

CROSS-BORDER BANKRUPTCY AND THE COOPERATIVE SOLUTION

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ABSTRACT

Cross-border bankruptcy continues to be an important topic within bankruptcy regimes worldwide. As more corporations find themselves interacting in a market without the confines of geographic borders, countries need to adapt their regulatory schemes to be able to properly handle an orderly liquidation or reorganization without an adverse impact on the economy. This paper discusses the challenges of a cross-border bankruptcy regime that would be effective and proposes a cooperative solution for increasing coordination among insolvency proceedings. As a result of increasing cooperation among jurisdiction in light of the recent and ongoing financial crisis, reform within the bankruptcy regimes around the world is foreseeable.

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Global Consumer Products Inc., “GCP,”² has operations in the United States, Germany, Brazil, India and China. Suppliers and creditors are spread globally in Australia, Russia, Japan, and the United Kingdom. GCP’s customers rely on selling GCP products on the customer’s store shelves across the globe. This corporation employs hundreds of thousands of employees, many whose retirement depends on their stock options. GCP is a mega-corporation, a company that personifies the growing trend of globalization. The collapse of GCP would be catastrophic to the world’s economy. What jurisdiction would be best equipped to represent this globally diverse group of creditors? Better yet, what jurisdiction would be able to manage an effective reorganization that would satisfy creditors but still protect an employee’s retirement? Corporations like GCP highlight the challenges of cross-border insolvency proceedings and the need for reform in current practices.

Views and approaches on bankruptcy have evolved over the years as the world faces an increasingly globalized market where the effects of an entity, like GCP, entering insolvency travels beyond geographic borders. Currently, international bankruptcy is a “complex area of the law, which is ‘underdeveloped and inconsistent at best.’”³ Recently, there has been an increase in cross-border insolvency cases.⁴ With the globalization of trade and “increasing international nature of business,” it is natural to see a “similar increase in the number of business failures, and

² GCP Inc. is a fictional company used to illustrate the thesis of this paper, any similarity to an actual corporation is coincidental.

³ Mike Perry, Note, *Lining-Up at the Border: Renewing the Call for a Canada-U.S. Insolvency Convention in the 21st Century*, 10 DUKE J. COMP. & INT’L L. 469, 473 (2000).

⁴ Paul L C Torremans, *Cross Border Insolvencies in EU, English and Belgian Law* 218 (Dr. K.J.M. Mortelmans ed., 2002).

hence also with the number of cross-border insolvency cases.”⁵ Although there is still a diverse collection of bankruptcy regimes operating in the world today, countries are responding to the globalization trend and working toward collaboration and harmonization within bankruptcy systems.⁶ This history of collaboration is only likely to increase as countries continue to respond to the recent financial crisis and work together to address concerns about businesses whose failures can be so deeply entangled in our global marketplace and how insolvency regimes can be aligned.⁷

I. Approaches to Insolvency Regimes

Most legal systems “provide a legal mechanism to address the collective satisfaction of the outstanding claims from assets” (whether intangible or tangible) of the debtor if the debtor is “unable to pay its debts and other liabilities as they become due.”⁸ There are a number of mechanisms for resolving a debtor’s financial difficulties: voluntary restructuring negotiations,⁹ insolvency proceedings,¹⁰ and administrative processes.¹¹ Insolvency proceedings can result in

⁵ *See id.*

⁶ Joseph Bellissimo, *Proposed Insolvency Legislation fosters cross-border cooperation*, The Lawyer’s Weekly Canada, August 31 2007 Issue (November 8, 2011), <<http://www.lawyersweekly.ca/index.php?section=article&articleid=529>>.

⁷ The Hon. Leif M. Clark & Karen Goldstein, *Sacred Cows: How to Care for Secured Creditors’ Rights in Cross-Border Bankruptcies*, 46 Tex. Int’l L.J. 513, 514 [hereinafter Clark]. Cross-border insolvencies are not a new phenomenon. However, it was only relatively recently that great stride have been made toward more coordinated and efficient cross-border bankruptcies.” *Id.* at 514.

⁸ United Nations Commission on International Trade Law (UNCITRAL). Legislative Guide on Insolvency Law 9 (2005) [hereinafter Legislative Guide].

⁹ Voluntary restructuring negotiations are “generally limited to cases of corporate financial difficulty or insolvency in which there is a significant amount of debt owed to banks and financiers.” They were developed by the bank sector and “led and influenced by internationally active banks and financiers.” Legislative Guide, *supra* note 8, at 21.

¹⁰ *See* Legislative Guide, *supra* note 8, at 26.

either reorganization or liquidation.¹² Although the days of debtor’s prison and torturing a debtor are behind us with only few exceptions,¹³ insolvency regimes still differ from country to country. If GCP, for example, found itself facing insolvency across its global operations, it would face a variety of, and at times conflicting, insolvency regimes.¹⁴ Further, if GCP wanted to reorganize, the laws of some jurisdictions in which they operate may not be favorable toward reorganization.¹⁵ Beyond differing philosophies on the goals of insolvency, a “dizzying array” of differences and disagreements exist between jurisdictions with respect to procedures and rules within a bankruptcy case, from the way creditors are required to file and substantiate a claim to avoidance of pre-insolvency transactions creating a hectic insolvency proceeding for GCP.¹⁶ These differences as discussed below can have an impact ranging from a minor inefficiency or individual inconvenience to producing vastly different outcomes for certain creditors depending

¹¹ See generally Legislative Guide, *supra* note 8, 21-29.

¹² See Legislative Guide, *supra* note 8, at 26.

¹³ In early Roman agrarian society, if a debtor failed to pay his creditor, the debtor could be taken captive by his creditor, and if the debts were unpaid for a “further sixty days, the creditor was entitled to either put the debtor to death or sell him into slavery across the Tiber River.” Bob Wessels, Bruce A. Markell & Jason J. Kilborn, *International Cooperation in Bankruptcy and Insolvency Matters* 3, (2009) [Hereinafter Wessels et. al.] Interestingly enough, recent talks in U.S. media suggest the return of a debtor’s prison of sort with “collection agencies taking advantage of archaic state laws to have some debtors arrest and sent to jail.” Henry Blodget, *The Return of Debtor’s Prisons: Collection Agencies Now Want Deadbeats Arrested*, Daily Ticker, Yahoo!News, November 22, 2011 < <http://finance.yahoo.com/blogs/daily-ticker/return-debtors-prisons-collection-agencies-now-want-deadbeats-172417607.html> > last viewed on January 5, 2012.

¹⁴ See *infra* Part I. A. and I. B. for more information on common insolvency regimes.

¹⁵ Outside of the United States and Canada, bankruptcies were typically not conducted with the goal of reorganization until more recently. Instead, most countries freeze debt until funding can be found or assets sold. *More Countries Adopt Similar Cross-Border Insolvency Laws*. Managing Credit Receivables & Collections (Institute for Management & Administration), October 2002.

¹⁶ See Wessels et. al., *supra* note 13, at 17-23.

on how a jurisdiction's rules apply to their claim.¹⁷ With GCP operating in so many jurisdictions that apply different rules to creditors, it could increase their overall cost of doing business if creditors require more security to protect themselves if GCP were to dissolve in a jurisdiction unfavorable to that creditor.

Broadly speaking, while insolvency regimes and doctrines can differ in both their philosophies and effects on a jurisdiction of the other,¹⁸ insolvency regimes are generally divided into two categories: territoriality and universality.¹⁹ Since neither "pure universalism nor pure territorialism" is practical, however, hybrid systems have emerged to create "modified universalism" and "cooperative territorialism."²⁰ Each type of insolvency regime has benefits and drawbacks in approaching and managing a cross-border insolvency.

A. *Territoriality*

If GCP became insolvent in a territoriality insolvency regime,²¹ it would file a case in each separate country, and each country would consider the proceeding its own main case.²² The

¹⁷ See Wessels et. al., *supra* note 13, at 17

¹⁸ See Clark, *supra* note 7, at 517, n15.

¹⁹ See Wessels et. al., *supra* note 13, at 40. ("Whether in trade in goods and services, enforcement of judgments or intellectual property rights, or even pursuit of those suspected of committing crimes, the overarching key question consistently boils down to the proper balance of the competing interests of local protection versus international cooperation.")

²⁰ See Clark, *supra* note 7, at 518.

