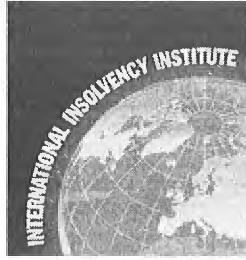

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A Comment on Universal Proceduralism

Jay L. Westbrook

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ARTICLES

Virtual Territoriality

Edward J. Janger

Sunset Clauses and Democratic Deliberation: Assessing the Significance of Sunset Provisions in Antiterrorism Legislation

John E. Finn

ESSAYS

A Comment on Universal Proceduralism

Jay Lawrence Westbrook

Report of the Mission to China of the Association of the Bar of the City of New York

Jerome A. Cohen, John M. Walker, Jr., R. Scott Greathead, Mark R. Shulman, Sarah A.W. Fitts, Sidney H. Stein, Robert N. Hornick, Margaret K. Lewis, Elisabeth Wickeri

NOTES

Reviewing and Reconsidering *Medellín v. Texas* in Light of the Obligatory Abstention from Security Council Voting

The Sovereign-Commercial Hybrid: Chinese Minerals for Infrastructure Financing in the Democratic Republic of the Congo

BOOK REVIEW

The Relationship Between State and Individual Responsibility for International Crimes

BOOKS RECEIVED

INDEX TO VOLUME 48

Essays

A Comment on Universal Proceduralism

JAY LAWRENCE WESTBROOK*

Professor Janger's proposal of universal proceduralism seeks a middle ground between territorialism and universalism in international insolvency cases by placing administration of the case in one main proceeding while dividing the debtor's assets into local pools, each governed by local priority rules. Not only is this concession to localism unnecessary, but it rests upon two conceptual errors. It ties local law to the assets that happen to be seized locally, rather than identifying legitimate local interests that should be served in a global set of proceedings. Because multinational creditors generally claim in all significant local proceedings, his approach prefers local distribution rules but may not prefer local creditors and leaves deserving local creditors to suffer in cases where circumstances have landed more substantial assets elsewhere. It also relies upon a substance-procedure distinction that is as clumsy here as it is elsewhere in the law. His leading examples of the distinction are readily shown to illustrate the impossibility of separating, for example, the control effects of the bankruptcy moratorium (which may require determining the substance of the claim) from its purely procedural aspects. Finally, this approach attempts to avoid forum shopping while opening the way for fo-

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I am grateful to the editors of the Columbia Journal of Transnational Law for the opportunity to publish this comment and to Professor Janger for permitting me to see his article in draft. I am indebted to Jamie E. France, Texas '11, for able research assistance for this response, and to Mechele Dickerson and Angela Littwin for comments, while laying claim myself to any missteps.

rum stashing, encouraging irresponsible debtors to switch their assets to haven jurisdictions with management friendly laws.

INTRODUCTION 504
I. UNIVERSAL PROCEDURALISM 507
II. CHOICE OF INSOLVENCY LAW 508
III. THE LINK BETWEEN LOCAL INSOLVENCY RULES AND THE PRESENCE OF LOCAL ASSETS 509
IV. NUMEROUS ADDITIONAL PROBLEMS WITH LOCAL RULES-LOCAL ASSETS 511
V. THE PLACE OF LOCAL INTERESTS IN MODIFIED UNIVERSALISM 514

INTRODUCTION

Professor Janger's thoughtful proposal of "universal proceduralism" raises a number of important issues. In particular, his proposal invites a focus on the place of local insolvency rules in a multinational business insolvency case.[1] I will not attempt in the brief space of this response to address all the issues implicated by universal proceduralism, but will address the important question of local interests and local priorities, as well as related problems such as forum stashing. I rely for the most part on Professor Janger's lucid explanation of the concepts and terms commonly used in discussing multinational insolvency.

Professor Janger proposes universal proceduralism as a compromise between territorialism and universalism,[2] combining central-

1. "Bankruptcy" is the term most often used in North America for the legal response to a general default by either a natural person or a legal entity. "Insolvency" is the English-language term generally used outside of North America to refer to business bankruptcy. 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.

