

2015

The Problem of Local Methods in Cross-Border Insolvencies

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Recommended Citation

Andrew B. Dawson, *The Problem of Local Methods in Cross-Border Insolvencies*, 12 *Berkeley Bus. L.J.* 45 (2015).

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The Problem of Local Methods in Cross-Border Insolvencies

Andrew B. Dawson[†]

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I. INTRODUCTION

The United States adopted the Model Law on Cross Border Insolvency ten years ago in order to advance procedural harmonization in the bankruptcy cases of multinational debtors.¹ This Model Law, drafted by the United National Commission on International Trade Law (“UNCITRAL”), was placed within a new Chapter 15 of the Bankruptcy Code.² Chapter 15 provides a procedure whereby an official appointed by a foreign bankruptcy court may seek assistance from a U.S. Bankruptcy Court to administer that multinational debtor’s estate.³

Critics of the Model Law have expressed concerns that this new chapter of the Bankruptcy Code would be ineffectual at best and invite pernicious international forum shopping at worst.⁴ Courts would be unlikely to adhere to the Model Law’s framework of international cooperation, defecting whenever cooperation would harm local interests or offend local policies.⁵ Further, debtors would have a strong incentive to engage in international forum shopping in the hopes that their chosen bankruptcy laws would be given international effect under the Model Law.⁶

Since Chapter 15’s enactment, there have certainly been instances in which debtors appear to have engaged in such forum shopping and in which U.S. courts have been unwilling to assist the foreign representatives (at least without certain conditions).⁷ Debtors have been able to engage in forum shopping in

1. MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION (UNCITRAL 1997), available at <http://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf> [hereinafter MODEL LAW and GUIDE, in reference to the separate parts].

2. 11 U.S.C. § 1501 (2012) (“The purpose of this chapter is to incorporate the Model Law on Cross-Border Insolvency . . .”).

3. As discussed in more detail *infra* notes 46–53 and accompanying text, a foreign representative may file a petition for assistance under § 1502 of the Bankruptcy Code in order to obtain, *inter alia*, a stay on creditor collection activities in the United States, turnover of U.S. assets, and discovery assistance. See 11 U.S.C. §§ 1517–1521 (2012).

4. See Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy*, 98 MICH. L. REV. 2216, 2234–38 (2000) [hereinafter LoPucki, *Territoriality*]; LoPucki, *Global and Out of Control?*, 79 AM. BANKR. L.J. 79 (2005) [hereinafter LoPucki, *Control*]; Frederick Tung, *Fear of Commitment in International Bankruptcy*, 33 GEO. WASH. INT’L. L. REV. 555, 560 (2001).

5. Tung, *supra* note 4, at 560; Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 CORNELL L. REV. 696, 730 (1999) (“Given the wide differences in bankruptcy regimes throughout the world, modified universalism will often, if not usually, lead to a refusal to cooperate.”) [hereinafter LoPucki, *Post-Universalist*]; see also John A. E. Pottow, *Greed and Pride in International Bankruptcy: The Problems of and Proposed Solutions to “Local Interests”*, 104 MICH. L. REV. 1899, 1906 (2006) [hereinafter Pottow, *Greed and Pride*]; Bob Wessels, *The European Union Insolvency Regulation: An Overview with Trans-Atlantic Elaborations*, 2003 ANN. SURV. BANKY. L. 481, 487 (both discussing the importance of “local interests” in cross-border insolvencies).

6. LoPucki, *Control*, *supra* note 4, at 89–90 (describing how the COMI rule opens the door to forum shopping).

7. See, e.g., Jeremy Leong, *Is Chapter 15 Universalist or Territorialist? Empirical Evidence from United States Bankruptcy Court Cases*, 29 WIS. INT’L L.J. 110 (2011) (examining “all 94 Chapter 15

some cases, and some courts have indeed refused to cooperate due to local interests. While it is far from clear that local interests have rendered the Model Law ineffectual, there is nonetheless evidence that local interests are extremely important in understanding how courts have defected from the Model Law's cooperative schema.

Although the problem of local interests continues to deserve substantial attention, this article describes an additional set of problems that merit consideration, namely, the problem of local methods. In several recent cases, U.S. courts have interpreted Chapter 15 in ways that are inconsistent with the workings and purposes of the Model Law even in cases in which U.S. interests are not at stake. Part III of this article examines three such cases – *In re Qimonda AG*, *In re Fairfield Sentry*, and *In re Barnet*⁸ – in which the courts interpreted Chapter 15 in ways inconsistent with the Model Law not (just) because local interests conflicted with the Model Law's cooperative structure but because the courts' methodological approaches of interpreting Chapter 15 and managing Chapter 15 cases are inconsistent with the Model Law. That is, these cases reflect not a problem with local interests but a problem with local methods.

These methodological issues are not unique to cross-border insolvency cases;⁹ however, these issues are particularly salient in the context of the Model Law's harmonization efforts. At the national level, differing legisprudential¹⁰ methodologies can create inconsistent interpretations of the U.S. Bankruptcy Code; however, the magnitude of these inconsistencies are bounded, as the U.S. bankruptcy courts are interpreting the exact same language and share the same legal traditions. At the international level, it is reasonable to expect that methodological differences towards interpreting the Model Law would have even greater significance, as courts in different countries not only might apply different approaches to statutory interpretation but also would lack a shared legal tradition.¹¹

cases filed between October 17, 2005 and June 8, 2009” and finding that “while U.S. courts recognized foreign proceedings in almost every Chapter 15 case, courts granted Entrustment in only 45.5 percent of cases where foreign proceedings were recognized.”). See *In re China Medical Technologies, Inc.*, 522 B.R. 28 (Bankr. S.D.N.Y. 2014), for an example of forum shopping in which a group of Chinese operating entities filed bankruptcy in the Cayman Islands based solely on their place of incorporation.

8. *Jaffe v. Samsung Electronics Co., Ltd. (In re Qimonda AG)*, 737 F.3d 14, 17 (4th Cir. 2013); *Drawbridge Special Opportunities Fund LP v. Katherine Elizabeth Barnet (In re Katherine Elizabeth Barnet)*, 737 F.3d 238 (2d Cir. 2013); and *Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.)*, 714 F.3d 127, 137 (2d Cir. 2013).

9. See *infra* Sections II.A & II.B discussing the problems of legisprudential methodology and case management in U.S. courts generally and in U.S. bankruptcy courts more specifically.

10. See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 624 (1990) (using the term “legisprudence” as “the jurisprudence of legislation”).

11. See e.g., John Honnold, *The United States Uniform Commercial Code: Interpretation by the Courts of the States of the Union*, in INTERNATIONAL UNIFORM LAW IN PRACTICE, ACTS AND PROCEEDINGS OF THE 3RD CONGRESS ON PRIVATE LAW HELD BY THE INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW 181, 190 (1989) (noting this problem in the context of the Convention for the International Sale of Goods: “The dilemma posed by the 1980 Sales Convention and other

Further, legisprudential methodology is particularly important in the context of the Model Law because of the Model Law's explicitly purposivist character. The Model Law requires courts to interpret its language in accord with its international character¹², explicitly states its objectives,¹³ and is accompanied by a Guide to Enactment and Interpretation containing the comments of the drafters. This purposivist structure calls for an intentionalist interpretation, which is directly at odds with the textualist methodology that is favored in U.S. law, and in U.S. bankruptcy law more specifically.¹⁴

Case management issues are likewise particularly important in the Model Law context, as the Model Law requires courts to take an active role in ancillary cases at both the recognition and cooperation stages.¹⁵ In the U.S. bankruptcy system, this may pose a particular problem, as Chapter 15 cases are less likely to be as litigation-oriented as large corporate bankruptcy cases might be.¹⁶ Whereas corporate reorganization law under Chapter 11 of the United States Bankruptcy Code envisions an adversarial process whereby creditor committees play an important monitoring function,¹⁷ the Model Law does not provide for the creation of such committees. U.S. bankruptcy law has sought to supplement creditor monitoring through the powers of the United States Trustee; however, this monitoring does not extend to Chapter 15 cases.¹⁸ As such, Chapter 15 cases arguably require a greater managerial role for bankruptcy judges relative to other types of bankruptcy cases.

While scholarship in the cross-border insolvency arena has focused primarily on the problem of local interests,¹⁹ the problem of local methods has largely

international laws is this: (1) Unlike the situation under the UCC, the gap-filling by reference to domestic law involves fragments of *diverse* legal systems.”)

12. See MODEL LAW, *supra* note 1, at Article 8.

13. See MODEL LAW, *supra* note 1, at Preamble.

14. See *infra* Section II.A.

15. See *infra* Section II.B.

16. See Hon. Timothy A. Barnes, *Notice, Due Process and the Public Policy Exception to Chapter 15 Relief in the United States*, INSOL WORLD FOURTH QUARTER 2011, 23, available at <http://www.curtis.com/siteFiles/Publications/Timothy%20Barnes%20Article%20-%20IW%20Q4%202011.pdf> (“The third distinction is perhaps the most relevant in this context: both the United States and the United Kingdom utilize a predominantly adversarial system of justice, as opposed to an inquisitorial system. The adversarial system, which often goes hand-in-hand with common law jurisdictions, relies heavily on opposing parties advocating their position to a neutral arbiter (the judge alone or the judge with the assistance of a jury for matters of factual interpretation).”).

17. Michelle M. Harner & Jamie Marincic, *Committee Capture? An Empirical Analysis of the Role of Creditors' Committees in Business Reorganizations*, 64 VAND. L. REV. 749, 761–62 (2011) (“Moreover, Chapter 11 posits the creditors' committee as a “statutory watchdog,” with authority to investigate and monitor the DIP's conduct.”).

18. Harvey R. Miller, *The Changing Face of Chapter 11: A Reemergence of the Bankruptcy Judge as Producer, Director, and Sometimes Star of the Reorganization Passion Play*, 69 AM. BANKR. L.J. 431, 434 (1995); Jerome R. Kerkman, *The Debtor in Full Control: A Case for Adoption of the Trustee System*, 70 MARQ. L. REV. 159, 193 (1987).

19. Even recent scholarship examining the procedural innovation of “synthetic secondary proceedings” are ultimately concerned with the problem of local interests. See, e.g., Bob Wessels, *Contracting*

remained in the background.²⁰ This article aims to bring the problem of local methods into sharper focus in the cross-border insolvency area. It examines how local methods may frustrate the Model Law's harmonization efforts and considers to what extent the Model Law and its Guide can address such problems. A better understanding of the obstacles to harmonization may inform future efforts of UNCITRAL, provide some guidance to actors in the Model Law's cross-border insolvency system, and identify topics in need of further empirical research.

Part II of this article provides a background on the Model Law and Chapter 15 and summarizes the principle academic debate between the "universalists" and "territorialists." This part concludes with a discussion of the problem of local interests – one of the principle points of contention between these two camps. Part III then describes the problem of local methods. The Model Law envisions courts playing an active case management role and engaging in an intentionalist methodology of statutory interpretation. U.S. Bankruptcy Courts, however, do not uniformly engage in such methodologies. Courts frequently apply a textualist approach to interpreting the Bankruptcy Code, and they at times refrain from managerial judging. These inconsistencies result in defections from the Model Law's purpose, even in cases that do not implicate local creditors or policies.

Part IV presents case studies that illustrate the problem of local methods, focusing on three cases from the U.S. Federal Courts of Appeal – *In re Qimonda AG*, *In re Barnet*, and *In re Fairfield Sentry*. Part V then considers the ramifications of methodological problems for the Model Law's harmonization efforts, suggesting that the changes to the Model Law's Guide to Enactment and Interpretation may address some of these problems. Part VI concludes by highlighting the need for further examination and study of the impact of local methodology on the Model Law's harmonization efforts.

