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Book Review

*321 MULTINATIONAL FINAICIAL DISTRESS: THE LAST HURRAH OF TERRITORIALISM

Lynn M. LoPucki, *Courting Failure: How Competition for Big Cases Is Corrupting the Bankruptcy Courts*, Ann Arbor: University of Michigan Press (2005), price: US\$27.95.

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I. Introduction

Professor Lynn LoPucki devotes two chapters in his recent book to international insolvency. [FN1] In them he invites us to prefer chaos to disorder, marshalling the considerable difficulties of managing multinational financial distress to persuade us to abandon hope of reform and be resigned to the vagaries of local responses to global financial crisis. His position is a counsel of despair that will attract little interest from those experienced in the practice and study of international bankruptcy.

Most of Professor LoPucki's book discusses domestic forum shopping. He devotes only two chapters in the book to international choice of forum, which is the

subject I want to address in this review. His domestic claims and proposals have attracted many critiques. [FN2] The only detailed response to his views on international insolvency fora was *322 written by Judge Samuel Bufford [FN3] in response to a version of the book chapter that appeared as an article in the American Bankruptcy Law Journal. [FN4] Although Judge Bufford exposed some of the principal difficulties in the LoPucki analysis, I want to explore further some aspects of the argument that strike me as especially important.

One of the many commendable things about Professor LoPucki's scholarship is that it is often usefully contrarian. In discussing multinational bankruptcies, he has again chosen the road less traveled, championing the traditional idea of territorialism as against the generally accepted modern notion of universalism, although he would modernize territorialism by calling it "cooperative territorialism." As I am one of those who carries the standard of universalism, he and I have engaged in friendly but vigorous debate on this subject for more than a decade. His book for the most part makes the same arguments, often in the same terms, as he has made over the years. I am anxious in this review to avoid stultifying the reader with yet another rehearsal of well-known arguments and responses. I begin instead by mentioning just a few key elements of this prior debate for the benefit of those new to the subject.

Thereafter I will focus on three somewhat new points that Professor LoPucki's book brings to the discussion. One is integration of the international forum debate with the controversies over domestic forum shopping. A second is his discussion of the difficulties presented by consolidation of multinational corporate groups as reflected in recent European cases. The third is a series of policy arguments that conflate two quite distinct choice-of-law issues.

II. Territorialism Versus Universalism

Territorialism, often called the "grab rule," describes the administration of a multinational insolvency case through the exercise of jurisdiction by each national court that has control of assets of the debtor. The courts act independently, applying their local law to the management and distribution of the assets they are able to seize. Professor LoPucki has updated territorialism to cooperative territorialism, where the courts involved cooperate to the extent cooperation benefits the local proceeding. [FN5] By contrast, universalism, which today usually appears in a version styled "modified universalism," has been summed up as follows:

[U]niversalism has come to be understood as a system where one central court administers the bankruptcy of a debtor on a worldwide basis with the help and cooperation of courts in each affected country. Despite a recent vigorous defense of a cooperative version of territorialism, [FN6] modern academic and *323 professional opinion has come down overwhelmingly on the side of universalism. [FN7]

On the other hand, no country has adopted universalism in its pure form and it may not be practical now or for some time in the future. . . . Modified universalism is universalism tempered by a sense of what is practical at the current stage of international legal development [FN8]

Professor LoPucki and I, along with professors Rasmussen and Guzman, debated the merits of these two approaches, as well as a contractualist solution, in a colloquium in the Michigan Law Review in 2000. [FN9] The reader who is interested in this debate and has not previously studied it will want to read those articles, which cover the ground pretty thoroughly. The reader might also consult Principles of Cooperation recently published by the American Law Institute. [FN10] A short

reprise of the LoPucki position and my response will do for the purposes of this review. Readers already schooled in that debate may safely skip on to Part III.

Professor LoPucki attacks universalism on two grounds: vested rights and impracticality. The first argument, which he de-emphasizes in his recent writings, is that creditors have legitimate expectations as to priorities and other aspects of insolvency that are disappointed if a form of universalism is adopted. That is, he assumes that creditors' expectations about insolvency are formed on the basis of the local law of the creditor (or perhaps the law of the transaction giving rise to the claim) and that those expectations should be vindicated. [FN11] To some extent, that view conflates the choice-of-law issues relating to bankruptcy and non-bankruptcy law. [FN12] More fundamentally, it reflects a traditional territorial view of choice-of-law questions that has been largely abandoned in the United States and is under increasing challenge elsewhere. [FN13] In commercial law, that view of creditors' legitimate expectations was rejected by the United States Supreme Court in the nineteenth century, when the Court held that creditors of foreign corporations should expect that the home-country law of a foreign debtor might have decisive effect in governing the rights of creditors following a general default. [FN14] Thus it has long been understood that we cannot cling to the notion of locally fixed creditors' rights in the insolvency proceeding of a foreign corporation. Such localism becomes even harder to defend in our rapidly globalizing world. Like other aspects of globalization, that fact *324 creates many serious problems of both efficiency and fairness. Those problems will not be solved by ignoring the realities of modern commerce.

To function effectively, bankruptcy law must have a reach co-extensive with the market in which it operates. It is for that reason that most bankruptcy laws are national in scope, even in countries like the United States where much commercial and property law is regional. That necessity drove our European friends to overcome serious difficulties to adopt the EU Insolvency Regulation (the Regulation), beginning the integration of bankruptcy proceedings throughout that increasingly unified market. [FN15] I summarized my view in the Michigan colloquium as follows:

[T]here 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. . . . Two of the primary functions of liquidation bankruptcy are to maximize asset value and to distribute proceeds according to a scheme of priority based on legal rights. . . . Such a collective system cannot operate unless: i) the assets of a debtor are part of a common pool for the benefit of stakeholders and ii) the rights of all potential stakeholders are finally resolved prior to a final distribution. Only a single system operating under a single set of overall rules can achieve those unified results. A single system cannot be legally effective unless it controls assets and binds stakeholders throughout the market.

Reorganization bankruptcy (often called "rescue" elsewhere) is even more dependant upon the existence of a single reorganization activity. . . .

It is therefore not surprising that when the Founders of the American Republic assembled to create a federation with a single national market they gave the national government the power to govern general defaults. . . .

Because bankruptcy is a market-symmetrical law, a global market requires a global bankruptcy law. A global default--that is, the general default of a multinational company--requires a single bankruptcy proceeding that can apply rules

and reach results that are conclusive with respect to all stakeholders throughout the global market. Anything short of that procedure is, at best, a temporary accommodation that awaits the political will to achieve the proper legal result. [\[FN16\]](#)

Writing with Professor William Whitford, Professor LoPucki has applied similar analysis in the context of domestic venue problems:

To give effect to these policies, it is generally recognized that a single bankruptcy court must be able to control, or at least coordinate, all aspects of the reorganization of the business:

[T]he need to centralize bankruptcy-related proceedings and prevent a chaotic scramble for the debtor's assets is an interest of paramount importance in the bankruptcy laws. The automatic stay . . . is designed to prevent a chaotic and uncontrolled scramble for the debtor's assets in a variety of uncoordinated proceedings in different courts. The stay insures that the debtor's affairs will be *325 centralized, initially, in a single forum in order to prevent conflicting judgments from different courts and in order to harmonize all of the creditors' interests with one another. [\[FN17\]](#)

In the Michigan symposium, Professor LoPucki accepted that universalism would triumph in the long run, [\[FN18\]](#) so the debate focused on the interim: would modified universalism or cooperative territorialism best serve us in the run up to a universalist future? Unfortunately, his writings often conflate universalism and modified universalism, the long term with the more immediate future. He points to reasons that the long-term solution is not readily applicable in the here and now as arguments to reject the shorter term approach of modified universalism. [\[FN19\]](#) His argument is like claiming that no plane can land on a jungle airstrip because a 747 cannot do it. Modified universalism is a modest mechanism designed to improve management of multinational defaults within the limitations presented by current circumstances. Universalism is the larger solution that must await further developments in our legal infrastructures.