²¹ A past example was the 1992 insolvency law in Japan. Rosalind Mason, *Cross-Border Insolvency Law: Where Private International Law and Insolvency Law Meet*, in *International Insolvency Law: themes and perspectives*, 27, 43 n95. (Paul J. Omar ed., 2008). For a discussion of Japan's ongoing substantive preference for territoriality under new Japanese bankruptcy law, see Kipnis, AM, "Beyond UNICTRAL: Alternatives to Universality in Transnational Insolvency", (3 July 2006), available at <ssrn.com/abstract=913844> (last viewed January 5, 2012). However, bankruptcy law in Japan with the passage of the Civil Rehabilitation Law is highly influenced by the U.S. Bankruptcy Code, so perhaps some of the territorialist aspect will

territoriality regime is best described as the “Grab Rule,” a concept built on the ground that “local creditors had legitimate expectations that any financial crisis would be resolved applying local policies and principles.”²³ A core principle of this approach to insolvency demonstrates the belief that “insolvency laws do not, of themselves, have an extraterritorial reach, dealing as they must with the application of a given country’s rules to a collection of property within the jurisdictional reach of that country.”²⁴

The benefit of a territoriality regime is that in some situations, resolution is more cost effective in protecting local creditors’ rights. Local creditors can set realistic expectations for resolution of the case, since “property is administered and distributed in each bankruptcy case according to the local law in which [the] property resides.”²⁵ Conversely, the effects of the bankruptcy proceeding are limited to property that is located within that jurisdiction.²⁶ The limitation of jurisdiction may work to the benefit of the debtor at the detriment of the creditor, if the debtor maintained a bulk of their assets in a jurisdiction different from where it incurred most of its debt, and therefore, creditors cannot reach those assets.²⁷ To counteract this problem, when

be softened by the U.S. influence. Peng Xu (Hosei University and RIETI), Bankruptcy Resolution in Japan: Civil Rehabilitation vs. Corporate Reorganization, RIETI Discussion Paper Series 04-E-010 (February 2004) <
<http://www.rieti.go.jp/en/publications/summary/04020008.html>>

²² This type of doctrine, therefore, leaves open the possibility that there could be a “plurality of proceedings” with the “exact number and jurisdictional location to be determined by the circumstances” in the case. For more information on the territoriality insolvency regime *See* Clark, *supra* note 7, at 517.

²³ Elizabeth Warren & Jay Lawrence Westbrook, *The Law of Debtors and Creditors: Tex, Cases and Problems* 841 (6th ed. 2009).

²⁴ *See* Clark, *supra* note 7, at 518.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Parents sometimes use subsidiaries as banks of last resort for restructurings and as a result shuffle around assets that could later hurt the creditor’s rights to these assets during an

local creditors make a decision to contract with a debtor, they can protect themselves by relying only on the security provided by local assets.²⁸

A territorialism approach was unchallenged until just relatively recently when “business began commonly to break past the constraints of national boundaries to establish both asset bases and networks of creditors and claims that span many sovereign territories.”²⁹ This unsatisfactory resolution regime for transnational companies has been partly addressed by alternative theories within territoriality, e.g. the theory of “cooperative territorialism” proposed by Professor LoPucki with principals of cooperation and mutual administration.³⁰

B. *Universality*

If GCP filed an insolvency case in a jurisdiction with a universality insolvency regime, it would face a very different result. Universality regimes focus on the fact that bankruptcy is a collective proceeding that “must extend to all the debtor’s assets and stakeholders” and a

insolvency proceeding whose jurisdiction is limited. Jacquie McNish, *It’s the law of the jungle for creditors: bankruptcy proceedings are seeing debt-holders launch some audacious cross-border plays for assets*, *Globe and Mail*, January 21, 2009 at B9.

²⁸ See Torremans, *supra* note 4, at 7.

²⁹ See Wessels et. al., *supra* note 13, at 41

³⁰ For more information on “cooperative territorialism” see Clark, *supra* note 7. “The five areas LoPucki suggests ought be the subject of cooperation: (1) the establishment of procedures for replicating claims filed [in a bankruptcy proceeding] in any one country in all of them; (2) the sharing of distribution lists by representatives to ensure that later distributions do not go to creditors who have already recovered the full amounts owed to them; (3) the joint sale of assets, when a joint sale would produce a higher price than separated sales in multiple countries or when the value of assets within a country is not sufficiently large to warrant separated administration; (4) the voluntary investment by representatives in one county in the debtor’s reorganization in another; and (5) the seizure and return of assets that have been the subject of avoidable transfers.” See Clark, *supra* note 7, at 520, n50.

resolution must therefore be “symmetric to a debtor’s market.”³¹ The focal point of this holistic approach is that “for every debtor there should be a unified process of administration with all claims and interest channeled through one main proceeding.”³² In a case brought under a universality doctrine in the debtor’s domicile country, all of the debtor’s property, regardless of its location, is brought to the home jurisdiction for resolution and creditors must bring their claims in that jurisdiction.³³ If GCP’s home jurisdiction for purposes of insolvency was considered the United States, for example, all of the corporation’s property, whether in India, China, or elsewhere, theoretically, would be brought into the United States’ jurisdiction for claim resolution purposes. Universality can sometimes be compared to ordinary bankruptcy proceeding found in the United States, and is considered to be more in “conformity with the very nature of bankruptcy and insolvency proceedings”³⁴ in addition to more economical, faster and more efficient.³⁵

But while a universality regime has the benefit of a belief that “expects that the effects – on both the property and the interests of the debtor – will be worldwide,” there are a number of drawbacks.³⁶ Even though universality provides a system that should eliminate “discussion

³¹ See Warren, *supra* note 23, at 841.

³² See Clark, *supra* note 7, at 517

³³ *Id.* at 516.

³⁴ See Torremans, *supra* note 4, at 4. “This argument is based on two assumptions. One is that in nature bankruptcy and insolvency proceeding are a form of collective liquidation and distribution of the assets of the debtor. The second one is that the assets can be seen as a single entity that is linked to the person of the debtor.” Torremans at 5.

³⁵ *Id.*

³⁶ One drawback is the protection of the creditors’ rights is not as certain as within a territoriality jurisdiction. Because the home country’s laws in the debtor’s home country are applied, expectations of creditors may be defeated by differing rules of distribution and priority. Additionally, there can be a considerable cost with consolidating all of the debtor’s assets and creditor’s claims in one court, especially in the case of “far-flung assets” that may have been

concerning the issue of which asset should go in which national territorial bankruptcy,” there are still contested issues with the location of intangible assets and whether the jurisdiction in which the asset is located is willing to give up local law application to the distribution of that asset.³⁷ Recognizing these drawbacks, an alternative theory of modified universality has developed and is considered the best balance between pure universality and territoriality regimes.³⁸

Since pure universality is unrealistic,³⁹ “modified universality begins with the idea of pure universalism and then moves toward the center of the spectrum by incorporating certain territorialism tendencies.”⁴⁰ This type of doctrine tries to address the problem of a debtor that could easily choose a forum based on the laws that will be applied, or engaging in “forum shopping.”⁴¹ If GCP, for example, went to file its insolvency case, it might select a forum that

better addressed in the jurisdiction of their physical location. Finally, there can be a challenge in funneling the assets of an entity into a home country’s jurisdiction and control if there is not a treaty or agreement in place that would increase the likelihood that a country would let property “located in their jurisdiction be administered under anything other than local law.” *See generally* Clark, *supra* note 7, 517-518.

³⁷ *See* Torremans, *supra* note 4, at 5-6.

³⁸ The compromise between universality in bankruptcy law and national sovereignty inherent in the concept of modified universality recently provided the basis for the conclusion of an international bankruptcy concordat instructive to Canada and the United States. Perry, *supra* note 3, at 478.

³⁹ *See* Wessels et. al., *supra* note 13, at 49. “In its purest form, universalism would mean that one worldwide court (or system of courts operating under one administrative umbrella) would apply one set of insolvency laws to all international insolvency cases.” *Id.*

⁴⁰ *See* Clark, *supra* note 7, at n34.

⁴¹ “Effective co-ordination measures should eliminate any potential incentive for parties in financial difficulties to engage in forum shopping by transferring assets to those Member-States [in the EU] that are perceived to have a more favorable protective regime.” *See* Torremans, *supra* note 4, at 139.

had more protections for debtors at the expense of creditor's rights.⁴² At a theoretical level, scholars would argue that a universal system, even modified universality, is far superior to territorialism because the approach is "market symmetrical" and a global market requires a global bankruptcy law that is "a single proceeding that can apply rules and reach results that are conclusive with respect to all stakeholders through the global market."⁴³

In a modified universalism system, typically, the lead court in administering the case is the company's 'home country.' This location is determined by the "center of its main interest" or "COMI."⁴⁴ For example, if an insolvent corporation's "home country" is the United States, U.S. courts would assert worldwide jurisdiction over the assets of the U.S. bankrupt.⁴⁵ With the choice of forum addressed, the question of choice of law can often be a distinct issue, although related to which country is the "home country." In any cross-border bankruptcy case, the court will be required to choose which bankruptcy and non-bankruptcy law to apply. With this knowledge in hand, debtors can be incentivized to file in a country that favors the debtor's needs, or avoid a "priority that would otherwise be enjoyed by a particular creditor constituency in another country where some assets or operations were located."⁴⁶ Therefore, these choices in a

⁴² For a discussion on jurisdictions with a high degree of creditor orientation and a ranking of creditor-debtor orientation by selected countries. See Editor OMAR, Armin J. Kammel. 65-66. "The Law and Economics of Corporate Insolvency"

⁴³ See Wessels et. al., *supra* note 13, at 49.

