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Article

***1** MULTINATIONAL ENTERPRISES IN GENERAL DEFAULT: CHAPTER 15, THE ALI PRINCIPLES, AND THE EU INSOLVENCY REGULATION

Jay Lawrence Westbrook [FNa1]

Not since the economic catastrophe of the second and third decades of the Twentieth Century has there been so much worldwide concern with the reform of laws governing the general default of an enterprise. It may even be necessary to go further back, to the late Nineteenth Century, to find a fully comparable period of interest and activity in reform of those laws. Germany, Japan, and Mexico are just three of the countries who have rewritten their domestic laws in the last decade. [FN1]

During that same time, the interest in reform has expanded beyond domestic laws to international cooperation and coordination. The steady expansion of international trade has become perhaps less significant than its consequence, the growth of multinational enterprise, which in turn has lead inevitably to the increased incidence of multinational financial failure. The legal response has produced the three important legal texts discussed in this ***2** article: [FN2] the UNCITRAL Model Law on Cross-Border Insolvency (the "Model Law"), [FN3] the American Law Institute's Principles of Cooperation in Transnational Insolvency Cases Among the Members of the North American Free Trade Agreement (the "ALI Principles"), [FN4] and the European Union Insolvency Regulation (the "EU Regulation"). [FN5] An Americanized version of the Model Law is pending adoption as a new Chapter 15 of the United States Bankruptcy Code, [FN6] a proposal that has been part of every version of the pending bankruptcy legislation passed by either House. [FN7] The EU Regulation has been adopted as positive law applicable throughout the European Union (the "EU"). The ALI Principles have been finally approved by the Institute and will be published in 2002.

Although the international legal reform efforts that led to these three texts arose at about the same time, in the early to mid-1990s, the Model Law is conceptually prior, because it represents a global standard. The EU Regulation, however, was the first completed and served as the source of some of the key concepts adopted in both the Model Law and the ALI Principles. On the other hand, the ALI Principles, the last to be approved, in some important respects represent the next generation of reform.

The EU Regulation can trace its origins to a draft convention proposed in 1982 after eleven years of work, but doomed almost from the start. [FN8] The project was revived in the 1990s and led to a new, more modest proposal, ***3** which was originally proposed as a treaty to be adopted by each of the EU members but ultimately took the form of a Regulation, a form of EU law directly applicable in each member state. When a debtor in an insolvency proceeding has its center within the EU, the Regulation establishes jurisdictional rules, as well as choice-of-law rules and rules for cooperation among the EU courts concerned. There is an extensive literature in English concerning the various provisions of the EU Regulation. [FN9] This Article will discuss only some of them in the process of comparison with the Model Law and the ALI Principles.

The background to the Model Law begins with a bold project at UNCITRAL, the United Nations Commission on

International Trade Law. With the assistance of various nongovernmental organizations ("NGOs"), notably INSOL International ("INSOL"), led by its former president, Richard Gitlin, UNCITRAL convened a Working Group to develop a Model Law on Cross-Border Insolvency. Although many around the world expressed the conviction that this effort was doomed from the start, a remarkable group of delegates from some forty countries, with the intelligent support of their governments, succeeded in creating a Model Law that was adopted by the Commission in 1997. That it did so in about two years was simply amazing for an international undertaking of this kind. Beyond doubt, an important factor in this achievement was the expertise developed by the delegates from the EU member states in the course of creating the EU Regulation. The Model Law was heavily influenced by the Regulation and follows its lead in many respects. It is unlikely the enterprise could have succeeded so quickly, if at all, without this influence and expertise.

Substantively, the relationship of the Model Law to the regional efforts represented by the EU Regulation and the ALI Principles is that it is more modest in its goals but more global in its application. Within the EU, its importance lies in defining the relationship between the EU countries and the rest of the world in insolvency cases. For the North American Free Trade Agreement ("NAFTA"), it can serve the same function vis-à-vis the rest of the world, but it is also important as a foundation and backdrop for the application of the ALI Principles among the NAFTA countries.

When the Model Law was promulgated, the view was expressed that it ***4** was all very well as an educational enterprise but would never be adopted by states with important commercial economies. [FN10] Yet in less than four years, the Model Law has been adopted by several important commercial countries and has strong prospects of adoption by more leading jurisdictions in the near future, including ourselves. Its adoption has been recommended by a number of influential international organizations, notably the International Monetary Fund [FN11] and the World Bank. [FN12] At this early stage, it would appear to be an idea whose time has come.

The newest of the reform texts, the ALI Principles, is a product of the Institute's Transnational Insolvency Project, which has also produced international statements of the bankruptcy laws of the three NAFTA countries, [FN13] Canada, Mexico and the United States. It arose from a conviction that a private-sector initiative could produce principles and methods of cooperation that would assist in multinational bankruptcy cases within NAFTA, by giving bench and bar a workable baseline of agreed approaches to such cases. The ALI Principles were developed by experts from all three NAFTA countries and include samples of guidelines and protocols for real-time communication and cooperation among courts and trustees. They are discussed in more detail below.

This Article places these three texts in the context of the continuing theoretical debate between universalism and territorialism; briefly reviews the provisions of the Model Law; discusses the philosophy underlying Chapter 15, the proposed version of the Model Law pending adoption in the United States; identifies some key aspects of the versions of the Model Law adopted in Japan, Mexico, South Africa, and the United Kingdom and being considered elsewhere; and compares the two leading regional initiatives--the EU Regulation and the ALI Principles of Cooperation--in the context of the Model Law.

I. THEORY

The first task is to place a discussion of these texts in a theoretical context, at least in brief summary. They each address the management of a general default by a multinational enterprise. [FN14] In every well- developed legal ***5** system around the world, a general default [FN15]--as contrasted with nonpayment of an individual debt--invokes a specialized legal regime of the sort variously called in English "bankruptcy" or "insolvency." [FN16] Under such regimes, control of the debtor's affairs becomes subject to some management system different from the normal one, and a variety of specialized procedures and legal doctrines come into play for the benefit of those who are defined as stakeholders in that regime. [FN17] While legal systems vary considerably in their approach to this task, most well-developed systems react to the problem of general default in a reasonably effective way. [FN18] By contrast, no legal system has developed a very efficient and effective way of managing the general default of a multinational enterprise with assets and stakeholders in more than one country. Indeed, in principle such a system cannot be achieved by one country acting alone. It is this problem which these three texts address.

A. UNIVERSALISM AND TERRITORIALISM

There have long been two theoretical positions with respect to multinational default: territorialism and universalism. Territorialism contemplates that each country would seize local assets and apply them for the benefit of local creditors, with little or no regard for foreign proceedings. It rests upon a notion of national sovereignty, but its central characteristic is the idea of "vested rights," which has also been at the heart of traditional ideas of private international law (conflicts of law, in United States terminology). [FN19] In this approach, national sovereignty imposes the law of the sovereign on all within its territorial reach, and that law grants vested rights in assets so situated at the time an insolvency proceeding is instituted. Thus the law of the situs controls the distribution of those assets, a system which was assumed to benefit local creditors. Given that system, the local law was generally applied ***6** to all or most issues, not merely distribution. [FN20]

By contrast, universalism is considered a system in which one court administers the insolvency of a debtor on a worldwide basis with the help of the courts in each affected country. One traditional idea was in rem jurisdiction, so that one court would enjoy jurisdiction over the entire "estate" of the indebted company, an idea often coupled with the idea that an insolvent debtor's assets were held for the benefit of creditors. The requirement to resolve property (in rem) questions made it necessary for one court to make all decisions involving the debtor's assets. Universal jurisdiction flowed from that central idea.

A more modern rationale for the universalist approach was recently stated by the present author:

The central theoretical point is "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.

Many legal systems vary within a market. They may differ regionally, as with common law tort rules governed by state law in the United States. The contract systemallows for enormous variation by virtue of publicly enforced private law created by contract. There is also considerable variation by industry, through both legal enactments and public enforcement of private codes and standard terms. Although there are always pressures to unify law to one degree or another at the level of the entire market, countervailing pressures to maintain local autonomy, party autonomy, and industry practices typically yield a pragmatic compromise in each field.

On the other hand, there are legal systems that cannot function effectively unless their scope is symmetrical with the market. That is, they must govern the interests of all parties throughout the market whose interests may be implicated. A common example of such a system is the law of intellectual ***7** property, which in virtually all jurisdictions is co- extensive with a national market and which imposes rules that govern the rights of all potential stakeholders, whether or not they have contractual relationships inter se. Such systems are often, but not invariably, considered to operate in rem, which may be a label reflecting the need to govern the rights of all possible stakeholders throughout a market.

A legal system that requires a market-wide application may nonetheless permit a considerable amount of variation by contract, by regional or industry rules, or otherwise, but it is characteristic of such systems that they have a core of rules that cannot be governed by contract or other submarket systems precisely because those rules must apply throughout the market to achieve their functional purposes.

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 .... [V]irtually 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. To achieve that result, it is necessary that the bankruptcy law cover the entire market in which the debtor company operates, and bind all of its participants. It is therefore unsurprising that virtually every country has established a national bankruptcy regime co-extensive with its national market. Most tellingly, as with intellectual property law, virtually all federated countries, including those (like the United States) that give considerable autonomy to regions (states) in business and commercial matters, nonetheless insist that the bankruptcy regime be national, to fit the national dimensions of the market. [FN21]

***8** It is highly significant that the EU Regulation states that its adoption is necessitated by the integration of the internal market, which is another way of saying the same thing. [FN22] From this fundamental idea follows the conclusion that a globalizing market requires a globalizing insolvency law; that is, as the market moves toward global dimensions, insolvency law must also become steadily more global.

Although many academic theorists have favored universalism in international insolvency matters, the practice of states has for the most part followed territorialism or, as it is sometimes called, the "grab rule." Indeed, some states, including the United States, went farther to adopt an asymmetric rule that gave their own courts universal, worldwide jurisdiction, while refusing to recognize international jurisdiction in other states.

In recent years, however, the expansion of global markets and of global ideas has moved the debate decisively in the direction of universalism. [FN23] In the United States, universalism is very generally accepted. Even the small minority of academics who defend territorialism make a narrow, pragmatic argument. They agree that universalism is the correct theoretical answer and that it must prevail in the long run, but they argue that day will be long in coming. [FN24]

In the meantime, they argue for "modified territorialism" as an interim solution. Their pragmatic argument starts with the great diversity of insolvency regimes around the world, even in well-developed legal systems. The territorialists claim that universalism cannot prevail until these insolvency regimes have been harmonized, which will take a very long time. Although this argument is pragmatic, it is combined with a contention that amounts to the old "vested rights" idea, so that creditors in each sovereign territory are claimed to be entitled to rely on local rules of distribution, even though the local availability of valuable assets will often be fortuitous and unpredictable and will grow even more unpredictable as assets become ever more quickly transferable from country to country. Their concession to the needs of the global market is to introduce "cooperative territorialism," in which domestic courts engage in coordination with other courts for particular pragmatic purposes, such as the sale of scattered assets in a unified transaction in order to maximize value. In virtually all legal respects, however, they would have the courts cling to territorialism in the traditional sense.

***9** The universalists respond to the pragmatic argument of the territorialists with "modified universalism." [FN25] There is no doubt that national insolvency laws differ greatly, especially as to priority in distribution, and that these differences will continue to exist for some time. Modified universalism responds to this difficulty by proposing a pragmatic development of universalism, moving toward the ultimate goal within the practical limits established by the markets and by local laws at any particular time and place. But to say this position is pragmatic is not to say it lacks principle or direction. On a national legislative level, it presses for less rigid rules for multinational debtors. Under existing laws, it adopts a worldwide perspective that seeks results as close to those achievable under a true universalism as national laws will permit in the circumstances of each case.

This view rejects any notion that persons who deal with multinational companies have "vested rights" in application of their local law, arguing that those who contract with such companies have every reason to understand that local law will be of limited value in protecting them in such contracts in the event their debtor goes into general, worldwide default. [FN26] While its proponents have an appreciation of the need to make special provision for victims of tort and for consumers, they argue that even that protection should rest on the common policies found in most jurisdictions, rather than on some notion of "vested rights" in mostly transient assets. Indeed, universalists argue that weak local creditors, and the local policies designed to protect them, are more likely to be predictably protected across a number of cases under a universalist regime than under a territorialist one. [FN27]

The approval of modified universalism in the ALI Principles of the American Law Institute, which are discussed later, confirms the general acceptance of the modified-universalism approach in the United States. Whether or not it is accepted theoretically elsewhere, the trends in law reform around the ***10** world suggest that its approach is gaining the approval of knowledgeable people in a number of countries.