That confusion aside, one argument dominates Professor LoPucki's crusade against universalism. It is a practical one. His oft-repeated "three questions" amount to an assertion that it is impossible to devise a satisfactory rule for identifying a home-country forum, which is the forum in which a universalist would concentrate the greater part of bankruptcy jurisdiction over a multinational (the "main" proceeding). [\[FN20\]](#) Most of his attack is focused on the test for the home country forum found in both the Model Law on Cross-border Insolvency (Chapter 15 in the United States) and the Regulation: the center of the debtor's main interests (COMI). [\[FN21\]](#) His position is that this rule is so ambiguous and prone to manipulation that it permits a multinational to file for bankruptcy anywhere in the world that it chooses. [\[FN22\]](#) Because universalism requires identification of a home country to act as the main jurisdiction, universalism is fatally flawed. Therefore cooperative territorialism is the better system.

Even if the premises were accepted, the syllogism is itself flawed. It is a non sequitur to point out the difficulties with proposition A and say therefore proposition B is better, unless the costs and benefits of each have been identified. Yet Professor LoPucki has consistently failed to compare cooperative territorialism with modified universalism. As always, he invites us to believe that a system that rests upon the absolute autonomy of each jurisdiction will do a better job of coordinating the insolvency of a closely integrated international company than will a system that is committed to cooperation on a global scale and uses the home-country court pragmatically to provide some center to the worldwide

effort. He is much like someone who proclaims that the accepted medical procedure for an illness is only effective half the time and therefore should be abandoned in favor of his blue pill, no one to know what is in it.

***326** The author had never even defined cooperative territorialism clearly until, in his latest writing, he explains that it is what we have now. [\[FN23\]](#) Thus his claim must be that the present "system" is a better solution today than modified universalism. He makes no attempt to square that assertion with the fact that the overwhelming majority of lawyers and judges with experience in the field have supported the modest first-step universalist reforms he deplores. [\[FN24\]](#)

Furthermore, he never makes his case concretely. For example, his only factual comparison is the KPNQwest case in which trustees from several countries were apparently unable to coordinate their proceedings to maximize the value of the debtor's European cable network. [\[FN25\]](#) He then asserts, without explanation, that cooperative territorialism would have solved the problem of getting everyone together to sell the network as a whole. [\[FN26\]](#) Why, exactly, would administrators and courts unwilling to cooperate under a statute requiring cooperation become happy coordinators under a system that demands single-minded attention to the interests of a local proceeding? He does not tell us. In fact, the trustees in KPNQwest prior to the Regulation might have been denied even the hope of coordination, because many civil law courts will be unable to cooperate because of a lack of statutory authorization to do so. [\[FN27\]](#) The enormous benefit that arises from providing that authorization in the Regulation is ignored as are all the other cases of successful cooperation.

In fact, he offers no persuasive argument that the cost of the ambiguities of the COMI rule exceeds the substantial benefits of a universalist approach. [\[FN28\]](#) In a case with bank accounts, operations, inventory and customers all over the world, territorialism presents the specter of multiple, conflicting decisions that would produce chaos in the administration, complete with dueling injunctions against debtor and creditors in various jurisdictions. [\[FN29\]](#) That cost is a central pillar of my claim that modified universalism would provide a more practical road to travel to the future as well as a better destination. [\[FN30\]](#) Even in the short term, courts that focus on a worldwide perspective are nearly certain to do a better, more coherent job of managing a multinational insolvency than will judges and trustees told to "look out for our own," with only a nod to cooperation when it seems necessary.

It is especially important to note that territorialism will presumably permit courts and administrators to cooperate only when it is in the interests of all the jurisdictions concerned. While any jurisdictional dispute in a system of modified universalism will almost always be limited to two jurisdictions, [\[FN31\]](#) many more jurisdictions may be contending in a territorialist ***327** system. Note that if a company or a division has a production line that stretches across four countries and could realize much greater value in a package sale, the incentive to hold out would be enormous. The hold-out jurisdiction could extort value from the rest under threat of going its own way, a variation on the hold-out problem that permeates international bankruptcy. [\[FN32\]](#) Worse still, given Professor LoPucki's vested rights approach to territorialism, it must be assumed that cooperation will be limited to those circumstances where the creditors in every proceeding will get more as a result of cooperation. If creditors in one country can profit from a separate sale, then there will be no cooperation despite the far lower overall value that will result.

Although short of ideal, adoption of modified universalism would improve this situation considerably. Being generous, we might assume that half of the multinational cases raise a serious question about which jurisdiction is the debtor's home country. In perhaps half of the remaining cases, honest judges would reach the same conclusion about that issue. [FN33] So now three-fourths of the cases enjoy the benefits of modified universalism. In the remaining quarter of the cases, each of two jurisdictions claim to be the main one. In those remaining cases, there is a risk of noncooperation between courts except when both proceedings would benefit, with a definite possibility of dueling injunctions and other conflicts--that is, the usual horrors of territorialism, although probably limited to two countries rather than a dozen. Three-fourths of the cases are much better handled, while the rest are no worse off. Few pragmatic solutions to difficult problems offer better results.

Thus the core argument that Professor LoPucki has repeated over and over--that any form of universalism must fail because of the difficulty of identifying the home country--is simply wrong, once costs and benefits are duly considered. Such additional arguments as he offers in his book are also purely negative, with no comparison between the pragmatic benefits and costs of modified universalism and any form of territorialism. They are considered below.

Although the cost/benefit argument is dispositive in my view, I will mention two specific responses to the claim that COMI is a useless standard. First, the claim that such a standard is hopelessly indeterminate is amply refuted by extensive experience with the use of similar standards in the law of United States, the law with which Professor LoPucki and I are most familiar. The venue provisions for corporations in diversity cases, for example, turn on a "principal place of business" standard [FN34] and the choice-of-law provisions for security interests under Article 9 of the Uniform Commercial Code refer to the debtor's "place of business" and "chief executive office." [FN35] Professor LoPucki never demonstrates that these and many other similar statutes have been hopeless to apply.

The European cases that the author uses to suggest the difficulty of applying COMI all involve subsidiaries in corporate groups. [FN36] It is in that context that one is most apt to find a geographic separation between executive administration and day to day operations, *328 the most common problem arising under any of the COMI-like statutes. [FN37] Should the place of business/chief executive office/COMI be where the company is administered or where it does business with its suppliers and customers? [FN38] Judge Bufford has reviewed these cases in detail and has made some useful suggestions for procedural reforms that would improve the results, focusing on the preliminary and ex parte nature of these jurisdictional decisions. [FN39] I will not retrace his steps. [FN40] To the extent that Professor LoPucki has shifted his argument to rest it upon judicial bias, I address it below.