⁴⁴ See Warren, *supra* note 23, at 843.

⁴⁵ Although there are some challenges to this assertion if the U.S. cannot find a way to assert personal jurisdiction over the entity. Two possible grounds for the exercise of jurisdiction consistent with due process asserted here: (i) transnational jurisdiction as set forth in 1 Restatement (Second) of Conflict of Laws §47(1)(1971) and (ii) general "doing business" jurisdiction as set forth in §47(2) of the Restatement. *In re McLean Industries, Inc* 68 B.R. 690 (Bankr. S.D.N.Y. 1986)

⁴⁶ See Clark, *supra* note 7, at 515.

universalism system can be determinative of the resolution of the insolvency case for a multinational corporation.

This concern is partially addressed by modified universality⁴⁷ because it recognizes the downside of a system where a “debtor can easily choose a substantive law that will govern their insolvency and that is contrary to the expectations and interests of creditors.”⁴⁸ This theory has emerged as the dominant theory of insolvency regime. However, some of the benefit of a universalist system where assets and claims are consolidated is lost within the modified universalism regime. Modified universality allows an ancillary court to “retain their right to protect local creditors,” therefore, losing some of the predictability of knowing in advance the debtor’s home country and laws that will be applied.⁴⁹ Many of the more modern bankruptcy regimes are reforming to align to a modified universality structure. Despite differences in insolvency regimes around the world, there is a history of cooperation between jurisdictions for the purposes of managing cross-border insolvency cases and the reorganization or liquidation of multinational businesses.

II. History of Cooperation

To address the growing number of cross-border insolvencies, practitioners, judges, and legislators have “crafted[ed] gap-filling solutions to bring order to the chaos of uncoordinated cross-border insolvency cases” with creativity and dedication.⁵⁰ Some countries have successfully reached agreements to cooperate in cross-border insolvency cases, at least

⁴⁷ The U.S. adopted a modified universality regime with the 2005 amendments to the Bankruptcy Code.

⁴⁸ See Clark, *supra* note 7, at 519, n35.

⁴⁹ See *Id.* at 519.

⁵⁰ See Wessels et. al., *supra* note 13, at xiii.

regionally if not globally.⁵¹ The importance of harmonized insolvency legislation is that it provides a “higher degree of certainty and reciprocity for the players.”⁵² Jurisdictions recognize that there is value and efficiency in an insolvency proceeding in mainly one jurisdiction, where one court primarily, although not necessarily exclusively, can control the assets of the restructuring and coordinate the treatment of creditors.⁵³ However, historically, many of these efforts at cross-border cooperation were either very regionalized or did not achieve widespread adoption.

A. *Treaties*

One of the first efforts that countries used to establish cooperative efforts for insolvency proceedings that spanned geographic borders was the use of treaties. Treaties have the advantage of being the “local law” in “all jurisdictions in which the treaty is adopted.”⁵⁴ While the power of a treaty can be helpful, it can also be quite limited if the number of signatories to the treaty is small since the treaty is only effective in the countries that have signed it. As a result, using treaties proved to be an unsuccessful method for coordinating insolvency proceedings across several countries.

B. *Comity*

Comity is used by countries to recognize foreign bankruptcy proceedings. Both Canada and the United States have used this principle to recognize proceedings of companies that are

⁵¹ There have been formal bankruptcies treaties and attempts at formal bankruptcy treaties dating back almost eight hundred years. Perry, *supra* note 3, at 478

⁵² See, Bellissimo, *supra* note 6.

⁵³ See, Bellissimo, *supra* note 6.

⁵⁴ Brief History of Efforts to Develop Formal Rules for Coordinating Cross-Border Insolvency Proceedings. P 13.02. 1-13 Collier on Bankruptcy.

highly interconnected between the two neighbors. Under Comity, “the extent that the United States and foreign bankruptcy laws are inconsistent is important in determination of whether a foreign court’s decrees should be enforced in the United States.”⁵⁵ U.S. courts deferred to the laws and judicial acts of the United Kingdom in *Maxwell Communication*, after determining that the “basic notions of due process and fair treatment of U.S. creditors were present.”⁵⁶ The U.S. Supreme Court had the opportunity to address Comity in *Hilton v. Guyot* and defined Comity as “the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under protection of its laws.”⁵⁷ Canada also used principles of Comity to recognize proceedings that spanned the United States-Canadian border, because of their frequent economic interaction.

Comity was later codified in U.S. law. Section 304 of the U.S. Bankruptcy Code was designed to “only permit the opening of an ancillary case” and did not address the coordination

⁵⁵ Douglas, Mark and Nicholas C. Kamphaus. *Cross-Bankruptcy Battleground: The Importance of Comity (Part II)*. Mondaq, Ltd (September 8, 2010).

⁵⁶ Anne Nielson, Mike Sigal & Karen Wagner. *International Law Symposium: Article: The Cross-Border Insolvency Concordat: Principles to Facilitate the Resolution of International Insolvencies*, 70 Am. Bankr. L.J. 533 (Fall 1996). The Maxwell communications business empire collapsed in the early 1990s, leaving some 400 subsidiaries and sub-subsidiaries spread all over the world. The business underwent bankruptcy proceedings under English and U.S. law. The joint agreement order in the MCC case represents a practical approach, taking a worldwide perspective to implementing an equitable solution to avoiding conflicts in a potentially very complicated cross-border reorganization situation. *See* Wessels et. al., supra note 13, at 69.

⁵⁷ 159 U.S. 113, 143 (1895) (holding that the U.S. court should enforce the judgment and that the issue should not be “tried afresh” if a foreign forum provides a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation and voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting)

of “full-blown proceedings pending both in the United States and another country” and was a “dramatic turn away from a history of territorialism.”⁵⁸ Case law developed under this section is still relevant, but the section was later repealed by the passage of the new chapter 15 in 2005.⁵⁹

C. *EU Convention on Insolvency Proceedings*

Although, the European Union’s member states have been “striving for harmony in the area of bankruptcy law for more than forty years”⁶⁰ with little success, real progress was made when the European Union developed its most widely adopted pan-European rules governing insolvency proceedings. The European Union Convention on Insolvency Proceedings (the “Insolvency Convention”) was passed on September 25, 1995,⁶¹ with final adoption on May 29, 2000.⁶² In order to promote the free flow of commerce and creation of a single market within the European Economic Community, the leaders recognized the need to deal with insolvency and bankruptcy.⁶³ The agreement incorporated a number of elements of a modified universality approach, as discussed above. The Explanatory Report to the Insolvency Convention read:

[The] Convention seeks to reconcile the principle of universality and the protection of local interest and also the principles of the respective legal systems...permits local proceedings governed by their own *lex fori concursus* (law applicable in the place of insolvency) to coexist with the main universal proceeding. Single universal proceedings are always possible within the EC, but the Convention does not exclude the opening of local proceedings,

⁵⁸ See Clark, *supra* note 7, at 523

⁵⁹ 10 *Collier on Bankruptcy* ¶ 13.02 (15th ed. 2008).

⁶⁰ See Perry, *supra* note 3, at 483.

⁶¹ See Nielson et. al., *supra* note 56.

⁶² See Torremans, *supra* note 4, at 133

⁶³ *Id.*

controlled and governed by its rules, to protect those local interests.⁶⁴

More recently, in 2007, the European Communication and Cooperation Guidelines for Cross-Border Insolvency (the “Insolvency Guidelines”) were published.⁶⁵ The Insolvency Guidelines are helpful for understanding some of the cumbersome procedures found in the Insolvency Convention.⁶⁶ The document highlights the role of a practitioner in insuring that coordination between proceedings take place through a duty to communicate information and cooperate.⁶⁷ Although the Insolvency Guidelines are not binding, they assist in setting standards for knowledge and professional behavior that are key to achieving the goals of the EC Insolvency Regulation.⁶⁸ The purpose of the Insolvency Guidelines was to introduce rules for “dealing with insolvencies with a cross-border element,” but its effectiveness in practice has been hampered by the Regulation’s restrictions on application to qualified proceedings.⁶⁹ However, even with procedures in place for managing insolvencies within the European Union’s borders, there are still challenges for forum shopping and companies jockeying among jurisdictions to file in the most favorable for their needs and purposes.

