

**THE PROBLEM OF LOCAL METHODS IN CROSS-BORDER  
INSOLVENCIES**

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## INTRODUCTION

The United States adopted the Model Law on Cross Border Insolvency ten years ago in order to advance procedural harmonization in the bankruptcy cases of multinational debtors.<sup>1</sup> This Model Law, drafted by the United National Commission on International Trade Law (“UNCITRAL”), was placed within a new chapter 15 of the Bankruptcy Code.<sup>2</sup> Chapter 15 provides a procedure whereby an official appointed by a foreign bankruptcy court may seek assistance from a U.S. Bankruptcy Court to administer that multinational debtor’s estate.<sup>3</sup>

Critics of the Model Law have expressed concerns that this new Chapter 15 would be ineffectual at best and invite pernicious international forum shopping at worst.<sup>4</sup> Courts would be unlikely to

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<sup>1</sup> UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, E.14.V.2 (1997) available at <http://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf> [hereinafter Model Law and Guide, in reference to the separate parts].

<sup>2</sup> 11 U.S.C. § 1501, et seq., adopted in Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 436(b), 119 Stat. 23.

<sup>3</sup> As discussed in more detail *infra* notes 41 - 48 and accompanying text, a foreign representative may file a petition for assistance under Section 1502 of the Bankruptcy Code in order to obtain, *inter alia*, a stay on creditor collection activities in the United States, turnover of U.S. assets, and discovery assistance. See Sections 1517-1521.

<sup>4</sup> See Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy*, 98 MICH. L. REV. 2216, 2234-38 (2000); LoPucki, *Global and Out of Control*, 79 AM. BANKR. L.J. 79 (2005); Frederick Tung, *Fear of Commitment in International Bankruptcy*, 33 GEO. WASH. INT’L L. REV. 555, 560 (2001).

adhere to the Model Law's framework of international cooperation, defecting whenever cooperation would harm local interests or offend local policies.<sup>5</sup> Further, debtors would have a strong incentive to engage in international forum shopping in the hopes that their chosen bankruptcy laws would be given international effect under the Model Law.<sup>6</sup>

Since Chapter 15's enactment, there have certainly been instances in which debtors appear to have engaged in such forum shopping and in which U.S. courts have been unwilling to assist the foreign representatives (at least without certain conditions).<sup>7</sup> Debtors have been able to engage in forum shopping in some cases, and some courts have indeed refused to cooperate due to local interests. While it is far from clear that local interests have rendered the Model Law ineffectual, there is nonetheless evidence that local interests do in fact

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<sup>5</sup> Tung, *supra* note 4 at 560; Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 CORNELL L. REV. 696, 730 (1999) ("Given the wide differences in bankruptcy regimes throughout the world, modified universalism will often, if not usually, lead to a refusal to cooperate.").

<sup>6</sup> LoPucki, *Global and Out of Control?*, *supra* note 4 at 89-90 (describing how the COMI rule opens the door to forum shopping).

<sup>7</sup> See e.g., Jeremy Leong, *Is Chapter 15 Universalist or Territorialist? Empirical Evidence from United States Bankruptcy Court Cases*, 29 WIS. INT'L L.J. 110 (2011) (examining "all ninety-four Chapter 15 cases filed between October 17, 2005 and June 8, 2009" and finding that "while U.S. courts recognized foreign proceedings in almost every Chapter 15 case, courts granted Entrustment in only 45.5 percent of cases where foreign proceedings were recognized."); see *In re: China Medical Technologies, Inc.*, 522 B.R. 28 (Bankr. S.D.N.Y. 2014) for an example of apparent forum shopping (in which a group of Chinese operating entities filed bankruptcy in the Cayman Islands based solely on their place of incorporation).

matter in understanding how courts have defected from the Model Law’s cooperative schema.

Local interests, though, have failed to explain adequately recent high profile defections from the Model Law. U.S. courts have interpreted Chapter 15 in ways that are inconsistent with the workings and purposes of the Model Law even in cases in which U.S. interests are not at stake. Part III of this article examines three such cases – *In re Qimonda AG*, *In re Fairfield Sentry*, and *In re Barnet*<sup>8</sup> – in which the courts interpreted Chapter 15 in ways inconsistent with the Model Law not (just) because local interests conflicted with the Model Law’s cooperative structure but because the courts’ methodological approaches of interpreting Chapter 15 and managing Chapter 15 cases are inconsistent with the Model Law. That is, these cases reflect not a problem with local interests but with local methods.

These methodological issues are not unique to cross-border insolvency cases;<sup>9</sup> however, these issues are particularly salient in the context of the Model Law’s harmonization efforts. At the national level differing legisprudential methodologies can create inconsistent interpretations of the U.S. Bankruptcy Code, at least the U.S. bankruptcy courts are interpreting the exact same language and share the same legal traditions. These interpretative inconsistencies may be magnified at the

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<sup>8</sup> *Jaffe v. Samsung Electronics Co., Ltd. (In re Qimonda AG)*, 737 F.3d 14, 17 (4th Cir. 2013); *Drawbridge Special Opportunities Fund LP v. Katherine Elizabeth Barnet (In re Katherine Elizabeth Barnet)*, 737 F.3d 238 (2d Cir. 2013); and *Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.)*, 714 F.3d 127, 137 (2d Cir. 2013).

<sup>9</sup> See Section IIA & B *infra* discussing the problems of legisprudential methodology and case management in U.S. courts generally and in U.S. bankruptcy courts more specifically.

international level in which courts do not share legal traditions.<sup>10</sup> It is reasonable to expect methodological differences towards interpreting the Model Law would have even greater significance on the international level, as courts in different countries not only might apply different approaches to statutory interpretation but also would lack a shared legal tradition.

Further, legisprudential methodology is particularly important in the context of the Model Law because of the Model Law’s explicitly purposivist character. The Model Law requires courts to interpret its language in accord with its international character<sup>11</sup>, explicitly states its objectives,<sup>12</sup> and is accompanied by a Guide to Enactment and Interpretation containing the comments of the drafters. This purposivist structure calls for an intentionalist interpretation, which is directly at odds with the textualist methodology that is favored in U.S. law, and in U.S. bankruptcy law more specifically.<sup>13</sup>

Case management issues are likewise particularly important in the Model Law context, as the Model Law requires courts to take an

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<sup>10</sup> See John Honnold, *The United States Uniform Commercial Code: Interpretation by the Courts of the States of the Union*, at 190, INTERNATIONAL UNIFORM LAW IN PRACTICE, Act and Proceedings of the 3<sup>rd</sup> Congress on Private Law held by the International Institute for the Unification of Private Law .noting this problem in the context of the Convention for the International Sale of Goods: “The dilemma posed by the 1980 Sales Convention and other international laws is this: (1) Unlike the situation under the UCC, the gap-filling by reference to domestic law involves fragments of *diverse* legal systems.”).

<sup>11</sup> See Model Law, *supra* 1 at Article 8.

<sup>12</sup> See the Preamble to the Model Law, *infra* note 85 and accompanying text.

<sup>13</sup> See *infra* notes 94 - 99 and accompanying text.

active role in ancillary cases at both the recognition and cooperation stages.<sup>14</sup> In the U.S. bankruptcy system, this may pose a particular problem as Chapter 15 cases are less likely to be as litigation-oriented as large corporate bankruptcy cases might be.<sup>15</sup> Whereas corporate reorganization law under Chapter 11 of the United States Bankruptcy Code envisions an adversarial process whereby creditor committees play an important monitoring function,<sup>16</sup> the Model Law does not provide for the creation of such committees. U.S. bankruptcy law has sought to supplement creditor monitoring through the powers of the United States Trustee; however, this monitoring does not extend to Chapter 15 cases.<sup>17</sup> As such, Chapter 15 cases arguably require a greater managerial role for bankruptcy judges.

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<sup>14</sup> See *infra* Section IIB.

<sup>15</sup> See Hon. Timothy A. Barnes, *Notice, Due Process and the Public Policy Exception to Chapter 15 Relief in the United States*, INSOL World – Fourth Quarter 2011, <http://www.curtis.com/siteFiles/Publications/Timothy%20Barnes%20Article%20-%20IW%20Q4%202011.pdf> (“The third distinction is perhaps the most relevant in this context: both the United States and the United Kingdom utilize a predominantly adversarial system of justice, as opposed to an inquisitorial system. The adversarial system, which often goes hand-in-hand with common law jurisdictions, relies heavily on opposing parties advocating their position to a neutral arbiter (the judge alone or the judge with the assistance of a jury for matters of factual interpretation).”).

<sup>16</sup> Michelle M. Harner & Jamie Marincic, *Committee Capture? An Empirical Analysis of the Role of Creditors' Committees in Business Reorganizations*, 64 VAND. L. REV. 749, 761-62 (2011) (“Moreover, Chapter 11 posits the creditors' committee as a “statutory watchdog,” with authority to investigate and monitor the DIP's conduct.”).

<sup>17</sup> Harvey R. Miller, *The Changing Face of Chapter 11: A Reemergence of the Bankruptcy Judge as Producer, Director, and Sometimes Star of the Reorganization Passion Play*, 69 AM. BANKR. L.J. 431,

This article examines how local methods may frustrate the Model Law's harmonization efforts and considers to what extent the Model Law and its Guide can address such problems. A better understanding of the obstacles to harmonization may inform future efforts of UNCITRAL, provide some guidance to actors in the Model Law's cross-border insolvency system, and identify topics in need for further empirical research.

The article begins with a background on the Model Law and Chapter 15 and a summary of the principle academic debate between the "universalists" and "territorialists." This part concludes with a discussion of the problem of local interests. Part II then describes the problem of local methods. The Model Law envisions courts playing an active case management role and engaging in an intentionalist methodology of statutory interpretation. U.S. Bankruptcy Courts, however, do not uniformly engage in such methodologies. Courts frequently apply a textualist approach to interpreting the Bankruptcy Code, and they at times refrain from managerial judging. These inconsistencies result in defections from the Model Law's purpose, even in cases that do not implicate local creditors or policies.

Part III then presents case studies that illustrate the problem of local methods, focusing on three cases from the Second Circuit Court of Appeals – *In re Fairfield Sentry I* and *II* and *In re Barnet*. Part IV then considers the ramifications of methodological problems for the Model Law's harmonization efforts, concluding that the changes to the Model

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434 (1995); Jerome R. Kerkman, *The Debtor in Full Control: A Case for Adoption of the Trustee System*, 70 MARQ. L. REV. 159, 193 (1987).

Law’s Guide to Enactment and Interpretation may address some of these problems. Part V concludes.

