

Toward Standardized Enforcement of Cross-Border Insolvency Decisions: Encouraging the United States to Adopt UNCITRAL's Recent Amendment to its Model Law on Cross-Border Insolvency

LIA METREVELI*

The broad and specific objectives of international insolvency have led to the emergence of several theories, such as territorialism and various forms of universalism, on how to best achieve these goals. In 1997, the United Nations Commission on International Trade Law (UNCITRAL) proposed a Model Law, based largely on modified universalism, to promote judicial cooperation in — and decrease the costs of — cross-border insolvency cases. The European Union, Australia, and the United States have all adopted the Model Law, either in part or in full. But the enforcement of cross-border insolvency judgments in these jurisdictions continues to be erratic, as judges implement the decisions of foreign courts inconsistently. Consequently, in 2015, the Commission proposed an amendment to the Model Law — the Recognition and Enforcement of Insolvency-Related Judgments — which would enforce insolvency-related orders subject to seven narrowly enumerated exceptions, such as due process and fraud. Rather than rely on judicial gap filling, Congress should adopt the proposed amendment, which will provide clarity and predictability to cross-border insolvencies, reduce costs, and maximize value to creditors.

* Articles Editor, Colum. J.L. & Soc. Probs., 2017–2018. J.D. Candidate 2018, Columbia Law School. The author would like to thank Professor Ronald Mann for his guidance and feedback, and the editors and staff of the *Columbia Journal of Law and Social Problems* for all of their helpful comments and hard work in producing this Note.

I. INTRODUCTION

The general goals of an insolvency law are safety and predictability.¹ First, by allowing reorganization or liquidation, insolvency laws insulate businesses in financial distress while protecting debtors and creditors.² Second, insolvency laws establish clear and predictable bankruptcy procedures, which encourage the development of an entrepreneurial class and provide a safety net for new and potentially risky ventures.³ Several theories — mainly territorialism and various forms of universalism — have emerged on how to best achieve these goals.⁴

Traditional theories of international bankruptcy have centered on territorialism and universalism.⁵ Under territorialism, bankruptcy courts in each country seize and allocate local assets for the benefit of local creditors.⁶ Universalism represents a system in which a single insolvency court in the debtor's home country has jurisdiction over all the debtor's assets — regardless of where in the world these assets are located — and distributes them in accordance with its laws.⁷ Modified universalism applies universalist principles to a territorialist foundation. Under this theory, a single main case in the debtor's home country adjudicates the debtor's bankruptcy.⁸ If the debtor has assets or creditors in other countries, ancillary proceedings in those countries will support the central proceeding in its home country.⁹

By the late 1990s, the advent of multinational conglomerates and a world of ever expanding international trade necessitated a

1. U.N. COMM'N ON INT'L TRADE LAW, LEGISLATIVE GUIDE ON INSOLVENCY LAW, at 14–16, U.N. Sales No. E.05.V.10 (2005), https://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf [<https://perma.cc/U4BY-H7U8>] [hereinafter UNCITRAL LEGISLATIVE GUIDE ON INSOLVENCY LAW].

2. *Id.*

3. *Id.*

4. AMERICAN LAW INSTITUTE, PRINCIPLES OF COOPERATION AMONG THE NAFTA COUNTRIES 31 (2003).

5. *Id.*

6. AMERICAN LAW INSTITUTE, *supra* note 4, at 8; Edward S. Adams & Jason Fincke, *Coordinating Cross-Border Bankruptcy: How Territorialism Saves Universalism*, 15 COLUM. J. EUR. L. 43, 55 (2009); Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy*, 98 MICH. L. REV. 2216, 2220 (2000).

7. Adams & Fincke, *supra* note 6, at 55.

8. *Id.*

9. Emilie Beavers, Note, *Bankruptcy Law Harmonization in The NAFTA Countries: The Case of the United States and Mexico*, 2003 COLUM. BUS. L. REV. 965, 982 (2003).

global approach to cross-border insolvencies.¹⁰ Beginning in the 1990s, the number of cross-border insolvencies increased dramatically, but “the adoption of national or international legal regimes equipped to address the issues raised by those cases [did] not ke[ep] pace.”¹¹ Cross-border insolvencies were plagued by unpredictability, inefficiency, lack of transparency, and conflict “between national laws and insolvency regimes.”¹² Most importantly, chaos in cross-border insolvency adjudication affected the asset values of “financially troubled businesses,” impeding their protection from decline and “hamper[ing] their rescue” in times of distress.¹³ Consequently, in 1997 the United Nations Commission on International Trade Law (UNCITRAL) proposed a Model Law to promote cooperation in and decrease the costs of cross-border insolvency cases.¹⁴ The Model Law is largely based on modified universalism and has been adopted in forty-five jurisdictions to date.¹⁵ Many of the world’s advanced economies — such as the European Union, Australia, and the United States — have all adopted a version of the Model Law.¹⁶ Accordingly, where a foreign main proceeding is pending outside of the European Union, Australia, and the United States, courts within these jurisdictions should enforce foreign insolvency judgments with an eye toward aiding the foreign main proceeding. Yet, enforcement has been inconsistent and unpredictable, rendering the recognition of any main or non-main¹⁷ foreign proceeding a toothless remedy and largely undermining the central goals of the Model Law.

10. Howard Steyn, *Going for Broke: Bankruptcies of Multinational Corporations*, 18 HARV. INT’L REV. 58, 58 (1996); U.N. COMM’N ON INT’L TRADE LAW, MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION, U.N. Sales No. E.14.V.2 (2014), <https://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf> [<https://perma.cc/3ND2-SMF2>] [hereinafter UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY].

11. U.N. Comm’n on Int’l Trade Law, *UNCITRAL Model Law on Cross-Border Insolvency (1997)*, http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html [<https://perma.cc/8EJK-5Q43>] [hereinafter UNCITRAL Model Law on Cross-Border Insolvency (1997)].

12. *Id.*

13. *Id.*

14. Adams & Fincke, *supra* note 6, at 61.

15. *Id.*; see also U.N. Comm’n on Int’l Trade Law, *Status: UNCITRAL Model Law on Cross-Border Insolvency*, http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html [<https://perma.cc/84NV-ACRE>] [hereinafter UNCITRAL Model Cross-Border Insolvency Law Status].

16. UNCITRAL Model Cross-Border Insolvency Law Status, *supra* note 15.

17. UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY, *supra* note 10, at 4 (defining a non-main proceeding as a foreign proceeding other than a foreign main pro-

In 2015, prompted by the globally inconsistent enforcement of insolvency judgments, the Committee on International Aspects proposed an amendment to the Model Law to improve global insolvency procedures — the Model Law on the Recognition and Enforcement of Insolvency-Related Judgments.¹⁸ The Amendment standardizes the enforcement of insolvency related judgments, clarifies the extent to which courts can deny recognition and enforcement, and provides needed certainty to global creditors and debtors. Jurisdictions that have already adopted some or all of the Model Law, especially the United States, should also adopt the Amendment.

This Note is organized as follows. Part II discusses the general background of international bankruptcy, including the goals and objectives of an insolvency law and the theories of international bankruptcy. Part III provides background information on the Model Law, explains how it furthers the goals and objectives of cross-border insolvency laws, and discusses three of the forty-plus jurisdictions that have adopted the Model Law — namely the U.K., Australia, and the United States. Part IV outlines cases that illustrate inconsistent recognition and enforcement of foreign insolvency judgments in the U.K., Australia, and the United States. Part V explores the Committee’s proposed Amendment, analyzes its statutory construction, and advocates for its congressional adoption.

II. GENERAL BACKGROUND

A. GOALS OF AN INSOLVENCY LAW

When a debtor becomes financially distressed because it can no longer pay debts and liabilities that become due, most jurisdictions provide a legal mechanism that allows the debtor to satisfy its outstanding claims through its assets.¹⁹ Insolvency is multi-dimensional and involves managing competing interests, includ-

ceeding, which takes place in a State where the debtor has an establishment, and is also referred to as “ancillary” or “secondary” proceedings).

18. INT’L ASPECTS COMM., NAT’L BANKR. CONFERENCE, REPORT OF THE COMMITTEE ON INTERNATIONAL ASPECTS 2 (2016), <http://nbconf.org/wp-content/uploads/2015/10/Intl-Aspect-Committee-2016-UNCITRAL-Report.pdf> [https://perma.cc/LZZ5-UHYT].