⁶⁴ “The absence of a Convention on insolvency proceedings with the framework of the Community is viewed as a short-coming in the completion of the internal market.” Miguel Virgos & Etienne Schmit, *Report on the Convention of Insolvency Proceedings*, EU Council Doc. 6500/96, DRS 8 para. 87 (CFC) (May 3, 1996).

⁶⁵ Bob Wessels, *European Communication and Cooperation Guidelines for Cross-Border Insolvency: Also of Interest for North-American Practitioners and Judges*, International Committee, ABI Committee News (Volume 4, Number 4/November 2007)[Hereinafter Wessels]

⁶⁶ See Wessels, *supra* note 65.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ See Torremans, *supra* note 4, at 140. The scope of the Regulation has been restricted in three ways: (1) the Regulation deals with insolvency procedures, and sets forth the requirements that need to be met before a procedure becomes an insolvency procedure, (2) certain types of companies are excluded from the scope of the Regulation [pg 144] and (3) the Regulation is restricted to the European Union. Torremans at 140.

D. *Cross-Border Insolvency Concordat*

In the spring of 1996, the International Bar Association approved the “Cross-Border Insolvency Concordat.”⁷⁰ The Concordat acted as an interim step until “treaties and/or statutes were adopted by commercial nations,” and set forth ten general principles. The Concordat, like the Insolvency Proceedings, employed a modified universality theory and was designed to assist courts and counsels in “harmonizing cross-border insolvencies.” The passage of the Concordat signaled recognition of the difficulty, given strong national interests, in the “preservation of sovereignty and the absence of treaties in creating truly unified proceedings.” The structure of the Concordat resulted in a “central administrative forum located in one country, supplemented by ancillary, or secondary, proceedings located in other countries.” Cases resolved with the help of the Concordat include *In Re Everfresh Beverages*⁷¹ and *In Re Joseph Nakash*.⁷²

E. *ALI Transnational Insolvency Project*

⁷⁰ Nielson, Anne, Mike Sigal and Karen Wagner. International Law Symposium: Article: The Cross-Border Insolvency Concordat: Principles to Facilitate the Resolution of International Insolvencies. 70 Am. Bankr. L.J. 533 (Fall 1996).

⁷¹ The case of *In Re Everfresh Beverages* involved a bankrupt U.S. corporation with operations in both the US and Canada that filed proceedings in both the US and Canada. During the proceedings, both the Ontario Court of Justice and the United States Bankruptcy Court for the Southern District of New York issued orders approving a stipulation of cross-border insolvency protocol to govern the bankrupt’s provision. The stipulation was consistent with – and almost identical to – many of the provisions of the Concordat. Perry, *supra note 3*, at 486.

⁷² In *Nakash*, the debtor had diversified business interests throughout the world....[and] filed a voluntary petition for reorganization under Chapter 11 of the United States Bankruptcy Code and managed his affairs as debtor and debtor-in-possession. The defendant was a member of the board of directors of the North American Bank, Ltd. (NAB), an Israeli banking institution which was declared insolvent and a Receiver was appointed. The case concerned jurisdiction and the extraterritoriality application of an automatic stay – with the court holding that participation in the U.S. Chapter 11 case gave the bankruptcy court jurisdiction and found the actions of the Israeli Receiver a violation of the automatic stay. *See In re Joseph Nakash v. Schmucl Zur*, 190 B.R. 763 (Bankr.S.D.N.Y. 1996).

The Insolvency Convention set the stage for further regional cooperation. The ALI Transnational Insolvency Project (the “ALI Project”) was developed in 2001 by the American Law Institute.⁷³ The ALI Project set out to propose “more specific procedures by which such cooperation – especially coordination of parallel proceedings – might be effectuated.”⁷⁴ The ALI principles were established based on the “perceived need for a private-sector initiative.” The objective of the ALI Project was limited to developing “cooperative procedures for use in business insolvency cases involving companies with assets or creditors in more than one of the three NAFTA countries.”⁷⁵ The proposed principles of cooperation include seventeen guidelines that were developed from the lessons learned during more than a dozen cross-border cases where courts aligned their approaches, communication, supervision and completion of a cross-border insolvency case.⁷⁶ The project took an interesting approach to develop procedures by first taking the time to get to “know each other’s laws” to report on their findings to all of the stakeholders and use that knowledge to be able to know how to coordinate those proceedings.⁷⁷ Adoption of amended national bankruptcy regimes supports the implementation of the principles proposed to increase commercial predictability within the NAFTA region.⁷⁸

F. Other Regional Efforts

The importance of, if nothing more, regional collaboration or coordination is best illustrated by the result when coordination is absent. When the conglomerate Asia Pulp and

⁷³ See Wessels et. al., *supra* note 13, at 247.

⁷⁴ *Id.* at 104.

⁷⁵ Jay Lawrence Westbrook, *Multinational Enterprises in General Default: Chapter 15, The Ali Principles, and the EU Insolvency Regulation*, 76 Am. Bankr. L.J. 1 (Winter, 2002).

⁷⁶ See *id.* at 247.

⁷⁷ See *id.* at 104.

⁷⁸ See *id.* at 247.

Paper (AP&P) collapsed in 2001, there were no regional cross-border insolvency laws in place at the time.⁷⁹ As a result, the company fell with debts of \$13.9 billion and its creditors were left with no alternative but a “hard fought informal restructuring of the group.”⁸⁰ Responding to the chaotic restructuring, the Asian Development Bank launched a program focused on insolvency law reform in Indonesia, Korea, the Philippines, and Thailand.⁸¹ In addition to regional arrangements now in existence in Southeast Asia, Latin America, Northern Europe and Central Africa have structures in place for some form of cooperation.⁸²

G. UNCITRAL

The most successful example to date of widespread cooperation of local courts interacting and cooperating within international insolvency cases is the UN Commission on International Trade Law Model Law adopted in 1997.⁸³ The law was introduced to try to address some of the gaps left behind by regionalized agreements.⁸⁴ Commonly referred to as “UNCITRAL Model Law” or just “Model Law,”⁸⁵ it is the basis for a number of local laws concerning cross-border bankruptcy, including Chapter 15 of the U.S. Bankruptcy Code.⁸⁶ The law was formulated to deal with the “rapidly expanding volume of international insolvency

⁷⁹ *Why Asia needs a regional insolvency pact: a regional treaty on cross-border insolvency would promote foreign investment.* International Financial Law Review (The Gale Group), March 2004. Volume 23; Issue 3.

⁸⁰ *Id.*

⁸¹ See Wessels et. al., supra note 4, at 163

⁸² See generally Wessels et. al., supra note 13, 154-162.

⁸³ *About UNCITRAL*, United Nations Commission on International Trade Law, http://www.uncitral.org/uncitral/en/about_us.html (last visited November 22, 2011)

⁸⁴ See Torremans, supra note 4, at 199.

⁸⁵ Here, the author uses “Model Law,” but the terms can be used interchangeably.

⁸⁶ Chapter 15 of the US Bankruptcy Code is very similar to the UNCITRAL Model Law. Brad Erens, *U.S. Bankruptcy Court Denies Failed Hedge Fund’s Request for Chapter 15 Recognition*, Mondaq Ltd., October 9, 2007.

cases.”⁸⁷ The law is an endorsement of cooperation among courts, and encourages such cooperation by any means permitted within local law.⁸⁸ To date, the Model Law has been enacted in 18 nations or territories, still far short of widespread adoption.⁸⁹ The Model Law does not “envisage a full-scale harmonization of national insolvency laws” but “comes in addition to the substantive insolvency laws of the states that will implement it and it aims to deal with the special difficulties that are associated with a number of cross-border insolvency situations.”⁹⁰ Other treaties and agreements in existence between countries still provide the basis for most cooperative efforts within a cross-border bankruptcy case. The Model Law, while providing the basis for domestic laws, addresses some important issues in international insolvency only indirectly and leaves unanswered questions on choice of law.⁹¹ Without the weight of widespread adoption, the Model Law still lacks credibility in many jurisdictions.

H. Notable Cases

The importance of attempting to mitigate the conflicts in national insolvency regimes when resolving a company with international corporate structure was learned through the complicated resolution of the Bank for Credit and Commerce International (“BCCI”). BCCI, founded in 1972 in Luxembourg, had more than 400 offices in 69 countries and collapsed after years of investigation revealed in 1991 that financial statements have been falsified since the bank’s founding.⁹² The challenges identified that complicated the liquidation of BCCI’s assets

⁸⁷ 10 *Collier on Bankruptcy* ¶ 13.02 (15th ed. 2008).

