its orders, including the automatic stay, against the creditor with respect to any assets of the debtor or the estate located anywhere, domestically or abroad, and with respect to any legal proceeding in any country.⁷² The Ninth Circuit, for example, has held that a foreign bank, by filing its bankruptcy claim, forfeits any right to claim that the bankruptcy court lacks power to enjoin it from proceeding against non-estate assets in a Hong Kong court.⁷³

The exercise of jurisdiction over a citizen of the United States does not involve the extraterritorial application of U.S. laws.⁷⁴ United States law applies to U.S. citizens, wherever they may be located.

2. Reach of the Automatic Stay and the Discharge Injunction

The provision of U.S. bankruptcy law that is most likely to be invoked abroad is the automatic stay resulting from the filing of a bankruptcy case in the United States. The filing of a bankruptcy case in the United States imposes an automatic stay,⁷⁵ arising by operation

70. See *infra* text accompanying notes 323–97.

71. See *International Admin. Servs.*, 211 B.R. at 94 (applying standard of reasonableness).

72. See *Simon*, 153 F.3d at 997.

73. See *id.*

74. See *Underwood v. Hilliard (In re Rimsat Ltd.)*, 98 F.3d 956, 961 (7th Cir. 1996).

75. 11 U.S.C. § 362(a) (2000), the automatic stay section, provides:

[Subject to exceptions not relevant here] a petition filed under . . . this title . . . operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

of law, that prohibits all creditors from taking or continuing any activity to obtain assets of the bankruptcy estate or to collect a debt owed by the debtor.

In due course, the automatic stay is normally replaced by a discharge injunction, which permanently prohibits all creditors (with certain exceptions⁷⁶) from taking or continuing any activity to collect a debt from the debtor or the debtor's assets.⁷⁷ The impact of the discharge injunction is the same as that of the automatic stay.⁷⁸ It thus has the same extraterritorial effect.⁷⁹

The automatic stay is the broadest form of injunction available in a U.S. court. Its application is automatic: It applies from the moment a bankruptcy case is filed, whether or not a creditor has notice of the filing.⁸⁰ Any action taken in violation of the stay is either void or voidable (depending on the judicial circuit in the United States where the domestic case is filed).⁸¹

Under U.S. law, the automatic stay applies worldwide,⁸² whether or not this is consistent with domestic law in the relevant foreign country. If a creditor violates the stay anywhere in the world, that creditor is subject to sanctions in the bankruptcy court in the United

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor

76. See 11 U.S.C. §§ 523 & 524(b) (2000).

77. See *id.* § 524(a).

78. See *Hong Kong & Shanghai Banking Corp. v. Simon (In re Simon)*, 153 F.3d 991, 996 (9th Cir. 1998), *cert. denied*, 525 U.S. 1141 (1999).

79. See *id.*

80. See 3 Collier, *supra* note 49, ¶ 362.02.

81. Compare *Soares v. Blockton Credit Union (In re Soares)*, 107 F.3d 969 (1st Cir. 1997) (action void), with *Easley v. Pettibone Mich. Corp.*, 990 F.2d 905 (6th Cir. 1993) (action voidable). See generally 3 Collier, *supra* note 49, ¶ 362.11[1] & nn. 1–2.

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

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States.⁸³ Sanctions may include the denial of the creditor's claim and, in an extreme case, injunctive relief.⁸⁴

Such a broad extraterritorial extension of U.S. jurisdiction may be problematic because a foreign country may consider that the application of the United States' automatic stay within the foreign country's borders is a violation of its sovereignty.⁸⁵ Nonetheless, the automatic stay is not an unusual notion in bankruptcy law. The bankruptcy laws of most other countries provide for a similar stay or moratorium against creditor collection activities after the commencement of an insolvency proceeding.⁸⁶

Some U.S. bankruptcy courts have taken a broad view of the extraterritorial application of the automatic stay. In *Lykes Bros. S.S. Co. v. Hanseatic Marine Serv. (In re Lykes Bros. S.S. Co.)*,⁸⁷ for example, the court found that a German corporation willfully violated the automatic stay when it caused the post-petition arrest in Belgium of a ship belonging to the debtor to enforce pre-petition debts resulting from the charter of two other ships. Although the German corporation had no direct contacts with the debtor or the United States, the court found that the corporation was formed and the debts were transferred to it secretly by the original two creditors after the bankruptcy filing, in a blatant effort to avoid the automatic stay and to disrupt the Chapter 11 plan.⁸⁸ The court found that it had personal jurisdiction over one of the original creditors because the creditor had filed a claim in the bankruptcy case, and thereby had submitted to the juris-

83. See 11 U.S.C. § 105 (2000).

84. See *Underwood v. Hilliard (In re Rimsat, Ltd.)*, 98 F.3d 956, 962 (9th Cir. 1996); *Lykes Bros. S.S. Co. v. Hanseatic Marine Serv. (In re Lykes Bros. S.S. Co.)*, 207 B.R. 282, 287 (Bankr. M.D. Fla. 1997); but see *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318–33 (1999) (holding that preliminary injunction cannot be issued to prohibit transfer of unencumbered assets prior to entry of money judgment).

85. See, e.g., *Marcos v. Hilao (In re Marcos)*, 94 F.3d 539, 543 n.5 (9th Cir. 1996) (reporting that Switzerland took the view that U.S. courts handling litigation over the decedent estate of Ferdinand Marcos, deposed dictator of the Republic of the Philippines, lacked jurisdiction over Marcos's bank accounts in Switzerland).

86. See, e.g., *Lindner Fund, Inc. v. Polly Peck Int'l PLC*, 143 B.R. 807, 809 (Bankr. S.D.N.Y. 1992) (describing automatic stay under English reorganization law).

87. 207 B.R. 282 (Bankr. M.D. Fla. 1997).

88. *Id.* at 287.

diction of the court.⁸⁹ It found that the second creditor was likewise subject to the personal jurisdiction of the court because the transactions at issue had sufficient contacts with the United States.⁹⁰

Even though the domestic court may have *in rem* jurisdiction over the assets of the estate, the court must have *in personam* jurisdiction over a creditor before the court may enforce sanctions for interfering with estate property.⁹¹ A bankruptcy court has such jurisdiction over any U.S. creditor for this purpose, and all domestic creditors are subject to the automatic stay with respect to assets located abroad.⁹²

If a foreign creditor has assets that are subject to the jurisdiction of a U.S. court or has filed a claim in the bankruptcy case,⁹³ the bankruptcy court will be able to enforce sanctions for violation of the automatic stay even if the violation occurred outside the United States. However, if the creditor is beyond the jurisdictional reach of a U.S. court, the debtor or trustee may have difficulty enforcing the automatic stay. Indeed, in several cases foreign creditors have seized foreign assets after the filing of a U.S. Chapter 11 case, and thereby have dismembered the estate and prevented a reorganization.⁹⁴

In addition to the automatic stay, a U.S. bankruptcy court may issue an injunction with application abroad in aid of its jurisdiction.⁹⁵ Such an injunction may also aid in the application of the automatic stay.⁹⁶

89. *Id.* at 285–86 (citing *Langenkamp v. Culp*, 498 U.S. 42 (1990) (finding without briefing that creditors who file proofs of claim in a bankruptcy case thereby submit to the equitable jurisdiction of the bankruptcy court)).

90. *See id.* at 286–87; *see also* *United States Lines, Inc. v. GAC Marine Fuels Ltd. (In re McLean Indus., Inc.)*, 68 B.R. 690, 698 (Bankr. S.D.N.Y. 1986) (same).

91. *Hobson v. Travelstead (In re Travelstead)*, 227 B.R. 638, 654–55 (D. Md. 1998).

92. *See id.*; *Underwood v. Hilliard (In re Rimsat, Ltd.)*, 98 F.3d 956, 961 (7th Cir. 1996); *In re McTague*, 198 B.R. 428, 430 (Bankr. W.D.N.Y. 1996).

93. *See Hong Kong & Shanghai Banking Corp. v. Simon (In re Simon)*, 153 F.3d 991, 997 (9th Cir. 1998) (filing proof of claim in bankruptcy case submits creditor to general jurisdiction of the bankruptcy court), *cert. denied*, 525 U.S. 1141 (1999).

94. *See Lykes Bros. S.S. Co. v. Hanseatic Marine Serv. (In re Lykes Bros. S.S. Co.)*, 207 B.R. 282, 285 (Bankr. M.D. Fla. 1997).

95. *Id.*

96. *Id.* at 288.

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3. Exercising Avoidance Powers

Both the U.S. Bankruptcy Code and the laws of individual states that are incorporated by reference in the Bankruptcy Code permit a bankruptcy trustee or a debtor in possession to recover certain assets that had been transferred away before the case was filed.⁹⁷ However, these laws may not apply to a foreign defendant if the defendant has insufficient contacts with the United States.⁹⁸

The *in rem* jurisdiction rules for property of the bankruptcy estate do not apply to property recoverable (but not yet recovered) under the avoidance powers. Property recoverable under the exercise of avoidance powers does not become property of the estate until the avoidance is completed.⁹⁹ Thus the law applicable to the exercise of the avoidance power must be governed by traditional notions of choice of law.¹⁰⁰

The requirements for personal jurisdiction over a defendant for the purpose of exercising avoidance powers parallel the general requirements for personal jurisdiction.¹⁰¹ A two-part test must be satisfied. First, the defendant must have at least “minimum contacts” with the relevant jurisdiction. Second, the exercise of jurisdiction over the defendant must be “fair and reasonable.”¹⁰²

Personal jurisdiction may be general or specific.¹⁰³ Specific jurisdiction applies where the litigation arises out of the defendant’s action in the relevant forum. In such a case, jurisdiction may be exercised where the defendant has purposefully directed its activities toward the forum.¹⁰⁴ For example, if a foreign corporation enters into a major commercial relationship with a U.S. corporation, it is subject to bankruptcy court jurisdiction for the return of preferential transfers

97. 11 U.S.C. § 547 (preferences); § 548 (fraudulent transfers) (2000).

98. See *Maxwell Communication Corp. v. Société Générale (In re Maxwell Communication Corp.)*, 186 B.R. 807 (S.D.N.Y. 1995), *aff’d*, 93 F.3d 1036 (2d Cir. 1996).

99. See *FDIC v. Hirsch (In re Colonial Realty Co.)*, 980 F.2d 125, 131 (2d Cir. 1992); *Grossman v. Murray (In re Murray)*, 214 B.R. 271, 278–79 (Bankr. D. Mass. 1997); *Klingman v. Levinson*, 158 B.R. 109, 113 (N.D. Ill. 1993); *In re Saunders*, 101 B.R. 303, 305 (Bankr. N.D. Fla. 1989).

100. See generally *infra* text accompanying notes 578–88.

101. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985).

102. *Id.*

103. See *Helicopteros Nacionales v. Hall*, 466 U.S. 408, 414 n.8 (1984).

104. See *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984).

arising out of this relationship.¹⁰⁵ Moreover, if there is no other forum where such an action could be brought, this factor may weigh heavily in favor of a bankruptcy court's exercise of jurisdiction over a foreign defendant in such an action.¹⁰⁶

General jurisdiction, in contrast, is required if the litigation does not arise out of the defendant's forum-related activities. General jurisdiction may only be exercised where the defendant has had continuous and systematic contacts with the forum jurisdiction.¹⁰⁷

The applicability of U.S. bankruptcy laws to payments made abroad is controversial. In *Maxwell Communication Corp. v. Société Générale (In re Maxwell Communication Corp.)*,¹⁰⁸ for example, the debtor sued several foreign banks for preferential transfers that would have been avoidable under U.S. law but not under English law. The Second Circuit Court of Appeals found that the contacts with the United States were insufficient to permit the application of U.S. law to the avoidance of the preferential transfers.¹⁰⁹

The district court's analysis on the first-level appeal in *Maxwell* is instructive. In the district court's opinion, the fact that the transfer was made outside the United States was insufficient to avoid the application of U.S. law.¹¹⁰ Otherwise, the court stated, any domestic creditor in a wholly domestic transaction could arrange for the transfer to take place outside the United States and thereby avoid U.S. law. The court held that more ties to a foreign jurisdiction, and looser ties to the United States, are necessary to avoid the application of U.S. law to a transaction.¹¹¹

105. See *Schwinn Plan Comm. v. AFS Cycle & Co. (In re Schwinn Bicycle Co.)*, 192 B.R. 461, 473 (Bankr. N.D. Ill. 1996).

106. See *id.* at 476. In contrast, if there is a choice of forum where such an action may be brought, both courts should evaluate the best forum to bring such an action under a standard of reasonableness. *In re International Admin. Servs., Inc.*, 211 B.R. 88, 94 (Bankr. M.D. Fla. 1997). If the interest of one country is greater, the country with a lesser interest should consider deferring jurisdiction to the other. See *id.* (citing Restatement of Foreign Relations § 403 (deferring to jurisdiction of the Isle of Guernsey because the assets at issue were located there, and any order would have to be enforced in a Guernsey court)).

107. See *Helicopteros*, 466 U.S. at 416.

108. 93 F.3d 1036 (2d Cir. 1996).

109. *Id.* See also *Schwinn*, 192 B.R. at 476–77.

110. *Maxwell Communication Corp. v. Société Générale (In re Maxwell Communication Corp.)*, 186 B.R. 807, 817 (S.D.N.Y. 1995), *aff'd*, 93 F.3d 1036 (2d Cir. 1996).

111. See *id.*

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In contrast, in a different case the Ninth Circuit found that the looting and wasting of the assets of a domestic corporation by a foreign parent corporation was sufficient to confer personal jurisdiction over the parent corporation in an adversary proceeding brought by the trustees of a litigation trust established by a Chapter 11 plan (which was the successor to the bankruptcy estate).¹¹²

4. Debtor in Possession

Foreign courts frequently have difficulty recognizing a reorganization case under Chapter 11 of the U.S. Bankruptcy Code as an insolvency proceeding similar to one under their domestic laws. The insolvency regimes in most countries require the appointment of an administrator (similar to a case trustee in the U.S. bankruptcy system) who takes possession of the assets of the debtor and administers them for the benefit of creditors.¹¹³ Leaving the debtor in possession of the assets, as is typical in a Chapter 11 case in the United States, is uncommon (but not unknown) outside the United States.

The failure of a foreign court to recognize a Chapter 11 case in the United States may have several consequences. A foreign court may not confer upon the debtor in possession rights similar to those of an administrator under local law in that country, or it may not accord the U.S. case dignity and treatment similar to a local insolvency case. A foreign court may refuse to recognize the standing of the U.S. Chapter 11 debtor in possession, either to participate in proceedings in that court or to initiate proceedings to collect assets belonging to the bankruptcy estate in the United States.¹¹⁴ Moreover, a foreign court may permit non-U.S. creditors to obtain local assets in violation of the automatic stay and without regard to the U.S. case and the rights of creditors (both foreign and domestic) who have filed their claims in the United States. Finally, a foreign court may not be willing to entertain avoidance actions against local creditors, even where

112. *Goodson v. Rowland (In re Pintlar Corp.)*, 133 F.3d 1141, 1146–47 (9th Cir. 1998).

113. *See* Convention on Insolvency Proceedings, Art. 2(b), Nov. 23, 1995, 35 I.L.M. 1223 (1996).

114. The refusal to recognize a debtor in possession as the appropriate representative of an insolvency estate is an unnecessarily narrow view, a view that both the UNCITRAL Model Law and the European Union Regulation reject.

such actions are permitted in an insolvency case under local law in that country.

5. Foreign Proceeding to Assist Domestic Case

Very few countries have statutory provisions similar to U.S. Bankruptcy Code § 304, which permits a limited insolvency proceeding in the United States in the aid of a foreign insolvency case.¹¹⁵ Two choices are generally available to a bankruptcy trustee appointed in a U.S. case. First, the trustee may bring a full-blown insolvency case in the foreign country where assets are located to administer them for the benefit of creditors in the United States or worldwide. Second, the trustee may bring a civil action in the foreign country's courts to resolve issues relating to assets located in that country.¹¹⁶

115. The bankruptcy law of the United Kingdom recognizes comity with the Commonwealth countries. Section 426(4) of the Insolvency Act of 1986 provides in relevant part:

The courts having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist the courts having the corresponding jurisdiction in any other part of the United Kingdom or any other relevant country for the purposes of § 426(4).

The "relevant countries" are: Anguilla, Australia, the Bahamas, Bermuda, Botswana, Canada, Cayman Islands, Falkland Islands, Gibraltar, Guernsey, Hong Kong, Republic of Ireland, Montserrat, New Zealand, St. Helena, Turks and Caicos Islands, Tuvalu, and Virgin Islands. Donna McKenzie, *International Solutions to International Insolvency: an Insoluble Problem?*, 26 U. Balt. L. Rev. 15, 19 n.6 (1997). In addition, section 426(4) mandates assistance between the courts of the United Kingdom and those of the Channel Islands and the Isle of Man. *Id.*

Australia has a similar provision in its Corporations Act:

In all external administration matters, the court:

(a) shall act in aid of, and be auxiliary to, the courts . . . of prescribed countries, that have jurisdiction in external administration matters; and

(b) may act in aid of, and be auxiliary to, the courts of other countries that have jurisdiction in external administration matters.

Corporations Act, 1989, § 581(2) (Austl.). Under this statutory provision (commonly known as the "generous provision"), Australian courts are required to act in aid of and be auxiliary to foreign courts handling insolvency cases (which are included in "external administration matters," see *id.* § 580) in the following "prescribed countries": Canada, Jersey, Malaysia, New Zealand, Papua New Guinea, Singapore, Switzerland, the United Kingdom, and the United States. See 1990 No. 455 Corporations Regulations 5.6.74 (Austl.). For all other countries, Australian courts have discretion to provide such aid and auxiliary support.

116. See, e.g., *In re International Admin. Servs., Inc.*, 211 B.R. 88, 92–96 (Bankr. M.D. Fla. 1997) (sustaining bankruptcy court decision to defer jurisdiction to court in Isle of Guernsey respecting debtor's assets located there, and rejecting challenge by debtor's sole shareholder to pursuit by creditor's committee of assets there); cf. *In re Hakim*, 212 B.R. 632 (Bankr. N.D.

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A third type of proceeding may be developed to provide foreign assistance in a domestic case. The United Nations Commission on International Trade Law has recently promulgated a model law that provides for the coordination of parallel insolvency proceedings in various countries.¹¹⁷ Under the model law, a special procedure is established, similar to that provided in Bankruptcy Code § 304.

Additional authority for such a special proceeding is provided in the European Union Regulation on Insolvency Proceedings,¹¹⁸ which goes into effect on May 31, 2002. The regulation provides for the recognition within the European Union of a main bankruptcy case in the country where a business is incorporated or has its principal place of business, and for the filing of subsidiary bankruptcy cases in the other European Union countries.

Cal. 1997) (granting relief from stay to permit the Chapter 11 debtor and his creditors to complete pending litigation in Switzerland on the ownership of funds located there).

117. This model law is discussed in greater detail, *infra*, at text accompanying notes 323–97.

118. European Union Convention on Insolvency Proceedings, 2000 O.J. (L 160) 1. For the text of the European Union Regulation, see *infra* Appendix C. The regulation is discussed in greater detail, *infra*, at text accompanying notes 457–533.

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III. Foreign Cases with Domestic Aspects

Foreign insolvency cases with domestic aspects have given rise to the largest body of transnational bankruptcy case law in the United States. Such a proceeding typically arises where there are assets located in the United States relating to an insolvency case that is filed abroad.

If an insolvency case is pending in a foreign country, a foreign representative¹¹⁹ may file a related bankruptcy case under Chapter 7 or Chapter 11 in the United States. A case under one of these chapters invokes the full panoply of bankruptcy powers and rights under U.S. law. For example, such a case creates a bankruptcy estate in the United States,¹²⁰ and the automatic stay takes effect immediately upon the filing of the bankruptcy petition.¹²¹ In addition, in such a case the trustee or debtor in possession has the unquestionable power to utilize the avoiding powers under the Bankruptcy Code to retrieve preferential transfers and fraudulent dispositions of property for the benefit of creditors.¹²²

If property in the United States belongs to the foreign insolvent entity, the foreign administrator may file a voluntary bankruptcy case under Chapter 7 or Chapter 11.¹²³ If the domestic bankruptcy case

119. Under the U.S. Bankruptcy Code, a *foreign representative* means a “duly selected trustee, administrator, or other representative of an estate in a foreign proceeding.” 11 U.S.C. § 101(24) (2000). Qualification as a foreign representative is construed broadly under the U.S. Bankruptcy Code. See *In re Kingscroft Ins. Co.*, 138 B.R. 121, 124 (Bankr. S.D. Fla. 1992) (finding that board of directors qualified as a foreign representative, even though the corporations were in winding-up proceedings in England and Bermuda, and liquidators had been appointed). The representative need not have a court appointment or authorization from the foreign court. See, e.g., *In re Board of Dirs. of Hopewell Int’l Ins. Ltd.*, 238 B.R. 25, 53 (Bankr. S.D.N.Y. 1999).

120. See *In re Axona Int’l Credit & Commerce Ltd.*, 88 B.R. 597, 606 (Bankr. S.D.N.Y. 1988). For a general discussion of U.S. treatment of foreign bankruptcies, see Richard A. Gitlin & Evan D. Flaschen, *The International Void in the Law of Multinational Bankruptcies*, 42 Bus. Law. 307 (1987); Barbara K. Unger, *United States Recognition of Foreign Bankruptcies*, 19 Int’l Law. 1153 (1985).

121. See *Axona*, 88 B.R. at 606.

122. See *id.*; *Universal Cas. & Sur. Co. v. Gee (In re Gee)*, 53 B.R. 891, 896 (Bankr. S.D.N.Y. 1985).

123. See 11 U.S.C. § 301 (2000).

involves a separate legal entity, it may be necessary for the foreign representative to file an involuntary case.¹²⁴

A. Ancillary Proceedings Under Section 304

Alternatively, a foreign representative may commence a limited bankruptcy proceeding ancillary¹²⁵ to a foreign case under U.S. Bankruptcy Code § 304. While there is substantial case law interpreting this statute, there are few secondary sources to alert a judge or lawyer to the issues arising thereunder.

1. Features of a Section 304 Proceeding

The principal statutory provision relating to international insolvencies with U.S. contacts is U.S. Bankruptcy Code § 304,¹²⁶ which provides for a special proceeding to be opened in the United States in the aid¹²⁷ of a foreign insolvency proceeding.¹²⁸ Section 304 assumes that it is usually in the best interests of a foreign debtor and its creditors to resolve the claims against the debtor and to collect and disburse its assets, wherever located, in an equitable, orderly, and systematic manner, rather than in a haphazard, erratic, or piecemeal fashion.¹²⁹

124. See 11 U.S.C. § 303 (2000).

125. See *supra* note 20.

126. 11 U.S.C. § 304 (2000).

127. See, e.g., *Armco Inc. v. North Atl. Ins. Co. (In re Bird)*, 229 B.R. 90, 94, 96 (Bankr. S.D.N.Y. 1999). See, 53 B.R. at 896; see also Stacy Allen Morales & Barbara Ann Deutsch, *Bankruptcy Code Section 304 and U.S. Recognition of Foreign Bankruptcies: The Tyranny of Comity*, 39 Bus. Law. 1573 (1984); Brian J. Gallagher & John Hartje, *The Effectiveness of § 304 in Achieving Efficient and Economic Equity in Transactional Insolvency*, 1983 Ann. Surv. Bankr. L. 1; Anne Norby Nielsen, Note, *Section 304 of the Bankruptcy Code: Has It Fostered the Development of an "International Bankruptcy System"?*, 22 Colum. J. Transnat'l L. 541 (1984).

128. The U.S. Bankruptcy Code defines a *foreign proceeding* as follows:

"foreign proceeding" means proceeding, whether judicial or administrative and whether or not under bankruptcy law, in a foreign country in which the debtor's domicile, residence, principal place of business, or principal assets were located at the commencement of such proceeding, for the purpose of liquidating an estate, adjusting debts by composition, extension, or discharge, or effecting a reorganization

11 U.S.C. § 101(23) (2000).

129. *Koreag, Controle et Revision S.A. v. Refco F/X Assocs., Inc. (In re Koreag, Controle et Revision S.A.)*, 961 F.2d 341, 348 (2d Cir. 1992); see *In re Brierley*, 145 B.R. 151, 167 (Bankr. S.D.N.Y. 1992).

III. Foreign Cases with Domestic Aspects

In addition, the foreign court should have an opportunity to determine “where and when claims should be liquidated in order to conserve estate resources” and to “maximize the assets available for distribution.”¹³⁰ It is the foreign court that is in the best position to make this determination.¹³¹

A proceeding under section 304 is not a full-scale bankruptcy case.¹³² The limited proceeding envisioned by section 304 is designed to be a more efficient and less costly alternative to commencing a plenary proceeding that would duplicate that in the foreign forum.¹³³ A section 304 proceeding does not call for the bankruptcy court to make a determination of the foreign debtor’s property interests, the timing of reorganization or liquidation, or the manner in which the validity of creditors’ claims is to be determined.¹³⁴

A section 304 proceeding does not confer on the foreign debtor the full panoply of rights that would otherwise be available to a debtor or trustee in a full bankruptcy case under U.S. law.¹³⁵ However, the court has the power to permit the application of any (or all) Bankruptcy Code provisions in a particular section 304 proceeding.¹³⁶

A foreign representative may file a petition under section 304 to administer assets located in the United States. A foreign debtor may have a vital interest in protecting its foreign assets from a U.S. judgment that could be given recognition in the foreign proceeding.¹³⁷ One important purpose of section 304 is to prevent U.S. creditors from dismembering the local assets of a foreign debtor.¹³⁸

130. *Vesta Fire Ins. Corp. v. New Cap Reinsurance Corp.*, 244 B.R. 209, 213 (S.D.N.Y. 2000) (quoting *Armco Inc. v. North Atl. Ins. Co. (In re Bird)*, 229 B.R. 90, 94 (Bankr. S.D.N.Y. 1999)).

131. *Bird*, 229 B.R. at 94.

132. See *In re Culmer*, 25 B.R. 621, 633 (Bankr. S.D.N.Y. 1982).

133. See *Cunard S.S. Co. v. Salen Reefer Servs. AB*, 773 F.2d 452, 456 (2d Cir. 1985); *In re Axona Int’l Credit & Commerce, Ltd.*, 88 B.R. 597, 607 (Bankr. S.D.N.Y. 1988).

134. See *Vesta*, 244 B.R. at 221.

135. See *id.* at 213.

136. See *In re Rubin*, 160 B.R. 269, 274 n.3 (Bankr. S.D.N.Y. 1993).

137. *In re Gercke*, 122 B.R. 621, 625–26 (Bankr. D.D.C. 1991).

138. See H.R. Rep. No. 95-595, at 34 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 5995; S. Rep. No. 95-989, at 35 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5821; *Armco Inc. v. North Atl. Ins. Co. (In re Bird)*, 229 B.R. 90, 94, 96 (Bankr. S.D.N.Y. 1999).

However, a foreign debtor need not have property in the United States to support a section 304 petition.¹³⁹ For example, a foreign administrator may file a section 304 petition to obtain a stay of litigation in the United States and require the plaintiff to file its claim in the foreign bankruptcy case.¹⁴⁰ In addition, such a proceeding may be used to bring fraudulent transfer or preferential transfer actions against domestic defendants.¹⁴¹

Section 304 does not depend on a determination that the insolvency law of the applicable foreign country is essentially similar to that in the United States. Section 304 also does not permit a U.S. court to determine the legitimacy or constitutionality of the foreign proceeding.¹⁴² This section requires only that the foreign law comport with principles of fundamental fairness.¹⁴³ A foreign representative may file a section 304 proceeding even if the debtor is not eligible under U.S. law to bring a full bankruptcy case, so long as the debtor qualifies for an insolvency proceeding under the laws of the debtor's own country.¹⁴⁴

Section 304 is not intended to be the exclusive remedy available to a foreign representative. The representative may also bring a full case under U.S. law if the estate in the United States is sufficiently complicated or substantial to merit a full case for proper administration.¹⁴⁵

139. See *Vesta*, 244 B.R. at 214; *Metzeler v. Bouchard Transp. Co. (In re Metzeler)*, 78 B.R. 674, 678–80 (Bankr. S.D.N.Y. 1987).

140. See *Haarhuis v. Kunnan Enters.*, 177 F.3d 1007 (D.C. Cir. 1999); *In re Kingscroft Ins. Co.*, 138 B.R. 121, 125–26 (Bankr. S.D. Fla. 1992); *Gercke*, 122 B.R. at 625–26 (staying action, except to require debtor to produce documents ordered in state court litigation before section 304 proceeding was filed).

141. See, e.g., *In re Kojima*, 177 B.R. 696, 703 (Bankr. D. Colo. 1995); *In re Axona Int'l Credit & Commerce Ltd.*, 88 B.R. 597 (Bankr. S.D.N.Y. 1988); *Metzeler*, 78 B.R. at 674; *In re Culmer*, 25 B.R. 621, 633 (Bankr. S.D.N.Y. 1982). *But see* *Universal Cas. & Sur. Co. v. Gee (In re Gee)*, 53 B.R. 891, 896 (Bankr. S.D.N.Y. 1985) (dictum that avoiding powers are not available under a section 304 petition). The avoidability of preferential or fraudulent transfers is determined according to the law of the applicable foreign country. See *Metzeler*, 78 B.R. at 677. The filing of the section 304 action also tolls prescription of a claim under the foreign law. See *id.*

142. See *In re Fracmaster, Ltd.*, 237 B.R. 627, 635 (Bankr. E.D. Tex. 1999).

143. See *Interpool, Ltd. v. Certain Freights*, 102 B.R. 373, 377 (D.N.J. 1988).

144. See *In re Brierley*, 145 B.R. 151, 167 (Bankr. S.D.N.Y. 1992); *Gee*, 53 B.R. at 900.

145. See *Cunard S.S. Co. v. Salen Reefer Servs. AB*, 773 F.2d 452, 456 (2d Cir. 1985); *Axona*, 88 B.R. at 607; see also *In re Florida Peach Corp.*, 63 B.R. 833, 839–40 (Bankr. M.D.

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Finally, section 304 gives the bankruptcy court significant discretion to mold appropriate relief so that a foreign insolvency can proceed in a rational fashion with due regard for all of the varied and competing interests at issue.¹⁴⁶ However, that discretion typically points in favor of granting relief to section 304 petitioners.¹⁴⁷

a. No Bankruptcy Estate

The filing of a section 304 petition does not create a bankruptcy estate in the United States, pursuant to which the debtor's property comes into the custody of the court (*in custodia legis*).¹⁴⁸ The estate of a foreign debtor is defined by the law of the jurisdiction in which the foreign case is pending.¹⁴⁹ While section 304(b)(2) authorizes the court to order turnover of the property of "such estate," this language refers to the estate created in the foreign case.¹⁵⁰

Only a primary proceeding should have extraterritorial jurisdiction over all assets of the debtor or the estate, wherever located. As an ancillary or secondary proceeding, a section 304 proceeding in a U.S. court should only affect assets located within the United States.¹⁵¹

Fla. 1986) (holding that the power of a Panamanian corporation, in liquidation in Panama, to file Chapter 11 case in United States turns on U.S. law (pursuant to Panamanian choice of law rules), where the corporation had a commercial domicile in United States). If a bankruptcy case is also pending in the United States, the foreign representative may file a claim in that case without initiating a section 304 case or engaging in any other formalities. *Banca Emiliana v. Farinacci (In re Enercons Virginia, Inc.)*, 812 F.2d 1469, 1472 (4th Cir. 1987).

146. See, e.g., *Bank of New York v. Treco (In re Treco)*, 240 F.3d 148, 154–55 (2d Cir. 2001); *Vesta Fire Ins. Corp. v. New Cap Reinsurance Corp.*, 244 B.R. 209, 213 (S.D.N.Y. 2000).

147. See, e.g., *Vesta*, 244 B.R. at 213.

148. See *In re Schimmelpenninck*, 183 F.3d 347, 351 (5th Cir. 1999); *Vesta*, 244 B.R. at 213; *In re Rubin*, 160 B.R. 269, 274 n.3 (Bankr. S.D.N.Y. 1993); *In re Brierley*, 145 B.R. 151 (Bankr. S.D.N.Y. 1992). In contrast, the filing of involuntary plenary petition by a foreign representative initiates a plenary U.S. bankruptcy case, and creates an estate within the meaning of the Bankruptcy Code. In such a plenary case, a foreign debtor is afforded the same treatment as a domestic debtor. See *In re Axona Int'l Credit & Commerce Ltd.*, 88 B.R. 597 (Bankr. S.D.N.Y. 1988).