II. CHAPTER 15 AND THE MODEL LAW

The Model Law on Cross Border Insolvency addresses the creditor coordi-

Out of Secondary Insolvency Proceedings: The Main Liquidator's Undertaking in the Meaning of Article 18 in the Proposal to Amend the EU Insolvency Regulation, 9 BROOK. J. CORP. FIN. & COM. L. 235, 248 (2014); John A. E. Pottow, *A New Role for Secondary Proceedings in International Bankruptcies*, 46 TEX. INT'L L.J. 579, 586 (2011)[hereinafter Pottow, *Secondary Proceedings*]; Edward J. Janger, *Virtual Territoriality*, 48 COLUM. J. TRANSNAT'L L. 401, 402 (2010).

20. See, e.g., LoPucki, *Post-Universalist*, *supra* note 5, at 762 (briefly mentioning the problem of differing legal cultures, noting that a modified universalist system would require creditors "to cross the barrier of legal culture — and perhaps also language -- alone"). Likewise, some of the leading scholars in the cross-border insolvency area have also been influential in studying the importance of local legal culture in the U.S. domestic bankruptcy system, see, e.g., Teresa A. Sullivan, Elizabeth Warren, and Jay Lawrence Westbrook, *The Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts*, 17 HARV. J. L. & PUB. POL'Y 801 (1994) – but have not considered these issues in the cross-border context.

nation problems that arise in the bankruptcy of a multinational debtor. Scholars agree that a core function of corporate bankruptcy law is to stop creditors from pursuing individual remedies against a defaulting debtor in order to prevent a creditor race from diminishing the overall value of the debtor.²¹ Once collection activities are stopped, bankruptcy then enables a majority of creditors to determine how best to allocate value, imposing such a plan on dissenting creditors.²² On a national level, bankruptcy law can solve this common-pool problem by imposing a broad injunction on all creditor collection efforts.²³ Bankruptcy law can further solve the holdout problem by enabling a majority of creditors to impose a debt renegotiation plan on dissenting creditors.²⁴ Both of these functions require a law capable of binding all creditors – what Westbrook refers to as the requisite “market symmetry” between the scope of the legal regime and the scope of the regulated market.²⁵ For a debtor with assets and creditors in multiple countries, there is no such bankruptcy law. There is no one court with jurisdiction over the debtor’s worldwide assets and creditors, and there is no super-national bankruptcy law. No one court can stop creditors from liquidating a debtor’s assets piecemeal. No one court can bind all creditors to a plan of reorganization.

The Model Law aims to approximate a super-national structure for multinational debtors by designating the bankruptcy proceedings in one country’s courts as the “main” proceedings and then permitting the debtor’s representative to open ancillary cases in jurisdictions to assist that main proceeding.²⁶ This quasi-centralized structure reflects an approach to cross-border insolvency law that has been called “modified universalism.”²⁷ “Universalism” in a pure form envisions a universal bankruptcy court applying a universal bankruptcy

21. See Thomas H. Jackson, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* 10–17 (1986); Jay Lawrence Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276, 2284 (2000) [hereinafter Westbrook, *Global Solution*] (“Despite a lack of general agreement about bankruptcy theory, there is a consensus that bankruptcy is a collective legal device that operates in each case to protect and adjudicate the interests of many stakeholders, even though there are disputes about the identity of the stakeholders.”).

22. Westbrook, *Global Solution*, *supra* note 21, at 2285 (“Such a plan is not achievable unless a court can bind all stakeholders to the reorganization plan, including dissenters.”).

23. The U.S. Bankruptcy Code imposes such an injunction via the automatic stay in § 362. The stay purports to limit all creditor collection efforts against the property of the debtor, with property of the debtor defined as including property “wherever located.” 11 U.S.C. § 541(a) (2012). Thus, the U.S. automatic stay could potentially enjoin worldwide collection efforts; however, the extraterritorial application of the stay is limited by the reach of personal jurisdiction.

24. See 11 U.S.C. § 1129(b) (2012) (setting forth the requirements to “cram down” a plan over the objections of a dissenting class of creditors).

25. See Westbrook, *Global Solution*, *supra* note 21, at 2283 (describing this ability of bankruptcy law to bind all stakeholders as “‘market symmetry’: the requirement that some systems in a legal regime must be symmetrical with the market, covering all or nearly all transactions and stakeholders in that market with respect to the legal rights and duties embraced by those systems”).

26. *Id.* at 2301 (“modified universalism takes a worldwide perspective, seeking solutions that come as close as possible to the ideal of a single-court, single-law resolution”).

27. *Id.*

law.²⁸ Universalism, of course, is detached from reality, as there is no such court or law. Modified universalism is an attempt to get the benefits of the theory of universalism within the current international political and legal landscape.²⁹ It would have courts recognize one bankruptcy proceeding as playing the lead role (the “main proceeding”), with all other proceedings (the “ancillary proceedings”) potentially playing a supporting role.

This article discusses this theoretical background and its realization in the Model Law in the following sections, but this broad introductory description highlights the two key assumptions of the Model Law: (1) that courts will be able to identify one proceeding to play the lead role and (2) that courts will be willing and able to play a supporting role.

As explored in more detail in Part C below, criticisms of the Model Law have challenged both of these key assumptions, arguing that the Model Law’s supporters underestimate both the incentives of debtors to manipulate such a structure and the incentives of courts to refuse to cooperate.³⁰ Without a clear definition of the debtor’s “home” jurisdiction, a multinational company may be able to pick and choose among multiple bankruptcy laws, selecting the one that would best protect its interests and, potentially, frustrating creditors’ expectations.³¹ Further, ancillary courts may refuse to cooperate with the main proceeding when doing so would harm local creditors or offend local bankruptcy policy.³² In short, critics argue that local interests will undermine the Model Law’s modified universalist structure.

The following sections discuss the theoretical background of the Model Law and how the United States has adopted the Model Law in Chapter 15 of the Bankruptcy Code. These sections provide the context and concepts that frame the problems of local interests and of local methods. Readers already familiar with the Model Law and Chapter 15 may wish to skip to Part C below.

A. *Theoretical Framework*

A primary function of bankruptcy law is to solve the common pool problem that arises upon a debtor’s inability to repay its creditors.³³ Acting individually, creditors would exercise their collection rights under non-bankruptcy law, allowing them to seize and liquidate the debtor’s assets. This piecemeal liquidation would fail to maximize the value of those assets and would destroy the debtor’s going concern value. Bankruptcy law serves to solve this problem by

28. *Id.*

29. *Id.*

30. See LoPucki, *Control*, *supra* note 4, at 89–90 (describing how the COMI rule opens the door to forum shopping).

31. *Id.*

32. See Tung, *supra* note 4, at 559.

33. Jackson, *supra* note 21; Westbrook, *Global Solution*, *supra* note 21.

stopping all creditor collection activities and binding all creditors to a plan for distributing the assets in a way approved by the majority of creditors.

While a national bankruptcy law can serve this function for a debtor with assets and creditors within a single country, there is no bankruptcy law that can fulfill this function in the case of a debtor with assets and creditors in multiple countries. For a multinational debtor, the natural state of the world is that local bankruptcy courts will administer the assets within their own territorial jurisdiction – that is, a territorialist approach to cross-border insolvency.³⁴ Under territorialism, multiple bankruptcy proceedings would be necessary to stop all creditors' collection efforts; however, these multiple proceedings necessarily carve the debtors' worldwide assets into territorial chunks. Under territorialism, no one court can impose a distributional plan on holdout creditors.³⁵

The polar opposite of territorialism is universalism, which envisions one court administering the worldwide assets of the multinational debtor.³⁶ Just as domestically it is necessary to have a bankruptcy court that can marshal the debtor's assets and bind its creditors on a national level, universalists argue that cross-border insolvency requires a bankruptcy court that can marshal the debtor's assets and bind its creditors on an international level.³⁷ The political reality, of course, is that there is no such universal bankruptcy law or procedure capable of administering the multinational debtor's assets and binding its worldwide creditors.

Each side recognizes that a cross-border insolvency system will be capable of resolving bankruptcy's common pool problem only if bankruptcy courts agree to cooperate with one another.³⁸ Territorialists recognize that preserving value requires that each country's bankruptcy courts cooperate with one another in order to facilitate going concern sales or impose reorganization plans.³⁹ This is cooperative territorialism, and it is effected on an *ex post* basis: if the creditors determine that inter-court cooperation would maximize value, they can petition those courts to so cooperate.⁴⁰

Universalists also recognize the need for cooperation but prefer an *ex ante*

34. See Tung, *supra* note 4, at 559; José M. Garrido, *No Two Snowflakes the Same: The Distributional Question in International Bankruptcies*, 46 TEX. INT'L L.J. 459, 466 (2011) (noting that "territorialism is the most ancient approach to insolvency").

35. LoPucki, *Post-Universalist*, *supra* note 5, at 753 (noting that even cooperative territorialism fails in different ways).

36. See Westbrook, *Global Solution*, *supra* note 21, at 2277.

37. *Id.* at 2284 ("From Jabez Henry to the participants in this symposium, virtually all theorists have agreed that bankruptcy requires a single proceeding in which all of the debtor's assets and claims are administered under a single set of rules--in traditional terms, in rem.")

38. LoPucki, *Post-Universalist*, *supra* note 5, at 756 (noting that inter-court cooperation is necessary for both modified universalism and cooperative territorialism).

39. *Id.*

40. John A. E. Pottow, *Procedural Incrementalism: A Model for International Bankruptcy*, 45 VA. J. INT'L L. J. 935, 954 (2005) [hereinafter Pottow, *Procedural Incrementalism*].

commitment to such cooperation.⁴¹ This approach, referred to as modified universalism, envisions a procedure whereby courts will recognize one bankruptcy proceeding as being the leader – the “foreign main proceeding” – with the other proceedings serving to enable the main proceeding to have extra-territorial effect.⁴²

The key concept with modified universalism is that these local “ancillary proceedings” (sometimes referred to as “secondary proceedings”) *enable* but do not *require* cooperation with the foreign proceeding. These “ancillary” proceedings may, for example, facilitate the foreign proceeding by stopping collection efforts within their own territorial jurisdiction, enforcing orders from the foreign main proceeding, and turning over local assets for distribution to that main proceeding. At the same time, modified universalism gives the local ancillary court the discretion to grant or deny such relief to the foreign proceeding in order to protect local interests.⁴³

Modified universalism, accordingly, combines principles of both universalism and territorialism. The following section examines this balancing in the specific context of the Model Law as enacted in Chapter 15 of the Bankruptcy Code.

B. Chapter 15 and Modified Universalism

The Model Law, adopted in the United States Bankruptcy Code under Chapter 15, embodies the modified universalist approach.⁴⁴ From the United States perspective, this modified universalism works as follows: a foreign multinational debtor would file a full bankruptcy proceeding in a foreign court; a bankruptcy debtor-in-possession, a trustee, or other appointed administrator (the “foreign representative”) would then file a Chapter 15 petition in a U.S. bankruptcy court in order to obtain that court’s assistance with the administration of the multinational debtor’s estate.⁴⁵ Such assistance may include stopping all creditor collection efforts in the United States;⁴⁶ requesting a turn-over of U.S. assets for distribution in the foreign bankruptcy case;⁴⁷ or requesting assistance in conducting discovery within the United States in order to locate the debtor’s assets or to explore potential causes of action.⁴⁸

This Chapter 15 petition commences a two-step process whereby the court will determine whether and how to cooperate with the foreign proceeding. The

41. *Id.*

42. Westbrook, *Global Solution*, *supra* note 21, at 2325.

43. Pottow, *Procedural Incrementalism*, *supra* note 40, at 952.

44. Jay Lawrence Westbrook, *Chapter 15 at Last*, 79 AM. BANKR. L.J. 713, 716 (2005).

45. 11 U.S.C. §§ 1502, 1515 (2012).

46. 11 U.S.C. § 1521(a)(1)–(2) (2012).

47. 11 U.S.C. § 1521(a)(5).