⁸⁸ *Id.*

⁸⁹ Mark Douglas & Nicholas C. Kamphaus. *Cross-Border Bankruptcy Battleground: The Importance of Comity (Part II)*. Mondaq Ltd. September 8, 2010.

⁹⁰ See Torremans, *supra* note 4, at 200.

⁹¹ See Mason, *supra* note 21, at 58.

⁹² Richard J. Herring, *BCCI & Barings: Bank Resolutions Complicated by Fraud and Global*

and reduced the amount that could be distributed to creditors included differing insolvency regimes for banks and branches⁹³, different liquidation procedures⁹⁴, the right of set-off differing across regimes⁹⁵, and the potential for criminal charges to be brought to prevent fraud in bankruptcy proceedings.⁹⁶ The two approaches to insolvency regimes have different implications for market discipline, and may “undermine incentives for creditors with international operations to seek to do transactions in well-supervised jurisdictions.”⁹⁷ With a lack of agreement on an international insolvency regime, uninsured creditors of BCCI incurred substantial legal expenses and a long wait for settlement of their claims.⁹⁸

I. Case-Level Protocols

Sometimes coordination can be achieved through case specific agreements for those cross-border bankruptcy cases that involve a particularly large pool of creditors spread across

Corporate Structure 5 (paper presented at the Federal Reserve Bank of Chicago Conference on Systemic Financial Crises: Resolving Large Bank Insolvencies, September 30-October 1)

⁹³ For example, the US follows a “separate-entity doctrine in which the agency or branch of a foreign bank is treated as if [it] were a separately incorporated legal entity for purposes of liquidation” and some countries, like Luxembourg and the UK follow a “single-entity doctrine.” In this doctrine, “foreign branches are treated as offices of a single corporate entity.” Herring, *supra* note 92, at 11.

⁹⁴ In the US, bankruptcy law does not apply to banks. Instead, the “primary bank supervisor would liquidate the branch of a foreign bank.” Conversely, some foreign courts apply to the same liquidation laws to banks as to other commercial entities, or decide on a case-by-case basis. Herring, *supra* note 92, at 13.

⁹⁵ Set off is defined as “a nonjudicial process whereby mutual claims between parties, such as a loan or deposit, are extinguished.” The Basel Committee (1992b, p.3).

⁹⁶ In jurisdictions where criminal charges can be levied against a bank, even when it has entered insolvency (like in the US), these ancillary charges could actually work to “override ex ante repayment priorities and reduce the amounts available for distribution to creditors.” Herring, *supra* note 92, at 15; Some of these challenges are unique to bank insolvency proceedings and do not apply to corporate entities in bankruptcy.

⁹⁷ See generally Herring, *supra* note 92.

⁹⁸ See Herring, *supra* note 92, at 18.

multiple jurisdictions. *In re Lehman Brothers Holding, Inc.*, jurisdictions involved in the resolution of the company developed a cross-border insolvency protocol that supported the coordination of foreign proceedings.⁹⁹ Under the protocol, “the administrators and trustees would have a streamlined method for administering intercompany claims, including the creation of a committee to discuss methods to resolve those claims” and create a framework to minimize the cost and maximize the recoveries to Lehman’s creditors.¹⁰⁰ The document lists seven goals, including coordination, communication, information and data sharing, asset preservation, claims reconciliation, the maximization of recoveries, and Comity.¹⁰¹ Administrators and trustees in Germany, Australia, Hong Kong, Singapore, the Netherlands and the United States have signed the Lehman Protocol.¹⁰² Case-level protocols are not without complications, as a case-level protocol does not “address the inherent complexities caused by state’s differing insolvency and private international laws” and can therefore be difficult to enforce.¹⁰³ A case-level protocol is seen as more of an economic solution than a legal approach, and fails to provide the predictability that would help stabilize the market and decrease risk when initially contracting with a debtor.¹⁰⁴

III. Challenges to Cooperation

⁹⁹ Leigh Kamping-Carder, *Court OKs Global Lehman Protocol*, Law 360, <http://www.law360.com/articles/107073> (last visited November 22, 2011)

¹⁰⁰ *See* Kamping-Carder, *supra* note 99.

¹⁰¹ *Id.* The protocol also gives representatives the right to appear in global proceedings and the ability to share certain nonpublic information — including the debtors' books, records, correspondence and other documents — and relevant information they can access without payment. Additionally, the agreement provides a mechanism for administrators to adjust distributions so that, in certain instances, creditors that have received payment for a claim in one proceeding would not necessarily receive payment in another. Kamping-Carder.

¹⁰² *See* Kamping-Carder, *supra* note 99.

¹⁰³ *See* Mason, *supra* note 21, at 36.

¹⁰⁴ *Id.* (citation omitted).

Despite movements to create more harmonized insolvency proceedings, many barriers still exist to full cooperation of jurisdictions in managing cross-border bankruptcy cases. Cultural and legal differences between jurisdictions can create friction in the coordination of resolution efforts. Even if jurisdictions are able to agree on deferring to a primary foreign proceeding, procedural challenges do not end there.

If the agreement is to place a primary insolvency proceeding in the company's "Center of Main Interests," how does a jurisdiction determine the "COMI"? This can be a contentious point in an insolvency proceeding even with existing cross-border cooperation agreements in place.¹⁰⁵ For example, GCP has operations in the United States, Germany, Brazil, India and China. If its executives and management responsibilities are spread evenly among those jurisdictions, how could the COMI be determined satisfactorily? In the United States, a main proceeding is defined by "a case pending in whatever country contains the debtor's 'center of main interests.'"¹⁰⁶ In order to interpret this statutory definition, the courts in the United States are expressly directed to look for guidance in the "interpretation of COMI by foreign jurisdictions under similar statutes."¹⁰⁷ The EU Insolvency Convention defines "COMI" as the "place where the debtor conducts administration of his interests on a regular basis and is therefore ascertainable by third

¹⁰⁵ Keith J. Shapiro, *America Now! What's New on the Other Side of the Pond?*, ABI Committee News, Volume 4, Number 4/November 2007.

¹⁰⁶ 11 U.S.C. §1502(4) (2011). In applying this test, however, the U.S. has denied the recognition of an insolvency proceedings based on the determination that the proceeding was not taking place in the entity's COMI. "Because the foreign proceedings are not pending in a country where the funds have their COMI or where that have an establishment, the proceedings are not eligible for relief as main or non-main proceedings under chapter 15." *In re Bear Stearns High-Grace Structured Credito Strategies Master Fund, Ltd.* 374 B.R. 122 (Bankr. S.D.N.Y. 2007).

¹⁰⁷ Brad Erens, *U.S. Bankruptcy Court Denies Failed Hedge Funds' Request for Chapter 15 Recognition*, Mondaq, (October 9, 2007).

parties.”¹⁰⁸ Courts in the United States have adopted the EU Convention standard of looking to objective and ascertainable factors to rebut the presumption that the jurisdiction of the registered office is the COMI of a debtor.¹⁰⁹ Despite agreement between the European Union and the United States on the determination of COMI, this remains a vague definition when applied to a corporation that is truly global in its operations, like GCP. Further, although there is harmonization between the United States and the European Union in defining “COMI,” a critical term, for purposes of recognizing proceedings, other definitions and tests exist. A debtor that has assets and conducts business in more than one country could find itself “satisfying the requirements to be subject to the insolvency laws of more than one State because of the different tests of debtor eligibility or different interpretations of the same test.”¹¹⁰ Countries may be unwilling to coordinate with another foreign proceeding if procedures and due process are not compatible.

Cultural attitudes also play a large role in the effectiveness of a national bankruptcy system, including approaches to debt forgiveness and the “way people stand in life (philosophically the United States’ approach is that every debtor is a potential entrepreneur).”¹¹¹ Different cultures hold different legal beliefs and values, and those values shape a domestic insolvency regime, including how it treats debtors, as mentioned earlier, debtor’s prisons still

¹⁰⁸ *Id.* This definition is very similar to the concept of “principal place of business” in U.S. law. *Hertz Corp. v. Friend*, 130 S. Ct. 1181(2010)(holding that “principal place of business” refers to the place where the corporation's high level officers direct, control, and coordinate the corporation's activities. Lower federal courts have often metaphorically called that place the corporation's "nerve center.")

¹⁰⁹ *In Re SPhinX, Ltd.* 351 B.R. 103 (Bankr. S.D.N.Y. 2006) *aff’d*, 371 B.R. 10 (S.D.N.Y. July 3, 2007)

¹¹⁰ *See* Legislative Guide, *supra* note 8, at 41.