2. Edward J. Janger, *Virtual Territoriality*, 48 COLUM. J. TRANSNAT'L L. 401 (2010). For the debate over territorialism and universalism, see, for example, Edward S. Adams & Jason Fincke, *Coordinating Cross-Border Bankruptcy: How Territorialism Saves Universalism*, 15 COLUM. J. EUR. L. 43 (2008) [hereinafter Adams & Fincke, *Coordinating*]; Lucian Arye Bebchuk & Andrew T. Guzman, *An Economic Analysis of Transnational Bankruptcies*, 42 J.L. & ECON. 775 (1999); Hannah L. Buxbaum, *Rethinking International*

ized administration with application of local law. He concedes the considerable virtues of universalism,[3] but supposes that the difficulties of locating a "home" or "main" court[4] where the debtor has its center of main interests (COMI) are so substantial that a palliative is needed in the form of territorial choice-of-law rules for "substantive" questions.

Although this comment focuses on the proposed solution, I also challenge his premise. Of course, there has been some litigation of the COMI rule, just as there has been a steady run of cases concerning the content of the United States rules turning on the similar standard, "principal place of business."[5] There has also been some variation internationally in judicial willingness to tolerate corporate

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Insolvency: The Neglected Role of Choice-of-Law Rules and Theory, 36 STAN. J. INT'L L. 23, 60 (2000); Neil B. Cohen, Michael A. Gerber & Edward J. Janger, *Bankruptcy in the Global Village: The Second Decade*, 32 BROOK. J. INT'L L. 753 (2007); Nigel John Howcroft, *Universal vs. Territorial Models for Cross-Border Insolvency: The Theory, the Practice, and the Reality that Universalism Prevails*, 8 U.C. DAVIS BUS. L.J. 366 (2008); Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 CORNELL L. REV. 696 (1999); John McMillan & Christopher Woodruff, Symposium, *Empirical Research in Commercial Transactions, Private Order Under Dysfunctional Public Order*, 98 MICH. L. REV. 2421 (2000); John A. E. Pottow, *The Myth (and Realities) of Forum Shopping in Transnational Insolvency*, 32 BROOK. J. INT'L L. 785 (2007); Frederick Tung, *Fear of Commitment in International Bankruptcy*, 33 GEO. WASH. INT'L L. REV. 555 (2001); Jay Lawrence Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276 (2000).

3. Janger, *supra* note 2, at 9–22.

4. The term "main" is used in the Model Law on Cross-Border Insolvency to refer to the insolvency proceeding initiated in the debtor's center of main interests. 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 (1997) [hereinafter MODEL LAW]. The MODEL LAW has been adopted in eighteen countries: Australia (2008), British Virgin Islands (2003), Canada (2009), Colombia (2006), Eritrea (1998), Great Britain (2006), Japan (2000), Mauritius (2009), Mexico (2000), Montenegro (2002), New Zealand (2006), Poland (2003), Republic of Korea (2006), Romania (2003), Serbia (2004), Slovenia (2007), South Africa (2000) and the United States of America (2005). Status: 1997–Model Law on Cross-border Insolvency, http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html (last visited April 8, 2010). The MODEL LAW was codified in Part XIII of the Bankruptcy and Insolvency Act, R.S.C. ch. B-3, §§ 267–84 (1985). In the United States, the MODEL LAW has become Chapter 15 of the Bankruptcy Code. 11 U.S.C. §§ 1501–1532 (2006). Although most of the EU members have not adopted the MODEL LAW formally, it has influenced recent revisions in member states. One example is Germany. COMMENTARY ON THE GERMAN INSOLVENCY CODE (Eberard Braun ed., 2006); *see also* Bundesgerichtshof [BGH] [Federal Court of Justice] Oct. 13, 2009, X ZR 79/06, *available at* juris online/Bundesgerichtshof (automatic recognition of United States Chapter 11 proceeding).

5. The Supreme Court has recently delivered another decision. Hertz Corp. v. Friend, 130 S. Ct. 1181 (2010).

havens as main proceedings.[6] But on the whole the COMI idea has worked perfectly well in most cases in Europe and North America.[7] Cases like *DaiseyTek*[8] that troubled many at first glance have come to be accepted and even applauded as providing a sensible location for the main court in a cooperative system.[9] The United States courts have had no real trouble with either excess litigation or forum shopping in this area.[10]

Nonetheless, I put aside the lack of a burning need for what might be called "universalism lite" and focus in this response on the proposed choice-of-law rule on the merits.[11] I have long agreed that universalism should make concessions to certain local interests, but it seems to me that the linking of local rules to local assets does not correspond to the need. The substance-procedure distinction of universal proceduralism is flawed as well. I think a list of those local in-