Under the COMI-like rules in the United States and elsewhere, the courts sometimes encounter hard cases, but on the whole sort them out in a satisfactory way. It is thus not surprising that Professor LoPucki has been unable to present a single instance in which the COMI rule produced a troubling result, except with regard to consolidation of corporate groups, a more general problem discussed below. [FN41]

Two cases, decided prior to the adoption of Chapter 15, illustrate the potential uses of COMI. [FN42] In Cenargo, a corporate group largely operating out of the United Kingdom, its place of incorporation, was the subject of an involuntary

filing in London, followed by a voluntary Chapter 11 filing in the United States. It had few contacts with the United States. The two courts narrowly avoided a transatlantic jurisdictional struggle, including dueling injunctions. The nearly disastrous result would have been a predictable consequence of territorialism, each court struggling to benefit its proceeding and protect local interests. [FN43] By contrast, under a COMI regime there would have been no basis for claiming that the *329 debtor was headquartered in the United States or that there was any other ground for United States jurisdiction of a main proceeding under Chapter 15 and COMI. [FN44]

Cenargo is exemplary in another important way. It shows the central role of communication. It was direct telephone communication between the courts that finally broke the deadlock and led to a satisfactory result. Closely related is the availability of information. Chapter 15 requires that the debtor inform the recognizing court of other pending proceedings and supplement that information as necessary. [FN45] The ALI Principles add a gloss to that duty. [FN46] In addition, Chapter 15 directs the courts to cooperate with foreign courts and explicitly authorizes direct communication with foreign courts and trustees. [FN47] Many of the difficulties that concern Professor LoPucki will be ameliorated or obviated by the use of these provisions.

A second example is the Maxwell case in the Second Circuit. [FN48] It would seem at first glance to be the perfect example for Professor LoPucki's argument, because one could plausibly argue the center of gravity of that debtor's affairs were in either the United States or the United Kingdom. Yet the courts involved chose to take a worldwide perspective of the universalist sort. The result was the classic instance in which that perspective overcame the technical problem of choosing a forum to produce the correct result, an agreed worldwide scheme of liquidation. [FN49]

III. The Evolution of the Argument

Professor LoPucki's position in his book has evolved from his earlier stance in three respects. First, he now says that the same factors that make reform of U.S. law so necessary are equally applicable in multinational cases. Specifically, he now says that the COMI standard will be manipulated by debtors and judges so as to permit almost unlimited *330 forum-shopping to the detriment of creditors and other stakeholders. Second, he cites recent European cases to argue that territorialism is better equipped to coordinate the bankruptcies of multinational corporate groups. Third, he claims a variety of policy ills that would arise from inappropriate choice-of-law decisions under a universalist system. It is these three arguments that I want to address in more detail in this review.

A. Integration with the Domestic Critique

The book is devoted primarily to a critique of the corporate venue system in the United States. As Professor LoPucki says, it permits a large corporation to file a Chapter 11 case in pretty much any federal judicial district. [FN50] The system makes it particularly easy to file in Delaware or the Southern District of New York, favored bankruptcy fora for such corporations. [FN51] As a result, many of these corporations have filed Chapter 11 cases in districts far from their actual headquarters, with various adverse consequences. [FN52] The classic case is Enron, which liquidated in Manhattan, far from its Houston base. The only legal tool for preventing the prejudice that results is the discretion given to the court where the case is filed to transfer it to the corporation's home court. Professor LoPucki argues that the discretion is rarely exercised in such cases, even when it

should be, leaving the cases in the improper forum. The relevance to the international problem is that he claims the same arguments and considerations apply to multinational bankruptcies under COMI. In fact they do not, for the reasons discussed below. [\[FN53\]](#)

Analytically, the analogy fails because the two forum-selection rules, domestic and international, are of opposite types. The basic domestic rule is highly specific, easy to apply, and completely permissive. That is, it permits a large debtor to file in nearly any part of the United States. The second part of the domestic rule gives broad discretion to a court to transfer the case to another district. The net result is that virtually every case is correctly filed when filed where the debtor prefers to be, although the court in that place has the power to move it elsewhere. [\[FN54\]](#) Thus the rule domestically is very permissive, subject to a possible judicial veto.

***331** The COMI rule has the opposite structure. The debtor corporation may only file in the forum that is its COMI. [\[FN55\]](#) It is true that the COMI rule is more ambiguous than the permissive domestic rule, but the COMI rule is not infinitely manipulable by a court endeavoring to apply it in good faith. In most cases just one jurisdiction will be plausible as the debtor's COMI. In the remaining cases there will almost always be only two jurisdictions that could pass the "blush test." As noted above, they will be the jurisdiction in which administration and decision making is concentrated and the jurisdiction in which the debtor has its assets and public operations. In many of those cases, the majority of uncorrupted, minimally competent judges will make the same choice of a jurisdiction as the main one. The result will often be to avoid jurisdictional conflict rather than to precipitate it. At worst, a period of litigation will reveal the strengths and weaknesses of each approach and will be followed by a choice of one standard or the other. [\[FN56\]](#)

Despite this crucial difference, Professor LoPucki asserts that the same judicial bias he finds on the domestic side will prevent judges from acting properly in response to manipulation of COMI internationally. Domestically, his claim is that United States judges will rarely exercise their discretion to send a large case to a district where it ought to have been filed because the domestic system is "corrupt." [\[FN57\]](#) While I strongly disagree with that assertion, I do believe that a variety of subtle but powerful factors may adversely influence even the most honest judge in the exercise of a discretion that is undefined and largely nonreviewable. [\[FN58\]](#) Given that the debtor's choice will almost always be permissible under the domestic statute, it is unlikely that most judges will feel free to override it as a matter of discretion when the local effects would be seriously adverse.

The international side is entirely different, because of the difference in the structure of the rules. The judge who would like to keep an international case will have to try to fit the debtor's local contacts into the phrase "the center of the debtor's main interests." Rarely will the local jurisdiction fit unless it is the place of executive administration or of the major economic activity of the company. At worst, the judge in making a plausible choice of the local forum will be choosing a place that has a great deal to recommend it as a place from which to manage a global liquidation or reorganization. [\[FN59\]](#) Where the local forum boasts neither the debtor's headquarters nor its principal operations, the court will almost never be able to advance a plausible argument for its treatment as the main proceeding. The illegitimacy of seizure of an attractive case by that judge would be patent and would almost certainly have consequences for that court, internally and externally. Of course, some judges, foreign or domestic, might nonetheless be

corrupt or incompetent. Any effort at international judicial cooperation must allow for that possibility, as Chapter 15 certainly *332 does. [FN60] Beyond that, only time and evolving international standards will reveal whether any international system can function effectively, because all of them will depend in significant part on the competence and honesty of judges. To the extent that judges have those qualities, the COMI rule will provide a good, although not perfect, level of predictability and control. Judge Bufford has listed some of the many cases that have demonstrated good will in deferring to foreign bankruptcies. [FN61]

The inaptness of the domestic analogy is further demonstrated by the fact that Professor LoPucki has not found such difficulty in domestic forum shopping as to drive him to Professor Skeel's state-by-state bankruptcy proposal, [FN62] the domestic equivalent of territorialism. Presumably, he recognizes that domestically the costs of a localized procedure would exceed the costs of forum shopping. [FN63] Thus he implicitly concedes that the domestic and international problems are quite different.

B. Corporate Groups

Professor LoPucki draws upon recent European case law to suggest that universalism is impractical in light of the fact that most large corporations operate through groups of affiliated companies incorporated under the laws of various jurisdictions. [FN64] He focuses in particular on the problem of consolidation of proceedings, because Chapter 15 and the Regulation treat each corporate entity separately. Although this argument sometimes intermingles with the COMI point in his discussion of the cases, it is distinct. It goes to the problem of liquidating or reorganizing a group of companies that may be incorporated and physically present in a number of different countries.