## I. CHAPTER 15 AND THE MODEL LAW

The Model Law on Cross Border Insolvency addresses the creditor coordination problems that arise in the bankruptcy of a multinational debtor. Scholars agree that a core function of corporate bankruptcy law is to stop creditors from pursuing individual remedies against a defaulting debtor in order to prevent a creditor race from diminishing the overall value of the debtor.<sup>18</sup> Once collection activities are stopped, bankruptcy then enables a majority of creditors to determine how best to allocate value, imposing such a plan on dissenting creditors.<sup>19</sup> On a national level, bankruptcy law can solve this common-pool problem by imposing a broad injunction on all creditor collection efforts.<sup>20</sup> Bankruptcy law can further solve the holdout problem by

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<sup>18</sup> See Thomas H. Jackson, The Logic and Limits of Bankruptcy Law, at 10-17 (Harvard 1986); Jay Lawrence Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276, 2284 (2000) (noting that “Despite a lack of general agreement about bankruptcy theory, there is a consensus that bankruptcy is a collective legal device that operates in each case to protect and adjudicate the interests of many stakeholders, even though there are disputes about the identity of the stakeholders.”).

<sup>19</sup> Westbrook, *A Global Solution*, *supra* note 18 at 2285 (“Such a plan is not achievable unless a court can bind all stakeholders to the reorganization plan, including dissenters.”).

<sup>20</sup> The U.S. Bankruptcy Code imposes such an injunction via the automatic stay in Section 362. The stay purports to limit all creditor collection efforts against the property of the debtor, with property of the debtor defined as including property “wherever located.” 11 U.S.C. § 541(a). Thus, the U.S. automatic stay could potentially enjoin worldwide collection efforts; however, the extraterritorial application of the stay is limited by the reach of personal jurisdiction.



enabling a majority of creditors to impose a debt renegotiation plan on dissenting creditors.<sup>21</sup> Both of these functions require there to be a law capable of binding all creditors – what Westbrook refers to as the requisite “market symmetry” between the scope of the legal regime and the scope of the regulated market.<sup>22</sup> For a debtor with assets and creditors in multiple countries, there is no such bankruptcy law. There is no one court with jurisdiction over the debtor’s worldwide assets and creditors, and there is no super-national bankruptcy law. No one court can stop creditors from liquidating a debtor’s assets piecemeal. No one court can bind all creditors to a plan of reorganization.

The Model Law aims to approximate a super-national structure for multinational debtors by designating the bankruptcy proceedings in one country’s courts as the “main” proceedings and then permitting the debtor’s representative to open ancillary courts in jurisdictions to assist that main proceeding.<sup>23</sup> This quasi-centralized structure reflects an approach to cross-border insolvency law that has been called “modified universalism.”<sup>24</sup> “Universalism” in a pure form envisions a universal

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<sup>21</sup> See 11 U.S.C. § 1129(b) (setting forth the requirements to “cram down” a plan over the objections of a dissenting class of creditors).

<sup>22</sup> See Westbrook, *A Global Solution*, *supra* note 18 at 2283 (describing this ability of bankruptcy law to bind all stakeholders as “market symmetry”: the requirement that some systems in a legal regime must be symmetrical with the market, covering all or nearly all transactions and stakeholders in that market with respect to the legal rights and duties embraced by those systems.”).

<sup>23</sup> *Id.* at 2301 (“modified universalism takes a worldwide perspective, seeking solutions that come as close as possible to the ideal of a single-court, single-law resolution”).

<sup>24</sup> *Id.*

bankruptcy court apply a universal bankruptcy law.<sup>25</sup> Universalism, of course, is detached from reality, as there is no such court or law. Modified universalism is an attempt to get the benefits of the theory of universalism within the current international political and legal landscape.<sup>26</sup> It would have courts recognize one bankruptcy proceeding as playing the lead role (the “main proceeding”), with all other proceedings (the “ancillary proceedings”) playing a supporting role.

This article discusses this theoretical background and its realization in the Model Law in the following sections, but this broad introductory description highlights the two key assumptions of the Model Law: (1) that courts will be able to identify one proceeding to play the lead role and (2) that courts will be willing and able to play a supporting role.

As explored in more detail in Part C below, criticisms of the Model Law have challenged both of these key assumptions, arguing that the Model Law’s supporters underestimate both the incentives of debtors to manipulate such a structure and the incentives of courts to refuse to cooperate.<sup>27</sup> The choice of distributional priorities may have significant consequences for creditors, and courts may be incapable of preventing parties from forum shopping into a jurisdiction with a favorable distributional scheme.<sup>28</sup> Further, ancillary courts may refuse to cooperate with the main proceeding when doing so would harm local

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> See Lynn M. LoPucki, *Global and Out of Control?*, 79 AM. BANKR. L.J. 79, 89-90 (2005) (describing how the COMI rule opens the door to forum shopping).

<sup>28</sup> *Id.*

creditors or offend local bankruptcy policy.<sup>29</sup> In short, critics argue that local interests will undermined the Model Law's modified universalist structure.

The following sections discuss the theoretical background of the Model Law and how the United States has adopted the Model Law in Chapter 15 of the Bankruptcy Code. These sections provide the context and concepts that frame the problems of local interests and of local methods. Readers already familiar with the Model Law and Chapter 15 may wish to skip to Part C below.

*A. Theoretical Framework*

A primary function of bankruptcy law is to solve the common pool problem that arises upon a debtor's inability to repay its creditors.<sup>30</sup> Acting individually, creditors would exercise their collection rights under nonbankruptcy law, allowing them to seize and liquidate the debtor's assets. This piecemeal liquidation would fail to maximize the value of those assets and would destroy the debtor's going concern value. Bankruptcy law serves to solve this problem by stopping all creditor collection activities and binding all creditors to a plan for distributing the assets in a way approved by the majority of creditors.

While a national bankruptcy law can serve this function for a debtor with assets and creditors within a single country, there is no bankruptcy law that can fulfill this function in the case of a debtor with assets and creditors in multiple countries. For a multinational debtor, the natural state of the world is that local bankruptcy courts will administer the assets within their own territorial jurisdiction – that is, a

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<sup>29</sup> See Tung, *supra* note 4 at 559.

<sup>30</sup> *Supra* note 18.

territorialist approach to cross-border insolvency.<sup>31</sup> Under territorialism, multiple bankruptcy proceedings would be necessary to stop all creditors' collection efforts; however, these multiple proceedings necessarily carve the debtors' worldwide assets into territorial chunks. Under territorialism, no one court can impose a distributional plan on holdout creditors.<sup>32</sup>

The polar opposite of territorialism is universalism, which envisions one court administering the world-wide assets of the multinational debtor.<sup>33</sup> Just as domestically it is necessary to have a bankruptcy court that can marshal the debtor's assets and bind its creditors on a national level, universalists argue that cross-border insolvency requires a bankruptcy court that can marshal the debtor's assets and bind its creditors on an international level.<sup>34</sup> The political reality, of course, is that there is no such universal bankruptcy law or procedure capable of administering the multinational debtor's assets and binding its worldwide creditors.

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<sup>31</sup> Tung, *supra* note 4 at 559; José M. Garrido, *No Two Snowflakes the Same: The Distributional Question in International Bankruptcies*, 46 TEX. INT'L L.J. 459, 466 (2011) (noting that "territorialism is the most ancient approach to insolvency").

<sup>32</sup> Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 CORNELL L. REV. 696, 753 (1999) (noting that even cooperative territorialism, multiple proceedings would be necessary to reach all the debtor's assets and handle all claims).

<sup>33</sup> Jay L. Westbrook, *A Global Solution*, *supra* note 18 at 2282.

<sup>34</sup> *Id.* at 2284 ("From Jabez Henry to the participants in this symposium,<sup>41</sup> virtually all theorists have agreed that bankruptcy requires a single proceeding in which all of the debtor's assets and claims are administered under a single set of rules--in traditional terms, in rem.").

Each side recognizes that a cross-border insolvency system will be capable of resolving bankruptcy’s common pool problem only if bankruptcy courts agree to cooperate with one another.<sup>35</sup> Territorialists recognize that preserving value requires that each country’s bankruptcy courts cooperate with one another in order to facilitate going concern sales or impose reorganization plans.<sup>36</sup> This is cooperative territorialism, and it is effected on an ex post basis: if the creditors determine that inter-court cooperation would maximize value, they can petition those courts to do so.<sup>37</sup>

Universalists also recognize the need for cooperation but prefer an ex ante commitment to such cooperation.<sup>38</sup> This approach, referred to as modified universalism, envisions a procedure whereby courts will recognize one bankruptcy proceeding as being the leader – the “foreign main proceeding” – and the other proceedings as serving to enable the main proceeding to have extra-territorial effect.<sup>39</sup> These “ancillary” or “secondary” proceedings may, for example, stop collection efforts within their own territorial jurisdiction, enforce orders from the foreign main proceeding, and turnover local assets for distribution to that main proceeding.

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<sup>35</sup> LoPucki, *Cooperation in International Bankruptcy*, *supra* note 32 at 756 (noting that inter-court cooperation is necessary for both modified universalism and cooperative territorialism).

<sup>36</sup> *Id.*

<sup>37</sup> John A. E. Pottow, *Procedural Incrementalism: A Model for International Bankruptcy*, 45 Va. J. Int’l L. 935, 954 (2005).

<sup>38</sup> *Id.*

<sup>39</sup> Westbrook, *A Global Solution*, *supra* note 18 at 2301.

*B. Chapter 15 and Modified Universalism*

The Model Law, adopted in the United States Bankruptcy Code under Chapter 15, embodies the modified universalist approach.<sup>40</sup> From the United States perspective, this modified universalism works as follows: a foreign multinational debtor would file a full bankruptcy proceeding in a foreign court; that foreign bankruptcy debtor-in-possession, trustee, or other appointed administrator (the “foreign representative”) would then file a Chapter 15 petition in a U.S. bankruptcy court in order to obtain that court’s assistance with the administration of the multinational debtor’s estate.<sup>41</sup> Such assistance may include stopping all creditor collection efforts in the United States;<sup>42</sup> requesting a turnover of U.S. assets for distribution in the foreign bankruptcy case;<sup>43</sup> or requesting assistance in conducting discovery within the United States in order to locate the debtor’s assets or to explore potential causes of action.<sup>44</sup>

This Chapter 15 petition commences a two-step process whereby the court will determine whether and how to cooperate with the foreign proceeding. The first step is a gatekeeper one: the court must determine whether it should recognize the foreign proceeding.<sup>45</sup>

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<sup>40</sup> Jay Lawrence Westbrook, *Chapter 15 at Last*, 79 Am. Bankr. L.J. 713, 716 (2005)

<sup>41</sup> 11 U.S.C. §§ 1502 & 1515.