¹¹¹ *See* Wessels et. al., *supra* note 13, at 10.

exist in some parts of the world. Further, a bankruptcy regime does not live in isolation, but is under the “influence of a particular nation’s overall legal system, where case law or code based¹¹² and the economic and financial structure of the domestic market. There exists a “close relationship between economic results and legal solutions” and insolvency law “underpins the commercial and financial dealings in the market economy” and the “choices it makes are a crucial indicator of the attitudes and fundamental values of the state’s legal system.”¹¹³ There is a strong probability that a government will seek an insolvency regime that protects local creditors and stakeholders. This is not a surprising result, because the government “faces public and policy pressure to allocate financial resources in a way that reduces the burden for its own taxpayers.”¹¹⁴

With all of these different factors affecting a country’s national bankruptcy system, there is the opportunity for great friction between two nation’s insolvency regimes.¹¹⁵ Any friction between the two countries in their cooperative efforts could be further burdened by the political overlay.¹¹⁶ These interacting factors can make it challenging for two countries to agree to

¹¹² See Wessels et. al., *supra* note 13, at 11

¹¹³ See Mason, *supra* note , at 35.

¹¹⁴ Aldo Caliari, *Transatlantic Cooperation for Post-Crisis Financial Reform: To What End?*, Rethinking Bretton Woods (Center of Concern at 40), 16
<<https://www.coc.org/files/PostCrisisRef.pdf>>

¹¹⁵ Aside from political tensions, differences between two jurisdictions can also present challenges when sharing information or transferring assets. For instance, China has very strong “state secrets” law and may block the exchange of some information if it has deemed that information to qualify as a “state secret,” a definition that is inherently broad. The potential “that economic and business data may be considered state secrets according to such sweeping interpretations has alarming consequences for U.S. companies collecting business data in China.” Edward Epstein, *When State Secrets are not Secret*, Insight, October 2010, at 17.

¹¹⁶ For example, the relations between U.S. and Cuba have always been strained to say the least. If a multinational corporation was attempting a resolution that was enforceable in both of these jurisdictions, the political tension would make this almost impossible. For more on Cuba-US relations see Background Note: Cuba, U.S. Department of State

collaborate on the resolution of an insolvency proceeding when their national systems exist in such different contexts. Cross-border insolvencies therefore “thrust these systems into sometimes uneasy partnerships,” forcing them to choose between “finding some means of cooperation and compromise or watching the destruction of viable enterprises and asset value.”¹¹⁷ Even if the tension between two jurisdictions can be managed, case-level challenges still exist.

Even with agreements in place, a lack of case-level coordination can be crippling to the successful resolution of a cross-border bankruptcy case. The liquidation of Allen Stanford’s banks faced conflicting rulings from Canadian and English Courts based on differing rulings on the determination of the Foreign Main Proceeding (the United States and Antigua, respectively).¹¹⁸ In addition to struggles between Canada and England, “the Antiguan liquidators and the United States receivership were gearing up for fights over assets situated in other locations, such as Switzerland.”¹¹⁹ The lack of cooperation between jurisdictions demonstrates some of the challenges still faced in developing effective coordination efforts in the resolution of cross-border insolvency case even if over-arching agreements for cooperation are in existence.

IV. Future of Cooperation

<http://www.state.gov/r/pa/ei/bgn/2886.htm>, last viewed on December 15, 2011. Even more recently the tensions between Iran have escalated, resulting in both the U.S. and E.U. announcing coordinating sanctions. These are political contexts and complications that can plague any coordination efforts between two jurisdictions. To read more about recent developments in Iran-Western relations, see Iran, Country and Territory Reports, The New York Times, Updated January 4, 2012

<<http://topics.nytimes.com/top/news/international/countriesandterritories/iran/index.html>>

¹¹⁷ See Wessels et. al., *supra* note 13, at 12

¹¹⁸ See Clark, *supra* note 7, at 521

¹¹⁹ *Id.*

We are now entering into a time of historical levels of cooperation and information sharing.¹²⁰ With widespread financial reform occurring around the world in response to the financial crisis in 2008-2009, changes in national bankruptcy systems could be a natural and necessary side effect. Often a prerequisite for “effective economic integration” between countries is a uniformity of bankruptcy laws, a concept recognized in the United States since the drafting of *The Federalist Papers*.¹²¹ As national systems are amending to adapt to growing globalization, some territorialist approaches could be relaxed amidst reform efforts for more cooperative measures that would promote effective and efficient resolution of cross-border insolvency cases for multinational corporations. While the task of a “formalized mutual administration” that is “attentive to the distinct interests of the effective administration of foreign-located assets and the maintenance of state sovereignty” that are at odds in cross-border insolvency may be daunting, there are signs of progress in the international conversation.¹²²

Experts contend that the financial crisis that rippled through the world in 2008-2009 was the worst shock to the global economy since the 1930’s.¹²³ World leaders came together to stabilize the global economy and met in 2009 at the *UN Conference on the World Financial and Economic Crisis and Its Impact on Development* to identify responses, both emergency and long

¹²⁰ Quentin Peel, Keynote at International Bar Association 2009 Annual Conference (Oct. 4, 2009). “In the first place, we were living in unprecedented world of open borders, free movement of capital and a lot of movement of people too. And the volume of the money that’s moving is of quite unprecedented quantities.”

¹²¹ See Perry, *supra* note 3, at n11.

¹²² *Id.* at 477.

¹²³ Subir Lall, IMF Research Department, *IMF Predicts Major Global Slowdown Amid Financial Crisis*, IMF Survey Magazine: IMF Research October 8, 2008, <http://www.imf.org/external/pubs/ft/survey/so/2008/res100808a.htm>

term.¹²⁴ As a result of increased communication and cooperation, global leaders, through the efforts and voice of the G-20,¹²⁵ have promoted an effort to coordinate global policy.¹²⁶

“The international system, as constructed following the Second World War, will be almost unrecognizable in 2025. Indeed, international system is a misnomer. It is likely to be more ramshackle than orderly, its composition hybrid and heterogeneous, as befits a transition that will still be a work in progress...the Transformation is being fuelled by a globalizing economy, marked by an historic shift of relative wealth and economic power from West to East, and by the increasing weight of new players especially China and India.”¹²⁷

Just recently, the G-20 again affirmed their commitment to advanced cooperative measures to promote financial stability in the international marketplace and work together to make “globalization serve the needs of our people.”¹²⁸ The increased dialogue is highlighted by the growing number of venues for such transatlantic cooperation to develop. While there has been cooperation among nations within criminal and human rights law,¹²⁹ international coordination is

¹²⁴ Global Financial Crisis – An Overview, UN Non-Governmental Liason Service, November 11, 2008 <http://www.un-ngls.org/spip.php?article596>

¹²⁵ The Group of 20 (G20) is an informal body that brings together members of the Group of 8 (G8) plus 12 more countries, including 9 that are “emerging market” economies. With leadership from the US and Canadian Finance Ministers, the group was created in 1999 in response to the 1997 East Asian financial crisis in order to “ensure broader participation in discussions on international financial affairs among countries whose size or strategic importance gives them a particularly crucial role in the global economy.” About G-20, G-20, http://www.g20.org/about_what_is_g20.aspx (last viewed November 22, 2011)

¹²⁶ See Peel, *supra* note 120.

¹²⁷ *Id.* citing *The World in 2025*, US National Intelligence Council (2008).

¹²⁸ Cannes Summit Final Declaration, Communiqués, G-20 (November 4, 2011). Today, we reaffirm our commitment to work together and we have taken decisions to reinvigorate economic growth, create jobs, ensure financial stability, promote social inclusion and make globalization serve the needs of our people.

¹²⁹ For example, the UN Convention Against Transnational Organized Crime aims to enable different countries' law enforcement authorities to co-operate effectively in combating organized crime by eliminating differences and different definitions of crimes among national legal

just now growing in international private law and its regulatory framework providing a basis for a conversation in bankruptcy reform.