19. U.N. COMM’N ON INT’L TRADE LAW, LEGISLATIVE GUIDE ON INSOLVENCY LAW, at 9, U.N. Sales No. E.05.V.10 (2005), http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf [https://perma.cc/S396-HWDG].

ing those of the debtor, secured and unsecured creditors, tax agencies, employees, etc.²⁰ The legal mechanism dictating insolvency should accommodate these interests while also striking a balance with the “relevant social, political, and other policy considerations” that impact the economic and legal goals of any insolvency proceeding.²¹ Thus, the general goals of any bankruptcy law are threefold. First, bankruptcy laws rescue financially-distressed businesses in a way that protects both debtors and creditors.²² Second, bankruptcy laws encourage the development of an entrepreneurial class by providing a safety net for new and risky ventures.²³ Third, bankruptcy laws complement the social and legal values of the societies in which they are based.²⁴

Specifically, an efficient and effective insolvency law must strike an equilibrium between: (1) providing certainty in the economic market, thereby promoting stability and growth; (2) maximizing asset values; (3) balancing liquidation and reorganization proceedings; (4) ensuring equitable treatment of similarly situated creditors; (5) providing for methodical and impartial insolvency resolution; (6) preserving the bankruptcy estate and allowing equitable distribution to creditors; (7) ensuring a transparent and predictable insolvency law that incentivizes gathering and dispensing information; and (8) recognizing existing creditors’ rights and establishing clear rules for ranking the priority of claims.²⁵ Most importantly, while balancing these eight objectives, an insolvency law must also be “compatible with the legal and social values of the society” which it serves; the outcomes of the insolvency law cannot conflict with the premises of non-insolvency laws within the jurisdiction.²⁶

20. *Id.* (“A range of interests needs to be accommodated by that legal mechanism: those of the parties affected by the proceedings including the debtor, the owners and management of the debtor, the creditors who may be secured to varying degrees (including tax agencies and other government creditors), employees, guarantors of debt and suppliers of goods and services, as well as the legal, commercial and social institutions and practices that are relevant to the design of the insolvency law and required for its operation.”).

21. *Id.*

22. *Id.* at 14–15.

23. *Id.*

24. *Id.* at 10.

25. *Id.* at 10–15.

26. *Id.* at 4.

B. THEORIES OF INTERNATIONAL BANKRUPTCY

Traditional theories of international bankruptcy have centered around territorialism and universalism, reflecting the tension between a desire to maintain national sovereignty and the need for cross-border cooperation. Generally, territorialism is associated with the grab rule — whereby the court of a jurisdiction seizes and allocates local assets for the benefit of local creditors — and universalism represents a system in which a single insolvency court in the debtor's home country has jurisdiction over all the debtor's assets, wherever located, and distributes them in accordance with the laws of that country.²⁷

Territorialism is consistent with classical notions of sovereignty and jurisdiction.²⁸ Under this theory, a bankruptcy court administers the domestic assets of a multinational debtor under domestic law and for the exclusive benefit of domestic creditors, whether through reorganization or liquidation.²⁹ Any assets abroad are administered through unique and separate proceedings within the countries in which they are located, with little regard to the bankrupt entity as a whole.³⁰

While the advantages of territorialism — such as simplicity,³¹ predictability, clarity, and avoidance³² — are few, the disadvantages are many. First, the costs of a territorialist bankruptcy are multiplied by the necessity of filing insolvency actions in each jurisdiction where an asset is located, because each action requires separate administration, filing, claim evaluation, and prosecution.³³ Second, territorialist bankruptcies can result in disparate treatment of similar creditors who happen to be in different countries.³⁴ Third, the level of cooperation required among creditors during a reorganization is hard to achieve because sepa-

27. AMERICAN LAW INSTITUTE, *supra* note 4; Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy*, 98 MICH. L. REV. 2216, 2220 (2000).

28. Kent Anderson, *The Cross-Border Insolvency Paradigm: A Defense of the Modified Universal Approach Considering the Japanese Experience*, 21 U. PA. J. INT'L ECON. L. 679, 679 (2000).

29. Adams & Fincke, *supra* note 6, at 55.

30. *Id.*

31. Anderson, *supra* note 28, at 681.

32. John D. Ayer et al., *Overview of Avoidance Actions*, 23-MAR AM. BANKR. INST. J. 26, 27, 56 (2004) (Avoidance actions are bankruptcy proceedings against creditors who have received payments from a bankrupt debtor prior to a bankruptcy filing; the two main types of avoidance actions are for preference or fraudulent transfers).

33. Adams & Fincke, *supra* note 6, at 58.

34. Anderson, *supra* note 28, at 681.

rate administrations decrease liquidation values.³⁵ Meaningful and systematic cooperation is also difficult because some courts are not legally authorized to cooperate, while other courts have legal authorization but choose not to cooperate.³⁶ Fourth, territorialism leads to a less efficient ex ante allocation of capital because creditors cannot foretell where a debtor's assets will be during bankruptcy.³⁷ Finally, isolated asset administration drives local debtors and creditors to advance personal interests at the expense of creditors worldwide.³⁸

Under universalism, all aspects of a debtor's bankruptcy are conducted through one main proceeding and under one insolvency law in the debtor's home country, usually defined as the debtor's center of main interest (COMI). Consequently, universalism eliminates many of the disadvantages associated with territorialism. For example, because a single insolvency court adjudicates a debtor's assets worldwide, universalist cross-border insolvencies eliminate the additional administrative and legal costs of filing multiple claims.³⁹ Universalism also minimizes disparate treatment of creditors because all creditors, regardless of where they are located, are treated equally by class.⁴⁰ Universalism also facilitates reorganizations, substantially increases liquidation values, and provides greater clarity and certainty to all parties in interest.⁴¹ Lastly, universalism increases available information and reduces inefficiencies in the international credit market because it allows business people, investors, and lenders to better quantify the risk associated with a potential international bankruptcy.⁴²

However, universalism is not without disadvantages. First, the difficulty of determining a debtor's COMI can result in forum shopping.⁴³ The standard for what constitutes a debtor's COMI is

35. Adams & Fincke, *supra* note 6, at 58.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 53.

40. Anderson, *supra* note 28, at 688 (citing Ulrich Drobnig, *Secured Credit in Cross-Border Insolvency Proceedings*, 33 TEX. INT'L L.J. 27, 66 (1998)) (stating that members of a class of creditors, e.g., secured creditors, unsecured creditors, etc. are treated equally, whether some members of the class are located in the debtor's COMI or in foreign jurisdictions).

41. Adams & Fincke, *supra* note 6, at 53.

42. *Id.*

43. Lynn M. LoPucki, *Universalism Unravels*, 79 AM. BANKR. L.J. 143, 143 (2005) ("Multinational companies do not have home countries in any meaningful sense, and no

“intentionally vague.”⁴⁴ Whether COMI is determined by principal place of business, place of incorporation, or other characteristics, Professor Lynn LoPucki argues that a multinational company can change business practices to manipulate its main proceeding’s venue.⁴⁵ As support, Professor LoPucki cites several examples of companies relocating in anticipation of bankruptcy:

Regardless which characteristics of a company determine a multinational’s COMI, the multinational can easily change them. [Examples include] Dresco Energy, which moved both its headquarters and center of operations from Canada to the United States in contemplation of bankruptcy; Singer N.V., which moved its headquarters from Hong Kong to the United States in order to file bankruptcy here; Commodore, which moved its headquarters and place of incorporation from the United States to the Bahamas for tax reasons before filing bankruptcy there; and BCCI, which moved its headquarters from London to Abu Dhabi before filing bankruptcy at its place of incorporation in Luxembourg.⁴⁶

Second, the international comity that is built into a single court’s administration of assets worldwide requires adherent countries to give up a measure of national sovereignty.⁴⁷ Professor LoPucki also argues that “no country will permit foreign courts to make and directly enforce orders within its borders.”⁴⁸

Modified universalism embraces universalism’s core belief in cooperation, but tempers the extent to which adherent countries have to sacrifice their sovereignty.⁴⁹ Under this theory, local courts can exercise discretion over the fairness of local procedures and the protection of local creditors’ interest.⁵⁰ Modified univer-

one has yet figured out a way to assign them. In a universalist system, the indeterminacy of the home country standard would lead to forum shopping and ultimately to a strain of court competition even more virulent than the strain that today is corrupting the U.S. bankruptcy courts.”).

44. *Id.* at 143.

45. *Id.* at 155.

46. *Id.*

47. *Id.*

48. LoPucki, *supra* note 27, at 2216.

49. Beavers, *supra* note 9, at 982 (“Thus, many scholars describe the U.S. procedural insolvency system as a form of ‘modified universalism.’ While embracing the notion of universalism in general, it reserves discretion to local courts to evaluate the fairness of the home country procedures and the protection of local creditors.”).

50. *Id.*

salism allows for a single main case in the debtor's COMI to adjudicate the debtor's bankruptcy.⁵¹ If the debtor has assets or creditors in other jurisdictions, this central proceeding will be supported through ancillary proceedings in the other jurisdictions.⁵² Instead of contemplating a full administration of the debtor's assets, ancillary proceedings aid and protect foreign representatives of the main proceeding through discovery regarding local assets and injunctions against local creditor lawsuits and seizures.⁵³

III. THE UNCITRAL MODEL LAW

Prior to 1997, international bankruptcies were mostly adjudicated according to territorialist principles,⁵⁴ though piecemeal attempts to develop cross-border insolvency regimes date back to the nineteenth century. For example, in 1889, five South American countries⁵⁵ signed treaties to regulate cross-border insolvency between them.⁵⁶ Although the treaties were updated in 1940 to reflect advancements in banking,⁵⁷ they centered around territorialist principles and allowed for simultaneous proceedings across multiple countries of a single company's bankruptcy.⁵⁸ In the 1980s, the International Bar Association promulgated the Model International Insolvency Cooperation Act, which failed because no country adopted it.⁵⁹ Thus, until 1997, the majority of cross-border insolvencies were decided without any governing international treaties. The resulting web of unilateral laws was "at best

51. Adams & Fincke, *supra* note 6, at 50.

52. *Id.*

53. Jay L. Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276, 2300 (2000); *see also* Adams & Fincke, *supra* note 6, at 73.