B. ANCILLARY AND PARALLEL PROCEEDINGS

The taxonomy of transnational insolvency requires one more classification that does not perfectly parallel universalism and territorialism. There are two procedural approaches to cooperation with a foreign main insolvency proceeding. One is the "ancillary proceeding" approach and the other is the "parallel" approach. [FN28] The ancillary method provides for a special proceeding in the case of a foreign debtor. An ancillary proceeding is not a full domestic insolvency, with its great array of rules, including priorities in distribution, but rather a limited proceeding which has as its central purpose rendering assistance to the foreign main proceeding in the country of

the debtor's "main interests." Naturally, the use of an ancillary proceeding will require the local court to be satisfied that creditors will be fairly treated in the foreign proceeding, [FN29] but once that hurdle is surmounted, then the whole focus of the proceeding is away from domestic law and in favor of aiding the foreign court. The ancillary approach has two advantages. First, it is apt to be cheaper, swifter, and more efficient because it does not invoke all of the complications and requirements of a full insolvency case. Second, because all the local rules do not apply, it permits coordination of a worldwide resolution (as, for example, in the Maxwell case [FN30]), a resolution that is often much more difficult when local priority rules and other provisions of a mandatory nature must be applied. [FN31]

The alternative is the parallel proceeding, in which there are full domestic insolvencies in each of the countries concerned, but the judges seek to coordinate and cooperate in their administration. Often this approach is supported as more likely to protect local creditors, [FN32] but that argument is unpersuasive. In virtually all well-developed legal systems foreign creditors are given generally ***11** equal status with local creditors, including the right to begin full local proceedings and to insist upon the application of local rules concerning priority in distribution and other matters. Because foreign creditors have these rights, if a full local proceeding has any important effect, it is to benefit those creditors, both local and foreign, who will achieve better results under local rules, while disadvantaging those creditors, both local and foreign, who would achieve better results under the foreign main proceeding. Thus the effect of a parallel approach, if any, is to privilege local law, but not necessarily to benefit local creditors. [FN33] Furthermore, even if it were desirable (which it is not) to discriminate against foreign creditors in favor of local creditors in a parallel proceeding, it is increasingly difficult to do so, because in a globalizing world the distinction between foreign and domestic creditors is increasingly blurred. [FN34]

There is a subcategory of the parallel proceeding, which is the "secondary proceeding." A secondary proceeding may be understood as a parallel proceeding (that is, a full local insolvency) which goes beyond mere coordination with other jurisdictions by requiring the local proceeding and local law to defer in some respects to a foreign main proceeding. This is the approach of the EU Regulation, as discussed below. The degree of deference to the main proceeding may be placed on a spectrum from very limited deference to great deference. At the former end, the secondary proceeding is an instance of the parallel- proceeding approach, while at the latter, great-deference end it comes closer to being an ancillary proceeding. For this reason, it is not possible to say, as one might be tempted to do, that the ancillary approach and the parallel approach represent modified universalism and cooperative territorialism respectively. The use of parallel proceedings as secondary proceedings can be ***12** consistent with modified universalism, depending on the extent to which the secondary proceeding defers to the main proceeding and therefore is truly secondary.

Thus the theoretical approach taken to transnational cases by any legal system can be placed within a four-box matrix with universalism and territorialism on one axis and ancillary and parallel on the other, although the box "territorial and ancillary" may be empty.

II. THE MODEL LAW [FN35] AND CHAPTER 15

As noted above, the proposed Chapter 15 of the Bankruptcy Code is the United States version of the Model Law. This Part summarizes the provisions of the Model Law as promulgated by UNCITRAL and then discusses the fundamental principles that were followed in producing Chapter 15.

A. THE MODEL LAW

The Model Law's thirty-two articles can be grouped and summarized by subject, at least as to the central points. [FN36] The key divisions of the Model Law are as follows: (a) scope; (b) general provisions; (c) access; (d) recognition; (e) effects of recognition; (f) treatment of foreign creditors; (g) cooperation and communication among proceedings in several countries; and (h) coordination of parallel proceedings.

1. Scope

The recognition, nondiscrimination, and cooperation procedures undertaken by the enacting state in adopting the Model Law extend to any proceeding "relating to insolvency," if the proceeding is "collective" and the debtor's assets and affairs are subject to court supervision or control. The definitions are carefully constructed to include debtor-in-possession reorganization proceedings in Latin American countries, the United States and elsewhere, and a debtor in possession is included in the definition of a "foreign representative" as a "body" authorized to administer the proceeding. Both reorganization and liquidation are covered, and no specific finding of the debtor's insolvency is required.

"Interim" proceedings of the sort commonly found in Commonwealth countries are also included, as are nonjudicial procedures found in some countries, ***13** if those procedures otherwise conform to the foregoing definition. Individual creditor actions, like attachment and garnishment, are excluded. Also excluded are the insolvencies of entities, like banks and insurance companies, that are subject to a specialized insolvency regime in the enacting state. It is contemplated that a separate convention or model law will be developed for these kinds of insolvencies, with the Model Law as the starting point.

2. General Provisions

This potpourri of provisions includes two reasons for a state to hold the law inapplicable in a given case: public policy (very narrowly construed) [FN37] and conflicting treaty obligations. [FN38]

Two articles of the Model Law are administrative. One designates the court or other authority which will implement the Model Law in the adopting jurisdiction. [FN39] This provision is included so that there will be a clarity of jurisdiction and transparency of procedure from the perspective of a foreign trustee. [FN40] The second administrative article [FN41] provides a general authorization for insolvency administrators to act in foreign jurisdictions as necessary and within the limits of the foreign law.

Two articles emphasize the international and cooperative spirit of the Model Law. One urges the courts in the adopting state to seek uniformity with other adopting states in the interpretation of the law. [FN42] The other article permits the courts of the adopting state to provide any additional assistance to the foreign representative that may be available under other laws of the adopting state. The effect is to preserve the benefits of preexisting statutes or court decisions in the adopting state that may provide better cooperation under certain circumstances than would the Model Law. [FN43]

3. Access

The Model Law gives a "foreign representative" the right to appear in local courts, a right denied or subject to elaborate diplomatic requirements in many states. In addition to the general right under article 9, two articles give the foreign representative standing to initiate a local insolvency or to participate ***14** as of right in an existing local insolvency proceeding. [FN44] If, after recognition, the foreign representative initiates an insolvency proceeding, there will be a presumption of insolvency under article 31.

4. Recognition

Recognition of a foreign representative is presently a long and expensive process in many countries. Articles 15-17 of the Model Law are designed to make the recognition process as simple, fast, and inexpensive as possible. The only showing necessary is that the applicant for recognition be a duly approved foreign representative in a foreign proceeding, as defined in article 2, and this showing can be made by presentation of formal certificates of the foreign court or certified copies of its decision. [FN45] Those documents may be presumed to be genuine and accurate as to their factual determinations unless shown otherwise. [FN46] Thus recognition can be reduced to a simple documentary process, unless challenged by an interested party. Here, as elsewhere, the nature and scope of notice required to be given to creditors and others is left to local procedural law.

The Model Law requires recognition of both "main" and "nonmain" proceedings, although a representative in a

nonmain proceeding is entitled to far less assistance. A main proceeding is defined in article 2 as a proceeding in the debtor's home country, which is the jurisdiction that is "the center of its main interests." It is presumed that a company's place of incorporation is the center of its main interests, unless proof to the contrary is offered. [FN47] A proceeding in a country other than the debtor's home country (i.e., a nonmain proceeding) must be recognized only if the debtor has an "establishment" in that country. [FN48] An establishment is defined in article 2 as a "nontransitory" place where the debtor operates with "human means and goods or services." All this was taken from the EU Convention on Insolvency (now the Regulation).

Although recognition is required upon a proper showing, the local court retains broad discretion under articles 6, 17, 19 and 22 to revoke or modify recognition or to revoke or modify the relief granted to the foreign representative. At several points, the court is required to consider the interests of creditors, including local creditors, and of other interested parties, including the debtor. The repeated references to protecting creditors and others reflect the anxiety of the UNCITRAL delegates that the local courts be vigilant to ***15** protect all the interests concerned. [FN49]

5. Effects of Recognition

Article 19 of the Model Law permits a foreign representative to apply for temporary emergency relief while an application for recognition is pending. Thereafter, if the foreign proceeding is recognized as a foreign main proceeding (i.e., a proceeding in the debtor's home country), recognition produces certain mandatory effects. [FN50] A stay comes into effect restraining all lawsuits and creditor enforcement actions and all transfers of interest in the debtor's assets. The key point is that the extent of the stay, the exceptions to the stay, and the procedures for "lifting" or nullifying the stay in whole or in part, are all provided with reference to the equivalent moratorium under local law. Paragraph 1 of article 20 establishes the reach of the stay, including halting lawsuits, executions (including secured creditor actions), [FN51] and transfers of interests in the debtor's property, but it is subject to the limitations on an insolvency stay that would apply under local insolvency laws. It does not restrain the bringing of lawsuits for the sole purpose of preventing termination of rights nor the initiation of a local insolvency proceeding. On the contrary, the stay may be modified or terminated as a result of the opening of a local proceeding involving the same debtor. [FN52]

Article 21 provides the local court with broad power to cooperate with the foreign proceeding. That power includes turning over assets to the foreign representative for management or realization within the adopting state and for distribution of the assets or their proceeds. The court is also authorized to help the foreign representative in searching for assets, including obtaining information and evidence to the extent permitted by local law. Article 21 also permits a foreign representative in a nonmain proceeding, who is denied the "semi-automatic" stay under article 20, to seek a stay or other assistance. However, the help is limited to assets or transactions that the recognizing court determines have an appropriate relationship to the nonmain proceeding, applying the law of the recognizing court.

Recognition also gives the foreign representative the right to intervene in actions to which the debtor is a party, although not as a substitute for the debtor, [FN53] and gives the representative standing to bring avoidance actions ***16** available under local insolvency law. [FN54]

6. Treatment of Foreign Creditors

As a general rule, the Model Law requires "national treatment" of foreign creditors. That is, they are generally to be treated in the same way that local creditors are treated, including the right to commence and participate in a local insolvency proceeding. This sweeping requirement of nondiscrimination has an important exception, however, in that it leaves open the question of discrimination in the application of priorities in distribution. [FN55] While this exception to the nondiscrimination principle was thought necessary, it was important to limit the exception by establishing a minimum level of fair treatment. That minimum requirement of nondiscrimination means that a foreign creditor must be treated in a distribution at least as well as a general, unsecured creditor, if a similarly situated local creditor would receive at least that treatment. It also leaves to the enacting state, as an option, whether to accept foreign tax claims in an insolvency.

These priority issues create substantial barriers to international cooperation in insolvency matters. [FN56] What is most important here is that the Model Law does not require or even authorize discrimination against foreign creditors as to distribution preferences; it is merely silent on the subject, leaving it to local law. [FN57] The same is true of allowance of foreign revenue claims; the Model Law simply takes no position, although its general spirit of equal treatment may have some influence.

7. Cooperation and Communication

Chapter IV of the Model Law deals specifically with cooperation among courts and administrators. Two articles, one for courts and one for administrators, require cooperation by local authorities with foreign ones, to the extent that something as intangible as "cooperation" can be required. Realizing that this notion of an active cooperation with foreign authorities is in many countries a new and somewhat strange idea for courts and court-appointed officials, article 27 provides specific authorization for certain types of cooperation, including communication of information and approval of the "protocols" ***17** (agreements among the parties) that are increasingly important in transnational cases.