48. 11 U.S.C. § 1521(a)(4).

first step is a gatekeeper one: the court must determine whether it should recognize the foreign proceeding.⁴⁹ Only if it grants recognition can it then provide further relief, such as enjoining creditor collection activities in the United States.⁵⁰ Chapter 15 requires the court to recognize the foreign proceeding as “main” if filed where the debtor has its center of main interests or as “nonmain” if filed where the debtor carries on non-transitory economic activity.⁵¹ If the debtor lacks either connection with the foreign proceeding, the court should refuse to grant recognition.⁵²

This recognition step represents a universalist-type approach to cross-border insolvency, as it establishes a nearly automatic grant of recognition for foreign proceedings, thus creating a choice-of-forum mechanism.⁵³ “Nearly automatic” in the sense that the determination of the debtor’s center of main interests may, in some cases, require judicial determination. Further, a court may deny recognition if recognition “would be manifestly contrary to the public policy of the United States.”⁵⁴

Once recognition is granted, the court proceeds to the cooperation step, under which it must determine what relief to grant the foreign proceeding in order to facilitate administration of the debtor.⁵⁵

If the foreign proceeding is recognized, then it is entitled to certain immediate relief (if is a foreign main proceeding) and other discretionary relief (whether it is a foreign main or nonmain proceeding).⁵⁶ While the recognition stage reflects a pre-commitment to universalism on a procedural level, the cooperation stage balances universalism and territorialism.⁵⁷ Certain recognition is automatically granted to foreign main proceedings, reflecting a preference

49. 11 U.S.C. §§ 1504 (“A case under this chapter is commenced by the filing of a petition for recognition of a foreign proceeding under section 1515.”), 1515(a) (2012) (“A foreign representative applies to the court for recognition of a foreign proceeding in which the foreign representative has been appointed by filing a petition for recognition.”).

50. 11 U.S.C. §§ 1520, 1521 (2012) (governing the relief available to a foreign representative, and both sections provide that such relief may be afforded “[u]pon recognition of a foreign proceeding”).

51. 11 U.S.C. § 1517(b)(1) & (2).

52. 11 U.S.C. § 1517(a)(1) (“[A]fter notice and a hearing, an order recognizing a foreign proceeding shall be entered if (1) such foreign proceeding for which recognition is sought is a foreign main proceeding or foreign nonmain proceeding within the meaning of section 1502.”).

53. Edward Janger, *Universal Proceduralism*, 32 BROOK. J.INT’L. L. 819, 842–43 (2007) (describing the recognition procedures as “automatic” under the Model Law).

54. 11 U.S.C. § 1506 (2012).

55. *Id.*

56. 11 U.S.C. §§ 1520, 1521 (2012).

57. See Edward S. Adams & Jason Fincke, *Coordinating Cross-Border Bankruptcy: How Territorialism Saves Universalism*, 15 COLUM. J. EUR. L. 43, 80–81 (2009) (“This universalist mandate is tempered by sections 1506, 1515, 1516, and others whereby U.S. bankruptcy judges still retain a wide amount of control over the administration of domestic assets and creditors’ rights. It is, in fact, these territorialistic provisions that will enable domestic judges to feel comfortable cooperating and coordinating with foreign proceedings. It is also these territorialistic provisions that will encourage domestic creditors to invest in foreign concerns and foreign creditors to invest in U.S. concerns.”).

for universalism when there is no fear of international forum shopping. Additional relief is available to both foreign main and nonmain proceedings, but only if the court is satisfied that such cooperation will not unduly burden local interests. For example, in granting discretionary relief, a court “must be satisfied that the interests of the creditors and of other interested persons, including the debtor, are adequately protected.”⁵⁸ As the Guide explains, the Model Law’s Article 22 (Section 1522 in the Bankruptcy Code) reflects the idea “that there should be a balance between relief that may be granted to the foreign representative and the interests of the persons that may be affected by such relief”⁵⁹ and “[i]n many cases the affected creditors will be ‘local creditors.’”⁶⁰

A final territorialist protection is found in the Model Law’s public policy exception in Article 6: “Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State.”⁶¹ The Guide explains that “[t]he Model Law preserves the possibility of excluding or limiting any action in favour of the foreign proceeding, including recognition of the proceeding, on the basis of overriding public policy considerations, although it is expected that the public policy exception will be rarely used.”⁶² It further explains that “[d]ifferences in insolvency schemes do not themselves justify a finding that enforcing one State’s laws would violate the public policy of another State.”⁶³

Chapter 15, then, commits to a choice of forum procedural rule, thus establishing the “infrastructure” for inter-court cooperation. Some of this cooperation is automatic, while the treatment of local assets remains in the U.S. court’s discretion. That court may permit the foreign proceeding to administer those assets, conditionally permit such foreign administration, or deny such foreign administration altogether.

C. *The Problem of Local Interests*

Leading up to the Model Law’s creation and its adoption in the United States, there was considerable debate about whether the Model Law’s cooperative regime would actually work.⁶⁴ As with any model law effort, states would first have to adopt the law and then courts would have to apply it uniformly.⁶⁵

58. See MODEL LAW, *supra* note 1, at art. 22.

59. GUIDE, *supra* note 1, at ¶ 196.

60. *Id.* at ¶ 198.

61. See MODEL LAW, *supra* note 1, at art. 6.

62. See GUIDE, *supra* note 1, at ¶ 21(e).

63. *Id.* at ¶ 30.

64. See LoPucki, *Territoriality*, and Tung, *supra* note 4; Westbrook, *Chapter 15 at Last*, *supra* note 44; Pottow, *Procedural Incrementalism*, *supra* note 40.

65. See Paul B. Stephan, *Courts, Tribunals, and Legal Unification—the Agency Problem*, 3 CHI. J. INT’L L. 333 (2002) (arguing that the judicial application phase “presents severe difficulties that will frustrate a wide range of unification projects”); see generally Edward J. Janger, *Predicting when the*

Countries may be reluctant to adopt any bankruptcy model law given the deep-rooted policies underlying distributional rules.⁶⁶ Once adopted, the Model Law would be subject to interest group capture⁶⁷ and to potentially inconsistent interpretation in the courts.⁶⁸

These concerns are common to almost all unification efforts that depend on court administration.⁶⁹ This issue has been relevant, for example, in adopting the Uniform Commercial Code within the United States and in adopting the United National Convention on Contracts for the International Sale of Goods (CISG).⁷⁰ In the international realm, scholars have recognized that states are likely to diverge in how they interpret a uniform text and have sought to identify the causes of this divergence.⁷¹ In the CISG literature, commentators have explained divergence as a “homeward trend” in the results courts reach.⁷² This term refers to the tendency of courts to interpret laws in accordance with their domestic legal framework. For example, scholars have noted that U.S. courts will use common law contract principles to interpret the CISG, even though the CISG is not a part of the common law.⁷³

While in many ways these problems are common to all legal harmonization efforts,⁷⁴ John Pottow has identified three characteristics of bankruptcy law that

Uniform Law Process Will Fail: Article 9, Capture, and the Race to the Bottom, 83 IOWA L. REV. 569 (1998); Caroline Bradley, *Transatlantic Misunderstandings: Corporate Law and Societies*, 53 U. MIAMI L. REV. 269, 270 (1993) (“Academics, governments and legislators who consider transplanting foreign rules to solve domestic problems or to make their own legal environment more like those of other countries must appreciate that rules which look similar may work differently in different contexts.”); Michael F. Sturley, *International Uniform Laws in National Courts: The Influence of Domestic Law in Conflicts of Interpretation*, 27 VA. J. INT’L L. 729, 729 (1986) (“Uniform laws are each year governing more and more aspects of private activity, both domestically and internationally. They have not yet achieved their full promise, however, because uniformity of interpretation has not always followed uniformity of enactment.”).

66. Tung, *supra* note 4, at 559; Pottow, *Greed and Pride*, *supra* note 5, at 1902 (identifying the “prickly” nature of bankruptcy laws’ redistributive provisions as a potential source of complication in cross-border insolvency laws).

67. See Janger, *Universal Proceduralism*, *supra* note 53, at 827–28 (noting the possibility of defections as “the drafters must consider the possible effects of jurisdictional competition and interest group capture on national legislatures”).

68. Tung, *supra* note 4, at 581–82 (raising the issue of whether universalism is possible under game theory analysis).

69. See Stephan, *supra* note 65.

70. See, e.g., John L. Gedid, *U.C.C. Methodology: Taking a Realistic Look at the Code*, 29 WM. & MARY L. REV. 341, 343 (1988); Larry A. DiMatteo et al., *Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence*, 24 NW. J. INT’L L. & BUS. 299, 303–05 (2004).

71. See, e.g., Sturley, *supra* note 65, at 738.

72. John Honnold, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 1 (1989).

73. See LARRY A. DIMATTEO ET AL., INTERNATIONAL SALES LAW: A CRITICAL ANALYSIS OF CISG JURISPRUDENCE 174 (“Despite the existence of enlightened decision-making by courts and arbitral panels using CISG interpretive methodology, the persistence of homeward trend remains a problem.”).

74. See Paul B. Stephan, *Courts, Tribunals, and Legal Unification—the Agency Problem*, 3 CHI. J. INT’L L. 333, 333 (2002) (arguing that the judicial application phase “presents severe difficulties that will frustrate a wide range of unification projects”).

make cross-border insolvency especially complex: (1) “insolvency laws have an expansive reach”; (2) bankruptcy “invades and displaces pre-existing legal relationships”; and (3) “bankruptcy law is also ‘prickly,’” as “the bankruptcy laws on the books in myriad jurisdictions around the globe contain a panoply of redistributive provisions.”⁷⁵ In the cross-border insolvency context, this means that the redistributive rules of a foreign bankruptcy law may threaten to displace a broad range of pre-existing legal relationships between a debtor and its local creditors.

Displacement of a local redistributive scheme with that of a foreign country will undoubtedly, in some circumstances, greatly impact the interests of local creditors. Lynn LoPucki offers the example of the employees of a Mexican subsidiary of a U.S. company.⁷⁶ The Mexican employees, presumably, would expect that their claims against their Mexican employer would be governed by Mexican bankruptcy law, which provides broad protections for employee claims. U.S. bankruptcy law, in contrast, offers a much weaker protection. If U.S. bankruptcy law were to apply extraterritorially to the Mexican workers, this would frustrate the expectations of the Mexican workers and greatly reduce their potential recoveries.

Carrying that example forward, not only would an extraterritorial application of U.S. bankruptcy law hurt the interests of the Mexican workers, but it would also offend the Mexican government’s interest in protecting its citizens.⁷⁷ That is, even if the Mexican workers’ interests are not actually impaired by the importation of U.S. redistributive rules, the Mexican government might object to ceding sovereignty over the bankruptcy assets within its own jurisdiction.⁷⁸

To some degree, the Model Law “sidesteps” these concerns by focusing on procedural aspects and by authorizing ancillary courts to refuse to apply foreign law.⁷⁹ Pottow has argued that this procedural focus is part of the “genius of the Model Law” harmonization effort.⁸⁰ Universal procedural rules do not directly challenge local interests: courts need only determine whether a foreign proceeding merits recognition as a “foreign main” or “foreign nonmain” proceeding. Only after recognition is granted does a court need to face the more diffi-

75. Pottow, *Greed and Pride*, *supra* note 5, at 1902.

76. LoPucki, *Post-Universalist*, *supra* note 5, at 710.

77. Pottow, *Greed and Pride*, *supra* note 5, at 1915 (discussing the problem of sovereignty and local interests).

78. *Id.* (“But there is another related, but conceptually distinct, significant of domestic law: application of local law for local law’s sake – that is, the vindication of regulatory sovereignty that flows from the simple fact that the sovereign exercises her might to regulate bankruptcy assets over which she has a plausible jurisdictional claim.”).

79. Pottow, *Procedural Incrementalism*, *supra* note 40, at 960 (“The Model Law’s most important feature is that its scope is self-consciously constrained. It does not settle the universalism-territorialism question. On the contrary, the drafters seemed to sidestep this core issue altogether.”).