<sup>42</sup> 11 U.S.C. § 1521(a)(1) & (2).

<sup>43</sup> 11 U.S.C. § 1521(a)(5).

<sup>44</sup> 11 U.S.C. § 1521(a)(4).

<sup>45</sup> 11 U.S.C. § 1504 (“A case under this chapter is commenced by the filing of a petition for recognition of a foreign proceeding under section 1515.”) & 11 U.S.C. § 1515(a) (“A foreign representative applies

Only if it grants recognition can it then provide further relief, such as enjoining creditor collection activities in the United States.<sup>46</sup> Chapter 15 requires the court to recognize the foreign proceeding as “main” if filed where the debtor has its center of main interests or as “nonmain” if filed where the debtor carries on nontransitory economic activity.<sup>47</sup> If the debtor lacks either connection with the foreign proceeding, the court should refuse to grant recognition.<sup>48</sup>

This recognition step represents a universalist-type approach to cross-border insolvency, as it establishes one main proceeding with ancillary proceedings to assist it.<sup>49</sup> This part is procedural – it aims to answer the choice-of-forum problem inherent in cross-border insolvencies, i.e., the question of *where* the multinational debtor should file bankruptcy.<sup>50</sup> Once recognition is granted, the court proceeds to the

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to the court for recognition of a foreign proceeding in which the foreign representative has been appointed by filing a petition for recognition.”).

<sup>46</sup> 11 U.S.C. §§ 1520 & 1521 govern the relief available to a foreign representative, and both sections provide that such relief may be afforded “[u]pon recognition of a foreign proceeding.”

<sup>47</sup> 11 U.S.C. § 1517(b)(1) & (2).

<sup>48</sup> 11 U.S.C. § 1517(a)(1) (“[A]fter notice and a hearing, an order recognizing a foreign proceeding shall be entered if (1) such foreign proceeding for which recognition is sought is a foreign main proceeding or foreign nonmain proceeding within the meaning of section 1502;”).

<sup>49</sup> Edward Janger, *Universal Proceduralism*, supra note 63 at 842-43 (within Janger’s vision of a cross-border insolvency law focused on universalism proceduralism, he recognizes that the recognition of foreign proceedings enables a universalist-type approach).

<sup>50</sup> *Id.* (noting that choice-of-forum is technically separate from choice-of-law, but noting the general presumption that these will often practically be linked).

cooperation step, under which it must determine what relief to grant the foreign proceeding in order to facilitate administration of the debtor.<sup>51</sup>

If the foreign proceeding is recognized, then it is entitled to certain immediate relief (if is a foreign main proceeding) and other discretionary relief (whether it is a foreign main or nonmain proceeding).<sup>52</sup> While the recognition stage reflects universalism on a procedural level, the cooperation stage reflects a territorialist quality of recognizing the need to respect and follow local laws within each country as to the distribution of assets.<sup>53</sup> For example, in granting discretionary relief, a court “must be satisfied that the interests of the creditors and of other interested persons, including the debtor, are adequately protected.”<sup>54</sup> As the Guide explains, Article 22 (Section 1522 in the Bankruptcy Code) reflects the idea “that there should be a balance between relief that may be granted to the foreign representative and the

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<sup>51</sup> *Id.*

<sup>52</sup> 11 U.S.C. §§ 1520, 1521.

<sup>53</sup> See Edward S. Adams & Jason Fincke, *Coordinating Cross-Border Bankruptcy: How Territorialism Saves Universalism*, 15 COLUM. J. EUR. L. 43, 80-81 (2009) (“This universalist mandate is tempered by sections 1506, 1515, 1516, and others whereby U.S. bankruptcy judges still retain a wide amount of control over the administration of domestic assets and creditors’ rights. It is, in fact, these territorialistic provisions that will enable domestic judges to feel comfortable cooperating and coordinating with foreign proceedings. It is also these territorialistic provisions that will encourage domestic creditors to invest in foreign concerns and foreign creditors to invest in U.S. concerns.”).

<sup>54</sup> See Model Law, *supra* 1 at art. 22.



interests of the persons that may be affected by such relief<sup>55</sup> and “[i]n many cases the affected creditors will be ‘local creditors’.”<sup>56</sup>

A final territorialist protection is found in the Model Law’s public policy exception in Article 6: “Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State.”<sup>57</sup> The purpose of this exception is clear: the Model Law promotes coordination and requires recognition of qualifying foreign proceedings; however, the Model Law does not force any enacting state from refusing to grant relief whenever doing so would offend local public policy. The Guide explains that “The Model Law preserves the possibility of excluding or limiting any action in favour of the foreign proceeding, including recognition of the proceeding, on the basis of overriding public policy considerations, although it is expected that the public policy exception will be rarely used.”<sup>58</sup> It further explains that “[d]ifferences in insolvency schemes do not themselves justify a finding that enforcing one State’s laws would violate the public policy of another State.”<sup>59</sup>

### C. *The Problem of Local Interests*

Leading up to the Model Law’s creation and its adoption in the United States, there was considerable debate about whether the Model

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<sup>55</sup> Guide, *supra* note 1, ¶ 196.

<sup>56</sup> *Id.* at ¶ 198.

<sup>57</sup> See Model Law, *supra* 1 at art. 6 (embodied in Section 1506 of Chapter 15).

<sup>58</sup> Guide, *supra* note 1, at ¶21(e).

<sup>59</sup> *Id.* at ¶ 30.

Law’s cooperative regime would actually work.<sup>60</sup> As with any model law effort, states would first have to adopt the law uniformly and then courts would have to apply it uniformly.<sup>61</sup> Countries may be reluctant to adopt any bankruptcy model law given the deep-rooted policies underlying distributional rules;<sup>62</sup> even if adopted, the Model Law would be subject to interest group capture;<sup>63</sup> and even if the adopted Model Law avoided capture, courts would not apply it uniformly.<sup>64</sup>

These concerns are common generally to all unification efforts that depend on court administration.<sup>65</sup> This issue has been relevant, for example, in adopting the Uniform Commercial Code within the United States and in adopting the United National Convention on Contracts for

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<sup>60</sup> See LoPucki & Tung, *supra* note 4; Westbrook, Chapter 15 at Last, *supra* note 40; Pottow, *Procedural Incrementalism*, *supra* note 37.

<sup>61</sup> See Paul B. Stephan, Courts, Tribunals, and Legal Unification—the Agency Problem, 3 Chi. J. Int’l L. 333 (2002) (arguing that the judicial application phase “presents severe difficulties that will frustrate a wide range of unification projects”); Janger, *Edward J. Predicting when the Uniform Law Process Will Fail: Article 9, Capture, and the Race to the Bottom*, 83 Iowa L. Rev. 569 (1997-1998).

<sup>62</sup> Tung, *Fear of Commitment*, *supra* note 4 at 559.

<sup>63</sup> See Edward J. Janger, *Universal Proceduralism*, 32 BROOK. J. INT’L L. 819, 827-28 (2007) (noting this possibility of defections: “Therefore, the drafters must consider the possible effects of jurisdictional competition and interest group capture on national legislatures.”)

<sup>64</sup> *Id.* at 581-82 (raising the issue of whether universalism is possible under game theory analysis).

<sup>65</sup> See Paul B. Stephan, *Courts, Tribunals, and Legal Unification—the Agency Problem*, 3 Chi. J. Int’l L. 333 (2002) (arguing that the judicial application phase “presents severe difficulties that will frustrate a wide range of unification projects”);

the International Sale of Goods (CISG).<sup>66</sup> In the international realm, scholars have recognized that states are likely to diverge in how they interpret a uniform text and have sought to identify the causes of this divergence.<sup>67</sup> In the CISG literature, commentators have explained divergence as a “homeward trend” in the results courts reach.<sup>68</sup> This term refers to the tendency of courts to interpret laws in accordance with their domestic legal framework. For example, in the CISG context, scholars have noted that U.S. courts will use common law contract principles to interpret the CISG, even though the CISG is not a part of the common law.<sup>69</sup>

Some argued that the fears of divergence were minimized in the cross-border context since the Model Law has a singularly procedural focus.<sup>70</sup> This narrow procedural focus avoided the especially thorny substantive bankruptcy issues inherent in creditor priority schemes.<sup>71</sup> At the same time, though, these procedural rules might have significant

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<sup>66</sup> See e.g., John L. Gedid, *U.C.C. Methodology: Taking a Realistic Look at the Code*, 29 Wm. & Mary L. Rev. 341 (1987-1988); Larry A. DiMatteo et al., *Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence*, *The*, 24 Nw. J. Int'l L. & Bus. 299 (2003-2004).

<sup>67</sup> See e.g., Michael F. Sturley, *International Uniform Laws in National Courts: The Influence of Domestic Law in Conflicts of Interpretation*, 27 VA. J. INT'L L. 729 (1987).

<sup>68</sup> John Honnold, *DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES* at 1 (1989).

<sup>69</sup> See Sturley *supra* note 67.

<sup>70</sup> Pottow, *Incremental Proceduralism*, *supra* note 37 at 960-61 (analyzing the Model Law's constraint); see also Janger, *Universal Proceduralism*, *supra* note 63.

<sup>71</sup> *Id.*

substantive consequences.<sup>72</sup> Specifically, although an ancillary court's decision to recognize a foreign main proceeding is a procedural question, following recognition that foreign main proceeding might seek to apply its bankruptcy laws abroad or to apply its own choice-of-law rules.<sup>73</sup> To the extent deference to the foreign court would produce results substantially different than those that would obtain under the ancillary court's domestic bankruptcy law, this might influence ancillary court's interpretation of the procedural rules. That is, an ancillary court might refuse to recognize a foreign proceeding when doing so would have consequences inconsistent with the ancillary court's bankruptcy laws. Thus, universalists have recognized that the Model Law's success depends, in part, on courts' willingness to tolerate outcome differences.<sup>74</sup>

Empirical research on Chapter 15 has also focused on courts' willingness to tolerate outcome differences. The first empirical project on Chapter 15 examined recognition orders, finding that U.S. courts

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<sup>72</sup> Edward J. Janger, *Virtual Territoriality*, 48 COLUM. J. TRANSNAT'L L. 401, 409 (2010) (noting that "[t]his distinction between bankruptcy substance and bankruptcy procedure is not, of course, tidy, either as a practical or a conceptual matter. Bankruptcy law, by its very nature, affects (and usually limits) the remedies available to creditors. It therefore alters the practical value of substantive entitlements.").