149. See, e.g., *Koreag, Controle et Revision S.A. v. Refco F/X Assocs., Inc. (In re Koreag)*, 961 F.2d 341, 348 (2d Cir. 1992); *Aranha v. Eagle Fund, Ltd. (In re Thornhill Global Deposit Fund, Ltd.)*, 245 B.R. 1, 10 (Bankr. D. Mass. 2000).

150. See *Koreag*, 961 F.2d at 348; *Goerg v. Parungao (In re Goerg)*, 844 F.2d 1562, 1567 (11th Cir. 1988); *Rubin*, 160 B.R. at 274 n.3 (Bankr. S.D.N.Y. 1993).

151. In contrast, if a plenary bankruptcy case is filed with respect to the foreign debtor under Chapter 7 or Chapter 11, such a case would establish primary jurisdiction in the United States. The filing would create an estate that consists of all assets of the debtor, wherever lo-

Because the bankruptcy “estate” is a central concept in U.S. bankruptcy law,¹⁵² the lack of such an estate makes many Bankruptcy Code provisions inapplicable in the section 304 context.¹⁵³

A problem can arise if a creditor of a debtor in a foreign case brings an action against a domestic subsidiary to collect a debt on the grounds that the domestic subsidiary is the *alter ego*¹⁵⁴ of the parent debtor. A bankruptcy estate, both in the United States and abroad, ordinarily includes the stock of a subsidiary, but not its assets.¹⁵⁵ Analytically, if the subsidiary is an alter ego of the parent, its assets should belong to the foreign estate of the parent.¹⁵⁶ Procedurally, the domestic court should grant injunctive relief against such a creditor because its claim advances a general grievance belonging to all of the creditors of the parent in the foreign proceeding.¹⁵⁷

Creditors’ entitlements in bankruptcy in the United States arise in the first instance from the underlying substantive law creating the debtor’s obligations, subject to any contrary or qualifying provisions of the Bankruptcy Code.¹⁵⁸ U.S. bankruptcy law does not define ownership or other rights. Because for the most part U.S. private law is not unified, these rights are created and defined by state law.¹⁵⁹ Thus state law in the United States defines the foreign estate’s interest in particular property located in the United States. A U.S. court must make a determination of the applicable property interests under state law before it can order the turnover of property to a foreign repre-

cated, except to the extent that they are included in the estate of the foreign bankruptcy case. The court would then be required to coordinate the U.S. case with the foreign case.

152. See 11 U.S.C. § 541(a) (2000).

153. See *Rubin*, 160 B.R. at 274 n.3.

154. *Alter ego* is a reciprocal relationship: if A is the alter ego of B, then B is the alter ego of A.

155. See *Peoples Bankshares, Ltd. v. Department of Banking (In re Peoples Bankshares, Ltd.)*, 68 B.R. 536, 539 (Bankr. N.D. La. 1986); *In re Midwestern Cos., Inc.*, 49 B.R. 98, 101 (Bankr. W.D. Mo. 1985).

156. See *In re Schimmelpenninck*, 183 F.3d 347, 361 (5th Cir. 1999).

157. See, e.g., *id.* at 360. This result should apply whether or not the court is in a judicial circuit that permits a corporate bankruptcy debtor to assert an *alter ego* claim belonging to a creditor. The courts of appeals are divided on whether such an *alter ego* claim may be made. The Second, Fourth, Fifth, and Seventh Circuits permit such a claim. See *id.* at 356 n.17 and cases cited therein. The Sixth and Eighth Circuits disagree. See *id.*

158. See *Raleigh v. Illinois Dep’t of Revenue*, 120 S. Ct. 1951, 1955 (2000).

159. See *Butner v. United States*, 440 U.S. 48, 55 (1979); *In re Board of Dirs. of Hopewell Int’l Ins. Ltd.*, 238 B.R. 25, 47 (Bankr. S.D.N.Y. 1999).

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sentative or otherwise administer the property in a section 304 proceeding.¹⁶⁰

If an adverse claimant plausibly disputes the ownership of the property sought to be repatriated, the court must first apply local law to determine whether the debtor has a valid ownership interest in the property.¹⁶¹

b. Automatic Stay and Injunctive Relief

Unlike a plenary domestic bankruptcy case, where there is a statutory automatic stay of all creditor collection activities both domestically and abroad,¹⁶² no automatic stay of creditor collection activities arises from the filing of the section 304 proceeding.¹⁶³

However, section 304(b)(1) gives the court the power to issue an injunction that has the same effect as the automatic stay.¹⁶⁴ The purpose of the injunction is the same as that of the automatic stay: to prevent individual creditors from appropriating for themselves property in the United States that belongs to all creditors (both domestic and foreign) in consequence of the foreign insolvency proceedings.¹⁶⁵ Such an injunction could prohibit the commencement or continuation of litigation against the debtor. It could impose a similar brake on counterclaims in litigation brought by the debtor.¹⁶⁶ This injunction would apply to all creditors, whether or not they have notice of

160. See *Koreag, Controle et Revision S.A. v. Refco F/X Assocs., Inc. (In re Koreag)*, 961 F.2d 341, 348–49 (2d Cir. 1992); *Armco Inc. v. North Atl. Ins. Co. (In re Bird)*, 229 B.R. 90, 96 (Bankr. S.D.N.Y. 1999).

161. See, e.g., *In re Rubin*, 160 B.R. 269, 274 n.3 (Bankr. S.D.N.Y. 1993).

162. See *supra* text accompanying notes 75–96.

163. See, e.g., *Goerg*, 844 F.2d at 1568; *In re Koreag, Controle et Revision*, 130 B.R. 705, 709–10 (Bankr. S.D.N.Y. 1991), *vacated and remanded on other grounds*, 961 F.2d 341 (2d Cir. 1992); *In re Axona Int'l Credit & Commerce Ltd.*, 88 B.R. 597, 607 (Bankr. S.D.N.Y. 1988).

164. See, e.g., *In re Schimmelpenninck*, 183 F.3d 347, 352, 361–62 (5th Cir. 1999). In *In re Singer*, 205 B.R. 355, 357 (Bankr. S.D.N.Y. 1997), the district court reversed a bankruptcy court's denial of such an injunction insofar as it would affect unidentified creditors. The bankruptcy court had reasoned that such an injunction against creditors lacking notice would violate their due process rights. In contrast, the district court found that due process is satisfied by providing creditors the opportunity to obtain relief from the automatic stay in the bankruptcy court in appropriate circumstances. See *id.*

165. See, e.g., *Armco Inc. v. North Atl. Ins. Co. (In re Bird)*, 229 B.R. 90, 94 (Bankr. S.D.N.Y. 1999); *In re Banco Nacional de Obras y Servicios Publicos, S.N.C.*, 91 B.R. 661, 664 (Bankr. S.D.N.Y. 1988).

166. *Bird*, 229 B.R. at 96.

the injunction. An action in violation of the injunction would be void or voidable.¹⁶⁷

In addition, the court may issue an injunction to enjoin actions not prohibited by an automatic stay.¹⁶⁸ Such an injunction is particularly appropriate where the failure to enjoin the action would jeopardize the success of the insolvency process or cause irreparable harm to the debtors' estate and to the creditors.¹⁶⁹ For example, in an appropriate case a court may enjoin an action against a debtor's subsidiary where an action may otherwise reduce the value of the subsidiary for the creditors in the parent corporation's insolvency case.¹⁷⁰

In a plenary bankruptcy case, certain creditors are entitled to relief from the automatic stay imposed by U.S. Bankruptcy Code § 362.¹⁷¹ In parallel circumstances, a bankruptcy court should normally grant relief from a section 304 injunction.¹⁷² However, in making this determination the court must consider the effect that relief from the stay will have on the main proceeding abroad and any other ancillary proceedings in other countries.

c. Discharge

A discharge normally should not be granted under section 304.¹⁷³ Typically the foreign court hearing the main case, not the court with the ancillary proceeding, should decide whether the debtor obtains a discharge. In an exceptional case, however, it may be appropriate to grant a discharge only for debts owing to creditors in the United States.

2. Powers of the Court

The limited scope of a section 304 proceeding is balanced with broad powers granted to the bankruptcy court to determine what relief to grant in a section 304 proceeding. Because the ancillary proceeding is

167. See *supra* note 81.

168. See *Schimmelpenninck*, 183 F.3d at 352, 361–62.

169. See *id.* at 362.

170. See *id.* at 361–62.

171. See 11 U.S.C. § 362 (2000).

172. See *In re Banco Nacional de Obras y Servicios Publicos, S.N.C.*, 91 B.R. 661, 667 (Bankr. S.D.N.Y. 1988).

173. *Goerg v. Parungao (In re Goerg)*, 844 F.2d 1562, 1568 (11th Cir. 1988).

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created to aid the administration of a foreign bankruptcy proceeding, numerous published opinions have stated that section 304 provides the U.S. courts with maximum flexibility to mold appropriate relief “in near blank check fashion.”¹⁷⁴

Section 304 specifies two types of relief that U.S. courts may grant in an ancillary case. First, the court may enjoin actions against the debtor (with respect to property involved in the foreign proceeding) or against the debtor’s property, including actions to enforce judgments or to create or enforce liens against such property.¹⁷⁵ Comity permits the issuance of injunctive relief without the usual showing of irreparable injury required under U.S. law.¹⁷⁶ The issuance of an injunction should be as “automatic” as the automatic stay in appropriate circumstances. An adversary proceeding is not needed to obtain injunctive relief in a section 304 proceeding.¹⁷⁷

Second, the court may order the turnover of property of the foreign estate or its proceeds to the foreign representative.¹⁷⁸ Whether adequate protection is required turns on the provisions of the applicable insolvency law, either foreign or domestic. Furthermore, turnover may be ordered even when the property is not necessary to facilitate the rehabilitation of the debtor’s business.¹⁷⁹

If the section 304 proceeding is brought to administer assets in the United States, the court must consider whether such assets can be administered in the foreign bankruptcy case. This issue is determined by the law of the country where the main proceeding is pending.¹⁸⁰

174. See, e.g., *Koreag, Controle et Revision S.A. v. Refco F/X Assocs., Inc. (In re Koreag)*, 961 F.2d 341, 348 (2d Cir. 1992); *In re Banco Nacional de Obras y Servicios Publicos, S.N.C.*, 91 B.R. 661, 664 (Bankr. S.D.N.Y. 1988); *In re Axona Int’l Credit & Commerce Ltd.*, 88 B.R. 597, 606 (Bankr. S.D.N.Y. 1988); *Universal Cas. & Sur. v. Gee (In re Gee)*, 53 B.R. 891, 897 (Bankr. S.D.N.Y. 1985); *In re Culmer*, 25 B.R. 621, 624 (Bankr. S.D.N.Y. 1982).

175. See 11 U.S.C. § 304(b) (2000); *In re Rubin*, 160 B.R. 269, 274 (Bankr. S.D.N.Y. 1993).

176. See *In re Rukavina*, 227 B.R. 234, 242 (Bankr. S.D.N.Y. 1998); *Rubin*, 160 B.R. at 283.

177. See, e.g., *Rukavina*, 227 B.R. at 239; cf. Fed. R. Bankr. P. 7001 (adversary proceeding necessary to obtain injunctive relief in plenary bankruptcy case).

178. See 11 U.S.C. § 304(b) (2000); *Rubin*, 160 B.R. at 274.

179. See *In re Treco*, 229 B.R. 280, 292 (Bankr. S.D.N.Y.), *aff’d*, 239 B.R. 36 (S.D.N.Y. 1999); *rev’d on other grounds*, 240 F.3d 148 (2d Cir. 2001).

180. See, e.g., *Rubin*, 160 B.R. at 274 n.3; *In re Toga Mfg., Ltd.*, 28 B.R. 165, 167 (Bankr. E.D. Mich. 1983).

For example, because Japanese bankruptcy law applies only to assets located in Japan, a Japanese representative would not be able to obtain assets located in the United States in support of a Japanese bankruptcy case. Most countries, including the United States, have laws that permit the inclusion in a bankruptcy estate of all assets, wherever located.

In addition, section 304 authorizes the court to order “other appropriate relief.”¹⁸¹ This clause gives a U.S. bankruptcy court broad powers to fashion relief that is appropriate to a particular case. For example, a section 304 proceeding may be brought to obtain discovery in the aid of a foreign insolvency proceeding.¹⁸²

3. Nature of Foreign Proceeding

For a section 304 proceeding to be properly filed, there must be both a foreign proceeding to which the section 304 proceeding will be ancillary and a foreign representative who has filed the domestic petition.¹⁸³ A foreign proceeding qualifies—even though a plan has been confirmed and the case closed—if the section 304 proceeding is brought to aid in implementing the plan.¹⁸⁴

The foreign proceeding need not be brought under the insolvency laws of that country.¹⁸⁵ The foreign proceeding under section 304 may be any judicial or administrative proceeding¹⁸⁶ “for the purpose of (a) liquidating an estate; (b) adjusting debts by composition, extension, or discharge; or (c) effecting a reorganization.”¹⁸⁷ For example, the foreign proceeding may be a winding up of a business,¹⁸⁸ even

181. 11 U.S.C. § 304(b) (2000).

182. See *In re Brierley*, 145 B.R. 151, 169 (Bankr. S.D.N.Y. 1992); *Universal Cas. & Sur. Co. v. Gee (In re Gee)*, 53 B.R. 891 (Bankr. S.D.N.Y. 1985) (winding up of foreign insurance company); *Angulo v. Kedzep Ltd.*, 29 B.R. 417, 419 (S.D. Tex. 1983).

183. See *Gee*, 53 B.R. at 897.

184. See, e.g., *In re Board of Dirs. of Hopewell Int’l Ins. Ltd.*, 238 B.R. 25, 49–50 (Bankr. S.D.N.Y. 1999).

185. See, e.g., *In re Fracmaster, Ltd.*, 237 B.R. 627, 632 (Bankr. E.D. Tex. 1999) (Canadian proceeding under Companies’ Creditors Arrangement Act and Judicature Act of Alberta).

186. See, e.g., *In re Banco de Descuento*, 78 B.R. 337 (Bankr. S.D. Fla. 1987) (administrative proceeding in Ecuador for liquidation of insolvent bank).

187. See *id.*; for the definition of “foreign proceeding,” see *supra* note 128.

188. See, e.g., *In re Treco*, 229 B.R. 280, 293–95 (Bankr. S.D.N.Y.), *aff’d*, 239 B.R. 36 (S.D.N.Y. 1999); *rev’d on other grounds*, 240 F.3d 148 (2d Cir. 2001) (winding up under Bahamas law).

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though such proceedings in the United States are governed by state corporation law rather than bankruptcy law.

The foreign debtor need not qualify as a “debtor” under U.S. law to file a section 304 petition.¹⁸⁹ Notably, the foreign debtor may be a bank,¹⁹⁰ an insurance company,¹⁹¹ a governmental entity,¹⁹² a decedent’s estate¹⁹³ or a trust, none of which may be eligible to file a full bankruptcy case under U.S. law.¹⁹⁴

4. Order of Distribution of Estate Assets

Section 304(c)(4) makes the distribution of estate assets in a foreign insolvency proceeding a factor that a domestic court should consider in fashioning relief for U.S. parties. This provision must be applied with considerable care.

Priorities for the distribution of bankruptcy estate assets vary among countries. Indeed, no other country duplicates exactly the priority list in U.S. Bankruptcy Code § 507(a).¹⁹⁵ These priorities, which judges have evaluated against a standard of fundamental fairness, include the following: (1) secured creditors should be paid from their collateral;¹⁹⁶ (2) some priorities among unsecured creditors should be recognized; (3) unsecured creditors of the same priority should be paid *pro rata* (if not in full); (4) creditors that are foreign to that country should be given the same treatment as its domestic

189. See, e.g., *Goerg v. Parungao (In re Goerg)*, 844 F.2d 1562, 1568 (11th Cir. 1988); *Haarhuis v. Kunnan Enter.*, 223 B.R. 252, 255 (Bankr. D.D.C. 1998), *aff’d*, 177 F.3d 1007 (D.C. Cir. 1999); *Saleh v. Triton Container Int’l, Ltd. (In re Saleh)*, 175 B.R. 422 (Bankr. S.D. Fla. 1994).

190. See, e.g., *Koreag, Controle et Revision S.A. v. Refco F/X Assocs., Inc. (In re Koreag)*, 961 F.2d 341 (2d Cir. 1992) (Swiss bank); *In re Culmer*, 25 B.R. 621 (Bankr. S.D.N.Y. 1982) (Bahamian bank).

191. See *In re Rubin*, 160 B.R. 269 (Bankr. S.D.N.Y. 1993) (Israeli reinsurance company); *In re Lines*, 81 B.R. 267 (Bankr. S.D.N.Y. 1988); *Universal Cas. & Sur. Co. v. Gee (In re Gee)*, 53 B.R. 891 (Bankr. S.D.N.Y. 1985).

192. See *Saleh*, 175 B.R. 422.

193. See *Goerg*, 844 F.2d at 1566–68.

194. See 11 U.S.C. § 109 (2000).

195. See *In re Brierley*, 145 B.R. 151, 166 (Bankr. S.D.N.Y. 1992); see also *In re Ionica PLC*, 241 B.R. 829, 837 (law of applicable foreign country need not provide for same priority of U.S. creditor as U.S. law).

196. See *Bank of New York v. Treco (In re Treco)*, 240 F.3d 148, 155–61 (2d Cir. 2001) (refusing to apply comity to Bahamian bankruptcy proceeding because administrative expenses, which would consume most or all assets of estate, were given priority over secured claim).

creditors;¹⁹⁷ and (5) owners (e.g., shareholders or partners) should receive a distribution only after creditors have been paid in full (unless the creditors agree otherwise, as may occur in the Chapter 11 context in the United States).¹⁹⁸ If a U.S. creditor's claim would not be recognized under the applicable foreign insolvency law, these requirements may provide a basis for denying recognition under section 304.¹⁹⁹

Certain creditors may be secured under the laws of one country and unsecured under the laws of another.²⁰⁰ This factor should make no difference in the determination of whether to recognize a foreign case under section 304.²⁰¹

5. International Comity

By far the most important factor in determining whether to recognize a foreign proceeding under section 304 is international comity. Comity is a principle of broad application in U.S. jurisprudence.²⁰²

a. Definition

The comity issues that arise in international insolvencies are distinctive and have generated a rich body of case law. The U.S. Supreme Court has defined comity "in the legal sense, [a]s neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good

197. See, e.g., *In re Culmer*, 25 B.R. 621, 629–30 (Bankr. S.D.N.Y. 1982).

198. This principle was wrongly applied in *In re Toga Mfg., Ltd.*, 28 B.R. 165 (Bankr. E.D. Mich. 1983), where the court held that a U.S. creditor with a judgment lien would not be treated the same in Ontario, because the creditor would probably be treated as an unsecured creditor under Canadian law. This principle does not require that each individual creditor be treated the same under the applicable foreign law, but only that the foreign law recognize the general categories of creditors similar to those recognized in U.S. bankruptcy law, and that they receive priority over owners.

199. See *In re Papeleras Reunidas, S.A.*, 92 B.R. 584, 590 (Bankr. E.D.N.Y. 1988).

200. See *In re Koreag, Controle et Revision S.A.*, 130 B.R. 705, 713–14 (Bankr. S.D.N.Y. 1991), *vacated and remanded on other grounds*, *Koreag, Controle et Revision S.A. v. Refco F/X Assocs., Inc. (In re Koreag, Controle et Revision S.A.)*, 961 F.2d 341 (2d Cir. 1992); *In re Axona Int'l Credit & Commerce Ltd.*, 88 B.R. 597, 611 (Bankr. S.D.N.Y. 1988). *Contra, Toga*, 28 B.R. at 169–71.

201. *But see Overseas Inns, S.A. v. United States*, 911 F.2d 1146, 1149–50 (5th Cir. 1990) (refusing to apply comity to a Luxembourg bankruptcy reorganization because it treated U.S. taxes as general unsecured debts instead of priority debts).

202. *Maxwell Communication Corp. v. Société Générale (In re Maxwell Communication Corp.)*, 93 F.3d 1036, 1046 (2d Cir. 1996).

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will, upon the other.”²⁰³ Comity is a rule of statutory construction and has no application where legislation is explicit.²⁰⁴

International comity comes into play whenever there is a true conflict between U.S. law and that of a foreign jurisdiction.²⁰⁵ Such a conflict arises only where it is not possible to comply with the substantive legal rules of both fora.²⁰⁶ Thus comity is a doctrine of adjustment where there are parallel inconsistent proceedings in domestic and foreign courts.²⁰⁷

The comity analysis must consider the international legal system as a whole in addition to the interests of individual states, because the effective functioning of the system is advantageous to all the affected jurisdictions.²⁰⁸ Comity takes into account the interests of the United States, the interests of the foreign state or states involved, and the mutual interests of the family of nations in just and efficiently functioning rules of international law.²⁰⁹

At the same time, the U.S. court must assure itself that the foreign proceeding at issue comports with fundamental notions of fairness and due process.²¹⁰ However, U.S. courts should be careful about assuming responsibility for supervising the integrity of the judicial system of another sovereign nation.²¹¹

203. *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895).

204. *See Maxwell*, 93 F.3d at 1047.

205. *See id.* at 1049; *In re Xacur*, 216 B.R. 187, 195–96 (Bankr. S.D. Tex. 1997) (finding no conflict between requirements of laws of the United States and Mexico on issues in controversy).

206. *See Maxwell*, 93 F.3d at 1050 (finding that a transaction would be an avoidable preference under U.S. law but not under English law, which was applicable to the case).

207. *See Underwood v. Hilliard (In re Rimsat Ltd.)*, 98 F.3d 956, 963 (7th Cir. 1996).

208. *See Maxwell*, 93 F.3d at 1048.

209. *See id.*

210. *See In re Koreag, Controle et Revision S.A.*, 130 B.R. 705, 714 (Bankr. S.D.N.Y. 1991), *vacated and remanded on other grounds*, *Koreag, Controle et Revision S.A. v. Refco F/X Assocs. (In re Koreag, Controle et Revision S.A.)*, 961 F.2d 341 (2d Cir. 1992); *In re Hackett*, 184 B.R. 656, 658–60 (Bankr. S.D.N.Y. 1995); *Pravin Banker Assocs. Ltd. v. Banco Popular*, 165 B.R. 379, 385 (S.D.N.Y. 1994); *Interpool, Ltd. v. Certain Freights*, 102 B.R. 373, 377 (D. N.J. 1988). *See also In re Banco de Descuento*, 78 B.R. 337, 340 (Bankr. S.D. Fla. 1987) (reserving determination whether the Labor Court in Ecuador had reached a decision on a compromise of a claim in accordance with regular and fair proceedings consistent with fundamental standards of due process, and ordering the retention of assets in the United States pending the determination of this issue).

211. *See Blanco v. Banco Indus. de Venezuela, S.A.*, 997 F.2d 974, 981–82 (2d Cir. 1993) (*forum non conveniens* case).

If the foreign country at issue is a common law jurisdiction, its laws enjoy a presumption that they are fair and that they comply with U.S. notions of due process.²¹² If the foreign country is not a common law jurisdiction, the domestic court may be required to make a more detailed examination of the law of that country to assure that these requirements are met.

Comity has sometimes been used by U.S. courts to impose a territorial approach for the protection of domestic creditors. However, most recent U.S. decisions have limited the scrutiny under comity to examining whether a foreign court has competent jurisdiction and whether that court's decisions would violate the laws or the public policy of the United States.²¹³

b. Application

Comity is particularly important in a U.S. bankruptcy case involving a foreign insolvency proceeding,²¹⁴ and it may often be the most significant factor.²¹⁵ Deference to foreign insolvency proceedings will often facilitate the distribution of the debtor's assets in an equitable, orderly, efficient, and systematic manner, rather than in a haphazard, erratic, or piecemeal fashion.²¹⁶

The guidelines of section 304(c) should be used with flexibility by the courts.²¹⁷ The legislative history of section 304 states:

These guidelines are designed to give the court the maximum flexibility in handling ancillary cases. Principles of international comity and respect for the judgments and laws of other nations suggest that the court be permitted to make the appropriate orders under all of the circum-

212. See, e.g., *In re Axona Int'l Credit & Commerce, Ltd.*, 88 B.R. 597, 610 (Bankr. S.D.N.Y. 1988); *Universal Cas. & Sur. v. Gee (In re Gee)*, 53 B.R. 891, 901 (Bankr. S.D.N.Y. 1985); *Lindner Fund, Inc. v. Polly Peck Int'l PLC*, 143 B.R. 807, 810 (S.D.N.Y. 1992).

213. See *Axona*, 88 B.R. at 608-09.

214. See, e.g., *Allstate Life Ins. Co. v. Linter Group Ltd.*, 994 F.2d 996, 999 (2d Cir. 1993); *Cunard S.S. Co. v. Salen Reefer Servs. AB*, 773 F.2d 452, 457 (2d Cir. 1985).

215. See *Axona*, 88 B.R. at 609.

216. See *Maxwell Communication Corp. v. Société Générale (In re Maxwell Communication Corp.)*, 93 F.3d 1036, 1048 (2d Cir. 1996); *Cunard*, 773 F.2d at 458.

217. See *Axona*, 88 B.R. at 598.

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stances of each case, rather than being provided with inflexible rules.²¹⁸

In general, comity should be accorded to foreign insolvency proceedings if they do not violate the laws or public policy of the United States, and if the foreign court abides by fundamental standards of procedural fairness.²¹⁹ Comity should be withheld only when its acceptance would be contrary or prejudicial to the interests of the United States.²²⁰ In the insolvency context, U.S. courts should require only that the foreign forum have subject-matter jurisdiction, recognize fundamental creditor protections, and provide fair treatment to all claim holders.²²¹

United States courts should not expect that the insolvency laws of a foreign country will be identical to those of the United States:

218. H.R. Rep. No. 95-595, at 324-25 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6280-81; S. Rep. No. 95-989, 35 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5821. See Mary Elaine Knecht, *The "Drapery of Illusion" of Section 304—What Lurks Beneath: Territoriality in the Judicial Application of Section 304 of the Bankruptcy Code*, 13 U. Pa. J. Int'l Bus. L. 287, 297 (1992).

219. See, e.g., *Finanz AG Zurich v. Banco Economico S.A.*, 192 F.3d 240, 246 (2d Cir. 1999); *In re Koreag, Controle et Revision S.A.*, 130 B.R. 705, 711 (Bankr. S.D.N.Y. 1991), vacated and remanded on other grounds, *Koreag, Controle et Revision S.A. v. Refco F/X Assocs. (In re Koreag, Controle et Revision S.A.)*, 961 F.2d 341 (2d Cir. 1992); *Interpool, Ltd. v. Certain Freights*, 102 B.R. 373, 377-78 (D. N.J. 1988) (refusing to open a section 304 proceeding ancillary to an Australian bankruptcy case, and entering an order for relief in an involuntary Chapter 7 case on the grounds that Australian bankruptcy law fails to provide a court-supervised liquidation procedure, notice to creditors of major agreements between the liquidator and insiders, or equitable subordination for insider misconduct). But see *In re Banco Nacional de Obras y Servicios Publicos, S.N.C.*, 91 B.R. 661, 664 (Bankr. S.D.N.Y. 1988) (comity will not be granted if it would result in forcing American creditors to participate in foreign proceedings in which their claims will be treated in a manner inimical to the U.S. policy of treating creditors equally).

220. See, e.g., *Philadelphia Gear Corp. v. Philadelphia Gear de Mexico, S.A.*, 44 F.3d 187, 191 (3d Cir. 1994); *Cunard*, 773 F.2d at 457; *In re Rubin*, 160 B.R. 269, 283 (Bankr. S.D.N.Y. 1993).

221. See, e.g., *In re Schimmelpenninck*, 183 F.3d 347, 352, 365 (5th Cir. 1999). But see *Interpool*, 102 B.R. at 378-80 (finding that Australian proceeding should not be given comity because U.S. creditors had already been prejudiced by ex parte proceedings in Australian case and Australian law had no provision for equitable subordination; and holding that U.S. bankruptcy case should proceed with respect to U.S. assets); *In re Papeleras Reunidas, S.A.*, 92 B.R. 584, 592-94 (Bankr. E.D.N.Y. 1988) (refusing to recognize Suspension of Payments proceeding in Spain, in part because of failure to notify U.S. creditors of proceeding, and unexplained disappearance of assets that should have been distributed to creditors).

They merely must not be repugnant to U.S. laws and policies.²²² For example, priorities provided by a foreign bankruptcy law may differ from those in domestic legislation.²²³ In addition, individualized notice may not be required as long as effective notice is received.²²⁴ Similarly, a requirement that claims be made in local currency does not create fundamental unfairness.²²⁵ A foreign insolvency system need not provide the entire arsenal of weapons and defenses given by the U.S. bankruptcy system to qualify for comity. The U.S. Supreme Court has said: “We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.”²²⁶ In addition, the Supreme Court stated more than 100 years ago:

[E]very person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government . . . as the known and established policy of that government authorizes. . . . He is conclusively presumed to have contracted with a view to such laws of that government, because the corporation must of necessity be controlled by them²²⁷

Factors providing indicia of procedural fairness include (1) whether creditors of the same class are treated equally in the distribution of assets; (2) whether the liquidators are considered fiduciaries and are held accountable to the court; (3) whether creditors have the right to submit claims which, if denied, can be submitted to a court for adjudication; (4) whether the liquidators are required to give notice to potential claimants; (5) whether there are provisions for creditors’

222. See, e.g., *Schimmelpenninck*, 183 F.3d at 365; *In re Brierley*, 145 B.R. 151, 166 (Bankr. S.D.N.Y. 1992); *Interpool*, 102 B.R. at 378; *In re Axona Int’l Credit & Commerce, Ltd.*, 88 B.R. 597, 610 (Bankr. S.D.N.Y. 1988); 2 Collier, *supra* note 49, at ¶ 304.08[5][b]; see also Ulrich Huber, *Creditor Equality in Transnational Bankruptcies: The United States Position*, 19 Vand. J. Transnat’l L. 741, 758–59 (1986) [hereinafter Huber].

223. See, e.g., *Brierley*, 145 B.R. at 166.

224. See, e.g., *Finanz AG Zurich*, 192 F.3d at 249 (notice by publication sufficient where creditor received notice in time to file a timely claim).

225. See, e.g., *id.* at 250. Indeed the United States itself requires that claims be determined in its local currency. See 11 U.S.C. § 502(b) (2000).

226. *The M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972).

227. *Canada S. Ry. v. Gebhard*, 109 U.S. 527, 537 (1883).

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meetings; (6) whether the foreign country's insolvency laws favor its own citizens; (7) whether all assets are marshaled before one body for centralized distribution; and (8) whether there are provisions for an automatic stay and the lifting of such a stay to facilitate the centralization of claims.²²⁸ To make this determination, the court may have to conduct an evidentiary hearing with expert testimony to ascertain the applicable foreign law and procedures.²²⁹

In deciding whether to apply comity in a particular case, the court must take a careful look at the nature and status of the foreign proceeding at issue. For example, comity should not be applied where it is opposed by creditors who have not been given notice of the foreign proceeding in time to protect their rights in the foreign forum.²³⁰

Comity also requires that a U.S. court respect the decisions that have already been made in the foreign court.²³¹ A decision of a foreign court cannot be attacked collaterally in a section 304 proceeding if the objector has failed to take advantage of opportunities to be heard before the decision was made.²³²

Comity in the section 304 context does not depend on the reciprocal recognition of comity in the related foreign insolvency case.²³³ Indeed, reciprocity is uncommon in such foreign cases, because comity is a legal doctrine that is largely found only in common law jurisdictions.²³⁴

Comity is a substantial factor to consider in determining which nation's courts will decide a particular issue in an international insolvency. Ordinarily, for example, claims against the estate should be decided in the courts of the country where the main case is pending, because the equitable and orderly distribution of the debtor's property

228. See, e.g., *Finanz AG Zurich*, 192 F.3d at 249; *Philadelphia Gear Corp. v. Philadelphia Gear de Mex., S.A.*, 44 F.3d 187, 191 (3d Cir. 1994); *Cunard S.S. Co. v. Salen Reefer Servs. AB*, 773 F.2d 452, 457 (2d Cir. 1985).

