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THE MODEL INTERNATIONAL INSOLVENCY COOPERATION ACT: AN INTERNATIONAL PROPOSAL FOR DOMESTIC LEGISLATION

Elizabeth K. Somers*

INTRODUCTION

Bankruptcy has been a neglected area of the law in the United States and other countries.¹ The need to further develop international bankruptcy law has become more urgent as the volume of international business increases.² Today, when a multinational company files for bankruptcy, it may have to adhere to the conflicting insolvency laws of numerous countries.³ Such a conflict of laws may have an adverse impact on the liquidation or reorganization of a company.⁴ More important, inconsistencies in international insolvencies create uncertainty and instability in international transactions.⁵ The difficulties resulting from cross-border insolvencies cause problems for consumers, investors and governments,⁶ and have spurred lawyers, accountants, and administrators to encourage increased cross-border cooperation.⁷

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1. See Morales and Deutsh, *Bankruptcy Code Section 304 and United States Recognition of Foreign Insolvencies: The Tyranny of Comity*, 39 BUS. LAW. 1573, 1574 (1984) (arguing that the only common principle linking United States bankruptcy decisions is the doctrine of comity of nations). For purposes of this Comment, the term "bankruptcy" will refer to bankruptcy, insolvency, liquidation, and reorganization.

2. See Mears, *Cross-Border Insolvencies in the 21st Century: A Proposal for International Cooperation*, 1 INT'L INSOL. R. 23, 24-25 (1991) (explaining that as international business increases, so must the need for international insolvency provisions).

3. *Id.* The conflicting laws prevent the equitable distribution of assets in one proceeding. *Id.* at 25.

4. *Id.* Ms. Mears claims that such conflicting laws may lead to "economic and legal chaos for creditors, debtors, and such innocent third parties as consumers, investors and governments." *Id.* For a demonstration of the extent to which bankruptcy laws of various countries conflict, see INTERNATIONAL LOAN WORKOUTS AND BANKRUPTCIES (Gitlin and Mears eds. 1989) [hereinafter INTERNATIONAL LOAN WORKOUTS AND BANKRUPTCIES] (detailing current bankruptcy law in Argentina, Brazil, Canada, Egypt, England, France, Germany, Israel, Italy, Japan, Mexico, the Netherlands, Switzerland, the United States, and Venezuela).

5. Mears, *supra* note 2, at 25. In particular, uncertainty and lack of predictability adversely affect global lending transactions. *Id.*

6. *Id.*

7. *Id.* Ms. Mears argues that lawyers, accountants, and administrators have taken the lead in fostering international cooperation because of the failure of multinationals, lenders, and governments to advocate international insolvency cooperation. *Id.*

Recognizing the complicated problems associated with multinational bankruptcies, Committee J of the International Bar Association formed a group to analyze the present state of international insolvency cooperation.⁸ The Model International Insolvency Cooperation Act (MIICA),⁹ created and drafted by members of Committee J, is a proposal for domestic legislation for adoption by individual countries.¹⁰ While some legislators, scholars, and bankruptcy practitioners advocate alternate methods for international insolvency cooperation,¹¹ MIICA offers the most realistic solution for the immediate future.

Part I of this Comment discusses the problems the United States and other countries face in international bankruptcy law. Part II explains MIICA's development and how MIICA proposes to solve modern problems. Part III surveys how the United States and other major industrialized nations must modify existing bankruptcy laws. Part IV analyzes alternate proposals for international cooperation in light of the MIICA draft. Part V recommends strategies for MIICA's enactment worldwide, with specific focus on domestic legislation in the United States. Finally, Part VI explains why MIICA presents the best alternative for the achievement of international consistency in cross-border insolvencies.

8. *Id.* at 28. Subcommittee J is called the Subcommittee on International Cooperation and is presently headed by Timothy E Powers. *Id.* at 29. Ms. Mears is a member of the Subcommittee on International Cooperation and has significantly contributed to the drafting and revision of MIICA. *Id.*

9. COMM. J, SEC. ON BUS. L., INT'L BAR ASS'N, MODEL INTERNATIONAL INSOLVENCY COOPERATION ACT (Third Draft, Nov. 1, 1988) reprinted in Barrett and Powers, *Proposal for Consultative Draft of Model International Insolvency Cooperation Act for Adoption by Domestic Legislation With or Without Modification*, INT'L BUS. LAW. 323-27 (July-August 1989) [hereinafter MIICA].