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6. *Compare In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 389 B.R. 325 (S.D.N.Y. 2008) *with* Case C-341/04, *In re* Eurofood IFSC Ltd., 2006 E.C.R. I-3813. *See also* Jay Lawrence Westbrook, *Locating the Eye of the Financial Storm*, 32 BROOK. J. INT'L L. 1019 (2007) [hereinafter *Locating*]; Gabriel Moss, *Group Insolvency—Choice of Forum and Law: The European Experience Under the Influence of English Pragmatism*, 32 BROOK. J. INT'L L. 1005 (2007); Harry Rajak, *Corporate Groups and Cross-Border Bankruptcy*, 44 TEX. INT'L L.J. 521 (2009). Eurofood was interpreting the identical COMI standard but in the context of the European Regulation Council Regulation 1346/2000. Council Regulation 1346/2000, European Union Regulation on Insolvency Proceedings, 2000 O.J. (L. 160), *available at* http://europa.eu/legislation_summaries /justice_freedom_security/judicial_cooperation_in_civil_matters/l33110_en.htm (follow "1346/2000" hyperlink) [hereinafter EU Regulation]. Cooperation within the European Union presents different issues than does the global context of the Model Law. Westbrook, *supra* 1034–35.

7. I am unsure if the concept has yet been litigated on other continents, although there are adherents to the Model Law in each of them.

8. *Re* Daisytek-ISA Ltd., [2003] B.C.C. 562 (Ch.) (England center of main interests for German and French subsidiaries because administrative headquarters in England).

9. Moss, *supra* note 6, at 1010–14; Christoph G. Paulus, *Global Insolvency Law and the Role of Multinational Institutions*, 32 BROOK. J. INT'L L. 755 (2007).

10. The caveat to that statement arises where a bankruptcy proceeding is initiated in the United States by a foreign-based company and no proceeding has been filed in the debtor's home country, but that problem is not really a COMI problem. *See* Jay L. Westbrook, *Multinational Insolvency: A First Analysis of Unilateral Jurisdiction*, *in* NORTON ANNUAL REVIEW OF INTERNATIONAL INSOLVENCY (2009).

11. Professor Janger provides an insightful discussion of the problems arising from harmonization of laws, including industry capture, but I leave that important topic for another day. Janger, *supra* note 2, at 22–26. For another discussion of a choice-of-law approach to multinational insolvency, see Buxbaum, *supra* note 2. For support for Professor Janger's preference for local distribution rules, see Adams & Fincke, *Coordinating*, *supra* note 2.

terests that are generally agreed to justify limited exceptions to universalism will eventually be codified. In the meantime, I expect universalist judges will be sensitive to the need to use choice-of-law rules to be responsive to those interests.

I. UNIVERSAL PROCEDURALISM

Universal proceduralism proposes that a home-country main court administer the assets of the debtor all over the world.[12] Unlike a universalist system, however, under universal proceduralism the main court would not administer the assets as one global pool for all purposes, but would apply local insolvency law to the separate pools of assets found in each local jurisdiction. Thus in the simple case of a single debtor company headquartered in the United States, but with assets and creditors in both the United States and Mexico, the United States insolvency court would administer the assets in both countries, but treatment of the Mexican asset pool would be governed for some purposes by Mexican law. The insolvency judge would apply the procedural rules of the main court, but substantive questions would be resolved by application of local insolvency law to each local pool of assets.

Professor Janger argues that his choice-of-law proposal would lessen the evils of forum shopping and contentious litigation concerning which jurisdiction is the COMI of a debtor.[13] It would have those results because a rule that applies local law to local assets, rather than following the law of the main jurisdiction for all assets wherever located, makes determination of the home forum much less important to outcomes.[14] That in turn would reduce the incentives for COMI litigation and forum shopping. He also suggests that application of "substantive" local insolvency laws to each asset pool will make the Model Law and other cooperative measures more attractive to policymakers in many countries.[15] At the same time, the proposal would

12. Professor Janger addresses the problems of corporate groups in his article, but I do not take up that formidable challenge in this short response. The area is so complex that even UNCITRAL has been able to make only a modest amount of progress. *See* UNCITRAL, *UNCITRAL Legislative Guide on Insolvency Law Part Three: Treatment of Enterprise Group in Insolvency*, U.N. Doc. A/CN.9/WG.V/WP.90/Add.1 (Aug. 31, 2009) *available at* http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V09/860/87/PDF/V0986087.pdf?OpenElement.