Both courts and administrators are specifically authorized to communicate directly with foreign counterparts. These provisions were the subject of much debate, but in the end a number of delegates who were hesitant at first became persuaded that a modern financial crisis requires full exploitation of modern methods of communication. It was also understood that local ideas of due process and natural justice would provide appropriate procedures and safeguards for this communication. The ALI Principles provide guidelines for such communications, discussed below. [FN58]

8. Coordinating Concurrent Proceedings

The articles just discussed may involve cooperation and communication among courts where ordinary lawsuits are pending, among ancillary proceedings, among concurrent full insolvency proceedings, or among any combination of the foregoing. Articles 28-29, by contrast, deal with the specific problem of coordinating multiple full insolvencies. It was a sine qua non of achieving the Model Law that local insolvency proceedings involving the same debtor could trump foreign proceedings, although that concession was mitigated by the authority of the foreign representative to intervene in the local proceeding under article 12. The potential primacy of the local insolvency case is provided by the requirement that orders in favor of the foreign representative must be made consistent with the existence of the local proceeding, including modification or termination of relief that had been previously granted to the foreign representative as necessary. Article 29 also provides that the semi- automatic stay of article 20 will be inoperative or reduced in light of a local full insolvency. A preference for the local proceeding is clear. On the other hand, this requirement is stated in the context of a strong emphasis on cooperation and coordination with the foreign proceeding and does not preclude deference to the foreign proceeding. Thus trumping the foreign proceeding is authorized, but is subject to the opportunity to defer if cooperation and coordination would best be served by deference.

There are two modestly deferential elements in these articles, beyond the general requirements of cooperation. One is that local nonmain proceedings govern only local assets, once a foreign main proceeding has been recognized. [FN59] The other is that the Model Law precludes initiation of a subsequent local proceeding after recognition of a foreign main proceeding, unless there are assets within the local territory.

Article 30 addresses coordination where more than one foreign proceeding ***18** seeks recognition. If one of them is a foreign main proceeding, it is given primacy.

9. Distributions in Multiple Proceedings

Article 32 provides a distribution rule of the sort called a "hotchpot" rule in common-law jurisdictions. A creditor that receives a distribution in a foreign insolvency proceeding must stand aside in a local distribution until

creditors of the same class (under local law) have gotten as much from the local proceeding as the first creditor got from the foreign one. Of course, distributions will be equal within the class from that point on. Thus if X, a general unsecured creditor who is owed $100, received $5 in a foreign proceeding and the distribution to general creditors in a local proceeding involving the same debtor was 15%, assuming creditor X would be classified as a general creditor without preference in both proceedings, creditor X would receive $10 locally, putting creditor X's distribution proportionately equal to the other general creditors at a 15% overall dividend.

B. CHAPTER 15

1. Overview of Chapter 15

The proposed legislation would create a new chapter of the Bankruptcy Code, Chapter 15, called "Ancillary and Other Cross-Border Cases." [FN60] It seems clear the House report on Chapter 15, which is more detailed and precise, will be the dominant source of legislative history, if the legislation is passed in something close to its present form, as is likely, [FN61] at least as to Chapter 15.

2. Important Features of Chapter 15

The three most important features of the United States legislation are the attempt to follow the Model Law's language and intent as closely as possible; the emphasis on an ancillary rather than a parallel approach; and the exclusion of small, natural person debtors.

a. Conformity with the Model Law

Chapter 15 tracks the Model Law from start to finish. The drafters even maintained the numbering of the original law, so that section 1501 of Chapter ***19** 15 adopts article 1 of the Model Law and so on. [FN62] They made a conscious effort to avoid changing the Model Law's language even where different formulations would fit more easily the United States statutory style and practice. For example, the definitions section of Chapter 15, section 1503, defines a foreign main proceeding in the exact language of the Model Law, even though the phrase "center of its main interests" is quite different from the usual United States formulation for a similar idea. Although various American commentators argued for a change to a more usual formulation, so as to give the United States courts a familiar phrase to interpret, the drafters decided that it was more important to have a uniform worldwide phrase (at least in English) for such a central point. Similar decisions to follow the Model Law's organization and language were made throughout Chapter 15, despite frequent comments in favor of change. [FN63]

Nonetheless, there are a number of changes in the wording of the Model Law as it is found in Chapter 15. Even with a strong commitment to the original, the drafters found that fitting the Model Law into the United States legal system required wording changes and additional provisions in sections where no substantive change in the policy of the Model Law was intended. A routine example is the definition of "establishment." [FN64] The United States version employs the concept of a place of operations "where the debtor carries out a non-transitory economic activity," the language of the Model Law definition, but omits the Model Law's additional phrase "with human means and goods or services." The reason for the omission was a fear, which the drafters concluded was well-founded, that United States courts would find this phrase so unusual that it might lead to unintended results, whereas the simple idea of "non-transitory economic activity" would likely be interpreted by the United States courts in the way the Model Law drafters had intended. Another example is the addition of a narrow definition of a "debtor" for the purposes of Chapter 15 as an entity in a foreign proceeding, [FN65] a definition not found in the Model Law. Because the word "debtor" is used throughout the Bankruptcy Code to mean the entity that is the subject of a domestic insolvency case, without this definition the use of "debtor" in Chapter 15 would have been hopelessly confusing. [FN66]

Those changes that are not merely semantic are usually procedural and ***20** are not meant to change the substance of the Model Law. A good example is a change in § 1514, concerning notification to creditors with

foreign addresses. It largely follows the language of article 14 of the Model Law, but it does not require that the notice form provide for a "reasonable time" for a creditor to respond to the notice by filing a claim. The reason is that United States policy generally provides fixed times for required responses, like the filing of claims in insolvency, and those time periods are usually prescribed by rules of court, rather than in a statute. Thus § 1514(d) instructs the rulemakers to adopt a time for foreign creditors to respond that will be "reasonable" for a foreign creditor. The result is the same, but the procedure conforms to United States law and practice. [FN67]

Because of the necessity for these changes in wording, and occasional changes in substance, the drafters have gone to considerable lengths to explain the reasons for each significant change from the wording of the Model Law. The House Report gives fairly detailed explanations, with references to United States law and to the Guide to Enactment. [FN68] These comments look in two directions. They repeatedly refer the United States judges to the Guide for discussion of the purposes and intent of particular provisions. At the same time, however, these comments are meant to speak to foreign lawyers and judges to explain why Chapter 15 has different language, distinguishing the many cases where no substantive change is intended from the few cases in which a change in language is meant to achieve a substantive difference.

The few substantive changes that are intended are discussed specifically in the House Report. An example discussed below is the exclusion of natural persons who are United States persons and who have only small debts. Any apparently substantive change not identified as such in the House Report is meant to be procedural only and is not meant to change the substance of the Model Law.

b. Ancillary Approach

The distinction between an ancillary and a parallel approach to transnational cooperation was discussed earlier. [FN69] The United States Code, under § 304, has long followed the ancillary proceeding approach. That tradition will undoubtedly be continued, and perhaps even strengthened, by the adoption of Chapter 15, despite the fact that § 304 will be formally repealed by its adoption. There are three clear manifestations of this fact.

***21** The first and most important manifestation is found in the fact that a companion provision to § 304 will not be repealed. Section 305(a)(2) of the Code permits a United States court to suspend or dismiss a full domestic bankruptcy whenever a foreign proceeding satisfies the requirements of § 304. That provision will be amended to provide for suspension or dismissal whenever there has been recognition of a foreign proceeding under § 1515 and the purposes of Chapter 15 would be best served by a suspension or dismissal. This provision enables the United States courts to eliminate a local parallel proceeding, with its attendant disadvantages for international coordination, whenever a foreign proceeding has been recognized. This power, which has been exercised under present law, [FN70] permits the courts to emphasize an ancillary role where a foreign main proceeding is involved. The retention of this provision and its direct linkage to recognition under Chapter 15 indicate a strong commitment to retaining the ancillary approach.

The second manifestation of the preference for the ancillary method is that the drafters have used § 1507 to ensure the continued vitality of the generous and deferential decisions made under existing § 304, some of which may go beyond the specific language of the Model Law. Article 7 of the Model Law makes it clear that the courts in an adopting country remain free to grant assistance under other laws or rules in addition to the assistance provided in the Model Law itself. The United States provision goes farther, by incorporating in § 1507(b) the power of the court under § 304, subject to the limitations of that section, to grant assistance not provided in Chapter 15. Thus any authority under the § 304 case law that might otherwise be deemed withdrawn by a provision of the Model Law will remain available, as long as it increases, rather than decreases, the assistance given to the foreign court. Because § 304 provides for ancillary proceedings only, this section emphasizes the retention of the ancillary method in United States law.

The third sign of an ancillary emphasis is found in § 1528, cognate to article 28 of the Model Law. Like article 28, § 1528 limits the effect of a domestic full bankruptcy to assets within the United States, although it adds the possibility of affecting other assets if those assets are not protected by other courts in recognized foreign proceedings. The key point is that both article 28 and § 1528 represent deference to a foreign main proceeding, although not the full deference that would result from a suspension or dismissal of a full bankruptcy under § 305,

as explained above.

c. Routine Cases of Natural Persons

The third key feature of Chapter 15 lies in the United States exclusion of ***22** certain natural persons from its operations. The United States delegation was one of those delegations arguing that natural persons should be excluded from the Model Law entirely. Although some rich persons might have enough in assets and liabilities to justify multinational insolvency proceedings, the United States was concerned about the entanglement of a number of social issues, like marital property and exemption of property from seizure, that arise only in the insolvencies of natural persons. It feared that these issues might cause countries to decline to adopt the Model Law, even though the overwhelming majority of multinational cases involve legal persons whose insolvencies raise none of these sensitive issues. [FN71]

UNCITRAL ultimately decided to include natural persons, but with the understanding that countries like the United States, who have special bankruptcy provisions for consumers, might decide to exclude them from its operation. [FN72] The United States has done so, but in a way a bit different from the exclusion that was described in the Guide. Section 1501 excludes from the Model Law an "individual" (that is, a natural person) who has debts within the limits that determine eligibility for Chapter 13 of the Code. [FN73] These limits represent a convenient standard for excluding certain natural persons from the transnational provisions. The Chapter 13 limits represent Congress' judgment about debt levels that are sufficiently small as to not require the procedural safeguards of Chapter 11 [FN74] and therefore it made sense to use those limits to determine exclusion of "small fry" from Chapter 15 as well.

On the other hand, the drafters of Chapter 15 were sensitive to the fact that other countries had wished not to exclude natural persons in any way. They were especially sensitive to the concerns of our friends in Canada, who had seen some of their citizens dash into the United States bankruptcy courts in an attempt to take advantage of the broader United States discharge for natural persons. [FN75] Thus the exclusion of natural persons is limited to United States citizens or long-term residents of the United States, ensuring that natural persons from other countries cannot use the United States as a sort of insolvency shelter. Given the debt limits and geographical restrictions, it ***23** would be a rare case indeed where a natural person (or married couple) [FN76] eligible for this exclusion would be the subject of a multinational insolvency campaign.

It must be conceded that the line drawn does not exactly correspond to the exclusion contemplated by the Guide, because it does not exclude consumers with greater amounts of debt and does exclude persons with debt that is primarily business debt. Nonetheless, it is submitted that it is consistent with the spirit of the contemplated exclusion in that it excludes natural persons whose likelihood of involvement in a transnational insolvency matter is very small. By this exclusion, the drafters of Chapter 15 avoided a host of difficult political issues associated with adoption of any law in the United States that touches the interests of consumers or small businesses and avoided having to draw very complex and novel distinctions that would have left much to the interpretation of the courts. The result exceeds in clarity and simplicity what it lacks in symmetry.

d. Other Features

Section 1505 provides for the appointment of a foreign representative, which permits the United States court to designate a natural person to act for the estate of the debtor overseas in Chapter 11 cases where the debtor in possession is given the management of the estate. It is hoped that this approach will have more clarity and simplicity in seeking recognition in other jurisdictions, even though the Model Law authorizes recognition of debtors in possession. [FN77]

The other feature of note is that § 1509 centralizes the process of recognition of foreign proceedings in the bankruptcy courts. [FN78] At the present time, any United States court, state or federal, may suspend or dismiss a civil action, for example, on the basis of the common law concept of "comity" among nations. Section 1509 will require that all applications for recognition, including requests for a halt to pending United States litigation, must be made in the appropriate bankruptcy court [FN79] and that court's decision about recognition will be controlling.

On the other hand, the small debtors excluded from Chapter 15 as described above will also be excluded from this ***24** requirement, so that in small cases involving United States natural persons, any United States court will be free to extend assistance to a foreign creditor or insolvency representative on the basis of common law "comity," as United States courts have often done in the past. [FN80]

While adoption of Chapter 15 is not essential to the use of the ALI Principles, it will serve as an excellent context for their application. Conversely, the ALI Principles will serve to implement and extend the provisions of Chapter 15 once they are part of the Bankruptcy Code. For example, its guidelines for procedures to be used in communications by telephone or video conferencing will help greatly in achieving agreement about the direct communications authorized for the first time by Chapter 15.