229. See *Cunard*, 773 F.2d at 457.

230. *Interpool, Ltd. v. Certain Freights*, 102 B.R. 373, 378–80 (D. N.J. 1988); *In re Paperas Reunidas, S.A.*, 92 B.R. 584, 590–91 (Bankr. E.D.N.Y. 1988).

231. See, e.g., *In re Board of Dirs. of Hopewell Int'l Ins. Ltd.*, 238 B.R. 25, 66–68 (Bankr. S.D.N.Y. 1999) (holding that injunctive relief granted by foreign court is entitled to domestic enforcement).

232. See *id.* at 56–61.

233. See *Cunard*, 773 F.2d at 460.

234. See John R. Paul, *Comity in International Law*, 32 Harv. Int'l L.J. 1 (1991).

can be best accomplished in the main proceeding.²³⁵ Comity may require that the assets located in the United States be transferred abroad for distribution in the court where the main proceeding is pending.²³⁶

However, U.S. courts are reluctant to recognize comity in certain circumstances. Courts may refuse to accord comity where a secured creditor is subject to an automatic stay in the United States but not in the foreign jurisdiction;²³⁷ where the U.S. creditor is treated as secured under U.S. law, but not under the law of the foreign jurisdiction;²³⁸ or where the debt at issue is federal taxes.²³⁹ In addition, collective bargaining issues should usually be decided by U.S. courts because of the distinctive nature of U.S. collective bargaining law.²⁴⁰

Normally, the decision of a bankruptcy court to accord comity to the proceedings of a foreign court is discretionary.²⁴¹ Such a decision is subject to appellate review only for abuse of discretion.²⁴² However, where a circuit court is reviewing an appellate decision on comity (or any other issue) by a district court or bankruptcy appellate panel, the circuit court's review of the lower appellate court is plenary or *de novo*.²⁴³

The application of comity in U.S. bankruptcy cases is not limited to proceedings under section 304: It is relevant to a bankruptcy case under any chapter of the U.S. Bankruptcy Code that involves a foreign insolvency proceeding.²⁴⁴ Comity may be taken into account even though no party has requested its application.

235. See *Cunard*, 773 F.2d at 452 (vacating domestic attachment and requiring creditor to make its claim in Swedish bankruptcy case); *In re Banco Nacional de Obras y Servicios Públicos*, S.N.C., 91 B.R. 661, 667 (Bankr. S.D.N.Y. 1988).

236. See, e.g., *In re Culmer*, 25 B.R. 621 (Bankr. S.D.N.Y. 1982).

237. See, e.g., *In re Papeleras Reunidas, S.A.*, 92 B.R. 584, 593 (Bankr. E.D.N.Y. 1988).

238. See *id.* at 593–94; *In re Toga Mfg. Ltd.*, 28 B.R. 165, 168–71 (Bankr. E.D. Mich. 1983).

239. See *Overseas Inns S.A. v. United States*, 911 F.2d 1146 (5th Cir. 1990).

240. See *Banco Nacional de Obras*, 91 B.R. at 664–67 (holding that certain collective bargaining issues should be decided in U.S. courts because of the distinctive nature of collective bargaining agreements under U.S. law).

241. See, e.g., *Finanz AG Zurich v. Banco Economico S.A.*, 192 F.3d 240, 246 (2d Cir. 1999).

242. *Id.*

243. See, e.g., *Maxwell Communication Corp. v. Société Générale (In re Maxwell Communication Corp.)*, 93 F.3d 1036, 1044 (2d Cir. 1996).

244. See, e.g., *In re Culmer*, 25 B.R. 621 (Bankr. S.D.N.Y. 1982).

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6. Choice of Venue

As a general rule, a freely negotiated forum-selection clause in an international contract unaffected by fraud, undue influence, or one-sided bargaining power should be given full effect, absent a strong showing that it should be set aside.²⁴⁵ However, in the insolvency context such provisions often must yield to considerations of comity.²⁴⁶ After an insolvency proceeding has been commenced, comity and the interests of all creditors may require that the rights of the parties be determined by the insolvency court rather than in the venue chosen by the parties.²⁴⁷

In international insolvency cases, courts have routinely disregarded the contentions of creditors that the inconvenience of litigating a claim in a foreign forum constitutes grounds for rejecting a section 304 petition. United States law provides equal treatment for foreigners: It requires foreign claimants to file their claims and to litigate in U.S. courts to obtain a share of a bankruptcy estate in a U.S. case.

Similarly, the right to arbitrate a dispute must usually yield to considerations of efficiency and convenience in the adjustment of the rights of creditors and the debtor in the forum of the main proceeding, even where international arbitration rights are compromised.²⁴⁸ While arbitration is favored in the U.S. judicial system,²⁴⁹ and this preference is particularly strong for international arbitration agreements, bankruptcy courts have discretion to refuse to refer a dispute

245. See, e.g., *The M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12–14 (1972).

246. See, e.g., *Allstate Life Ins. Co. v. Linter Group Ltd.*, 994 F.2d 996, 1000 (2d Cir. 1993); *Official Comm. v. Transpacific Corp. (In re Commodore Int'l, Ltd.)*, 242 B.R. 243, 261 (Bankr. S.D.N.Y. 1999); *In re Gercke*, 122 B.R. 621, 632 (Bankr. D.D.C. 1991) (choice of venue).

247. See *Gercke*, 122 B.R. at 632.

248. See, e.g., *Vesta Fire Ins. Co. v. New Cap Reinsurance Corp.*, 244 B.R. 209, 215 (S.D.N.Y. 2000) (finding it particularly appropriate to issue an injunction against a pending arbitration where it required the posting of a deposit that would essentially convert an unsecured creditor into a secured creditor).

249. See, e.g., *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (stating that “Congress has . . . mandated the enforcement of arbitration agreements”).

to arbitration where doing so would adversely affect the underlying purposes of the Bankruptcy Code.²⁵⁰

Furthermore, the right to arbitrate is itself a contractual right that is subject to alteration in a reorganization plan, foreign or domestic. For example, a plan may provide for the substitution of one location for another for the arbitration, or for the governing law to be changed.²⁵¹

7. Procedure

The procedures for a section 304 proceeding are different in several respects from those for plenary cases under the Bankruptcy Code.

a. Commencing a Section 304 Proceeding

A section 304 proceeding is commenced by filing a petition alleging that (1) a foreign proceeding was commenced by or against the debtor, (2) the petitioner is a foreign representative entitled to file the petition under section 304, and (3) the debtor has assets within the judicial district where the petition is filed.²⁵² A section 304 petition must be served, together with a summons, on the parties against whom relief is sought pursuant to section 304(b), and on any other parties as the court may direct.²⁵³ Service must be made in the manner provided for serving a summons and complaint.²⁵⁴ Service by mail is authorized whenever it is made within the United States.²⁵⁵ However, service by mail is usually not available where service is to be made in a foreign country.²⁵⁶ Service abroad requires compliance with the applicable procedures of the Federal Rules of Civil Procedure.²⁵⁷

250. See, e.g., *United States Lines, Inc. v. American S.S. Owners Mut. Protection & Indem. Ass'n (In re United States Lines, Inc.)*, 197 F.3d 631, 639–41 (2d Cir. 1999), *cert. denied*, 120 S. Ct. 1532 (2000).

251. See, e.g., *In re Board of Dirs. of Hopewell Int'l Ins. Ltd.*, 238 B.R. 25, 61–66 (Bankr. S.D.N.Y. 1999).

252. See, e.g., *In re Koreag, Controle et Revision S.A.*, 130 B.R. 705, 711 (Bankr. S.D.N.Y. 1991), *vacated and remanded on other grounds*, *Koreag, Controle et Revision S.A. v. Refco F/X Assocs. (In re Koreag, Controle et Revision S.A.)*, 961 F.2d 341 (2d Cir. 1992).

253. See Fed. R. Bankr. P. 1010.

254. See *id.*

255. See Fed. R. Bankr. P. 7004(b).

256. See 9 Collier, *supra* note 49, ¶ 1010.03.

257. See Fed. R. Civ. P. 4(f) & (j).

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A party in interest has a right to oppose the granting of relief under section 304 by filing a timely opposition to the petition.²⁵⁸ Any defense or objection to the petition must be served and filed within twenty days after the service of the summons.²⁵⁹ If a timely objection to the petition is filed, the court must determine in due course whether relief under section 304 should be granted. The determination of whether a section 304 petition should be granted requires two findings: (1) that a “foreign proceeding” is pending, as defined in Bankruptcy Code § 101(23), and (2) that the party filing the section 304 petition qualifies as a “foreign representative,” as defined in section 101(24).²⁶⁰ In order to make this determination, the court may be required to conduct a trial.²⁶¹

Upon the filing of a section 304 petition, the court must determine whether it should recognize a foreign case as the debtor’s main case. In making this determination, section 304(c) provides that the court shall be guided by “what will best assure an economical and expeditious administration of such [foreign] estate” consistent with the following factors: (1) just treatment of all claimants; (2) protection of U.S. creditors against prejudice and inconvenience; (3) prevention of preferential or fraudulent transfers of property of the estate; (4) substantial conformity to the U.S. Bankruptcy Code order of distribution of proceeds; (5) comity; and (6) if applicable, the provision of an opportunity for a fresh start for the foreign debtor.²⁶² These are guidelines, not requirements, by which the bankruptcy court should measure the extent to which foreign law is compatible with U.S. law and practice.²⁶³

258. See 11 U.S.C. § 304(b) (2000); *In re Fracmaster, Ltd.*, 237 B.R. 627, 632 (Bankr. E.D. Tex. 1999).

259. See Fed. R. Bankr. P. 1011(b).

260. *Id.*

261. See, e.g., Fed. R. Bankr. P. 7012 & 7056; see also *In re Culmer*, 25 B.R. 621, 624 (Bankr. S.D.N.Y. 1982).

262. See 11 U.S.C.A. § 304(c) (2000).

263. See *Haarhuis v. Kunnan Enters., Ltd.*, 223 B.R. 252, 255 (D. D.C. 1998), *aff’d*, 177 F.3d 1007 (D.C. Cir. 1999).

b. Venue: Which Domestic District?

Domestic venue in a section 304 proceeding is governed by 28 U.S.C. § 1410.²⁶⁴ Section 1410 provides that the proper venue depends upon the relief requested. A section 304 proceeding must be filed (1) in the district where an action sought to be enjoined is pending,²⁶⁵ (2) in the district where the property that is the subject of a turnover request is located,²⁶⁶ or (3) in all other situations, where the principal place of business or principal asset of the foreign estate is located.²⁶⁷

Section 1410 does not resolve the issue of proper venue where assets are dispersed among various districts in the United States, or when a representative seeks to enjoin actions or enforcement of judgments in different districts. Arguably such circumstances could require a separate section 304 proceeding in each district where assets are located or where litigation is pending. However, such an interpretation would violate the goals of section 304—promoting comity, judicial economy, efficiency of administration, and the avoidance of inconsistent judgments.²⁶⁸ In such circumstances, the proper venue for a section 304(c) petition is the district where the debtor's principal

264. Section 1410 provides:

(a) A case under section 304 of title 11 to enjoin the commencement or continuation of an action or proceeding in a state or federal court, or the enforcement of a judgment, may be commenced only in the district court for the district where the state or federal court sits in which is pending the action or proceeding against which the injunction is sought.

(b) A case under section 304 of title 11 to enjoin the enforcement of a lien against a property, or to require the turnover of property of an estate, may be commenced only in the district court for the district in which such property is found.

(c) A case under section 304 of title 11, other than a case specified in subsection (a) or (b) of this section, may be commenced only in the district court for the district in which is located the principal place of business in the United States, or the principal assets in the United States, of the estate that is the subject of such case.

28 U.S.C. § 1410 (2000).

265. See, e.g., *Aranha v. Eagle Fund, Ltd. (In re Thornhill Global Deposit Fund, Ltd.)*, 245 B.R. 1, 8 (Bankr. D. Mass. 2000); *In re Brierley*, 145 B.R. 151, 162 (Bankr. S.D.N.Y. 1992); *In re Banco de Descuento*, 78 B.R. 337, 338 (Bankr. S.D. Fla. 1987); *Angulo v. Kedzep Ltd.*, 29 B.R. 417, 418 (S.D. Tex. 1983).

266. See, e.g., *Thornhill*, 245 B.R. at 8; *Angulo*, 29 B.R. at 418.

267. See, e.g., *Brierley*, 145 B.R. at 162.

268. See, e.g., *In re Board of Dirs. of Hopewell Int'l Ins. Ltd.*, 238 B.R. 25, 44 (Bankr. S.D.N.Y. 1999).

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assets or principal place of business in the United States is located.²⁶⁹ Once a section 304 petition is filed in a district with proper venue, that court may grant nationwide relief, including issuing a nationwide injunction.²⁷⁰ The court may also authorize the recovery of estate property located in other districts.²⁷¹

A court has the authority to transfer venue of a section 304 proceeding to another district. However, there is a strong presumption against transfer, and the party seeking transfer has the burden of showing that a transfer should be granted. The relevant factors for making a transfer include the location of the parties, the accessibility of evidence, the expense and ability to obtain witnesses (including unwilling witnesses), the enforceability of any resulting judgment, the ability to receive a fair trial, and the overall economics of estate administration.²⁷²

B. Personal Jurisdiction Over Domestic Parties

A domestic court in the United States normally may not proceed with litigation against a defendant unless the court has personal jurisdiction over the defendant. If the defendant has filed a claim in the domestic bankruptcy case, the defendant is subject to the bankruptcy court's equitable power.²⁷³ The bankruptcy court then has jurisdiction over the creditor, at least on any claims arising out of the same transaction or occurrence.

If a defendant has not filed a claim in a bankruptcy case, personal jurisdiction for litigation against the defendant requires "minimum contacts" of the party with the United States as a whole.²⁷⁴ However,

269. *Id.*

270. See *In re Saleh*, 175 B.R. 422, 426 (Bankr. S.D. Fla. 1994).

271. See *Evans v. Hancock, Rothert, & Bunshoft (In re Evans)*, 177 B.R. 193, 197 (Bankr. S.D.N.Y. 1995).

272. See *In re Continental Airlines, Inc.*, 133 B.R. 585, 587–88 (Bankr. D. Del. 1991).

273. See, e.g., *Langenkamp v. Culp*, 498 U.S. 42, 44 (1990).

274. See, e.g., *In re Tuli*, 172 F.3d 707, 713 (9th Cir. 1999); *Warfield v. KR Entertainment, Inc. (In re Federal Fountain Inc.)*, 165 F.3d 600, 601–02 (8th Cir. 1999); *Nordberg v. Granfinanciera (In re Chase & Sanborn Corp.)*, 835 F.2d 1341, 1344–48 (11th Cir. 1988), *rev'd on other grounds*, 492 U.S. 33 (1989); *Official Comm. v. Transpacific Corp. (In re Commodore Int'l, Ltd.)*, 242 B.R. 243, 253–55 (Bankr. S.D.N.Y. 1999); *Gex Ky., Inc. v. Wolf Creek Collieries Co. (In re Gex Ky., Inc.)*, 85 B.R. 431, 434 (Bankr. N.D. Ohio 1987); see also *Diamond Mortgage Corp. v. Sugar*, 913 F.2d 1233, 1244 (7th Cir. 1990); *Teitelbaum v. Cho-*

minimum contacts with the state where the court is located may be necessary for a bankruptcy court to exercise personal jurisdiction over a defendant in a non-core proceeding.²⁷⁵

Because there is a bankruptcy law provision for service of process, the bankruptcy court need not rely on the long-arm statute of the state in which it sits to obtain personal jurisdiction over a defendant who is not a resident of that particular state.²⁷⁶ If a bankruptcy court lacks personal jurisdiction over a party, it may nonetheless proceed with respect to specific property if it has *in rem* jurisdiction over that property.²⁷⁷ In addition, the property may provide jurisdictional grounds for proceeding against the property's owner for actions relating to the property, in which case the court exercises *quasi in rem* jurisdiction.²⁷⁸ However, an *in rem* or *quasi in rem* judgment is not binding on the property's owner personally.²⁷⁹ Such a judgment attaches to the property at issue and is only enforceable to the extent of the property's value.²⁸⁰

C. Declining to Exercise Domestic Jurisdiction

In a section 304 proceeding, a U.S. court has the power to decline to exercise jurisdiction. The court may decide either to abstain from exercising jurisdiction in the proceeding because it is in the best interests of creditors, or to decline to exercise jurisdiction on the grounds of *forum non conveniens*.

quette & Co. (*In re* Outlet Dep't Stores, Inc.), 82 B.R. 694, 699 (Bankr. S.D.N.Y. 1988). This result derives from Federal Rule of Bankruptcy Procedure 7004(d), which authorizes the service of process anywhere in the United States.

275. See *Celotex Corp. v. Rapid Am. Corp.* (*In re* Celotex Corp.), 124 F.3d 619, 630 (4th Cir. 1997).

276. See *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 108 (1987).

277. See 4 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1070 (1987) [hereinafter Wright & Miller].

278. See *id.*

279. See *id.*

280. See *id.*

III. Foreign Cases with Domestic Aspects

1. Abstention

The doctrine of abstention is codified in Bankruptcy Code § 305(a), which empowers a court, after notice and hearing,²⁸¹ to dismiss or suspend all proceedings in a bankruptcy case. The doctrine permits a federal court, in the exercise of its discretion,²⁸² to relinquish jurisdiction over a bankruptcy case where it is in the best interests of creditors and the debtor.²⁸³ Abstention may be exercised only in an extraordinary case.²⁸⁴ Abstention is not based on a balancing test:²⁸⁵ Indeed, the court may be required to find a true conflict between domestic and foreign law to justify abstention.²⁸⁶ Any party in interest may request abstention.

Section 305 gives a court two ways to exercise its powers of abstention. First, the court may order the dismissal of the entire bankruptcy case, and thus relinquish all jurisdiction in connection with the case.²⁸⁷ Second, the court may temporarily abstain from exercising jurisdiction and order a suspension of domestic proceedings pending other developments.²⁸⁸

281. Federal Rule of Bankruptcy Procedure 1017(c) provides that a case shall not be dismissed or suspended until after hearing and notice to all creditors and interested parties pursuant to Rule 2002(a).

282. See *Underwood v. Hilliard (In re Rimsat, Ltd.)*, 98 F.3d 956, 962 (7th Cir. 1996) (court may exercise its discretion to refuse abstention).

283. See *Underwood*, 98 F.3d at 962.

284. See *In re Tuli*, 172 F.3d 707, 713 (9th Cir. 1999) (holding that bankruptcy court abused its discretion in abstaining from considering a transaction with the government of Iraq, assuming that the transaction took place in Iraq, where the bankruptcy court gave no further explanation for its abstention).

285. See *In re Xacur*, 216 B.R. 187, 195 (Bankr. S.D. Tex. 1997).

286. See *Hobson v. Travelstead (In re Travelstead)*, 227 B.R. 638, 656 (D. Md. 1998).

287. See, e.g., *Finanz AG Zurich v. Banco Economico S.A.*, 192 F.3d 240, 246 (2d Cir. 1999); *In re Ionica PLC*, 241 B.R. 829, 834–38 (Bankr. S.D.N.Y. 1999) (dismissing Chapter 11 case filed while administration proceeding pending in United Kingdom—the U.S. case was based solely on bank's holding of pledged securities and the case was filed only to take advantage of possible equitable subordination and substantive consolidation); *In re Phoenix Summus Corp.*, 226 B.R. 379, 381–82 (Bankr. N.D. Tex. 1998); *New Line Int'l Releasing, Inc. v. Ivex Films, S.A.*, 140 B.R. 342 (S.D.N.Y. 1992).

288. See *In re Axona Int'l Credit & Commerce, Ltd.*, 88 B.R. 597, 608 (Bankr. S.D.N.Y. 1988); *In re Trackman*, 33 B.R. 780, 783–84 (Bankr. S.D.N.Y. 1983) (suspending section 304 proceeding because parallel district court interpleader proceeding provided most of the relief available in bankruptcy court).

A choice-of-venue clause is not a basis for abstention. Such a clause is not enforceable if its enforcement would be unreasonable.²⁸⁹ Where there is a foreign bankruptcy proceeding in progress, considerations of efficient and fair distribution of the debtor's assets are likely to make it unreasonable to enforce a choice-of-venue provision.²⁹⁰

Section 305(b) places certain limits on the authority of a foreign representative to request the dismissal or suspension of a U.S. bankruptcy case in favor of a pending foreign case.²⁹¹ The foreign representative must show (1) that there is a foreign insolvency proceeding under way,²⁹² and (2) that the factors specified in section 304(c) warrant such dismissal or suspension.²⁹³ The factors of section 304(c) are applicable even where the U.S. proceeding is a full bankruptcy case and not an ancillary proceeding under section 304.²⁹⁴ Pursuant to section 305(c), an order granting or denying a motion to dismiss or suspend a U.S. proceeding is reviewable only by the district court or the bankruptcy appellate panel; it is not reviewable by appeal or otherwise by the circuit court.²⁹⁵

In several cases the administrator of a foreign bankruptcy case has filed a Chapter 7 case in the United States to bring avoidance actions under the U.S. Bankruptcy Code.²⁹⁶ In such a case, after the recovery of avoidable transfers is complete, the U.S. case may be suspended and the assets transferred to the country where the main case is

289. See *The M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972); *New Line*, 140 B.R. at 346.

290. See *New Line*, 140 B.R. at 346.

291. See *In re Spanish Cay Co.*, 161 B.R. 715, 724 (Bankr. S.D. Fla. 1993).

292. See *In re Xacur*, 216 B.R. 187, 195 (Bankr. S.D. Tex. 1997). For the definition of "foreign proceeding," see *supra* note 128.

293. See *In re Axona Int'l Credit & Commerce, Ltd.*, 88 B.R. 597, 608 (Bankr. S.D.N.Y. 1988).

294. See, e.g., *In re Ionica PLC*, 241 B.R. 829, 834–38 (Bankr. S.D.N.Y. 1999).

295. See *Underwood v. Hilliard (In re Rimsat, Ltd.)*, 98 F.3d 956, 962 (7th Cir. 1996); *In re Emerson Radio Corp.*, 52 F.3d 50, 52 (3d Cir. 1995). But see *In re Georg*, 930 F.2d 1563, 1566 (11th Cir. 1991).

296. See, e.g., *Axona*, 88 B.R. at 601 (foreign representative filed Chapter 7 case under U.S. bankruptcy law because it was not clear that the representation would be permitted to exercise avoiding powers in a proceeding under section 304); *Banque de Financement, S.A. v. First Nat'l Bank*, 568 F.2d 911 (2d Cir. 1977); *Israel-British Bank (London) Ltd. v. FDIC*, 536 F.2d 509 (2d Cir. 1976).

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pending for distribution to all creditors (including those from the United States) according to the priority provisions of that nation's law. The foreign forum should normally determine the validity or amount of claims against a foreign debtor.²⁹⁷

A foreign representative should generally file a motion to dismiss or suspend a plenary U.S. case in connection with the commencement of an ancillary proceeding in the United States.²⁹⁸ The main case in the United States may be dismissed if three criteria are met: (1) the main case is competing with a pending foreign proceeding; (2) the ancillary proceeding is able to deal effectively with both U.S. creditors and assets; and (3) relinquishing jurisdiction would best ensure the economical and expeditious administration of the estate.²⁹⁹

A motion for such dismissal or suspension may be denied in the U.S. case if the debtor is seeking a reorganization under Chapter 11 of the U.S. Bankruptcy Code and if such a reorganization is not available under the laws of the appropriate foreign jurisdiction.³⁰⁰

2. Forum Non Conveniens

Forum non conveniens is another ground on which courts have traditionally deferred to other jurisdictions for the determination of controversies. The doctrine of *forum non conveniens* gives a court discretion to decline jurisdiction when the convenience of the parties and ends of justice would be better served if the case were to proceed in another forum.³⁰¹ A bankruptcy court may use *forum non conveniens* either to dismiss or to suspend a case,³⁰² though this rule is not codified in the U.S. Bankruptcy Code.³⁰³ In a typical domestic federal

297. See *In re Brierley*, 145 B.R. 151, 168 (Bankr. S.D.N.Y. 1992).

298. *Universal Cas. & Sur. Co. v. Gee (In re Gee)*, 53 B.R. 891, 905 (Bankr. S.D.N.Y. 1985).

299. See Huber, *supra* note 222, at 766. See also *Gee*, 53 B.R. at 904–05.

300. See *In re Spanish Cay Co.*, 161 B.R. 715, 724 (Bankr. S.D. Fla. 1993).

301. See *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 721–22 (1996); *Alfadda v. Fenn*, 159 F.3d 41, 45–46 (2d Cir. 1998); *Official Comm. v. Transpacific Corp. (In re Commodore Int'l, Ltd.)*, 242 B.R. 243, 262 (Bankr. S.D.N.Y. 1999).

302. See, e.g., *Commodore*, 242 B.R. at 261–64.

303. Section 305(a)(1) may be read to incorporate the *forum non conveniens* doctrine. However, the legislative history indicates that Congress intended this provision to apply where the parties are working out an arrangement out of court, and a few recalcitrant creditors file an involuntary bankruptcy case to improve their negotiating power.

case, the remedy for *forum non conveniens* is to transfer the case to the proper district.³⁰⁴ In contrast, in international practice the solution to a *forum non conveniens* problem is the same as that in a federal case that should have been brought in state court: The case is dismissed or suspended.³⁰⁵

The application of *forum non conveniens* requires a three-step analysis. First, the court must examine the availability of an alternate forum.³⁰⁶ Second, the court must consider the plaintiff's choice of forum, which enjoys a presumption in its favor.³⁰⁷ Third, the court must balance the plaintiff's choice of forum against the private interest factors affecting the convenience of the litigants and the public interest factors affecting the convenience of the forum and the interests of justice.³⁰⁸ In a complex bankruptcy case, the public interest factors frequently weigh in favor of having the controversy decided in the forum of the main insolvency case.³⁰⁹

In a proceeding brought under section 304, a bankruptcy court must consider the factors specified in section 304(c) in determining whether to apply the doctrine of *forum non conveniens* in favor of a foreign forum.

304. See 5A Wright & Miller, *supra* note 277, § 1352.

305. See *id.*

306. See *Commodore*, 242 B.R. at 263.

307. See *id.*

308. See *id.*

309. See *id.*

IV. International Conventions and Other Sources of International Bankruptcy Law

Traditionally there have been very few international conventions on the specific subject of transnational insolvencies, and none to which the United States has been a party. Several international treaties specifically govern transnational insolvency matters, but only among the states that are parties to the applicable convention.³¹⁰ The Nordic Bankruptcy Convention of 1933,³¹¹ for example, applies among Denmark, Finland, Iceland, Norway, and Sweden. It has been used sparingly, however, because of the relatively small number of insolvency proceedings in these countries. In addition, there are several bilateral treaties between European countries that include provisions relating to transnational insolvencies,³¹² but the international insolvency aspects of these treaties are largely superseded by the European Union Regulation on Insolvency Proceedings, effective May 31, 2002.³¹³

At least two treaties between various Latin American countries include provisions on the subject of insolvencies. Chapter X of the Montevideo Treaty of 1889³¹⁴ governs insolvency issues between Argentina, Bolivia, Columbia, and Peru. In addition, the Code Bustamante (Convention on Private International Law of 1928)³¹⁵ covers fifteen Latin American countries: Bolivia, Brazil, Chile, Costa Rica,

310. Three other bankruptcy treaties have been drafted but never ratified: the Hague Bankruptcy Convention of 1925, the Draft United States–Canada Bankruptcy Treaty of 1979, and the Benelux Convention of 1961 (Belgium, Luxembourg, and the Netherlands).

311. See Convention Regarding Bankruptcy, Nov. 7, 1933, 155 L.N.T.S. 115, as amended, October 11, 1977; see generally David C. Cook, *Prospects for a North American Bankruptcy Agreement*, 2 Sw. J. Law & Trade Am. 81, 85 (1995).

312. See European Union Reg. on Insolvency Proceedings, art. 44, 2000 O.J. (L 160) 1 (see Appendix C, *infra*).

313. See *infra* text accompanying notes 457–533.

314. 2 Int. Am. Conf. 884 (1889).

315. Convention on Private International Law (Bustamante Code), Feb. 20, 1928, 86 L.N.T.S. 254 (English version).

Cuba, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru, and Venezuela. It appears that these treaties are not put to much use.

In addition, there are more general treaties that may cover certain international aspects of transnational bankruptcy cases. For example, treaties on civil and commercial litigation may provide assistance in litigation in insolvency cases.³¹⁶

Apart from treaties and the new EU Regulation, there is little public international law³¹⁷ that applies to transnational insolvencies. Similarly, there are no international tribunals with competence (i.e., jurisdiction)³¹⁸ in the arena of transnational insolvencies.³¹⁹

Notwithstanding the relative lack of international treaties on transnational insolvencies, four documents can provide substantial assistance in dealing with transnational insolvencies. The first is a

316. See, e.g., Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361; Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555. See also EU Reg., art. 44 (listing nine bilateral conventions containing provisions that are replaced by the EU Regulation; see *infra* Appendix C).

317. International law is part of the domestic law of the United States. See *The Paquete Habana*, 175 U.S. 677, 700 (1900) (stating that international law is part of the law of the United States and must be ascertained and administered by the courts of justice of appropriate jurisdiction whenever the applicable law depends on the application of international law).

318. It is conceivable that a dispute involving a transnational insolvency could be submitted to the International Court of Justice or to the International Trade Court. Such a proceeding would be highly unusual and would occur only if a state with standing took up the interests of one of its citizens or businesses in such a forum. See, e.g., *In re Elettronica Sicula S.P.A.*, 1989 I.C.J. 15 (rejecting U.S. challenge that Italian local government paid an insufficient price for a factory taken over by the municipality).

On one occasion the World Court received a request to resolve an international insolvency problem. See *Barcelona Traction, Light & Power Co. (Belgium v. Spain)*, 1970 I.C.J. 3. The World Court found that Belgium had no legal standing to exercise diplomatic protection for shareholders of a Canadian company relating to measures taken against that company in Spain. The World Court found that Canada could protect shareholders of its own corporations. Furthermore, the World Court expressed reluctance to permit a country to provide diplomatic protection for shareholders, because that would open the door to competing claims by various states, which would create an atmosphere of insecurity in international economic relations.

319. The European Union Convention on Insolvency Proceedings proposed to give jurisdiction to the Court of Justice of the European Communities to interpret the Convention. See European Union Convention on Insolvency Proceedings, arts. 43–45, Nov. 23, 1995, 35 I.L.M. 1223 (1996). The provisions apparently did not confer jurisdiction on the Court of Justice to hear insolvency cases or secondary proceedings that could be brought in the member countries. These provisions were deleted before the adoption of the convention text as an EU regulation.

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model law drafted by the United Nations Commission on International Trade Law [hereinafter the Model Law].³²⁰ The second is the American Law Institute's NAFTA Transnational Insolvency Project,³²¹ which was recently completed pursuant to the North American Free Trade Agreement. The third, adopted by the European Community to govern transnational insolvencies among its members, is the European Union Regulation on Insolvency Proceedings, which goes into effect on May 31, 2002. The fourth is the Cross-Border Insolvency Concordat, which establishes a set of general principles developed by Committee J of the International Bar Association to harmonize and coordinate insolvency proceedings in multiple countries.

Until the Model Law takes effect (as it is adopted by various countries), the Concordat is the principal source of procedures for international insolvencies. The EU Regulation may also be used as a source of international insolvency law in non-EU countries.³²²

A. UNCITRAL Model Law on Cross-Border Insolvency

Except in the European Union, international insolvencies are likely to be affected by the United Nations Commission on International Trade Law (UNCITRAL) Model Law, which is designed for internal adoption in various countries. As a model law, this statute will presumably be adopted with modifications and adjustments to accommodate each enacting country's respective commercial code(s), business laws, and legal culture. As a result, it is necessary to examine the actual law as enacted in a particular country to determine the provisions and application of the law in that state.

320. Model Law on Cross-Border Insolvency, May 30, 1997, 36 I.L.M. 1386 (1997); see also *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, 1997 XXVIII UNCITRAL Y.B. pt. 3, § 2, U.N. Doc. A/CN.9/442, reprinted in 6 Tul. J. Int'l & Comp. L. 415 (1998); see generally André J. Berends, *The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview*, 6 Tul. J. Int'l & Comp. L. 309 (1998). For the text of the Model Law, see *infra* Appendix B.