80. *Id.* at 939.

cult and “prickly” choice of distributional rules: should the court defer to the redistributive rules of the foreign court or adhere to its own local rules? Pottow suggests that pushing these difficult decisions down the road serves not only a political function of bridging the interests of universalists and territorialists, but it also provides an opportunity for states to adjust to the increasing frequency of cross-border insolvencies.⁸¹

Universalists have argued that courts will likely adjust to the Model Law as states realize that universalism’s overall efficiency gains offset any losses to local interests. This argument has two parts. The first is that states will realize that any losses to local creditors in one case will be offset against the gains accrued overall, the so-called “Rough Wash Theory.”⁸² The second is that familiarity will also assuage states’ concerns about ceding sovereignty – a “secondary Rough Wash.”⁸³

Such theories have of course been challenged theoretically and empirically.⁸⁴ Frederick Tung, for example, has argued that some states are more likely to be “winners” and others to be “losers,” such that the overall efficiency gains of modified universalism will inure to the benefit of only a handful of actors. Accordingly, no “rough wash” is likely to even out these losses.⁸⁵

Empirical work in this area has likewise focused on courts’ willingness to adhere to the Model Law’s cooperative schema. The first empirical project on Chapter 15 examined recognition orders, finding that U.S. courts routinely recognized foreign proceedings – suggesting, perhaps, that U.S. courts were adhering to the procedural recognition framework.⁸⁶ A later study examined what courts did following recognition, i.e., what sort of cooperation did they extend to the foreign proceeding.⁸⁷ That study found that U.S. courts were willing to cooperate, but only conditionally.⁸⁸ Courts, for example, did not simply turn over U.S. assets for administration abroad; rather, courts conditioned the turnover on the foreign court’s agreement to apply U.S. law or to otherwise protect U.S. creditors.⁸⁹

The problem of local interests, accordingly, has occupied a central place in the cross-border insolvency field. And rightfully so. These issues are indeed

81. *Id.* at 988 (discussing the Model Law’s approach as according “states the chance to desensitize gradually to other states’ bankruptcy systems; acclimation is permitted”).

82. Jay Lawrence Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L.J. 457, 465 (1991) (positing “that a universalist rule will roughly even out benefits and losses for local creditors, who will gain enough from foreign deference to the local forum in one case to balance any loss from local deference to the foreign forum in another”).

83. Pottow, *Greed and Pride*, *supra* note 5, at 1921.

84. *See* Tung, *Fear of Commitment*, *supra* note 4, at 577.

85. *Id.*

86. *See* Andrew B. Dawson, *Offshore Bankruptcies*, 88 NEB. L. REV. 317, 319 (2009).

87. *See* Leong, *supra* note 7, at 117–19.

88. *Id.*

89. *Id.*

“prickly” points that threaten to frustrate the Model Law’s modified universalist model. These issues are complicated, in part, by the lack of symmetry among state participants – some of which are likely to be net losers and others to be net winners. And they are complicated by the deep-seated policy concerns that lie at the heart of bankruptcy law – policies which reflect attitudes about failure and forgiveness. But, as discussed in the following section, these issues may be further complicated by an additional layer of difficulty that has so far received much less attention: the problem of local methods.

III. DEFECTION: LOCAL INTERESTS AND LOCAL METHODS

While there have been recent cases illustrating these territorialist impulses as U.S. courts have either refused to cooperate or strongly conditioned cooperation in order to avoid outcome differences, territorialist impulses do not fully explain court divergence. Courts have at times departed from the Model Law’s structure and purpose even when there is no evidence of outcome differences, i.e., even when there is no indication that defection furthers local creditors or local policy. These defections stem instead from problems of interpretative methodology and case management, reflecting a difficulty in understanding and implementing a law that is systematically different than the overall Bankruptcy Code within which Chapter 15 resides. This article refers to these problems as arising from local methods.

Questions about the proper methodology of statutory interpretation and case management are not unique to Chapter 15 or even to bankruptcy more generally. There have been many studies on the proper methodology of statutory interpretation broadly and in the bankruptcy context more specifically.⁹⁰ Scholars have also focused on the proper method of judicial case management, discussing the role of judges as adjudicators and as case facilitators; again, some of these studies focus on courts generally and others focus on bankruptcy courts more specifically.⁹¹

Although these methodological problems are not unique to the Model Law, they are particularly important in this context. The problems of local methods have received relatively little attention in this field compared to the problems of

90. See, e.g., Daniel J. Bussel, *Textualism’s Failures: A Study of Overruled Bankruptcy Decisions*, 53 VAND. L. REV. 887, 900 (2000) (analyzing textualism through the lens of bankruptcy cases, in part because of an interest in bankruptcy but more generally because these cases provide a good context within which to evaluate textualism’s effectiveness); Robert M. Lawless, *Legisprudence Through a Bankruptcy Lens: A Study in the Supreme Court’s Bankruptcy Cases*, 47 SYRACUSE L. REV. 1 (1996); Robert K. Rasmussen, *A Study of the Costs and Benefits of Textualism: The Supreme Court’s Bankruptcy Cases*, 71 WASH. U. L.Q. 535 (1993); Charles Jordan Tabb & Robert M. Lawless, *Of Commas, Gerunds and Conjunctions: The Bankruptcy Jurisprudence of the Rehnquist Court*, 42 SYRACUSE L. REV. 823 (1991).

91. See, e.g., Melissa B. Jacoby, *What Should Judges Do in Chapter 11?*, 2015 U. ILL. L. REV. 571 (2015); Judith Resnick, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

local interests. This is not to say that matters of interpretation and case management have been overlooked. With regards to case management, Judge Louise DeCarl Adler has recently published a book through the Federal Judicial Center, addressing the methodology of managing Chapter 15 cases.⁹² Judge Adler acknowledges in her introduction that these cases “may raise unique case-management issues.”⁹³

As to interpretation, with perhaps the only exception of Jay Westbrook’s recent article,⁹⁴ scholarship has focused heavily on matters of interpretation of the Model Law, especially on the question of how the COMI standard should be interpreted in the context of corporate groups.⁹⁵ Others have considered an innovative use of ancillary proceedings that may prevent the problem of local interests from undermining the Model Law’s harmonization efforts – an approach that recognizes both the importance of local interests but also suggests a potential solution through creative case management

This article does not address these specific questions but instead the broader question of the methodology of handling Chapter 15 matters. That is, this article does not discuss the proper meaning of the “center of main interests” standard in the corporate group context. It focuses instead on the methodology employed to interpret that standard. The aim of this article is to highlight the importance of these methodological issues for the Model Law’s cooperative structure and to tie these issues into the broader literature on statutory interpretation and case management. A better understanding of the sources of defection may help inform and guide the continuing cross-border insolvency harmonization effort.

A. *Methodology of Statutory Interpretation*

The principal problem of interpretative methodology in Chapter 15 arises from the conflict between the purposive nature of the Model Law and the textualist bent of bankruptcy jurisprudence. Textualism may be a problematic interpretative methodology both in general and, as some have suggested, in the context of bankruptcy law more specifically.⁹⁶ This article argues that it is an

92. Hon. Louise De Carl Adler, *Managing the Chapter 15 Cross-Border Insolvency Case* 2d ed., Federal Judicial Center (2014), [http://www.fjc.gov/public/pdf.nsf/lookup/adler-chapter-15-2d-fjc-2014.pdf/\\$file/adler-chapter-15-2d-fjc-2014.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/adler-chapter-15-2d-fjc-2014.pdf/$file/adler-chapter-15-2d-fjc-2014.pdf) (last visited April 30, 2015).

93. *Id.* at 1.

94. Jay L. Westbrook, *Interpretation Internationale* (U. Tex. Law, Public Law Research Paper No. 626; U. Tex. Law, Law and Econ Research Paper No. E623, 2015), <http://ssrn.com/abstract=2589638> or <http://dx.doi.org/10.2139/ssrn.2589638> (calling for an international systems-based interpretative approach to the Model Law).

95. See, e.g., Nora Wouters & Alla Raykin, *Corporate Group Cross-Border Insolvencies Between the United States & European Union: Legal & Economic Developments*, 29 EMORY BANKR. DEV. J. 387, 387 (2013).

96. See sources *supra* note 90.

especially inapt methodology as applied to the Model Law, as it directly conflicts with the language and purpose of the Model Law.

The Model Law's purposive nature is articulated in its preamble, adopted as Section 1501 of the Bankruptcy Code, which provides that,

"The purpose of this Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:

- (a) Cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;
- (b) Greater legal certainty for trade and investment;
- (c) Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
- (d) Protection and maximization of the value of the debtor's assets; and
- (e) Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment."

The Model Law's rule of interpretation further supports this purposive nature by mandating that courts consider the law's "international origin" and "the need to promote uniformity in its application and the observance of good faith."⁹⁷

These provisions of the Model Law have analogues in other bodies of law designed to promote harmonization in commercial law. The Convention on the International Sale of Goods, for example, similarly states its purpose in the preamble and then contains a rule of construction that requires courts to interpret the CISG "with regard . . . to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade" and that,

Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private -international law.⁹⁸

Similarly, the Uniform Commercial Code contains purposive language and a rule of construction:

- (a) [The Uniform Commercial Code] must be liberally construed and applied to promote its underlying purposes and policies, which are:
 - (1) to simplify, clarify, and modernize the law governing commercial transactions;
 - (2) to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and

97. See MODEL LAW, *supra* note 1, at art. 8.

98. CISG Article 7.

(3) to make uniform the law among the various jurisdictions.⁹⁹

Such statements of purpose and rules of interpretation have led scholars to characterize the CISG and the UCC as purposive legal frameworks. Indeed, scholars have noted that the purposivist interpretation is a core attribute of Karl Llewellyn's and the drafters' design for the UCC.¹⁰⁰

The Model Law's purposivist nature is also reflected and reinforced through its accompanying Guide to Enactment and Interpretation. The Guide, in many ways, informs the Model Law in a way analogous to the manner in which the Official Comments inform the Uniform Commercial Code. As with the Official Comments, the Guide is neither statutory text nor legislative history but is a core component of the Model Law's harmonization effort.¹⁰¹ The Guide is akin to a legislative history in that it contains notes from the drafters; however, unlike a legislative history, these notes are specifically designed and adopted by the UNCITRAL Working Group to provide guidance to courts and legislatures.¹⁰²

A second important distinction between the Guide and legislative history is that the Guide may be, and has been, changed even after the Model Law's drafting was complete. Legislative history, of course, is "history" and thus cannot be prospectively changed after a bill is passed into law. UNCITRAL's Working Group V, in contrast, continues to work on revising the language of the Guide and the language of the Model Law. This ongoing nature further reflects the importance of the Guide in the Model Law's ongoing harmonization effort.

While the Model Law's language and structure call for a purposivist interpretation, the prevailing methodology of interpreting the Bankruptcy Code has been and seemingly continues to be textualism.¹⁰³ Early studies of the Supreme Court's bankruptcy jurisprudence found that textualism was the predominant methodology.¹⁰⁴ More recent studies have found textualism to be on the decline, but it still casts an important shadow over bankruptcy jurisprudence.¹⁰⁵

99. U.C.C. § 1-103 (2012).

100. See, e.g., Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 794 (2013) ("[I]t is universally agreed that legislatures (as well as parties to a contract) can dictate to courts which interpretive principles to apply. The Uniform Commercial Code (U.C.C.) is precisely such an interpretive statute."); Gregory E. Maggs, *Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code*, 71 U. COLO. L. REV. 541 (2000).

101. David Frisch, *The Recent Amendments to UCC Article 9: Problems and Solutions*, 45 U. RICH. L. REV. 1009, 1028 (2011) ("The most obvious point is that, although comments play an extremely prominent role in Code interpretation, they are not part of the statutory text, nor are they legislative history of the enacting state legislatures in the usual sense.").

102. GUIDE, *supra* note 1, at ¶ 17 (describing the history and purpose of the Guide).

103. Rasmussen, *supra* note 90, at 539.

104. *Id.*

105. See Bussel, *supra* note 90, at 909–10 ("Interestingly, even a casual look at the data indicates

While some have argued that, in theory, textualism is well-suited to bankruptcy law because it provides for greater certainty,¹⁰⁶ others have suggested that, in practice, textualism is no more likely to provide certainty than purposivism.¹⁰⁷ That is, judges are likely to reach divergent interpretations of the same language whether employing textualism or purposivism.