54. Steyn, *supra* note 10, at 60; *see also* ANDREW KEAY & PETER WALTON, *INSOLVENCY LAW* 387 (Jordans, 2d ed. 2011).

55. These countries are Argentina, Bolivia, Paraguay, Peru, and Uruguay. *See* Wyndham Bewes, *The Treaties of Montevideo (1889)*, 6 TRANSACTIONS OF THE GROTIUS SOC'Y 59, 59 (1920).

56. *Id.*

57. Ana Delic, *The Birth of Modern Private International Law: The Treaties of Montevideo (1889, amended 1940)*, OXFORD PUB. INT'L LAW, <http://opil.oup.com/page/Treaties-Montevideo> [<https://perma.cc/UTF5-V36W>] (last visited Feb. 1, 2018).

58. PHILIP WOOD, *PRINCIPLES OF INTERNATIONAL INSOLVENCY* 29-080 (Sweet & Maxwell, 2d ed. 2007).

59. Elizabeth Somers, Note, *The Model International Insolvency Cooperation Act: An International Proposal for Domestic Legislation*, 6 AM. U.J. INT'L L. & POL'Y 677, 678 (2011).

redundant and at worst contradictory.”⁶⁰ But the advent of multinational conglomerates and a world of ever-expanding international trade necessitated a global approach to cross-border insolvency, especially since these insolvencies rose sharply during the 1990s.⁶¹

Consequently, in 1997, UNCITRAL drafted and proposed the Model Law on Cross-Border Insolvency (Model Law), based on “modified universalism with a territorialist foundation.”⁶² Specifically, the Model Law does not preempt the substantive law of any given jurisdiction; rather, it provides a thirty-two article procedural framework for the interdependent operation of various local laws, courts, and court appointees.⁶³ Additionally, the Model Law encourages consistency by (1) promoting coordination between courts and other competent authorities involved in cross-border insolvencies; (2) providing greater legal clarity for trade and investments; (3) ensuring fair and efficient administration of cross-border insolvencies that protect creditors’ and debtors’ interests; and (4) protecting and maximizing financially troubled businesses, thereby protecting investments and preserving employment.⁶⁴

The Model Law is designed to apply where: (1) assistance is sought in one jurisdiction on behalf of a debtor subject to insolvency proceedings in another jurisdiction; (2) assistance is sought outside of an enacting state and in connection with insolvency proceedings pending under the laws of that foreign state; (3) concurrent insolvency proceedings are ongoing in an enacting state and in a foreign state; and (4) creditors want to file insolvency proceedings under the laws of an enacting jurisdiction.⁶⁵ The Model Law also presumes that a representative (known as the “foreign representative”)⁶⁶ will be appointed to represent a debtor’s assets and interests wherever insolvency proceedings are initiated.⁶⁷

60. Steyn, *supra* note 10.

61. UNCITRAL Model Law on Cross-Border Insolvency (1997), *supra* note 13.

62. Adams & Fincke, *supra* note 6, at 61.

63. UNCITRAL Model Law on Cross-Border Insolvency (1997), *supra* note 13.

64. Adams & Fincke, *supra* note 6, at 61.

65. U.N. COMM’N ON INT’L TRADE LAW, MODEL LAW ON CROSS-BORDER INSOLVENCY: THE JUDICIAL PERSPECTIVE, at 4 (2012) [hereinafter JUDICIAL PERSPECTIVES ON THE MODEL LAW], https://www.uncitral.org/pdf/english/texts/insolven/V1188129-Judicial_Perspective_ebook-E.pdf [https://perma.cc/2P2T-UZ7P].

66. UNCITRAL Model Law on Cross-Border Insolvency (1997), *supra* note 13, at 4.

67. JUDICIAL PERSPECTIVES ON THE MODEL LAW, *supra* note 65, at 4, 9–10.

The Model Law has four central provisions: Access, Recognition, Relief, and Cooperation and Coordination.⁶⁸ Access opens the courts of an enacting state to foreign insolvency representatives and creditors seeking relief within that state.⁶⁹ Recognition allows a court hearing insolvency claims related to an insolvency action pending in a foreign jurisdiction to recognize that action as either the main or non-main proceeding.⁷⁰ Main proceedings occur in jurisdictions where the debtor has its COMI; non-main proceedings take place in non-COMI jurisdictions, usually where the debtor merely has an establishment.⁷¹ Simplified recognition procedures for qualifying foreign proceedings provide certainty, eliminate the lengthy legalization processes that would otherwise apply, and provide relief to the debtor.⁷² For example, under the Model Law, if a multinational company with assets in the U.S. initiates insolvency proceeding in a foreign jurisdiction, it must petition a U.S. court for recognition of those insolvency proceedings.⁷³ If the U.S. court recognizes the proceedings as a foreign main proceeding, the debtor is immediately entitled to non-discretionary relief.⁷⁴ Namely, the debtor is automatically accorded a stay of all proceedings against him in the U.S.⁷⁵ Such relief assists the fair adjudication of the foreign main proceeding and ensures the uniform treatment of all creditors, wherever located.

In addition to automatic stays upon the recognition of a main proceeding, the Model Law also provides interim, urgent relief upon application for recognition of a foreign proceeding and discretionary relief for both main and non-main proceedings post-recognition.⁷⁶ Cooperation and communication between insolvency representatives and local and foreign courts are essential to

68. *Id.* at 5.

69. *Id.*

70. *Id.*

71. JUDICIAL PERSPECTIVES ON THE MODEL LAW, *supra* note 65, at 14; *see also* UNCITRAL Model Law on Cross-Border Insolvency (1997), *supra* note 13, at 4 (“Establishment” means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.”).

72. UNCITRAL Model Law on Cross-Border Insolvency (1997), *supra* note 13, at 28.

73. Kevin J. Walsh & Eric R. Blythe, *Where do your interests lie under Chapter 15 of the Bankruptcy Code?*, MINTZ LEVIN: BANKRUPTCY (Apr. 30, 2013), <https://www.lexology.com/library/detail.aspx?g=bce73e20-458b-4784-9547-70080bdfdaa9> [https://perma.cc/8RKC-7G8H].

74. *Id.*

75. *Id.*

76. JUDICIAL PERSPECTIVES ON THE MODEL LAW, *supra* note 65, at 35–36.

the Model Law.⁷⁷ These principles ensure that an insolvency proceeding concerning a single debtor is optimized to meet the needs of all its creditors.⁷⁸ The principle of cooperation “is the only realistic way, for example, to prevent asset dissipation, maximize asset value, and find the best solution for the reorganization of a business.”⁷⁹ Cooperation also “leads to better coordination of . . . various insolvency proceedings, streamlining them with the object of achieving greater benefits for creditors.”⁸⁰

Access, recognition, relief, and cooperation and communication further the public policy objectives of the Model Law.⁸¹ These provisions provide “legal certainty for trade and investment,” promote “fair and efficient management” of cross-border insolvency, and “protect[] and maximize[e]” the value of debtor’s assets for distribution to creditors.⁸² These provisions also enable governments and private actors to work together in rescuing financially distressed businesses while “protecting investment[s] and preserving employment.”⁸³

The Model Law has been well received. For example, both the World Bank and the International Monetary fund have expressly supported enacting the Model Law.⁸⁴ To date, forty-five jurisdictions have also adopted the Model Law, including advanced economies such as the United States, Australia, and the United Kingdom.⁸⁵ The United States adopted the Model Law almost verbatim as Chapter 15 of the Bankruptcy Code in 2005.⁸⁶ The United Kingdom passed the Cross-Border Insolvency Regulations in 2006 and enacted the Model Law, enabling the recognition of foreign

77. *Id.* at 46.

78. *Id.* (“The objective is to maximize returns to creditors . . . and . . . to facilitate protection of investment and the preservation of employment through fair and efficient administration of the insolvency estate.”).

79. *Id.*

80. *Id.*

81. *Id.* at 5.

82. *Id.*

83. *Id.*

84. THE WORLD BANK, PRINCIPLES FOR EFFECTIVE INSOLVENCY AND CREDITOR/DEBTOR REGIMES 2 (Revised 2011), <http://siteresources.worldbank.org/EXTGILD/Resources/5807554-1357753926066/ICRPrinciples-Jan2011%5bFINAL%5d.pdf> [<https://perma.cc/2LCV-FSLW>]; see also INTERNATIONAL MONETARY FUND, *Orderly & Effective Insolvency Procedures: Key Issues* (1999), <http://www.imf.org/external/pubs/ft/orderly/index.htm> [<https://perma.cc/U55Q-TP72>].