Other areas of growing global collaboration set the example for increased information and resource sharing within the insolvency context. For example, foreign institutions have measures in place to cooperate in the investigation and prosecution of securities law violations. “Because territory-based conflicts approaches parcel out regulatory authority along geographical lines, it is evident that they are in many respects ill-suited to resolve conflicts in a world of cross-border activity.”¹³⁰ The International Organization of Securities Commissions Multilateral Memorandum of Understanding (“IOSCO MMOU”), developed in 2001 and endorsed by IOSCO in 2005,¹³¹ is the first global information-sharing arrangement among securities regulators and sets a “new international benchmark for cross-border cooperation critical to combating violations of securities and derivatives laws.”¹³² The IOSCO MMOU, signed by securities regulators from 80 countries with 34 members listed in the Annex B List,¹³³ recognizes

systems, so a crime in one country will be recognized as crime in other countries. EC Ratification of UN Convention Against Transnational Organized Crime, European Union @ United Nations, http://www.europa-eu-un.org/articles/en/article_2668_en.htm (September 1, 2003)

¹³⁰ Hannah L. Buxbaum, *Conflict of Economic Laws: From Sovereignty to Substance*, 42 Va. J. Int'l L. 931, 976 (Summer 2002).

¹³¹ IOSCO Historical Background, IOSCO, <http://www.iosco.org/about/index.cfm?section=background>

¹³² Multilateral MMOU: Current Signatories and Members Listed on Appendix B, IOSCO Library, http://www.iosco.org/library/index.cfm?section=mou_main (last viewed November 22, 2011).

¹³³ Members listed on Appendix B have committed to seeking the legal authority necessary to enable them to become full signatories to the IOSCO MMoU (Appendix A). For these members, cooperation in accordance with the standards set out in the IOSCO MMoU will begin on the date of its signing to Appendix A. Multilateral MMOU: Current Signatories and Members Listed on

the global nature of transactions and the necessity of countries working together to share information and assist in investigations to protect investors from a crime that is rarely contained within a single jurisdiction. The IOSCO MMOU increased interaction and cooperation between foreign securities regulators.¹³⁴ Other initiatives have developed within jurisdictions to promote collaboration in the financial markets, like the efforts of the Office of Financial Research in the United States, established within the U.S. Treasury Department.¹³⁵ Although securities fraud appears to be a more egregious crime than a creditor being denied their rights to a debtor's assets because of jurisdictional limitations, the injuries to a creditor can be just as severe to that of a defrauded investor.¹³⁶ The fact that countries are willing to work together to protect an investor

Appendix B, IOSCO Library, http://www.iosco.org/library/index.cfm?section=mou_main (last viewed November 22, 2011).

¹³⁴ MMoU Information Requests have consistently increased over the last seven years:

Year	Requests
2003	56
2004	307
2005	384
2006	526
2007	726
2008	867
2009	1261
2010	1624

Multilateral MMOU, IOSCO Library, http://www.iosco.org/library/index.cfm?section=mou_main (last viewed November 22, 2011).

¹³⁵“The goal of this organization is to collaborate with global regulatory community, by understanding what they are doing in collecting data, promoting research and establishing standards and sharing information.” Richard Berner, counselor to the Secretary of the Treasury, Regulatory Panel at the Center for Financial Policy’s Systemic Risk and Data Issues Conference at the Robert H. Smith School of Business, University of Maryland (October 6, 2011)

¹³⁶ Interestingly enough, the term for bankrupt in Italian has its roots in a term that can be traced back to “defraud,” leading to a translation of the debtor being a fraudster or crook. Wessels et. al., *supra* note 13, at 5. Some creditors are often at a disadvantage in an insolvency proceeding if they hold an unsecured claim that has no priority in distribution or hold a dischargeable debt. Often, a creditor may only receive a few cents on the dollar for recovery of debt in bankruptcy.

provides the groundwork for similar arrangements in sharing information and resources to protect a creditor or debtor, regardless of the number of jurisdictions involved.

Some of the more fundamental conflicts between insolvency laws have seen some resolution as states converge around the “rescue model.”¹³⁷ Although historically most insolvency systems have approached insolvency with the end goal of liquidation, countries are now “increasingly adopting and enhancing insolvency laws designed to facilitate reorganization of faltering businesses rather than immediately resorting to liquidation.”¹³⁸ This shift is notable when examining the goals of the Financial Stability Board (the “FSB”). The FSB brings together national authorities responsible for financial stability in significant international financial centers, international financial institutions, sector-specific international groupings of regulators and supervisors, and committees of central bank experts¹³⁹ Established to “address vulnerabilities and to develop and implement strong regulatory, supervisory and other policies in the interest of financial stability,”¹⁴⁰ the FSB is promoting a comprehensive policy framework “comprising a new international standard for resolution regimes, more intensive and effective supervision, and requirements for cross-border cooperation and recovery and resolution

¹³⁷ See Wessels et. al., *supra* note 13, at 167.

¹³⁸ *Id.* The “penetration of a new business rescue culture into nearly every corner of the globe is vividly illustrated by developments in one of the most tradition-bound nations in the world.” For a further discussion of insolvency reforms that converge around a rescue model, *see generally* Wessels et. al., 167-195.

¹³⁹ Overview, About the FSB, Financial Stability Board, <http://www.financialstabilityboard.org/about/overview.htm> (last viewed November 22, 2011).

¹⁴⁰ Financial Stability Board, <http://www.financialstabilityboard.org/> (last viewed November 22, 2011).

planning.”¹⁴¹ A lot of this reform is in response to the designation of Global Systemically Important Financial Institutions (“G-SIFIs”) or institutions “too big to fail.”

G-SIFIs are defined by the FSB as “financial institutions whose distress or disorderly failure, because of their size, complexity and systemic interconnectedness, would cause significant disruption to the wider financial system and economic activity.”¹⁴² In order to address policy considerations for the resolutions of these mega firms, the FSB is promoting legislative changes that will be required in many jurisdictions to strengthen cooperation.¹⁴³ Both the United States and European Union have already adopted new regulation or amended legislation that addresses the resolution of these global institutions. New regulation to address the management of an orderly resolution of failing companies that have a large presence in multiple jurisdictions is arguably the strongest protection against another future public bailout.¹⁴⁴ In this regard, the Dodd-Frank Act in the United States¹⁴⁵ creates an Orderly Liquidation Authority¹⁴⁶ for systemically important firms and the European Union issued Directive on Credit Institutions Reorganization and Winding-Up addresses the resolution of a bank systemically important to the

¹⁴¹ Cannes Summit Final Declaration, Communiqués, G-20 (November 4, 2011).

¹⁴² Financial Stability Board, *Policy Measures to Address Systemically Important Financial Institutions*, 4 November 2011. www.financialstabilityboard.org/publications/r_111104bb.pdf

¹⁴³ See Financial Stability Board, *supra* note 140.

¹⁴⁴ See Caliani, *supra* note 114, at 29.

¹⁴⁵ The Dodd-Frank Act is a wide-sweeping legislative reform requiring updated rules and regulations with the financial sector. The goal of the Act is “to promote the financial stability of the United States by improving accountability and transparency in the financial system, and to end “too big to fail,” to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes.” “Dodd Frank. Wall Street Reform and Consumer Protection Act.” Title 2 Pub.L. 111-203, H.R. 4173(2010). For more information, see also dodd-frank.com.

¹⁴⁶ “Dodd Frank. Wall Street Reform and Consumer Protection Act.” Title 2 Pub.L. 111-203, H.R. 4173(2010).

European Union.¹⁴⁷ However, “without an agreed cross-border regime, both European and U.S. companies will [still] be hard to unwind.”¹⁴⁸ Even with legislation in place to address systemically important institutions, the legislation does not necessarily allow for coordination if that institution has an equally strong and vital presence in both the United States and European Union. The need for further cooperation in developing cross-border resolution regimes is illustrated by the difficulties in resolving large and complex cross-border institutions. Those resolutions reveal the need for significant transatlantic cooperation in order to ensure the credibility and viability of cross-border bank and financial companies’ resolution regimes and avoidance of bailouts.¹⁴⁹

Other organizations have also addressed providing a framework for the orderly resolution of “cross-border failures of large complex banking organizations,” recognizing the necessity of change. The Basel Committee’s¹⁵⁰ Cross-Border Bank Resolution Group has developed ten recommendations¹⁵¹ for national authorities, which “aim at greater convergence of national resolution frameworks” and should “help strengthen cross-border crisis management” regarding

¹⁴⁷ The directive uses the principle of universality and was developed in response to the BCCI collapse, discussed *supra*, although not implemented in 2004. The purpose of the legislative framework, in part, is to eliminate obstacles to the freedom to establish and provide services within the EC community, and if difficulties arise in a credit institutions that have branches in multiple Member States. The EC Insolvency Regulation excluded banks. Andrew Campbell, *Issues in Cross-Border Bank Insolvency: The European Community Directive on the Reorganization and Winding-Up of Credit Institutions*, University of Wales, Aberystwyth, mimeo (2003).

¹⁴⁸ See Caliarì, *supra* note 114, at 14.

¹⁴⁹ *Id.* at 11.