Whether or not textualism is an appropriate methodology in bankruptcy generally, textualism is unlikely to produce results consistent with the purposivist Model Law. Just as scholars have lamented that textualism does violence to the purposivist nature of the U.C.C., textualism likewise is inconsistent with the nature of the Model Law.¹⁰⁸

Textualism is not only inconsistent with Chapter 15's structure and purpose, the justifications for a textualist approach are less apt in this context. Textualism has been justified by concerns about the use of legislative history. Judge Easterbrook, for example, has argued against relying on legislative history to discern "legislative intent" because legislative intent is a fiction.¹⁰⁹ Textualism has also been justified based on separation of powers concerns, as it delegates the judicial function of interpreting statutes into the hands of Congressional committees.¹¹⁰

These concerns are misplaced in the Model Law context because, as discussed above, the Guide is not a legislative history. It does not serve to support a supposedly elusive concept of "legislative intent." Instead, it reflects the actual intent of the UNCITRAL Working Group. The Guide does not threaten to usurp the role of courts; rather, it exists to provide background materials to inform courts' efforts to comply with the Model Law's requirement that courts interpret its language "with regard to its international origin and to the need to promote uniformity in application and the observance of good faith."¹¹¹

Even though textualism is an inapt methodology for interpreting the Model Law, it may be particularly attractive in this context as a means of restraining bankruptcy court discretion. U.S. bankruptcy courts have broad leeway in

that textualism is not a dominant mode of statutory interpretation in the Courts of Appeals, even in the bankruptcy area, notwithstanding the Supreme Court's particular insistence for a decade on "plain meaning" constructions of the Bankruptcy Code. Approximately 80 percent of the control group cases were decided on largely or entirely nontextualist grounds.").

106. Rasmussen, *supra* note 90, at 565.

107. See, e.g., Lawless, *supra* note 90, at 104 ("[T]he predictability and certainty of textualism rests on the dubious premise that the diverse persons who make up this nation's federal judiciary can (and should) interpret language in the same manner.").

108. See e.g., Julian B. McDonnell, *Purposive Interpretation of the Uniform Commercial Code: Some Implications for Jurisprudence*, 126 U. PA. L. REV. 795, 853 (1978).

109. Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 68 (1994).

110. John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 706-37 (1997) (arguing that reliance on legislative history violates the constitutional prohibition against delegation of lawmaking power to entities under the exclusive control of Congress).

111. MODEL LAW, *supra* note 1, at art. 8.

cross-border insolvency cases to determine when to cede U.S. sovereignty over U.S. assets. While U.S. bankruptcy courts may willingly exercise this discretion to resolve cross-border insolvency issues, courts of appeal may be more likely to exercise a strict textualist approach in order to restrict such discretion.

This appellate-bankruptcy court dynamic has manifested itself in the domestic bankruptcy context more generally, as the Supreme Court has steadily restricted the equitable powers and jurisdiction of the bankruptcy courts. Bankruptcy courts have at times been characterized as “courts of equity” because of Section 105(a)’s broad language: “The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.”¹¹² This description as courts of equity, however, is no longer accurate, as appellate courts’ strict interpretation of the Code has reined in the equitable powers of bankruptcy courts.¹¹³ In the past, courts had invoked this power as a utility tool for handling a broad array of problems, for example, to fashion procedural relief for putative asbestos-related claimants.¹¹⁴ Since then, though, the Supreme Court has limited the scope of Section 105(a), most recently in *Law v. Siegel* in which the Court held that “whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code.”¹¹⁵

The Supreme Court has likewise restricted the jurisdiction of bankruptcy courts to enter final judgments, a move that directly limits the power of bankruptcy courts.¹¹⁶ It has been suggested that this restriction may reflect “an agenda to narrow federal equity jurisdiction and powers, at least in commercial disputes, and in that case to do so by restricting the power of the primary federal court of equity in the financial realm, the bankruptcy court.”¹¹⁷

This aim of restraining bankruptcy courts’ equitable powers may likewise motivate courts of appeal to employ a textualist approach to interpreting Chapter 15 as a means to restrict bankruptcy courts from exercising broad-ranging equitable powers. And, as discussed in Part III, *infra*, this appears to be motivating, in part, courts to defect from the Model Law’s structure even when lo-

112. 11 U.S.C.A. § 105 (West 2010).

113. See, e.g., Mark Berman, ‘Wither’ the Equity Powers of the Bankruptcy Court, <https://blogs.law.harvard.edu/bankruptcyroundtable/2014/05/27/wither-the-equity-powers-of-the-bankruptcy-court/>; Adam J. Levitin, *Toward a Federal Common Law of Bankruptcy: Judicial Lawmaking in a Statutory Regime*, 80 AM. BANKR. L.J. 1, 3 (2006) (arguing that “because American courts are uncomfortable with unguided equitable discretion, they have tried to limit their equitable powers to those authorized by statute or grandfathered in under the pre-Code practices doctrine”); *Wells Fargo Bank of Texas N.A. v. Sommers (In re Amco Ins.)*, 444 F.3d 690, 695 (5th Cir. Tex. 2006) (“Section 105(a) does not permit courts to act as roving commissions to do equity.”) (internal quotation marks, alterations, and citations omitted).

114. See, e.g., *In re UNR Indus.*, 46 B.R. 671 (Bankr. N. D. Ill. 1985).

115. *Law v. Siegel*, 134 S.Ct. 1188, 1194–95 (2014).

116. See *Stern v. Marshall*, 131 S. Ct. 2594 (2011).

117. Randolph J. Haines, *The Conservative Assault on Federal Equity*, 88 AM. BANKR. L.J. 451, 455 (2014).

cal interests are not at stake.

B. Methodology of Case Management

Case management methodology concerns the role of the court in granting relief and adjudicating disputes. Should the court serve as solely an arbiter? Or should it be an active participant in the case, raising issues *sua sponte* even when the parties have not? Scholars have long questioned the proper role of judges in civil cases and, more specifically, in bankruptcy cases.¹¹⁸

The style of case management can markedly influence bankruptcy outcomes, particularly in those cases in which there is little to no stakeholder participation to limit the debtor's control of the bankruptcy filing. John Ayer raised this concern over two decades ago, noting that the Bankruptcy Code provides little guidance to judges on "the issue of the independent responsibility of the bankruptcy judge. How far should the judge be permitted to act 'on his own?'"¹¹⁹ In her recent work on case management issues in bankruptcy, Melissa Jacoby has noted that Congress has since then only "nibbled on the edges of the problem."¹²⁰

As with interpretative methodologies, case management methodology varies from court to court, and even from case to case. Within the domestic U.S. bankruptcy courts, judges have reported a wide range of judicial style, with some reporting that they serve principally as arbiters and others as part arbiter/part case manager.¹²¹ On an international scale, case management style may vary even more, as some insolvency systems are more litigation-oriented and others more administrative.¹²²

The issue of case management has received significant attention in the U.S. bankruptcy system but has largely been overlooked in the cross-border insolvency context. The point of this part of the article is to highlight that the characteristics of bankruptcy practice that point to the importance of case management in corporate reorganizations are likewise present in the cross-border insolvency cases.

Scholars have focused on bankruptcy case management, in part because the

118. See e.g., Resnick, *supra* note 91; Jacoby, *supra* note 91; and John D. Ayer, *The Forms of Action in Bankruptcy Practice: An Exposition and a Critique*, 1985 ANN. SURV. BANKR. L. 307, 329 (William L. Norton ed., 1985).

119. Ayer, *supra* note 119, at 329.

120. Jacoby, *supra* note 91, at 581; see also Melissa B. Jacoby, *The Detroit Bankruptcy, Pre-Eligibility*, 41 FORDHAM URB. L.J. 849, 861 (2014) (discussing the important, and uncertain, role of the judge in municipal bankruptcy filings under Chapter 9).

121. Stacy Kleiner Humphries & Robert L. R. Munden, *Painting A Self-Portrait: A Look at the Composition and Style of the Bankruptcy Bench*, 14 BANKR. DEV. J. 73, 78–79 (1997) (reporting that the majority of bankruptcy judges surveyed saw their job as requiring a mix of dispute resolution and managerial judging).

122. See Barnes, *supra* note 16, at 24.

Bankruptcy Reform Act of 1978 explicitly sought to modify the role of judges in the bankruptcy system.¹²³ Congress sought to shift case management functions from bankruptcy judges to the trustee and the United States Trustee, thus limiting judges to an adjudicatory function.¹²⁴ Congress also hoped that creditors would play an active role in bankruptcy governance. To that end, the Bankruptcy Code attempts to resolve creditors' collective action problem by authorizing the United States Trustee to form committees of stakeholders empowered to participate in the bankruptcy and authorized to be compensated from the bankruptcy estate.¹²⁵

Many have argued that removing bankruptcy judges from case management has created a governance vacuum in business bankruptcies. In groundbreaking empirical work in this area, Professor LoPucki famously concluded that the bankruptcy reforms had effectively left the "debtor in full control."¹²⁶ Based on his empirical analysis of bankruptcy cases filed in the Western District of Missouri, he concluded that "[I]f objection or request from the creditors' committee seemed frequently to be considered by the court as an indication that all was well, rather than that the creditors' committee had not organized well enough to have an opinion, as was probably more often the case."¹²⁷

Since then, Congress has responded by augmenting the role of the United States Trustee in small business cases,¹²⁸ thus providing a stronger monitoring presence in those cases in which creditor monitoring is less reliable.¹²⁹ Courts have also responded to the governance gap in bankruptcy cases by engaging in more active case management in order to fill this governance vacuum.¹³⁰ For example, Richard Levin notes that "judges often move to fill any vacuums in the administration or management of the cases, because they continue to feel

123. See Miller, *supra* note 18, at 431.

124. *Id.* at 433–34.

125. 11 U.S.C. §§ 1102 (permitting the appointment of committees), 1103 (authorizing committees to hire professionals and to, *inter alia*, investigate the debtor's actions and financial conditions and to participate in plan negotiations), and 328 & 330 (authorizing the committee to employ professionals that may be paid out of the estate) (2012).

126. LoPucki, *The Debtor in Full Control – Systems Failure Under Chapter 11 of the Bankruptcy Code?* (pt. 2), 57 AM. BANKR. L. J. 247, 250 (1983) [hereinafter LoPucki, *Debtor in Full Control*].

127. *Id.* at 253.

128. Timothy J. Curtin, Karen Gross, and Albert Togut, *Debtors-Out-Of-Control: A Look at Chapter 11's Check and Balance System*, 1988 ANN. SURV. OF BANKR. LAW 4.

129. See Edward R. Morrison, *Bankruptcy Decision Making: An Empirical Study of Continuation Bias in Small-Business Bankruptcies*, 50 J.L. & ECON. 381, 394 (2007) (concluding that LoPucki's continuation bias is no longer a concern as creditors and trustees are actively involved in managing the case).

130. See Richard B. Levin, *Towards A Model of Bankruptcy Administration*, 44 S.C. L. REV. 963, 968 (1993) (noting that "judges often move to fill any vacuums in the administration or management of the cases, because they continue to feel responsible for the expeditious resolution of their cases"); Humphries & Munden, *supra* note 121, at 78–79 (reporting that the majority of bankruptcy judges surveyed saw their job as requiring a mix of dispute resolution and managerial judging).

responsible for the expeditious resolution of their cases.”¹³¹

The domestic bankruptcy system, then, can be understood to have adjusted to governance vacuums in some cases in order to limit the “debtor in full control” problem. Through more active case management and oversight, bankruptcy practice may no longer be as susceptible to the fallacy exposed by LoPucki’s study, namely the fallacy that lack of creditor objections is tantamount to creditor consent. It is now more widely understood that creditor silence may reflect creditor coordination problems more than actual consent.