85. UNCITRAL Model Law on Cross-Border Insolvency (1997), *supra* note 13.

86. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. No. 108-09, Title VIII, §§ 801-02 and Title XV, 119 Stat. 23, 134–46. All subsequent chapter and section references are to 11 U.S.C §§ 1501–32.

proceedings. Finally, Australia enacted the Model Law in its entirety in the Cross-Border Insolvency Act of 2008.⁸⁷

IV. INCONSISTENT ENFORCEMENT OF INSOLVENCY JUDGMENTS UNDER THE MODEL LAW

Despite the Model Law's emphasis on access, recognition, relief, and cooperation and coordination, it does not specifically address the enforcement of foreign cross-border insolvency judgments within local jurisdictions.⁸⁸ Consequently, over the last decade the enforcement of foreign insolvency judgments in the United Kingdom, Australia, and the United States has been inconsistent and unpredictable. For example, recently U.K. courts have refused to enforce some foreign insolvency judgments, conflicting with precedent and significantly narrowing the Model Law's applicability. Australian courts have also denied enforcement of foreign insolvency judgments in blatant disregard of the Model Law. American courts have similarly undermined the objectives of the Model Law by continuously and dramatically expanding Chapter 15's limited exceptions to enforcement. But absent enforcement, the recognition of a foreign proceeding — whether as a main or non-main proceeding — is a toothless remedy, making the central goals of the Model Law impossible to achieve.

A. UNITED KINGDOM

The United Kingdom has several legal regimes that operate in cross-border insolvency cases, and the Cross-Border Insolvency Regulation (CBIR) is a crucial component of these regimes.⁸⁹ Early cases after the adoption of the Model Law — such as *Cambridge Gas Transport Corp. v. Official Committee of Unsecured Creditors of Navigator Holdings, PLC*⁹⁰ and *In re HIH*⁹¹ — ap-

87. Sandeep Gopalan & Michael Guihot, *Recognition and Enforcement in Cross-Border Insolvency Law: A Proposal for Judicial Gap-Filling*, 48 VAND. J. TRANSNAT'L L. 1225, 1239 (2015).

88. *Id.* at 1233.

89. *Id.* at 1259.

90. *Cambridge Gas Transport Corp. v. Official Committee of Unsecured Creditors (of Navigator Holdings PLC and others) (Isle of Man)* [2006] UKPC 26 [hereinafter *Cambridge Gas*].

91. *In re HIH Cas. & Gen. Ins. Ltd.* [2008] UKHL 21.

plied the CBIR according to modified universalist principles.⁹² But more recent cases, such as *Rubin v. Eurofinance*,⁹³ interpreted the CBIR as purely procedural and incapable of providing for English enforcement of relief available in a foreign insolvency case, but unavailable under English common or statutory law.⁹⁴

1. Cambridge Gas

Cambridge Gas Transport Corp. v. Official Committee of Unsecured Creditors of Navigator Holdings, PLC was decided in 2006 and concerned the bankruptcy of a shipping company.⁹⁵ Several European businessmen borrowed \$300 million on the New York bond market and purchased five gas transport vessels.⁹⁶ These vessels were owned by a group of separate Isle of Man companies that were, in turn, subsidiaries of a management company.⁹⁷ Navigator Holdings owned shares of that management company, and Cambridge Gas owned seventy percent of the issued shares of Navigator.⁹⁸ Because freight rates dropped to lower-than-expected values, the shipping venture experienced financial distress and the European businessmen approached a New York bankruptcy court for relief under Chapter 11.⁹⁹

The New York court approved a plan vesting Navigator's shares to its creditors and provided Cambridge Gas with steps to effectuate this plan.¹⁰⁰ But Cambridge Gas did not submit to the New York court's jurisdiction and resisted the court's ordered plan of relief. Instead, Cambridge Gas petitioned the English High Court to deny recognition of the plan.¹⁰¹ On appeal, the English Privy Council held that since Navigator was the parent company to Cambridge Gas and had submitted to the New York court's jurisdiction, the New York court's ordered plan of relief was enforceable.¹⁰² The court went on to distinguish bankruptcy

92. Gopalan & Guihot, *supra* note 87, at 1259–63.

93. *Rubin v. Eurofinance SA* [2012] UKSC 46.

94. *Id.*

95. *Cambridge Gas*, *supra* note 90, ¶ 1.

96. *Id.*; *see also Rubin*, ¶ 36.

97. *Cambridge Gas*, *supra* note 90, ¶ 1–2; *see also Rubin*, ¶ 37–38.

98. *See id.*

99. *Cambridge Gas*, *supra* note 90, ¶ 4–6; *see also Rubin*, ¶ 39.

100. Ashok Kumar, *Foreign Insolvency Proceedings — A new Look at International Comity*, LAW GAZETTE (June 2012), <http://v1.lawgazette.com.sg/2012-06/> [<https://perma.cc/R8ZR-DGJP>].

101. Gopalan & Guihot, *supra* note 87, at 1259.

102. *Id.*

proceedings from judgments *in rem* or *in personam*, holding that unlike judgments *in rem* or *in personam*, bankruptcy proceedings merely apportion existing rights.¹⁰³

When a judgment *in rem* or *in personam* is recognized by a foreign court, it is accepted as establishing the right which it purports to have determined, without further inquiry into the grounds upon which it did so. The judgment itself is treated as the source of the right. The purpose of bankruptcy proceedings, on the other hand, is not to determine or establish the existence of rights, but to provide a mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established.¹⁰⁴

The court also observed that under the English common law, fairness requires insolvency proceedings to have universal application.¹⁰⁵ A single insolvency proceeding should govern because “[n]o one should have an advantage because he happens to live in a jurisdiction where more of the assets or fewer of the creditors are situated.”¹⁰⁶ The court concluded by observing that although Cambridge Gas had not technically submitted to the New York court’s jurisdiction, it had no economic interest in the proceeding and ample opportunity to participate if it so wished.¹⁰⁷ Thus, enforcing the ordered plan of relief was “not . . . unfair.”¹⁰⁸

2. *In re HIH*

In 2008, *In re HIH* followed in the footsteps of *Cambridge Gas* by enforcing a foreign insolvency court’s order of priority.¹⁰⁹ The case involved the collective bankruptcy of four Australian insurance companies that were going through winding-up proceedings in Australia.¹¹⁰ But a portion of the companies’ assets were located in England, so provisional liquidators were appointed in the U.K. to protect these assets.¹¹¹ The Australian court asked the English court to direct the English provisional liquidators to re-

103. Cambridge Gas, *supra* note 90, ¶ 13–15.

104. Gopalan & Guihot, *supra* note 87, at 1261.

105. *Id.*

106. *Id.* at 1262.

107. *Id.*

108. *Id.*

109. *In re HIH Cas. & Gen. Ins. Ltd.* [2008] UKHL 21.

110. *Id.* ¶ 1.

111. *Id.*

mit their assets to the Australian creditors.¹¹² However, the Australian order of priority for disbursement of assets was distinguishable from that under English law, though both systems were committed to equal asset distributions among creditors.¹¹³

The question before the House of Lords was whether the English assets could be remitted for distribution in Australia, given the differences between the Australian and English laws.¹¹⁴ The court abided by the precedent established in *Cambridge Gas* and ruled that the English assets could be remitted, enforcing the Australian court's order of priority.¹¹⁵ Lord Hoffman relied on principles of modified universalism and stated that "English courts should, so far as is consistent with justice and UK public policy, co-operate with the [Australian] courts to ensure that all the company's assets are distributed to its creditors under a single system of distribution."¹¹⁶ Creditors' expectations formed part of the justification for the court's holding, because policy-holders and creditors dealing with Australian companies likely assumed that Australian laws would determine their rights in the event of bankruptcy.¹¹⁷

3. Rubin v. Eurofinance

Rubin v. Eurofinance, decided in 2012, was a suit against English defendants involved in a sales promotion scam.¹¹⁸ Eurofinance created a trust, which ran into financial difficulties and sought bankruptcy protection in New York.¹¹⁹ The New York court appointed Rubin to serve as foreign representative on behalf of the trust, and Rubin commenced adversary proceedings to recover fraudulently transferred funds.¹²⁰ The defendants in the-

112. *Id.* ¶ 3–4.

113. *Id.* ¶ 2.

114. *Id.* ¶ 1.

115. *Id.* ¶ 62–63, 83; Gopalan & Guihot, *supra* note 87, at 1263.

116. *In re HHH*, ¶ 30.

117. Gopalan & Guihot, *supra* note 87, at 1263.

118. Rubin v. Eurofinance SA [2012] UKSC 46, ¶ 2; *see also* Richard Keady & Jay Qin, *Rubin v. Eurofinance: A return to Common Sense*, BIRD & BIRD (Jan. 8, 2013), <https://www.twobirds.com/en/news/articles/2012/rubin-v-eurofinance-0113> [<https://perma.cc/8LNN-5ET3>].