13. Janger, *supra* note 2, at 26–28.

14. *Id.*

15. *Id.* at 33.

have the universalist advantage of centralizing the actual administration of the case, because a single control point is very helpful in maximizing value and permitting reorganization where possible.[16] He rejects harmonization of domestic insolvency laws as an alternative solution to the forum shopping and litigation problems because of the risk of "capture" of the harmonization process by interest groups.[17]

II. CHOICE OF INSOLVENCY LAW

To understand the merits of this choice-of-law proposal, we should begin by clarifying the distinction between choice of noninsolvency law and choice of insolvency law.[18] For example, in the ordinary case of a claim for breach of contract against a debtor in an insolvency proceeding, X Corp, in the amount of one million dollars, there would usually be three issues: was the contract breached, what were the breach damages and how many dollars should the administrator pay to the claimant? The first two issues will almost always be governed by noninsolvency law, specifically the law of contracts. Which law of contracts will be applied will be determined using ordinary choice-of-law rules (for example, party autonomy to choose applicable law within certain constraints).

It is when we reach the third choice-of-law problem in this example, choice of the rules of priority in distribution of value on account of that claim, that Professor Janger and I are in substantial disagreement. Distribution rules are part of insolvency law. A distribution rule governs the third type of issue in the X Corp example given above; if the nonbankruptcy rules would give the claimant a $1 million claim for breach of contract, the distribution rules would govern what percentage of that claim, if any, the claimant would actually receive in an insolvency proceeding (e.g., $100,000 or "ten cents on the dollar" in the traditional phrase). The amount to be distributed on account of the claim depends on the value available and where the applicable insolvency law places the claimant in line among the claimants seeking payment.[19]

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16. *Id.* at 36–37.

17. *Id.* at 24–25.

18. Jay Lawrence Westbrook, *Avoidance of Pre-Bankruptcy Transactions in Multinational Bankruptcy Cases*, 42 TEX. INT'L. L.J. 899, 900–04 (2007) [hereinafter *Avoidance*].

19. Arguably, the courts and parties in the *Lehman-Perpetual* cases, discussed *infra* note 28, confused these two quite different choices of law. The English courts held that

Distribution rules are one of the three areas that Professor Janger characterizes as "substantive" and therefore to be governed by each local insolvency law. In addition to distribution of value, use of avoiding powers and approval of plans of reorganization would be governed by local insolvency law with regard to each separate pool of local assets. I have great difficulty understanding how either avoiding powers or plan formulation and approval can be meaningfully related to a local pool of assets. However, the distribution rules are the only ones he uses as an example, so that is the category I will address in detail.[20]

For me, the appeal of Professor Janger's proposal concerning distribution rules is pragmatic and unrelated to his distinction between substantive and procedural rules. A choice-of-law concept that applies local law to aspects of insolvency distribution could make a useful contribution to modified universalism because it would permit centralization of the administration of the case while providing some room for favoring local interests, potentially reducing nationalistic pressures. Its value depends upon its rationale and scope.

III. THE LINK BETWEEN LOCAL INSOLVENCY RULES AND THE PRESENCE OF LOCAL ASSETS

The central underlying difficulty in the proposed choice-of-law rule is the lack of a direct relationship between local interests and the assets that would be governed by local insolvency law. Universal proceduralism connects local interests to local assets rather than to policies that are inherently local. Resting only indirectly on protect-

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English law governed as the law of the contract, which was clearly true for the interpretive aspect of the case, but was not correct as to whether insolvency law in England should govern as to the validity of the clause at issue there—or, at a minimum, the choice of insolvency law should have been separately analyzed, given that England has adopted the Model Law.

20. For a discussion of choice-of-law rules for avoiding powers, see *Avoidance*, *supra* note 18; *Locating*, *supra* note 6; *see also* American Law Institute, PRINCIPLES OF COOPERATION AMONG THE NAFTA COUNTRIES, Proc. Prin. 20, at 22-23 (2003). I will note that the most important precedent for multinational application of an avoiding power, *Maxwell Communications*, did not adopt a local-asset choice-of-law rule. *In re* Maxwell Commc'n Corp., 93 F.3d 1036 (1996). As to plans, that case did use parallel proceedings to get approval of a global reorganization (liquidation) plan, with creditors in the two major jurisdictions involved (the United States and the United Kingdom) voting under their own local procedures, which might be what Professor Janger has in mind as the application of local insolvency law. Nonetheless, immense problems would be presented if local law were applied in such a case absent consent all around such as was achieved in *Maxwell*.

ing important local interests, universal proceduralism arises instead from the sheer power of the local courts to control certain valuable assets.