The cross-border insolvency area, though, remains susceptible to this fallacy of creditor consent for at least three reasons. First, the Model Law is still relatively new. Even though the Model Law has been in effect in the United States for ten years now, it is a niche area of bankruptcy law with relatively few opportunities for the practice to evolve.

Second, the creditor consent fallacy is particularly problematic in this area because there is even less reason to believe that creditors will participate at all. Under Chapter 15, there is no role for the United States Trustee or for a committee of creditors or other stakeholders. Interested parties may face not only the coordination problems typical to creditors but also the further obstacles of being geographically dispersed. Thus, in some important ways, Chapter 15 cases are back to the “Debtor in Full Control” scenario, only this time it is the foreign representative in full control.

Third, the Model Law requires more managerial judging in some areas, as the Model Law and the Guide require courts to exercise independent judgment as to the recognition and cooperation stages. At the recognition stage, for example, the court is entitled to presume that the debtor’s center of main interests is at its registered office;¹³² however, the Guide clarifies that a court “will be required to consider independently where the debtor’s centre of main interests is located.”¹³³ At the cooperation stage, the Model Law specifically requires that, in granting discretionary relief to the foreign representative, the court be “satisfied that the interests of creditors in this State are adequately protected.”¹³⁴ The Model Law further specifically provides that a court may *sua sponte* modify or terminate any relief.¹³⁵

Despite such language in the Model Law and the Guide, courts in Chapter 15 cases are prone to the same error identified by LoPucki’s early study: they tend to view the lack of objections as indicating creditor consent.¹³⁶ The au-

131. *Id.*

132. 11 U.S.C. § 1516(c) (2014).

133. GUIDE, *supra* note 1, at ¶ 143 (noting the court’s need to do so when “there appears to be a separation between the place of the debtor’s registered office and its alleged centre of main interests”).

134. See MODEL LAW, *supra* note 1, at art. 21.

135. *Id.* at art. 22(3).

136. LoPucki, *Debtor in Full Control*, *supra* note 126.

thor's prior empirical analysis of all Chapter 15 petitions between 2005 and 2008 found that courts granted recognition to foreign proceedings even when there was a tenuous connection at best between the debtor and the jurisdiction of the foreign proceeding.¹³⁷ For example, between 2005 and 2008, about 20 percent of all Chapter 15 petitions sought relief related to a haven jurisdiction bankruptcy filing.¹³⁸ In these cases, the debtor had nothing more than a letter-box presence in the haven jurisdiction. Nonetheless, U.S. courts recognized the haven proceeding as a foreign main proceeding. In one case in which the court denied recognition as a foreign main proceeding, the court even said that but for the foreign representatives' blatant attempts to use the Cayman bankruptcy proceeding to interfere with a related Chapter 11 proceeding in the United States, the court would have recognized the Cayman proceeding.¹³⁹ In doing so, the court said that it was sufficient that no creditors had objected to the competence of the Cayman Islands proceedings.¹⁴⁰ The court interpreted the lack of objections as an indication that the creditors consented to the Cayman jurisdiction, thus demonstrating that the creditor consent fallacy may be alive and well in Chapter 15.

The notable exception to this "creditor consent" approach to recognition occurred in the petition to recognize the Cayman Islands liquidation of two Bear Stearns hedge funds in 2007.¹⁴¹ In that case, the foreign representatives claimed that the funds had their center of main interests in the Cayman Islands, and no parties objected. The court determined that it should not defer to the creditors, and reliance on creditor consent "would make the recognition process a rubber stamp exercise."¹⁴² It then held that the debtor's true center of main interests was in the United States given that "there are no employees or managers in the Cayman Islands, the investment manager for the Funds is located in New York, the Administrator that runs the back-office operations of the Funds is in the United States along with the Funds' books and records and prior to the commencement of the Foreign Proceeding, all of the Funds' liquid assets were located in United States."¹⁴³

137. Dawson, *supra* note 86, at 336.

138. *Id.*

139. *In re SPhinX, Ltd.*, 351 B.R. 103, 121 (Bankr. S.D.N.Y. 2006), *aff'd*, 371 B.R. 10 (S.D.N.Y. 2007) ("However, a primary basis for the Petition, and the investors' tacit consent to the Cayman Islands proceedings as foreign main proceedings, is improper: that is, it has the purpose of frustrating the RCM Settlement by obtaining a stay of the appeals upon the invocation of Bankruptcy Code section 362(a) that would go into effect under section 1520(a)(1) upon such recognition.").

140. *Id.* at 121 ("But because these are liquidation cases in which competent JOLs under the supervision of the Cayman Court are the only parties ready to perform the winding up function, and, importantly, the vast majority of the parties in interest tacitly support that approach, normally the Court would recognize the Cayman Islands proceedings as main proceedings.").

141. *In re Bear Stearns High-Grade Structure Credit Strategies Master Fund*, 374 B.R. 122 (Bankr. S.D.N.Y. 2007).

142. *Id.* at 130.

143. *Id.*

The *Bear Stearns* decision highlights the importance of case management. The case did not turn on a novel interpretation of “center of main interests.” Instead, it turned on the interpretation of a judge’s role in the Chapter 15 context.

IV. CASE STUDIES: DEFECTIONS AND LOCAL METHODS

This section will describe three recent decisions from U.S. Courts of Appeals interpreting Chapter 15, all of which illustrate the problem of local methods. In each of these cases, the courts ultimately depart from the structure and purpose of the Model Law.

In the first case, *In re Qimonda*, there are public policy and creditor protection consequences – that is, local interests are relevant. Analyses of *Qimonda* have thus far focused on these local interests issues.¹⁴⁴ This part considers instead the procedural troubles reflected in this case, namely which court should act first: the foreign proceeding or the ancillary one. In the latter two cases, *In re Barnett* and *In re Fairfield Sentry*, there are no apparent local interests at stake at all. All three cases, even *Qimonda*, highlight the important consequences of local methods, as courts’ methodologies lead to conclusions inconsistent with the Model Law. These methodologies further raise questions about the efficacy of the Model Law and the Guide in harmonizing cross-border insolvencies.

A. *In re Qimonda AG*

Qimonda AG was a German manufacturer of semiconductor memory devices before filing bankruptcy in Munich, Germany in 2009. One of the German insolvency administrator’s most significant tasks was to liquidate the company’s roughly 10,000 patents, about 4,000 of which were U.S. patents.¹⁴⁵ The administrator’s challenge was that *Qimonda* had cross-licensed its patents, allowing other semiconductor manufacturers to practice these patents in exchange for a right to practice theirs. This sort of arrangement is a common solution to the so-called “patent thicket” that arises in such industries in which there are so many patents that it is difficult to know with any precision which patents are necessary for any particular process.¹⁴⁶ This cross-licensing arrangement may have made business sense for *Qimonda* as an operating company; however, it provided no value to *Qimonda*’s creditors in liquidation. Accordingly, the administrator sought to terminate the cross-licensing agreements and then re-license the patents for royalties. Under German law, such termination may be

144. See, e.g., John J. Chung, *In Re Qimonda Ag: The Conflict Between Comity and the Public Policy Exception in Chapter 15 of the Bankruptcy Code*, 32 B.U. INT’L L.J. 89 (2014).

145. *Jaffe v. Samsung Elecs. Co.*, 737 F.3d 14, 17 (4th Cir. 2013).

146. Carl Shapiro, *Navigating the Patent Thicket*, INNOVATION POLICY AND THE ECONOMY VOL. 1 121, 127 (2001).

available; however, Section 365(n) of the U.S. Bankruptcy Code prohibits debtors from terminating intellectual property licensing agreements.¹⁴⁷

Because Qimonda had subsidiaries, creditors, and assets in the United States, the German administrator sought relief under Chapter 15 in the Bankruptcy Court for the Eastern District of Virginia.¹⁴⁸ The administrator filed a petition for recognition in the United States under Chapter 15 of the Bankruptcy Code and sought an order requesting supplemental relief, including turnover of U.S. assets and the application of several U.S. Bankruptcy Code sections. The bankruptcy court granted this petition and then clarified, through an amended order, that German bankruptcy law would apply to the question of whether the administrator could terminate the debtor's cross-licenses, concluding that "the legal theory arises under German law and is best resolved by German courts. It should not be complicated by superimposing [U.S. Bankruptcy Code] § 365 on the analysis."¹⁴⁹

In so ruling, the bankruptcy court interpreted Chapter 15 as creating ancillary proceedings to assist foreign proceedings, with those foreign proceedings applying their own local bankruptcy law. Because the U.S. patents belonged to the German debtor, German law would apply to those patents and their accompanying licensing agreements.¹⁵⁰

The cross-licensees of the U.S. patents appealed this order, arguing that U.S. law should apply to their cross-licensing agreements and that the bankruptcy court erred in turning over the U.S. patents for administration in Germany. The district court agreed, arguing that the bankruptcy court should have considered whether deferring to German law would sufficiently protect the interests of the U.S. creditors and whether such deference would violate fundamental U.S. policy.¹⁵¹ Ultimately, the bankruptcy court found that German law would harm U.S. local creditors and offend U.S. policy, as embodied in Section 365 of the Bankruptcy Code.¹⁵²

That order was certified for direct appeal to the Fourth Circuit Court of Appeals. At this point, the United States submitted an amicus brief arguing that both the German liquidator and the U.S. creditors were incorrect.¹⁵³ The United

147. 11 U.S.C. § 365(n) (2012). Under this provision, a debtor may reject an executory intellectual property license but may not terminate the licensee's right to use the license.

148. *In re Qimonda AG*, 2009 WL 4060083, at *2 (Bankr. E.D. Va. 2009).

149. *Id.*

150. This issue of ownership of the U.S. patents had already been decided in a separate action in the District of Delaware. *See* Disclosure Statement with Respect to Joint Plan of Liquidation of the Debtors and Debtors in Possession, Qimonda Richmond, LLC, and Qimonda North America Corp., *In re Qimonda Richmond, LLC*, Doc. 09-10589 (Bankr. D. Del. Dec. 16, 2000) (Doc. No. 989).

151. *Id.*

152. *In re Qimonda AG*, 462 B.R. 165, 182-185 (Bankr. E.D. Va. 2011).

153. Brief for the United States as Amicus Curiae in Support of Neither Party, *In re Qimonda AG Bankruptcy Litigation*, 433 B.R. 547 (E.D. Va. Sep. 28, 2012) (No. 12-1802) (Doc. No. 25), 2012 WL 4812564.

States argued that the bankruptcy court's initial ruling was correct: "[T]he fate of appellees' licenses in the German insolvency proceeding is entirely, and properly, a question of German law As we explain below, a court in the United States may have occasion to decide, in a future case, whether to give effect to the rejection of appellees' patent licenses as a matter of U.S. law. But the bankruptcy court had no authority, under Section 365(n) or otherwise, to dictate the results of the German insolvency proceeding."¹⁵⁴

The Fourth Circuit affirmed on the creditor-protection point, holding that the bankruptcy court reasonably balanced the interests of all parties in determining that turn-over of the assets without the licensee protections of Section 365(n) would not sufficiently protect the interests of the U.S. licensees.¹⁵⁵ It dismissed the United States' argument, stating that the bankruptcy court did not "constrain the operation of German insolvency law in Germany;" rather, "the bankruptcy court conditioned its grant of power to [the German administrator] to 'administer the assets of Qimonda AG within the territorial jurisdiction of the United States with the limitation that he was taking the company's U.S. patents subject to the preexisting licenses, which he was obliged to treat in a manner consistent with § 365(n).'"¹⁵⁶ The court said this was not an extraterritorial application of U.S. law but a finding that the administrator must apply U.S. law in rejecting the U.S. patent licenses.¹⁵⁷

Although the Fourth Circuit may have been correct that U.S. law should apply to the U.S. patents, it is not at all clear why the ancillary Chapter 15 court should make that choice of law decision instead of the German court. The Model Law's presumption is that the foreign main proceeding would make choice of law decisions, which the ancillary courts would later have discretion whether or not to enforce that main court's order domestically. The role of the ancillary court then would be to determine whether to recognize the foreign court's order or not. Thus, in Qimonda's liquidation, the German court would apply German law to the licensing agreements and then seek to enforce that order through the United States Chapter 15 petition. At that point, the court would consider the local interests issues: would enforcing the order (a) balance the interests of the debtor and the creditors and/or (b) offend fundamental U.S. public policy?