III. THE MODEL LAW AS ADOPTED [FN81] OR PROPOSED ELSEWHERE

A. JAPAN

The abandonment by Japan of its strict territorialist rules, including the adoption of the Model Law, is an enormous step forward. It is especially noteworthy that a country with such a strong territorialist tradition refused to adopt a requirement of reciprocity. On the other hand, Japan's version of the Model Law is the least uniform of those adopted so far. [FN82] What appear to be the most important differences from the Model Law are described below. [FN83]

1. Concurrent Proceedings

Although deviations from the text of the Model Law are inevitable in each adopting country, some of those found in the new Japanese law are troubling. The greatest concern may arise from the decision to forbid concurrent proceedings as contemplated by articles 28-30 of the Model Law. If there is a recognized foreign proceeding and a local proceeding involving the same debtor, the Japanese court must dismiss either the recognition petition or the local proceeding. There cannot be concurrent proceedings. It is the local proceeding that survives unless the court finds that the foreign proceeding ***25** is a "main" proceeding and that it serves the general interests of all creditors, two unobjectionable standards. But the court must also find "no likelihood" of detriment to local creditors. [FN84] If this last requirement is generously interpreted to mean only that the foreign proceeding is fair, nondiscriminatory, and follows the usual insolvency standards of well-developed legal systems, it will not be seriously harmful, because several other provisions of the Model Law urge the courts to be careful of creditors' rights, and we may be sure each court will be especially concerned about "local" creditors. [FN85]

If, however, the language is interpreted to dismiss the recognition of the foreign proceeding whenever local creditors would do better in a local, territorial case, then the effect would be to eliminate almost all useful cooperation. [FN86] In each transnational insolvency, each jurisdiction will be either a "surplus" or a "deficit" jurisdiction. A surplus jurisdiction will have a ratio of assets to claims greater than the asset/claims ratio worldwide, while the ratio in a deficit jurisdiction will be lower than the worldwide ratio. [FN87] The second interpretation of the language of the Japanese provision would result in a refusal of cooperation in nearly every case where Japan was a surplus jurisdiction. Such an interpretation would obviously be unfair to other countries and its general adoption would prevent cooperation in virtually all cases. Professor Yamamoto suggests that this language will be read to require no more than a finding that the rights of local creditors will not "be seriously violated" [FN88] in the foreign proceeding. We must hope he is right.

2. Stays Generally

There are other provisions that may or may not be obstacles to cooperation, depending upon their interpretation. Notably, the Japanese drafters decided not to grant the automatic effects of recognition set forth in article 20 ***26** of the Model Law. On the other hand, the Japanese law does provide for interim relief, so fast action by the courts could have many of the same effects as an automatic stay. But that encouragement is somewhat weakened by

the elimination of the requirement for very prompt action on a request for recognition in article 17(3) of the Model Law. Because of these and other changes in the Japanese version of the Model Law, we will have to await experience in Japan before coming to any firm conclusions about the effectiveness of stays under the new law.

3. Secured Creditor Stays

Article 27 of the Japanese law will permit the staying of execution by a secured creditor, but only if the creditor is restrained by the law of the main proceeding. If that law does not restrain the secured creditor, neither will the recognizing court in Japan. Furthermore, the enforcement of Japanese tax claims is not considered a judicial proceeding and is not restrained under domestic law. Therefore enforcement of such claims will not be restrained in Japan either. [FN89]

4. Communication and Cooperation

One of the greatest reforms of the Model Law was achievement of agreement on communication among courts and administrators in the interest of greater cooperation in transnational insolvencies. The Japanese drafters decided that they could not accept in Japanese law the direct involvement of the courts in communication with other courts and administrators or in direct cooperation between courts. They have, however, included direct communication and cooperation between administrators, which should accomplish many of the good results intended by articles 25-27 of the Model Law. It should be noted that Mexico has included these provisions as to courts as well as to administrators, although the idea was initially as strange to their legal culture as it was to the Japanese. [FN90]

It is to be hoped that more countries will follow the Mexican than the Japanese example. [FN91] The experience in North America has been that direct communication has lead to important improvements in efficiency and more just results in transnational cases. There are also examples of inefficiency and confusion which direct communication could have avoided. For example, a recent Canadian-United States case involved a Canadian main proceeding to ***27** which the United States court had granted assistance by enjoining United States lawsuits against the debtor and certain third parties. The Canadian court subsequently modified its stay to permit certain third-party suits to go forward. When a similar modification was sought in the United States court, confusion about the purpose and effect of the Canadian modification led to delay and expensive litigation in the United States court. [FN92] The case was a classic example of a situation where direct telephone communication between the Canadian and United States courts, with appropriate procedural safeguards, would likely have saved everyone concerned considerable time and money.

B. MEXICO

Mexico was the first country in Latin America to adopt the Model Law. It was adopted as part of a complete reform of the Mexican insolvency law, which had not been significantly revised since its adoption in 1943. [FN93] The old law [FN94] was repealed and replaced by La Ley de Concursos Mercantiles ("LCM"). [FN95] Despite its name, the new law contains both liquidation and reorganization procedures and now constitutes the whole of Mexico's insolvency law. Its drafters were strongly influenced by the new German law. In particular, they adopted the idea of a unified proceeding in which the appropriate procedure--liquidation or reorganization--would be determined after an examination of the debtor's affairs during an initial period.

The new Mexican law adopts the Model Law almost word for word, with a few notable exceptions, the most important of which are discussed below.

1. Branches

Although Mexico has always claimed worldwide jurisdiction over a debtor's assets, it has had an unusual provision that permitted the insolvency in Mexico of a debtor's Mexican branch to be considered separately,

regardless of the status of the rest of the debtor company in other countries. [FN96] In that way, the branch could be liquidated as if it were a local subsidiary, having effect only as to local assets and creditors who dealt with the local branch. Somewhat surprisingly, given the adoption of the Model Law, this ***28** provision has been preserved in the LCM. [FN97]

2. Consumers

The Model Law contemplates possible exclusion of consumer debtors from its operation. [FN98] Mexico has taken advantage of the opportunity to exclude consumers from the Model Law. The scope of the law is limited to merchants, who are those legal or natural persons who engage regularly in business. Like many other countries, Mexico's domestic insolvency law does not extend to nonmerchants, so this limitation merely extends that distinction to the international level. Thus throughout the new Mexican law, the word "merchant" ("comerciante") is used to refer to the entity in an insolvency proceeding.

3. Reciprocity

The most important--and unfortunate--change in the Mexican version of the Model Law is the addition in article 280 of a requirement of reciprocity (see also South Africa below). On the other hand, it appears that the adoption of the Model Law by a jurisdiction whose foreign representative seeks recognition is highly likely to be taken as sufficient evidence of reciprocity. [FN99]

4. Verification of Insolvency

Under the new unified procedure in Mexico, the filing of a voluntary or involuntary insolvency request requires in every case the appointment of an independent expert to conduct a "verification visit" to determine if the merchant is insolvent. The same requirement is therefore imposed with respect to a foreign debtor whose representative is seeking recognition in Mexico. The visit is conducted at the debtor's principal place of business in Mexico, if the debtor has one. [FN100] The relationship between this requirement and the presumption of insolvency under article 31 (LCM article 307) is not clear.

5. Stay Against Litigation

Quite surprisingly, even in domestic cases the new Mexican law does not stay litigation involving a debtor nor consolidate that litigation in the court ***29** before which an insolvency case is pending. [FN101] Therefore, the stay provided by article 20 of the Model Law, article 299 of the LCM, does not stay such proceedings upon recognition of a foreign proceeding.

C. OTHER NATIONAL DEVELOPMENTS

1. South Africa

South Africa has adopted the Model Law, but unfortunately has included a reciprocity requirement. [FN102] The proponents of the law fought long and hard to prevent the addition of such a requirement, but in the end were unsuccessful. [FN103] A reciprocity requirement was debated several times in the UNCITRAL discussions because a small number of countries favored it, but it was defeated by a large consensus each time. The experience in the United States under § 304 of the Bankruptcy Code, which has no reciprocity requirement, is that helpful and cooperative actions by our courts have begun to produce reciprocal assistance from courts in other countries. [FN104] This experience proves once again that acts of helpful cooperation, without an initial requirement of reciprocity, breed reciprocity in friendly countries.

2. The United Kingdom

The United Kingdom has taken a long step toward adopting the Model Law, although the exact form of its adoption has not yet been determined. It used a procedure which is apparently fairly common there, but not familiar to many in other countries. The Insolvency Act 2000, which introduced a number of reforms into British law, authorizes the relevant ministry to adopt the Model Law by regulation, but through a procedure which requires some final approval by the Parliament. [FN105] It is understood that the effect is to make it highly likely that the Model Law will be adopted in the fairly near future, but the ministry has not yet released a text upon which one can comment. One point that will bear watching is whether § 426 of the existing law, which permits the relevant minister to "designate" certain countries as entitled ***30** to swift and complete cooperation, will be retained in the British law. If so, then the British courts in large multinational insolvencies may be looking in three directions: the Regulation within the EU, the mandated cooperation with the designated countries, and the Model Law for cooperation with everyone else, including the United States.

3. New Zealand

The Law Commission of New Zealand has recommended adoption of the Model Law to its Ministry of Justice. [FN106] It is likely that it will be adopted as part of a comprehensive reform of New Zealand insolvency law. [FN107] It is mentioned here because the Law Commission report contains an especially fine analysis of the issues presented to a policy maker in considering whether to adopt the Model Law.

IV. THE ALI PRINCIPLES

As mentioned earlier, it seems very likely that the next step, building upon the Model Law, will come at the regional level. As discussed earlier, the central imperative at work in the governance of transnational insolvency is the need to have an insolvency regime symmetrical with the market, which means insolvency law must continue to globalize as the market globalizes. Central to the evolution of global markets has been and continues to be the creation of ever-closer relationships, and therefore ever-more- developed markets, at the regional level. It follows that it is at the regional level that we can expect to see the next important developments in the internationalization of insolvency law.

A. THE ALI TRANSNATIONAL INSOLVENCY PROJECT

The ALI Principles were developed by its Transnational Insolvency Project ("Project"). The ALI established the Project because of the perceived need for a private-sector initiative. It was thought unlikely that public-sector initiatives in the area of transnational insolvency would be undertaken among the NAFTA countries in the near term, yet it seemed apparent that closer integration and cooperation in the insolvencies of multinational companies were essential to full realization of the free flow of investment contemplated by the NAFTA. Private sector action to create principles agreed by the leading experts in each country might permit progress without necessarily requiring legislation or new international agreements.

The objective of the ALI Transnational Insolvency Project was to develop ***31** cooperative procedures for use in business insolvency cases involving companies with assets or creditors in more than one of the three NAFTA countries. The Project comprised three national divisions, with Reporters and Advisory Committees in the three countries, following the traditional ALI model. The reporters and committees included many of the leading experts in insolvency law in each of the three countries. [FN108] The reporters have worked together closely throughout. The advisory committees have met separately and together, as needs required.

The Project was structured in two phases. Phase I produced an authoritative international statement summarizing the insolvency laws and practices of each country. Phase II produced the ALI Principles, which are a set of cooperative procedures for use in the insolvencies of multinational companies.

The indispensable first step for such a project was to achieve among all participants an understanding of the insolvency laws of each of the other countries involved. In addition, achievement of the Project's goal required the education of judges and lawyers in the insolvency laws of the NAFTA countries so they could function effectively in transnational cases and could apply the procedures to be developed in the Project. To serve both these purposes, Phase I of the Project was devoted to approval of international statements of the insolvency laws of each of the NAFTA countries. All three were completed and approved. [FN109]

These texts are truly international in a sense unusual in comparative law work, because the Reporters and Committee in each responding country have interrogated the draft texts produced in each other country, seeking clarification and elaboration important to the respondent's understanding of the laws of the expository country. They will be published in Spanish and English. The texts produced in Phase I give judges and lawyers in insolvency proceedings an authoritative common ground in understanding the laws and practices of the NAFTA countries, which should make it far easier for them to cooperate in particular proceedings. Equally important, these texts give business people and their lawyers in the three countries common ground for structuring financial transactions in a predictable way throughout the NAFTA countries. Although the texts are summaries of basic principles, procedures, and practices, rather than treatises, they will greatly narrow the range of uncertainty ***32** in insolvency proceedings and in business planning with reference to defaults. They will also be helpful to scholars, judges, and lawyers in non-NAFTA jurisdictions as introductions to the insolvency laws of each of these countries.