The imprecise connection between local assets and local interests can be simply illustrated. On the one hand, the presence of an operating branch of an insolvent company in a particular jurisdiction is likely to be associated to some extent with claims from consumers, small suppliers, taxing authorities and employees. Each locality has a legitimate interest in providing special protections for these types of creditors and the presence of a branch marks the likelihood that some of those interests are implicated. The same thing may be true for aspects of local law applicable to real estate (immovables).[21] On the other hand, the presence in a given country of a certificate of deposit or a large account receivable is often a mere accident of the timing of the insolvency filing and the vagaries of the business. A rule tying allocation of insolvency value to the presence of local assets will often apply to some interest-connected and some accidental assets, a haphazard and unpredictable result. The connection to local interests becomes more attenuated when one remembers that foreign creditors will be claiming against those same assets under the same local distribution rules,[22] because almost all countries will treat such foreign claims on a basis of equality with other general creditors.[23]

Thus there is no necessary connection between truly localized interests and the assets that are captured by the local courts. Applying a local choice-of-law rule may grant a local priority to grain farmers in distributing the proceeds of a company airplane found at the local airport at the moment of filing or the value of a local patent on a product unrelated to any local activity. The proceeds of inventory captured locally might be distributed in favor of local employees although the inventory was produced and marketed by employees in another country, being merely in transit at the time of filing. On top of that, the proceeds of locally captured assets may have to be shared

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21. *Avoidance*, *supra* note 18, at 913–14. *See generally*, RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 542–46 (5th ed. 2006). Even there, some insolvency rules may require centralized choice-of-law rules. *Avoidance*, *supra* note 18, at 914.

22. I think I am safe in assuming that Professor Janger does not mean to discriminate against foreign creditors in the application of local distribution rules.

23. Chapter 15 in the United States follows the Model Law in that regard. *Compare Model Law*, *supra* note 4, art. 13 *with* 11 U.S.C. §1513(b)(1) (2006). As a delegate, I can report that the corresponding article 13 of the Model Law was completely uncontroversial at UNCITRAL (although technically tricky), reflecting the near-universal acceptance of the nondiscrimination principle.

with the multi-million dollar claims of an international lender who has employed local lawyers and filed claims in every country where assets of the debtor were seized. Admittedly, some of the assets seized by the local court might relate in a meaningful way to important local interests, so that the application of local rules would be only semi-random in relation to legitimate local concerns. But the connections may often be marginal to nonexistent.

IV. NUMEROUS ADDITIONAL PROBLEMS WITH LOCAL RULES-LOCAL ASSETS

Instead of litigation over the center of main interests of the debtor,[24] universal proceduralism will give us endless litigation over the legal location of assets. It has long been recognized that territorial choice-of-law rules in any area of the law are artificial as applied to intangible assets.[25] The rules are either arbitrary or they constitute applying a label to a result thought to be sound for some underlying reason. A bank account or an account receivable owed by a customer to the debtor might be held to be located in the home country of the counterparty bank or the customer, or in the country where the debt is to be paid (although often no place of payment has been specified), among other possibilities.[26] Years of litigation and analysis have not resolved these issues.

Then there is the problem of recent geographic transfers. One thinks of the peripatetic eight billion dollars that was in England at the weekend of September 12, 2008, but was found in a New York bank account on the Monday morning after Lehman Brothers filed

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24. I do not mean to concede that COMI litigation would cease under universal proceduralism, because the prize of universal administration, which universal proceduralism would presumably award to the COMI court, is itself quite valuable. Control of an insolvency proceeding, especially a reorganization, is important and rewarding. *See generally*, Jay L. Westbrook, *The Control of Wealth in Bankruptcy*, 82 TEX. L. REV. 795 (2004).

25. WEINTRAUB, *supra* note 21, at § 8.1.

26. *See, e.g.,* Citibank, N.A. v. Wells Fargo Asia Ltd., 495 U.S. 660 (1990). A recent case in France illustrates the point as well. There, the creditor sought and obtained attachment of a bank account opened and maintained in Monaco by an action against the bank's French branch. *See* Cass. 2e civ., Feb. 14, 2008, Bull. civ. II, No. 36. The same sorts of questions would be raised by a debt owed to a United States company headquartered in Connecticut through the New York office of a German customer, especially if the invoicing was handled by a Canadian subsidiary and past payments had been made from an account in London to the subsidiary's account in that city. Where is the debt located? A party game for geeks, perhaps.

for bankruptcy in the United States, transmitted on account of overnight cash management procedures that differed from those employed by other large multinationals only in the number of zeros. As explained below, there is also the problem of a debtor transferring assets to the advantage of insiders at a time of financial distress.[27]