Thus, while there are clearly local interests at play in *In re Qimonda*, there are also important interpretative questions here: Which court actually leads the worldwide administration of the multinational debtor's insolvency – the foreign main proceeding or the ancillary proceeding? This is a step that the bankruptcy

154. *Id.* at 21.

155. *Jaffe v. Samsung Electronics Co.*, 737 F.3d 14, 29 (4th Cir. 2013).

156. *Id.* at 25 n.3.

157. *Id.*

court initially undertook, albeit with little analysis, and that was later skipped altogether on appeal.

B. In re Barnet

This case arises from the Australian liquidation of the Octaviar Administration Pty Ltd (OA), in which Katherine Barnet and William Fletcher were appointed as liquidators. In seeking recognition, the liquidators averred that they “are not aware of any creditors of either OA or the Octaviar Group in the United States,”¹⁵⁸ but that Chapter 15 relief would facilitate the liquidators’ investigation into potential assets in the United States “in the form of claims or causes of action against entities located in the United States.”¹⁵⁹ One of the potential subjects of the liquidators’ discovery efforts was Drawbridge Special Opportunities Fund LP, from whose Australian affiliates the liquidators were seeking to recover AUD \$210,000,000.¹⁶⁰

Drawbridge objected to the recognition petition, arguing that OA was not eligible for bankruptcy relief in the United States, under Section 109(a).¹⁶¹ Section 109(a) limits bankruptcy eligibility to “only a person that resides or has a domicile, a place of business, or property in the United States.” Because OA admitted it had no known assets in the United States, and it clearly had no U.S. domicile or place of business, the Drawbridge defendants argued that it was ineligible for Chapter 15 relief.

The Bankruptcy Court overruled this objection, recognized the Australian proceeding as a foreign main proceeding, and certified the recognition order for direct appeal to the Second Circuit.¹⁶² While that appeal was pending, the Bankruptcy Court granted the liquidators’ discovery motion. The Second Circuit then granted the application for direct appeal and stayed the discovery.

The Second Circuit applied a “straightforward” exercise of statutory interpretation to determine whether Section 109(a) applies to a debtor in a Chapter 15 proceeding.¹⁶³ The court reasoned as follows: Chapter 1 of the Bankruptcy

158. Verified Petition under Chapter 15 for Recognition of a Foreign Main Proceeding at 12, *In re Octaviar Administration Pty Ltd (OA)*, No. 12-13443, (Bankr. S.D.N.Y. Aug. 13, 2012) (Doc. No. 2).

159. *Id.*

160. Petitioner’s Response to Objection of Drawbridge Special Opportunities Fund LP to Verified Petition Under Chapter 15 for Recognition of a Foreign Main Proceeding at 3, *In re Octaviar Administration Pty Ltd (OA)*, No. 12-13443, (Bankr. S.D.N.Y. Aug. 30, 2012) (Doc. No. 2).

161. Objection of Drawbridge Special Opportunities Fund LP to Alleged Foreign Representatives’ Verified Petition under Chapter 15 for Recognition of Foreign Main Proceeding, *In re Octaviar Administration Pty Ltd (OA)*, No. 12-13443, (Bankr. S.D.N.Y. Aug. 30, 2012) (Doc. No. 13).

162. Memorandum Opinion in Support of Certification of Direct Appeal to the Court of Appeals for the Second Circuit, *In re Octaviar Administration Pty Ltd (OA)*, No. 12-13443, (Bankr. S.D.N.Y. Nov. 28, 2012) (Doc. No. 47).

163. *Drawbridge Special Opportunities Fund LP v. Katherine Elizabeth Barnet (In re Katherine Elizabeth Barnet)*, 737 F.3d 238 (2d Cir. 2013). The court first worked through “an unusual jurisdictional thicket” before determining that Drawbridge had standing to appeal the recognition order. The court

Code (which includes Section 109(a)) applies to Chapter 15; Chapter 15 governs the recognition of foreign proceedings; foreign proceedings are defined as “proceedings in which ‘the assets and affairs of the debtor are subject to control or supervision by a foreign court;’” therefore, a foreign proceeding may be recognized under Chapter 15 only if the debtor that is the subject of the foreign proceeding meets the requirements of Section 109(a).¹⁶⁴

The court rejected the notion that the foreign representatives were not seeking recognition of a *debtor* but of a *foreign proceeding* “because the presence of a debtor is inextricably intertwined with the very nature of a Chapter 15 proceeding, both in terms of how such a proceeding is defined and in terms of the relief that can be granted.”¹⁶⁵ It also rejected the liquidators’ argument that Chapter 15’s chapter-specific definition of “debtor” overrides Section 109(a), as Section 109(a) deals with eligibility and not with the definition of “debtor.”¹⁶⁶ Finally, the court concluded that its interpretation was not inconsistent with the context or purpose of Chapter 15 and that it would not impair cooperation in cross-border insolvencies, as the liquidators could always obtain relief under 28 U.S.C. § 1782.¹⁶⁷

As to the outcome of *Barnet*, the case is unlikely to make a lasting impact on Chapter 15 or to mark a major departure from the Model Law. Although it imposes a requirement on foreign debtors that is out of line with the Model Law, it is a requirement that can easily be circumvented. Following the Second Circuit’s opinion, the Octaviar liquidators filed a second Chapter 15 petition in the New York bankruptcy court, this time asserting U.S. property in the form of U.S. legal claims and an undrawn retainer with local counsel.¹⁶⁸ The Drawbridge witnesses again objected, but the bankruptcy court held that this was sufficient U.S. property to satisfy Section 109(a)’s eligibility requirements.¹⁶⁹

As to the methodology, however, *Barnet* shows a misplaced adherence to the plain meaning approach, failing to appreciate what many lower courts had expressed before: Chapter 15 cases are different in nature in that the petitioner is not a debtor seeking relief; rather, it is a foreign representative seeking relief.¹⁷⁰ Prior to Chapter 15, courts had understood this to be true of ancillary petitions under Section 304 of the Bankruptcy Code. Nothing in Chapter 15, ac-

ultimately determined that Drawbridge had standing to appeal that order because the discovery order was appealable.

164. *Id.* at 247.

165. *Id.* at 248.

166. *Id.* at 249.

167. *Id.* at 251.

168. Chapter 15 Petition for Recognition of Foreign Proceeding, *In re Octaviar Administration* (OA) Ptd Ltd., No. 14-10438 (Bankr. S.D.N.Y. Feb. 27, 2014) (Doc. No. 1).

169. *In re Octaviar Admin. Ptd Ltd.*, 511 B.R. 361 (Bankr. S.D.N.Y. 2014).

170. *See In re Millennium Global Emerging Credit Master Fund Ltd.*, 471 B.R. 342, 347 (Bankr. S.D.N.Y. 2012).

ording to these bankruptcy courts, evinced any intention of altering this understanding: “There is no authority that the adoption of chapter 15 was intended to abrogate the availability of the tools of discovery to foreign representatives, whether or not the foreign debtor has assets in the United States.”¹⁷¹

This case illustrates the bankruptcy-court of appeal dynamic described above in Section II.A, as the bankruptcy court interpreted Chapter 15 in light of the purposes of the Model Law, while the court of appeal adhered to a strict textualist interpretation to reach a conclusion out of line with its modified universalist structure.¹⁷²

C. *In re Fairfield Sentry*

In re Fairfield Sentry raised a question of interpretation regarding the center of main interests standard. Questions about the COMI determination are centrally important to the functioning of the Model Law. They have attracted substantial scholarly focus and continue to do so, particularly as the UNITRAL Working Group V continues to work on guidelines for handling the especially complicated question of identifying the COMI of a corporate group.¹⁷³ *Fairfield* raised the specific question of whether the debtor’s center of main interests should be ascertained as of the time it filed its foreign proceeding or as of the time it filed its Chapter 15 petition. The focus of this analysis is more methodological, namely whether, and how, courts should use the Guide in engaging in this interpretation.

Fairfield Sentry was a major feeder fund of the Bernard Madoff’s notorious Ponzi scheme, investing up to 90 percent of their money into the Madoff Funds. Fairfield was incorporated in the British Virgin Islands (BVI) but all trading activity took place in New York City.¹⁷⁴ When the Madoff scheme imploded, Fairfield’s shareholders commenced a liquidation proceeding in the BVI and all operations in New York ceased. Roughly a year later, the BVI liquidators filed a Chapter 15 petition in the Bankruptcy Court for the Southern District of New York, seeking recognition of the BVI proceeding as a foreign main proceeding under Section 1517.

Section 1517 provides that “a foreign proceeding shall be recognized as a foreign main proceeding if it is pending in the country where the debtor has its

171. *In re Toft*, 453 B.R. 186, 193 (Bankr. S.D.N.Y. 2011).

172. See *supra* notes 113–16 and accompanying text.

173. See e.g., Jay Lawrence Westbrook, *Locating the Eye of the Financial Storm*, 32 BROOK. J. INT’L L. 1019, 1019 (2007); UNCITRAL Working Group V (Insolvency Law) Forty-fifth session, New York, 21–25 April 2014, Facilitating the cross-border insolvency of multinational enterprise groups, at ¶¶ 1–3, <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V14/008/48/PDF/V1400848.pdf?OpenElement>.

174. *Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.)*, 714 F.3d 127, 137 (2d Cir. 2013).

center of main interests.”¹⁷⁵ The recognition analysis turned on a question of timing: if the relevant time for determining Fairfield’s COMI was the date its BVI proceeding commenced, then the COMI was arguably the United States, since that is where its business was conducted; if the relevant time was the date of the liquidators’ Chapter 15 petition, then the COMI would be the BVI, since the debtor had by that time ceased all activities in the United States and its only activities were its liquidation proceedings.

The Second Circuit held that the relevant time was at the time of the Chapter 15 petition, thus concluding that Fairfield Sentry’s COMI was in the British Virgin Islands. The court reasoned that Section 1517’s use of the present tense demonstrates Congress’s intent that the court should examine the debtor’s COMI at the time of the Chapter 15 petition.¹⁷⁶ In its analysis, the court considered that center of main interests might be interpreted as “principal place of business,” in which case the court ought to look at where the debtor conducted its business. Pre-Chapter 15, the Bankruptcy Code had a similar cooperation-based standard that used the language of principal place of business.¹⁷⁷ Chapter 15 abandoned this language, instead adopting “center of main interests.” While the House Report is silent as to the intent of this change in language, some courts had interpreted this change to a “center of main interests” standard as reflecting both the intent to keep Chapter 15 consistent with the Model Law and the intent not to depart from Section 304’s principal place of business standard.¹⁷⁸ For example, in *In re Tricontinental* and *In re Millennium Global*, the courts quote the following language from Professor Westbrook, one of the drafters of the Model Law:

Chapter 15 was drafted to follow the Model Law as closely as possible, with the idea of encouraging other countries to do the same. One example is use of the phrase “center of main interests,” which could have been replaced by “principal place of business” as a phrase more familiar to American judges and lawyers. The drafters of Chapter 15 believed, however, that such a crucial jurisdictional test should be uniform around the world and hoped that its adoption by the United States would encourage other countries to use it as well.¹⁷⁹

175. 11 U.S.C. § 1517(b)(1) (2012).

176. *In re Fairfield Sentry Ltd.*, 714 F.3d at 133 (“The present tense suggests that a court should examine a debtor’s COMI at the time the Chapter 15 petition is filed. . . . It therefore matters that the inquiry under Section 1517 is whether a foreign proceeding ‘is pending in the country where the debtor has the center of its main interests.’”) (emphasis in original).