321. American Law Institute, Transnational Insolvency Project: Principles of Cooperation in Transnational Insolvency Cases Among the Members of the North American Free Trade Agreement (draft, Apr. 14, 2000).

322. See, e.g., the Israel district court ruling in *In re Tower Air*, liquidation files 1383/00, 1384/00 (D.C.T.A., May 28, 2000), summarized in Adi Kahan, *Country Focus*, Insol World, Dec. 2000, at 4-5 (adopting the concept of "establishment" from the EU Regulation).

UNCITRAL promulgated the Model Law in 1997 to provide countries with an internal legal regime for the treatment of insolvencies with transnational features. The Model Law is designed for cases involving a debtor, assets, creditors, operations, or transactions located in two or more countries. Its purpose is to provide a means for more effective, equitable, and efficient case administration of transnational insolvency liquidations and reorganizations.

The Model Law is designed to function where two or more nations have adopted the law in their domestic legislation; it governs transnational insolvency problems between those countries where the law has been adopted. Even absent adoption in a relevant country, the Model Law is likely to provide an international standard for courts on the treatment of transnational insolvency problems.

UNCITRAL developed the Model Law because, despite substantial efforts, no treaty had been drafted that had received any substantial approval.³²³ A model law was perceived as a more modest proposal that could more easily be accepted. Unlike a convention, which generally must be accepted or rejected as a whole, a model law can be tailored by each country to its particular needs and interests.³²⁴ In addition, a convention takes much longer to draft because every participant has a vested interest in the text. A model law, in contrast, does not require the same level of commitment because of the possibility of modification by an adopting nation.³²⁵

The Model Law has been adopted thus far in Japan, South Africa, Mexico, and Eritrea.³²⁶ Canada has also enacted legislation inspired by the Model Law.³²⁷ The Model Law is incorporated into S. 420 and H.R. 333 of the 107th U.S. Congress³²⁸—this legislation would in-

323. See Berends, *supra* note 13, at 319.

324. See *id.* at 320.

325. See *id.* at 319.

326. See <http://www.uncitral.org/en-index.htm> (visited Apr. 3, 2001).

327. See Bankruptcy and Insolvency Act, R.S.C., ch. 13-3, §§ 267–275 (1995) (Can.) (effective Sept. 30, 1997). This statute was recently invoked to protect the solvent Canadian subsidiary of a U.S. Chapter 11 debtor, even though applicable Canadian substantive law did not permit the filing of an insolvency case by a solvent entity. See *In re Babcock & Wilcox*, No. 00-CL-3667 (Ont. Ct. Feb. 25, 2000), summarized in E. Bruce Leonard, *Non-Debtor Protection in an International Case*, Am. Bankr. Inst. J. 28–29 (May 2000) [hereinafter Leonard I].

328. See S. 420 § 801, 107th Cong. (2001); H.R. 333, § 801, 107th Cong. (2001); see generally, M. Cameron Gilreath, *Overview and Analysis of How the United Nations Model Law on*

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corporate the Model Law into the U.S. Bankruptcy Code as Chapter 15. As of this writing, these bills await resolution on Capitol Hill.

The Model Law³²⁹ has three principal features. First, it provides for more timely, effective, and efficient procedures for recognizing foreign insolvency proceedings. Second, it authorizes each accredited representative to participate in foreign courts and proceedings in enacting nations. Third, it mandates the cooperation by courts and authorized estate representatives in one country with courts and estate representatives of other countries with related proceedings. Such cooperation is subject to the primacy of local proceedings and deference to the local judge's statutory discretion, and to applicable principles of due process and customary court practices.

Three features of the Model Law are especially important for U.S. interests. First, it recognizes debtors in possession as proper estate representatives. Chapter 11 debtors in the United States have had substantial difficulty in obtaining recognition in foreign insolvency proceedings, where a trustee is usually appointed to represent the estate.³³⁰ Second, the Model Law contains an automatic stay, which applies to secured creditors as well as unsecured creditors. In contrast, a number of countries have automatic stays that apply only to unsecured creditors. Third, reorganization is promoted as a fundamental goal of the Model Law, even though the bankruptcy laws of many countries provide only for liquidation.

The Model Law is not the ultimate step in international cooperation in insolvency cases. It leaves unresolved many difficult legal issues. Notably, the Model Law has no provision to govern conflict-of-laws and choice-of-law issues.

1. Definitions

The Model Law introduces several defined concepts that are important for understanding the law. A *state* is a nation that has adopted the Model Law. A *foreign proceeding* is defined broadly to include any col-

Insolvency Would Affect United States Corporations Doing Business Abroad, 16 Bankr. Dev. J. 399 (2000).

329. The description of the Model Law given here assumes that it is adopted without modification by the adopting country.

330. See *supra* text accompanying notes 113–14.

lective judicial or administrative proceeding (including an interim proceeding) pursuant to a law relating to insolvency in a foreign state, in which the assets and affairs of the debtor are subject to control or supervision by a foreign court for the purpose of reorganization or liquidation.³³¹

A *foreign non-main proceeding* is a foreign proceeding, other than a foreign main proceeding, taking place in a state where the debtor has an establishment.³³² An *establishment* is broadly defined to include any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.³³³

The distinction between a main proceeding and a non-main proceeding is important under the Model Law. The recognition of a foreign proceeding as a main proceeding imposes an automatic stay on creditor collection activities in the United States, and suspends the right to transfer, encumber, or otherwise dispose of any assets of the debtor.³³⁴ In contrast, such a stay and suspension of transfer rights upon the recognition of a foreign non-main proceeding arises only pursuant to court order, and is discretionary.³³⁵

A *foreign court* is a judicial or other authority competent to control or supervise a foreign proceeding.³³⁶ A *foreign representative* means a person or body (including one appointed on an interim basis) authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding.³³⁷

The *center of main interests* of a debtor is a critically important new concept introduced by the Model Law. This concept is also used in

331. See Model Law, art. 2(a). This definition may cover proceedings that do not fall within the bankruptcy law of the nation at issue. For example, an insolvency proceeding for a bank or an insurance firm would qualify, even though it does not take place under U.S. bankruptcy law. Similarly, a winding up of a corporation or a partnership under state law in the United States would also probably qualify for Model Law purposes.

332. See *id.* art. 2(c).

333. See *id.* art. 2(f).

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

335. See *id.* art. 21(1).

336. See *id.* art. 2(e).

337. See *id.* art. 2(d).

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the EU Regulation³³⁸ and in the NAFTA Transnational Insolvency Project.³³⁹ As of now, this concept is unknown in U.S. law.

Under the Model Law, the center of a debtor's main interests, absent proof to the contrary, is presumed to be the state where the debtor's registered office is located or the debtor's habitual residence in the case of an individual.³⁴⁰ A foreign proceeding granted recognition under the Model Law is a foreign main proceeding if it is pending in the state where the center of the debtor's main interests are located.³⁴¹

Several other concepts are also important to understanding the Model Law. *Insolvency* is a broad umbrella term that includes both reorganizations and liquidations. Insolvency does not necessarily mean financial (balance sheet) insolvency: A debtor is not required to be financially insolvent to qualify for a liquidation or reorganization. A *proceeding* is the generic term for an insolvency (or bankruptcy) case: The term is not limited to *adversary proceeding* as in U.S. bankruptcy law terminology. Finally, *preference* is generally synonymous with the term "priority" in U.S. law, and is used to designate the rank of a claim: The term does not relate to "preferential transfers" as in U.S. bankruptcy law.³⁴²

2. Application of the Model Law

The Model Law is drafted to cover all kinds of insolvency proceedings. However, it is anticipated that exceptions will be recognized in some countries, especially for banks and insurance companies, which frequently have special regimes for winding up. Some countries are also considering the exclusion of consumer insolvencies, because consumers are not provided for in those countries' domestic insolvency legislation.³⁴³

338. See *infra* text accompanying notes 479–84.

339. See *infra* text accompanying notes 422, 450–51.

340. See Model Law, art. 16(3).

341. See *id.* art. 2(b).

342. See 11 U.S.C. § 547 (2000).

343. Most countries that lack consumer insolvency laws also lack any substantial amount of consumer debt. However, the credit card industry is rapidly expanding its reach into these countries. Consumer insolvency legislation likely will follow in the affected countries in due course.

The Model Law should be interpreted with due regard to its international origin and to the need to promote uniformity in its application and the observance of good faith.³⁴⁴ The Model Law is intended to apply in any of the following situations: (1) a “foreign court” or “foreign representative” involved in an insolvency case seeks assistance in the courts of a second state; (2) a court, trustee, or debtor in possession in a state seeks assistance of a second state involving an insolvency proceeding in the first state; (3) there are two or more concurrent insolvency cases in different states involving the same debtor; or (4) creditors or other parties in interest in one state seek to commence or participate in an insolvency proceeding in another state.³⁴⁵

Notwithstanding the broad scope of the Model Law, there are three important restrictions to its application. First, the Model Law is preempted by any applicable international treaties and agreements of the states at issue.³⁴⁶ Second, the Model Law permits courts of an enacting state to refuse to apply the Model Law where such action would be manifestly contrary to the public policy of the state.³⁴⁷ Third, a court in an enacting state is given discretion to qualify, condition, limit, modify, or terminate an order for relief with respect to a foreign proceeding or foreign representative as appropriate.³⁴⁸

3. Access of Foreign Representatives and Creditors to Courts

The Model Law provides that foreign creditors and representatives of foreign proceedings are to be granted more expeditious, simplified, and certain access to insolvency proceedings in an enacting state. A foreign representative is entitled to apply directly to a court in an enacting state with minimal formalities.³⁴⁹ However, such a representative may be subject to routine requirements and generally applied practice procedures of the court where the application for access is made.³⁵⁰ Such an application does not expose the foreign representa-

344. *See* Model Law, art. 8.

345. *See id.* art. 1.

346. *See id.* art. 3.

347. *See id.* art. 6.

348. *See id.* art. 22.

349. *See id.* art. 9.

350. *See id.* art. 11.

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tive, or assets subject to the foreign proceeding, to the general jurisdiction and authority of the domestic court for purposes other than the proceeding at issue.³⁵¹

Foreign creditors are entitled to the same rights as domestic creditors to commence or participate in an insolvency proceeding.³⁵² Foreign creditors' claims are generally to be treated the same as local claims of equal rank, according to the priorities and treatment of claims under the law of the enacting state.³⁵³

When notice to creditors in an insolvency case is required by the law of the enacting state, notice must also be given to known foreign creditors of the debtor.³⁵⁴ Unless the court orders otherwise, that notice is to be direct and "individual," without requiring letters rogatory or other similar formalities.³⁵⁵ Notice by publication, whether in a commercial register or a newspaper of general circulation, is insufficient to notify known creditors.³⁵⁶ The court may order notice to unknown creditors by whatever means may be appropriate.³⁵⁷

Notification to foreign creditors of commencement of a case must include at least the following elements: notice of the time and place to file claims; notice to secured creditors if their claims must be filed; and all other information required by the enacting state to be given to domestic creditors.³⁵⁸

4. Recognition of Foreign Proceeding and Relief

Perhaps the most important feature of the Model Law is the provision for the recognition of a foreign insolvency proceeding and the consequences of such recognition. The Model Law provides a structured but flexible framework for the decision of a court to recognize a foreign insolvency proceeding, and thus trigger the law's statutory consequences, rights, and benefits.

351. *See id.* art. 10.

352. *See id.* art. 13(1).

353. *See id.* art. 13(2).

354. *See id.* art. 14(1).

355. *See id.* art. 14(2).

356. *Accord*, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313–20 (1950).

357. *See* Model Law, art. 14(1).

358. *See id.* art. 14(3).

Only a duly authorized and qualified foreign representative may apply to a court (“the forum court”) to obtain recognition of a foreign proceeding.³⁵⁹ Such an application must be made in a language acceptable to the court, and must be accompanied by two kinds of documents. First, the representative must present a statement identifying all other known foreign insolvency proceedings related to the debtor. Second, the representative must provide certificated documents from the foreign court reflecting the existence of a pending insolvency case and the appointment of the foreign representative, or other evidence acceptable to the forum court demonstrating the existence of the foreign proceeding and the authority of the foreign representative.³⁶⁰

To simplify the application and recognition processes, a forum court is permitted to invoke certain presumptions as to the legitimacy and accuracy of documentation supporting the application for recognition.³⁶¹ A foreign representative has a duty to supplement the information supplied to the forum court if there is a substantial change in the status of the foreign proceeding or of the foreign representative.³⁶²

A forum court is required to recognize a foreign proceeding if three requirements are met: (1) recognition is not manifestly against the public policy of the forum state;³⁶³ (2) both the foreign proceeding and its designated foreign representative are fully qualified and properly certified to be recognized;³⁶⁴ and (3) the application is legally sufficient and submitted to the proper court.³⁶⁵

The forum court is directed to decide promptly the issue of recognition.³⁶⁶ The court may recognize the foreign proceeding as a foreign main proceeding or a foreign non-main proceeding. The forum court may modify or terminate the decision to recognize a foreign

359. *See id.* art. 15(1); art. (2)(d).

360. *See id.* art. 15.

361. *See id.* art. 16.

362. *See id.* art. 18.

363. *See id.* art. 6; art. 17(1).

364. *See id.* art. 2; art. 17(1).

365. *See id.* art. 15(2); art. 17(1); art. 4.

366. *See id.* art. 17(3).

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proceeding if its grounds were lacking at the outset or have subsequently ceased to exist.³⁶⁷

A forum court may grant emergency relief to a foreign representative while an application for recognition is pending. Emergency relief may include (1) staying execution against a debtor's property; (2) suspending any right to transfer, encumber, or dispose of the debtor's property; (3) providing for examination of witnesses and discovery concerning a debtor's assets, affairs, and obligations; (4) entrusting the debtor's property to the foreign representation or other custodian to protect and preserve its value; and (5) any other relief provided for under the laws of the forum state.³⁶⁸ Emergency relief is subject to applicable notice requirements of the forum court. Furthermore, any such emergency relief terminates upon recognition of the foreign proceeding.³⁶⁹

Upon recognition of a foreign main proceeding, a moratorium or automatic stay prohibits the following: the commencement or continuation of private litigation involving the debtor's assets, rights, or obligations; execution on the debtor's assets; and the transfer, encumbrance, or disposition of the debtor's assets located within the jurisdiction of the forum court.³⁷⁰ This moratorium or automatic stay is effective throughout the state where the forum court is located, unless the recognition order or an applicable statute of the state of the forum court provides otherwise. In contrast, a moratorium or automatic stay is not imposed if the foreign proceeding is not a main proceeding.

The Model Law provides exceptions to the automatic stay resulting from the recognition of a foreign main proceeding. These exceptions include those specified in the law of the state where the forum court is located, the commencement of actions necessary to preserve a creditor's claim, and the commencement of a new insolvency proceeding in the forum state.³⁷¹

367. *See id.* art. 17(4).

368. *See id.* art. 19(1); art. 21(1), (c), (d) & (g).

369. *See id.* art. 19(2), (3).

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

371. *See id.* art. 20(2).

After the recognition of any foreign proceeding, main or non-main, the foreign representative may request that the forum court grant relief to protect the debtor's assets or creditors' interests. Such relief may include any of the relief available on an emergency and interim basis.³⁷² Further, if the court is satisfied that the interests of creditors in the forum state are adequately protected, it may entrust the distribution of all or part of the debtor's assets located in the forum state to the foreign representative or another person designated by the court.³⁷³ If the foreign proceeding is a non-main proceeding, the relief available is limited to assets subject to administration in the foreign non-main proceeding (as determined by the law of the forum state).³⁷⁴

A foreign insolvency proceeding may not qualify as either a main or a non-main proceeding as these terms are defined in the Model Law. If the proceeding is filed in a state that is neither the center of the debtor's main interests nor a state where the debtor has an establishment, the proceeding is neither a main proceeding nor a non-main proceeding. Under common law statutory construction, such a proceeding could nonetheless be recognized. Under the Model Law, however, recognition would not be mandatory. In addition, the Model Law does not provide any consequences required by such recognition. The court granting recognition would have to determine the consequences flowing from recognition on a case-by-case basis.

The Model Law grants substantial discretion and flexibility to a forum court after the recognition of a foreign proceeding.³⁷⁵ The court in the forum state may, at any time, condition, qualify, or terminate any relief granted after recognition of a foreign proceeding.³⁷⁶

After recognition, a foreign representative may intervene in any civil action in the forum state in which the debtor is a party.³⁷⁷ In addition, the foreign representative may initiate actions in the forum state for the avoidance of fraudulent or preferential transfers or other

372. *See id.* art. 21(1).

373. *See id.* art. 21(2).

374. *See id.* art. 23(2).

375. *See id.* art. 22.

376. *See id.*

377. *See id.* art. 24.

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acts “detrimental to creditors” that may be brought under the laws of the forum state.³⁷⁸

5. Cooperation and Communication with Foreign Courts and Foreign Representatives

The Model Law envisions a maximum level of cooperation and direct communication by both the parties and the courts. It directs courts to “cooperate to the maximum extent possible with foreign courts or foreign representatives,” either directly or indirectly through an authorized official (such as a trustee or debtor in possession) administering an estate.³⁷⁹ The Model Law specifically authorizes a judge to communicate directly with a foreign judge and foreign representatives and to request information or assistance directly from them.³⁸⁰ The mandate to cooperate is subject to the enacting state’s public policy and the court’s discretion.

Another procedure available for cooperation between courts in different states is a joint hearing of the respective courts, which may be connected by a conference telephone call or videoconference.³⁸¹ If the courts conduct business in different languages, translators can be used.

The Model Law also requires a trustee or debtor in possession to “cooperate to the maximum extent possible” with foreign courts and foreign representatives.³⁸² Furthermore, the trustee or debtor in possession may communicate directly or indirectly with foreign courts and foreign representatives, subject to supervision of the forum

³⁷⁸. See *id.* art. 23.

³⁷⁹. See *id.* art. 25(1).

³⁸⁰. See *id.* art. 25(2).

³⁸¹. Joint hearings between tribunals in the United States and Canada have taken place in at least three cases. In *In re Solv-Ex Corp.*, No. 11-97-14361-MA (Bankr. D. N.M. 1997), and *In re Solv-Ex Canada Ltd.*, No. 9701-10022 (Q.B. Alta. 1997), which involved proceedings in a bankruptcy court in New Mexico and a court in Calgary, Alberta, Canada, a joint hearing was set up by telephone conference call between the two courts at the urging of the respective judges. A similar joint hearing by conference call took place between a court in the United States and a Canadian court in *In re Everfresh Beverages, Inc.*, No. 95-B-45405 (Bankr. S.D.N.Y. 1995) and No. 32-077978 (Ont. Ct. 1995), and in *In re Loewen Group Inc.*, No. 99-01244 (Bankr. D. Del. 1999) and No. 99-CL-3384 (Ont. Super. 1999). Furthermore, Judge Sidney Brooks in Denver held a transatlantic hearing in a case to take evidence from liquidators in England concerning property in China. See Leonard I, *supra* note 327, at 29.

³⁸². See Model Law, art. 26(1).

court.³⁸³ The Model Law mandates that such cooperation be “implemented by any appropriate means,” which may include (1) appointment of a person to act at the direction of the court, (2) sharing of information by any court-approved method of communication, (3) coordination of administration of the debtor’s assets and affairs, (4) court approval of agreements concerning coordination of proceedings, and (5) coordination of concurrent proceedings regarding the same debtor.³⁸⁴

6. Concurrent Proceedings

The Model Law places a premium on making an application for recognition of a foreign main proceeding before an insolvency proceeding has been commenced as to the same debtor in the forum state. Once a court has recognized a foreign main proceeding, the courts of that state may not entertain a main proceeding (whether voluntary or involuntary) as to the same debtor.³⁸⁵ The courts may only entertain a non-main proceeding, which must be limited principally to the assets of the debtor located in that state.³⁸⁶

However, in order to foster cooperation and coordination with a foreign main proceeding,³⁸⁷ a non-main proceeding in the forum state may administer assets abroad pursuant to that forum state’s domestic law. For example, if a main proceeding is filed in Japan (where the debtor’s estate is limited to property in Japan), a non-main proceeding may be filed in the United States (which lays claim to all property of the debtor wherever located, except in Japan), and the U.S. proceeding may administer property in a third country to effect cooperation and coordination with the Japanese main proceeding.³⁸⁸

A more difficult problem arises if there are concurrent proceedings in two or more enacting states and an application for recognition of a foreign main proceeding is made in a third state, but there has been no determination as to which of the first two proceedings is the main

383. *See id.* art. 26(2).

384. *See id.* art. 27.

385. *See id.* art. 28.

386. *See id.*

387. *See id.*

388. *See In re Maruko Inc.*, 160 B.R. 633 (Bankr. S.D. Cal. 1993).

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proceeding. In such a circumstance, the Model Law first imposes on the courts an obligation of mutual cooperation and communication.³⁸⁹ Second, any emergency relief or post-recognition relief must be consistent with and subject to the proceedings in the other states.³⁹⁰ If a foreign proceeding is a main proceeding, then the stay of creditor rights and suspension of rights to transfer or encumber the debtor's property are inapplicable in the forum court.³⁹¹

If a plenary insolvency proceeding is filed in a state after an application for recognition of a foreign proceeding has been made to a court in that state, the court considering recognition must review any emergency or post-recognition relief to make it consistent with the domestic plenary proceeding.³⁹² If the foreign proceeding is a main proceeding, the automatic stay resulting from the recognition order must be modified if it is inconsistent with the domestic proceedings.³⁹³ Finally, if the foreign proceeding is a non-main proceeding, the court granting recognition must ensure that any relief granted in the recognition proceeding does not impinge on the domestic proceeding. Such relief must relate to assets that should be administered (pursuant to domestic law) in the foreign proceeding or must concern information required in the foreign proceeding.³⁹⁴

If there are two or more foreign proceedings involving the same debtor, the Model Law imposes similar obligations on the forum court and the parties.³⁹⁵ Relief in the local proceeding must be coordinated with each of the foreign proceedings. In particular, if one of the foreign proceedings is a main proceeding, the relief in the domestic proceeding must recognize its status as a non-main proceeding.³⁹⁶

Finally, in determining the distribution of funds to unsecured creditors, the Model Law requires local courts to take into account payments to unsecured creditors from foreign insolvency proceedings.

389. See Model Law, art. 29.

390. See *id.* art. 29(a)(I).

391. See *id.* art. 29(a)(ii).

392. See *id.* art. 29(b)(I).

393. See *id.* art. 29(b)(ii).

394. See *id.* art. 29(b)(iii).

395. See *id.* art. 30.

396. See *id.* art. 30(b).

No distribution may be made from “local” assets to an unsecured creditor who has received a distribution from an insolvency proceeding in a foreign state until the other local creditors of the same rank have received an equal distribution (usually from the local assets).³⁹⁷

B. North American Free Trade Agreement (NAFTA)

Another source of international law for transnational insolvency cases that arise in NAFTA³⁹⁸ member countries is the American Law Institute’s recently completed NAFTA Transnational Insolvency Project.³⁹⁹ The project aims to develop procedures for the coordination of business bankruptcy cases involving assets or creditors in more than one of the NAFTA member countries (currently Canada, Mexico, and the United States).⁴⁰⁰

Most important, the NAFTA Project contains a set of general principles that offer policy recommendations and a set of procedural principles that provide practical approaches within the existing legal competence of the courts that do not require new legislation or treaties. These principles can be implemented immediately in any transnational insolvency case involving two or more NAFTA countries. For instance, a court may issue an order stating that the general principles and the procedural principles are to be followed in a particular case.⁴⁰¹ Any U.S. bankruptcy court with a case involving Canada or Mexico should strongly consider the NAFTA Project’s general and procedural principles in the administration of that case.

The NAFTA Project also provides a text in each official language that summarizes the domestic and international aspects of the insol-

397. *See id.* art. 32.

398. The North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 296.

399. American Law Institute, Transnational Insolvency Project: Principles of Cooperation in Transnational Insolvency Cases Among the Members of the North American Free Trade Agreement (draft, Apr. 14, 2000) [hereinafter NAFTA Principles].

400. *See generally* Jay Lawrence Westbrook, *Creating International Insolvency Law*, 70 Am. Bankr. L.J. 563 (1996). This regime may be extended to additional countries if NAFTA is expanded beyond the present three parties. For example, Chile has requested to join NAFTA, and several other Latin American countries are considering a similar step.

401. *See* NAFTA Principles at 44.

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veny laws and practices in each country. In addition, it contains legislative recommendations to facilitate the management of international cases in the future. The implementation of these recommendations requires new legislation or international agreement. An appendix to the project contains proposed guidelines for court-to-court communications in transnational insolvency cases.

1. General Principles

The NAFTA Project proposes seven general principles that are generally accepted among the three NAFTA countries. In general terms, the principles are also applicable to non-NAFTA transnational insolvency cases.

The first general principle is that courts and administrators should cooperate in a transnational bankruptcy case with the goal of maximizing the value of the debtor's worldwide assets and furthering the just administration of the case.⁴⁰² Second, the bankruptcy of a debtor in one NAFTA country should be recognized and given appropriate effect under the circumstances in each of the other NAFTA countries.⁴⁰³ In addition, recognition should be granted as quickly and inexpensively as possible, with a minimum of legal formalities.⁴⁰⁴

Third, bankruptcy cooperation requires a moratorium or stay at the earliest possible time in each country where the debtor has assets.⁴⁰⁵ The moratorium must impose reasonable restraints on the debtor, creditors, and other interested parties.⁴⁰⁶ Fourth, cooperation should include, as a minimum, a free exchange of information obtained in each case concerning assets and claims.⁴⁰⁷ In addition, a recognized foreign representative should be entitled to use all available legal means to obtain information about the debtor's assets in each jurisdiction.⁴⁰⁸

The fifth general principle provides that, where a court has recognized the representative of a foreign proceeding in another NAFTA

402. *See id.* at 26.

403. *See id.* at 35.

404. *See id.*

405. *See id.* at 36.

406. *See id.*

407. *See id.* at 37.

408. *See id.*

country, it should be prepared to approve the sharing of the value of the debtor's assets on a worldwide basis.⁴⁰⁹ Sixth, there should be no discrimination against claimants based on nationality, residence, or domicile.⁴¹⁰ Finally, a creditor should not be permitted to use distributions in multiple countries to recover in any country more than the percentage recovered by other creditors of the same class in that country.⁴¹¹

2. Procedural Principles

Procedural principles are recommendations that can be put into effect under existing law. Each of the twenty-seven procedural principles represents either existing practice or a recommended best practice in the United States and at least one other NAFTA country.⁴¹²

The first set of procedural principles relates to the initiation of a bankruptcy case and the consequences thereof. When a bankruptcy case is pending in a NAFTA country, each NAFTA country should grant recognition to that case and its administrator.⁴¹³ Only in the rare case where recognition would be manifestly contrary to public policy in the recognizing country should recognition be denied.⁴¹⁴ Recognition of a case in another NAFTA country should be granted as quickly as possible.⁴¹⁵ Recognition may be revoked or modified if it is clearly shown there was fraud in the opening of the foreign case or in obtaining its recognition in the recognizing court.⁴¹⁶

Several provisions relate to a stay or moratorium on creditor debt-collection activities. Unless a stay already exists because of a domestic bankruptcy case concerning the same debtor, recognition of a main case should lead immediately to the imposition of a stay or moratorium restraining collection actions by creditors and constraining use or disposal of assets by the debtor.⁴¹⁷ In a reorganization case, the stay

409. *See id.* at 39.

410. *See id.* at 40.

411. *See id.* at 42.

412. *See id.* at 5, 43–44.

413. *See id.* at 47.

414. *See id.*

415. *See id.* at 50.

416. *See id.* at 54.

417. *See id.* at 56.

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should usually permit the continued operation of the debtor's business in the ordinary course.⁴¹⁸ Where no domestic bankruptcy case is pending in the recognizing country and the recognizing country has issued a stay substantially equivalent to a domestic stay in the same sort of case, the stay in the main case should cease to affect conduct in the recognizing country, and the stay in the recognizing country should have no effect on conduct in the country of the main case.⁴¹⁹

Where there are parallel cases, each NAFTA court should attempt to minimize conflict between bankruptcy stays.⁴²⁰ Where in such circumstances a main proceeding in a NAFTA country has been recognized in a second NAFTA country, any moratorium or similar order issued in the recognizing country should apply to conduct in a third country only insofar as the conduct is not within the jurisdiction of the main proceeding.⁴²¹

When a non-main case is filed in a NAFTA country and the court in that country determines that the country has little interest in the case's outcome as compared to the country that is the center of the debtor's main interests, the court should (1) dismiss the bankruptcy case, if dismissal is permitted under its law and would not damage legitimate interests, or (2) ensure that the bankruptcy stay arising from the non-main proceeding has no effect outside that country.⁴²²

A recognized foreign representative should be granted direct access to any NAFTA court necessary for the exercise of the representative's legal rights.⁴²³ A recognized foreign representative of a main case should be granted such access to the same extent as a domestic administrator. In addition, the foreign representative in a main case should have the power to initiate a domestic bankruptcy case concerning the debtor.⁴²⁴

An administrator, debtor, or creditor filing a bankruptcy or seeking recognition of a foreign bankruptcy should be required to pro-

418. *See id.*

419. *See id.* at 56–57.

420. *See id.* at 67.

421. *See id.*

422. *See id.* at 69.

423. *See id.* at 71.

424. *See id.*

vide full disclosure of all relevant information about the existence and status of each bankruptcy or similar case pending in other jurisdictions as to the same or a related debtor at the time of filing.⁴²⁵ Administrators or debtors in possession should be required to inform the court of any material development in any such foreign case.⁴²⁶

A recognized foreign representative should be permitted to use all legal methods of obtaining information that would be available to a creditor or to an administrator in a domestic bankruptcy case.⁴²⁷

To the maximum extent permitted by domestic law, courts considering bankruptcy cases or requests for assistance from foreign bankruptcy courts should communicate with each other directly or through administrators.⁴²⁸ To the maximum extent, courts should take advantage of modern methods of communication including telephone, telefacsimile, teleconferencing, and electronic mail, as well as written documents delivered in traditional ways.⁴²⁹ Such communications should at all times follow procedures consistent with domestic law.⁴³⁰

A number of the procedural principles relate to the administration of the domestic bankruptcy case. In the absence of a domestic bankruptcy of the same debtor, the recognized foreign representative should be given legal control, and assistance in obtaining practical control, over all domestic assets of the debtor to the same extent as would a domestic administrator, subject to supervision by the domestic court.⁴³¹ In addition, in the absence of a domestic bankruptcy of the same debtor, and if there is no unfair prejudice to domestic creditors, a recognized foreign representative should be allowed by court order to remove assets to another jurisdiction when appropriate for the bankruptcy case.⁴³²

When a bankruptcy case is likely to include claims from another NAFTA country where no parallel case is pending, the court should

425. *See id.* at 73–74.

426. *See id.* at 74.

427. *See id.* at 77.

428. *See id.* at 79.

429. *See id.*

430. *See id.*

431. *See id.* at 82.

432. *See id.* at 84.

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make special orders concerning the giving of notice to foreign creditors to afford them a fair chance to file claims and participate in the bankruptcy.⁴³³

Several procedural principles facilitate the coordination of parallel cases in different NAFTA countries. The administrators in parallel cases should cooperate in all aspects of the case.⁴³⁴ Such cooperation is best arranged by an agreement or protocol that establishes decision-making procedures.⁴³⁵ However, many decisions may be made informally as long as the essentials are agreed.⁴³⁶ A protocol for cooperation among cases should include, at a minimum, provisions for coordinated court approval of decisions and actions when required and for communication with creditors as required under each applicable law.⁴³⁷ To the extent possible, it should also provide for timesaving procedures to avoid unnecessary and costly court hearings and other proceedings.⁴³⁸

Where there are parallel cases, each administrator should obtain court approval of any action affecting assets or operations in a particular jurisdiction if approval is required under the laws of that jurisdiction, except as provided in a protocol approved by that court.⁴³⁹ Each administrator should seek agreement in advance from other administrators as to questions affecting the cases of the latter administrators or assets in their countries, except in an emergency.⁴⁴⁰

Notice of any court hearing or the issuance of any court order should be given at the earliest possible time to a foreign administrator if the hearing or order is relevant to that administrator.⁴⁴¹ Notice and approval should always be in advance if possible or if required by applicable law.⁴⁴²

433. *See id.* at 87.