Although the Canadian and United States texts have been finally approved, publication has been delayed by the need to revise completely the Mexican Statement because of the adoption of the new insolvency statute. It is expected that the three statements will be published early in 2002.

Phase II, the Principles of Cooperation, was completed in May 2000, and has been finally approved by the three national Advisory Committees and the ALI. It consists of three parts: General Principles, Procedural Principles, and Legislative Recommendations. All three parts include explanatory commentary and illustrations. The Procedural Principles are differentiated from the General Principles because the former are quite specific rules or standards recommended to the courts and parties.

A central idea of the Project from the start was to discover principles that could be applied under existing law in each NAFTA country. For the most part, this result has been achieved. The committees of experts from each of the three countries found that the Procedural Principles could be implemented by their courts under existing law in most instances. The main exceptions were in Mexican law, because of its former outdated insolvency legislation. Under the new Mexican statute, it is thought that virtually all of the ALI Principles can be implemented under current law in all three NAFTA countries. In this connection, it should be noted that not every expert agreed about every point, but every principle represented a substantial consensus and no principle was included if there was a significant division of opinion along national lines. [FN110] The result may be less ambitious than if a broader rule of inclusion had been adopted, but this consensus rule has produced a set of approaches that judges and lawyers in each country can confidently adopt.

Notwithstanding the foregoing, some desirable procedures for cooperation could not be applied under the existing laws of one or more of the NAFTA states. They were the subject of recommendations for legislation. The Legislative Recommendations are largely suggestions that each country adopt by statute any of the ALI Principles that prove to be difficult to apply without legislation, although a couple require legislation in all three countries. [FN111] The very first Recommendation, adoption of the Model Law, has ***33** already been achieved by Mexico. As discussed earlier, the adoption of the Model Law is very helpful in permitting each country to apply the ALI Principles, including those that go well beyond the modest reach of the Model Law itself.

The ALI Principles are completing a process of revision to reflect the changes in Mexican law. It is anticipated that they will be published in 2002 in English. All four Project texts--the three statements of national bankruptcy laws and the ALI Principles--will be published in Spanish sometime later in that year.

It is important to emphasize that this sort of private-sector initiative, coming from the ALI, fits well into the present phase of transnational insolvency development, at least in North America. Large transnational cases in recent years have been guided largely by protocols agreed among major parties and approved by the relevant courts. The ALI Principles provide a common ground created by well-known experts in all three NAFTA countries, which

will make it easier for lawyers to agree upon more specific procedures for a particular case and for courts to approve those agreements. [FN112]

B. COMPARING THE EU REGULATION [FN113] AND THE ALI PRINCIPLES

To compare these two regional initiatives, the EU Regulation and the ALI Principles, we must start with the obvious and central point of advantage for the Regulation: it is positive law, in place and binding, whereas the ALI Principles are unofficial best-practice recommendations. On the other hand, some of the concepts in the ALI Principles go well beyond the EU Regulation. For those reasons, the two are not directly comparable. Nonetheless, it is instructive to compare some key provisions.

1. Opening Effects

The Regulation's greatest achievement is to produce automatic recognition and immediate effects throughout the Union. [FN114] Needless to say, the ALI Principles cannot provide such a result for NAFTA. Instead, they must contemplate a separate recognition procedure in each country. However, the ALI Principles urge almost automatic recognition of main insolvencies (using the EU and Model Law concept of a "main" proceeding) followed by very fast action to restrain both debtor and creditors. [FN115] Denied instant effects, the ALI Principles recommend that only a relatively minimal presentation be required for imposition of a broad moratorium, with an early opportunity ***34** thereafter to amend the actions taken. [FN116] Experience has shown that a swift moratorium is central to success in insolvency cases, domestic or international. Among other important effects, it gives the parties themselves "breathing room" to consult together and arrive at agreements. The ALI Principles go as far as they can to follow the path of the EU Regulation.

One especially interesting difference between the EU Regulation and the ALI Principles is that the Regulation makes universal the effects of the moratorium imposed by the law of the main proceeding, while the ALI Principles instead grant to the recognized proceeding whatever judicial protection is granted to similar proceedings in the recognizing jurisdiction. [FN117] In that regard, the ALI Principles follow the Model Law; [FN118] the EU Regulation does not. Thus under the Regulation, a main insolvency in country A applies country A's moratorium throughout the EU, while under the ALI Principles and the Model Law, recognition of the main country A proceeding by country B's courts results in a moratorium in B of whatever sort B normally grants to a liquidation or reorganization of a type similar to that of the main proceeding. Similarly, the Regulation gives the trustee the powers granted by the law of the main proceeding, [FN119] while the ALI Principles leave that question to the law, [FN120] and necessary court action, in the recognizing country. [FN121]

2. Universal Perspective

The EU Regulation has a split personality, at least as seen from North America. When a debtor is the subject of only one insolvency proceeding, the Regulation is breathtakingly universal within the EU. It has direct and immediate effect everywhere and its choice-of-law rules apply the law of the main proceeding to most important issues. [FN122] By contrast, the ALI Principles expressly disclaim any attempt to adopt choice-of-law rules [FN123] and they contain only a few rules of arguably substantive effect.

On the other hand, once secondary proceedings are filed, the Regulation's choice-of-law rules can fragment, so that assets are distributed on a largely ***35** territorial basis. [FN124] By contrast, the most important single General Principle in the ALI Principles text is the fifth one, Sharing of Value, which adopts a worldwide perspective on the distribution of assets. [FN125] General Principle V urges that the courts of the NAFTA countries determine distributions from a universalist perspective to the maximum extent permitted by their respective laws. Thus, for example, the ALI Principles expressly contemplate the possibility of dismissing one or more full insolvency proceedings, so that a reorganization (rescue) plan can be adopted in the main proceeding without the complications created by detailed differences in priority rules. [FN126]

Even where there are secondary proceedings, however, the Regulation may be more universal than the ALI

Principles in one important respect: the possibility of Universal Cross Filing, [FN127] which is the term the present author has proposed for the right (duty?) [FN128] of each EU insolvency administrator to file creditor claims from that administrator's insolvency proceeding in each other proceeding. [FN129] That provision is one of the most progressive in the Regulation, at least potentially. The effect of such cross-filing could be to produce essentially equal distributions for unsecured creditors in each proceeding, if priority or preferential distributions are ignored. Unfortunately, this effect may be limited by the fact that in all countries priority distributions very often consume all or most of the available value in an insolvency case.

With respect to the allowance of claims in parallel proceedings, the Regulation does not address the question of re-litigation of "allowance" decisions, by which I mean a court decision finding that a claim is valid and enforceable in an insolvency to the amount of X currency units, regardless of what actual percentage distribution might ultimately be possible. Presumably, under the Regulation, the law of each proceeding that is opened will determine if allowance of a claim in an insolvency case in country A is preclusive (res judicata) to relitigation of the validity of the claim in a country B insolvency. The ALI Principles adopt the view that claims allowed in one NAFTA country should be considered allowed, and not subject to relitigation, in insolvency proceedings in the other two NAFTA countries. Of course, this effect goes to the validity of the claim under noninsolvency law only, not its validity under any special insolvency rule or its priority in distribution.

***36** By way of example, in the insolvency of a United States company, if the claim were by a landlord of the company in Canada who claimed also in the United States main proceeding, the Canadian court's determination that the landlord had a valid claim of C$10,000 (say US$7000) would be binding on the United States bankruptcy court as to the allowability of the claim in the United States proceeding, but it would still be subject to the special United States limits on all landlord claims. [FN130] Any factual questions related to the applicability of those limits would be subject to determination by the United States court. This Principle opens the possibility of establishing a claims facility in large cases, permitting creditors, especially small creditors, to file in their own countries in their own languages on an affordable basis, a result which would greatly encourage judges and lawmakers to support international cooperation. [FN131]

3. Binding Effect of Reorganization Plans

If reorganization (rescue) of a multinational corporation is to be successful, the new financial structure must be binding on all parties throughout the relevant market. As with the opening moratorium, the Regulation has a split personality. When there is only a main proceeding, the approval of a rescue plan has a conclusive effect throughout the EU, which is a major step forward. [FN132] The situation is unclear, however, where a secondary proceeding has been opened. May a creditor who opposed a plan that was approved over its dissent in a main proceeding in country A nonetheless sue the postre- organization debtor in country B on the original debt if there was a secondary proceeding in country B?

The ALI Principles make an approved plan binding to a large extent, although not completely, through two Procedural Principles. The first one urges that all creditors be considered bound, and therefore barred from filing a suit inconsistent with the approved plan, if they participated in the reorganization in country A (as, for example, by filing a claim) or if they accepted payment under the plan. [FN133] The second one goes further, holding a creditor bound if the general civil courts of country A would have had jurisdiction over that creditor and its transaction with the debtor. [FN134] In either case, if the ***37** creditor files to sue on its original claim in country B, the court should dismiss the case.

4. Communications

The EU Regulation is silent on the subject of communication between courts. By contrast, articles 25(2) and 26(2) of the Model Law authorize direct communication between courts and administrators in different jurisdictions. The ALI Principles endorse the proper use of such communication and contain a set of guidelines for communication that will help courts and lawyers feel comfortable about them and ensure fairness to all concerned. [FN135] The guidelines manage to lay out principles without preventing adaptation of these rules to the requirements of the professional and judicial rules of each NAFTA country. Some of the likely difficulties in

that regard are discussed in its commentary.

5. Protocols

Another subject unaddressed by the EU Regulation is the use of stipulations and agreements among the parties. Much of the cooperation in North American cases has been by way of "protocols," agreements negotiated by lawyers and accountants for the parties (or many of them) and approved by the courts involved. These agreements have enabled lawyers and judges to create a legal framework for the conduct of a major case despite the lack of treaties or other public enactments serving that function. The Model Law, and Chapter 15, provide for cooperation between courts and administrators, but do not provide a mechanism for achieving it. The ALI Principles attach two exemplary protocols as Appendix 3, giving bench and bar a place to start and a general idea of what has been considered both fair and practical. The difference between the two regional texts may reflect different attitudes about the role of private parties in public proceedings.

6. Cross-Border Sales

A potentially important topic addressed by the ALI Principles but not by the EU Regulation is coordination of cross-border sales. The classic situation is a liquidation where the debtor had a widget division with plants, inventory, and trademarks in each of three different countries, A, B, and C. The division would realize a higher price sold as a unit, but in country C the liquidator could sell just its local assets more quickly and at a price that would return more to creditors in that proceeding. Understandably, the Regulation does not address this sort of specific problem, although in article 31 it does command communication and cooperation between liquidators, which might lead to a coordinated sale.

***38** The ALI Principles suggest that the division should be sold to realize the greatest value for all creditors despite the lost advantage for country C claimants. [FN136] This situation is simply a specific application of the General Principle of realizing and sharing value on a worldwide basis rather than a territorial basis.

7. Corporate Groups

The final difference to be mentioned here is the treatment of corporate groups. [FN137] The Regulation does not provide any special rules for corporate groups, leaving the matter to national law. The ALI Principles "put a toe in the water" of this difficult problem by urging two rules concerning subsidiaries: first, that they should be allowed to file for insolvency in the parent company's home country, even if they would not ordinarily be allowed to do so, so that they can be reorganized on a group basis. [FN138] Note that this approach does not mean ignoring the corporate form (except for the good reasons sometimes permitting that result), but rather permits the group to be reorganized administratively in one jurisdiction, saving much time and money. The second principle is that corporate groups should be reorganized from a worldwide perspective just as with a single company, subject to the necessity of allocating value with regard to the corporate form. [FN139] The point is to maximize coordination and cooperation despite necessary legal adjustments to reflect the rights that arise because different claimants have rights against different entities.

V. ADOPTION OF THE MODEL LAW BY THE EU OR ITS MEMBERS

Although the ALI Principles recommend adoption of the Model Law by each of the NAFTA countries, there is a debate in Europe as to whether the EU countries should adopt it. Some feel that adoption of the EU Regulation obviates any need for adoption of the Model Law by the EU or its members. Whether or not that is true within the EU, it is certainly not true vis-à-vis the rest of the world. As important as regional integration may be, it must surely be part of the continuing expansion of economic ties among all nations ***39** around the world. Thus it is important that regional initiatives avoid the reality, or even the appearance, of creating a "club" that looks only inward. [FN140]

More broadly, insofar as it is accepted that insolvency regimes must expand in scope to be as symmetrical as possible with the market, the steady extension of economic unity from the regional to the global level requires that the scope of the insolvency regime, at least at the level of coordination and perspective, must do the same.