119. Rubin, ¶ 2; *see also* CAREY OLSEN, RUBIN V. EUROFINANCE — A WELCOME CLARIFICATION FOR THE INSOLVENCY WORLD (2012), <https://s3.amazonaws.com/documents.lexology.com/cb996d2f-ed40-47b2-ba5e-f7380808e169.pdf> [<https://perma.cc/82GE-KESF>].

120. OLSEN, *supra* note 119.

se adversary proceedings were not New York residents, and they did not submit to the jurisdiction of the court or defend themselves in these proceedings.¹²¹ As a result, the court entered default and summary judgment orders against the defendants for recovery of the fraudulently transferred funds.¹²² The English proceedings in the U.K. Supreme Court sought enforcement of the U.S. judgments against the defendants.¹²³ However, diverging from previous decisions, the U.K. Supreme Court refused to enforce the U.S. judgment against the defendants.¹²⁴ In reaching its decision, the Court relied on the standard English common law rule (sometimes referred to as Rule 36),¹²⁵ holding that a foreign insolvency judgment is not enforceable in England “unless the person concerned was present in the foreign jurisdiction at the time the proceedings . . . were commenced, was a claimant or counterclaimant in those proceedings, had submitted to the jurisdiction . . . or had agreed to submit to the foreign court’s jurisdiction.”¹²⁶

The Court reasoned that recognition and enforcement of orders made during a foreign insolvency proceeding should be governed by standard common law rules, such as Rule 36.¹²⁷ However, lower courts previously held that non-common law rules should govern the enforcement of foreign insolvency judgments, as insolvency orders function for the benefit of creditors and therefore the principle of universalism should apply.¹²⁸ The decisions of the lower courts were based on the Privy Council’s decision in *Cambridge Gas*, which held that bankruptcy judgments were distinguishable from judgments in personam in providing a mechanism for collective creditor execution against debtor property rather than a determination of rights.¹²⁹ Thus, through this holding, the U.K. Supreme Court not only overruled *Cambridge Gas* and went against precedential cases like *In re HIH*, but also

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*; see also Gordon Stewart et al., *International Cooperation in Cross-Border Cases: Is Modified Universalism a Busted Flush?*, 103014 ABI-CLE 69, 69 (Oct. 31, 2014).

125. Stewart et al., *supra* note 124 (stating that the standard common law rule is sometimes referred to as “Rule 36”).

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

held that lower courts did not have jurisdiction to change settled law: such changes could only be made by Parliament.¹³⁰

The U.K. Supreme Court's holding introduces uncertainty into cross-border insolvency proceedings, especially because London's popularity as a major commercial litigation hub makes the U.K. a leading jurisdiction for cross-border insolvencies.¹³¹ Following *Rubin*, neither debtors nor creditors will be able to foretell whether certain judgments will be unenforceable because they fall under common law rules.¹³² The Court's holding also reasserts territorialist principles and runs counter to the purpose of the Model Law because "there is not a lot of point in being able to 'recognize' U.S. Chapter 11 proceedings, for example, if any reorganization plan . . . implemented by [a] . . . U.S. Bankruptcy court would be unenforceable against creditors who are not subject to the jurisdiction of the U.S. Bankruptcy Court."¹³³ Consequently, cross-border insolvency proceedings involving the U.K. could become more expensive as debtors or creditors may need to open parallel English proceedings rather than simply seek recognition of a foreign plan in a U.K. court.¹³⁴ The ramifications of *Rubin v. Eurofinance* could be felt beyond the U.K., especially in U.S.-based international bankruptcy cases. The decision may influence the development of cross-border insolvency laws in other common law jurisdictions that have traditionally followed English judiciary developments, such as Hong Kong, Singapore, and Australia.¹³⁵

B. AUSTRALIA

The Cross-Border Insolvency Act of 2008 — Australia's adoption of the Model Law — has been portrayed as more universalist than its Corporations Act of 2001 and the limited approach of some local legislation.¹³⁶ But recent cases illustrate that Austral-

130. Keady & Qin, *supra* note 118.

131. Gopalan & Guihot, *supra* note 87, at 1259.

132. STEFANO CALABRETTA, PIPER ALDERMAN, FEDERAL COURT OF AUSTRALIA UPHOLDS LANDMARK CROSS BORDER INSOLVENCY DECISION (2014), https://www.piperalderman.com.au/_files/f/6625/Insolvency%200914.pdf [<https://perma.cc/F8GL-S46T>].

133. Stewart et al., *supra* note 124.

134. Gopalan & Guihot, *supra* note 87, at 1227.

135. Keady & Qin, *supra* note 118.

136. Gopalan & Guihot, *supra* note 87, at 1237–38. Australia did not have a uniform law governing corporate bankruptcy until the *Corporations Act 2001* (Cth) § 581(1)–(4) (Austl.), https://www.comlaw.gov.au/Details/C2015C00336/Html/Volume_2 [<https://perma.cc/F8GL-S46T>].

ian courts have used their broad judicial discretion to follow territorialist principles by checking the ability of foreign representatives to recover local assets, thus limiting the Act's effectiveness as a universalist instrument.¹³⁷ For example, in *Ackers v. Saad Investments Company*, applying the Act to a case involving a simple local tax debt resulted in sunk costs and an ultimately territorialist application of local Australian law.¹³⁸ The court in *Yu v. STX Pan Ocean Company* declined to protect a bankrupt company's ships from local creditors, aligning with the reasoning of *Ackers* and solidifying a territorialist interpretation and application of the Act.

1. *Ackers v. Saad Investments Company Ltd*

In 2009, Saad began liquidation proceedings per an order of the Grand Court in the Cayman Islands, its COMI.¹³⁹ Before liquidation, Saad had invested in Australian assets, and the liquidating creditors wanted to recover these assets.¹⁴⁰ However, the Australian Commissioner of Taxation (ACT) sought to insure that before the liquidators could recover these assets, all outstanding local taxes and penalties were paid.¹⁴¹ Thus, in 2013, the Federal Court of Australia (FCA), after it had already recognized the Cayman proceedings as the foreign main proceedings in 2010, allowed the ACT "the right to recover the same portion of [outstanding tax and penalty payments] that it would have been entitled to . . . in the liquidation as if it had a provable debt, and to be paid that sum from Saad's Australian assets before they were liquidated in the Caymans."¹⁴²

While the FCA's holding benefited the ACT, it contravened both the principles and the provisions of the Model Law. Under

cc/H4YA-JHAN]. Until passage of the Act, courts were not required to act in aid of and auxiliary to other courts adjudicating insolvency proceedings — each state passed and abided by unique laws governing the winding up of companies in liquidation. Gopalan & Guihot, *supra* note 87, at 1237–38.

137. Gopalan & Guihot, *supra* note 87, at 1245.

138. Michael Guihot, *Cross-Border Insolvency: A Case for a Transaction Cost Economics Analysis*, 25 NO. 5 J. BANKR. L. & PRAC. NL ART. 4, ¶ 3.5 (2016).

139. *Ackers v Saad Invs. Co. Ltd.* (2010) FCR 1221 (Austral.); Alfred Escherstrasse, *Will Liquidators Now Receive Foreign Assets Net of Local Tax?* SOLOMON HARRIS: LEGAL UPDATES, <https://www.solomonharris.com/news-updates/will-liquidators-now-receive-foreign-assets-net-of-local-tax-saad-investments> [<https://perma.cc/27PP-Z56T>].

140. CALABRETTA, *supra* note 132.

141. Escherstrasse, *supra* note 139.

142. *Id.*

Article 20, all company assets located outside of the COMI are quarantined from local insolvency laws after those local jurisdictions have granted recognition.¹⁴³ In this case, because the FCA recognized the Cayman Islands proceedings as foreign main proceedings, the Australian assets should have been insulated from the enforcement of local tax and penalty laws; but, under this quarantine, the ACT would have had no effective remedies for enforcement because its judgment for the taxes and penalties would not have been recognized under Cayman Islands law.¹⁴⁴ In other words, the ACT debts were not provable in the Cayman Islands liquidation, and the ACT would not have received payment for outstanding taxes and penalties by the Australian asset liquidators.¹⁴⁵

In contravening Article 20, the FCA held Article 22 (which enables protection of creditors and other interested persons) granted it jurisdiction to modify its previous recognition order of 2010 to adequately protect the interests of the ACT and enable the ACT to enforce local laws against the Cayman Islands liquidators.¹⁴⁶ But whether Article 22 actually granted the FCA jurisdiction to favor local creditors is questionable, as Article 22 provides, *inter alia*: “[i]n granting or denying relief . . . the court must be satisfied that the interests of *the* creditors and other interested persons, including the debtor, are adequately protected.”¹⁴⁷ Thus, per the statutory language, the FCA should have considered whether subjecting the assets to local Australian tax and penalty laws would have benefited all of Saad’s creditors — not just the ACT.