<sup>73</sup> Janger, *Universal Proceduralism*, *supra* note 63 at 833-34 (arguing that it is not necessary for the Model Law to link the procedural choice of forum and substantive choice of law questions, but noting that this linkage underlies both Westbrook's ideal of universalism and LoPucki's fears of a univesalist race to the bottom.)

<sup>74</sup> Jay L. Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 Am. Bankr. L.J. 457, 58 (1991); Pottow, *Procedural Incrementalism*, *supra* note 37 at 1003-1010.

routinely recognized foreign proceedings – suggesting, perhaps, that U.S. courts were adhering to the procedural recognition framework.<sup>75</sup> A later study examined what courts did following recognition, i.e., what sort of cooperation did they extend to the foreign proceeding.<sup>76</sup> That study found that U.S. courts were willing to cooperate, but only conditionally.<sup>77</sup> Courts, for example, did not simply turnover U.S. assets for administration abroad; rather, courts conditioned the turnover on the foreign court’s agreement to apply U.S. law or to otherwise protect U.S. creditors.<sup>78</sup>

## II. DEFECTION: LOCAL INTERESTS AND LOCAL METHODS

While there have been recent cases illustrating these territorialist impulses as U.S. courts have either refused to cooperate or strongly conditioned cooperation in order to avoid outcome differences, territorialist impulses does not fully explain court divergence. Courts have at times departed from the Model Law’s structure and purpose even when there is no evidence of outcome differences, i.e., even when there is no indication that defection furthers local creditors or local policy. Courts have defected even when local interests are not at stake. These defections stem instead from problems of interpretative methodology and case management, and they reflect a difficulty in understanding and implementing a law that is systematically different than the Bankruptcy Code within which it resides. This article refers to these problems as arising from local methods.

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<sup>75</sup> Dawson, *Offshore Bankruptcies*, 88 Neb. L. Rev. 317 (2009).

<sup>76</sup> Leong, *Is Chapter 15 Universalist?*, *supra* note 7.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

Questions about the proper methodology of statutory interpretation and case management are not unique to Chapter 15 or even to bankruptcy more generally. There have been many studies on the proper methodology of statutory interpretation broadly and in the bankruptcy context more specifically.<sup>79</sup> Scholars have also focused on the proper method of judicial case management, discussing the role of judges as adjudicators and as case facilitators – again with, some of these studies focusing on courts generally and others on bankruptcy courts more specifically.<sup>80</sup>

Although these methodological problems are not unique to the Model Law, they are particularly important in this context. The problems of local methods have received relatively little attention compared to the problems of local interests. This is not to say that matters of interpretation and case management have been overlooked. To the contrary, recent scholarship has focused heavily on matters of interpretation of the Model Law, especially on the question of how the COMI standard should be interpreted in the context of corporate

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<sup>79</sup> See e.g., Daniel J. Bussel, *Textualism's Failures: A Study of Overruled Bankruptcy Decisions*, 53 VAND. L. REV. 887 (2000) (analyzing textualism through the lens of bankruptcy cases, in part because of an interest in bankruptcy but more generally because these cases provide a good context within which to evaluate textualism's effectiveness); Robert M. Lawless, *Legisprudence Through a Bankruptcy Lens: A Study in the Supreme Court's Bankruptcy Cases*, 47 SYRACUSE L. REV. 1 (1996); Robert K. Rasmussen, *A Study of the Costs and Benefits of Textualism: The Supreme Court's Bankruptcy Cases*, 71 WASH. U. L.Q. 535 (1993); Charles Jordan Tabb & Robert M. Lawless, *Of Commas, Gerunds and Conjunctions: The Bankruptcy Jurisprudence of the Rehnquist Court*, 42 SYRACUSE L. REV. 823 (1991).

<sup>80</sup> See e.g., Melissa B. Jacoby, *What Should Judges Do in Chapter 11?*, 2015 U. ILL. L. REV. \_\_ (forthcoming 2015); Judith Resnick, *Managerial Judges*, 96 HARV. L. REV. 374 (1982)

groups.<sup>81</sup> Others have considered an innovative use of ancillary proceedings which may prevent the problem of local interests from undermining the Model Law's harmonization efforts – an approach that recognizes both the importance of local interests but also suggests a potential solution through creative case management.<sup>82</sup>

This article does not address these specific questions; rather, it focuses on the sort of methodological issues of how such issues might be handled. That is, this article does not discuss how courts should interpret the “center of main interests” standard in the corporate group context. It focuses on the broader questions that arise based on the sort of methodology courts might use in answering that question. The aim of this article is to highlight the importance of these issues for the Model Law's cooperative structure, tying these issues into the broader literature on statutory interpretation and case management. A better understanding of the sources of defection may help inform and guide the continuing cross-border insolvency harmonization effort.

*A. Methodology of Statutory Interpretation*

The principal problem of interpretative methodology arises from the conflict between the purposive nature of the Model Law and the textualist bent of bankruptcy jurisprudence. Textualism may be a problematic interpretative methodology in general and, as some have

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<sup>81</sup> See e.g., Nora Wouters & Alla Raykin, *Corporate Group Cross-Border Insolvencies Between the United States & European Union: Legal & Economic Developments*, 29 EMORY BANKR. DEV. J. 387, 387 (2013)

<sup>82</sup> See John A. E. Pottow, *A New Role for Secondary Proceedings in International Bankruptcies*, 46 TEX. INT'L L.J. 579, 589 (2011); Edward Janger, *Virtual Territoriality*, 48 COLUM. J. TRANSNAT'L L. 401 (2010).

suggested, in the context of bankruptcy law.<sup>83</sup> This article argues here that it is an especially inapt methodology as applied to the Model Law as it directly conflicts with the language and purpose of the Model Law.

The Model Law’s purposive nature is articulated in its preamble, adopted as Section 1501 of the Bankruptcy Code, which provides that,

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.<sup>84</sup>

The Model Law’s rule of interpretation further supports this purposive nature by mandating that courts consider the law’s “international

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<sup>83</sup> See Jackson and Westbrook, *supra* note 79.

<sup>84</sup> 11 U.S.C. § 1501.



origin” and “the need to promote uniformity in its application and the observance of good faith.”<sup>85</sup>

These provisions of the Model Law have analogues in other bodies of law designed to promote harmonization in commercial law. The Convention on the International Sale of Goods, for example, similarly states its purpose in the preamble and then contains a rule of construction that requires courts to interpret the CISG “with regard . . . to its international character and to the need to promote uniformity in its -application and the observance of good faith in international trade” and that

“Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private -international law.”<sup>86</sup>

Similarly, the Uniform Commercial Code contains purposive language and a rule of construction:

“(a) [The Uniform Commercial Code] must be liberally construed and applied to promote its underlying purposes and policies, which are:

(1) to simplify, clarify, and modernize the law governing commercial transactions;

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<sup>85</sup> See Model Law, *supra* 1 at art. 8.

<sup>86</sup> CISG Article 7.

- (2) to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and
- (3) to make uniform the law among the various jurisdictions.”<sup>87</sup>

Such statements of purpose and rules of interpretation have led scholars to characterize the CISG and the UCC as purposive in nature. Indeed, scholars have noted that the purposivist interpretation is a core attribute of the Karl Llewellyn and the drafters’ design for the UCC.<sup>88</sup>

The Model Law’s purposivist nature is also reflected in its accompanying Guide to Enactment and Interpretation, which contains the notes of the drafters. The Guide is akin to a legislative history of the Model Law; however, it has attributes that significantly distinguish it from a legislative history. As an initial matter, legislative history refers to the comments and reports of legislators in deliberating the passage of a bill. The Guide, in contrast, contains comments of the United Nations delegates to the Working Group V charged with drafting and developing the cross-border insolvency regime.<sup>89</sup> These drafters are not legislators,

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<sup>87</sup> UCC 1-103.

<sup>88</sup> Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 794 (2013) (“it is universally agreed that legislatures (as well as parties to a contract) can dictate to courts which interpretive principles to apply. The Uniform Commercial Code (U.C.C.) is precisely such an interpretive statute.”); Gregory E. Maggs, *Karl Llewellyn’s Fading Imprint on the Jurisprudence of the Uniform Commercial Code*, 71 U. Colo. L. Rev. 541 (2000).

<sup>89</sup> Guide, *supra* note 1, at ¶ 17 (describing the history and purpose of the Guide).

and the Model Law is not legislation. So the Guide is technically distinct from legislative history. It is also practically significant. Legislative history contains the comments of various delegates and/or committees. These comments arguably do not reflect the true understanding of all the legislators, who may in fact have all understood the proposed legislation differently. Thus, as Judge Easterbrook has argued, “[i]ntent is elusive for a natural person, fictive for a collective body.”<sup>90</sup> The Guide, in contrast, reflects the considered comments of the Working Group V delegates for the explicit purpose of clarifying the language and purpose of the Model Law. As such, the Guide is not subject to this same critique – the delegates drafted the Guide to explicitly express intention.<sup>91</sup>

A second important distinction between the Guide and legislative history is that the Guide may be, and has been, changed even after the Model Law’s drafting was complete. Legislative history, of course, is “history” and thus cannot be prospectively changed after a bill is passed into law. Working Group V continues to work on revising the language of the Guide and the language of the Model Law.

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<sup>90</sup> Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 61, 68 (1994)

<sup>91</sup> See Julian B. McDonnell, *Purposive Interpretation of the Uniform Commercial Code: Some Implications for Jurisprudence*, 126 U. PA. L. REV. 795, 829 (1978) (making this argument about the official comments: “Another traditional objection to purposive inquiry is that indications of purpose not expressed in the statute itself are likely to be reflective not of the legislative will but of partisan views that could not achieve majority approval . . . . This criticism loses most of its force with respect to U.C.C. litigation, however, because of the programmatic way in which those responsible for the Code project sought to manifest their objectives in the text and its accompanying commentary.”).

The Guide is accordingly much more akin to the Official Comments to the UCC than to a legislative history. The Official Comments are not statutory text or legislative history.<sup>92</sup> Further as with just as Working Group V can change the language in the Guide without changing the Model Law, the American Law Institute can change the Official Comments without changing the text.<sup>93</sup> The Official Comments have been recognized as a key component of the UCC's purposivist approach to commercial law: if courts are to interpret the UCC according to its guiding principles, then the Official Comment's guiding principles play an important role.<sup>94</sup>

While the Model Law's language and structure call for a purposivist interpretation, the prevailing methodology of interpreting the Bankruptcy Code has been and seemingly continues to be textualism.<sup>95</sup> Early studies of the Supreme Court's bankruptcy jurisprudence found that textualism was the predominant

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<sup>92</sup> David Frisch, *The Recent Amendments to Ucc Article 9: Problems and Solutions*, 45 U. RICH. L. REV. 1009, 1028 (2011) ("The most obvious point is that, although comments play an extremely prominent role in Code interpretation, they are not part of the statutory text, nor are they legislative history of the enacting state legislatures in the usual sense.").