The ALI Principles address this question squarely, saying:

> Although this Project seeks to take advantage of regional relationships to advance closer cross-border cooperation, it does not seek to exclude or limit cooperation with countries outside of the NAFTA. On the contrary, many of the principles and procedures discussed below can be applied by courts in the NAFTA countries to cooperate with proceedings in non-NAFTA jurisdictions. The bench and bar are encouraged to draw on those principles to increase cooperation in those instances as well, even though we cannot expect as high a level of cooperation as we hope to achieve within the NAFTA. [FN141]

There is no equivalent recital in the EU Regulation. Instead, the EU Regulation suggests that each member state is free to decide what approach it will adopt as to nonmember states. [FN142]

Adoption of the Model Law by EU member states would serve several purposes. One is that such adoption would be regarded as a very friendly gesture in other states. It is likely that within the next two years, three of the EU's primary trading partners--Japan, Mexico, and the United States--will have adopted the Model Law. [FN143] Although only one of them, Mexico, ***40** may require reciprocity, judges in all of them will be influenced favorably by the knowledge that an EU member state has looked outward to cooperation in multinational insolvency cases.

A more important purpose served by adoption of the Model Law is that it would produce a uniform law within the EU as to non-EU companies. The Regulation states that any insolvency case involving a debtor whose center of main interests is outside the Union is excluded from its coverage. [FN144] Thus if a United States company with assets in several EU member states goes into insolvency in New York, the treatment of requests for recognition and assistance by the United States debtor in possession or foreign representative must be considered by the courts in each relevant EU member state. If each of them has adopted the Model Law, however, all of those courts will be applying the same law and that same law will also likely be adopted in the United States by that time. The improvement in coordination and communication would obviously be enormous, to the benefit of rescue chances and creditor recoveries, and the likelihood of inconsistent results within the EU would be greatly reduced.

Would it be possible for the EU to adopt the Model Law as a Regulation with respect to non-EU main proceedings? If so, there would obviously be some additional provisions to consider. Perhaps one court could be given international jurisdiction to recognize a foreign main proceeding under article 17. If so, there would be questions like these: Could that court also grant interim relief effective throughout the community? Which law would apply under article 20? Could that court release assets found in all EU countries? It may be that a busy Union does not have time available for this question at the EU level, but it would be a marvelous advance if it did. [FN145]

CONCLUSION

The Model Law represents a modest, but extremely important, step forward ***41** in the management of the general defaults of multinational companies. Its adoption and prospective adoption in major commercial countries is a reason for celebration. The celebration will be magnified if the European Union or its member states adopt it as well.

As we then seek to move beyond the necessarily modest baseline of the Model Law, we will look to regional developments for the next steps. Our European friends have moved beyond us thus far in adopting the EU Regulation. However, in North America we have a set of principles around which judges can fashion a cooperative regime that in some respects goes farther than the European reform. By providing a consensus of experts from all three NAFTA countries, the ALI Principles make it possible for judges and lawyers to have a common ground for developing the protocol approach that has already worked well in North American cases.

[FNa1]. Benno C. Schmidt Chair of Business Law, The University of Texas School of Law. An earlier version of

this article was presented to the German Procedure Association at its annual meeting in Athens and will be published in Germany as part of its proceedings. I much appreciate the assistance I received for this paper from Mitchell Mills, The University of Texas School of Law, J.D. Candidate 2003.

[FN1]. A recent article summarizes the reform wave:

Legislatures in Bonn, Buenos Aires, Canberra, Ottawa, and Tokyo have rewritten their bankruptcy laws in the last decade, as have Russia and China (twice each) and most of Eastern Europe. New bankruptcy laws have also appeared in Singapore, Indonesia, and Thailand. The wave has not crested. In addition to the promise of further reform in Tokyo, the British government has introduced a bill substantially revising the Insolvency Act of 1986, the Mexican Congress has adopted a measure completely rewriting La Ley de Quiebras Y Suspension de Pagos, and many other ministries are well along with reform measures. These domestic reforms have included, in every instance, substantial examination of other countries' laws and reform proposals, so they rest upon an emerging international oeuvre of reform.

Jay L. Westbrook, A Global Solution to Multinational Default, 98 MICH. L. REV. 2276, 2278-79 (2000) (footnotes omitted), available at <http:// papers.ssrn.com/paper.taf?abstract_idW259960> [hereinafter Global Solution]. Since that paper was written, the British statute has been adopted. See infra note 105 and accompanying text.

[FN2]. There have been other significant texts as well, notably the International Bar Association's Concordat. See Anne Nielsen et al., The Cross-Border Insolvency Concordat: Principles to Facilitate the Resolution of International Insolvencies, 70 AM. BANKR. L.J. 533 (1996). Among other things, the Concordat includes universalist distribution rules not found in the texts discussed here. See id. at 548-49 (Principle 4).

[FN3]. U.N. COMM'N ON INT'L TRADE LAW, MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT, art. 1, U.N. Sales No. E.99.V.3 (year) [hereinafter MODEL LAW]; U.N. TDBOR Comm'n on Int'l Trade Law, 30th Sess., art. 2(d), at 67- 73, U.N. Doc. A/CN.9/442 (1997) [hereinafter GUIDE].

[FN4]. AM. L. INST., PRINCIPLES OF COOPERATION IN TRANSNATIONAL INSOLVENCY CASES AMONG THE MEMBERS OF THE NORTH AMERICAN FREE TRADE AGREEMENT (2002) (on file with the author) [hereinafter ALI PRINCIPLES]. The Principles, along with the International Statement of Mexican Bankruptcy Law, had to be revised in certain details after final approval to reflect the new Mexican bankruptcy law. See infra notes 109-12 and accompanying text.

[FN5]. Council Regulation 1346/2000 European Union Regulation on Insolvency Proceedings, 2000 O.J. (L 160), at <http://Europa.eu.int/eur- lex/en/lif/dat/2000/en_300R1346.html> [hereinafter EU REGULATION].

[FN6]. Title 11 of the United States Code.

[FN7]. H.R. 333, 107th Cong. (2001), at <http://thomas.loc.gov>; S. 420, 107th Cong. (2001) at <http://thomas.loc.gov>. As of this writing, the legislation has not been adopted. The most controversial provisions of the pending legislation would impose substantially greater burdens of repayment on consumer debtors and would make it more difficult for them and for small businesses to use the bankruptcy law.

[FN8]. EEC Draft Bankruptcy Convention, reprinted in IAN FLETCHER, CONFLICT OF LAWS AND EUROPEAN COMMUNITY LAW app. C (1982). See also Donald T. Trautman et al., Four Models for International Bankruptcy, 41 AM. J. COMP. L. 573, 578 (1994) [hereinafter Four Models]. For a history of the EU Regulation, see IAN FLETCHER, THE LAW OF INSOLVENCY 267 (London 1996).

[FN9]. See, e.g., IAN F. FLETCHER, INSOLVENCY IN PRIVATE INTERNATIONAL LAW 246 (1999); Manfred Balz, The European Union Convention on Insolvency Proceedings, 70 AM. BANKR. L.J. 485, 489 (1996); Wolfgang Lueke, The New European Law on International Insolvencies: A German Perspective, 17 BANKR. DEV. J. 369 (2001) [hereinafter Lueke]; Robert Wessels, European Union Regulation On Insolvency Proceedings, 20 AM. BANKR. INST. J. 24 (2001). Professor Fletcher has written another informative analysis of the EU Regulation which will be published in Germany as part of the proceedings of the German Procedure Association, Athens, 2001. Ian Fletcher, International Insolvency in Transformation: United Kingdom Perspectives on Implementation of the European Union Regulation on Insolvency Proceedings (manuscript on file with author) [hereinafter Fletcher, United Kingdom Perspectives].

[FN10]. Views orally expressed to this author.

[FN11]. LEGAL DEPT., INT'L MONETARY FUND, ORDERLY & EFFECTIVE INSOLVENCY PROCEDURAL PRINCIPLES: KEY ISSUES 81 (1999).

[FN12]. WORLD BANK, PRINCIPLES AND GUIDELINES FOR EFFECTIVE INSOLVENCY AND CREDITOR RIGHTS SYS. 24, ¶ 180 (2001).

[FN13]. See infra note 109.

[FN14]. The ALI Principles apply only to legal persons, while the EU Regulation and the Model Law apply to natural persons as well. This paper addresses primarily general default by a multinational legal person engaged in commerce.

[FN15]. For this purpose, the phrase "general default" means a debtor's actual or threatened failure to pay all or most of its debts.

[FN16]. "Bankruptcy" is the term most often used in North America for the legal response to general default by either a natural person or a legal entity. "Insolvency" is the term used in the United Kingdom and other common-law countries for business defaults. This paper will generally use the term "insolvency," except when a reference to United States law and practice would make such a reference inaccurate or awkward.

[FN17]. In many regimes, the stakeholders for whose benefit the law functions are the creditors only, while in others the employees (as employees, not merely as creditors), owners, and others may be considered stakeholders, although in the latter systems their inclusion is not always formally stated in the law.

[FN18]. Of course, a very substantial debate continues about which of the approaches is the best. See, e.g., Manfred Balz, Market Conformity Of Insolvency Proceedings: Policy Issues Of The German Insolvency Law, 23 BROOK, J. INT'L L. 167 (1997).

[FN19]. This approach was very entrenched in the United States from the time of the great judge and legal scholar Joseph Story until the adoption of the Second Restatement of Conflicts. See JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC (Arno Press 1972) (1834); RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971).

[FN20]. A bankruptcy theory with some currency in academic circles at the present time is Contractualism. Two recent articles have extended its reach to the international level. See Robert K. Rasmussen, Resolving Transnational Insolvencies Through Private Ordering, 98 MICH. L. REV. 2252 (2000); Robert K. Rasmussen, A New Approach to Transnational Insolvencies, 19 MICH. J. INT'L L. 1 (1997). It is not discussed in this paper, although several authors have responded to its claims. See Andrew T. Guzman, International Bankruptcy: In Defense of Universalism, 98 MICH. L. REV. 2177, 2204-06 (2000); Lynn M. LoPucki, The Case for Cooperative Territoriality in International Bankruptcy, 98 MICH. L. REV. 2216, 2242-50 (2000) [hereinafter Cooperative Territoriality]; Global Solution, supra note 1, at 2303-28.

[FN21]. Global Solution, supra note 1, at 2283-84 (footnotes omitted). A number of scholars have supported universalism, although from various perspectives. See, e.g., Kent Anderson, The Cross-Border Insolvency Paradigm: A Defense Of The Modified Universal Approach Considering The Japanese Experience, 21 U. PA. J. INT'L ECON.L. 679 (2000); Lucian Arye Bebchuk & Andrew T. Guzman, An Economic Analysis Of Transnational Bankruptcies, 42 J. L.& ECON. 775 (1999); Ronald J. Silverman, Advances In Cross-Border Insolvency Cooperation: The UNCITRAL Model Law On Cross-Border Insolvency, 6 ILSA J. INT'L & COMP. L. 265 (2000) [hereinafter Silverman]; Liza Perkins, Note, A Defense of Pure Universalism in Cross-Border Corporate Insolvencies, 32 N.Y.U. J. INT'L L. & POL. 787 (2000) [hereinafter Perkins]. See also Hannah L. Buxbaum, Rethinking International Insolvency: The Neglected Role of Choice- of-Law Rules and Theory, 36 STAN. J. INT'L L. 23, 60 (2000) (arguing for a single jurisdiction internationally following the logic of domestic practice); Lore Unt, Note, International Relations and International Insolvency Cooperation: Liberalism, Institutionalism, and Transnational Legal Dialogue, 28 LAW & POL'Y INT'L BUS. 1037 (1997) (arguing that the answer is cooperation among decentralized courts in liberal states).

[FN22]. See EU Regulation, supra note 5, at Recitals 3-5.

[FN23]. See, e.g., X/Schenkius, Hof, 'S-Hertogenbosch, 6 juli 1993, 42 NETH. INT'L L. REV. 121 (1995) (Netherlands moving away from a strict territoriality in insolvency matters).