¹⁵⁰ The Basel Committee on Banking Supervision provides a forum for regular cooperation on banking supervisory matters. About the Basel Committee, Bank for International Settlements, <http://www.bis.org/bcbs/about.htm> (last viewed November 22, 2011).

¹⁵¹ See Basel Committee on Banking Supervision, *Report and Recommendations of the Cross-Border Resolution Group*, Cross-Border Bank Resolution Group (Basel: Basel Committee, September 2009).

these systemically important firms, particularly large banks or financial institutions.¹⁵² In order to adequately protect the global economy from the failure of these G-SIFIs or large financial institutions, countries are being asked to amend their national regulation to allow for increase global cooperativeness. Although reform has been primarily concerned with global financial institutions, the disorderly failure of a multinational manufacturing company, like our hypothetical GCP, could be just as problematic for maintaining stability in the global marketplace. With hundreds of thousands of employees relying on GCP for income, and suppliers and creditors relying on contracts with GCP, the collapse of GCP could have a rippling effect throughout the world's economies. Widespread cooperation concerning G-SIFIs can provide the precedent for aligning diverse national bankruptcy systems and easing the historical friction in coordinating transnational insolvency cases.

Attention to transatlantic reform within cross-border insolvencies continues to grow and a number of other international institutions – notably the International Monetary Fund (the “IMF”) and the World Bank – are interested in reform of bankruptcy laws, both domestic and international.¹⁵³ The World Bank has asserted the important benefit to market economies of an insolvency framework that is predictable:

The creation . . . of a framework [for an insolvency system], and its integration within the wider context of the established legal process, are vital to the maintenance of social order and stability in the fullest sense: all parties in interest need to be in a position to

¹⁵² Daniel K. Tarullo, Governor on Board of Governors of the Federal Reserve System, *International cooperation to modernize financial regulation*, Testimony Before the Subcommittee on Security and International Trade and Finance, Committee on Banking, Housing, and Urban Affairs (September 30, 2009), on <http://www.federalreserve.gov/newsevents/testimony/tarullo20090930a.htm>

¹⁵³ See Warren, *supra* note 23, at 872. Other examples of organizations proposing international cooperation include INSOL International (International Association of Restructuring, Insolvency & Bankruptcy Professionals) and the International Insolvency Institute.

anticipate their legal rights in the event of the debtor's inability to pay, or to pay in full, whatever is due to them in consequence of their dealings and relationship. This in turn enables them to make calculations regarding the economic implications of such default by the debtor, and hence to estimate risk.¹⁵⁴

The IMF, in recognizing the world needs a new way of handling debt crisis, has entertained the option of creating bankruptcy “procedures on the international level that are similar to those that exist on the domestic level.”¹⁵⁵ In this regard, the IMF would limit itself to the debt crises faced by countries in economic trouble, and would act as a sort of bankruptcy court.¹⁵⁶ While this proposal has sparked renewed discussion in an international forum for resolving bankruptcy disputes, the feasibility of this IMF proposal is challenged by limited resources and legal barriers.¹⁵⁷ Regardless, the IMF and World Bank play an important role in the convergence of bankruptcy law by requiring bankruptcy reform in developing countries as a condition of loan support.¹⁵⁸

Although there is increased transnational dialogue regarding broad financial reform and coordinated regulation, reforming cross-border bankruptcy laws may be more difficult to address because of the complexity of aligning differing national bankruptcy laws. Despite progress in international cooperation in some regulatory matters, like foreign securities law, countries may not see the benefit in changes in national bankruptcy systems that allow for cooperation. The hope is that with increased dialogue and collaboration within some regulatory frameworks, the

¹⁵⁴ World Bank, ‘Draft Background Paper: Building Effective Insolvency Systems: Towards Principles and Guidelines’, Paper presented to the Conference on Insolvency Systems in Asia: An Efficiency Perspective (1999, Sydney) at 1 as cited in Mason, *supra* note 21, at 34.

¹⁵⁵ Ian Vaquez, The IMF as Bankruptcy Court for Countries?, CATO Institute, October 10, 2002.

¹⁵⁶ *See id.*

¹⁵⁷ *See id.*

¹⁵⁸ *See* Buxbaum, *supra* note 130, at 946.

discussion for more coordination in transnational insolvency cases can be broached. The best approach to cooperation may be through the insolvency protocol agreement on a case-level basis.

V. *A Cooperative Solution*

A uniform global bankruptcy law, while entertained in academic discussions, is likely unfeasible. For the reasons discussed earlier countries have unique cultural, legal and political systems in which they operate and transact and those long standing histories evolve only slowly and with corresponding baggage. In response to globalization, the best option for future cooperation most likely exists on the case-level insolvency protocol agreements. However, the case-level insolvency protocol needs to be supported by a strong over-arching international agreement between jurisdictions that would provide consistent guidance and precedent to protect debtors and creditors alike when transacting business. Predictability can be hard to come by in an inherently chaotic system like insolvency and an advantage of having more universal rules could be increased predictability and therefore, stability.¹⁵⁹

The problems of the case-by-case protocol, like that used in Lehman, stem from a lack of authoritative weight to enforce the principles of the protocol. The international bankruptcy regime could use an IOSCO-like agreement, as mentioned supra in IV, that would help bind signatories to complying with case protocols for international insolvency proceedings, providing a legal context for this previously economic solution. This type of Multilateral Memorandum Of Understanding (“MMOU”) would require a considerable amount of groundwork as countries would need to adapt their domestic laws to allow them to comply with an international agreement. While revolution is well underway thanks to the UNICTRAL Model Law, further

¹⁵⁹ See Wessels et. al., *supra* note 13, at 51.

revision is necessary. The agreement would govern the development and implementation of a protocol for a specific cross-border case and would provide better clarity and structure in defining the players, and roles of jurisdictions involved. The Foreign Main Proceeding would be an easier determination with an objective criteria for determination of the primary jurisdiction, and through this agreement, countries would pledge to support the main proceeding by whatever means necessary, within the limits of their domestic law.

Although a widespread cooperative arrangement for insolvency would not be without its challenges, it could still be an important tool in managing cross-border bankruptcy cases. It is still unlikely that all jurisdictions would sign on to an agreement like this because of the cultural, political and legal differences between countries. Ideally, however, enough countries would sign the agreement to make the principles of the agreement a standard practice in insolvency proceedings around the world and carry some authoritative weight. Using GCP as an example, if all the countries in which GCP had operations, suppliers and creditors were signatories to the agreement, GCP would use the principles of the agreement to determine where the main proceeding should be filed. The agreement could contain an objective formula for determining the primary jurisdiction (that is, a calculation based on where a majority of operating costs are incurred, or where a majority of credit is obtained). After the main proceeding was finalized, the court in that primary jurisdiction would have the ability to request assistance, through the agreement, from other jurisdictions to consolidate assets and claims in the primary jurisdiction. The benefit of this solution for more streamlined cross-border insolvency proceedings, however, would be compromised if one of the jurisdictions GCP had operations in, like Brazil, did not sign the agreement and instead made a determination by its local laws that the main proceeding

should be in Brazil. Hopefully the relatively widespread adoption of the IOSCO MMOU would bode well for similar adoption of an agreement in the insolvency context.

VI. Conclusion

At the crossroads of insolvency law and private international law, remain critical issues of predictability in business interactions that depends on transparency in applicable foreign regulations.¹⁶⁰ As long as these issues remained unresolved by the current international insolvency scheme, there will be uncertainty and potential instability in the global market place. As a company like GCP highlights, most corporations interact in multiple jurisdictions and can be so integral to some marketplaces, that a disorderly failure or collapse of the corporation could be catastrophic to a local or even regional economy. Compounding to that inherent risk of failure and the impact on the world economy, transactional costs also increase for globalized companies. If creditors that are unsure as to how their claims would be resolved should GCP find itself unable to pay or pay in full its liabilities, it may increase GCP's cost of doing business (which could ripple through to consumers). In any insolvency, whether contained in a single jurisdiction or spanning multiple jurisdictions, the interests must be balanced among the debtor, the creditor, and the legal environment or community in which they transact. Insolvency law is so "intimately linked to the commercial, financial and social fabric of a state that finding this balance is inherently challenging."¹⁶¹ With an agreement in place that establishes the guidelines for jurisdictions interacting and managing a multi-jurisdiction resolution, this balance could be met. As long as the economies of the world continue to interact at historical levels and corporations find themselves intricately interwoven in the world without regard to geographic borders,

¹⁶⁰ See Mason, *supra* note 21, at 59.

¹⁶¹ For more on the competing interests in an insolvency case see See Mason, *supra* note 21, at 59

international insolvency reform in the form of cooperative efforts will be the key to maintain future global financial stability.