10. Mears, *supra* note 2, at 27-28. The proposal strives to provide a reciprocal and unified method for handling cross-border insolvencies. *Id.*

11. See, e.g., Draft, Convention on Bankruptcy, Winding-Up, Arrangements, Compositions and Similar Proceedings, 1980, reprinted in 2 Common Mkt. Rep. (CCH) ¶ 6111 (1981) [hereinafter EEC Draft Convention] (proposing a draft treaty for the European Economic Community); Draft of United States of America-Canada Bankruptcy Treaty, October 29, 1979 [hereinafter United States-Canada Draft Treaty], reprinted in J. DALHUISEN, 2 DALHUISEN ON INTERNATIONAL INSOLVENCY AND BANKRUPTCY (1981) (advocating United States-Canadian cooperation in cross-border insolvencies); Scandinavian Convention, November 7, 1933, 155 L.N.T.S. 136 (memorializing an agreement of Denmark, Finland, Iceland, Norway, and Sweden); Bustamante Code of Private International Law, February 2, 1928, 86 L.N.T.S. 362 (including a chapter on bankruptcy signed by fifteen Latin American countries).

I. CURRENT UNITED STATES BANKRUPTCY LAW

A. GENERAL PRINCIPLES

Currently, the Bankruptcy Reform Act of 1978 (the "Bankruptcy Code") governs United States bankruptcy law.¹² A debtor usually obtains bankruptcy relief either through Chapter 7,¹³ Chapter 11,¹⁴ or Chapter 13¹⁵ of the United States Bankruptcy Code. The Bankruptcy Code provides for the appointment of a bankruptcy trustee in all Chapter 7¹⁶ and Chapter 13¹⁷ cases, and in some Chapter 11 cases as well.¹⁸ Either an individual or a corporation¹⁹ can act as a bankruptcy trustee, functioning as the representative of the debtor's estate with the ability to sue and be sued.²⁰

Upon the filing of a bankruptcy petition, United States law orders the payment preferences and priorities to creditors to achieve the equitable distribution of the debtor's estate.²¹ This standard hierarchy may be altered subsequently by the adjudicating court.²² The different priority levels are established according to the types of claims asserted by creditors.²³ The general classes of claims include secured claims, priority unsecured claims, nonpriority unsecured claims, and equity interests.²⁴ The claims are disbursed according to the class to which they

12. 11 U.S.C. §§ 101-105 (1988). The Bankruptcy Reform Act governs almost all bankruptcy cases because it applies to cases filed after October 1, 1979. *Id.*

13. *Id.* §§ 701-766 (1988) (entitled Liquidation). In Chapter 7 cases, the debtor gives all non-exempt property owned at the time of the filing of the bankruptcy petition to the bankruptcy trustee hoping to receive a discharge from any personal liability. *See Id.* § 704 (describing the duties of the bankruptcy trustee).

14. *Id.* §§ 1101-74 (1988) (entitled Reorganization). Chapter 11 deals with the rehabilitation of the debtor's assets. *Id.* Although Chapter 11 relief is available to all debtors, any reorganization scheme must follow certain guidelines. *Id.* § 1123.

15. *Id.* §§ 1301-30 (1988) (entitled Adjustment of Debts of an Individual With Regular Income). Chapter 13, like Chapter 11, offers relief in the form of reorganization, but requires that the debtor be an individual with a regular income. *Id.*

16. *Id.* §§ 701-704 (1988).

17. *Id.* § 1302 (1988). Chapter 13 provides for appointment of a trustee if the court so orders. *Id.*

18. *Id.* § 1104.

19. *Id.* § 321.

20. *Id.* § 323.

21. Melnick, International Bar Association Committee on International Creditors' Rights, Insolvency, Liquidation and Reorganization (Committee J), Priorities and Preferences Under United States Bankruptcy Law, 1 (Oct. 1989) (on file at the offices of The American University Journal of International Law & Policy); REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 137, 93d Cong., 1st Sess. 213 (1983).

22. Melnick, *supra* note 21.

23. *Id.* at 2.

24. *Id.* A creditor holds a secured claim when he or she has a valid security interest in property of the debtor's estate or when he or she has a right to set off prepetition

belong.²⁵ Classification of the claim dictates treatment of the creditor and often changes in the course of the bankruptcy proceedings. As a result, creditors must assert their rightful and most beneficial place in line at the commencement of the bankruptcy proceeding and must remain attentive throughout the proceeding to retain that status.²⁶

B. FULL PROCEEDINGS

In asserting jurisdiction over a bankruptcy proceeding, a court examines the debtor's domicile, principal place of business, or the presence of property within the jurisdiction.²⁷ A bankruptcy proceeding commences through the filing of either a voluntary or involuntary petition.²⁸ A person domiciled in the United States, a person whose principal place of business is in the United States, or a person who owns property in the United States may file a voluntary petition.²⁹ It is possi-

claims (derived from common law, statute, or contract) against mutual prepetition debts owed to the debtor. *Id.* at 3.