The FCA’s decision illustrates that not only can local tax collection be protected despite the Model Law, but that given discretion, local judges will interpret the Model Law in ways that contradict its aims in favor of territorialist interests.¹⁴⁸ The wider implication of the FCA’s decision is that going forward, local courts can use Article 22 to undercut Article 20 and recover taxes

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. UNCITRAL Model Law on Cross-Border Insolvency (1997), *supra* note 13, at 12 (emphasis added).

148. Escherstrasse, *supra* note 139; see also *Jumping the Cross-Border Insolvency Queue*, ALLENS LINKLATERS: RESTRUCTURING & INSOLVENCY (Aug. 12, 2013), <https://www.allens.com.au/pubs/insol/foinsol12aug13.htm> [<https://perma.cc/P8QY-ABL6>].

and penalties from the assets of an insolvency proceeding in a different jurisdiction.¹⁴⁹

2. *Yu v. STX Pan Ocean Company*

The FCA's decision in *Yu v. STX Pan Ocean Company*, like the decision in *Ackers*, interpreted Article 22 for the benefit of local creditors, further undermining the modified universalist principles of the Model Law. In *Yu*, a foreign representative applied to the FCA to prevent enforcement of debts against company ships that continued to sail and trade around the world as the parent company underwent bankruptcy in South Korea (which the FCA recognized as the foreign main proceeding).¹⁵⁰ Specifically, the foreign representative sought court orders preventing Australian creditors from seizing the ships as they docked in Australian waters.¹⁵¹

The judge refused to grant the foreign representative's order, holding that "to do so would impinge on what, under [Australian] maritime law, [is] equivalent to the rights of a secured creditor."¹⁵² The court based its reasoning on Articles 21 and 22, reading them as requiring considerations of the interests of Australian creditors. However, Article 21, like article 22, mandates that the "interests of *the* creditors" collectively, not merely local creditors, are adequately protected.¹⁵³ Like the decision in *Ackers*, the judge's decision in this case highlights both the limitations of the Model Law and the reluctance of Australian courts to apply modified universalist principles when doing so would threaten or diminish local creditors' rights.

C. UNITED STATES

Chapter 15 of the Bankruptcy Code was adopted almost verbatim from the Model Law.¹⁵⁴ Section 1501 also explicitly provides that Chapter 15's purpose is to incorporate the Model Law,

149. Escherstrasse, *supra* note 139.

150. Gopalan & Guihot, *supra* note 87, at 1243.

151. *Id.* at 1243–44.

152. *Id.* at 1244.

153. UNCITRAL Model Law on Cross-Border Insolvency (1997), *supra* note 13, at 11 (emphasis added).

154. E. BRUCE LEONARD, AM. C. OF BANKR., THE NEW CHAPTER 15 (2005), https://www.americancollegeofbankruptcy.com/file.cfm/38/docs/Chapter%2015%20Paper%20revised%20May%2030%2005-v1%20_3_.pdf [https://perma.cc/NE94-8N42].

including its objectives of (1) increasing co-operation between U.S. courts and insolvency administrators and foreign courts and insolvency administrators, (2) providing greater legal certainty for trade and investment, and (3) facilitating the rescue of financially troubled businesses.¹⁵⁵ Under Section 1520, U.S. bankruptcy courts are required to cooperate to the extent possible with foreign courts and representatives, tempered only by public policy concerns. The public policy exception is embodied in Section 1506 of the Bankruptcy Code, and states that a court may refuse to take actions governed by Chapter 15 that are “manifestly contrary to the public policy of the United States.”¹⁵⁶ However, as Chapter 15’s originating source is the Model Law,¹⁵⁷ U.S. judicial interpretations must accord with judicial interpretations given by other adopting countries to promote a uniform and coordinated legal regime for cross-border insolvency.¹⁵⁸ Commentary on Chapter 15 also advises that the public policy exception be used narrowly and applied only in “circumstances where a ‘fundamental policy’ of the United States is threatened.”¹⁵⁹ But, as subsequent cases demonstrate, U.S. courts have increasingly used and expanded § 1506 to enforce foreign insolvency judgments inconsistently.

1. *In re Metcalfe*

In re Metcalfe involved a 2009 Canadian insolvency proceeding in which an Ontario court recognized and implemented a creditor-backed restructuring plan involving a third-party release.¹⁶⁰ A court-appointed monitor sought recognition of the plan in the U.S. under Chapter 15.¹⁶¹ But according to U.S. bankruptcy law, releases may only be approved if essential to the success of a reorganization or restructuring plan.¹⁶² Nevertheless, the New

155. 11 U.S.C. § 1501 (2012).

156. 11 U.S.C. § 1506 (2012).

157. *Chapter 15 — Bankruptcy Basics*, U.S. COURTS: BANKR. BASICS, <http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-15-bankruptcy-basics> [https://perma.cc/54JG-TEGZ] (last visited Feb. 1, 2018).

158. *Id.*

159. Kevin P. Ray, *Ch.15 and Public Policy Lessons from Jaffe v. Samsung*, LAW 360 (Mar. 21, 2014), <http://www.law360.com/articles/520171/ch-15-and-public-policy-lessons-from-jaffe-v-samsung> [https://perma.cc/V9J5-P4FR].

160. *In re Metcalfe & Mansfield Alt. Invs.*, 421 B.R. 685 (Bankr. S.D.N.Y. 2010).

161. *Id.* at 687.

162. *Id.*

York Bankruptcy Court — citing principles of comity and modified universalism — enforced the Canadian restructuring plan and held Section 1506 inapplicable.¹⁶³ The Court stated that the public policy exception was narrow, and relevant only when a foreign court used procedures that were manifestly contrary to American “fundamental standards of fairness.”¹⁶⁴ In other words, the public policy exception allowed for different outcomes between U.S. and foreign courts, and “fairness was not threatened merely because the foreign court did not provide the same solution as a [U.S.] court.”¹⁶⁵

2. *Jaffé v. Samsung Electronics*

Jaffé v. Samsung Electronics was filed in the Fourth Circuit as an appeal from a Virginia Bankruptcy Court case, *In re Qimonda*, involving a German technology company undergoing foreign main insolvency proceedings in Germany.¹⁶⁶ The debtor company’s primary assets consisted of ten thousand technology patents.¹⁶⁷ Slightly less than half of these patents were American.¹⁶⁸ However, American and German bankruptcy laws treat intellectual property, such as patents, differently. Under Section 365(n) of the U.S. Bankruptcy Code, where a debtor licensor of intellectual property chooses to reject the license, the licensee may nevertheless elect to retain its rights under that rejected license.¹⁶⁹ In contrast, under Section 103 of the German Insolvency Code, if the debtor determines that the intellectual property license is too burdensome, it may not only reject the license, but can also terminate the licensee’s right to use the intellectual property.¹⁷⁰

Thus, when the German liquidator filed a Chapter 15 petition for recognition in Virginia and sought to terminate several million U.S. patent licenses, determining whether Section 365(n) applied became critical.¹⁷¹ Ultimately, the Bankruptcy Court rec-

163. *Id.* at. 697–98.

164. *Id.* at 697.

165. Elizabeth Buckel, Note, *Curbing Comity: The Increasingly Expansive Public Policy Exception of Chapter 15*, 44 GEO. J. INT’L L. 1281, 1297 (2013).

166. *Jaffé v. Samsung Elect.*, 737 F.3d 14 (4th Cir. 2013); *In re Qimonda AG Bankr. Litig.*, 433 B.R. 547 (Bankr. E.D. Va 2010).

167. *Jaffé*, 737 F. 3d, at 16.

168. *Id.*

169. 11 U.S.C. § 365(n) (2012).

170. *Jaffé*, 737 F.3d, at 17; *see also* Ray, *supra* note 159.

171. *Jaffé*, 737 F.3d, at 18.

ognized the German insolvency proceeding as the foreign main proceeding but held that under Section 1506, termination of the licenses would be manifestly contrary to public policy.¹⁷²

In analyzing Section 1506, the court considered:

(1) whether the foreign proceeding was procedurally unfair, and (2) whether the application of the foreign law or the recognition of a foreign main proceeding under Chapter 15 would “severely impinge the value and import” of a U.S. statutory or constitutional right, such that granting comity would “severely hinder United States bankruptcy courts” abilities to carry out . . . the most fundamental policies and purposes of these rights.¹⁷³

The court held that granting the German liquidator’s request to terminate U.S. patent licenses would slow the pace of innovation and undermine the U.S. economy, thereby severely impinging on statutory rights and undermining fundamental American public policies.¹⁷⁴ However, the court relied heavily on broad assertions of fundamental public policy, “without providing much background, precedent, or evidentiary showing, . . . in stark contrast with the rest of the opinion, which opined on the narrowness of the exception and general principles of comity imbedded in Chapter 15.”¹⁷⁵ Thus, the court expanded the Section 1506 public policy exception to encompass policies promoting technological innovation and protecting U.S. patent licensees, to the detriment and contravention of Chapter 15 and the principles underlying the Model Law.