Professor LoPucki is correct in saying that Chapter 15 and the Regulation do not solve the problem of coordinating the liquidation or reorganization of a multinational corporate group. However, he does not explain how they somehow impede that process or how territorialism has done it better.

The author offers a large hypothetical example of Daimler-Chrysler (Daimler) in financial distress. One aspect of this example suggests coordination may be bad. He argues that territorialism would do a better job where a subsidiary is economically independent. [FN65] He cites the Mexican subsidiary of Daimler as a company completely contained within the borders of Mexico, so that the management of its sale or *333 reorganization from Germany would be absurd. [FN66] Putting to one side the fact that it is already managed from Germany (no doubt with the aid of Mexican legal counsel), the example of a multinational automobile company seems particularly ill-suited to his argument. Those companies are said to be remarkably integrated worldwide. The plant in Mexico no doubt draws its parts from all over the world, including many Daimler affiliates. Those companies share chasses as well as thousands of computer chips and other components. It seems highly probable that one could obtain more value for the stakeholders of the subsidiary and Daimler itself by selling or reorganizing it as part of an integrated package with a number of other companies, including perhaps Chrysler U.S. and Chrysler Canada. [FN67] The sale of a plant and its inventory standing alone would likely be a fire sale at rock bottom prices. The focus of modern bankruptcy law on going-concern value is designed to avoid just such a destruction of value. Preservation of going-concern value in a multinational group is very difficult in a territorialist system.

There may be some subsidiaries that might truly stand alone, but even those companies are quite likely to obtain financing from affiliates and parents. In a multinational group, it will often be true that the major lenders will have cross-guarantees from all or many subsidiaries, while bondholders, suppliers, tort victims, and others will have a legal relationship with only one or a small number of the affiliates. Under the universalist principles formulated by the ALI, the courts managing the general default would take a worldwide perspective on value and priorities, [\[FN68\]](#) while territorialist courts would often be forced to take steps defeating maximization so as to protect local recoveries. [\[FN69\]](#)

When Professor LoPucki considers the imagined failure of the Daimler group as a whole, he concedes that coordination of the insolvencies of its affiliates is desirable. [\[FN70\]](#) However, as throughout his work in this area, he offers not a clue how to do that. The problem of managing the general default of a multinational corporate group is very difficult and complex. In the short to medium term, Chapter 15 and the Regulation offer some first steps to solving the problem.

The most important contribution of Chapter 15 is to authorize cooperation and make it mandatory. Courts in countries adopting the Model Law, [\[FN71\]](#) on which Chapter 15 is based, [\[FN72\]](#) are obligated to work with foreign courts "to the maximum extent possible." [\[FN73\]](#) This language gives that authority to civil law courts that previously lacked competence to ***334** engage in cooperation. [\[FN74\]](#) Even in the common law countries like the United States, it makes the duty to cooperate statutory and explicit rather than just implicit in the case law. [\[FN75\]](#)

Both Mexico and United States have adopted the Model Law. [\[FN76\]](#) Thus in the Daimler proceeding hypothesized by Professor LoPucki, the courts in Mexico and the United States would be bound to cooperate in the liquidation or reorganization of Chrysler U.S. and Chrysler Mexico, maximizing value for all concerned. That reform may be modest, leaving many questions unanswered, [\[FN77\]](#) but it is far better than no provision for cooperation. [\[FN78\]](#)

In summary, Professor LoPucki's comments about corporate groups amount to saying that their defaults present great difficulties that reforms to date have failed to solve. That statement is true, although it ignores the helpful first steps that have been taken. He has provided no evidence or even argument that supports the notion that territorialism has offered better solutions nor that the territorialist perspective is superior in helping parties and courts arrive at pragmatic solutions pending further reform. [\[FN79\]](#)

***335** C. Choice of Law

Multinational bankruptcy cases present a uniquely complex interaction of choice of law and choice of forum. [\[FN80\]](#) In some respects, Professor LoPucki's analysis conflates these problems by assuming that in a universalist system the law of the foreign main proceeding must necessarily govern all the rights and obligations of all stakeholders. That is not true.

I have recently offered an analysis of the choice-of-law problem presented by the Lernout case. [\[FN81\]](#) There, a group of U.S. equity holders had fraud claims under U.S. securities law for which they would receive nothing under U.S. bankruptcy law but would share pro rata with other unsecured creditors under Belgian bankruptcy law. The debtor was headquartered in Belgium, but acquisitions made in the United States during the last year of its corporate life meant its

largest group of assets was here. The U.S. courts ultimately distributed assets almost entirely under the U.S. priority system rather than the Belgian one. The key point for present circumstances was that the choice-of-law analysis in the United States courts was fundamentally flawed because it confused choice of bankruptcy law with choice of the substantive law governing the claims themselves. [\[FN82\]](#) In order to choose a bankruptcy rule, the courts relied on United States contacts and interests with regard to security fraud, a basic mistake. It should instead have applied United States law to determine the validity of the securities claim and then determined independently what bankruptcy law should apply to determine the proper priorities. [\[FN83\]](#) I refer the reader to the other article for the details.

Professor LoPucki suggests in his Daimler hypothetical that the German law of the parent would apply to the claims of U.S. employees in a system of modified universalism. [\[FN84\]](#) Let us assume that Daimler, the parent, for various purposes directly employs 100 persons who live and work full time in the United States. Daimler files for reorganization in Germany and that proceeding is recognized in a U.S. bankruptcy court as a main proceeding under Chapter 15. One of the U.S. employees might have an unpaid pre-bankruptcy salary claim. Professor LoPucki seems to assume that realization of that claim would be governed by German law. In fact, the problem is far more nuanced.

The salary claim is squarely governed by New York and federal law as to entitlement. That is, any dispute over the amount owed is governed by U.S. law. [\[FN85\]](#) The only question to which German law applies is the priority to be given the claim in the German bankruptcy. Putting to one side for the moment the possibility of a full U.S. bankruptcy under the *336 Bankruptcy Code, [\[FN86\]](#) that question will be governed by German bankruptcy law. As it happens, the reformed German law has abolished the priority for pre-bankruptcy claims of employees, who are now paid in full from a general unemployment fund. [\[FN87\]](#) Would the fund pay to the U.S. employees? If not, would the U.S. bankruptcy court condition relief under section 1521 of the Code (including turnover of assets) upon payment of the employees? As to the post-bankruptcy salary claim, there is a possibility of personal liability of the administrator if these are not paid, although that claim may or may not be enforceable by the employees. There are no easy or self-evident answers to the issues raised by these claims. To suggest that the employee's claim will simply be governed "by German law" is far too simplistic.

The question is further complicated by the effect of state and federal laws protecting employees. Failure to pay the employee may generate both civil and criminal sanctions under U.S. law, a result especially relevant if Daimler is reorganizing and hopes to continue doing business in the United States. Any goods it manufactures may also be subject to the "hot goods" provision of federal labor law and be banned from interstate commerce. [\[FN88\]](#) Thus the German administrator might find it prudent to pay the employees rather than risk these penalties.

It is also possible that the United States employees could bring a "full" involuntary bankruptcy against Daimler. Professor LoPucki suggests that it is difficult to do that, [\[FN89\]](#) but in the case of a debtor in a foreign proceeding it is now easy. Under Chapter 15 there is a presumption that a debtor in a foreign main proceeding is not paying its debts as they become due under [section 303\(h\) of the Bankruptcy Code](#). [\[FN90\]](#) In that proceeding the employees would have a priority under section 507(a)(3), subject to the possibility of dismissal under section 305. [\[FN91\]](#)

However, such a local proceeding would not necessarily protect the employees.