Priority unsecured claims, in descending order, include: administration claims; gap creditor claims; employee and wage claims; fisherman and grain producer claims; consumer claims; and tax, duty, and penalty claims. *Id.* at 6-12. Nonpriority unsecured claims which are timely filed are entitled to proceeds from the estate after senior creditors are paid. *Id.* at 13.

Equity interests are subordinate to all classes of claims and may receive little or nothing in a liquidation. *Id.* at 30. Holders of equity interests thus have the most to gain from the reorganization rather than liquidation of the insolvent estate. *Id.*

25. *Id.*

26. *Id.* at 31.

27. Unger, *United States Recognition of Foreign Bankruptcies*, 19 INT'L LAW. 1153, 1153-54 (1985) (citing J. DALHUISEN, DALHUISEN ON INTERNATIONAL INSOLVENCY AND BANKRUPTCY, §§ 2.04 [1] and [2], at 3-229 (1981)). If jurisdiction is based on the presence of property, the *in rem* proceeding can only affect the property located in that jurisdiction. *Id.* at 1154. This rule respects the principle that adjudication in one country may not affect property in another country. Honsberger, *Conflict of Laws and the Bankruptcy Reform Act of 1978*, 30 CASE W. RES. L. REV. 631, 639 (1980).

28. See generally The United States Working Group, Committee J, International Bar Association, Amendments to United States Bankruptcy Law Required to Incorporate the Model International Insolvency Act (MIICA) Approved by the International Bar Association and Strategies for Achieving Enactment, 1 (Oct. 4, 1989) (on file at the offices of The American University Journal of International Law and Policy) [hereinafter U.S. Working Group] (describing present United States bankruptcy law).

29. 11 U.S.C. §§ 109(a) and 301 (1988). Section 109(a) provides:

Notwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title.

Id. § 109(a). Section 301 provides:

A voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter. The commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter.

Id. § 301.

ble to file an involuntary petition against a domestic or foreign entity if that entity qualifies as a debtor under the Bankruptcy Code.³⁰ The Bankruptcy Code also allows the foreign representative of an estate in a foreign proceeding to file an involuntary petition against a person.³¹ The filing of either a voluntary or involuntary petition in the United States imposes restrictions on and grants rights to a foreign debtor or creditor.³²

C. ANCILLARY PROCEEDINGS

United States bankruptcy law also provides for the filing of suits auxiliary to the principal proceeding³³ and the opportunity for a foreign representative to make a limited appearance in a United States court.³⁴

30. *Id.* § 303. To qualify as a debtor, a foreign entity must meet the requirements of section 109(a). *Id.* Section 303(a) of Title 11 provides:

An involuntary case may be commenced only under chapter 7 or 11 of this title, and only against a person, except a farmer, family farmer, or a corporation that is not a moneyed, business, or commercial corporation, that may be a debtor under the chapter under which such case is commenced.

Id.

31. *Id.* § 303(b)(4). This section provides:

An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title—by a foreign representative of the estate in a foreign proceeding concerning such person.

Id.

32. U.S. Working Group, *supra* note 28, at 5. Asserting jurisdiction over the bankruptcy proceeding empowers a court to strive for deference to foreign proceedings and foreign law while preserving basic United States bankruptcy principles. *Id.*

33. 11 U.S.C. § 304 (1988). Section 304(b) states that in granting ancillary relief, a court may:

(1) enjoin the commencement or continuation of—

(A) any action against—

(i) a debtor with respect to property involved in such foreign proceeding; or

(ii) such property; or

(B) the enforcement of any judgment against the debtor with respect to such property, or any act or the commencement or continuation or any judicial proceeding to create or enforce a lien against the property of such estate;

(2) order turnover of the property of such estate, or the proceeds of such property, to such foreign representative; or

(3) order other appropriate relief.

Id. § 304(b).

An ancillary proceeding does not commence a full bankruptcy case, but may be used “to administer assets located in this country, to prevent dismemberment by local creditors of assets located here, or for other appropriate relief.” H.R. REP. NO. 595, 95th Cong., 1st Sess. 324-25 (1977) [hereinafter HOUSE REPORT]; S. REP. NO. 989, 95th Cong., 2d Sess. 35 (1978) [hereinafter SENATE REPORT].