On appeal, the Fourth Circuit upheld the Bankruptcy Court’s outcome, but tempered its holding. The Fourth Circuit based its ruling on Section 1522(a) (holding that a court may grant, modify, or deny relief if “the interests of the creditors and other interested entities, including the debtor,” are sufficiently protected) rather than entirely relying on Section 1506.¹⁷⁶ Nevertheless, the Court recognized that “by affirming the bankruptcy court’s appli-

172. *Id.*

173. *In re Qimonda AG Bankr. Litig.*, 433 B.R. 547, 568–69 (Bankr. E.D. Va 2010).

174. *Id.* at 565.

175. Buckel, *supra* note 165, at 1305.

176. 11 U.S.C. § 1522(a) (2012); *see also Jaffé*, 737 F.3d, at 18.

cation of § 365(n) . . . we also indirectly further the public policy that underlies § 365(n).”¹⁷⁷

3. In re Vitro

Vitro was a Mexican holding company operating through multinational subsidiaries.¹⁷⁸ After the global financial crises and corresponding downturn in business in 2008, Vitro began negotiations with its creditors to restructure outstanding debts and filed a voluntary judicial reorganization proceeding in Mexico, seeking approval of a restructuring plan.¹⁷⁹ The Mexican court approved the plan, and Vitro’s foreign representative filed a motion for recognition in New York Bankruptcy Court under Chapter 15.¹⁸⁰ The Bankruptcy Court refused to enforce the restructuring plan, holding that the plan was manifestly contrary to public policy as it discharged “obligations held by non-debtor guarantors and [did] not provide the protections afforded to creditors under the Bankruptcy Code.”¹⁸¹ The court reasoned that the restructuring plan could not be enforced because Section 524 of the Bankruptcy Code (preventing the discharge of claims for entities other than a debtor absent extraordinary circumstances)¹⁸² and Fifth Circuit precedent established a fundamental public policy protecting third-party claims in bankruptcy proceedings.

Despite the court’s reasoning, its holding is at odds with both *Metcalfe* and the plain meaning of Section 1506. The *Metcalfe* court not only enforced the foreign restructuring plan, but held that the public policy exception was narrow, applying only to cases resting on fundamental procedural unfairness and not to mere difference in outcomes between U.S. and foreign courts. Yet the *Vitro* court seems to rest its decision on outcome differences between the U.S. and Mexican courts, given that the court does not discuss fundamental unfairness regarding the Mexican insolvency procedures. Furthermore, while the court attempted to distinguish *Metcalfe* as resting on unanimous creditor approval of the restructuring plan, it failed “to explain how these differences re-

177. *Jaffé*, 737 F.3d, at 32.

178. *In re Vitro S.A.B. de CV*, 701 F.3d 1031 (5th Cir. 2012).

179. *Id.* at 1037–38.

180. *Id.* at 1040–41.

181. Buckel, *supra* note 165, at 1303–04.

182. 11 U.S.C. § 524 (2012).

flected a fundamental public policy.”¹⁸³ Moreover, a single section of the vast Bankruptcy Code and one Fifth Circuit precedent are hardly clear and obvious indicators of an established public policy.

The court’s holding runs counter to Chapter 15 and the Model Law:

Specifically, a refusal to enforce [Vitro’s restructuring] plan in the U.S. would result in a series of cases, judgment, and collections that would conflict with the plan. [The resulting inconsistency] would expose Vitro to differing obligations to its creditors “depending on the legal regime they opt to rely on or are bound by,” and create disincentives for “creditors to reach consensual resolutions in foreign insolvency proceedings.”¹⁸⁴

Thus, the *Vitro* court further expanded the Section 1506 public policy exception at the expense of the general aims of Chapter 15 and the Model Law “to establish greater legal certainty, trade, and investment.”¹⁸⁵ The court’s decision also went against the trend of construing the public policy exception narrowly, especially in New York — a major hub of international trade and natural axis for cross-border insolvency.¹⁸⁶ Since the court’s decision, inconsistent enforcement of insolvency judgements has continued within the United States, as at least one court has declined to follow the *Vitro* court’s expansive interpretation.¹⁸⁷

183. Buckel, *supra* note 165, at 1307.

184. *Id.*

185. *Id.*

186. *In re OAS S.A.*, 533 B.R. 83 (Bankr. S.D.N.Y. 2015) (granting recognition to a Brazilian proceeding as a foreign main proceeding because not manifestly contrary to public policy under § 1506); *In re Toft*, 453 B.R. 186 (Bankr. S.D.N.Y. 2011) (explaining that the public policy exception is drafted in narrow terms and must be applied sparingly); *In re Metcalfe & Mansfield Alt. Invs.*, 421 B.R. 685 (Bankr. S.D.N.Y. 2010) (the public policy exception is narrowly construed); *In re Ephedra Prods. Liab. Litig.*, 349 B.R. 333 (Bankr. S.D.N.Y. 2006) (recognizing and enforcing a Canadian’ courts order because the public policy exception should be narrowly interpreted as only applicable to the most fundamental policies of the United States).

187. *In re Fairfield Sentry Ltd.*, 714 F.3d 127, 139 (2d Cir. 2013) (stating that the public policy exception should be read “restrictively” and invoked only “under exceptional circumstances concerning matters of fundamental importance for the enacting State”).

V. UNCITRAL PROPOSED MODEL LAW ON THE RECOGNITION AND ENFORCEMENT OF INSOLVENCY RELATED JUDGMENTS

In 2015, prompted by inconsistent enforcement of insolvency judgments in the U.K. (e.g., *Rubin v. Eurofinance*), Australia (e.g., *Ackers v. Saad Investments*), and the United States (e.g., *In re Vitro*), the Committee on International Aspects proposed an amendment to the Model Law to promote uniformity in global insolvency procedures — the Model Law on the Recognition and Enforcement of Insolvency-Related Judgments (the Amendment).¹⁸⁸ The Amendment is designed to clarify and standardize the enforcement of insolvency related judgments, and if adopted, it will have a global impact on insolvency law.¹⁸⁹

A. STATUTORY CONSTRUCTION AND ANALYSIS

The Amendment is drafted as a stand-alone law but can easily be reformatted as an addendum to existing enactments of the Model Law, such as Chapter 15. The Amendment consists of fifteen articles, substantially overlapping with the existing Model Law with the exception of Article 13, which provides limited grounds to refuse recognition and enforcement of an insolvency related judgment.

Article 13 is intended to streamline global recognition and enforcement procedures, making local recognition and enforcement of foreign insolvency proceedings easy, predictable, and subject only to eight enumerated exceptions.¹⁹⁰ That the Committee drafted eight exceptions and did not include a catch-all clause suggests that these exceptions are meant to be an exclusive limit on broad judicial discretion to refuse recognition and enforcement under the interpretive canon of *expressio unius est exclusio alterius*, namely that “expressing one item . . . excludes another left unmentioned.”¹⁹¹ Moreover, the content of the exceptions includes situations that would have previously been “manifestly contrary to public policy” under the Model Law.¹⁹² Thus, after adoption of the Amendment, judges will no longer be able to

188. INT’L ASPECTS COMM., *supra* note 18, at 2.

189. *Id.*

190. *Id.*

191. *Chevron USA v. Echazabal*, 536 U.S. 73, 80 (2002).

192. 11 U.S.C. § 1506 (2012).

stretch and distort the meaning of public policy beyond its intended scope and will have to defer to the enumerated exceptions. This interpretation is also supported by the fact that broad judicial discretion in cases such as *Rubin v. Eurofinance* served as the direct impetus for drafting the Amendment.¹⁹³

Article 13(a) allows courts to refuse recognition and enforcement when notice procedures have been violated either as to the defendant (§ i) or as to the receiving state (§ ii). Thus, 13(a)(ii) allows a court to deny enforcement of foreign insolvency judgments where service of process (in the foreign jurisdiction) was made in a manner that contradicted *its* service procedures. On its face, the text seems to suggest that rather than deterring inconsistent enforcement, 13(a)(ii) codifies the holding in *Rubin*, where American service of process on the British defendant violated both British common law and the Foreign Judgments (Reciprocal Enforcement) Act of 1933.¹⁹⁴

However, this argument makes little sense when the context in which the Amendment was proposed and the Committee's commentary on the Amendment is properly considered. First, "the immediate impetus for the drafting [of the Amendment] was the decision of the U.K. Supreme Court in *Rubin*."¹⁹⁵ That the Committee would draft an Amendment seeking to correct the erroneous holding in *Rubin*, but would also codify this flawed holding as sound seemingly defies logic. Second, the Committee notes accompanying the Amendment state that "[13](a)(ii) is concerned with the interests of the receiving State, provided that the receiving state is the State in which the defendant was notified of the proceeding giving rise to the judgment."¹⁹⁶ Accordingly, 13(a)(ii) seems to be inapplicable to *Rubin* unless the British defendant was notified of the New York proceedings against him, in Britain and in contravention of British statutory and common law. While the *Rubin* opinion does not discuss where service of process occurred, the Federal Rules of Civil Procedure (FRCP) allow valid service of process through the mail, electronic transmission, or the court clerk's office.¹⁹⁷ Thus, the British defendant could con-

193. INT'L ASPECTS COMM., *supra* note 18, at 3.

194. *Rubin v. Eurofinance SA* [2012] UKSC 46.