Local proceedings often do not protect local creditors, including employees. It is quite possible that there would be insufficient assets in the United States to pay their claims. An insufficiency is especially likely as to amounts that exceeded the U.S. statutory priorities for such claims and therefore would be paid only pro rata with other U.S. creditors. Thus in some cases the United States employees might be better off with a local proceeding, but in others they would do better in a worldwide resolution. It is for that reason that territorialism may be worse for them and other local creditors in any given case. [\[FN92\]](#) Maximizing worldwide recoveries in a system of modified universalism makes more sense.

IV. Conclusion

In all candor, and with great respect for Professor LoPucki's scholarship overall, his obsession with his four flaws and three questions [\[FN93\]](#) has lost whatever value it may have had. *337 It is not useful to have still more pages of rhetoric pointing out the many ways in which the management of multinational defaults is very difficult. We all know that. For just that reason, hundreds of lawyers, judges, and scholars from around the world have worked at UNCITRAL, at the ALI, at the European Commission, and elsewhere to construct the beginnings of pragmatic solutions that will lead eventually to the universalist system that we all agree is the right long-term answer. What we need in this effort are constructive ideas for advancing in that direction, not an endless repetition of the difficulties in the way. If Professor LoPucki has better solutions, I await them with eager anticipation. Short of that, he should leave it alone.

[\[FNd1\]](#). Benno C. Schmidt Chair of Business Law, The University of Texas School of Law. I am grateful for the research assistance of Rafael A. Colorado, J.D. 2006, The University of Texas School of Law.

[\[FN1\]](#). Lynn M. LoPucki, *Courting Failure: How Competition for Big Cases Is Corrupting the Bankruptcy Courts* (2005), ch. 7-8. See [Global and Out of Control?](#), *79 Am. Bankr. L.J.* 79 (2005) [hereinafter *Global and Out of Control*].

[\[FN2\]](#). Symposium, *Bankruptcy*, 54 *Buff. L. Rev.* (forthcoming Spring 2006); Thomas J. Salerno, *Courting Failure: How Competition for Big Cases Is Corrupting the Bankruptcy Courts*, *Am. Bankr. Inst. J.* 46 (2005) (book review).

[\[FN3\]](#). Samuel L. Bufford, [Global Venue Controls Are Coming: A Reply to Professor LoPucki](#), *79 Am. Bankr. L.J.* 105 (2005).

[\[FN4\]](#). Professor LoPucki has supplemented his views by way of a reply to Professor Bufford. Lynn M. LoPucki, [Universalism Unravels](#), *79 Am. Bankr. L.J.* 143 (2005). My references to the international material will be to the articles rather than the book.

[\[FN5\]](#). I speak of a benefit to the local proceeding, not to local creditors, because virtually every country in the world now treats local and foreign creditors (however defined) without discrimination, at least in theory and often in fact. Thus the beneficiaries of territorialism are those creditors that happen to file locally, which will typically include both the local deli and Citibank. The idea that territorialism serves "local" creditors or locally centered expectations is highly attenuated in a globalizing world. See *infra* Part III.C & note 90 for further discussion.

[\[FN6\]](#). Lynn LoPucki, [Cooperation in International Bankruptcy: A Post-Universalist Approach](#), *84 Cornell L. Rev.* 696 (1999).

[FN7]. Id. at 698; see also Donald T. Trautman, Jay Lawrence Westbrook & Emmanuel Gaillard, Four Models for International Bankruptcy, 41 Am. J. Comp. L. 573, 576-78 (1994).

[FN8]. Am. Law Inst., Principles of Cooperation Among the NAFTA Countries 8 (2003) [hereinafter ALI Principles] (I had the privilege of serving as the U.S. Reporter for the project). See generally Evelyn H. Biery, Jason L. Boland & John D. Cornwell, A Look at Transnational Insolvencies and Chapter 15 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 47 B.C. L. Rev. 23 (2005).

[FN9]. Colloquium, International Bankruptcy, 98 Mich. L. Rev. 2276 (2000).

[FN10]. ALI Principles, supra note 8.

[FN11]. See Lynn M. LoPucki, The Case for Cooperative Territoriality in International Bankruptcy, 98 Mich. L. Rev. 2216 (2000). Another U.S. scholar who has argued against the universalist position is Professor Tung. See Frederick Tung, Fear of Commitment in International Bankruptcy, 33 Geo. Wash. Int'l L. Rev. 555 (2001).

[FN12]. See infra Part III.C.

[FN13]. See generally David F. Cavers, A Critique of the Choice-of-Law Problem, 47 Harv. L. Rev. 173 (1933); Brainerd Currie, Survival of Actions: Adjudication Versus Automation in the Conflict of Laws, 10 Stan. L. Rev. 205 (1959); Robert A. Lefflar, The Nature of Conflicts Law, 81 Colum. L. Rev. 1080 (1981); Willis L.M. Reese, Conflict of Laws and the Restatement Second, 28 Law & Contemp. Probs. 679 (1963); Russell J. Weintraub, An Approach to Choice of Law that Focuses on Consequences, 56 Alb. L. Rev. 701 (1993). All of these articles criticize the territorial/vested rights approach to choice of law and express the view that its time had passed.

[FN14]. Can. S. R.R. v. Gebhard, 109 U.S. 527, 537-38 (1883).

[FN15]. See Council Regulation 1346/2000, 2000 O.J. (L 160) 1 [hereinafter Council Regulation 1346]. Professor LoPucki criticizes the Regulation extensively in his book. *Global and Out of Control*, supra note 1, at 86-90.

[FN16]. Jay Lawrence Westbrook, A Global Solution to Multinational Default, 98 Mich. L. Rev. 2276, 2283-87 (2000) (footnotes omitted).

[FN17]. Lynn M. LoPucki & William C. Whitford, Venue Choice and Forum Shopping in the Bankruptcy Reorganization of Large, Publicly Held Companies, 1991 Wis. L. Rev. 11, 52 (footnote omitted).

[FN18]. See LoPucki, supra note 11, at 2217.

[FN19]. See, e.g., LoPucki, supra note 4, at 144-45. There the author attacks "universalism" for its failure to identify a single court for a worldwide administration of a case. In the long term, when treaties and model laws have enabled us to reach the goal of universalism, that will not be a problem. In the short to medium term, there will be a number of courts involved in multinational cases and the role of modified universalism will be to move them toward such global solutions as are pragmatically possible. Westbrook, supra note 16, at 2323.

[FN20]. See LoPucki, supra note 4, at 144-45.

[FN21]. [11 U.S.C.A. § 1502\(4\)](#) (West 2005); Council Regulation 1346 art. 3(1).

[FN22]. See *Global and Out of Control*, supra note 1, at 101-02.

[FN23]. See LoPucki, supra note 4, at 167. Actually, it is what we had twenty years ago, before section 304 and cognate notions in other countries began, slowly and painfully, to erode territorialism and move toward modified universalism.

[FN24]. The severe critics of the Regulation, for example, do not advocate its repeal or a return to territorialism. See infra notes 38-39 for further discussion.

[FN25]. See *Global and Out of Control*, supra note 1, at 96-97.

[FN26]. Professor LoPucki draws the example from Van Galen's paper. Robert van Galen, *The European Insolvency Regulation and Groups of Companies 3* (INSOL Eur. Annual Cong., 2003), available at http://www.insol-europe.org/downloads/congress/2003/Van_Galen_full.paper.pdf. That paper contains no suggestion that territorialist rules would have improved cooperation in that case.