[FN24]. Cooperative Territoriality, supra note 20, at 2217.

[FN25]. Global Solution, supra note 1, at 2300-02; ALI PRINCIPLES, supra note 4, at 22. But see Perkins, supra note 21 (arguing that pure universalism is the correct approach).

[FN26]. See, e.g., Canada S. Ry. Co. v. Gebhard, 109 U.S. 527 (1883).

[FN27]. See Global Solution, supra note 1, at 2310-11. The article explains:

Even in a territorial system, local policies are very difficult to apply to multinationals, especially in the context of insolvency and general default. Is a tort victim protected by a territorial system? As things stand now, no web of laws ensures that a dangerous foreign product sold in the United States is backed by either insurance or substantial local assets. Absent local assets, how will a territorial system of bankruptcy protect the tort victim? What about the employee priority for repayment in bankruptcy? Would it be protected in a territorial system? No law requires a foreign company with an American payroll to have sufficient funds in the United States to pay employees. Instead, available funds may be e-transferred out of the country to a distant bank moments before the payroll checks are processed, with no local assets to cover the employees. In those circumstances, only a universalist procedure would have the possibility of protecting the employees.

[FN28]. The differences between these approaches and the consequences of those differences are discussed in the ALI Principles. See ALI PRINCIPLES, supra note 4, at Section II, Topic A.

[FN29]. Several Commonwealth countries follow the approach of "designating" countries with the result that the designated countries are automatically "qualified" for ancillary assistance. See, e.g., s.426 Insolvency Act 1986 (United Kingdom).

[FN30]. See Maxwell Communication Corp. v. Barclays Bank plc (In re Maxwell Communication Corp.), 170 B.R. 800 (Bankr. S.D.N.Y. 1994), aff'd, 186 B.R. 807 (S.D.N.Y. 1995), aff'd, 93 F.3d 1036 (2d Cir. 1996).

[FN31]. The Maxwell case is actually an instance in which the existence of parallel proceedings did not prevent a worldwide resolution, but the presence of two full proceedings (in the U.K. and the U.S.) made that resolution much more difficult and almost prevented its success. See Mark Homan, Managing Default By A Multi-National Corporation (1997) (unpublished paper, Texas International Law Journal Symposium) (on file with the author) (Mr. Homan was one of the U.K. administrators in the Maxwell case).

[FN32]. See Lynn M. LoPucki, Cooperation in International Bankruptcy: A Post-Universalist Approach, 84 CORNELL L. REV. 696, 751-52 (1999); Frederick Tung, Fear Of Commitment In International Bankruptcy, 33 GEO. WASH. INT'L L. REV. 555 (2001).

[FN33]. In fact, it may be primarily to benefit large and powerful multinational creditors.

[FN34]. One recent discussion illustrates the problem:

> Even if one wanted to discriminate, it is difficult to determine a standard for foreignness for that purpose. This difficulty provides a second argument against discrimination, revealing the anomaly of such discrimination in a globalizing environment. Shall we refuse [to grant the U.S. priority for employees] if the claimant is a noncitizen although a resident, so that the green-card employee gets no priority? Shall we base refusal on residence or nonresidence instead, so that the U.S. citizen who works for a U.S. company in France gets no priority when it goes bust? Shall we permit priority to both citizens and residents, but deny it to a French employee who came to Toledo to work for six months or two years alongside Toledoans? Should it matter if he or she worked for the same company in Lyons instead, alongside the U.S. employees assigned there? Should the answers vary if the debtor is a company incorporated in one country but doing business primarily in another? Or one doing business in ten countries, including the United States?

Jay L. Westbrook, Universal Priorities, 33 TEX. INT'L L.J. 27, 35 (1998) (footnotes omitted) [hereinafter Universal Priorities].

[FN35]. The present author had the honor of serving as co-head of the United States delegation to the UNCITRAL Working Group and the Commission on this subject.

[FN36]. The material for this section draws heavily on the summary in the Report of the United States National Bankruptcy Review Commission. NATIONAL BANKRUPTCY REVIEW COMMISSION, BANKRUPTCY: THE NEXT TWENTY YEARS, FINAL REPORT (1997). See also Andre J. Berends, The UNCITRAL Model Law On Cross-Border Insolvency: A Comprehensive Overview, 6 TUL. J. INT'L & COMP. L. 309 (1998); Silverman, supra note 21; Jay L. Westbrook, Modeling International Bankruptcy, in 1998-1999 ANNUAL SURVEY OF BANKRUPTCY LAW 465 (1999).

[FN37]. See Model Law, supra note 3, at art. 6; GUIDE, supra note 3, at art. 6, 86-89.

[FN38]. See Model Law, supra note 3, at art. 3.

[FN39]. See id. at art. 4.

[FN40]. At the least, it may aid the foreign representative in looking for local attorneys in the right part of the recognizing country.

[FN41]. MODEL LAW, supra note 3, at art. 5.

[FN42]. See id. at art. 8.

[FN43]. German jurisprudence, in particular, has been progressive in this field, so it is to be hoped that such a provision in German law would preserve the effect of cases which go beyond what is required by the Model Law. See, e.g., OLGZ Zweibruecken, Decision of 17 Apr. 1989 (3 W 1/89); OLGZ Zweibruecken, Decision of May 27, 1993, (IX ZR 254/92), discussed in Christoph G. Paulus, A New German Decision on International Insolvency Law, 41 AM. J. COMP. L. 667 (1994).

[FN44]. See Model Law, supra note 3, at arts. 11 & 12.

[FN45]. See id. at art. 15.

[FN46]. See id. at art. 16.

[FN47]. Id.

[FN48]. Id. at art. 17. If a local proceeding is opened in a country where the debtor has assets but no establishment, recognition is not required.

[FN49]. It is worth memorializing the fact that it was several times proposed that protective references be made in terms of "local" creditors, but each time these suggestions were rejected, based on the argument that the distinction was both invidious and very difficult to make. See Universal Priorities, supra note 34.

[FN50]. MODEL LAW, supra note 3, at art. 20. This stay came to be called the "semi-automatic stay" by the UNCITRAL delegates, because, unlike the Regulation, it is automatic only upon recognition.

[FN51]. See Guide, supra note 3, at art. 20(1), 141-47.

[FN52]. MODEL LAW, supra note 3, at art. 28.

[FN53]. See id. at arts. 13 and 24.

[FN54]. See id. at art. 23. As the Guide notes, this provision does not contain or imply a choice-of-law rule for avoidance; it merely gives the foreign representative the right to bring whatever action under whatever law would be available to an insolvency administrator in the courts of the recognizing state. GUIDE, supra note 3, at art. 23, 165-67.

[FN55]. See Model Law, supra note 3, at art. 13.

[FN56]. ALI PRINCIPLES, supra note 4, at Section II, Topic D, subtopic 3. Ulrik Rammeskow Bang-Pedersen, Asset Distribution In Transnational Insolvencies: Combining Predictability And Protection Of Local Interests, 73 AM. BANKR. L. J. 385 (1999); Jay L. Westbrook, Universal Participation in Transnational Bankruptcies, in MAKING COMMERCIAL LAW: ESSAYS IN HONOUR OF ROY GOODE 419 (Ross Cranston ed., Oxford Univ. Press 1997); Universal Priorities, supra note 34, at 37-38.

[FN57]. Even for states that want to discriminate, there remains the difficult question of distinguishing a foreign creditor in a globalizing world. See supra note 27.

[FN58]. See infra note 135.

[FN59]. See Model Law, supra note 3, at art. 28. See also EU REGULATION, supra note 5, at art. 27 (same).

[FN60]. H.R. 333, 107th Cong., § § 1501-1532 (2001). The Congressional committee staffs drafted the proposed Chapter 15, with assistance from those who had been involved in its development. Two people, the present author and Dan Glosband, a lawyer from Boston, Massachusetts who represented the International Bar Association at the UNCITRAL meetings, were most closely involved in assisting the Congressional staffs. A number of other lawyers, representing the federal and state governments and the private sector, reviewed drafts and made important contributions to the work.

[FN61]. H.R. REP. NO. 107-4 (2001), at <http://thomas.loc.gov>. The present author and Mr. Glosband (see supra note 60) were closely involved in assisting the House staff in its excellent work on this report.

[FN62]. See H.R. 333, § 1501. To achieve this result while incorporating the Preamble to the Model Law and being faithful to the United States statutory drafting style, the drafters incorporated the Preamble into § 1501.

[FN63]. The commentators were among those involved in the drafting process. See supra notes 60-61.

[FN64]. See Model Law, supra note 3, at art. 2(f); H.R. 333, § 1502(2).

[FN65]. See H.R. 333, § 1502(1).

[FN66]. By the same token, the order of the definitions in § 1502 was changed from the Model Law to put them into alphabetical order in English, which is the invariable custom throughout the Bankruptcy Code.

[FN67]. Indeed, the Rules Committee for the United States Rules of Bankruptcy Procedure has already begun an informal process of consultation about changes in the rules that will be required by the adoption of proposed Chapter 15.

[FN68]. H.R. REP. NO. 105-540, at § 601 (1998).

[FN69]. See supra Part I.B.

[FN70]. In re Axona Int'l Credit & Commerce, Ltd., 88 B.R. 597 (Bankr. S.D.N.Y. 1988), aff'd, 115 B.R. 442 (S.D.N.Y. 1990). Closely related is the fact that a petition under Chapter 15 opens a distinct "case" under that chapter, which further emphasizes its ancillary nature. H.R. 333, § 1504.

[FN71]. For these reasons, the ALI Project is limited to legal persons. See ALI PRINCIPLES, supra note 4, section I at 8, n.7.

[FN72]. See Guide, supra note 3, at art. 1(2), 66.

[FN73]. The limits at the present time are not more than $871,550 in secured debts and not more than $290,525 in unsecured debts. 11 U.S.C. § § 104, 109(e) (2001). These numbers may not seem "small" to all observers in other countries, but in the context of the United States economy, they represent fairly ordinary people, both consumers and proprietors of small businesses.

[FN74]. A substantial percentage of Chapter 11 cases (ten to twenty-five percent) are brought by natural-person debtors. Elizabeth Warren & Jay L. Westbrook, Financial Characteristics of Businesses in Bankruptcy, 73 AM. BANKR. L.J. 499 (1999), available at <http://papers.ssrn.com>.

[FN75]. It must be noted, however, that a recent Canadian paper suggests a role for the United States discharge, at least for those who have been long- time United States residents. Personal Insolvency Task Force, Group 5 -- Technical Discharge Issues (Oct. 21, 2001) (unpublished paper, on file with author).

[FN76]. The debt limits apply to a married couple jointly, so Chapter 15 would apply to a married couple with around $300,000 of unsecured debt, for example. 11 U.S.C. § 109(e) (2001); H.R. 333, § 1501(c)(2).

[FN77]. See Anthony J. Smits, The Global Restructuring of Singer, GLOBAL INSOLVENCY & RESTRUCTURING REV., Sept./Nov. 2000, at 23.

[FN78]. For a concern about lack of concentration of judicial authority under the EU Regulation, see Lueke, supra note 9, at 381-82.

[FN79]. Section 1410 of title 28 of the United States Code pertains to venue of bankruptcy cases and will be amended to provide that Chapter 15 cases will be brought at the principal place of business of the foreign debtor in the United States. It will also provide for alternative locations in the event the foreign debtor does not have a place of business in the United States.

[FN80]. See ALI PRINCIPLES, supra note 4, at Procedural Principle I, Comment, Second Reporter's Note.

[FN81]. The first country to adopt the Model Law was Eritrea. I intend no disrespect when I say that its lack of commercial presence has resulted in little incentive to study or discuss its approach to the Model Law.

[FN82]. Law on Recognition and Assistance of a Foreign Insolvency Proceeding, summarized in 2001 THE JAPANESE ANN. OF INT'L L. 331 [hereinafter Recognition Law]. The new law became effective April 1, 2001.

[FN83]. There is an article by a leading Japanese authority describing the new Japanese provisions in much greater detail. Kazuhiko Yamamoto, New Japanese Legislation on Cross-Border Insolvency-As Compared with the UNCITRAL Model Law, in 2001 The JAPANESE ANN. OF INT'L LAW 83 [hereinafter Yamamoto].

[FN84]. Recognition Law, supra note 82, at art. 16(1).

[FN85]. Concerning the difficulty of distinguishing "local" creditors in a globalizing world, see Universal Priorities, supra note 34.