434. *See id.* at 91.

435. On protocols, *see infra* text accompanying notes 568–73.

436. *See* NAFTA Principles, *supra* note 399, at 91–92.

437. *See id.* at 92.

438. *See id.*

439. *See id.* at 93.

440. *See id.*

441. *See id.* at 94.

442. *See id.*

When there are parallel cases and assets are to be sold, each domestic administrator should seek to sell assets in cooperation with the other administrators to produce the maximum total value for the assets of the debtor, across national borders,⁴⁴³ and each domestic court should approve sales that will produce such value.⁴⁴⁴

If a main case in a NAFTA country is a reorganization case, courts in the other two NAFTA countries should conduct their parallel domestic cases to promote the reorganization objectives in the main case.⁴⁴⁵

Where there are parallel cases, especially in reorganization cases, administrators and courts should cooperate in coordinating their respective cases. For example, they should cooperate to obtain necessary post-bankruptcy financing, including the granting of priority or secured status to reorganization lenders, insofar as permitted under applicable law.⁴⁴⁶ In addition, the administrators should attempt to agree on a common position concerning the avoidance of any pre-bankruptcy transaction involving the debtor.⁴⁴⁷ The administrators should share information on a timely basis concerning claims, including a list of all claims and claimants, whether the claims are asserted as secured, priority, or general claims, and whether they are approved, disputed, or disapproved.⁴⁴⁸ Similarly, where there are parallel proceedings, a claim that is proved in one NAFTA case should be accepted in each of the other NAFTA cases, except as to distinct factual and legal issues arising under the other country's distribution rules.⁴⁴⁹

Several procedural principles apply to the treatment of entities within corporate groups. A bankruptcy case for a subsidiary should be permitted in the country where the parent company's bankruptcy was filed. In addition, procedural or substantive consolidation should be authorized under applicable law, unless the subsidiary's main interests

443. *See id.* at 95.

444. *See id.*

445. *See id.* at 97.

446. *See id.* at 98.

447. *See id.* at 100–01.

448. *See id.* at 102.

449. *See id.* at 103.

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are centered in another country and a case involving the subsidiary has been filed in that country.⁴⁵⁰ Where a subsidiary is involved in a parallel case in the country of its main interests, administrators should coordinate the two cases as much as possible to achieve the benefits of consolidation.⁴⁵¹

The final three procedural principles relate to the resolution of a bankruptcy case. First, a claim should never be given priority in an international distribution beyond what it would enjoy in the nation where the priority is created.⁴⁵² Second, where a plan of reorganization is adopted in a main case in any NAFTA country and there is no parallel case pending in another NAFTA country, the reorganization plan should be final and binding upon the debtor and upon every creditor who participates in any way in the main case.⁴⁵³ For this purpose, participation includes filing a claim, voting, or accepting a distribution of money or property under a plan.⁴⁵⁴

Third, where a plan of reorganization is adopted in a main case in a NAFTA country and there is no parallel case in another NAFTA country, that plan should be final and binding as to the claims against the debtor of every unsecured creditor, whether the creditor has filed a claim or not.⁴⁵⁵ This principle would apply to every creditor who received adequate individual notice of the case and who would be within the jurisdiction of the courts in ordinary commercial matters under the law of the country of the main case.⁴⁵⁶

C. European Union Regulation on Insolvency Proceedings

When it enters into force on May 31, 2002, the European Union Regulation on Insolvency Proceedings (hereinafter EU Regulation)⁴⁵⁷ will impose a body of public international law on transna-

450. *See id.* at 109.

451. *See id.*

452. *See id.* at 116.

453. *See id.* at 121.

454. *See id.*

455. *See id.*

456. *See id.* at 123–24.

457. European Union Convention on Insolvency Proceedings, 2000 O.J. (L 160) 1. *See also* Ian F. Fletcher, *The European Union Convention on Insolvency Proceedings: An Overview and Comment, with U.S. Interest in Mind*, 23 Brook. J. Int'l L. 25 (1997) [hereinafter Fletcher I]; Eberhard

tional insolvencies arising in two or more of the nations that are members of the European Union.⁴⁵⁸ The EU Regulation implements Article 65 of the European Union Treaty,⁴⁵⁹ which provides for judicial cooperation in civil matters among the European Union members in order to promote the proper functioning of the internal European Union marketplace.⁴⁶⁰ The EU Regulation will govern cross-border reorganization and liquidation proceedings for the member states of the European Union⁴⁶¹ (except for Denmark).⁴⁶² However, the EU Regulation will not apply to insolvencies insofar as they extend beyond the boundaries of the European Union.

Instead of defining “insolvency,” the EU Regulation lists the national laws of the corresponding member states.⁴⁶³ Thus the EU Regulation will apply to a variety of proceedings, including unitary rehabilitation under German law, French *redressement judiciaire*, Italian *amministrazione straordinaria*, and Dutch *surseance van betaling*.⁴⁶⁴ However, the regulation will not apply to preinsolvency proceedings, such as the French *reglement amiable*.

To promote a more efficient system of legal cooperation on insolvency matters, the EU Regulation focuses on three specific aspects of insolvency proceedings: (1) jurisdiction for opening such proceedings and issuing binding judgments in such proceedings, (2) the recognition of such judgments, and (3) the determination of the applicable

Schollmeyer, *The New European Convention on International Insolvency*, 13 *Bankr. Dev. J.* 421 (1997) [hereinafter Schollmeyer]; Balz, *supra* note 9.

458. The European Union was established in 1957 and presently includes the following member states: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, Spain, Sweden, and the United Kingdom.

459. See Treaty Establishing European Community, as amended by the Treaty of Amsterdam, Oct. 2, 1997, 1997 O.J. (C 340) 145.

460. See EU Reg., pmbl. para. 2.

461. Acceptance of the EU Regulation will presumably be required as a condition for admission to the European Union for the aspiring Central and Eastern European countries.

462. Although it is a member of the European Union, Denmark is not covered by the EU Regulation at the present time. Its exclusion results from the terms of its accession to the European Union. See EU Reg., pmbl. para. 33. Denmark has the unilateral right to waive the provision, preventing its being governed by the EU Regulation. While the United Kingdom and Ireland have similar provisions in their accession treaties, they have waived their rights to be excluded from the EU Regulation. See *id.* pmbl. para. 32.

463. See EU Reg., art. 2(a) & Annex A.

464. See *id.*

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law when parties in interest or assets are located in more than one European Union country.⁴⁶⁵ In addition, the European Union was concerned about forum shopping by debtors among its member countries.⁴⁶⁶ The European Union took action because these issues could not be addressed to a sufficient degree at the national level.⁴⁶⁷ To resolve these problems, the EU Regulation adopted a compromise between universality and territoriality approaches to transnational insolvencies.⁴⁶⁸

The EU Regulation does not apply to insolvency proceedings involving insurance businesses, credit institutions, or certain other entities.⁴⁶⁹ Insolvencies in these businesses will continue to be governed by the internal law of each country.

The EU Regulation is particularly concerned about accommodating the varying property rights (rights *in rem*) among the European Union countries and protecting the priority claims of employees.⁴⁷⁰ Because the legal regime protecting these rights varies from country to country, the European Union decided that a universal regime for insolvencies within the Union was not attainable.⁴⁷¹

The EU Regulation replaces the provisions of prior conventions, specified in Article 44, that are inconsistent with the EU Regulation. The list includes the Nordic Convention (as it relates to Finland and Sweden) and nine bilateral conventions between members of the European Union.⁴⁷²

465. See *id.* pmbl. paras. 6, 8.

466. See *id.* pmbl. para. 4; see also Balz, *supra* note 9, at 495.

467. See EU Reg., pmbl. para. 5.

468. For a discussion of territoriality and universality, see *supra* text accompanying notes 10–18. See also Ulrik Rammeskov Bang-Pedersen, *Asset Distribution in Transnational Insolvencies: Combining Predictability and Protection of Local Interests*, 73 Am. Bankr. L.J. 385, 407–09 (1999) [hereinafter Bang-Pedersen] (stating that the EU Convention adopts a territoriality viewpoint).

469. See EU Reg., art. 1(2), pmbl. para. 9.

470. See *id.* arts. 5 & 10, pmbl. para. 11.

471. See *id.* pmbl. para. 11.

472. See *id.* art. 44.

1. Jurisdiction and Choice of Law⁴⁷³

Chapter I of the EU Regulation (articles 1–15) provides for jurisdiction to open main insolvency proceedings and secondary insolvency proceedings. Like the Model Law,⁴⁷⁴ the EU Regulation recognizes two types of proceedings: a main proceeding that may affect all creditors and property of the debtor,⁴⁷⁵ and a secondary proceeding that affects only creditors and property of the debtor that are located in a country different from that where a main proceeding may be filed.⁴⁷⁶ The EU Regulation also provides uniform choice-of-law rules to determine the governing law for issues arising in a transnational insolvency proceeding, including the determination of the rights of foreign creditors and other parties in interest.⁴⁷⁷ In addition, the regulation provides special rules to protect particular kinds of local transactions from the full impact of insolvencies filed in other European Union countries.⁴⁷⁸

A main proceeding must be opened in the member state where the center of main interests of the debtor is located.⁴⁷⁹ Any dispute between countries as to which proceeding qualifies as the main proceeding is to be decided by the first court to open proceedings.⁴⁸⁰

The concept of “center of main interests” is new for EU law and the law of its member states. The EU Regulation explains it in part as follows: “In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.”⁴⁸¹ In addition, the pre-

473. Because the civil law in each European Union country (except Great Britain) is unified (i.e., there is one legal regime throughout the country), a choice-of-law issue is a question of which country provides the applicable law. Thus choice of law in the international arena is known as “international private law.”

474. See *supra* text accompanying notes 323–97.

475. See EU Reg., art. 3(1), pmb. para. 12.

476. See *id.* art. 3(2)–(3), pmb. para. 12.

477. See *id.* art. 4.

478. See *id.* arts. 5–11, 14–15.

479. See *id.* art. 3(1), pmb. para. 12. United States law does not follow this rule. See *supra* text accompanying notes 264–72. The EU Regulation would not interfere with the assertion of jurisdiction by a U.S. court over a debtor whose center of main interests is located in the European Union because the EU Regulation does not apply where the proceeding is outside the EU member states. See Fletcher I, *supra* note 457, at 35–36.

480. See EU Reg., pmb. para. 22.

481. See *id.* art. 3(1).

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amble explains, 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 by third parties.⁴⁸² For an individual, presumably the center of main interests is the individual’s domicile or habitual residence.

The EU Regulation will apply only to debtors whose center of main interests is located in a European Union member state.⁴⁸³ The EU Regulation is not applicable where the center of main interests is located outside the European Union.⁴⁸⁴

Except where the EU Regulation provides otherwise, a main proceeding is governed by the internal laws of the member state where the proceeding is initiated.⁴⁸⁵ Thus the laws of that state determine all matters of procedure and most matters of substantive law.⁴⁸⁶

However, the opening of a main proceeding does not affect the *in rem* rights of secured creditors⁴⁸⁷ or real property purchasers⁴⁸⁸ in other countries within the EU because these rights are important to creditors in granting credit.⁴⁸⁹ These *in rem* rights include the right to foreclose and the right to enforce guarantees of indebtedness.⁴⁹⁰ While creditors can be expected to consider national law in deciding to grant credit, it would be unreasonable to require them to foresee the impact of foreign insolvency proceedings as well. In consequence, the law of the situs governs *in rem* rights, including security interests.⁴⁹¹

482. See *id.* pmb. para. 13.

483. See *id.* pmb. para. 14.

484. See Fletcher I, *supra* note 457, at 54.

485. See EU Reg., art. 4, pmb. para. 23. On the choice-of-law provisions in the EU Regulation, see Ian F. Fletcher, *The European Union Convention on Insolvency Proceedings: Choice-of-Law Provisions*, 33 Tex. Int’l L.J. 119 (1998) [hereinafter Fletcher II]; Nick Segal, *The Choice of Law Provisions in the European Union Convention on Insolvency Proceedings*, 23 Brook. J. Int’l L. 57 (1997) [hereinafter Segal].

486. See Fletcher II, *supra* note 485, at 138.

487. See EU Reg., arts. 5, 11.

488. See *id.* art. 14.

489. See *id.* pmb. para. 25.

490. See *id.* art. 5(2).

491. See Segal, *supra* note 485, at 62–65; Fletcher II, *supra* note 485, at 128–31. The law of the situs also governs enforcement actions of security interests based on floating charges. See Segal, at 62–65. Segal takes the position that the holder of security in collateral located outside the country where the insolvency proceeding is filed may ignore an automatic stay. See *id.* at 63. However, it is doubtful that the adoption of local law to govern *in rem* rights extends this far.

The EU wants to protect employees and jobs.⁴⁹² Thus, both individual employment contracts and collective bargaining agreements are governed by non-insolvency law, including applicable choice-of-law rules.⁴⁹³ In contrast, avoidance actions are governed by the law of the state where the insolvency is filed.⁴⁹⁴ The effect of an insolvency case on a pending lawsuit is governed by the law of the country where the lawsuit is pending.⁴⁹⁵

2. Recognition of Main Proceedings

Chapter II of the EU Regulation (articles 16–26) provides rules for the recognition of a main insolvency proceeding, the effects of recognition, the powers of officials to act on behalf of the estate in the proceeding, and the formalities required for such officials to act abroad.

Under the EU Regulation, a court order opening an insolvency proceeding must be automatically recognized in all other member states.⁴⁹⁶ Automatic recognition means that, except in a country where a secondary proceeding is opened, the opening of a main insolvency proceeding has the same effects in all EU countries as it has in the country where the proceeding is opened.⁴⁹⁷ Most importantly, any automatic stay applicable in the forum state also applies in every other state.⁴⁹⁸ Similarly, a discharge in the main case is effective in every state, even one where a bankruptcy discharge is not provided by local law.⁴⁹⁹

However, if an insolvency court judgment in another European Union country conflicts with a state's public policy, the state may refuse to recognize the insolvency proceeding and may refuse to en-

492. See EU Reg., pmb. para. 28.

493. See *id.* art. 10.

494. See Segal, *supra* note 485, at 69.

495. See EU Reg., art. 15; Segal, *supra* note 485, at 73; Fletcher II, *supra* note 485, at 138.

496. See EU Reg., arts. 16, 25; see also Balz, *supra* note 9, at 513–19; Schollmeyer, *supra* note 457, at 431–34.

497. See EU Reg., art. 17(1).

498. See Schollmeyer, *supra* note 457, at 436. Every European Union insolvency law claims worldwide effect of its automatic stay and the application of the law to all property, wherever in the world it may be situated. See *id.* at 420 n.25.

499. See *id.* at 437.

force a judgment thereunder.⁵⁰⁰ Such a refusal may be invoked to protect constitutional rights or fundamental liberties in the forum state.⁵⁰¹ Except where this provision is applicable, the court where a secondary insolvency proceeding is filed may not tailor the proceedings to promote the fair or economic administration of an international case inconsistent with the laws of the state where the main proceeding has been opened.⁵⁰²

A liquidator in a main case may exercise all available powers in every European Union country unless a secondary case has been opened in the country at issue.⁵⁰³ A liquidator may exercise avoiding powers⁵⁰⁴ and retrieve assets of the estate.⁵⁰⁵ In exercising these powers, the liquidator must comply with the requirements of local law in the country where the assets are located.⁵⁰⁶

3. Secondary Proceedings

Chapter III (articles 27–38) regulates secondary insolvency proceedings in European Union countries apart from the country where the main insolvency proceeding is pending. Following the opening of a main insolvency proceeding, a secondary insolvency proceeding may be brought by the liquidator in the main insolvency proceeding or by any party with standing under local law.⁵⁰⁷ No insolvency requirement applies for the opening of a secondary proceeding.⁵⁰⁸ In addition to protecting local creditor interests, a secondary proceeding may be useful if a case is so complex that it cannot be administered as a single unit. If the differences in the legal systems of the applicable countries make it more efficient to open a secondary proceeding, a secondary proceeding may have a broader scope.⁵⁰⁹ Furthermore, no collateral attack is permitted on the effects of the opening of a secondary insol-

500. See EU Reg., art. 26.

501. See *id.*

502. See Balz, *supra* note 9, at 496–97.

503. See EU Reg., art. 18(1).

504. See *id.* art. 18(2).

505. See *id.* art. 18(1).

506. See *id.* art. 18(3).

507. See *id.* art. 29, pmbl. para. 18; Balz, *supra* note 9, at 524.

508. See EU Reg., art. 27; Fletcher II, *supra* note 485, at 42.

509. See EU Reg., pmbl. para. 19.

veny proceeding in an EU country apart from that where the secondary proceeding is filed.⁵¹⁰

Where the center of main interests is located in one EU country, another country has jurisdiction to open a secondary insolvency proceeding only if the debtor has an “establishment”⁵¹¹ in that country. The effects of the secondary proceeding are limited to the assets of the debtor in that country.⁵¹² For example, claims filed in a secondary proceeding may only be satisfied from the assets administered in that proceeding.⁵¹³ Absent a main insolvency proceeding in another European Union country, a secondary insolvency proceeding may not be opened unless (1) a main insolvency proceeding cannot be opened because of conditions in the law of the country where the main proceeding must be opened, or (2) the secondary insolvency proceeding is sought by a local creditor.⁵¹⁴ A secondary insolvency proceeding under the EU Regulation must be a winding-up proceeding.⁵¹⁵

However, upon receiving a request from the liquidator in the main insolvency proceeding, the forum court for the secondary proceeding is required to stay the process of liquidation (in whole or in part) for a period of three months (which may be renewed for similar periods).⁵¹⁶ In particular, a liquidator may invoke the right to a stay to permit the sale of an entire business as a going concern or to permit a unified transnational reorganization.⁵¹⁷ The forum court may condition such a stay on the provision of suitable measures to guarantee the interests of the creditors or of individual classes of such creditors in the secondary proceeding.⁵¹⁸ The court where the secondary insol-

510. *See id.* art. 17(2).

511. An “establishment” is “any place of operations where the debtor carries out a non-transitory economic activity with human means and goods.” EU Reg., art. 2(h). A bank account or real property may not be sufficient to meet this definition. *See Fletcher I, supra* note 457, at 38.

512. *See* EU Reg., arts. 3(2), 27.

513. *See id.*

514. *See id.* art. 3(4).

515. *See id.* art. 3(3). The concept of a secondary proceeding under the EU Regulation is distantly related to section 304 of the U.S. Bankruptcy Code. However, the flexibility given to U.S. judges under section 304 is unacceptable in the civil law systems of Continental Europe. *See Balz, supra* note 9, at 521.

516. *See* EU Reg., art. 33(1).

517. *See Balz, supra* note 9, at 525–26.

518. *See* EU Reg., art. 33(1).

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veny proceeding is pending may only reject such a request by the main proceeding's liquidator if the stay is clearly of no interest to the creditors in the main proceeding.⁵¹⁹

The opening of a secondary insolvency proceeding makes the domestic law of the forum state applicable, instead of the law of the state where the main insolvency proceeding is opened.⁵²⁰ For example, a secured creditor may become subject to an automatic stay in the forum state of the secondary proceeding, if so provided under local law, even though there may be no such stay under the internal law of the state where the main proceeding is opened.⁵²¹

4. Receiving Information and Filing Claims

Chapter IV (articles 39–42) provides for the right to receive information concerning the main proceeding and regulates the right to lodge claims in the various related insolvency proceedings.

A creditor in any EU member state⁵²² may file a claim in the main proceeding and in any secondary proceeding.⁵²³ Claims may include taxes owing to a government agency in any European Union country, as well as debts owing to social insurance institutions.⁵²⁴ In addition, a liquidator in any proceeding (whether main or secondary) is required to lodge claims on behalf of its creditors in all related proceedings, except where there would be no resulting benefit.⁵²⁵ In contrast, the treatment of a creditor located outside the European Union is unregulated by the EU Regulation and thus is governed by the laws of the state where a claim is lodged.

The payment of creditors from assets in secondary insolvency proceedings may result in the unequal treatment of equally ranked creditors. While the EU Regulation permits a creditor to keep a dis-

519. *See id.*

520. *See id.* art. 28.

521. *See Balz, supra* note 9, at 520.

522. The location of a creditor is determined by the creditor's habitual residence, domicile, or registered office. The nationality of the creditor plays no role in this determination. *See* EU Reg., art. 42(2); *see also* Fletcher II, *supra* note 485, at 46.

523. *See* EU Reg., art. 32(1). A claim may be filed in the "home" language of the creditor, although the claimant may eventually be required to provide a translation. *See id.* art. 42(2).

524. *See id.* pmbl. para. 21.

525. *See id.* art. 32(2).

tribution that temporarily gives that creditor more than other creditors of equal rank, it disqualifies such a creditor from receiving any further distributions until the other creditors of the same class have caught up.⁵²⁶ Thus a consolidated schedule of distributions must be prepared, with the goal of providing equal treatment to all creditors of the same class wherever they may be located in the European Union.⁵²⁷

Any unsecured creditor who has obtained payment after the opening of a main case from assets of the debtor located in another state is required to turn over the funds to the administrator in the main case.⁵²⁸ However, if at the time of payment no publication of the opening of an insolvency proceeding (whether main or secondary) has been made in the creditor's state, the creditor may keep the payment.⁵²⁹

The various liquidators in the main insolvency proceeding and in related secondary insolvency proceedings are required to exchange information and to cooperate in many respects.⁵³⁰ For example, cooperation and exchange of information are needed to maximize the total value of a debtor's assets, to permit a sale of the debtor's business as a going concern, or to achieve rehabilitation of a debtor. To facilitate these goals, the liquidator or representative in each primary or secondary proceeding has standing to participate in each of the other related proceedings.⁵³¹

5. Entry into Force and Retroactivity

The EU Regulation will take effect on May 31, 2002.⁵³² It does not apply to insolvency proceedings opened before that date.⁵³³

526. *See id.* art. 20(2). On the difficulties and ambiguities in making this calculation, see Bang-Pedersen, *supra* note 468 *passim*.

527. *See* EU Reg., pmb. para. 12.

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

529. *See id.* art. 24(2).

530. *See id.* art. 31, pmb. para. 20.

531. *See id.* art. 32(3).

532. *See id.* art. 47.

533. *See id.* art. 43.

D. Concordat

The most effective present regime for regulating and coordinating transnational insolvencies is provided by the Cross-Border Insolvency Concordat,⁵³⁴ which was developed by Committee J of the Section on Business Law of the International Bar Association. The Concordat consists of general principles designed to assist courts and counsel in coordinating and harmonizing insolvency proceedings pending in two or more countries. The application of the Concordat is meant to be flexible. Courts may decide which Concordat principles to apply on a case-by-case basis.⁵³⁵

The Concordat is intended as an interim measure to guide transnational insolvencies until treaties or statutes are adopted by commercial nations.⁵³⁶ Thus it may become outmoded as the Model Law and the EU Regulation are adopted and implemented. Until such time, however, the Concordat is the main source of principles to guide the coordination of multinational insolvencies.

The Concordat can be used in several types of transnational insolvency situations, including (1) a main insolvency proceeding that governs assets and claims on a worldwide basis; (2) a main insolvency proceeding and one or more non-main insolvency proceedings in different countries; (3) multiple insolvency proceedings that proceed on the basis of territory; and (4) multiple insolvency proceedings whose jurisdiction over assets and claims overlap.⁵³⁷

534. See International Bar Association, Committee J Cross-Border Insolvency Concordat, Sept. 17, 1995. For the text of the Concordat, see *infra* Appendix A. For a comprehensive discussion of the Concordat, see Anne Nielson et al., *The Cross-Border Insolvency Concordat: Principles to Facilitate the Resolution of International Insolvencies*, 70 Am. Bankr. L.J. 533 (1996) [hereinafter Nielson]. See also John K. Londot, Note, *Handling Priority Rules Conflicts in International Bankruptcy: Assessing the International Bar Association's Concordat*, 13 Bankr. Dev. J. 163 (1996); E. Bruce Leonard, *Managing Default by a Multinational Venture: Cooperation in Cross-Border Insolvencies*, 33 Tex. Int'l L.J. 543, 547–53 (1998) [hereinafter Leonard II].

For reports on the application of the Concordat in *In re Everfresh Beverages, Inc.*, No. 95-B-45405 (Bankr. S.D.N.Y. 1995) and No. 32-077978 (Ont. Ct. 1995), see Leonard II at 548–53; Nielson at 557–61.

535. See Nielson, *supra* note 534, at 535.

536. See Report on the Committee J Cross-Border Insolvency Concordat, presented to the Council of the International Bar Association's Section on Business Law, Sept. 17, 1995, at 2, 3; Nielson, *supra* note 534, at 537–38.

537. See Nielson, *supra* note 534, at 538.

The Concordat envisions a single administrative forum as the main forum for the insolvency proceeding; cases in other fora are subsidiary to the main case.⁵³⁸ The main forum should coordinate the collection and administration of assets⁵³⁹ and should receive all assets (after payment of secured and priority claims) from other fora.⁵⁴⁰ Common claims should be filed in the main case in the local language and may be filed by mail with no formalities except for those provided by local insolvency law.⁵⁴¹ A discharge in the main case should be universally recognized.⁵⁴²

If there is no main proceeding, the Concordat recommends using a protocol to coordinate the proceedings in the various countries.⁵⁴³ In such a circumstance, each forum should administer the assets within its jurisdiction.⁵⁴⁴ A claimant should be required to file a claim in only one forum.⁵⁴⁵ The priority and ranking of claims should be governed by the rules of each forum.⁵⁴⁶ The payment of claims, however, should be coordinated to assure a *pro rata* distribution to each creditor of the same class.⁵⁴⁷ Thus, as a general rule, secured and priority claims are governed by local law while general unsecured claims are treated on a worldwide basis.⁵⁴⁸ Any surplus after paying claims in one forum should be transferred to another appropriate forum, which may be the main forum or another subsidiary forum.⁵⁴⁹

Official representatives, such as trustees, should receive notices of proceedings in all fora and should have the right to appear in all fora.⁵⁵⁰ However, unlike the Model Law and the EU Regulation, the Concordat permits the imposition of a requirement that the official representative utilize an exequatur or similar proceeding to imple-

538. See Concordat, Prin. 1.

539. See *id.* Prin. 2(A).

540. See *id.* Prin. 2(B) & 5.

541. See *id.* Prin. 2(C).

542. See *id.* Prin. 2(F).

543. See *id.* Prin. 4(A).

544. See *id.* Prin. 4(B).

545. See *id.* Prin. 4(C).

546. See *id.* Prin. 4(D).

547. See *id.* Prin. 4(E) & (F).

548. See Nielson, *supra* note 534, at 549.

549. See Concordat Prin. 5.

550. See *id.* Prin. 3(A).

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ment recognition.⁵⁵¹ The official representatives may select from the administrative rules provided by any relevant forum, and are not limited to those of their home forum.⁵⁵² Similarly, the official representatives may choose avoiding power rights from any forum,⁵⁵³ unless the transaction at issue has no significant relationship with the chosen forum.⁵⁵⁴

The Concordat provides that all creditors in any forum should have the right to appear in the other fora without being subject to personal jurisdiction there on matters unrelated to the insolvency proceeding at issue.⁵⁵⁵ Ex parte and interim orders should be subject to challenge for a reasonable period of time by creditors and official representatives from another forum, to the extent permitted by the procedural rules of the issuing forum.⁵⁵⁶ Public information should be shared among creditors in all fora, and nonpublic information should be provided to official representatives appointed in all fora.⁵⁵⁷

The Concordat further provides that, if there is more than one plenary forum and no main proceeding,⁵⁵⁸ each forum should coordinate with the others.⁵⁵⁹ Furthermore, in appropriate cases there should be a governance protocol to facilitate such coordination.⁵⁶⁰ The filing of a claim should be required only in the forum of the claimant's choice,⁵⁶¹ and common claims should be paid pro rata, regardless of the forum providing the source of funds.⁵⁶² However, each forum may apply its own ranking rules for classification of and distribution

551. *See id.*

552. *See id.* Prin. 6.

553. *See id.* Prin. 7. For a case holding that the U.S. court must apply British preference law to a British corporation's pre-filing transfers to a British and a French bank, see *Maxwell Communication Corp. v. Société Générale (In re Maxwell Communication Corp.)*, 93 F.3d 1036 (2d Cir. 1996).

554. *See* Concordat, Prin. 8(C).

555. *See id.* Prin. 3(C).

556. *See id.* Prin. 3(B).

557. *See id.* Prin. 3(D).

558. For cases involving two main proceedings, one in the United States and one in the United Kingdom, see *Maxwell Communication Corp. v. Société Générale (In re Maxwell Communication Corp.)*, 93 F.3d 1036 (2d Cir. 1996); *In re Brierley*, 145 B.R. 151 (Bankr. S.D.N.Y. 1992).

559. *See* Concordat, Prin. 4(A).

560. *See id.*

561. *See id.* Prin. 4(C).

562. *See id.* Prin. 4(E).

to secured and priority claims.⁵⁶³ The applicable law for determining the allowability of a claim, and any offset or rights to collateral should be determined according to applicable international private law.⁵⁶⁴ If the insolvency involves local regulation with important policy concerns (such as banking or insurance), local assets should go first to local creditors protected by the regulatory scheme.⁵⁶⁵

Reorganization can be undertaken, even if the laws of one plenary forum do not so permit, so long as the reorganization can be effected in a nondiscriminatory manner.⁵⁶⁶ Finally, a forum should not give effect to an act of state in another jurisdiction that purports to invalidate a preinsolvency transaction unless required by the substantive law of the forum.⁵⁶⁷

E. Protocols

Where there are related insolvency proceedings in more than one country, usually one of the first tasks of counsel is to negotiate the applicable law for the transnational proceeding. Negotiation is necessary because there is normally no clear answer to this question in a transnational case. Negotiation usually results in the adoption of a protocol⁵⁶⁸ that must be approved by each of the courts with a related proceeding.⁵⁶⁹ Prompt resolution of the issue of applicable law can facilitate an effective reorganization or an orderly liquidation.

The protocol typically establishes which forum determines particular issues, where assets are administered, and what national law applies to the determination of specified disputes.⁵⁷⁰ The protocol should also determine where creditors should file their claims, the language in which claims must be filed, and the required form for

563. *See id.* Prin. 4(D).

564. *See id.* Prin. 8(A).

565. *See id.* Prin. 4(G).

566. *See id.* Prin. 9.

567. *See id.* Prin. 10.

568. *See, e.g., id.*

569. The EU Regulation avoids this problem by a treaty provision giving predominance to the insolvency proceeding in the country with the center of the main interests of the business enterprise.

570. *See, e.g., In re Ionica PLC*, 241 B.R. 829, 835–36 (Bankr. S.D.N.Y. 1999) (describing protocol adopted in that case relating primarily to which law would govern asset sales and professional fees).

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filing claims. Special attention must be given to the treatment of foreign creditors so that they will not be unduly disadvantaged.

Most protocols negotiated to date have followed the principles of the Concordat.⁵⁷¹ These protocols now serve as models for protocols in future transnational insolvency cases.⁵⁷² The NAFTA Project recommends the use of a protocol to facilitate the coordination of parallel insolvency cases in two or more NAFTA countries.⁵⁷³ The UNCITRAL Model Law and the European Regulation are also likely to have substantial influence on protocols in the future.

571. For a discussion of the Concordat, *see supra* text accompanying notes 534–67.

572. For a brief description of a protocol, *see* Official Comm. v. Transpacific Corp. (*In re* Commodore Int'l, Ltd.), 242 B.R. 243, 256–57, 259 (Bankr. S.D.N.Y. 1999). Protocols tend to be rather lengthy documents.

573. *See supra* text accompanying notes 434–39.

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V. Procedural Issues in Transnational Insolvency Cases

Five types of procedural problems that often arise in transnational bankruptcy cases merit special attention: the appropriate venue for the main case in a transnational insolvency; giving notice to creditors; communication between the judges to whom the cases are assigned in the respective countries; the conflict of laws between the applicable international jurisdictions; and the method of calculation of creditor distributions.

A. Appropriate Venue for the Transnational Case

The appropriate venue for a transnational case may not be altogether apparent. While the EU Regulation provides that the country with the center of the debtor's main interests is the proper location for a main insolvency proceeding, this is not always the best choice. For example, the insolvency law of that country may be less favorable than that of another country to the debtor's orderly reorganization or liquidation and to the protection of the rights of creditors and other parties in interest.