[FN27]. See U.N. Comm'n on Int'l Trade Law, *Cross-Border Insolvency: Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, paras. 15-16, 26, 173, U.N. Doc. A/CN.9/442 (Dec. 19, 1997) [hereinafter *Guide to Model Law on Cross-Border Insolvency*] (noting a lack of provisions in many countries adequate to permit international cooperation); Am. Law Inst., *International Statement of Mexican Bankruptcy Law 111* (2003) [hereinafter *ALI Statement of Mexican Bankruptcy Law*].

[FN28]. Professor Guzman and I discuss the benefits at length in the Michigan symposium. See Westbrook, supra note 16, at 2315-19; Andrew T. Guzman, [International Bankruptcy: In Defense of Universalism](#), 98 *Mich. L. Rev.* 2177, 2193-204 (2000) (arguing the benefits of universalism as compared with territorialism).

[FN29]. See, e.g., [In re Cenargo Int'l, PLC](#), 294 B.R. 571 (Bankr. S.D.N.Y. 2003).

[FN30]. Westbrook, supra note 16, at 2325.

[FN31]. See infra Part III.A.

[FN32]. See Sean Hagan, [Designing a Legal Framework to Restructure Sovereign Debt](#), 36 *Geo. J. Int'l L.* 299 (2005).

[FN33]. See discussion infra note 54 and accompanying text.

[FN34]. [28 U.S.C. § 1332\(c\)\(1\)\(2000\)](#).

[FN35]. [U.C.C. § 9-307\(b\)](#) (2001); [Id. § 9-307](#) cmt. 2 (defining the debtor's "location"). While these rules have changed a good deal under the revised Article 9, the prior version used the same language to identify the debtor's location. [Id. § 9-103\(3\)\(d\)](#) (1978). A twist in the new rules makes the law of the state of incorporation controlling for U.S. companies, but uses the "location" of the debtor as the key variable for companies registered outside the United States. [Id. § 9-307](#) cmt. 2 (2001).

[FN36]. These cases have engendered controversy among lawyers and scholars in the

European Union and generated proposals for amendment of the Regulation, although it is noteworthy that none of the critics has proposed a replacement for the COMI standard or abolishment of the Regulation in favor of a return to territorialism.

[FN37]. See generally Bob Wessels, *Int'l Insolvency Inst., International Jurisdiction to Open Insolvency Proceedings in Europe, in Particular Against (Groups of) Companies 6-9* (Nov. 25, 2003), <http://www.iiiglobal.org/country/netherlands.html> (analyzing how courts interpret facts to find the center of main interest of a company); Gabriel Moss & Christoph G. Paulus, *The European Insolvency Regulation--The Case for Urgent Reform, 19 Insolvency Intelligence 1, 4-5* (2006).

[FN38]. Cf. [U.C.C. § 9-307](#) cmt. 2. Following the recent experience in the European Union, some scholars have criticized the headquarters approach. Wessels, *supra* note 37, at 6; Moss & Paulus, *supra* note 37, at 5 (Professor Paulus). Others would apply it. Moss & Paulus, *supra* note 37, at 4 (Mr. Moss).

[FN39]. See Bufford, *supra* note 3, at 131-36. That is not to say that I endorse his suggestions in detail. Experience will continue to inform us concerning the types of procedures that will ameliorate some of the difficulties. I will point out, however, that it is always possible to grant interim relief prior to a dispositive hearing, a possibility that Professor LoPucki ignores in his criticism of Judge Bufford. See LoPucki, *supra* note 4, at 155-58. That course in turn leaves certain difficulties, but none that are strange to lawyers in commercial practices.

[FN40]. However, it is worth addressing briefly Professor LoPucki's assertion that Chapter 15 makes recognition automatic and eliminates any protection for U.S. interests in cases like [In re Treco, 240 F.3d 148 \(2d Cir. 2001\)](#). See Global and Out of Control, *supra* note 1, at 79, 86-87 (protection of U.S. creditors by denial of recognition replaced by automatic recognition). That is a misreading of the statute. [Sections 1515-17](#) of the Bankruptcy Code do provide for recognition based purely on the existence of a foreign proceeding, but section 1517(d) specifically provides for revocation or modification of recognition in appropriate circumstances. Section 1520 grants an automatic stay upon recognition, but the stay can be lifted at any time upon the grounds provided in section 362 of the Code, including "cause." Finally, sections 1519 and 1521-22 give the court broad discretion to grant, deny, modify, or revoke relief granted under Chapter 15, *inter alia*, to ensure that "the interests of the creditors and other interested entities, including the debtor, are sufficiently protected." Thus the U.S. court has ample authority to avoid the various pitfalls that concern Professor LoPucki. The addition of procedural reforms, perhaps along the lines suggested by Judge Bufford, would complement and complete the statutory scheme.

[FN41]. Corporate groups present special difficulties for any approach to international cooperation. One distinguished German scholar who does not favor the headquarters approach generally would apply it nonetheless in the case of corporate groups. Moss & Paulus, *supra* note 37, at 5 (Professor Paulus). He takes the overall position that in the case of corporate groups, the maximization of value trumps predictability. Christoph Paulus, *Two Comments on Advocate General Jacobs' Opinion in the Eurofood Case, Global Turnaround*, Nov. 2005, at 10-11.

[FN42]. [In re Cenargo Int'l, PLC, 294 B.R. 571 \(Bankr. S.D.N.Y. 2003\)](#).

[FN43]. Even as it was, the U.S. professionals were paid substantial amounts. [Id. at 574-75, 605-06](#); see LoPucki, *supra* note 4, at 160.

[FN44]. The United Kingdom case was ultimately conceded the primary role. It would undoubtedly have been the "main" proceeding under the Bankruptcy Code and the Regulation. Had Chapter 15 been in effect, the proper result would simply have been a dismissal or stay of the U.S. case under [section 305 of the Bankruptcy Code](#) and the grant of relief to the main proceeding in the United Kingdom. See, e.g., [In re Argentinian Recovery Co. v. Bd. of Dirs. of Multicanal S.A., 331 B.R. 537, 543 \(Bankr. S.D.N.Y. 2005\)](#). See generally Jay Lawrence Westbrook, *The Challenges of Insolvency Law Reform in the 21st Century* 359 (forthcoming 2006) (reprinting an essay by author, *The Duty to Seek Cooperation in Multinational Insolvency Cases*, in 2004 Annual Review of Insolvency Law 187 (Janis P. Sarra ed., 2004) (Canada)). Professor LoPucki cites Cenargo to show how aggressive the United States courts can be, while not noticing it was a product of the current system, which he proclaims to be his cooperative territorialism.

[FN45]. See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 § 801, [11 U.S.C. §§ 1515\(c\), 1518 \(2005\)](#).

[FN46]. See ALI Principles, *supra* note 8, at 27, 54.

[FN47]. [11 U.S.C. §§ 1525-27](#). The ALI Principles provide an annex of suggested procedures for such communications. ALI Principles, *supra* note 8, at 115. The International Insolvency Institute is conducting a program of translation of these guidelines into many other languages and distribution of them worldwide. See Int'l Insolvency Inst., Member Page of Committee on Cross-Border Communications in Insolvency Cases, http://www.iiiglobal.org/members/committee_c.html (last visited Mar. 3, 2006).

[FN48]. [Maxwell Comm. Corp. v. Societe Generale \(In re Maxwell Comm. Corp.\), 93 F.3d 1036 \(2d Cir. 1996\)](#), *aff'g* [186 B.R. 807 \(Bankr. S.D.N.Y. 1995\)](#), *aff'g* [170 B.R. 800 \(Bankr. S.D.N.Y. 1994\)](#).