[FN86]. Jay L. Westbrook, Japan's New Cross-Border Insolvency Law, 1112 KINYU SHOJI 86 (2001) (in Japanese) (English text available from author).

[FN87]. See Jay L. Westbrook, Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum, 65 AM. BANKR. L. J. 457, 465 (1991).

[FN88]. See Yamamoto, supra note 83, at 111-12. A similarly generous reading is given in another recent article, which says the local proceeding may be dismissed if it will not "unduly disturb" the interests of local creditors. Mie Fujimoto & Hon. Shinjiro Takagi, Japan's New Law On Recognition Of And Assistance In Foreign Insolvency Proceedings, 20 AM. BANKR. INST. J., July-Aug. 2001, at 14. Some of the same tension in U.S. law is found in a recent Second Circuit decision. Bank of New York v. Treco (In re Treco), 240 F.3d 148 (2d Cir. 2001). A broad reading of that case would reduce United States law under § 304 to the same state of noncooperation as a broad reading of the Japanese provision regarding detriment to creditors, while a narrower reading of either is perfectly consistent with international cooperation and protection of creditors claiming in the United States or Japan. See Jay L. Westbrook, International Bankruptcy Approaches Chapter 15, N.Y. L.J., Aug. 23, but see Ronald J. Silverman & Helder P. Pereira, Second Circuit Explores Parameters Of Ancillary Jurisdiction, 20 AM. BANKR. INST. J., May 2001, at 14.

[FN89]. See Yamamoto, supra note 83, at 111-12.

[FN90]. See "La Ley de Concursos Mercantiles," D.O., 12 de mayo de 2000, at art. 304 [hereinafter LCM], discussed infra Part III.B.

[FN91]. The ALI Principles include as attachments Guidelines for Communication in transnational cases, as well as samples of protocols that have proven successful when agreed among parties to transnational insolvencies and approved by the courts concerned. See ALI PRINCIPLES, supra note 4, at Appendices 2 & 3. The Guidelines, like the rest of the ALI Principles, were written primarily for application in North America, but reflect

agreement among leading experts from both common and civil law jurisdictions.

[FN92]. In re YMB Magnex Int'l, Inc., 249 B.R. 402 (Bankr. E.D. Pa. 2000).

[FN93]. INTERNATIONAL STATEMENT OF MEXICAN INSOLVENCY LAW 20, (TRANSNATIONAL INSOLVENCY PROJECT, Council Draft. No. 1 Dec. 1, 1997) [hereinafter MEXICAN STATEMENT]. This statement is being revised to reflect the new Mexican bankruptcy law and will be published as a single volume. See infra note 96.

[FN94]. "La Ley de Quiebras y Suspensión de Pagos," D.O., 20 de julio de 1943.

[FN95]. The new law has been in effect over two years.

[FN96]. See Mexican Statement, supra note 93. The original Mexican Statement is in the process of revision to reflect the changes in the new Mexican law, but will be included in the publication of the project's texts in 2002 [hereinafter Revised Mexican Statement] (on file with author).

[FN97]. See LCM, supra note 90, at art. 16. It is interesting in this regard to compare Dr. Lueke's comments concerning secondary proceedings against "establishments" under the EU Regulation. See Lueke, supra note 9, at 381-82.

[FN98]. See supra note 72.

[FN99]. The point made in the text is in the Revised Mexican Statement, supra note 96.

[FN100]. See LCM, supra note 90, at art. 293. Apparently, there is no requirement for a visit if the merchant does not have a place of business in Mexico. On the other hand, in that case the foreign representative must provide the court with the home address of the merchant for service.

[FN101]. See Revised Mexican Statement, supra note 96. The old law did impose a stay and "attract" all litigation to the bankruptcy court. MEXICAN STATEMENT, supra note 93, at 51.

[FN102]. Cl. 2(2)(a)-(b) of Cross-Border Insolvency Act of 2000, reprinted in 426 S. AFRICAN GAZETTE NO. 21899 (15 December 2000). The requirement is that a state be "designated" by the appropriate minister as a state that grants sufficient reciprocity to South African insolvency proceedings as "justifies" application of the Model Law provisions.

[FN103]. It is noteworthy that the question of reciprocity was raised in the hearings on the U.S. version of the Model Law but was strongly opposed by the witnesses who appeared and therefore was not seriously pursued.

[FN104]. See, e.g., Roberts v. Picture Butte Mun. Hosp., [1999] 4 W.W.R. 443 (staying Dow Corning lawsuits in Canada); Barclays Bank plc v. Homan (In re Maxwell Communication Corp.), [1992] BCC 757 (Ch.) (Homan), aff'd, [1992] BCC 767 (C.A.) (British court's refusal to enjoin U.S. preference action although most parties British).

[FN105]. See Fletcher, United Kingdom Perspectives, supra note 9.

[FN106]. NEW ZEALAND LAW COMMISSION, CROSS-BORDER INSOLVENCY: SHOULD NEW ZEALAND ADOPT THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY? (1999).

[FN107]. NEW ZEALAND LAW COMMISSION, INSOLVENCY LAW REFORM: PROMOTING TRUST AND CONFIDENCE (2001).

[FN108]. The reporters were E. Bruce Leonard & Jacob Ziegel (Canada); Miguel Hernandez Romo & Carlos Sanchez-Mejorada (Mexico); Jay L. Westbrook (United States).

[FN109]. See INTERNATIONAL STATEMENT OF UNITED STATES INSOLVENCY LAW (TRANSNATIONAL INSOLVENCY PROJECT Tentative Draft Apr. 15, 1997); International Statement of Canadian Insolvency Law (TRANSNATIONAL INSOLVENCY PROJECT Tentative Draft Apr. 15, 1998); MEXICAN STATEMENT; Revised Mexican Statement, supra notes 93, 96. The Revised Mexican Statement has necessarily been through a somewhat truncated process, but nonetheless has been subject to extensive non-Mexican review and questioning to ensure clarity for those not expert in the Mexican legal system. The three country statements and the Principles are expected to be published in 2002.

[FN110]. ALI PRINCIPLES, supra note 4, at Section I.

[FN111]. Some of the legislative recommendations suggest legislation to cover subject matter beyond that addressed by the ALI Principles. Notable is Recommendation 4: Priority Claims, which recommends that the three countries harmonize their priority schemes. The ALI Principles do not cover priorities, except to limit them in certain respects.

[FN112]. Indeed, the ALI Principles include an appendix containing sample protocols from successful cases.

[FN113]. For authorities discussing the various provisions of the EU Regulation, see supra note 9.

[FN114]. EU REGULATION, supra note 5, at art. 17.

[FN115]. ALI PRINCIPLES, supra note 4, at Procedural Principles 1, 2, 4.

[FN116]. The Model Law, with its automatic effects upon recognition under article 20, follows this approach.

[FN117]. ALI PRINCIPLES, supra note 4, at Procedural Principle 4. The stay does not issue if a domestic proceeding and stay are already in effect as to the debtor.

[FN118]. See MODEL LAW, supra note 3, at art. 20.

[FN119]. See EU Regulation, supra note 5, at art. 18.

[FN120]. See, e.g., ALI PRINCIPLES, supra note 4, at Procedural Principle 9 (liquidator able to use all procedures for information gathering available under recognizing state law).

[FN121]. The Model Law is relatively neutral on this point, presumably leaving it to the recognizing court to determine what law governs the powers of the liquidator. See, e.g., Model Law, supra note 3, at art. 21.

[FN122]. See EU Regulation, supra note 5, at art. 4. It must be said that some of the exceptions are large ones (e.g., for secured creditors) and seem regrettable to some observers, including the present author. See Four Models, supra note 8.

[FN123]. See ALI Principles, supra note 4, at Section II, Topic D, subtopic 2.

[FN124]. The worst case for universalism in this context is the debtor with establishments and with creditors who have preferential claims, in all the countries where it has substantial assets, giving creditors both the motive and opportunity to initiate secondary proceedings.

[FN125]. See ALI PRINCIPLES, supra note 4, at 39.

[FN126]. See id. at 119-20.

[FN127]. See Universal Priorities, supra note 34, at 29-30.

[FN128]. Dr. Lueke suggests that administrators have a duty to cross-file claims under article 32(2). See Lueke, supra note 9.

[FN129]. See EU Regulation, supra note 5, at art. 32(2).

[FN130]. See 11 U.S.C. § 502(b)(6) (2000).

[FN131]. There is U.S. precedent for establishing such a claims facility. It was done in a cross-border case with Mexico, although there is no published opinion as to this point.

[FN132]. EU REGULATION, supra note 5, at art. 4(j-k).

[FN133]. See ALI PRINCIPLES, supra note 4, at Procedural Principle 26.

[FN134]. See id. at Procedural Principle 27. The test used by the Principle is whether the creditor and its transaction with the debtor had sufficient contact with country A so that there would have been civil jurisdiction in

the courts of A in connection with a dispute over that transaction (that is, if there is either "general" or "specific" jurisdiction, in common-law terms). Presumably, under the Regulation, the question of jurisdiction, as a necessary predicate to binding effect, is resolved by the Regulation's grant of jurisdiction to the main proceeding.

[FN135]. For a detailed discussion, see E. Bruce Leonard, Breakthroughs In Court-To-Court Communications In Cross-Border Cases, 20 AM. BANKR. INST. J. 18, Sept. 2001.

[FN136]. See ALI PRINCIPLES, supra note 4, at Procedural Principle 17.

[FN137]. See generally, PHILLIP I. BLUMBERG & KURT A. STRASSER, THE LAW OF CORPORATE GROUPS (1998).

[FN138]. See ALI PRINCIPLES, supra note 4, at Procedural Principle 23. There are two common problems here. One is that local law in either the main jurisdiction or the subsidiary's jurisdiction may require insolvency as a condition of filing for insolvency or reorganization. The parent may be insolvent, but the subsidiary may not be. Second, the court of the main proceeding may not ordinarily accept jurisdiction over a company that is not registered and does not do business in that country, which will often be true of the subsidiary. The ALI Principles suggest an exception to these rules with regard to subsidiaries of a parent in a main proceeding in the interests of an efficient reorganization.

[FN139]. See id. at Procedural Principle 24.

[FN140]. See Four Models, supra note 8. There are apparently others in Europe who feel that adoption of the Model Law might be harmful in another way, because in its absence the courts of the EU countries might apply the EU Regulation's concepts to non-EU countries as well and that would be preferable. I have not yet seen either of these views in print.

[FN141]. ALI PRINCIPLES, supra note 4, at Section II, Overview. This language was added to an earlier draft at the helpful suggestion of the sole EU citizen on the Advisory Committee, Professor Ian Fletcher.

[FN142]. See EU Regulation, supra note 5, at Recital 14.

[FN143]. Japan and Mexico have already done so and the United States is likely to do so soon, as explained above. Although Canada is now entering its regular five-year review of its insolvency laws, it is not clear if adoption of the Model Law is likely. Some Canadian lawyers take the position that their courts are cooperating now and therefore no further legislation is necessary. With great respect, the present author is concerned that such a view may be shortsided, leaving our Canadian friends with the burdens of cooperation without getting the full benefit of a recognition of that cooperation. Especially in civil law countries, case law or cooperation in fact does not command the respect and reciprocity that is achieved by adopting a statute. Mexico's unfortunate decision to require reciprocity emphasizes the potential importance of that point.

[FN144]. See EU Regulation, supra note 5, at Recital 14. To a distant observer, the text is not entirely clear, however, because the scope statement in article 1 covers all insolvency proceedings and the limitation in article 3 applies only to international jurisdiction under the EU Regulation. The exclusions in article 44 do not include exclusion of non-EU companies from coverage. It is assumed that the Recital controls, but only an EU expert can say for sure.

[FN145]. Apparently, some concern has been expressed in certain civil-law countries about the amount of discretion given to courts under the Model Law. With deference, two comments could be offered. One is that this problem of discretion, and the differences between the civil and common law countries in that regard, was a constant subject of discussion and compromise throughout the two years of negotiation at UNCITRAL. The civil-law countries were widely and ably represented in those meetings. By the end, it appeared that most of their experts felt the language ultimately agreed upon was workable with regard to discretion. The second point is that a country adopting the Model Law could, of course, modify especially difficult sections to include more definite standards and controls where discretion seems too great in the model text. Such changes are not desirable, but they would be preferable to a failure to adopt the law at all.

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