177. 11 U.S.C. § 101(23) (2012).

178. See, e.g., *In re Tri-Cont’l Exch. Ltd.*, 349 B.R. 627, 633 (Bankr. E.D. Cal. 2006); *In re Millennium Global Emerging Credit Master Fund Ltd.*, 458 B.R. 63, 72 (Bankr. S.D.N.Y. 2011); but see *In re Ran*, 607 F.3d 1017, 1025 (5th Cir. 2010), *In re British Am. Isle of Venice (BVI), Ltd.*, 441 B.R. 713, 720–21 (Bankr. S.D. Fla. 2010); *In re British Am. Ins. Co.*, 425 B.R. 884, 909–10 (Bankr. S.D. Fla. 2010); *In re Betcorp Ltd.*, 400 B.R. 266, 290–92 (Bankr. D. Nev. 2009).

179. *Id.* (quoting Jay Lawrence Westbrook, *Chapter 15 at Last*, 79 AM. BANKR. L.J. 713, 719–20 (2005)).

The *Fairfield* court rejected this line of reasoning, concluding instead that Congress, by replacing “principal place of business,” intended to “abandon[] that provision in enacting Chapter 15.”¹⁸⁰

Although the court found that this statutory text controls its interpretation, it proceeded to consider whether the Guide shed light on this timing issue.¹⁸¹ As the court found, the Guide explains that “[s]ince the formulation ‘centre of main interests’ in the EC Regulation corresponds to that of the Model Law, albeit for different purposes (see para. 141), jurisprudence interpreting the EC Regulation may also be relevant to interpretation of the Model Law.”¹⁸² The Guide then provides the relevant language from the EC Regulation: “The ‘centre of main interests’ should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.”¹⁸³ The court gleaned from these sources that the most important factors regarding the “centre of main interests” standard are regularity and predictability from a third party creditor’s point of view. That is, the most important feature is that the debtor’s center of main interests should correspond with creditors’ *ex ante* expectations.

Having examined these principles from the Guide, the court then concluded that: “Overall, international sources are of limited use in resolving whether U.S. courts should determine COMI at the time of the Chapter 15 petition or in some other way.”¹⁸⁴

The court’s analysis of the COMI timing issue reveals the same textualist approach that was displayed in *In re Barnet*. While *Barnet* is likely to have little impact on Chapter 15 practice and outcomes, *Fairfield Sentry* may be more significant, as it effectively allows a company to liquidate in its chosen forum. More significantly from a methodological point, however, is the court’s treatment of the Guide. The court interprets the Guide as if it were interpreting legislative history, i.e., something to examine only to the extent that the plain language of the statute is ambiguous.

Further, in interpreting the Guide, the court gives little or no weight to the drafters’ direction to consider the center of main interests standard in line with the way that the term is used in the EC Regulation. The principles derived from that source clearly indicate that the center of main interests should provide regularity and predictability to creditors. Predictability is important so that credi-

180. *In re Fairfield Sentry Ltd.*, 714 F.3d 127, 135 (2d Cir. 2013).

181. *Id.* at 136 (“Although the statutory text controls, first and ultimately, we consider international sources to the extent they help us carry out the congressional purpose of achieving international uniformity in cross-border insolvency proceedings.”).

182. GUIDE, *supra* note 1, at ¶ 82.

183. *Id.* at ¶ 83.

184. *In re Fairfield Sentry Ltd.*, 714 F.3d at 137.

tors can anticipate the governing law and adjust their behavior accordingly. This purpose clearly requires examining the creditors' expectations as of the moment of lending, not at the moment an insolvency proceeding is commenced. The court's treatment of the Guide not only reflects a misunderstanding of its role in the Model Law schema but also a failure to engage in its content.

V. THE CHALLENGES OF LOCAL METHODS

As explored above and examined in these case studies, the problem of local methods poses a significant obstacle to the Model Law's goals of uniformity and predictability. Methodological problems may exacerbate the problem of local interests (as in *Qimonda*) or they may arise even when local interests are absent altogether (as in *Barnet*).

Methodological problems may exacerbate the problem of local interests by introducing another layer of complexity in the modified universalist process. As illustrated in *Qimonda*, uncertainty about the proper role of an ancillary court may complicate modified universalism: Should the ancillary court await rulings from the home proceeding (as the bankruptcy court initially would have done) or more actively protect local interests by requiring that U.S. law apply to the U.S.-based assets?

Methodological problems may also complicate the Rough Wash and Secondary Rough Wash theories. Those theories posit that modified universalism's efficiency gains would ease concerns about local interests – both “greed” and “pride.”¹⁸⁵ That is, courts and policymakers will grow more tolerant of outcome differences between local and foreign laws as they grow familiar with the Model Law and its potential to increase recoveries for creditors in the long run. While bankruptcy courts may have sufficient exposure to Chapter 15 cases and be willing to exercise discretion to tolerate outcome differences, courts hearing these issues on appeal are less likely to be familiar and, perhaps, less likely to defer to bankruptcy courts' discretion. That is, the methodological approach to interpreting Chapter 15 may be directed more by courts with less experience in this matter and less inclination for a purposive and flexible interpretation of the law.¹⁸⁶

Even when local interests are absent, methodological problems may still frustrate the Model Law's goals and policies. Interpretative and case management problems may arise from U.S. courts applying a domestic-oriented meth-

185. See *supra* notes 82–83 and accompanying text.

186. This is a problem that may be further exacerbated by longstanding tensions between the Article I bankruptcy courts and the Article III courts on appeal. See, e.g., Haines, *supra* note 118, at 513 (examining the formalist approach courts have used since *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) to narrow the jurisdiction of bankruptcy courts).

odology to Chapter 15, despite that chapter's international origins and purposes. Thus, as in *Barnet*, a court may defect from the Model Law by failing to recognize that a Chapter 15 case is fundamentally different than one under other chapters of the Bankruptcy Code.

In some ways, the cross-border insolvency "system" – i.e., UNCITRAL working groups, courts, parties – may be able to manage the consequences of these methodological problems; however, treating the causes of these problems is more difficult. For example, UNCITRAL may respond to "bad" interpretations of the Model Law by amending the language in the Guide, as it did following *Fairfield Sentry*, in which Working Group V added language to the Guide that contradicted the Second Circuit's holding.¹⁸⁷ While this may persuade some courts to reject the *Fairfield Sentry* approach, it does not address the problem of interpretative methodology that produced that result. Likewise, following *Barnet*, foreign representatives may respond to rigid interpretations of Section 109, as the administrators in *Barnet* in fact did; however, this does likewise does not address the underlying methodological problems.

Courts may, of course, adjust their methodologies as they become more aware of these problems and more familiar with the Model Law. There is evidence that courts have done so in the context of Chapter 11, as the contrast of the LoPucki and Morrison studies can be understood as showing that the bankruptcy system – courts, trustee, parties – adjusted to solve the problem of the "debtor in full control."¹⁸⁸ Potentially, with more time and exposure to Chapter 15, the bankruptcy system might likewise adjust case management and administration issues to the particular needs of Chapter 15.

At the same time though, the development of court expertise and familiarity may be threatened by the dynamic between bankruptcy courts and appellate courts, as illustrated in the case studies. These appellate decisions – particularly when heard on direct appeal to the Courts of Appeal – may cut short this learning curve. Early appellate decisions may limit the ability of courts to "play" with the new Model Law and adjust to its structure.¹⁸⁹ While this preemptive effect is most direct as to bankruptcy courts within the appellate court's jurisdiction, the effect may be much broader due to the Model Law's rule of interpretation requiring courts to look to decisions from other jurisdictions.

This places increased importance on the role of the Guide and other secondary sources in leading the familiarization process. The Guide has the poten-

187. 2013 Revised Guide at ¶¶ 157–59, available at <http://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf>.

188. See *supra* notes 127–30 and accompanying text.

189. Lawrence Ponoroff, *The Dubious Role of Precedent in the Quest for First Principles in the Reform of the Bankruptcy Code: Some Lessons from the Civil Law and Realist Traditions*, 74 AM. BANKR. L.J. 173, 181 (2000) (making this point regarding bankruptcy law generally, arguing that too many reported appellate decisions concerning the Bankruptcy Code "has hampered pragmatic and considered decisionmaking in the bankruptcy courts").

tial to educate not only policymakers but also courts, highlighting case management issues and interpretative approaches.¹⁹⁰ The Guide's power to effect change in this way, of course, is limited. As illustrated in *Fairfield Sentry*, courts may discount the Guide, treating it as a legislative history. And if the language of the Model Law itself is unable to push courts towards a more purposive jurisprudential methodology, then there is certainly reason to doubt the effectiveness of the Guide in doing so.

Nonetheless, the Guide may serve a useful function as courts continue to adjust to the Model Law. Even though Congress adopted the Model Law nearly ten years ago, filings under Chapter 15 remain relatively infrequent, and the majority of these cases raise few issues. Thus, U.S. bankruptcy courts remain largely unfamiliar with Chapter 15, and federal district court and courts of appeals judges less familiar still. The Guide, along with such important contributions as Judge Adler's work,¹⁹¹ may assist courts' familiarization process with the Model Law.¹⁹² While this would not effect immediate changes – for example, it would not overturn *Fairfield Sentry* – it might gradually guide courts to appreciate the distinct nature of Chapter 15 as part of the international solution to cross-border insolvency.¹⁹³

VI. CONCLUSION

Maintaining uniformity in cross-border insolvency law requires, in part, an understanding of how courts are likely to defect from the law's language and purpose. While most of the commentary about defections from the Model Law field has focused on the territorialist instinct to protect local interests, the cases discussed in this article suggest that courts may defect even when local interests are not at stake. Interpretative differences between the domestic bankruptcy law and the Model Law may lead some courts to depart from the Model Law. Further, courts may diverge from the Model Law due to their style of case management.

190. One possibility, consistent with Westbrook's *Interpretation Internationale*, *supra* note 94, is to highlight the overarching insolvency system and the need to interpret the Model Law to advance the goals of that system.

191. Frisch, *supra* note 101.

192. There is some support for the Guide's role in the familiarization process, as the Official Comments to the Uniform Commercial Code have played a key role in courts' adjustment to that major legislative effort. See Robert Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798, 808–09 (1958) (describing the uncertainty about the use of the comments); David Frisch, *Commercial Common Law, the United Nations Convention on the International Sale of Goods, and the Inertia of Habit*, 74 TUL. L. REV. 495, 529 (1999) (describing the interpretative problems in the well-known case of *Roto-Lith, Ltd. v. F.P. Bartlett & Co.*, 297 F.2d 497 (1st Cir. 1962), how the courts adjusted to the new Uniform Commercial Code, and how the drafters changed the relevant Official Comments, all leading to the First Circuit's reversal of *Roto-Lith* in *Ionics, Inc. v. Elmwood Sensors, Inc.*, 100 F.3d 184 (1st Cir. 1997)); see also Robert H. Skilton, *Some Comments on the Comments to the Uniform Commercial Code*, 1966 WIS. L. REV. 597 (1966).

193. See Westbrook, *Interpretation Internationale*, *supra* note 94.

Since cross-border insolvency proceedings are still relatively novel, courts are more likely to view them, at least initially, through the same interpretative lens as applied to traditional bankruptcy cases. Courts are also likely to manage cross-border cases in the same way they manage traditional cases.

While the cross-border insolvency system may resolve the consequences of these methodological problems fairly quickly, the system will likely take more time to address the actual problems themselves. As courts become more familiar with the Model Law, they may adjust their interpretative and managerial approaches to further the goals of the Model Law. But, due in part to the relative infrequency of such cases and to appellate decisions that may stymy growth and flexibility, the Guide may likely play a greater role in this familiarization process. By articulating clearly the policies and goals of the Model Law and by suggesting methodological approaches consistent with those aims, the Guide may help assist courts to manage cross-border cases more consistently. Continued examination into case management and interpretative methodologies may present further insights into how the Guide may evolve in order to continue addressing these issues.