[FN49]. In Maxwell, the home country could have been the United Kingdom, the center of the group's administration and financing, or the United States, which had come to be the home of its principal assets. The U.S. courts applied British law to defeat a preference claim against three European banks, despite the fact that the result reduced any supposed vested rights of American creditors by many millions of dollars. The highlight of the case was approval of a worldwide plan of sale and distribution. See generally Jay Lawrence Westbrook, *The Lessons of Maxwell Communication*, [64 Fordham L. Rev. 2531 \(1996\)](#); Harold S. Burman, *Harmonization of International Bankruptcy Law: A United States Perspective*, [64 Fordham L. Rev. 2543 \(1996\)](#); Suzanne Harrison, Comment, *The Extraterritoriality of the Bankruptcy Code: Will the Borders Contain the Code?*, [12 Bankr. Dev. J. 809 \(1996\)](#).

[FN50]. The mechanism that produces this result within the United States has two elements. One provision permits a corporate debtor to file at its place of incorporation. See [28 U.S.C. § 1408 \(2000\)](#). For many corporate debtors, this place of incorporation is Delaware. See Paul P. Daley & George W. Shuster, Jr., *Bankruptcy Court Jurisdiction*, [3 DePaul Bus. & Com. L.J. 383, 399-401 \(2005\)](#). The other element is the affiliate rule, which permits a corporate group to cause a subsidiary to file in the favored forum and then have all the other affiliates in the corporate group, including the parent, file in that same forum, even though the parent and the other affiliates have no real connection with that forum. [28 U.S.C. § 1408\(2\)](#). See generally LoPucki & Whitford, *supra* note 17, at 16.

[FN51]. See Lynn M. LoPucki & Sara D. Kalin, *The Failure of Public Company*

[Bankruptcies in Delaware and New York: Empirical Evidence of a "Race to the Bottom," 54 Vand. L. Rev. 231, 233-34 \(2001\)](#); Theodore Eisenberg & Lynn M. LoPucki, [Shopping for Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganizations, 84 Cornell L. Rev. 967, 968 \(1999\)](#).

[FN52]. [Id. at 971.](#)

[FN53]. I should say that I agree with Professor LoPucki as to the existence of adverse consequences arising from the domestic venue system and also as to the need for its reform. I strongly disagree with his characterization of the problem, including his use of the word "corruption," which is seriously inaccurate. But those points have been widely discussed by others. See, e.g., sources cited in note 2 supra (critiquing LoPucki's book).

[FN54]. See Amended Initial Order upon Transfer of Venue, In re Winn-Dixie Stores, Inc., No. 05-03817-3F1 (Bankr. Mid. D. Fla. Apr. 19, 2005), available at <http://www.flmb.uscourts.gov/megacases.htm> (follow "Initial Order upon Transfer of Venue" hyperlink); see also New York Judge Orders Venue Transfer of Winn-Dixie Case, Jan. 1, 2005, <http://reedsmith.com> (follow "Library" hyperlink; then follow "Search Library" hyperlink; then type "Winn-Dixie" into search engine; then follow "New York Judge Orders Venue Transfer of Winn-Dixie Case" hyperlink).

[FN55]. The reader should note that the COMI rule is much more limited than some of the case law construction of section 304. See, e.g., [Nat'l Warranty Ins. Risk Retention Group v. Bullmore \(In re Nat'l Warranty Ins. Risk Retention Group\), 384 F.3d 959 \(8th Cir. 2004\)](#) (debtor permitted to file in its country of incorporation, regardless of the location of its business and assets, for the purposes of qualifying for section 304 relief). (Disclosure: the author was of counsel to the party opposing the Bahamas proceeding.) The COMI rule is also much narrower than the rules governing the filing of a United States full bankruptcy, in which the jurisdictional requirement may be satisfied with only the presence of property in the United States. [11 U.S.C. § 109\(a\)](#).

[FN56]. Professor LoPucki also suggests that the EU courts are defenseless against pre-bankruptcy manipulation of the debtor's COMI. See Global and Out of Control, supra note 1, at 93 (citing Professor Wessels). Actually, Professor Wessels was arguing that the European courts do have power to avoid debtor attempts at forum shopping. See Wessels, supra note 37, at 12-13.

[FN57]. LoPucki, supra note 4, at 143.

[FN58]. These pressures would include a reluctance to give up a highly interesting case with national visibility for all concerned, as well as enormous economic benefits to the local community including the local professionals. A succession of big bankruptcy cases in the local courthouse is like getting a new Honda plant.

[FN59]. Professor LoPucki also suggests that there will be bankruptcy "havens" under a universalist regime, and their use will be facilitated through the use of corporate affiliates. See discussion infra note 79.

[FN60]. [11 U.S.C.A. § 1522 \(2005\)](#).

[FN61]. See Bufford, supra note 3, at 30. Similarly, Van Galen lists two cases which have reached good results under the Regulation. See Van Galen, supra note 26, at 3-4.

[FN62]. See generally David A. Skeel, Jr., [Rethinking the Line Between Corporate Law and Corporate Bankruptcy](#), 72 *Tex. L. Rev.* 471, 517-24 (1994).

[FN63]. There is a larger point, which is that too often scholars assume that forum shopping is always bad or that its costs always exceed the costs of restraints meant to prevent it. Both assumptions are false, but the larger argument must await another occasion.

[FN64]. See *Global and Out of Control*, supra note 1, at 92-98.

[FN65]. The author sometimes seems to be advocating an extreme form of territorialism in which each local court is absolutely limited to assets within its territory. See, e.g., LoPucki, supra note 4, at 148 n.25. That is difficult to reconcile with his statement that cooperative territorialism represents the current system, because most courts (notably the United States) claim at least some extraterritorial jurisdiction and always have. See [28 U.S.C. 1334\(e\) \(2000\)](#); Am. Law Inst., *Transnational Insolvency: Cooperation Among the NAFTA Countries: International Statement of United States Bankruptcy Law* 76 (2003). The few courts that have had rigidly territorial systems are moving away from them. See, e.g., Junichi Matsushita, *Comprehensive Reform of Japanese Insolvency Law and Civil Rehabilitation Law*, 6 *Zeitschrift für Zivilprozeß Int'l* 277, 291-92 (2001) (F.R.G.); X/Schenkius (receiver for Y), *Gerechtshof [Hof] [Court of Appeal]*, s'Hertogenbosch, 6 juli 1993, NJ 250 (Neth.), translated in 42 *Neth. Int'l L. Rev.* 121 (1995).

[FN66]. It would be surprising if this company were as isolated as the author suggests. It is not unusual for a subsidiary organized under the laws of one country--say Mexico--to serve as the headquarters for a much larger area--say Central America--and therefore to have assets and operations in all those countries. The neat segregation of assets and liabilities in one country is a vanishing phenomenon.

[FN67]. How the proceeds would be distributed in light of a universalist perspective tempered by a respect for the corporate form is a very complex problem, although not beyond solution. See, e.g., ALI Principles, supra note 8, at 18-21, 83-84; see also Jay Lawrence Westbrook, *Universal Participation in Transnational Bankruptcies*, in *Making Commercial Law: Essays in Honour of Roy Goode* 419 (Ross Cranston ed., 1997) [hereinafter Westbrook, *Universal Participation*]; Jay Lawrence Westbrook, [Universal Priorities](#), 33 *Tex. Int'l L.J.* 27 (1998) [hereinafter Westbrook, *Universal Priorities*]; Ulrik Rammeskov Bang-Pedersen, [Asset Distribution in Transnational Insolvencies: Combining Predictability and Protection of Local Interests](#), 73 *Am. Bankr. L.J.* 385 (1999).