For example, *In re Maruko Inc.*⁵⁷⁴ involved a Japanese corporation, but the bankruptcy case in Japan could not deal with the debtor's foreign assets or liabilities because of the Japanese insolvency law's territorial limitations. Thus a foreign main insolvency proceeding was necessary. In addition, the debtor found it more attractive to file a bankruptcy case in the United States rather than in Australia, because the U.S. automatic stay applies to secured creditors and the Australian law does not. While it was not clear that the Australian secured creditors would be bound by the U.S. automatic stay, in the end the creditors decided to observe the stay.

In addition, a debtor may prefer to file in a particular country because of the sophistication of the judiciary in that country in handling

⁵⁷⁴ 160 B.R. 633 (Bankr. S.D. Cal. 1993).

bankruptcy cases, or because of the integrity and independence of the judicial processes in that country. Other factors affecting the choice of venue may include the expertise and availability of bankruptcy professionals such as accountants and attorneys.

B. Notice to Creditors

Notice to creditors is essential to the insolvency process. Creditors must be given notice that a bankruptcy case has been opened so they know that they are bound by the automatic stay against further creditor collection activities. Creditors must be given notice of an opportunity to file claims, and of the deadline therefor. Many other proceedings in a bankruptcy case require notice to creditors.⁵⁷⁵ Giving notice to foreign creditors, however, poses unusual problems.

One problem relating to notice is the character of the notice itself. As in the United States, citizens of many other countries are accustomed to certain formalities (which vary substantially from country to country) before their legal rights are affected. The notice that is given in a typical bankruptcy case, after which an action affects a creditor's legal rights, frequently does not have this level of formality. In the United States such notices are given often enough in legal proceedings that it is not unfair to expect a person to be bound by such a notice. However, in a country where such notices are unknown or unusual, it may not be fair to bind a creditor who has only received a notice that is typical in a U.S. bankruptcy case.⁵⁷⁶

Another problem arises because it takes substantial time for a notice to be delivered abroad. While a notice by regular mail is normally delivered within two days in the United States, a notice sent abroad by regular mail may take a number of weeks to arrive. Even air mail may take a number of days for delivery. In addition, the typi-

575. See, e.g., Fed. R. Bankr. P. 2002 (specifying the notice required for a number of common proceedings in bankruptcy cases).

576. For example, notice may be considered insufficient unless the party giving notice complies with the requirements of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163 (1969). Thirty-six countries, including the United States and most of its major trading partners, are parties to this convention. The notice process is lengthy and cumbersome. This treaty and its contents are described in Edith Wu, *Evolutionary Trends in the United States Application of Extraterritorial Jurisdiction*, 10 *Transnat'l Law* 1 (1997).

cal notice provisions in the Federal Rules of Bankruptcy Procedure and local rules may be insufficient to provide meaningful notice to creditors located abroad.

Increasingly, domestic notice is being given by E-mail and by fax. These means are especially useful for giving notice to foreign creditors and parties in interest because such notice is much faster. Of course, fax numbers and E-mail addresses must be available to permit notice by these means.

A further problem may arise if a foreign creditor or other party in interest does not understand the language in which the notice is written. In this circumstance, the notice may be insufficient for the foreigner.⁵⁷⁷

C. Communication Between Judges

Traditionally, judges in different courts have been reluctant to communicate with each other on related cases. This is especially so when the courts are located in different countries and when translators are needed to overcome language barriers. However, it is important in transnational cases that the respective judges communicate with each other, whether directly or indirectly, about the conduct of related proceedings. United States trial judges have recently become much more willing to communicate with each other on related cases, and this change is likely to extend to the international arena.

Ineffective communication between judges may lead to problems, such as undue delays and expense, unduly cumbersome and lengthy hearings, inconsistent treatment of similarly situated creditors, and ultimately the dissipation of valuable assets. Perhaps the most serious problem that can arise from ineffective communication between judges is that the parties may “play” one court against another, which can lead to a battle between the affected courts. In addition to creating all of the foregoing problems, such a battle may bring the courts themselves into disrepute.

⁵⁷⁷ For this reason the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *supra* note 576, requires that all documents subject to the convention be translated into the local language. See arts. 5 & 7.

There is no single model for proper communication between judges in transnational insolvencies. Perhaps the best means of communication is a telephone or video conference, with translators if needed. Written communications between judges may also be advisable. In most cases, communications should be off-the-record, private, and confidential. It may be appropriate simply to inform the parties in interest that the respective judges have been in contact with one another.

D. Conflict of Laws in International Insolvency Cases

International insolvency cases frequently raise the potential for the application of the laws of more than one country. There are traditional rules, under the general doctrine of international private law, which generally govern the determination of applicable law where a transaction or event overlaps political boundaries.⁵⁷⁸ However, very few reported U.S. cases apply conflict-of-laws rules in the context of international insolvencies.

Generally accepted choice-of-law standards require that a controversy be decided by the law of the jurisdiction with the greatest interest in the controversy.⁵⁷⁹ Under this test, the court is required to evaluate the relative importance of the various contacts of each jurisdiction with respect to a particular issue in controversy and to make a reasoned determination as to which jurisdiction's laws and policies are implicated to the greatest extent.⁵⁸⁰

This principle probably explains the relative rarity of conflict-of-laws discussions in the reported case law. In a typical transnational bankruptcy case, the assets and the litigation at issue are usually firmly rooted in the United States. Thus, U.S. law would clearly apply to a

578. See, e.g., *Aranha v. Eagle Fund, Ltd. (In re Thornhill Global Deposit Fund, Ltd.)*, 245 B.R. 1, 10–11 (Bankr. D. Mass. 2000); see generally Restatement (Second) of Conflict of Laws (1997).

579. See, e.g., *Koreag, Controle et Revision S.A. v. Refco F/X Assocs., Inc. (In re Koreag)*, 961 F.2d 341, 350 (2d Cir. 1992); *Wells Fargo Asia, Ltd. v. Citibank, N.A.*, 936 F.2d 723, 726 (2d Cir. 1991); *Maxwell Communication Corp. v. Société Générale (In re Maxwell Communication Corp.)*, 93 F.3d 1036 (2d Cir. 1996).

580. See *Koreag*, 961 F.2d at 350; *Maxwell Communication Corp. v. Barclays Bank (In re Maxwell Communication Corp.)*, 170 B.R. 800, 816 (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).

V. Procedural Issues in Transnational Insolvency Cases

case or proceeding pending in a U.S. court under the applicable choice-of-law standards. However, in certain circumstances it is appropriate to apply the law of another jurisdiction under the choice-of-law rule.

The leading U.S. bankruptcy case on choice of law is *Maxwell Communication Corp. v. Barclays Bank*,⁵⁸¹ which involved plenary bankruptcy cases in both England and the United States. The British administrators of the joint case brought a preferential transfer action in the U.S. court to set aside certain payments that had been made to two British banks and one French bank shortly before the filing of the bankruptcy cases. The U.S. court applied traditional choice-of-law principles to find that the controversy must be decided under English law.⁵⁸² Given this decision, the court dismissed the suits on the grounds of comity.⁵⁸³

The *Maxwell* case illustrates the kind of issue where foreign law may be the appropriate choice. In general, an adversary proceeding brought against a foreign entity raises the issue of which country's law should apply. However, issues rooted in domestic assets or domestic procedure should be governed by local law.

For secured claims, it is generally assumed that the law of the situs of the collateral is the applicable law for all purposes. Generally, this rule is well founded for real estate, which is usually governed by the law of the situs. However, for personal property and especially for intangibles, a different result may often be appropriate.

The choice-of-law issue sharpens when assets are transferred abroad for administration in a foreign main case. In such a situation, the foreign forum typically will properly apply its own law to both substantive and procedural issues.

The choice-of-law issue raises additional complexities in a U.S. proceeding. Federal courts sitting in diversity jurisdiction are required to apply the choice-of-law rules of the forum state.⁵⁸⁴ This rule imposes the forum state's choice-of-law rules on bankruptcy adjudications where the underlying rights and obligations are defined by state

581. *Maxwell*, 170 B.R. 800.

582. *See id.* at 816–18.

583. *See id.* at 818.

584. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941).

(and not federal) law.⁵⁸⁵ In contrast, a court of appeals has held that federal principles should control in cases arising under federal law.⁵⁸⁶ Because bankruptcy law in the United States is a complex mix of state and federal law, a bankruptcy court may be required to determine the source of the applicable legal rules (whether federal or state law) before determining which conflict-of-laws rules to apply. Fortunately, few cases require a decision between federal and state choice-of-law rules.⁵⁸⁷

The EU Regulation provides a variation on this analysis. Under its procedures, a domestic non-main proceeding is governed by its own domestic law for most purposes, but the court is limited in how it treats local assets and creditors in light of the pendency of a main proceeding in a different country.⁵⁸⁸

E. Distribution to Creditors

The proper calculation of the distribution of assets to creditors is an unexpectedly difficult issue when there are parallel proceedings in two or more countries.⁵⁸⁹ This difficulty inheres in both the territoriality and the universality approaches⁵⁹⁰ to international insolvencies.⁵⁹¹ How much a particular unsecured creditor receives may be affected substantially by the order in which the insolvency cases distribute assets to creditors.⁵⁹² For example, a creditor may receive substantially more if the distribution to unsecured creditors is made first in country A than if the distribution is made first in country B. Furthermore, the

585. See, e.g., *Arab Monetary Fund v. Hashim (In re Hashim)*, 213 F.3d 1169, 1171 (9th Cir. 2000); *Continental Cas. Co. v. Kellogg (In re Chanel Fin., Inc.)*, 102 B.R. 549, 550 (Bankr. N.D. Tex. 1988); *Hassett v. Far West Fed. Sav. & Loan Ass'n (In re O.P.M. Leasing Serv., Inc.)*, 40 B.R. 380, 391–92 (Bankr. S.D.N.Y.), *aff'd*, 44 B.R. 1023 (S.D.N.Y. 1984); *Central Trust Co. v. Shepard (In re Shepard)*, 29 B.R. 928, 931 (Bankr. M.D. Fla. 1983). *But see Koreag*, 961 F.2d at 350 (dictum that federal choice-of-law principles should apply in cases arising under federal law, but finding no difference between the applicable New York and federal principles).

586. See *Koreag*, 961 F.2d at 350; *accord*, *Wells Fargo Asia, Ltd. v. Citibank, N.A.*, 936 F.2d 723, 726 (2d Cir. 1991).

587. See *Koreag*, 961 F.2d at 350.

588. See *supra* text accompanying notes 473–95.

589. See generally, Bang-Pedersen, *supra* note 468.

590. See *supra* text accompanying notes 10–18.

591. See Bang-Pedersen, *supra* note 468, at 385–86.

592. See *id.*, *passim*.

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recovery of a particular creditor may be substantially greater if the creditor files its claim in each of the countries where an insolvency proceeding is filed. In addition, varying priority laws in the relevant countries can affect the amount of a distribution received.⁵⁹³

Courts should adopt a maximum dividend rule. That is, a particular creditor should not be permitted to receive more than 100% of its claim collectively from the various insolvency proceedings in the various countries. A rule that disqualifies a creditor from receiving any more distributions in any relevant proceeding thereafter would accomplish this goal. However, such a rule may have a variety of complicated consequences for other creditors.⁵⁹⁴

Thus far, the reported cases in the United States have not addressed these problems.

593. *See id.*

594. *See id.*

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Appendix A

Cross-Border Insolvency Concordat

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INTERNATIONAL BAR ASSOCIATION
SECTION ON BUSINESS LAW
COMMITTEE J - INSOLVENCY AND CREDITORS' RIGHTS

Committee J
Cross-Border Insolvency Concordat

Adopted by the Council of the Section on Business Law of the International Bar Association
Paris, France
September 17, 1995

Adopted by the Council of the International Bar Association
Madrid, Spain
May 31, 1996

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Cross-Border Insolvency Concordat	

INTRODUCTION TO THE CROSS-BORDER
INSOLVENCY CONCORDAT

Committee J of the International Bar Association is pleased and proud to have sponsored the development of the Cross-Border Insolvency Concordat. The Concordat is one of the most significant initiatives in international insolvency and reorganizations in many years.

Our Committee is highly appreciative of the work that so many Members of our Committee have put into the analysis and development of the concepts that form the basis of the Concordat. Under the Co-Chairs of our Subcommittee on the Cross-Border Insolvency Concordat, Mike Sigal of New York and Christoph Staubli of Zurich, Country Teams were organized in over twenty countries from all around the world. Through presentations at Committee J Conferences and Meetings, several hundred members of our Committee have been able to participate in the deliberations on the Concordat. The Committee also acknowledges a deep debt of gratitude to several distinguished international jurists who participated in the development and, more latterly, in the actual application of the Concordat to an existing cross-border reorganization between two of Committee J's member countries.

The Concordat is intended to be an evolving work that will be altered and modified to reflect the experiences that members of the international insolvency community gain from working with its concepts and applying it in practice. We are aware of the benefits to be derived from the application of the principles of the Concordat within the work of the United Nations Commission on International Trade Law (UNCITRAL) prospective Model Law on Cross-Border Insolvency. We are also considering provisions based on the Concordat model that would be suitable for application in the case of cross-border insolvencies involving financial institutions and the potential development and use of the Concordat for model provisions in commercial documentation in international transactions.

Committee J welcomes comments and suggestions on the provisions of the Cross-Border Insolvency Concordat and on measures that could be used to increase the effectiveness of the Concordat in meeting our Committee's goals of achieving increased levels of co-

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ordination and harmonization among Committee J's member countries in cross-border and multinational insolvencies and reorganizations.

Madrid, Spain
May 31, 1996

E. Bruce Leonard
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Chairman, Committee J

INTRODUCTION TO THE COMMITTEE J
CROSS-BORDER INSOLVENCY CONCORDAT

Flexibility in the rules appears to be indispensable in international bankruptcy. The situations which arise are so varied that any one rigid rule cannot solve all of them satisfactorily. Neither the theory of territoriality nor the theory of ubiquity can cope adequately with the divergent situations.

—Professor Kurt H. Nadelmann¹

The Cross-Border Insolvency Concordat is a framework for harmonizing cross-border insolvency proceedings. There exists today no uniform statute or treaty adopted by commercial nations dealing with the policy and commercial problems that arise in cross-border insolvencies. Yet cross-border insolvencies are increasing both in number and size, as well as in complexity. The Concordat attempts to aid in filling this gap in international law.

International commerce will be encouraged if the insolvency bench and bar develop a set of general guidelines, a “concordat,” which may be used in developing solutions to individual cross-border insolvencies. The purpose of the Concordat is to suggest generalized principles, which the participants or courts could tailor to fit the particular circumstances and then adopt as a practical approach toward dealing with the process.

To be supportive of international commerce, any insolvency regime must be reasonably predictable, fair and convenient. Supporting international commerce is a worthy goal, because, as some have noted, countries which trade together rarely make war upon one another. International commerce will be furthered by an understanding in the international business community that general principles exist which, in the event of business crisis, are recognized as an underpinning to harmonize insolvency proceedings.

These principles should reflect respect for the legitimate private expectations of the parties transacting business with the debtor, including their reasonable reliance upon laws of particular jurisdictions. However, legislation reflecting a particular jurisdiction’s policies re-

1. *Solomons v. Ross and Int’l Bankruptcy Law*, 9 Mod. L.R. 154, 167–68 (1946).

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garding such matters as priorities among claims must be given due weight where jurisdictionally appropriate, as should regulatory laws governing businesses such as banking or insurance.

The Concordat has been prepared to provide a framework of general principles for addressing cross-border insolvencies. The Concordat deals with some of the important conceptual issues that arise in cross-border insolvencies. Some principles have been framed in the alternative, reflecting among other things extensive comment from many countries.

It is important to note what the Concordat is not. The Concordat is not intended to be used as, or as a substitute for, a treaty or statute. The Concordat is not a rigid set of rules; indeed, it is expected to change as it is used. Rather, the Concordat is an interim measure until treaties and/or statutes are adopted by commercial nations. It is intended, in the absence of an applicable treaty or statute, to guide practitioners in harmonizing cross-border insolvencies. The Concordat, as modified by counsel to fit the circumstances of any particular cross-border insolvency, could be implemented by court orders or formal agreements between official representatives or informal arrangements, depending upon the rules and practices of the particular forum involved.

**COMMITTEE J CROSS-BORDER INSOLVENCY
CONCORDAT**

PRINCIPLE 1

IF AN ENTITY OR INDIVIDUAL WITH CROSS-BORDER CONNECTIONS IS THE SUBJECT OF AN INSOLVENCY PROCEEDING, A SINGLE ADMINISTRATIVE FORUM SHOULD HAVE PRIMARY RESPONSIBILITY FOR COORDINATING ALL INSOLVENCY PROCEEDINGS RELATING TO SUCH ENTITY OR INDIVIDUAL.

Commentary: In most cases, an enterprise will have its nerve center and many of its assets in one country. In the usual circumstance that country is the most appropriate forum for the administrative center of its insolvency. Having a primary administrative forum presents the possibility of many benefits enhancing control of assets, increasing business values, and ensuring fair treatment of creditors. Predictability of the “natural” administrative forum will also be most supportive of international commerce.

The Concordat is designed to provide principles useful where any of several procedural situations occurs. While in most cases the establishment of a single main proceeding will be the best way to achieve the common goals of most national insolvency regimes, there may well be circumstances in which more than one plenary case is maintained. For example, plenary proceedings might proceed in two jurisdictions, with or without an administrative protocol, and with or without limited proceedings in yet other jurisdictions. In all of these circumstances the Concordat provides principles intended to assist in coordination. The Concordat also provides principles applicable in any forum whether one, or several, plenary or limited proceedings are pending. These include the analysis of appropriate choice of law in litigated matters such as claim resolution and voiding rules.

PRINCIPLE 2

WHERE THERE IS ONE MAIN FORUM:

- A. ADMINISTRATION AND COLLECTION OF ASSETS SHOULD BE COORDINATED BY THE MAIN FORUM.
- B. AFTER PAYMENT OF SECURED CLAIMS AND PRIVILEGED CLAIMS, AS DETERMINED BY LOCAL LAW, ASSETS IN ANY FORUM OTHER THAN IN THE MAIN FORUM SHALL BE TURNED OVER TO THE MAIN FORUM FOR DISTRIBUTION.
- C. COMMON CLAIMS ARE FILED IN AND DISTRIBUTIONS ARE MADE BY THE MAIN FORUM. COMMON CREDITORS NOT IN THE MAIN FORUM MUST FILE CLAIMS IN THE MAIN FORUM BUT (TO THE EXTENT ALLOWABLE UNDER THE PROCEDURAL RULES OF THE MAIN FORUM) MAY FILE BY MAIL, IN THEIR LOCAL LANGUAGE AND WITH NO FORMALITIES OTHER THAN REQUIRED UNDER THEIR LOCAL INSOLVENCY LAW.
- D. THE MAIN FORUM MAY NOT DISCRIMINATE AGAINST NON-LOCAL CREDITORS.
- E. FILING A CLAIM IN THE MAIN FORUM DOES NOT SUBJECT A CREDITOR TO JURISDICTION FOR ANY PURPOSE, EXCEPT FOR CLAIMS ADMINISTRATION SUBJECT TO THE LIMITATIONS OF PRINCIPLE 8 AND EXCEPT FOR ANY OFFSET (UNDER VOIDING RULES OR OTHERWISE) UP TO THE AMOUNT OF THE CREDITOR'S CLAIM.
- F. A DISCHARGE GRANTED BY THE MAIN FORUM SHOULD BE RECOGNIZED IN ANY FORUM.

Commentary: International commerce is encouraged to the extent that participants may rely upon the expectation that if they engage in transactions with a multinational enterprise, and an insolvency proceeding is commenced in any nation with which the enterprise has a connection, that participant will not suffer discriminatory treatment based solely upon nationality or domicile. While a creditor may be

subject to the inconvenience of an insolvency proceeding in another country, that risk is part of engaging in business with a multinational enterprise. But the risk of discriminatory treatment should not be a business. Nor should the risk that the creditor's preinsolvency claim will be unanticipated jurisdiction, unilaterally chosen by the entity or individual commencing insolvency proceedings, be a risk of doing such business.

To promote economy, and in light of modern communications technology, the main forum should have the ability to serve process worldwide, but a defendant should be permitted to object to jurisdiction of the main forum without submitting to jurisdiction, and to raise other objections to the forum. Similarly, the filing of a claim in a particular jurisdiction subjects the creditor to insolvency jurisdiction, but only as exercised by the court ultimately found appropriate to hear a matter, which may not be the main forum, and only with respect to its claim and offsets.

PRINCIPLE 3

- A. IF THERE IS MORE THAN ONE FORUM, THE OFFICIAL REPRESENTATIVES APPOINTED BY EACH FORUM SHALL RECEIVE NOTICE, AND HAVE THE RIGHT TO APPEAR IN, ALL PROCEEDINGS IN ANY FORA. IF REQUIRED IN A PARTICULAR FORUM, AN EXEQUATUR OR SIMILAR PROCEEDING MAY BE UTILIZED TO IMPLEMENT RECOGNITION OF THE OFFICIAL REPRESENTATIVE. AN OFFICIAL REPRESENTATIVE SHALL BE SUBJECT TO JURISDICTION IN ALL FORA FOR ANY MATTER RELATED TO THE INSOLVENCY PROCEEDINGS, BUT APPEARING IN A FORUM SHALL NOT SUBJECT HIM/HER TO JURISDICTION FOR ANY OTHER PURPOSE IN THE FORUM STATE.
- B. TO THE EXTENT PERMITTED BY THE PROCEDURAL RULES OF A FORUM, EX PARTE AND INTERIM ORDERS SHALL PERMIT CREDITORS OF ANOTHER JURISDICTION AND OFFICIAL REPRESENTATIVES APPOINTED BY ANOTHER JURISDICTION THE RIGHT,

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FOR A REASONABLE PERIOD OF TIME, TO REQUEST THE COURT TO RECONSIDER THE ISSUES COVERED BY SUCH ORDERS.

- C. ALL CREDITORS SHOULD HAVE THE RIGHT TO APPEAR IN ANY FORUM TO THE SAME EXTENT AS CREDITORS OF THE FORUM STATE, REGARDLESS OF WHETHER THEY HAVE FILED CLAIMS IN THAT PARTICULAR FORUM, WITHOUT SUBJECTING THEMSELVES TO JURISDICTION IN THAT FORUM (INCLUDING WITH RESPECT TO RECOVERY AGAINST A CREDITOR UNDER VOIDING RULES OR OTHERWISE IN EXCESS OF A CREDITOR'S CLAIM).
- D. INFORMATION PUBLICLY AVAILABLE IN ANY FORUM SHALL BE PUBLICLY AVAILABLE IN ALL FORA. TO THE EXTENT PERMITTED, NON-PUBLIC INFORMATION AVAILABLE TO AN OFFICIAL REPRESENTATIVE SHALL BE SHARED WITH OTHER OFFICIAL REPRESENTATIVES.

Commentary: If more than one plenary forum is presiding over insolvency proceedings of a multinational entity or individual, coordination of both the administration and claims processing is essential. The goals of Principle 1 are still important, and they can be achieved only if the Official Representatives are in constant communication, work together to coordinate the process, and have the respect of all relevant jurisdictions. All should be aware of proceedings in all courts, and where necessary should be heard if judicial resolution of a matter is required.²

Where more than one plenary forum exists, it appears to be an equitable corollary that any Official Representatives should be subject to plenary jurisdiction in every such forum. If creditors must respond in that forum, the Official Representatives must surely be required to respond in that forum. However, the Official Representatives should

2. Official Representatives will most often seek to appear to press claims of the creditors in their country or to assert an interest in assets. However, Official Representatives should be heard on any matter of interest to their position.

not be subject to jurisdiction for any purpose unrelated to representation of the estate.

Interim orders must often be made on short notice, especially in the first stages of insolvency proceedings. Because of the greater complexity of cross-border proceedings, such orders should be made subject to “come-back” procedures, so that any affected party may request the court to reconsider the matter when the situation has stabilized and the facts are clearer. In that way, courts will be given sufficient time and sufficient input to consider carefully the consequences of orders having cross-border ramifications. In addition, parties who are uncertain of the court’s intentions regarding the cross-border reach of their orders, and who are not otherwise subject to the jurisdiction of the court, should be free to obtain clarification of such issues without being subjected to jurisdiction for other purposes.

Because the guiding principle of this Concordat is that all common creditors should be treated as creditors of a single world-wide estate, even though the estate is administered by more than one forum, as a matter of fairness all creditors should have a right to be heard (where a forum permits creditors to speak) on administrative matters in which they have an interest without submission to jurisdiction of the administrative forum for any purpose other than administrative matters and claims administration. No creditor not otherwise found in the administrative forum state, or whose claim is not connected to the forum state, should, as a result of administrative participation, lose its rights to jurisdictional and other international law arguments with respect to an adversary proceeding against the creditor.

PRINCIPLE 4

WHERE THERE IS MORE THAN ONE PLENARY FORUM
AND THERE IS NO MAIN FORUM:

- A. EACH FORUM SHOULD COORDINATE WITH EACH OTHER, SUBJECT IN APPROPRIATE CASES TO A GOVERNANCE PROTOCOL.
- B. EACH FORUM SHOULD ADMINISTER THE ASSETS WITHIN ITS JURISDICTION, SUBJECT TO PRINCIPLE 4(F).

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- C. A CLAIM SHOULD BE FILED IN ONE, AND ONLY ONE, PLENARY FORUM, AT THE ELECTION OF THE HOLDER OF THE CLAIM. IF A CLAIM IS FILED IN MORE THAN ONE PLENARY FORUM, DISTRIBUTION MUST BE ADJUSTED SO THAT RECOVERY IS NOT GREATER THAN IF THE CLAIM WERE FILED IN ONLY ONE FORUM.
 - D. EACH PLENARY FORUM SHOULD APPLY ITS OWN RANKING RULES FOR CLASSIFICATION OF AND DISTRIBUTION TO SECURED AND PRIVILEGED CLAIMS.
 - E. CLASSIFICATION OF COMMON CLAIMS SHOULD BE COORDINATED AMONG PLENARY FORA. DISTRIBUTIONS TO COMMON CLAIMS SHOULD BE PRO-RATA REGARDLESS OF THE FORUM FROM WHICH A CLAIM RECEIVES A DISTRIBUTION.
 - F. ESTATE PROPERTY SHOULD BE ALLOCATED (AFTER PAYMENT OF SECURED AND PRIVILEGED CLAIMS) AMONG, OR DISTRIBUTIONS SHOULD BE MADE BY, PLENARY FORA BASED UPON A PRO-RATA WEIGHING OF CLAIMS FILED IN EACH FORUM. PROCEEDS OF VOIDING RULES NOT AVAILABLE IN EVERY PLENARY FORUM SHOULD BE:
 - ALTERNATIVE A: ALLOCATED PRO-RATA AMONG ALL PLENARY FORA FOR DISTRIBUTION.
 - ALTERNATIVE B: ALLOCATED FOR DISTRIBUTION BY THE FORUM WHICH ORDERED VOIDING.
 - G. IF THE ESTATE IS SUBJECT TO LOCAL REGULATION THAT INVOLVES AN IMPORTANT PUBLIC POLICY (SUCH AS A BANKING OR INSURANCE BUSINESS), LOCAL ASSETS SHOULD BE USED FIRST TO SATISFY LOCAL CREDITORS THAT ARE PROTECTED BY THAT REGULATORY SCHEME (SUCH AS BANK DEPOSITORS AND INSURANCE POLICY HOLDERS) TO THE EXTENT PROVIDED BY THAT REGULATORY SCHEME.
-

Commentary: As suggested with respect to Principle 1, estate assets and business values are more likely to be preserved and enhanced if administration is centered in a single forum. If there are multiple insolvency proceedings and no main forum and if assets are located in several plenary fore or outside of any plenary forum, the same objectives may be met if the relevant fora agree upon a governance protocol.

Where more than one plenary proceeding exists, creditors should have the ability to choose the forum most advantageous or convenient for the creditor. If all creditors have the choice, all are provided equal treatment. Therefore, the holder of a claim should be permitted to file it in any plenary forum.

The choice of law applicable to the underlying validity of the claim is not affected by the choice of where it is filed—under this Concordat the same choice of law rules will apply in every forum. However, the creditor may feel that one forum is more hospitable than another, and a privileged creditor may fare better under one distribution system rather than another.

Privileged claims, which reflect national policy choices, should be recognized by permitting distributions to those claims in each forum to be made according to its rules. Where a particular country has no assets for distribution and allocated a portion of estate assets for distribution to privileged creditors, the country may distribute such assets to privileged creditors first.

Certain industries, such as banking and insurance, involve regulation that implements important public policies. Under the Concordat, these are respected.³

To promote fairness, which in turn promotes commerce, distribution of estate assets, domestic or multinational, should generally be made pro-rata among creditors of the same class, wherever located. However, where more than one plenary forum has been found appropriate, each should be permitted to make distributions pursuant to its own procedural law. Therefore, each must be allocated an appropriate portion of estate property.

3. See *In re Norske Lloyd Ins. Co.*, 242 N.Y. 148 (1926); *In re Ocana*, 151 B.R. 670 (S.D.N.Y. 1993); see also, art. 1(1) of the Council of Europe Convention and art. 1(2) of the draft EU Convention.

Estate property should be allocated (after satisfaction of secured claims and payment of privileged claims in any jurisdiction in which estate property is located) such that it is distributed on a pro-rata basis among plenary fora based upon claims filed. Claims in comparable classes in each jurisdiction should be valued on a comparative basis, and then the assets, or their proceeds, should be allocated among each jurisdiction based upon claims filed.

PRINCIPLE 5

A LIMITED PROCEEDING SHALL, AFTER PAYING SECURED AND PRIVILEGED CLAIMS, AS DETERMINED BY LOCAL LAW, TRANSFER ANY SURPLUS TO THE MAIN FORUM OR ANOTHER APPROPRIATE PLENARY FORUM.

Commentary: In many situations, it may be useful, where a plenary insolvency proceeding is pending on one jurisdiction, to commence a proceeding in another jurisdiction to serve limited objectives, such as collection of assets, where there is no need for a second comprehensive proceeding. In some countries there exist defined statutory vehicles for limited proceedings, such as “secondary proceedings” recognized in the Council of Europe Convention and the draft EU Convention and “ancillary proceedings” in the United States. In many countries, the only available vehicle is a plenary proceeding. However, it appears that in most countries a plenary proceeding may be tailored by the presiding judge to effect limited objectives. The Concordat favors the exercise of discretion, where available, to limit proceedings. This will avoid conflict with plenary proceedings in other jurisdictions and will reduce the cost of cross-border cases.

In any limited proceeding, the court should make every effort to coordinate with courts presiding over plenary proceedings. However, the court in a limited proceeding has authority to collect assets in its jurisdiction, and distribute such assets to secured and privileged creditors. To effect the equality goal of the Concordat and most insolvency regimes, the Concordat provides that surplus assets or proceeds should then be transferred to an appropriate plenary proceeding which handles distribution to common claims.

PRINCIPLE 6

SUBJECT TO PRINCIPLE 8, THE OFFICIAL REPRESENTATIVES MAY EMPLOY THE ADMINISTRATIVE RULES OF ANY PLENARY FORUM IN WHICH AN INSOLVENCY PROCEEDING IS PENDING, EVEN THOUGH SIMILAR RULES ARE NOT AVAILABLE IN THE FORUM APPOINTING THE OFFICIAL REPRESENTATIVE.

Commentary: Where it is found appropriate that administrative supervision of a cross-border insolvency be exercised in more than one country, it should also be appropriate that administrative rules applicable in a particular forum be available for use by the Official Representative to enhance the assets of the estate. For example, if the entity in insolvency proceedings is a party to executory contracts in a nation whose insolvency law permits rejection of executory contracts that are burdensome, the Official Representative should be enabled to use such procedures for the benefit of all creditors. Thus, an Official Representative appointed in Country A could, subject to Principle 8, use a rejection power available in Country B (the main forum) even if Country A's laws provide no such power. Where appropriate, an exequatur or similar proceeding would be used in Country B.

However, the Official Representative is not permitted to use such rules in an unexpected manner. If the pre-insolvency entity was a party to executory contracts to be performed in a country in which rejection is not permissible, the rejection procedure of another country may not be used. Again, international commerce is hindered if parties entering into contracts with multinational entities are concerned that unexpected unilateral use by such entities of favorable law will occur in the event of insolvency. Application of principles of international law may determine whether use of administrative procedures is appropriate.