<sup>93</sup> *Id.*

<sup>94</sup> Westbrook, *Chapter 15 at Last*, *supra* note 40 at 720 (noting that the two most important interpretative tools for Chapter 15 are the House Committee Report and the Guide); H.R. REP. 109-31(I), 109-10, 2005 U.S.C.C.A.N. 88, 172-73 ("Interpretation of this chapter on a uniform basis will be aided by reference to the Guide and the Reports cited therein, which explain the reasons for the terms used and often cite their origins as well.").

<sup>95</sup> Robert K. Rasmussen, *A Study of the Costs and Benefits of Textualism: The Supreme Court's Bankruptcy Cases*, 71 WASH. U. L.Q. 535, 539 (1993);

methodology.<sup>96</sup> More recent studies have found textualism to be on the decline, but it still casts an important shadow over bankruptcy jurisprudence.<sup>97</sup> Some have argued that textualism is well-suited to bankruptcy law, as it provides for greater certainty.<sup>98</sup> Other have argued that textualism is no more likely to provide certainty than purposivism.<sup>99</sup> Whether or not textualism is an appropriate methodology in other contexts, textualism is unlikely to produce results consistent with the purposivist Model Law.

At the same time, to the extent textualism is justified non-delegation concerns, then courts may find textualism to be particularly attractive in this context.<sup>100</sup> That is, textualism has at times been defended as ensuring that the comments of a Congressional speaker or committee do not usurp the legislative powers of Congress or the

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<sup>96</sup> *Id.*

<sup>97</sup> See Daniel J. Bussel, *Textualism's Failures: A Study of Overruled Bankruptcy Decisions*, 53 VAND. L. REV. 887, 909-10 (2000) (“Interestingly, even a casual look at the data indicates that textualism is not a dominant mode of statutory interpretation in the Courts of Appeals, even in the bankruptcy area, notwithstanding the Supreme Court’s particular insistence for a decade on “plain meaning” constructions of the Bankruptcy Code. Approximately 80 percent of the control group cases were decided on largely or entirely nontextualist grounds.”).

<sup>98</sup> Rasmussen, *supra* note 79 at 565.

<sup>99</sup> See *e.g.*, Lawless, *supra* note 79, at 104 (“the predictability and certainty of textualism rests on the dubious premise that the diverse persons who make up this nation’s federal judiciary can (and should) interpret language in the same manner.”).

<sup>100</sup> John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 Colum. L. Rev. 673, 706-37 (1997) (arguing that reliance on legislative history violates the constitutional prohibition against delegation of lawmaking power to entities under the exclusive control of Congress)

interpretative powers of courts.<sup>101</sup> If a court gives weight to legislative history, it effectively, and inappropriately, elevates the remarks of a few lawmakers to the level of law. In interpreting the Model Law, courts may feel especially cautious about delegating interpretative issues to the comments of that law’s drafters – as this would effectively delegate legislative authority to the UNCITRAL delegates.

Nonetheless, as discussed above, the Guide is not a legislative history representing the remarks of one or a few lawmakers; rather, the Guide embodies the considered remarks of the UNCITRAL delegates. Such remarks play an essential role in the Model Law’s harmonization effort, just as the Official Comments are an integral part of the Uniform Commercial Code. Accordingly, textualism’s non-delegation concerns are misplaced in this realm.

*B. Methodology of Case Management*

As with interpretative methodologies, case management methodology varies from court to court, and even from case to case. Within the domestic U.S. bankruptcy courts, judges have reported a wide range of judicial style, with some reporting that they serve principally as arbiters and others as part arbiter/part case manager.<sup>102</sup> On an international scale, case management style may vary even more, as some

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<sup>101</sup> *Id.*

<sup>102</sup> Stacy Kleiner Humphries & Robert L. R. Munden, *Painting A Self-Portrait: A Look at the Composition and Style of the Bankruptcy Bench*, 14 BANKR. DEV. J. 73, 78-79 (1997) (reporting that the majority of bankruptcy judges surveyed saw their job as requiring a mix of dispute resolution and managerial judging.).

insolvency systems are more litigation-oriented and others more administrative.<sup>103</sup>

The issue of case management has received significant attention in the U.S. bankruptcy system but has largely been overlooked in the cross-border insolvency context. The point of this part of the article is the characteristics of bankruptcy practice that point to the importance of case management in the context of corporate reorganizations are likewise present in the cross-border insolvency context.

Scholars have focused on bankruptcy case management in part because the Bankruptcy Reform Act of 1978 explicitly sought to modify the role of judges in the bankruptcy system.<sup>104</sup> Congress sought to shift case management functions from bankruptcy judges to the trustee and the United States Trustee, thus limiting judges to an adjudicatory function.<sup>105</sup> Congress also hoped that creditors would play an active role in bankruptcy governance. To that end, the Bankruptcy Code attempts to resolve creditors’ collective action problem by empowering the United States Trustee to form committees of stakeholders empowered to participate in the bankruptcy and authorized to be compensated from the bankruptcy estate.<sup>106</sup>

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<sup>103</sup> See Barnes, *supra* note 15.

<sup>104</sup> See Miller, *supra* note 17.

<sup>105</sup> *Id.* at 433-34.

<sup>106</sup> 11 U.S.C. §§ 1102 (permitting the appointment of committees), 1103 (authorizing committees to hire professionals and to, *inter alia*, investigate the debtor’s actions and financial conditions and to participate in plan negotiations), and 328 & 330 (authorizing the committee to employ professionals that may be paid out of the estate).

Many have argued that removing bankruptcy judges from case management has created a governance vacuum in business bankruptcies. In groundbreaking empirical work in this area, Professor LoPucki famously concluded that the bankruptcy reforms had effectively left the “debtor in full control.”<sup>107</sup> Based on his empirical analysis of bankruptcy cases filed in the Western District of Missouri, he concluded “[l]ack of objection or request from the creditors' committee seemed frequently to be considered by the court as an indication that all was well, rather than that the creditors' committee had not organized well enough to have an opinion, as was probably more often the case.”<sup>108</sup>

Since then, Congress has responded by augmenting the role of the United States Trustee in small business cases,<sup>109</sup> thus providing a stronger monitoring presence in those cases in which creditor monitoring is less reliable.<sup>110</sup> Courts have also responded to the governance gap in bankruptcy cases by engaging in more active case management in order to fill this governance vacuum.<sup>111</sup> For example,

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<sup>107</sup> LoPucki, *The Debtor in Full Control – Systems Failure Under Chapter 11 of the Bankruptcy Code?* (pt. 2), 57 AM. BANKR. L. J. 247, 250 (1983).

<sup>108</sup> *Id.* at 253.

<sup>109</sup> Timothy J. Curtin, Karen Gross, and Albert Togut, *Debtors-Out-Of-Control: A Look at Chapter 11's Check and Balance System*, 1988 ANN. SURV. OF BANKR. LAW 4.

<sup>110</sup> See Edward R. Morrison, *Bankruptcy Decision Making: An Empirical Study of Continuation Bias in Small-Business Bankruptcies*, 50 J.L. & ECON. 381, 394 (2007) (concluding that LoPucki's continuation bias is no longer a concern as creditors and trustees are actively involved in managing the case).

<sup>111</sup> See Richard B. Levin, *Towards A Model of Bankruptcy Administration*, 44 S.C. L. REV. 963, 968 (1993) (noting that “judges often move to fill any vacuums in the administration or management of the



Richard Levin notes that “judges often move to fill any vacuums in the administration or management of the cases, because they continue to feel responsible for the expeditious resolution of their cases.”<sup>112</sup>

The style of case management can markedly influence bankruptcy outcomes, particularly in those cases in which no other stakeholder (creditor or trustee) can limit the debtor’s control of the bankruptcy filing. Similarly, although in an area of bankruptcy law that is distinct in several significant ways, Melissa Jacoby’s work has highlighted the importance of the bankruptcy judge’s role in municipal bankruptcies – another area of bankruptcy law in which creditors and trustees play a circumscribed role in bankruptcy.<sup>113</sup>

The domestic bankruptcy system, then, can be understood that have adjusted to governance vacuums in some cases in order to limit the “debtor in full control” problem. Through more active case management and oversight, bankruptcy practice may no longer be as susceptible to the fallacy exposed by LoPucki’s study, namely, the fallacy that lack of creditor objections is tantamount to creditor consent. It is now more widely understood that creditor silence may reflect creditor coordination problems more than actual consent.

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cases, because they continue to feel responsible for the expeditious resolution of their cases.”); Humphries & Munden, *Painting A Self-Portrait*, *supra* note 102 at 78-79 (1997) (reporting that the majority of bankruptcy judges surveyed saw their job as requiring a mix of dispute resolution and managerial judging.).

<sup>112</sup> *Id.*

<sup>113</sup> Melissa B. Jacoby, *The Detroit Bankruptcy, Pre-Eligibility*, 41 *FORDHAM URB. L.J.* 849, 861 (2014).

The cross-border insolvency area, though, remains susceptible to this fallacy of creditor consent for at least three reasons. First the Model Law is still relatively new. Even though the Model Law has been in effect in the United States for ten years now, it is a niche area of bankruptcy law with relatively few opportunities for the practice to evolve.

Second, the creditor consent fallacy is particularly problematic in this area because there is even less reason to believe creditors will participate at all. Under Chapter 15, there is no role for the United States Trustee or for a committee of creditors or other stakeholders. Interested parties may face not only the coordination problems typical to creditors but also the further obstacles of being geographically dispersed. Thus, in some important ways, Chapter 15 cases are back to the “Debtor in Full Control” scenario, only this time it is the foreign representative in full control.

Third, the Model Law requires more managerial judging in some areas, as the Model Law and the Guide require courts to exercise independent judgment as to the recognition and cooperation stages. At the recognition stage, for example, the court is entitled to presume that the debtor’s center of main interests is at its registered office;<sup>114</sup> however, the Guide clarifies that a court “will be required to consider independently where the debtor’s centre of main interests is located.”<sup>115</sup> At the cooperation stage, the Model Law specifically requires that, in granting discretionary relief to the foreign representative, the court be “satisfied that the interests of creditors in this State are adequately

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<sup>114</sup> 11 U.S.C. § 1516(c)).