The difficulty is well illustrated by another aspect of the Lehman affair, although none of the courts involved addressed the issues Professor Janger and I consider central to the correct result.[28] The case involved entitlement to millions of dollars of valuable collateral under a contract clause purporting to reverse the priority of the parties under a complex investment vehicle. The contract gave the Lehman entity priority in the collateral except in the instance of certain kinds of defaults, including the filing of an insolvency proceeding. If the Lehman entity entered insolvency, then priority would shift to favor other parties. The English courts upheld the contractual "flip" in priority, but the United States bankruptcy court held that it violated the American rule against making bankruptcy a default condition[29] and therefore the priorities between the parties must remain as they were despite the Lehman filing.[30] In neither opinion was the location of the collateral a material factor in the result.

If a local rule had applied in *Lehman-Perpetual* under universal proceduralism, the tangle would have been even worse. The collateral consisted of synthetic obligations relating to credits that were likely to be owed by obligors in a number of countries—the trustee was Bank of New York, with a London branch, and the contract at issue chose English law as controlling. The parties were the Lehman entity and a European representative of investors who were likely resident in many other jurisdictions as well. In what locality were these assets located for the purposes of a territorial choice-of-law rule? Which localities' interests were to be served?

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27. *See, e.g*, *In re* National Warranty Ins. Risk Retention Group, 306 B.R. 614, 618 (B.A.P. 8th Cir. 2004), *aff'd*, 384 F.3d 959 (8th Cir. 2004).

28. These are the *Lehman-Perpetual* cases. *In re* Lehman Bros. Holdings Inc., 422 B.R. 407 (Bankr. S.D.N.Y. 2010); Perpetual Tr. Co. Ltd. v. BNY Corporate Tr. Services Ltd., [2009] EWCA (Civ) 1160 (Court of Appeal).

29. Under the United States Bankruptcy Code, a clause terminating or modifying a contract because of bankruptcy is unenforceable. 11 U.S.C. §365(e) (2006). *See, e.g.*, *In re Lehman Bros. Holdings Inc.*, 422 B.R at 415–16; 3 COLLIER ON BANKRUPTCY ¶ 365.08(3) (15th ed. rev. 1996).

30. This summary ignores important matters of detail in favor of clarity for present purposes.

The case is a good example of another undesirable consequence of a local-assets choice-of-law rule. The courts in two friendly countries were potentially at daggers drawn over the fate of the collateral, having made squarely inconsistent rulings. A rule that invites application of different insolvency rules by local courts greatly increases the chance of that result. Bank of New York was at risk of being ordered to obey conflicting orders by two courts with the power to do it great harm. Fortunately, the judges on both sides of the Atlantic recognized the difficulty and encouraged the parties to find an accommodation, but the situation illustrates the risk of inconsistent and even warring judgments that inevitably arises from a failure to address global problems in a single forum or at least with deference to a central, main proceeding.

On top of these difficulties, universal proceduralism threatens to create as much forum manipulation as territorialists imagine would arise with modified universalism. Instead of forum shopping we will face forum stashing. A haven jurisdiction will establish a local-asset choice-of-law rule, along with many rules that favor management and lenders, and invite financially distressed companies to transfer their assets thither from their true corporate seats. The debtor, or those in a position to pressure the debtor, can arrange the transfer of both tangible and intangible personal property to the favorable jurisdiction prior to the filing of an insolvency proceeding and thus control the distribution. One notable example in the United States was the transfer of more than $20 million from Omaha to the Cayman Islands just before the debtor filed an insolvency proceeding in that lovely Caribbean getaway, leaving thousands of disappointed American consumers behind.[31] Application of a local distribution rule to those funds on the grounds of their location would surely have had no connection with any legitimate policy concern or rule of fairness. Forum stashing in such cases is certainly much easier than forum shopping under the COMI concept and local choice-of-law rules would reward it handsomely.

Manipulation of location, conceptually and physically, is not only problematic in itself, but it also increases the unpredictability of

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31. *National Warranty*, 306 B.R. at 618. The debtor was a seller of extended automobile warranties exclusively to United States persons and had its only business in the United States. The author was involved in that case in opposition to the debtor, so the example is vivid in my mind. The point, of course, is not necessarily how that case was handled in the Cayman Islands, but why American creditors should have had to rely on a foreign court that had no economic connection with the debtor. Thus my criticism is not of the Cayman Islands courts or bar, but rather of the use of havens to manage insolvency cases.