PRINCIPLE 7

SUBJECT TO PRINCIPLE 8, THE OFFICIAL REPRESENTATIVES MAY EXERCISE VOIDING RULES OF ANY FORUM.

Commentary: Many nations provide rules for negating transactions which occur within a defined period before the onset of insolvency proceedings. The purpose of these laws is usually to prevent the preference by the pre-insolvency entity of some creditors over others, or to prevent the overpayment of some creditors caused by exchanges for unequal value, so creditors not so preferred are treated equally by having all claims considered based on facts existing at the filing date (or as they should have existed as of that date had the voidable transactions not occurred).

The Official Representative should be permitted to use any provisions available to it to maximize recoveries, provided the use of such remedy is consistent with principles of international law.⁴

PRINCIPLE 8

- A. EACH FORUM SHOULD DECIDE THE VALUE AND ALLOWABILITY OF CLAIMS FILED BEFORE IT USING A CHOICE OF LAW ANALYSIS BASED UPON PRINCIPLES OF INTERNATIONAL LAW. A CREDITOR'S RIGHTS TO COLLATERAL AND SET-OFF SHOULD ALSO BE DETERMINED UNDER PRINCIPLES OF INTERNATIONAL LAW.
- B. PARTIES ARE NOT SUBJECT TO A FORUM'S SUBSTANTIVE RULES UNLESS UNDER APPLICABLE PRINCIPLES OF INTERNATIONAL LAW SUCH PARTIES WOULD BE SUBJECT TO THE FORUM'S SUBSTANTIVE LAWS IN A LAWSUIT ON THE SAME TRANSACTION IN A NON-INSOLVENCY PROCEEDING. THE SUBSTANTIVE AND VOIDING LAWS OF THE

⁴ Some jurisdictions and the draft EU Convention are not as flexible in that they require the voiding rules of the law of the State in which proceedings are opened to apply. The Concordat considers this approach overly narrow, but is cognizant of this approach.

FORUM HAVE NO GREATER APPLICABILITY THAN THE LAWS OF ANY OTHER NATION.

- C. EVEN IF THE PARTIES ARE SUBJECT TO THE JURISDICTION OF THE PLENARY FORUM, THE PLENARY FORUM'S VOIDING RULES DO NOT APPLY TO TRANSACTIONS THAT HAVE NO SIGNIFICANT RELATIONSHIP WITH THE PLENARY FORUM.

Commentary: A multinational corporation or corporate group may have transactions in many countries with citizens or domiciliaries of many other countries, involving assets or debt in many countries. The parties to these transactions will have reasonable expectations with respect to the law applicable to such transactions.

When such an enterprise fails, the established rules of international law should apply to claims, collateral, set-off rights, and lawsuits among the participants in the insolvency proceeding. Thus, substantive laws applicable to claims resolution and to lawsuits must be decided based upon on the relevant facts. So should issues of jurisdiction and venue. While the interests of creditors are relevant, those interests are served by the application of laws providing for procedural fairness, not by the application of substantive laws or voiding rules on an unexpected basis.

If there is a main forum, it will usually be an appropriate forum for litigation if it applies international law principles, particularly choice of law principles, to any adversarial litigation pending before it.⁵ The issue could be by more complex where there are multiple administrative fora. In each case, an evaluation must be made based upon the applicable principles of international law, including giving due consideration to relevant insolvency law, as to what law should apply.

5. The parties may not alone determine the substantive law applicable to a transaction. For example, if payments alleged to be fraudulent conveyances were made in connection with a contract governed by Singaporean law, the determination whether the payments are voidable is not necessarily made under Singaporean law. The appropriate law for evaluating voidability depends upon an analysis of all the circumstances of the payments, including the designation of Singaporean law in the contract, which may be relevant to the parties' expectations and intent. Where, as a result of the insolvency, the laws of another country may be relevant despite the intent of the parties, the basis for its application should also be examined.

Voiding rules raise special issues. Such laws invalidate an otherwise legal transaction. Thus, a forum should have a clear interest in order for its voiding rules to apply. This is consistent with the overall principle that international commerce will be supported if otherwise valid commercial transactions are not disturbed unless a jurisdiction has a clear interest in doing so.

PRINCIPLE 9

A COMPOSITION IS NOT BARRED BECAUSE NOT ALL PLENARY FORA HAVE LAWS WHICH PROVIDE FOR A COMPOSITION AS OPPOSED TO A LIQUIDATION, OR A COMPOSITION CANNOT BE ACCOMPLISHED IN ALL PLENARY FORA, AS LONG AS THE COMPOSITION CAN BE EFFECTED IN A NON-DISCRIMINATORY MANNER.

Commentary: Not all nations have insolvency laws which provide for a composition. The policy decision whether to permit a composition is based upon a socio-economic view as to whether society benefits from maintaining the debtor as an on-going enterprise rather than liquidating it. The rules that govern the requirements to be satisfied in order to achieve a composition will differ from nation to nation and, thus, it is possible that a composition would be achievable in some, but not all, administrative fora.

In such an instance, if it appears that a composition is in the interests of the creditors, or other constituencies, such as employees or regulatory authorities, of countries which permit a composition, it is essential that the Official Representatives and courts coordinate their actions so that the objectives of all relevant nations may, to the extent possible, be realized. There appears to be no bar to a composition where creditors in any forum in which a vote is permitted in fact vote by the requisite majority of that forum in favor of the composition.

PRINCIPLE 10

TO THE EXTENT PERMITTED BY THE SUBSTANTIVE LAW OF A FORUM, COURTS OF THAT FORUM WILL NOT GIVE EFFECT TO ACTS OF STATE OF ANOTHER JURISDICTION USED TO INVALIDATE OTHERWISE VALID PRE-INSOLVENCY TRANSACTIONS.

Commentary: Insolvency laws are designed to protect the integrity of commerce. They do so by allocating the assets of a failed enterprise in a manner which attempts to weight claims arising from different non-insolvency law bases in an equitable manner. While preferences and priorities reflecting a particular nation's political decisions are also part of many insolvency statutes, these are usually quite limited and are known in advance to the participants in commercial activity relating to that nation.

The reasonable commercial expectation of the parties should not be upset by *ad hoc* intervention, post-insolvency, of the executive of a nation by use of any act of state. For example, the pre-insolvency obligations of a private entity should not be invalidated by sovereign acts after the onset of insolvency proceedings.

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GLOSSARY OF TERMS

This Glossary of Terms is included for convenience and does not have independent significance. These terms may be tailored to conform to the applicable terms of those jurisdictions involved in any particular cross-border insolvency in which the Concordat is utilized.

Administrative Rules. The rules of insolvency law, excluding voiding rules, governing the conduct of a plenary proceeding.

Common Claim. A claim which is neither a secured claim nor a privileged claim.

Composition. A proceeding with the goal of rehabilitating the business of the entity or individual that is involved in insolvency proceedings, possibly with new owners, including arrangement, suspen-

Appendix A: Cross-Border Insolvency Concordat

sion of payment, reconstruction, reorganization, or similar processes, with distributions to creditors and/or shareholders or other equity holders of cash, property and/or obligations of, or interests in, the rehabilitated business.

Discharge. A court order or provision of an instrument effecting a composition releasing a debtor from all liabilities that were, or could have been, addressed in the insolvency proceeding, including contracts that were modified as part of a composition.

Distribution. Allocation of estate property among creditors and/or shareholders or other equity interests.

Insolvency Proceeding/Forum. Any proceeding over which a court or other official forum presides with respect to the insolvency of an entity or individual, which may be a plenary or limited proceeding.

International Law. The laws governing relations among parties of diverse nationalities.

Limited Proceeding. An insolvency proceeding that is not a plenary proceeding. Limited proceedings include secondary and ancillary proceedings.

Liquidation. A proceeding with the goal of selling the debtor's business, either as a going concern or otherwise, with distribution of proceeds to creditors.

Main Forum/Proceeding. The exclusive or primary plenary forum/proceeding.

Non-Local Creditors. Creditors who are neither nationals nor domiciliaries of the forum in question.

Official Representative. A representative of the entity or individual that has commenced insolvency proceedings, or the estate created thereby, or its or his/her creditors, which may include an administrator, liquidator, trustee, supervisor or debtor-in-possession.

Plenary Forum/Proceeding. A forum or insolvency proceeding which addresses, on a plenary basis, administrative matters, including, on the one hand, operation or liquidation of the debtor's business or assets, and, on the other hand, the filing, processing and allowance of claims and distribution to creditors.

Privileged Claim. A claim that, pursuant to statutory or other law, or pursuant to ranking rules, is given a preference or priority over

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common claims, including a public law claim arising from the public law of a nation.

Ranking Rules. The rules by which claims and equity interests are ranked.

Secured Claim. A claim that is a valid charge upon or interest in collateral to the extent of the value of the collateral.

Voiding Rules. Rules relating to voidness, voidability or enforceability of claims or pre-insolvency transactions.

Appendix B

UNCITRAL Model Law on Cross-Border Insolvency

(Reprinted from United Nations Publication, Sales No. E.99.V.3, ISBN 92-1-133608-2.)

PREAMBLE

The purpose of this Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:

- (a) cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;
- (b) greater legal certainty for trade and investment;
- (c) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
- (d) protection and maximization of the value of the debtor's assets; and
- (e) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

Chapter I. GENERAL PROVISIONS

Article 1. Scope of application

- (1) This Law applies where:
 - (a) assistance is sought in this State by a foreign court or a foreign representative in connection with a foreign proceeding; or
 - (b) assistance is sought in a foreign State in connection with a proceeding under [identify laws of the enacting State relating to insolvency]; or

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(c) a foreign proceeding and a proceeding under [identify laws of the enacting State relating to insolvency] in respect of the same debtor are taking place concurrently; or

(d) creditors or other interested persons in a foreign State have an interest in requesting the commencement of, or participating in, a proceeding under [identify laws of the enacting State relating to insolvency]. (2) This Law does not apply to a proceeding concerning [designate any types of entities, such as banks or insurance companies, that are subject to a special insolvency regime in this State and that this State wishes to exclude from this Law].

Article 2. Definitions

For the purposes of this Law:

(a) “foreign proceeding” means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation;

(b) “foreign main proceeding” means a foreign proceeding taking place in the State where the debtor has the centre of its main interests;

(c) “foreign non-main proceeding” means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of subparagraph (f) of this article;

(d) “foreign representative” means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceeding;

(e) “foreign court” means a judicial or other authority competent to control or supervise a foreign proceeding;

(f) “establishment” means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.

Article 3. International obligations of this State

To the extent that this Law conflicts with an obligation of this State arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail.

Article 4. [Competent court or authority]

The functions referred to in this Law relating to recognition of foreign proceedings and cooperation with foreign courts shall be performed by [specify the court, courts, authority or authorities competent to perform those functions in the enacting State].

Article 5. Authorization of [insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State] to act in a foreign State

A [insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State] is authorized to act in a foreign State on behalf of a proceeding under [identify laws of the enacting State relating to insolvency], as permitted by the applicable foreign law.

Article 6. Public policy exception

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.

Article 7. Additional assistance under other laws

Nothing in this Law limits the power of a court or a [insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State] to provide additional assistance to a foreign representative under other laws of this State.

Article 8. Interpretation

In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

Chapter II. ACCESS OF FOREIGN REPRESENTATIVES AND
CREDITORS TO COURTS IN THIS STATE

Article 9. Right of direct access

A foreign representative is entitled to apply directly to a court in this State.

Article 10. Limited jurisdiction

The sole fact that an application pursuant to this Law is made to a court in this State by a foreign representative does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the courts of this State for any purpose other than the application.

Article 11. Application by a foreign representative to commence a proceeding under [identify laws of the enacting State relating to insolvency]

A foreign representative is entitled to apply to commence a proceeding under [identify laws of the enacting State relating to insolvency] if the conditions for commencing such a proceeding are otherwise met.

Article 12. Participation of a foreign representative in a proceeding under [identify laws of the enacting State relating to insolvency]

Upon recognition of a foreign proceeding, the foreign representative is entitled to participate in a proceeding regarding the debtor under [identify laws of the enacting State relating to insolvency].

Article 13. Access of foreign creditors to a proceeding under [identify laws of the enacting State relating to insolvency]

(1) Subject to paragraph (2) of this article, foreign creditors have the same rights regarding the commencement of, and participation in, a proceeding under [identify laws of the enacting State relating to insolvency] as creditors in this State.

(2) Paragraph (1) of this article does not affect the ranking of claims in a proceeding under [identify laws of the enacting State relating to insolvency], except that the claims of foreign creditors shall not be

ranked lower than [identify the class of general non-preference claims, while providing that a foreign claim is to be ranked lower than the general non-preference claims if an equivalent local claim (e.g. claim for a penalty or deferred-payment claim) has a rank lower than the general non-preference claims].

Article 14. Notification to foreign creditors of a proceeding under
[identify laws of the enacting State relating to insolvency]

(1) Whenever under [identify laws of the enacting State relating to insolvency] 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 creditor whose address is not yet known.

(2) 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. No letters rogatory or other, similar formality is required.

(3) When a notification of commencement of a proceeding is to be given to foreign creditors, the notification shall:

(a) indicate a reasonable time period for filing claims and specify the place for their filing;

(b) indicate whether secured creditors need to file their secured claims; and

(c) contain any other information required to be included in such a notification to creditors pursuant to the law of this State and the orders of the court.

Chapter III. RECOGNITION OF A FOREIGN PROCEEDING
AND RELIEF

Article 15. Application for recognition of a foreign proceeding

(1) A foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed.

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(2) An application for recognition shall be accompanied by:

(a) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or

(b) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or

(c) in the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.

(3) An application for recognition shall also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.

(4) The court may require a translation of documents supplied in support of the application for recognition into an official language of this State.

Article 16. Presumptions concerning recognition

(1) If the decision or certificate referred to in article 15(2) indicates that the foreign proceeding is a proceeding within the meaning of article 2(a) and that the foreign representative is a person or body within the meaning of article 2(d), the court is entitled to so presume.

(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.

(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.

Article 17. Decision to recognize a foreign proceeding

(1) Subject to article 6, a foreign proceeding shall be recognized if:

(a) the foreign proceeding is a proceeding within the meaning of article 2(a);

(b) the foreign representative applying for recognition is a person or body within the meaning of article 2(d);

(c) the application meets the requirements of article 15(2); and

(d) the application has been submitted to the court referred to in article 4.

(2) The foreign proceeding shall be recognized:

(a) as a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests; or

(b) as a foreign non-main proceeding if the debtor has an establishment within the meaning of article 2(f) in the foreign State.

(3) An application for recognition of a foreign proceeding shall be decided upon at the earliest possible time.

(4) The provisions of articles 15, 16, 17 and 18 do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.

Article 18. Subsequent information

From the time of filing the application for recognition of the foreign proceeding, the foreign representative shall inform the court promptly of:

(a) any substantial change in the status of the recognized foreign proceeding or the status of the foreign representative's appointment; and

(b) any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.

Article 19. Relief that may be granted upon application for recognition of a foreign proceeding

(1) From the time of filing an application for recognition until the application is decided upon, the court may, at the request of the foreign representative, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature, including:

(a) staying execution against the debtor's assets;

(b) entrusting 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, in order to protect and preserve the value of assets that, by their nature or because of other cir-

cumstances, are perishable, susceptible to devaluation or otherwise in jeopardy;

(c) any relief mentioned in article 21(1)(c), (d) and (g).

(2) [Insert provisions (or refer to provisions in force in the enacting State) relating to notice.]

(3) Unless extended under article 21(1)(f), the relief granted under this article terminates when the application for recognition is decided upon.

(4) The court may refuse to grant relief under this article if such relief would interfere with the administration of a foreign main proceeding.

Article 20. Effects of recognition of a foreign main proceeding

(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.

(2) The scope, and the modification or termination, of the stay and suspension referred to in paragraph (1) of this article are subject to [refer to any provisions of law of the enacting State relating to insolvency that apply to exceptions, limitations, modifications or termination in respect of the stay and suspension referred to in paragraph (1) of this article].

(3) Paragraph (1)(a) of this article does not affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor.

(4) Paragraph (1) of this article does not affect the right to request the commencement of a proceeding under [identify laws of the enacting State relating to insolvency] or the right to file claims in such a proceeding.

Article 21. Relief that may be granted upon recognition of a foreign proceeding

(1) Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including:

(a) staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under article 20(1)(a);

(b) staying execution against the debtor's assets to the extent it has not been stayed under article 20(1)(b);

(c) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under article 20(1)(c);

(d) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;

(e) entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court;

(f) extending relief granted under article 19(1);

(g) granting any additional relief that may be available to [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State] under the laws of this State.

(2) Upon recognition of a foreign proceeding, whether main or non-main, the 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.

(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 adminis-

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tered in the foreign non-main proceeding or concerns information required in that proceeding.

Article 22. Protection of creditors and other interested persons

(1) In granting or denying relief under article 19 or 21, or in modifying or terminating relief under paragraph (3) of this article, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected.

(2) The court may subject relief granted under article 19 or 21 to conditions it considers appropriate.

(3) The court may, at the request of the foreign representative or a person affected by relief granted under article 19 or 21, or at its own motion, modify or terminate such relief.

Article 23. Actions to avoid acts detrimental to creditors

(1) Upon recognition of a foreign proceeding, the foreign representative has standing to initiate [refer to the types of actions to avoid or otherwise render ineffective acts detrimental to creditors that are available in this State to a person or body administering a reorganization or liquidation].

(2) When the foreign proceeding is a foreign non-main proceeding, the court must be satisfied that the action relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding.

Article 24. Intervention by a foreign representative
in proceedings in this State

Upon recognition of a foreign proceeding, the foreign representative may, provided the requirements of the law of this State are met, intervene in any proceedings in which the debtor is a party.

Chapter IV. COOPERATION WITH FOREIGN COURTS
AND FOREIGN REPRESENTATIVES

Article 25. Cooperation and direct communication between a court of this State and foreign courts or foreign representatives

(1) In matters referred to in article 1, the court shall cooperate to the maximum extent possible with foreign courts or foreign representatives, either directly or through a [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State].

(2) The court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.

Article 26. Cooperation and direct communication between the [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State] and foreign courts or foreign representatives

(1) In matters referred to in article 1, a [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State] shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent possible with foreign courts or foreign representatives.

(2) The [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State] is entitled, in the exercise of its functions and subject to the supervision of the court, to communicate directly with foreign courts or foreign representatives.

Article 27. Forms of cooperation

Cooperation referred to in articles 25 and 26 may be implemented by any appropriate means, including:

(a) appointment of a person or body to act at the direction of the court;

(b) communication of information by any means considered appropriate by the court;

(c) coordination of the administration and supervision of the debtor's assets and affairs;

(d) approval or implementation by courts of agreements concerning the coordination of proceedings;

(e) coordination of concurrent proceedings regarding the same debtor;

(f) [the enacting State may wish to list additional forms or examples of cooperation].

Chapter V. CONCURRENT PROCEEDINGS

Article 28. Commencement of a proceeding under [identify laws of the enacting State relating to insolvency] after recognition of a foreign main proceeding

After recognition of a foreign main proceeding, a proceeding under [identify laws of the enacting State relating to insolvency] may be commenced only if the debtor has assets in this State; the effects of that proceeding shall be restricted to the assets of the debtor that are located in this State and, to the extent necessary to implement cooperation and coordination under articles 25, 26 and 27, to other assets of the debtor that, under the law of this State, should be administered in that proceeding.

Article 29. Coordination of a proceeding under [identify laws of the enacting State relating to insolvency] and a foreign proceeding

Where a foreign proceeding and a proceeding under [identify laws of the enacting State relating to insolvency] are taking place concurrently regarding the same debtor, the court shall seek cooperation and coordination under articles 25, 26 and 27, and the following shall apply:

(a) when the proceeding in this State is taking place at the time the application for recognition of the foreign proceeding is filed,

(i) any relief granted under article 19 or 21 must be consistent with the proceeding in this State; and

(ii) if the foreign proceeding is recognized in this State as a foreign main proceeding, article 20 does not apply;

(b) when the proceeding in this State commences after recognition, or after the filing of the application for recognition, of the foreign proceeding,

(i) any relief in effect under article 19 or 21 shall be reviewed by the court and shall be modified or terminated if inconsistent with the proceeding in this State; and

(ii) if the foreign proceeding is a foreign main proceeding, the stay and suspension referred to in article 20(1) shall be modified or terminated pursuant to article 20(2) if inconsistent with the proceeding in this State;

(c) in granting, extending or modifying relief granted 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.

Article 30. Coordination of more than one foreign proceeding

In matters referred to in article 1, in respect of more than one foreign proceeding regarding the same debtor, the court shall seek cooperation and coordination under articles 25, 26 and 27, and the following shall apply:

(a) any relief granted under article 19 or 21 to a representative of a foreign non-main proceeding after recognition of a foreign main proceeding must be consistent with the foreign main proceeding;

(b) if a foreign main proceeding is recognized after recognition, or after the filing of an application for recognition, of a foreign non-main proceeding, any relief in effect under article 19 or 21 shall be reviewed by the court and shall be modified or terminated if inconsistent with the foreign main proceeding;

(c) if, after recognition of a foreign non-main proceeding, another foreign non-main proceeding is recognized, the court shall grant, modify or terminate relief for the purpose of facilitating coordination of the proceedings.

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Article 31. Presumption of insolvency based on
recognition of a foreign main proceeding

In the absence of evidence to the contrary, recognition of a foreign main proceeding is, for the purpose of commencing a proceeding under [identify laws of the enacting State relating to insolvency], proof that the debtor is insolvent.

Article 32. Rule of payment in concurrent proceedings

Without prejudice to secured claims or rights in rem, a creditor who has received part payment in respect of its claim in a proceeding pursuant to a law relating to insolvency in a foreign State may not receive a payment for the same claim in a proceeding under [identify laws of the enacting State relating to insolvency] regarding the same debtor, so long as the payment to the other creditors of the same class is proportionately less than the payment the creditor has already received.

Appendix C

European Union Regulation on Insolvency Proceedings

(Council regulation 1346/2000, 29 May 2000, on insolvency proceedings, 2000 O.J. (L160) 1–18. Copyright 2000 Commission of the European Communities.)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 61(c) and 67(1) thereof,

Having regard to the initiative of the Federal Republic of Germany and the Republic of Finland,

Having regard to the opinion of the European Parliament,¹

Having regard to the opinion of the Economic and Social Committee,²

Whereas:

(1) The European Union has set out the aim of establishing an area of freedom, security and justice.

(2) The proper functioning of the internal market requires that cross-border insolvency proceedings should operate efficiently and effectively and this Regulation needs to be adopted in order to achieve this objective which comes within the scope of judicial cooperation in civil matters within the meaning of Article 65 of the Treaty.

(3) The activities of undertakings have more and more cross-border effects and are therefore increasingly being regulated by Community law. While the insolvency of such undertakings also affects the proper functioning of the internal market, there is a need for

1. Opinion delivered on 2 March 2000 (not yet published in the Official Journal).

2. Opinion delivered on 26 January 2000 (not yet published in the Official Journal).

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a Community act requiring coordination of the measures to be taken regarding an insolvent debtor's assets.

(4) It is necessary for the proper functioning of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (forum shopping).

(5) These objectives cannot be achieved to a sufficient degree at national level and action at Community level is therefore justified.

(6) In accordance with the principle of proportionality this Regulation should be confined to provisions governing jurisdiction for opening insolvency proceedings and judgments which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings. In addition, this Regulation should contain provisions regarding the recognition of those judgments and the applicable law which also satisfy that principle.

(7) Insolvency proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings are excluded from the scope of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters,³ as amended by the Conventions on Accession to this Convention.⁴

(8) In order to achieve the aim of improving the efficiency and effectiveness of insolvency proceedings having cross-border effects, it is necessary, and appropriate, that the provisions on jurisdiction, recognition and applicable law in this area should be contained in a Community law measure which is binding and directly applicable in Member States.

(9) This Regulation should apply to insolvency proceedings, whether the debtor is a natural person or a legal person, a trader or an individual. The insolvency proceedings to which this Regulation applies are listed in the Annexes. Insolvency proceedings concerning

3. OJ L 299, 31.12.1972, p. 32.

4. OJ L 204, 2.8.1975, p. 28; OJ L 304, 30.10.1978, p. 1; OJ L 388, 31.12.1982, p. 1; OJ L 285, 3.10.1989, p. 1; OJ C 15, 15.1.1997, p. 1.

insurance undertakings, credit institutions, investment undertakings holding funds or securities for third parties and collective investment undertakings should be excluded from the scope of this Regulation. Such undertakings should not be covered by this Regulation since they are subject to special arrangements and, to some extent, the national supervisory authorities have extremely wide-ranging powers of intervention.

(10) Insolvency proceedings do not necessarily involve the intervention of a judicial authority; the expression “court” in this Regulation should be given a broad meaning and include a person or body empowered by national law to open insolvency proceedings. In order for this Regulation to apply, proceedings (comprising acts and formalities set down in law) should not only have to comply with the provisions of this Regulation, but they should also be officially recognised and legally effective in the Member State in which the insolvency proceedings are opened and should be collective insolvency proceedings which entail the partial or total divestment of the debtor and the appointment of a liquidator.

(11) This Regulation acknowledges the fact that as a result of widely differing substantive laws it is not practical to introduce insolvency proceedings with universal scope in the entire Community. The application without exception of the law of the State of opening of proceedings would, against this background, frequently lead to difficulties. This applies, for example, to the widely differing laws on security interests to be found in the Community. Furthermore, the preferential rights enjoyed by some creditors in the insolvency proceedings are, in some cases, completely different. This Regulation should take account of this in two different ways. On the one hand, provision should be made for special rules on applicable law in the case of particularly significant rights and legal relationships (e.g. rights in rem and contracts of employment). On the other hand, national proceedings covering only assets situated in the State of opening should also be allowed alongside main insolvency proceedings with universal scope.

(12) This Regulation enables the main insolvency proceedings to be opened in the Member State where the debtor has the centre of

his main interests. These proceedings have universal scope and aim at encompassing all the debtor's assets. To protect the diversity of interests, this Regulation permits secondary proceedings to be opened to run in parallel with the main proceedings.

Secondary proceedings may be opened in the Member State where the debtor has an establishment. The effects of secondary proceedings are limited to the assets located in that State. Mandatory rules of coordination with the main proceedings satisfy the need for unity in the Community.

(13) 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 by third parties.

(14) This Regulation applies only to proceedings where the centre of the debtor's main interests is located in the Community.

(15) The rules of jurisdiction set out in this Regulation establish only international jurisdiction, that is to say, they designate the Member State the courts of which may open insolvency proceedings.

Territorial jurisdiction within that Member State must be established by the national law of the Member State concerned.

(16) The court having jurisdiction to open the main insolvency proceedings should be enabled to order provisional and protective measures from the time of the request to open proceedings.

Preservation measures both prior to and after the commencement of the insolvency proceedings are very important to guarantee the effectiveness of the insolvency proceedings. In that connection this Regulation should afford different possibilities. On the one hand, the court competent for the main insolvency proceedings should be able also to order provisional protective measures covering assets situated in the territory of other Member States. On the other hand, a liquidator temporarily appointed prior to the opening of the main insolvency proceedings should be able, in the Member States in which an establishment belonging to the debtor is to be found, to apply for the preservation measures which are possible under the law of those States.

Appendix C: European Union Regulation on Insolvency Proceedings

(17) Prior to the opening of the main insolvency proceedings, the right to request the opening of insolvency proceedings in the Member State where the debtor has an establishment should be limited to local creditors and creditors of the local establishment or to cases where main proceedings cannot be opened under the law of the Member State where the debtor has the centre of his main interest. The reason for this restriction is that cases where territorial insolvency proceedings are requested before the main insolvency proceedings are intended to be limited to what is absolutely necessary. If the main insolvency proceedings are opened, the territorial proceedings become secondary.

(18) Following the opening of the main insolvency proceedings, the right to request the opening of insolvency proceedings in a Member State where the debtor has an establishment is not restricted by this Regulation. The liquidator in the main proceedings or any other person empowered under the national law of that Member State may request the opening of secondary insolvency proceedings.

(19) Secondary insolvency proceedings may serve different purposes, besides the protection of local interests. Cases may arise where the estate of the debtor is too complex to administer as a unit or where differences in the legal systems concerned are so great that difficulties may arise from the extension of effects deriving from the law of the State of the opening to the other States where the assets are located. For this reason the liquidator in the main proceedings may request the opening of secondary proceedings when the efficient administration of the estate so requires.

(20) Main insolvency proceedings and secondary proceedings can, however, contribute to the effective realisation of the total assets only if all the concurrent proceedings pending are coordinated. The main condition here is that the various liquidators must cooperate closely, in particular by exchanging a sufficient amount of information. In order to ensure the dominant role of the main insolvency proceedings, the liquidator in such proceedings should be given several possibilities for intervening in secondary insolvency proceedings which are pending at the same time. For example, he should be able

to propose a restructuring plan or composition or apply for realisation of the assets in the secondary insolvency proceedings to be suspended.

(21) Every creditor, who has his habitual residence, domicile or registered office in the Community, should have the right to lodge his claims in each of the insolvency proceedings pending in the Community relating to the debtor's assets. This should also apply to tax authorities and social insurance institutions. However, in order to ensure equal treatment of creditors, the distribution of proceeds must be coordinated. Every creditor should be able to keep what he has received in the course of insolvency proceedings but should be entitled only to participate in the distribution of total assets in other proceedings if creditors with the same standing have obtained the same proportion of their claims.

(22) This Regulation should provide for immediate recognition of judgments concerning the opening, conduct and closure of insolvency proceedings which come within its scope and of judgments handed down in direct connection with such insolvency proceedings. Automatic recognition should therefore mean that the effects attributed to the proceedings by the law of the State in which the proceedings were opened extend to all other Member States. Recognition of judgments delivered by the courts of the Member States should be based on the principle of mutual trust. To that end, grounds for non-recognition should be reduced to the minimum necessary. This is also the basis on which any dispute should be resolved where the courts of two Member States both claim competence to open the main insolvency proceedings. The decision of the first court to open proceedings should be recognised in the other Member States without those Member States having the power to scrutinise the court's decision.

(23) This Regulation should set out, for the matters covered by it, uniform rules on conflict of laws which replace, within their scope of application, national rules of private international law. Unless otherwise stated, the law of the Member State of the opening of the proceedings should be applicable (*lex concursus*). This rule on conflict of laws should be valid both for the main proceedings and for local proceedings; the *lex concursus* determines all the effects of the insol-

veny proceedings, both procedural and substantive, on the persons and legal relations concerned. It governs all the conditions for the opening, conduct and closure of the insolvency proceedings.

(24) Automatic recognition of insolvency proceedings to which the law of the opening State normally applies may interfere with the rules under which transactions are carried out in other Member States. To protect legitimate expectations and the certainty of transactions in Member States other than that in which proceedings are opened, provisions should be made for a number of exceptions to the general rule.

(25) There is a particular need for a special reference diverging from the law of the opening State in the case of rights in rem, since these are of considerable importance for the granting of credit. The basis, validity and extent of such a right in rem should therefore normally be determined according to the *lex situs* and not be affected by the opening of insolvency proceedings. The proprietor of the right in rem should therefore be able to continue to assert his right to segregation or separate settlement of the collateral security. Where assets are subject to rights in rem under the *lex situs* in one Member State but the main proceedings are being carried out in another Member State, the liquidator in the main proceedings should be able to request the opening of secondary proceedings in the jurisdiction where the rights in rem arise if the debtor has an establishment there. If a secondary proceeding is not opened, the surplus on sale of the asset covered by rights in rem must be paid to the liquidator in the main proceedings.

(26) If a set-off is not permitted under the law of the opening State, a creditor should nevertheless be entitled to the set-off if it is possible under the law applicable to the claim of the insolvent debtor. In this way, set-off will acquire a kind of guarantee function based on legal provisions on which the creditor concerned can rely at the time when the claim arises.

(27) There is also a need for special protection in the case of payment systems and financial markets. This applies for example to the position-closing agreements and netting agreements to be found

in such systems as well as to the sale of securities and to the guarantees provided for such transactions as governed in particular by Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems.⁵ For such transactions, the only law which is material should thus be that applicable to the system or market concerned. This provision is intended to prevent the possibility of mechanisms for the payment and settlement of transactions provided for in the payment and set-off systems or on the regulated financial markets of the Member States being altered in the case of insolvency of a business partner. Directive 98/26/EC contains special provisions which should take precedence over the general rules in this Regulation.