<sup>115</sup> Guide, *supra* note 1, at ¶ 143 (noting the court’s need to do so when “there appears to be a separation between the place of the debtor’s registered office and its alleged centre of main interests.”).

protected.”<sup>116</sup> The Model Law further specifically provides that a court may *sua sponte* modify or terminate any relief.<sup>117</sup>

Despite such language in the Model Law and the Guide, courts in Chapter 15 cases are prone to the same error identified by LoPucki’s early study: they tend to view the lack of objections as indicating creditor consent.<sup>118</sup> In my prior empirical analysis of all Chapter 15 petitions between 2005-2008, I found that courts granted recognition to foreign proceedings even when there was a tenuous, at best, connection between the debtor and the jurisdiction of the foreign proceeding.<sup>119</sup> For example, between 2005-2008, about 20% of all Chapter 15 petitions sought relief related to a haven jurisdiction bankruptcy filing.<sup>120</sup> In these cases, the debtor had nothing more than a letter-box presence in the haven jurisdiction. Nonetheless, U.S. courts recognized the haven proceeding as a foreign main proceeding. Even in one case in which the court denied recognition as a foreign main proceeding, the court said that, but for the foreign representatives’ blatant attempts to use the Cayman bankruptcy proceeding to interfere with a related Chapter 11 proceeding in the United States, the court would have recognized the Cayman proceeding.<sup>121</sup> In doing so, the court said that it was sufficient

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<sup>116</sup> See Model Law, *supra* 1 at art. 21.

<sup>117</sup> *Id.* at art.22(3).

<sup>118</sup> LoPucki, *Debtor in Full Control*, *supra* note 106.

<sup>119</sup> Dawson, *Offshore Bankruptcies*, *supra* note 75.

<sup>120</sup> *Id.* at 336.

<sup>121</sup> *In re SPhinX, Ltd.*, 351 B.R. 103, 121 (Bankr. S.D.N.Y. 2006) *aff’d*, 371 B.R. 10 (S.D.N.Y. 2007) (“However, a primary basis for the Petition, and the investors’ tacit consent to the Cayman Islands proceedings as foreign main proceedings, is improper: that is, it has the purpose of frustrating the RCM Settlement by obtaining a stay of the

that no creditors had objected to the competence of the Cayman Islands proceedings.<sup>122</sup> The court interpreted the lack of objections as an indication that creditors consented to the Cayman jurisdiction, thus demonstrating that the creditor consent fallacy may be alive and well in Chapter 15.

### III. CASE STUDIES: DEFECTIONS AND LOCAL METHODS

This section will describe three recent decisions from U.S. Courts of Appeals interpreting Chapter 15. In each of these cases, the courts ultimately depart from the structure and purpose of the Model Law. In the first case, *In re Qimonda*, there are public policy and creditor protection consequences – that is, local interests are relevant. Analyses of *Qimonda* have thus far focused on these local interests issues.<sup>123</sup> This part considers instead the procedural troubles reflected in this case, namely, which court should act first – the foreign proceeding or the ancillary one.

In the latter two cases, *In re Barnett* and *In re Fairfield Sentry*, there are no apparent local interests at stake at all. All three cases, even *Qimonda*, highlight the important consequences of local methods, as

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appeals upon the invocation of Bankruptcy Code section 362(a) that would go into effect under section 1520(a)(1) upon such recognition.”).

<sup>122</sup> *Id.* at 121 (“But because these are liquidation cases in which competent JOLs under the supervision of the Cayman Court are the only parties ready to perform the winding up function, and, importantly, the vast majority of the parties in interest tacitly support that approach, normally the Court would recognize the Cayman Islands proceedings as main proceedings.”).

<sup>123</sup> See e.g., John J. Chung, *In Re Qimonda Ag: The Conflict Between Comity and the Public Policy Exception in Chapter 15 of the Bankruptcy Code*, 32 B.U. INT’L L.J. 89 (2014).

courts’ methodologies lead to conclusions inconsistent with the Model Law. These methodologies further raise questions about the efficacy of the Model Law and the Guide to harmonize cross-border insolvencies.

A. *In re Qimonda AG*

Qimonda AG was a German manufacturer of semiconductor memory devices before filing bankruptcy in Munich, Germany, in 2009. One of the German insolvency administrator’s most significant tasks was to liquidate the company’s roughly 10,000 patents, about 4,000 of which were U.S. patents.<sup>124</sup> The administrator’s challenge was that Qimonda had cross-licensed its patents, allowing other semiconductor manufacturers practice these patents in exchange for a right to practice theirs. This sort of arrangement is a common solution to the so-called “patent thicket” that arises in such industries in which there are so many patents that it is difficult to know with any precision which patents are necessary for any particular process.<sup>125</sup> This cross-licensing arrangement worked well Qimonda as an operating company; however, it provided no value to Qimonda’s creditors in liquidation. Accordingly, the administrator sought to terminate the cross-licensing agreements and then re-license the patents for royalties. Under German law, such termination may be available; however, Section 365(n) of the U.S. Bankruptcy Code prohibits debtors from terminating intellectual property licensing agreements.<sup>126</sup>

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<sup>124</sup> *Jaffe v. Samsung Electronics Co., Ltd.*, 737 F.3d 14, 17 (4th Cir. 2013).

<sup>125</sup> Carl Shapiro, *Navigating the Patent Thicket*, INNOVATION POLICY AND THE ECONOMY VOL. 1 121, 127 (2001).

<sup>126</sup> 11 U.S.C. § 365(n).

Because Qimonda had subsidiaries, creditors, and assets in the United States, the German administrator sought relief under Chapter 15 in the Bankruptcy Court for the Eastern District of Virginia.<sup>127</sup> The administrator filed a petition for recognition in the United States under Chapter 15 of the Bankruptcy Code and sought an order requesting supplemental relief, including turnover of U.S. assets and the application of several U.S. Bankruptcy Code sections. The bankruptcy court granted this petition and then clarified, through an amended order, that German bankruptcy law would apply to the question of whether the administrator could terminate the debtor’s cross-licenses, concluding that “the legal theory arises under German law and is best resolved by German courts. It should not be complicated by superimposing [U.S. Bankruptcy Code] § 365 on the analysis.”<sup>128</sup>

In so ruling, the bankruptcy court interpreted Chapter 15 as creating ancillary proceedings to assist foreign proceedings, which foreign proceedings would be determined under the applicable foreign bankruptcy laws. Because the U.S. patents belonged to the German debtor, German law would apply to those patents and their accompanying licensing agreements.<sup>129</sup>

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<sup>127</sup> In re Qimonda AG, 2009 WL 4060083, at \*2 (Bankr. E.D. Va. Nov. 19, 2009).

<sup>128</sup> In re Qimonda AG, 2009 WL 4060083, at \*2 (Bankr. E.D. Va. Nov. 19, 2009).

<sup>129</sup> This issue of ownership of the U.S. patents had already been decided in a separate action in the District of Delaware. *See* Disclosure Statement with Respect to Joint Plan of Liquidation of the Debtors and Debtors in Possession, Qimonda Richmond, LLC, and Qimonda North America Corp., *In re Qimonda Richmond, LLC*, Doc. 09-10589, Bankr. D. Del., Doc. # 989.

The cross-licensees of the U.S. patents appealed this order, arguing that U.S. law should apply to their cross-licensing agreements and that the bankruptcy court erred in turning over the U.S. patents for administration in Germany. The district court agreed, arguing that the bankruptcy court should have considered whether deferring to German law would sufficiently protect the interests of the U.S. creditors and whether such deference would violate fundamental U.S. policy.<sup>130</sup> Ultimately, the bankruptcy court found that German law would harm U.S. local creditors and offend U.S. policy, as embodied in Section 365 of the Bankruptcy Code.<sup>131</sup>

That order was certified for direct appeal to the Fourth Circuit Court of Appeals. The United States at this point submitted an amicus brief arguing that both the German liquidator and the U.S. creditors were incorrect.<sup>132</sup> The United States argued that the bankruptcy court’s initial ruling was correct: “[t]he fate of appellees’ licenses in the German insolvency proceeding is entirely, and properly, a question of German law. . . . As we explain below, a court in the United States may have occasion to decide, in a future case, whether to give effect to the rejection of appellees’ patent licenses as a matter of U.S. law. But the bankruptcy court had no authority, under Section 365(n) or otherwise, to dictate the results of the German insolvency proceeding.”<sup>133</sup>

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<sup>130</sup> *Id.*

<sup>131</sup> *In re Qimonda AG*, 462 B.R. 165, 182-185.

<sup>132</sup> Brief for the United States as Amicus Curiae in Support of Neither Party, No. 12-1802, Doc. #25.

<sup>133</sup> *Id.* at 21.

The Fourth Circuit affirmed on the creditor-protection point, holding that the bankruptcy court reasonably balanced the interests of all parties in determining that turnover of the assets without the licensee protections of Section 365(n) would not sufficiently protect the interests of the U.S. licensees.<sup>134</sup> It dismissed the United States’ argument, stating that the bankruptcy court did not “constrain the operation of German insolvency law in Germany” rather, “the bankruptcy court conditioned its grant of power to [the German administrator] to ‘administer the assets of Qimonda AG *within the territorial jurisdiction of the United States* with the limitation that he was taking the company’s U.S. patents subject to the preexisting licenses, which he was obliged to treat in a manner consistent with § 365(n).”<sup>135</sup> The court said this was not an extraterritorial application of U.S. law but a finding that the administrator must apply U.S. law in rejecting the U.S. patent licenses.<sup>136</sup>

Although the Fourth Circuit may have been correct that U.S. law should apply to the U.S. patents, it is not at all clear why the ancillary Chapter 15 court should make that choice of law decision instead of the German court. Although the Model Law is silent as to choice of law questions, there is a presumption at the very least the foreign proceeding would make this determination. The role of the ancillary court would then simply be whether to recognize the foreign court’s order or not. Thus, in Qimonda’s liquidation, the German court would apply German law to the licensing agreements and then seek to enforce

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<sup>134</sup> Jaffe, 737 F.3d at 29.

<sup>135</sup> Id. at 25 n.3.

<sup>136</sup> Id.



that order through the United States Chapter 15 petition. At that point, the court would then consider the local interests issues: would enforcing the order (a) balance the interests of the debtor and the creditors and/or (b) offend fundamental U.S. public policy.

Thus, while there are clearly local interests at play in *In re Qimonda*, there are also important interpretative questions here: namely, which court actually leads the worldwide administration of the multinational debtor’s insolvency – the foreign main proceeding or the ancillary proceeding? This is a step that the bankruptcy court initially undertook, albeit with little analysis, and that was later skipped altogether on appeal.