[FN68]. ALI Principles, supra note 8, at 8-10, 17-18.

[FN69]. The reader will recall that local recoveries are not the same as recoveries by local creditors. See discussion supra note 5; Westbrook, *Universal Participation*, supra note 67; Westbrook, *Universal Priorities*, supra note 67.

[FN70]. See *Global and Out of Control*, supra note 1, at 94.

[FN71]. See *Guide to Model Law on Cross-Border Insolvency Model Law on Cross-Border Insolvency*, supra note 27.

[FN72]. See, e.g., Jay Lawrence Westbrook, [Chapter 15 at Last](#), 79 *Am. Bankr. L.J.* 713 (2005).

[FN73]. [11 U.S.C.A. § 1525 \(2005\)](#).

[FN74]. See discussion *supra* note 27.

[FN75]. *Id.* at 174. Note that [section 304 of the Bankruptcy Code](#), the predecessor to Chapter 15, imposed no duty to cooperate on its face. [11 U.S.C.A. § 304](#), repealed by Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 119 Stat. 23. It empowered the courts to cooperate, but did not direct them to do so.

[FN76]. Mexico, like the United States, has adopted the Model Law almost word for word, except that Mexico has added a reciprocity requirement. See ALI Statement of Mexican Bankruptcy Law, *supra* note 27, at 109. Insofar as one would like to see Chrysler Canada added to a Daimler package for sale or spin-off, our Canadian friends have nearly adopted a version of the Model Law also, although its effects are a bit difficult to predict. See Bruce Leonard, *When Will Canada Adopt the UNCITRAL Model Law?*, *Canadian Ann. Insolvency Rev.* (forthcoming 2006); Jacob Ziegel et al., *Submissions on Bill C-55, 2005: The Wage Earner Protection Program Act, and Amendments to the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*, Presented to the H. of Commons Standing Comm. on Indus., Natural Res., Dev. & Tech., Nov. 9, 2005 (copy on file with author). Professor LoPucki says that the United States and the United Kingdom are the only important countries to adopt the Model Law. In addition to Mexico and Canada, I would have thought that South Africa and Poland, among others, are important countries. Japan has also adopted the essence of the Model Law, although not its language. *Law Relating to Recognition and Assistance for Foreign Insolvency Proceedings*, Law No. 129 of 2000 (Japan); see Kazuhiko Yamamoto, *New Japanese Legislation on Cross-Border Insolvency as Compared with the UNCITRAL Model Law*, *11 Int'l Insolvency Rev.* 67 (2002); see generally *UNCITRAL Model Law on Cross-Border Insolvency Status*, http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Modelstatus.html (last visited Mar. 8, 2006).

[FN77]. Any suggestion that proponents of the Model Law might have been disingenuous in presenting it to Congress is demonstrably false. See LoPucki, *Universalism Unravels*, *supra* note 4, at 166 nn.102-03. In particular, 1) the proponents of the Model Law were hardly responsible for changes in Congressional procedures in recent years that have reduced the free flow of debate on many issues; and 2) they did not claim the Model Law represents universalism because it does not, although it is a modest step in that direction. It should be noted in this connection that the Model Law was recommended to Congress unanimously by the National Bankruptcy Review Commission, one of the very few things upon which that politically diverse and contentious body was able to agree.

[FN78]. The Regulation also requires cooperation, although in terms less broad. Council Regulation 1346/2000 arts. 31, 33-34, 2000 O.J. (L 160) 1 (EC).

[FN79]. He also claims that it would be easy to manipulate the location of corporate headquarters to choose bankruptcy "havens." *Global and Out of Control*, *supra* note 1, at 15-17, 30. His exemplary company, however, is Fruit of the Loom, which apparently relocated its substantive business well before it changed headquarters. Where the switch in headquarters is perfunctory (e.g., only a corporate secretary and a clerk are found in the haven on a regular basis), there is a good chance the courts will see through the maneuver. Furthermore, territorialism permits manipulation of forum by the far easier and faster method of transferring assets to the bankruptcy haven at electronic speeds. Once the assets have been safely sequestered there, territorialism gives that court full power

because of its physical control of the assets. In re National Warranty Insurance Risk Retention Group is a perfect example of this sort of manipulation. [384 F.3d 959 \(8th Cir. 2004\)](#).

[FN80]. See, e.g., [Lernout & Hauspie Speech Prods. N.V. v. Stonington Partners, Inc., 268 B.R. 395 \(Bankr. D. Del. 2001\)](#), rev'd, [310 F.3d 118 \(3d Cir. 2002\)](#); see Jay Lawrence Westbrook, [Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum](#), [65 Am. Bankr. L.J. 457 \(1991\)](#).

[FN81]. Jay Lawrence Westbrook, [Universalism and Choice of Law](#), [23 Penn St. Int'l L. Rev. 625 \(2005\)](#).

[FN82]. I refer to the bankruptcy and district courts. The Court of Appeals for the Third Circuit saw that the lower courts had gotten the choice-of-law analysis wrong, but never had the opportunity to address it directly itself. See [id. at 635-37](#).

[FN83]. My conclusion is that Belgian bankruptcy law should have applied to the priority issue, but the point for this discussion is that choice of the substantive law and of the priorities under bankruptcy law are two different issues. The irony in that case was that the highly territorialist result disadvantaged creditors who were primarily "local" American claimants. The Third Circuit had a much more universalist view, but the lower courts failed to follow its directions.

[FN84]. See [Global and Out of Control](#), supra note 1, at 80. To critique that assertion, I ignore for this purpose the corporate group problem to avoid making complex issues even more complex for purposes of exposition. See discussion supra note 67 regarding issues of priority.

[FN85]. In virtually all systems, a labor contract claim, or a claim under a local labor statute, will be governed by local law. See, e.g., Rome Convention on the Law Applicable to Contractual Obligations art. 6, opened for signature June 19, 1980, 1980 O.J. [\(L 226\)](#), [19 I.L.M. 1492](#).

[FN86]. It has become customary to refer to a case under chapters 7, 9, 11, or 13 as a "full" United States bankruptcy by contrast with an "ancillary" case under old [section 304](#) or the new Chapter 15.

[FN87]. See Manfred Balz, [Market Conformity of Insolvency Proceedings: Policy Issues of the German Insolvency Law](#), [23 Brook. J. Int'l L. 167, 174 n. 34 \(1997\)](#); Klaus Kamlah, "Vergleichsverfahren": A German Reorganization Procedure, in [Insolvency Law: Theory and Practice 251 \(Harry Rajak ed., 1993\)](#).

[FN88]. See [Citicorp Industrial Credit, Inc. v. Brock](#), [483 U.S. 27 \(1987\)](#).

[FN89]. See [Global and Out of Control](#), supra note 1, at 80.

[FN90]. Even under prior law it was possible under [section 303\(h\)](#) to file an involuntary petition on the ground that a custodian had been appointed for the company in the foreign proceeding, so that no separate showing of "generally not paying" was required. That provision remains available.

[FN91]. See discussion supra note 44 concerning dismissal under [section 305](#) in favor of a foreign proceeding.

[FN92]. See Westbrook, supra note 80, at 465; Westbrook, supra note 16, at 2310-11

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(examples of weakness of territorialism to protect local interests).

[\[FN93\]](#). See Global and Out of Control, *supra* note 1, at 81, 102.

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