(28) In order to protect employees and jobs, the effects of insolvency proceedings on the continuation or termination of employment and on the rights and obligations of all parties to such employment must be determined by the law applicable to the agreement in accordance with the general rules on conflict of law. Any other insolvency-law questions, such as whether the employees' claims are protected by preferential rights and what status such preferential rights may have, should be determined by the law of the opening State.

(29) For business considerations, the main content of the decision opening the proceedings should be published in the other Member States at the request of the liquidator. If there is an establishment in the Member State concerned, there may be a requirement that publication is compulsory. In neither case, however, should publication be a prior condition for recognition of the foreign proceedings.

(30) It may be the case that some of the persons concerned are not in fact aware that proceedings have been opened and act in good faith in a way that conflicts with the new situation. In order to protect such persons who make a payment to the debtor because they are unaware that foreign proceedings have been opened when they should in fact have made the payment to the foreign liquidator, it

5. OJ L 166, 11.6.1998, p. 45.

should be provided that such a payment is to have a debt-discharging effect.

(31) This Regulation should include Annexes relating to the organisation of insolvency proceedings.

As these Annexes relate exclusively to the legislation of Member States, there are specific and substantiated reasons for the Council to reserve the right to amend these Annexes in order to take account of any amendments to the domestic law of the Member States.

(32) The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community, have given notice of their wish to take part in the adoption and application of this Regulation.

(33) Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, is not participating in the adoption of this Regulation, and is therefore not bound by it nor subject to its application,

HAS ADOPTED THIS REGULATION:

CHAPTER I GENERAL PROVISIONS

Article 1 Scope

1. This Regulation shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator.

2. This Regulation shall not apply to insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings which provide services involving the holding of funds or securities for third parties, or to collective investment undertakings.

Article 2

Definitions

For the purposes of this Regulation:

(a) “insolvency proceedings” shall mean the collective proceedings referred to in Article 1(1). These proceedings are listed in Annex A;

(b) “liquidator” shall mean any person or body whose function is to administer or liquidate assets of which the debtor has been divested or to supervise the administration of his affairs. Those persons and bodies are listed in Annex C;

(c) “winding-up proceedings” shall mean insolvency proceedings within the meaning of point (a) involving realising the assets of the debtor, including where the proceedings have been closed by a composition or other measure terminating the insolvency, or closed by reason of the insufficiency of the assets. Those proceedings are listed in Annex B;

(d) “court” shall mean the judicial body or any other competent body of a Member State empowered to open insolvency proceedings or to take decisions in the course of such proceedings;

(e) “judgment” in relation to the opening of insolvency proceedings or the appointment of a liquidator shall include the decision of any court empowered to open such proceedings or to appoint a liquidator;

(f) “the time of the opening of proceedings” shall mean the time at which the judgment opening proceedings becomes effective, whether it is a final judgment or not;

(g) “the Member State in which assets are situated” shall mean, in the case of:

- tangible property, the Member State within the territory of which the property is situated,
- property and rights ownership of or entitlement to which must be entered in a public register, the Member State under the authority of which the register is kept,
- claims, the Member State within the territory of which the third party required to meet them has the centre of his main interests, as determined in Article 3(1);

(h) “establishment” shall mean any place of operations where the debtor carries out a non-transitory economic activity with human means and goods.

Article 3

International jurisdiction

1. The courts of the Member State within the territory of which the centre of a debtor’s main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.

2. Where the centre of a debtor’s main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State.

The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.

3. Where insolvency proceedings have been opened under paragraph 1, any proceedings opened subsequently under paragraph 2 shall be secondary proceedings. These latter proceedings must be winding-up proceedings.

4. Territorial insolvency proceedings referred to in paragraph 2 may be opened prior to the opening of main insolvency proceedings in accordance with paragraph 1 only:

(a) where insolvency proceedings under paragraph 1 cannot be opened because of the conditions laid down by the law of the Member State within the territory of which the centre of the debtor’s main interests is situated; or

(b) where the opening of territorial insolvency proceedings is requested by a creditor who has his domicile, habitual residence or registered office in the Member State within the territory of which the establishment is situated, or whose claim arises from the operation of that establishment.

Article 4

Law applicable

1. Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened, hereafter referred to as the “State of the opening of proceedings.”

2. The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. It shall determine in particular:

(a) against which debtors insolvency proceedings may be brought on account of their capacity;

(b) the assets which form part of the estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings;

(c) the respective powers of the debtor and the liquidator;

(d) the conditions under which set-offs may be invoked;

(e) the effects of insolvency proceedings on current contracts to which the debtor is party;

(f) the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of lawsuits pending;

(g) the claims which are to be lodged against the debtor’s estate and the treatment of claims arising after the opening of insolvency proceedings;

(h) the rules governing the lodging, verification and admission of claims;

(i) the rules governing the distribution of proceeds from the realisation of assets, the ranking of claims and the rights of creditors who have obtained partial satisfaction after the opening of insolvency proceedings by virtue of a right in rem or through a set-off;

(j) the conditions for and the effects of closure of insolvency proceedings, in particular by composition;

(k) creditors’ rights after the closure of insolvency proceedings;

(l) who is to bear the costs and expenses incurred in the insolvency proceedings;

Appendix C: European Union Regulation on Insolvency Proceedings

(m) the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors.

Article 5

Third parties' rights in rem

1. The opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets - both specific assets and collections of indefinite assets as a whole which change from time to time - belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.

2. The rights referred to in paragraph 1 shall in particular mean:

(a) the right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage;

(b) the exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of a guarantee;

(c) the right to demand the assets from, and/or to require restitution by, anyone having possession or use of them contrary to the wishes of the party so entitled;

(d) a right in rem to the beneficial use of assets.

3. The right, recorded in a public register and enforceable against third parties, under which a right in rem within the meaning of paragraph 1 may be obtained, shall be considered a right in rem.

4. Paragraph 1 shall not preclude actions for voidness, voidability or unenforceability as referred to in Article 4(2)(m).

Article 6

Set-off

1. The opening of insolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of the debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim.

2. Paragraph 1 shall not preclude actions for voidness, voidability or unenforceability as referred to in Article 4(2)(m).

Article 7

Reservation of title

1. The opening of insolvency proceedings against the purchaser of an asset shall not affect the seller's rights based on a reservation of title where at the time of the opening of proceedings the asset is situated within the territory of a Member State other than the State of opening of proceedings.

2. The opening of insolvency proceedings against the seller of an asset, after delivery of the asset, shall not constitute grounds for rescinding or terminating the sale and shall not prevent the purchaser from acquiring title where at the time of the opening of proceedings the asset sold is situated within the territory of a Member State other than the State of the opening of proceedings.

3. Paragraphs 1 and 2 shall not preclude actions for voidness, voidability or unenforceability as referred to in Article 4(2)(m).

Article 8

Contracts relating to immovable property

The effects of insolvency proceedings on a contract conferring the right to acquire or make use of immovable property shall be governed solely by the law of the Member State within the territory of which the immovable property is situated.

Article 9

Payment systems and financial markets

1. Without prejudice to Article 5, the effects of insolvency proceedings on the rights and obligations of the parties to a payment or settlement system or to a financial market shall be governed solely by the law of the Member State applicable to that system or market.

2. Paragraph 1 shall not preclude any action for voidness, voidability or unenforceability which may be taken to set aside payments or transactions under the law applicable to the relevant payment system or financial market.

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Article 10

Contracts of employment

The effects of insolvency proceedings on employment contracts and relationships shall be governed solely by the law of the Member State applicable to the contract of employment.

Article 11

Effects on rights subject to registration

The effects of insolvency proceedings on the rights of the debtor in immovable property, a ship or an aircraft subject to registration in a public register shall be determined by the law of the Member State under the authority of which the register is kept.

Article 12

Community patents and trade marks

For the purposes of this Regulation, a Community patent, a Community trade mark or any other similar right established by Community law may be included only in the proceedings referred to in Article 3(1).

Article 13

Detrimental acts

Article 4(2)(m) shall not apply where the person who benefited from an act detrimental to all the creditors provides proof that: - the said act is subject to the law of a Member State other than that of the State of the opening of proceedings, and - that law does not allow any means of challenging that act in the relevant case.

Article 14

Protection of third-party purchasers

Where, by an act concluded after the opening of insolvency proceedings, the debtor disposes, for consideration, of:

- an immovable asset, or
- a ship or an aircraft subject to registration in a public register, or
- securities whose existence presupposes registration in a register laid down by law, the validity of that act shall be governed by the law

of the State within the territory of which the immovable asset is situated or under the authority of which the register is kept.

Article 15

Effects of insolvency proceedings on lawsuits pending

The effects of insolvency proceedings on a lawsuit pending concerning an asset or a right of which the debtor has been divested shall be governed solely by the law of the Member State in which that lawsuit is pending.

CHAPTER II
RECOGNITION OF INSOLVENCY PROCEEDINGS

Article 16

Principle

1. Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings.

This rule shall also apply where, on account of his capacity, insolvency proceedings cannot be brought against the debtor in other Member States.

2. Recognition of the proceedings referred to in Article 3(1) shall not preclude the opening of the proceedings referred to in Article 3(2) by a court in another Member State. The latter proceedings shall be secondary insolvency proceedings within the meaning of Chapter III.

Article 17

Effects of recognition

1. The judgment opening the proceedings referred to in Article 3(1) shall, with no further formalities, produce the same effects in any other Member State as under this law of the State of the opening of proceedings, unless this Regulation provides otherwise and as long as no proceedings referred to in Article 3(2) are opened in that other Member State.

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2. The effects of the proceedings referred to in Article 3(2) may not be challenged in other Member States. Any restriction of the creditors' rights, in particular a stay or discharge, shall produce effects vis-à-vis assets situated within the territory of another Member State only in the case of those creditors who have given their consent.

Article 18

Powers of the liquidator

1. The liquidator appointed by a court which has jurisdiction pursuant to Article 3(1) may exercise all the powers conferred on him by the law of the State of the opening of proceedings in another Member State, as long as no other insolvency proceedings have been opened there nor any preservation measure to the contrary has been taken there further to a request for the opening of insolvency proceedings in that State. He may in particular remove the debtor's assets from the territory of the Member State in which they are situated, subject to Articles 5 and 7.

2. The liquidator appointed by a court which has jurisdiction pursuant to Article 3(2) may in any other Member State claim through the courts or out of court that moveable property was removed from the territory of the State of the opening of proceedings to the territory of that other Member State after the opening of the insolvency proceedings. He may also bring any action to set aside which is in the interests of the creditors.

3. In exercising his powers, the liquidator shall comply with the law of the Member State within the territory of which he intends to take action, in particular with regard to procedures for the realisation of assets. Those powers may not include coercive measures or the right to rule on legal proceedings or disputes.

Article 19

Proof of the liquidator's appointment

The liquidator's appointment shall be evidenced by a certified copy of the original decision appointing him or by any other certificate issued by the court which has jurisdiction.

A translation into the official language or one of the official languages of the Member State within the territory of which he intends

to act may be required. No legalisation or other similar formality shall be required.

Article 20

Return and imputation

1. A creditor who, after the opening of the proceedings referred to in Article 3(1) obtains by any means, in particular through enforcement, total or partial satisfaction of his claim on the assets belonging to the debtor situated within the territory of another Member State, shall return what he has obtained to the liquidator, subject to Articles 5 and 7.

2. In order to ensure equal treatment of creditors a creditor who has, in the course of insolvency proceedings, obtained a dividend on his claim shall share in distributions made in other proceedings only where creditors of the same ranking or category have, in those other proceedings, obtained an equivalent dividend.

Article 21

Publication

1. The liquidator may request that notice of the judgment opening insolvency proceedings and, where appropriate, the decision appointing him, be published in any other Member State in accordance with the publication procedures provided for in that State. Such publication shall also specify the liquidator appointed and whether the jurisdiction rule applied is that pursuant to Article 3(1) or Article 3(2).

2. However, any Member State within the territory of which the debtor has an establishment may require mandatory publication. In such cases, the liquidator or any authority empowered to that effect in the Member State where the proceedings referred to in Article 3(1) are opened shall take all necessary measures to ensure such publication.

Article 22

Registration in a public register

1. The liquidator may request that the judgment opening the proceedings referred to in Article 3(1) be registered in the land regis-

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ter, the trade register and any other public register kept in the other Member States.

2. However, any Member State may require mandatory registration. In such cases, the liquidator or any authority empowered to that effect in the Member State where the proceedings referred to in Article 3(1) have been opened shall take all necessary measures to ensure such registration.

Article 23

Costs

The costs of the publication and registration provided for in Articles 21 and 22 shall be regarded as costs and expenses incurred in the proceedings.

Article 24

Honouring of an obligation to a debtor

1. Where an obligation has been honoured in a Member State for the benefit of a debtor who is subject to insolvency proceedings opened in another Member State, when it should have been honoured for the benefit of the liquidator in those proceedings, the person honouring the obligation shall be deemed to have discharged it if he was unaware of the opening of proceedings.

2. Where such an obligation is honoured before the publication provided for in Article 21 has been effected, the person honouring the obligation shall be presumed, in the absence of proof to the contrary, to have been unaware of the opening of insolvency proceedings; where the obligation is honoured after such publication has been effected, the person honouring the obligation shall be presumed, in the absence of proof to the contrary, to have been aware of the opening of proceedings.

Article 25

Recognition and enforceability of other judgments

1. Judgments handed down by a court whose judgment concerning the opening of proceedings is recognised in accordance with Article 16 and which concern the course and closure of insolvency proceedings, and compositions approved by that court shall also be

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recognised with no further formalities. Such judgments shall be enforced in accordance with Articles 31 to 51, with the exception of Article 34(2), of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Conventions of Accession to this Convention.

The first subparagraph shall also apply to judgments deriving directly from the insolvency proceedings and which are closely linked with them, even if they were handed down by another court.

The first subparagraph shall also apply to judgments relating to preservation measures taken after the request for the opening of insolvency proceedings.

2. The recognition and enforcement of judgments other than those referred to in paragraph 1 shall be governed by the Convention referred to in paragraph 1, provided that that Convention is applicable.

3. The Member States shall not be obliged to recognise or enforce a judgment referred to in paragraph 1 which might result in a limitation of personal freedom or postal secrecy.

Article 26⁶

Public policy

Any Member State may refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual.

6. Note the Declaration by Portugal concerning the application of Articles 26 and 37 (OJ C 183, 30.6.2000, p. 1).

CHAPTER III
SECONDARY INSOLVENCY PROCEEDINGS

Article 27

Opening of proceedings

The opening of the proceedings referred to in Article 3(1) by a court of a Member State and which is recognised in another Member State (main proceedings) shall permit the opening in that other Member State, a court of which has jurisdiction pursuant to Article 3(2), of secondary insolvency proceedings without the debtor's insolvency being examined in that other State. These latter proceedings must be among the proceedings listed in Annex B. Their effects shall be restricted to the assets of the debtor situated within the territory of that other Member State.

Article 28

Applicable law

Save as otherwise provided in this Regulation, the law applicable to secondary proceedings shall be that of the Member State within the territory of which the secondary proceedings are opened.

Article 29

Right to request the opening of proceedings

The opening of secondary proceedings may be requested by:

- (a) the liquidator in the main proceedings;
- (b) any other person or authority empowered to request the opening of insolvency proceedings under the law of the Member State within the territory of which the opening of secondary proceedings is requested.

Article 30

Advance payment of costs and expenses

Where the law of the Member State in which the opening of secondary proceedings is requested requires that the debtor's assets be sufficient to cover in whole or in part the costs and expenses of the proceedings, the court may, when it receives such a request, require

the applicant to make an advance payment of costs or to provide appropriate security.

Article 31

Duty to cooperate and communicate information

1. Subject to the rules restricting the communication of information, the liquidator in the main proceedings and the liquidators in the secondary proceedings shall be duty bound to communicate information to each other. They shall immediately communicate any information which may be relevant to the other proceedings, in particular the progress made in lodging and verifying claims and all measures aimed at terminating the proceedings.

2. Subject to the rules applicable to each of the proceedings, the liquidator in the main proceedings and the liquidators in the secondary proceedings shall be duty bound to cooperate with each other.

3. The liquidator in the secondary proceedings shall give the liquidator in the main proceedings an early opportunity of submitting proposals on the liquidation or use of the assets in the secondary proceedings.

Article 32

Exercise of creditors' rights

1. Any creditor may lodge his claim in the main proceedings and in any secondary proceedings.

2. The liquidators in the main and any secondary proceedings shall lodge in other proceedings claims which have already been lodged in the proceedings for which they were appointed, provided that the interests of creditors in the latter proceedings are served thereby, subject to the right of creditors to oppose that or to withdraw the lodgement of their claims where the law applicable so provides.

3. The liquidator in the main or secondary proceedings shall be empowered to participate in other proceedings on the same basis as a creditor, in particular by attending creditors' meetings.

Article 33

Stay of liquidation

1. The court, which opened the secondary proceedings, shall stay the process of liquidation in whole or in part on receipt of a request from the liquidator in the main proceedings, provided that in that event it may require the liquidator in the main proceedings to take any suitable measure to guarantee the interests of the creditors in the secondary proceedings and of individual classes of creditors. Such a request from the liquidator may be rejected only if it is manifestly of no interest to the creditors in the main proceedings. Such a stay of the process of liquidation may be ordered for up to three months. It may be continued or renewed for similar periods.

2. The court referred to in paragraph 1 shall terminate the stay of the process of liquidation:

- at the request of the liquidator in the main proceedings,
- of its own motion, at the request of a creditor or at the request of the liquidator in the secondary proceedings if that measure no longer appears justified, in particular, by the interests of creditors in the main proceedings or in the secondary proceedings.

Article 34

Measures ending secondary insolvency proceedings

1. Where the law applicable to secondary proceedings allows for such proceedings to be closed without liquidation by a rescue plan, a composition or a comparable measure, the liquidator in the main proceedings shall be empowered to propose such a measure himself.

Closure of the secondary proceedings by a measure referred to in the first subparagraph shall not become final without the consent of the liquidator in the main proceedings; failing his agreement, however, it may become final if the financial interests of the creditors in the main proceedings are not affected by the measure proposed.

2. Any restriction of creditors' rights arising from a measure referred to in paragraph 1 which is proposed in secondary proceedings, such as a stay of payment or discharge of debt, may not have effect in respect of the debtor's assets not covered by those proceedings without the consent of all the creditors having an interest.

3. During a stay of the process of liquidation ordered pursuant to Article 33, only the liquidator in the main proceedings or the debtor, with the former's consent, may propose measures laid down in paragraph 1 of this Article in the secondary proceedings; no other proposal for such a measure shall be put to the vote or approved.

Article 35

Assets remaining in the secondary proceedings

If by the liquidation of assets in the secondary proceedings it is possible to meet all claims allowed under those proceedings, the liquidator appointed in those proceedings shall immediately transfer any assets remaining to the liquidator in the main proceedings.

Article 36

Subsequent opening of the main proceedings

Where the proceedings referred to in Article 3(1) are opened following the opening of the proceedings referred to in Article 3(2) in another Member State, Articles 31 to 35 shall apply to those opened first, in so far as the progress of those proceedings so permits.

Article 37⁷

Conversion of earlier proceedings

The liquidator in the main proceedings may request that proceedings listed in Annex A previously opened in another Member State be converted into winding-up proceedings if this proves to be in the interests of the creditors in the main proceedings.

The court with jurisdiction under Article 3(2) shall order conversion into one of the proceedings listed in Annex B.

Article 38

Preservation measures

Where the court of a Member State which has jurisdiction pursuant to Article 3(1) appoints a temporary administrator in order to ensure the preservation of the debtor's assets, that temporary admin-

7. Note the Declaration by Portugal concerning the application of Articles 26 and 37 (OJ C 183, 30.6.2000, p. 1).

istrator shall be empowered to request any measures to secure and preserve any of the debtor's assets situated in another Member State, provided for under the law of that State, for the period between the request for the opening of insolvency proceedings and the judgment opening the proceedings.

CHAPTER IV
PROVISION OF INFORMATION FOR CREDITORS AND
LODGEMENT OF THEIR CLAIMS

Article 39

Right to lodge claims

Any creditor who has his habitual residence, domicile or registered office in a Member State other than the State of the opening of proceedings, including the tax authorities and social security authorities of Member States, shall have the right to lodge claims in the insolvency proceedings in writing.

Article 40

Duty to inform creditors

1. As soon as insolvency proceedings are opened in a Member State, the court of that State having jurisdiction or the liquidator appointed by it shall immediately inform known creditors who have their habitual residences, domiciles or registered offices in the other Member States.

2. That information, provided by an individual notice, shall in particular include time limits, the penalties laid down in regard to those time limits, the body or authority empowered to accept the lodgement of claims and the other measures laid down. Such notice shall also indicate whether creditors whose claims are preferential or secured in rem need lodge their claims.

Article 41

Content of the lodgement of a claim

A creditor shall send copies of supporting documents, if any, and shall indicate the nature of the claim, the date on which it arose and its amount, as well as whether he alleges preference, security in rem

or a reservation of title in respect of the claim and what assets are covered by the guarantee he is invoking.

Article 42
Languages

1. The information provided for in Article 40 shall be provided in the official language or one of the official languages of the State of the opening of proceedings. For that purpose a form shall be used bearing the heading “Invitation to lodge a claim. Time limits to be observed” in all the official languages of the institutions of the European Union.

2. Any creditor who has his habitual residence, domicile or registered office in a Member State other than the State of the opening of proceedings may lodge his claim in the official language or one of the official languages of that other State. In that event, however, the lodgement of his claim shall bear the heading “Lodgement of claim” in the official language or one of the official languages of the State of the opening of proceedings. In addition, he may be required to provide a translation into the official language or one of the official languages of the State of the opening of proceedings.

CHAPTER V
TRANSITIONAL AND FINAL PROVISIONS

Article 43
Applicability in time

The provisions of this Regulation shall apply only to insolvency proceedings opened after its entry into force. Acts done by a debtor before the entry into force of this Regulation shall continue to be governed by the law which was applicable to them at the time they were done.

Article 44
Relationship to Conventions

1. After its entry into force, this Regulation replaces, in respect of the matters referred to therein, in the relations between Member

Appendix C: European Union Regulation on Insolvency Proceedings

States, the Conventions concluded between two or more Member States, in particular:

(a) the Convention between Belgium and France on Jurisdiction and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instruments, signed at Paris on 8 July 1899;

(b) the Convention between Belgium and Austria on Bankruptcy, Winding-up, Arrangements, Compositions and Suspension of Payments (with Additional Protocol of 13 June 1973), signed at Brussels on 16 July 1969;

(c) the Convention between Belgium and the Netherlands on Territorial Jurisdiction, Bankruptcy and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instruments, signed at Brussels on 28 March 1925;

(d) the Treaty between Germany and Austria on Bankruptcy, Winding-up, Arrangements and Compositions, signed at Vienna on 25 May 1979;

(e) the Convention between France and Austria on Jurisdiction, Recognition and Enforcement of Judgments on Bankruptcy, signed at Vienna on 27 February 1979;

(f) the Convention between France and Italy on the Enforcement of Judgments in Civil and Commercial Matters, signed at Rome on 3 June 1930;

(g) the Convention between Italy and Austria on Bankruptcy, Winding-up, Arrangements and Compositions, signed at Rome on 12 July 1977;

(h) the Convention between the Kingdom of the Netherlands and the Federal Republic of Germany on the Mutual Recognition and Enforcement of Judgments and other Enforceable Instruments in Civil and Commercial Matters, signed at The Hague on 30 August 1962;

(i) the Convention between the United Kingdom and the Kingdom of Belgium providing for the Reciprocal Enforcement of Judgments in Civil and Commercial Matters, with Protocol, signed at Brussels on 2 May 1934;

(j) the Convention between Denmark, Finland, Norway, Sweden and Iceland on Bankruptcy, signed at Copenhagen on 7 November 1933;

International Insolvency

(k) the European Convention on Certain International Aspects of Bankruptcy, signed at Istanbul on 5 June 1990.

2. The Conventions referred to in paragraph 1 shall continue to have effect with regard to proceedings opened before the entry into force of this Regulation.

3. This Regulation shall not apply:

(a) in any Member State, to the extent that it is irreconcilable with the obligations arising in relation to bankruptcy from a convention concluded by that State with one or more third countries before the entry into force of this Regulation;

(b) in the United Kingdom of Great Britain and Northern Ireland, to the extent that it is irreconcilable with the obligations arising in relation to bankruptcy and the winding-up of insolvent companies from any arrangements with the Commonwealth existing at the time this Regulation enters into force.

Article 45

Amendment of the Annexes

The Council, acting by qualified majority on the initiative of one of its members or on a proposal from the Commission, may amend the Annexes.

Article 46

Reports

No later than 1 June 2012, and every five years thereafter, the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Regulation. The report shall be accompanied if need be by a proposal for adaptation of this Regulation.

Appendix C: European Union Regulation on Insolvency Proceedings

Article 47

Entry into force

This Regulation shall enter into force on 31 May 2002.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

Done at Brussels, 29 May 2000.

For the Council

The President

A. Costa

ANNEX A

Insolvency proceedings referred to in Article 2(a)

AUSTRIA

- Das Konkursverfahren
- Das Ausgleichsverfahren

BELGIUM

- Het faillissement/La faillite
- Het gerechtelijk akkoord//Le concordat judiciaire
- De collectieve schuldenregeling/Le règlement collectif de dettes

FINLAND

- Konkurssi/konkurs
- Yrityssaneeraus/företagsanering

FRANCE

- Liquidation judiciaire
- Redressement judiciaire avec nomination d'un administrateur

GERMANY

- Das Konkursverfahren
- Das gerichtliche Vergleichsverfahren
- Das Gesamtvollstreckungsverfahren
- Das Insolvenzverfahren

GREECE

- Πτωχευση
- Η ειδικη εκκαθαριση
- Η προσωρινη διαχειριση εταιριας. Η διοικηση και η διαχειριση των πιστωτων
- Η υπαγωγη επιχειρησης υποj επιτροπο με σκοποj τη συζητηση συμβιβασμουj με τουj πιστωτεjς

Appendix C: European Union Regulation on Insolvency Proceedings

IRELAND

- Compulsory winding up by the court
- Bankruptcy
- The administration in bankruptcy of the estate of persons dying insolvent
- Winding-up in bankruptcy of partnerships
- Creditors' voluntary winding up (with confirmation of a Court)
- Arrangements under the control of the court which involve the vesting of all or part of the property of the debtor in the Official Assignee for realisation and distribution
- Company examinership

ITALY

- Fallimento
- Concordato preventivo
- Liquidazione coatta amministrativa
- Amministrazione straordinaria
- Amministrazione controllata

LUXEMBOURG

- Faillite
- Gestion contrôlée
- Concordat préventif de faillite (par abandon d'actif)
- Régime spécial de liquidation du notariat

NETHERLANDS

- Het faillissement
- De surséance van betaling
- De schuldsaneringsregeling natuurlijke personen

PORTUGAL

- O processo de falência
- Os processos especiais de recuperação de empresa, ou seja:
- A concordata
- A reconstituição empresarial
- A reestruturação financeira
- A gestão controlada

International Insolvency

SPAIN

- Concurso de acreedores
- Quiebra
- Suspensión de pagos

SWEDEN

- Konkurs
- Företagsrekonstruktion

UNITED KINGDOM

- Winding up by or subject to the supervision of the court
- Creditors' voluntary winding up (with confirmation by the court)
- Administration
- Voluntary arrangements under insolvency legislation
- Bankruptcy or sequestration

ANNEX B

Winding up proceedings referred to in Article 2(c)

AUSTRIA

- Das Konkursverfahren

BELGIUM

- Het faillissement/La faillite

FINLAND

- Konkurssi/konkurs

FRANCE

- Liquidation judiciaire

GERMANY

- Das Konkursverfahren
- Das Gesamtvollstreckungsverfahren
- Das Insolvenzverfahren

GREECE

- Πτωχευοή
- Η ειδική εκκαθάριση

IRELAND

- Compulsory winding up
- Bankruptcy
- The administration in bankruptcy of the estate of persons dying insolvent
 - Winding-up in bankruptcy of partnerships
 - Creditors' voluntary winding up (with confirmation of a court)
 - Arrangements under the control of the court which involve the vesting of all or part of the property of the debtor in the Official Assignee for realisation and distribution

International Insolvency

ITALY

- Fallimento
- Liquidazione coatta amministrativa

LUXEMBOURG

- Faillite
- Régime spécial de liquidation du notariat

NETHERLANDS

- Het faillissement
- De schuldsaneringsregeling natuurlijke personen

PORTUGAL

- O processo de falência

SPAIN

- Concurso de acreedores
- Quiebra
- Suspensión de pagos basada en la insolvencia definitiva

SWEDEN

- Konkurs

UNITED KINGDOM

- Winding up by or subject to the supervision of the court
- Creditors' voluntary winding up (with confirmation by the court)
- Bankruptcy or sequestration

ANNEX C

Liquidators referred to in Article 2(b)

AUSTRIA

- Masseverwalter
- Ausgleichsverwalter
- Sachwalter
- Treuhänder
- Besondere Verwalter
- Vorläufiger Verwalter
- Konkursgericht

BELGIUM

- De curator/Le curateur
- De commissaris inzake opschorting/Le commissaire au sursis
- De schuldbemiddelaar/Le médiateur de dettes

FINLAND

- Pesänhoitaja/boförvaltare
- Selvittäjä/utredare

FRANCE

- Représentant des créanciers
- Mandataire liquidateur
- Administrateur judiciaire
- Commissaire à l'exécution de plan

GERMANY

- Konkursverwalter
- Vergleichsverwalter
- Sachwalter (nach der Vergleichsordnung)
- Verwalter
- Insolvenzverwalter
- Sachwalter (nach der Insolvenzordnung)
- Treuhänder
- Vorläufiger Insolvenzverwalter

International Insolvency

GREECE

- Ο συζδικο
- Ο πρσωρινόϋ διαειρίσθηϋ. Η διοικουϋσα επιτροφη τwn πιστωτwn
- Ο ειδικόϋ εκκαγαρίσθηϋ
- Ο επιπύο

IRELAND

- Liquidator
- Official Assignee
- Trustee in bankruptcy
- Provisional Liquidator
- Examiner

ITALY

- Curatore
- Commissario

LUXEMBOURG

- Le curateur
- Le commissaire
- Le liquidateur
- Le conseil de gérance de la section d'assainissement du notariat

NETHERLANDS

- De curator in het faillissement
- De bewindvoerder in de surséance van betaling
- De bewindvoerder in de schuldsaneringsregeling natuurlijke personen

PORTUGAL

- Gestor judicial
- Liquidatário judicial
- Comissão de credores

Appendix C: European Union Regulation on Insolvency Proceedings

SPAIN

- Depositario-administrador
- Interventor o Interventores
- Síndicos
- Comisario

SWEDEN

- Förvaltare
- God man
- Rekonstruktör

UNITED KINGDOM

- Liquidator
- Supervisor of a voluntary arrangement
- Administrator
- Official Receiver
- Trustee
- Judicial factor

The Federal Judicial Center

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The Federal Judicial Center is the research and education agency of the federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620–629), on the recommendation of the Judicial Conference of the United States.

By statute, the Chief Justice of the United States chairs the Center's Board, which also includes the director of the Administrative Office of the U.S. Courts and seven judges elected by the Judicial Conference.

The Director's Office is responsible for the Center's overall management and its relations with other organizations. Its Systems Innovation & Development Office provides technical support for Center education and research. Communications Policy & Design edits, produces, and distributes all Center print and electronic publications, operates the Federal Judicial Television Network, and through the Information Services Office maintains a specialized library collection of materials on judicial administration.

The Judicial Education Division develops and administers education programs and services for judges, career court attorneys, and federal defender office personnel. These include orientation seminars, continuing education programs, and special-focus workshops. The Interjudicial Affairs Office provides information about judicial improvement to judges and others of foreign countries, and identifies international legal developments of importance to personnel of the federal courts.

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The Research Division undertakes empirical and exploratory research on federal judicial processes, court management, and sentencing and its consequences, often at the request of the Judicial Conference and its committees, the courts themselves, or other groups in the federal system. The Federal Judicial History Office develops programs relating to the history of the judicial branch and assists courts with their own judicial history programs.