*B. In re Barnet*

This case arises from the Australian liquidation of the Octaviar Administration Pty Ltd (OA), in which Katherine Barnet and William Fletcher were appointed as liquidators. In seeking recognition, the liquidators averred that they “are not aware of any creditors of either OA or the Octaviar Group in the United States”<sup>137</sup> but that Chapter 15 relief would facilitate the liquidators’ investigation into potential assets in the United States “in the form of claims or causes of action against entities located in the United States.”<sup>138</sup> One of the potential subjects of the liquidators’ discovery efforts was Drawbridge Special Opportunities

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<sup>137</sup> *In re Octaviar Administration Pty Ltd (OA)*, No. 12-13443, (Bankr. S.D.N.Y. Aug. 13, 2012), Doc. #2, at 12.

<sup>138</sup> *Id.*

Fund LP, from whose Australian affiliates the liquidators were seeking to recover AUD \$210,000,000.<sup>139</sup>

Drawbridge objected to the recognition petition, arguing that OA was not eligible to be a debtor under the Bankruptcy Code because it was ineligible under Section 109(a).<sup>140</sup> The Bankruptcy Court overruled this objection, recognized the Australian proceeding as a foreign main proceeding, and certified the recognition order for direct appeal to the Second Circuit.<sup>141</sup> While that appeal was pending, the Bankruptcy Court granted the liquidators’ discovery motion. The Second Circuit then granted the application for direct appeal and stayed the discovery.

The Second Circuit applied a “straightforward” exercise of statutory interpretation to determine whether Section 109(a) applies to a debtor in a Chapter 15 proceeding.<sup>142</sup> The court reasoned as follows: Chapter 1 of the Bankruptcy Code (which includes Section 109(a))

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<sup>139</sup> Petitioner’s Response to Objection of Drawbridge Special Opportunities Fund LP to Verified Petition Under Chapter 15 for Recognition of a Foreign Main Proceeding, No. 12-13443, Doc. #16, at 3.

<sup>140</sup> Objection of Drawbridge Special Opportunities Fund LP to Alleged Foreign Representatives’ Verified Petition under Chapter 15 for Recognition of Foreign Main Proceeding, No. 12-13443, Doc. #13.

<sup>141</sup> Memorandum Opinion in Support of Certification of Direct Appeal to the Court of Appeals for the Second Circuit, No. 12-13443, Doc. #47.

<sup>142</sup> *Drawbridge Special Opportunities Fund LP v. Katherine Elizabeth Barnet (In re Katherine Elizabeth Barnet)*, 737 F.3d 238 (2d Cir. 2013). The court first worked through “an unusual jurisdictional thicket” before determining that Drawbridge had standing to appeal the recognition order. The court ultimately determined that Drawbridge had standing to appeal that order because the discovery order was appealable.

applies to Chapter 15; Chapter 15 governs the recognition of foreign proceedings; foreign proceedings are defined as “proceedings in which ‘the assets and affairs of the debtor are subject to control or supervision by a foreign court’”; therefore, a foreign proceeding may be recognized under Chapter 15 only if the debtor that is the subject of the foreign proceeding meets the requirements of Section 109(a).<sup>143</sup>

The court rejected the notion that the foreign representatives were not seeking recognition of a debtor but of a foreign proceeding “because the presence of a debtor is inextricably intertwined with the very nature of a Chapter 15 proceeding, both in terms of how such a proceeding is defined and in terms of the relief that can be granted.”<sup>144</sup> It also rejected the liquidators’ argument that Chapter 15’s chapter-specific definition of “debtor” overrides Section 109(a), as Section 109(a) deals with eligibility and not with the definition of “debtor.”<sup>145</sup> Finally, the court concluded that its conclusion was not inconsistent with the context or purpose of Chapter 15 and that it would not impair cooperation in cross-border insolvencies, as the liquidators could always obtain relief under 28 U.S.C. § 1782.<sup>146</sup>

As to the outcome of *Barnet*, the case is unlikely to make a lasting impact on Chapter 15 or to mark a major departure from the Model Law. Although it imposes a requirement on foreign debtors that is out of line with the Model Law, it is a requirement that can easily be circumvented. Following the Second Circuit’s opinion, the Octaviar liquidators filed a

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<sup>143</sup> *Id.* at 247.

<sup>144</sup> *Id.* at 248.

<sup>145</sup> *Id.* at 249.

<sup>146</sup> *Id.* at 251.

second Chapter 15 petition in the New York bankruptcy court, this time asserting U.S. property in the form of an undrawn retainer with local counsel and in the form of a U.S. legal claims.<sup>147</sup> The Drawbridge witnesses again objected, but the bankruptcy court held that this was sufficient U.S. property to satisfy Section 109(a)’s eligibility requirements.<sup>148</sup>

As to the methodology, however, *Barnet* shows a misplaced adherence to the plain meaning approach, failing to appreciate what many lower courts had expressed before: Chapter 15 cases are different in nature in that it is not a debtor seeking relief but a foreign representative.<sup>149</sup> Courts had found this to be true under the prior bankruptcy law and had concluded that Courts interpreting Chapter 15 had found that this had been true under Section 304 and “[t]here is no authority that the adoption of chapter 15 was intended to abrogate the availability of the tools of discovery to foreign representatives, whether or not the foreign debtor has assets in the United States.”<sup>150</sup>

*C. In re Fairfield Sentry*

*In re Fairfield Sentry* raised a question of interpretation regarding the center of main interests standard. Questions about the COMI determination are centrally important to the functioning of the Model Law. They have attracted substantial scholarly focus and

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<sup>147</sup> *In re Octaviar Administration Ptd Ltd.*, No. 14-10438 (Bankr. S.D.N.Y. Feb. 27, 2014).

<sup>148</sup> *In re Octaviar Admin. Ptd Ltd.*, 511 B.R. 361 (Bankr. S.D.N.Y. 2014).

<sup>149</sup> *See In re Millennium Global Emerging Credit Master Fund Ltd.*, 471 B.R. 342, 347 (Bankr. S.D.N.Y. 2012)

<sup>150</sup> *In re Toft*, 453 B.R. 186, 193 (Bankr. S.D.N.Y. 2011).

continue to do so, particularly as the UNITRAL Working Group V continues to work on guidelines for handling the especially complicated question of identifying the COMI of a corporate group.<sup>151</sup> *Fairfield* raised the specific question of whether the debtor's center of main interests should be ascertained as of the time it filed its foreign proceeding or at the time it filed its Chapter 15 petition. The focus of this analysis is more methodological, namely whether, and how, courts should use the Guide in engaging in this interpretation.

Fairfield Sentry was a major feeder fund of the Madoff funds, investing up to 90% of their money into the Madoff Funds. Fairfield was incorporated in the British Virgin Islands but all trading activity took place in New York City.<sup>152</sup> When the Madoff scheme imploded, Fairfield's shareholders commenced a liquidation proceeding in the BVI and all operations in New York ceased. Roughly a year later, the BVI liquidators filed a Chapter 15 petition in the Bankruptcy Court for the Southern District of New York, seeking recognition of the BVI proceeding as a foreign main proceeding under Section 1517.

Section 1517 provides that "a foreign proceeding shall be recognized as a foreign main proceeding if it is pending in the country

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<sup>151</sup> See e.g., Jay Lawrence Westbrook, *Locating the Eye of the Financial Storm*, 32 BROOK. J. INT'L L. 1019, 1019 (2007); UNCITRAL Working Group V (Insolvency Law) Forty-fifth session, New York, 21-25 April 2014, Facilitating the cross-border insolvency of multinational enterprise groups, at ¶¶ 1 – 3, <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V14/008/48/PDF/V1400848.pdf?OpenElement>.

<sup>152</sup> *Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.)*, 714 F.3d 127, 137 (2d Cir. 2013).

where the debtor has its center of main interests.”<sup>153</sup> The recognition analysis turned on a question of timing: if the relevant time for determining Fairfield’s COMI was the date its BVI proceeding commenced, then the COMI was arguably the United States, since that is where its business was conducted; if the relevant time was the date of the liquidators’ Chapter 15 petition, then the COMI would be the BVI, since the debtor had by that time ceased all activities in the United States and its only activities were its liquidation proceedings.

The Second Circuit held that the relevant time was at the time of the Chapter 15 petition, thus concluding that Fairfield Sentry’s COMI was in the British Virgin Islands. The court reasoned that Section 1517’s use of the present tense demonstrates Congress’s intent that the court should examine the debtor’s COMI at the time of the Chapter 15 petition.<sup>154</sup> In its analysis, the court considered that center of main interests might be interpreted as “principal place of business,” in which case the court ought to look at where the debtor conducted its business. Pre-Chapter 15, the Bankruptcy Code had a similar cooperation-based standard that used the language of principal place of business.<sup>155</sup> Chapter 15 abandoned this language, instead adopting “center of main interests.” While the House Report is silent as to the intent of this change in language, some courts had interpreted this change to a “center

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<sup>153</sup> 11 U.S.C. § 1517(b)(1).

<sup>154</sup> *In re Fairfield Sentry Ltd.*, 714 F.3d 127, 133 (2d Cir. 2013) (“The present tense suggests that a court should examine a debtor’s COMI at the time the Chapter 15 petition is filed. . . . It therefore matters that the inquiry under Section 1517 is whether a foreign proceeding “*is pending* in the country where the debtor has the center of its main interests.”)(emphasis in original).

<sup>155</sup> 11 U.S.C. § 101(23) (2000).

of main interests” standard as reflecting an intent to keep Chapter 15 consistent with the Model Law and not to depart from Section 304’s principal place of business standard.<sup>156</sup> For example, in In re Tricontinental and In re Millenium Global, the courts quotes the following language from Professor Westbrook, one of the drafters of the Model Law:

Chapter 15 was drafted to follow the Model Law as closely as possible, with the idea of encouraging other countries to do the same. One example is use of the phrase “center of main interests,” which could have been replaced by “principal place of business” as a phrase more familiar to American judges and lawyers. The drafters of Chapter 15 believed, however, that such a crucial jurisdictional test should be uniform around the world and hoped that its adoption by the United States would encourage other countries to use it as well.<sup>157</sup>

The Fairfield court rejected this line of reasoning, concluding instead that Congress, by replacing “principal place of business” intended to “abandon[] that provision in enacting Chapter 15.<sup>158</sup>

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<sup>156</sup> See e.g., In re Tri-Cont’l Exch. Ltd., 349 B.R. 627, 633 (Bankr. E.D. Cal. 2006) & In re Millennium Global Emerging Credit Master Fund Ltd., 458 B.R. 63, 72 (Bankr. S.D.N.Y. 2011); *but see* In re Ran, 607 F.3d 1017, 1025 (5th Cir.2010), In re British Am. Isle of Venice (BVI), Ltd., 441 B.R. 713, 720–21 (Bankr.S.D.Fla.2010); In re British Am. Ins. Co., 425 B.R. 884, 909–10 (Bankr.S.D.Fla.2010); In re Betcorp Ltd., 400 B.R. 266, 290–92 (Bankr.D.Nev.2009).