195. INT'L ASPECTS COMM., *supra* note 18, at 3.

196. WORKING GROUP V, UNITED NATIONS COMM'N ON INT'L TRADE LAW, RECOGNITION AND ENFORCEMENT OF INSOLVENCY-RELATED JUDGMENTS: COMMENTARY AND NOTES ON THE DRAFT MODEL LAW, at 9, U.N. Doc. A/CN.9/WG.V/WP.143/Add.1 (2016).

197. FED. R. CIV. P. 5(b).

ceivably have been served “in America” for the purposes of the FRCP and 13(a)(ii) even if he never set foot in the country.

Furthermore, even if the British defendant was served in Britain, the U.K. Supreme Court’s holding would still arguably fall outside of the scope of Article 13, which is geared towards procedural fairness surrounding service of process, and “permits the court to refuse recognition and enforcement if the defendant in the proceeding giving rise to the judgment was not properly notified of that proceeding.”¹⁹⁸ In contrast, the *Rubin* holding is based entirely on whether the British defendant was present in or submitted to the jurisdiction of the New York bankruptcy court, not whether he had been properly served.¹⁹⁹ Consequently, the Supreme Court should not (and probably could not) read 13(a)(ii) as giving it license to deny enforcing the New York bankruptcy court’s judgment against the British defendants. Thus, rather than reading 13(a) as codifying *Rubin*, it should be read as codifying the reasoning in *Metcalfe* — that procedural unfairness and incompatibility can be a ground for denying recognition and enforcement.

Article 13(b) codifies fraud as a ground for denying recognition and enforcement. The Committee notes indicate that “while in some legal systems . . . fraud may fall within the scope of the public policy exception, this is not the case for all, hence the inclusion of this provision.”²⁰⁰ But, even in legal systems where fraud falls within the public policy exception, 13(b) will narrow the exception. Presence of a standalone basis for denying recognition based on procedural or substantive claims of fraud will almost always preempt denying recognition on more amorphous public policy grounds, thus narrowing the exception and the judicial discretion that comes with stretching it.

Article 13(e) is designed to preserve the primacy of the court with jurisdiction over the main proceeding, reinforcing the modified universalist goals of the Model Law. The first part of the section “deals with the desirability of avoiding interference with the conduct and administration of the foreign proceeding” and seems largely geared toward countering the effects of U.K. and U.S. courts (e.g. in *Rubin*, *Jaffé*, and *In Re Vitro*) that refuse recognition and render foreign proceedings (either as main or

198. WORKING GROUP V, *supra* note 196, at 9.

199. *Rubin*, ¶ 177.

200. WORKING GROUP V, *supra* note 196, at 9.

non-main) mere toothless remedies.²⁰¹ The second part of the section concerns inconsistent recognition and enforcement in the face of an automatic stay and could be speaking to *Ackers*, in which the FCA violated the automatic stay by refusing to insulate Australian assets from the enforcement of local tax and penalty laws. By ruling that the taxes and penalties on the Saad's Australian assets had to be paid, the FCA violated an automatic and individually enforceable stay.²⁰² However, 13(e) could still be useful. Under this section the *Ackers* Grand Court in the Cayman Islands, conducting the foreign main proceeding, could have neither recognized nor enforced the FCA's ruling, which was inconsistent with both the automatic stay and the main proceedings.

Finally, Article 13(g) is a list of grounds upon which recognition and enforcement of foreign insolvency judgments may be refused. According to the Committee notes, this section is broad and permits "refusal on the grounds of inadequate jurisdiction in the originating court (as determined by the receiving court) with four 'safe harbors' that render the provision inapplicable if the originating court satisfies any one of them."²⁰³ Therefore, this section allows courts to refuse recognition or enforcement based on extravagant claims of jurisdiction. Specifically, subsection (g)(i) provides that if the debtor consents, the originating court's exercise of jurisdiction is legitimate and cannot be contested later; (g)(ii) holds that the originating court's jurisdiction will be adequate if the receiving state would exercise jurisdiction in parallel circumstances; and lastly, (g)(iii) broadens (g)(ii) and applies additional jurisdictional grounds, thus "discourag[ing] courts from refusing recognition and enforcement . . . [where] the originating court's exercise of jurisdiction was not unreasonable."²⁰⁴ Even without subparagraphs (g)(iv) and (v), this section addresses the uncertainty left behind by *Rubin* because it eliminates the ex-ante speculation by enumerating exactly under what circumstances judgments will be unenforceable for lack of jurisdiction.

However, because subparagraphs (g)(iv) and (v) are based upon the concept of foreign main proceedings, they are intended for

201. *Id.* at 10.

202. Escherstrasse, *supra* note 139; see also *Will Liquidators Now Receive Foreign Assets Net Of Local Tax?*, SOLOMON HARRIS: LEGAL UPDATES, <https://www.solomonharris.com/news-updates/will-liquidators-now-receive-foreign-assets-net-of-local-tax-saad-investments> [<https://perma.cc/2XBU-P7WQ>] (last visited Feb. 4, 2018).

203. WORKING GROUP V, *supra* note 196, at 11.

204. *Id.*

enactment in jurisdictions that have already adopted the Model Law. These subparagraphs are critical, because under (g)(iv), “if the originating court . . . was supervising a foreign main proceeding concerning the judgment debtor, subparagraph (g) does not apply as a ground to refuse recognition.”²⁰⁵ In other words, (g)(iv) prohibits the holding in *Rubin*, where the New York bankruptcy court was acting as a foreign main proceeding and sent its appointed representative to facilitate insolvency proceedings through ancillary judgments in the U.K.

Overall, the Amendment introduces more stability into the world of international insolvency by narrowing the range of judicial discretion and enumerating finite exceptions through which enforcement and recognition can be denied.

B. CONGRESSIONAL ADOPTION

11 U.S.C. § 1520 provides that “consistent with the goal of cross-border cooperation, the court is required to cooperate, to the extent possible, with a foreign court or representative.” But, as the decisions in *In re Melcalfe*, *In re Qimonda*, and *In re Vitro* show, American judges have neglected the obligations of Section 1520.²⁰⁶ Rather than collaborate with global insolvency proceedings, judges have stretched the public policy exception to justify applying territorialist principles that protect local creditors. Clearly, judicial discretion is insufficient to promote the goals of Chapter 15 and the Model Law — to effectively and efficiently administer cross-border insolvencies.²⁰⁷

For the foregoing reasons, Congress should adopt the Amendment, especially Article 13, in its entirety. The Amendment will enhance Chapter 15 by clarifying the extent to which courts can deny recognition and enforcement and provide much needed certainty to global creditors and debtors. American adoption of the Amendment might also motivate other jurisdictions, such as Australia and the U.K., to adopt the Amendment. Global adoption of the Amendment will, in turn, translate to streamlined procedures for recognition and enforcement of foreign insolvency judgments

205. *Id.* at 12.

206. *In re Vitro* S.A.B. de CV, 701 F.3d 1031, 1031 (5th Cir. 2012); *In re Qimonda AG* Bankr. Litig., 433 B.R. 547, 547 (Bankr. E.D. Va 2010); *In re Metcalfe & Mansfield Alt. Invs.*, 421 B.R. 685, 685 (Bankr. S.D.N.Y. 2010).

207. Gopalan & Guihot, *supra* note 87.

by local courts, promoting universalist ideals and ensuring greater value to creditors and protection to debtors.

VI. CONCLUSION

The onset of multinational conglomerates has increased international trade dramatically in the last two decades. The number of cross-border insolvencies has also risen correspondingly, making safety and predictability in cross-border insolvency law even more critical. The Model Law was drafted to further these policies by emphasizing access, recognition, relief, and communication and cooperation. But the Model Law still falls short of creating a predictable regime of cross-border insolvency because it does not address how foreign cross-border insolvency judgments should be enforced within local jurisdictions. The notable absence of streamlined recognition and enforcement procedures from the Model Law has led to inconsistent enforcement of foreign insolvency judgments. For example, a recent U.K. Supreme Court decision has significantly narrowed the Model Law's applicability by breaking with precedent and refusing to enforce a foreign insolvency judgment; Australian courts have also contravened the Model Law by refusing to enforce foreign insolvency judgments; and U.S. courts have dramatically expanded Chapter 15's limited exceptions to enforcement. Insolvency courts' erratic approach to recognition and enforcement renders these proceedings toothless, largely undermining the central goals of the Model Law.

The Committee's proposed Amendment will not only guide global recognition and enforcement of foreign insolvency judgments, but will also curb judicial discretion and restore the bite of the Model Law by furthering its goals of clarity and consistency in cross-border insolvencies. Thus, jurisdictions that have already adopted the Model Law — either in part or in full — should also adopt the Committee's proposed Amendment.