<sup>157</sup> *Id.* (both quoting Jay Lawrence Westbrook, *Chapter 15 at Last*, *supra* note 40 at 719–20).

<sup>158</sup> In re Fairfield Sentry Ltd., 714 F.3d 127, 135 (2d Cir. 2013)

Although the court found that this statutory text controls its interpretation, it proceeded to consider whether the Guide shed light on this timing issue.<sup>159</sup> As the court found, the Guide explains that “[s]ince the formulation ‘centre of main interests’ in the EC Regulation corresponds to that of the Model Law, albeit for different purposes (see para. 141), jurisprudence interpreting the EC Regulation may also be relevant to interpretation of the Model Law.”<sup>160</sup> The Guide then provides the relevant language from the EC Regulation: “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.”<sup>161</sup> The court gleaned from these sources that the most important factors regarding the “centre of main interests” standard are regularity and predictability from a third party creditor’s point of view. That is, the most important feature is that the debtor’s center of main interests should correspond with creditors’ ex ante expectations.

Having examined these principles from the Guide, the court then concluded that “[o]verall, international sources are of limited use in resolving whether U.S. courts should determine COMI at the time of the Chapter 15 petition or in some other way.”

The court’s analysis of the COMI timing issue reveals the same textualist approach as in *In re Barnet*. While *Barnet* is likely to have little

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<sup>159</sup> *Id.* at 136 (“Although the statutory text controls, first and ultimately, we consider international sources to the extent they help us carry out the congressional purpose of achieving international uniformity in cross-border insolvency proceedings.”).

<sup>160</sup> Guide, *supra* note 1, at ¶ 82.

<sup>161</sup> *Id.* at ¶ 83.



impact on Chapter 15 practice and outcomes, *Fairfield Sentry* may be more significant, as it effectively allows a company to liquidate in its chosen forum. More significantly from a methodological point, however, is the court’s treatment of the Guide. The court interprets the Guide as if it were interpreting legislative history, i.e., something to examine only to the extent the plain language of the statute is ambiguous.

Further, in interpreting the Guide, the court gives little or no weight to the drafters’ direction to consider the center of main interests standard in line with the way that term is used in the EC Regulation. The principles derived from that source clearly indicate that the center of main interests is to serve regularity and predictability to creditors. Predictability is important so that creditors can anticipate the governing law and adjust their behavior accordingly. This purpose clearly requires examining the creditors’ expectations as of the moment of lending, not at the moment an insolvency proceeding is commenced.

The court’s treatment of the Guide not only reflects a misunderstanding of its role in the Model Law schema but also a failure to engage in its content.

#### **IV. ANALYSIS**

As explored above and examined in these case studies, the problem of local methods poses a significant obstacle to the Model Law’s goals of uniformity and predictability. Due perhaps to lack of familiarity with the Model Law, courts may fall into the creditor consent fallacy, giving too much deference to foreign representatives seeking ancillary relief. And due to a commitment to textualism, courts may fail to properly interpret the Model Law or apply its Guide.

As with homeward trend problems generally, it is possible that the problems identified here will be ameliorated with greater awareness of cultural differences and greater familiarity with the Model Law.<sup>162</sup> Even though Congress adopted the Model Law nearly ten years ago, filings under Chapter 15 remain relatively infrequent, and the majority of these cases raise few issues. Thus, U.S. bankruptcy courts remain largely unfamiliar with Chapter 15, and federal district and courts of appeals judges less familiar still. One might expect then that some of these problems will simply disappear as courts become more fluent in the language of the Model Law.

Familiarity may very well help when it comes to case management issues. The contrast of the LoPucki and Morrison studies can be understood as showing that the bankruptcy system – courts, trustee, parties – adjusted to solve the problem of the “debtor in full control.” Potentially, with more time and exposure to Chapter 15, the bankruptcy system might likewise adjust case management and administration issues to the particular needs of Chapter 15. Judge Adler’s book is a significant step in that direction, potentially accelerating that familiarization process.

At the same time though, this learning curve may be cut short by appellate decisions such as the ones discussed above. Courts within those circuits – particularly the Second Circuit – are bound to those

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<sup>162</sup> See e.g. Sturley, *supra* note 67 at 801 (suggesting, without much optimism, that “[p]erhaps the identification and explanation of the problem and the role of domestic law in causing it will begin a process of increasing judicial awareness so that no more conflicts in interpretation will arise.”).

decisions. They are no longer free to observe how other courts both domestically and abroad are applying the Model Law.<sup>163</sup>

UNCITRAL may also adjust the Guide to address some of the case management and interpretation problems. The Guide, however, is limited by the uncertainty concerning the its role in interpreting the Model Law. To the extent courts treat it as legislative history, they are unlikely to reach the Guide or give it much weight. This limits the ability of UNCITRAL to continue developing this area of law. For example, in 2013, following *Fairfield*, UNICTRAL amended its Guide to clarify that COMI is to be measured as of the date of the foreign proceeding.<sup>164</sup> It is as yet unclear whether this change arrived too late to impact courts’ interpretation of Chapter 15, given that there is now a Second Circuit case on this issue.

Courts’ uncertainty about the proper role of the Guide in interpreting Chapter 15 is similar to the uncertainty regarding the proper role of the Official Comments to the Uniform Commercial Code.<sup>165</sup>

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<sup>163</sup> Lawrence Ponoroff, *The Dubious Role of Precedent in the Quest for First Principles in the Reform of the Bankruptcy Code: Some Lessons from the Civil Law and Realist Traditions*, 74 AM. BANKR. L. J. 173, 181(2000) (making this point regarding bankruptcy law generally, arguing that too many reported appellate decisions concerning the Bankruptcy Code “has hampered pragmatic and considered decisionmaking in the bankruptcy courts.”).

<sup>164</sup> 2013 Revised Guide at ¶ 31; see Report of the United Nations Commission on International Trade Law, Forty-sixth session (8-26 July), General Assembly, Official Records, Sixty-eighth session, Supplement No. 17, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V13/858/38/PDF/V1385838.pdf?OpenElement>.

<sup>165</sup> See Robert Braucher, *The Legislative History of the Uniform Commercial Code*, 58 Colum. L. Rev. 798, 808-09 (1958) (describing the

Although I came across no empirical studies on the use of the Official Comments, there seems to be a consensus that courts adjusted to the new scheme and generally follow the comments.<sup>166</sup> Court might likewise adjust and be found to generally follow the Guide over time. Indeed, the U.C.C. provides some example of this approach, as the Official Comments are frequently cited. Changes to those comments have also been linked to courts overruling prior case law.<sup>167</sup>

This adjustment requires time and experience with the Model Law. It further requires courts to develop an understanding of Chapter 15 as being distinct from the Bankruptcy Code in important ways. While Chapter 15 is embodied in the Bankruptcy Code and cross-references provisions of the Bankruptcy Code, its origins as an international model law give it a distinct character. Congress has instructed U.S. bankruptcy courts to interpret Chapter 15 consistently with foreign courts’ application of the Model Law; and the Model Law recognizes the Chapter 15 case law as precedential abroad. As Van Alstine has argued in the context of the CISG,

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uncertainty about the use of the comments); *see also* Robert H. Skilton, *Some Comments on the Comments to the Uniform Commercial Code*, 1966 Wis. L. Rev. 597 (1966).

<sup>166</sup> 58 Ohio St. L. Jr. 419, 441 (citing James J. White & Robert S. Summers, UNIFORM COMMERCIAL CODE at 13.)

<sup>167</sup> *See* David Frisch, *Commercial Common Law, the United Nations Convention on the International Sale of Goods, and the Inertia of Habit*, 74 TUL. L. REV. 495, 529 (1999) (describing the interpretative problems in the well-known case of *Roto-Lith, Ltd. v. F.P. Bartlett & Co.*, 297 F.2d 497 (1st Cir. 1962), how the courts adjusted to the new Uniform Commercial Code, and the drafters changed the relevant Official Comments, all leading to the First Circuit’s reversal of *Roto-Lith* in by *Ionics, Inc. v. Elmwood Sensors, Inc.*, 100 F.3d 184 (1st Cir. 1997)

Properly appreciated, this approach amounts to a delegation of lawmaking authority to the courts. But the unique element is the international dimension. Bolstered by a mandated deference to the needs of uniformity, the 'general principles' methodology sanctions participation by courts in this country in the fashioning of an international common law around the frame of an international convention.<sup>168</sup>

U.S. courts should likewise recognize that Congress, by enacting the Model Law, has delegated to U.S. courts to fashion an international common law of cross-border insolvency. Understood in this way, the role of the Guide as providing a set of general principles becomes clear.

## V. CONCLUSION

Maintaining uniformity in cross-border insolvency law requires, in part, an understanding of how courts are likely to defect from the law's language and purpose. While most of the commentary in the Model Law field has focused on the territorialist instinct to protect local interests, the cases discussed in this article suggest that courts may defect even when local interests are not at stake. Interpretative differences between the domestic bankruptcy law and the Model Law may lead some courts to depart from the Model Law. Further, courts may diverge from the Model Law due to their style of case management.

may be the result of a lack of familiarity with the Model Law. Since cross-border insolvency proceedings are novel, courts are more

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<sup>168</sup> See Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687, 792 (1998) (arguing for such an international common law in the context of the CISG).

likely to view them, at least initially, through the same interpretative lens as applied to traditional bankruptcy cases. Courts are also likely to manage cross-border cases in the same way they manage traditional cases. As courts become more familiar with the Model Law, this may change, as there is already some evidence to that effect.

At the same time, it is important to consider case management issues, both at the domestic level and the UNCITRAL working group-level. Domestically, courts may begin to develop special case management styles appropriate to the Model Law. The UNCITRAL working groups may also consider adding case management recommendations to the Guide, in order to provide for greater international uniformity on this issue. Such changes may both increase awareness of the importance of cultural differences and provide for greater predictability in how courts will administer ancillary proceedings and interpret the Model Law.