34. 11 U.S.C. § 306 (1988). This provision permits a foreign representative to appear in a United States court without being subjected to the jurisdiction of any court in the United States. The purpose is to prevent local creditors from obtaining an unfair

The Bankruptcy Code offers ancillary relief based upon the discretion of the presiding judge.³⁵ In determining what relief to grant a party commencing a case ancillary to a foreign bankruptcy proceeding, the court must consider:

- (1) just treatment of all holders of claims against or interests in such estate; (2) protection of claimholders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding; (3) prevention of preferential or fraudulent dispositions of property of such estate; (4) distribution of proceeds of such estate substantially in accordance with the order prescribed by [the Bankruptcy Code]; (5) comity;³⁶ and (6) if appropriate, the availability of a fresh start for the individual that such foreign proceeding concerns.³⁷

This provision of the Bankruptcy Code strives to defer to foreign proceedings and further the general bankruptcy goal of equitable adjudication of the debtor's assets.³⁸

advantage over the foreign representative. HOUSE REPORT, *supra* note 33, at 325-26; SENATE REPORT, *supra* note 33, at 36. The bankruptcy court may, however, condition relief to the foreign representative on compliance with the orders of the bankruptcy court. U.S. Working Group, *supra* note 28, at 4.

35. HOUSE REPORT, *supra* note 33, at 324-25; SENATE REPORT, *supra* note 33, at 35. See also U.S. Working Group, *supra* note 28, at 4 (stating that an ancillary proceeding is not a full bankruptcy case and so does not create rights to property within the United States).

36. 11 U.S.C. § 304(c) (1988). See *Hilton v. Guyot*, 159 U.S. 113, 164 (1895) (noting that comity has been defined as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of the laws."); see also *Clarkson v. Shaheen*, 544 F.2d 624, 629 (2d Cir. 1976) (asserting that New York courts construe the doctrine of comity especially narrowly when a foreign jurisdiction also applies common law similar to United States law); *Drexel Burnham Lambert Group, Inc. v. A.W. Galardi and A.W. Galardi Commodities*, 610 F. Supp. 114, 119 (S.D.N.Y. 1985) (holding that international comity dictated recognition of Dubai bankruptcy proceedings because they were consistent with American principles); Leonard, Carfagnini and McLaren, *Can There Be International Co-operation in Foreign Bankruptcies? A Canadian Examination of Some Alternative Models*, 3 REV. INT'L BUS. L. 23, 28 (1989) (explaining that despite the absence of international agreements in insolvency proceedings, comity serves as a basis for recognizing foreign bankruptcy proceedings).

37. 11 U.S.C. § 304(c) (1988). These guidelines are designed to give the courts maximum flexibility in handling ancillary cases. HOUSE REPORT, *supra* note 33, at 324-25; SENATE REPORT, *supra* note 33, at 35. Principles of international comity and respect for the judgments and laws of other nations suggest that courts should issue orders that consider all of the circumstances of each case rather than respect inflexible rules. HOUSE REPORT, *supra* note 33, at 324-25; SENATE REPORT, *supra* note 33, at 35.

38. U.S. Working Group, *supra* note 28, at 5.

D. EVALUATION OF CURRENT UNITED STATES BANKRUPTCY LAW

Commentators have both widely acclaimed and criticized United States treatment of foreign proceedings.³⁹ On one hand, the Bankruptcy Reform Act of 1978⁴⁰ mandates greater recognition of foreign proceedings when those foreign proceedings facilitate the administration of the debtor's estate.⁴¹ The Bankruptcy Reform Act initiated increased international cooperation in the bankruptcy realm, resulting in increased stability in international markets.⁴² On the other hand, American and foreign bankruptcy practitioners have criticized the Bankruptcy Code for its failure to address the issue of which substantive law to apply when determining whether to grant ancillary relief.⁴³ Additionally, the Bankruptcy Code formally binds only bankruptcy courts and has no authority over non-bankruptcy courts, many of which routinely face decisions involving the recognition of foreign insolvency proceedings.⁴⁴

Other questions raised under the Bankruptcy Code involve whether a foreign debtor ineligible for relief under section 109(b)⁴⁵ may be the subject of a section 304 proceeding; whether a foreign debtor must

39. See, e.g., Morales and Deutsch, *supra* note 1, at 1573-74 (arguing that Congress, by enacting section 304 of the Bankruptcy Code, provided a forum and standards for resolution of international commercial disputes); Unger, *supra* note 27, at 1153 (describing the Bankruptcy Code of 1978 as reflective of a more generous attitude toward claims of foreign creditors); Gitlin and Flaschen, *The International Void in the Law of Multinational Bankruptcies*, 42 BUS. LAW. 307, 317-18 (1987) (detailing the flaws of section 304 of the Bankruptcy Code).

40. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended in scattered sections of 11 U.S.C. and 28 U.S.C.).

41. Unger, *supra* note 27, at 1155-56.

42. *Id.* at 1183.

43. U.S. Working Group, *supra* note 28, at 5.

44. See Unger, *supra* note 27, at 1178 (claiming that although non-bankruptcy courts have applied the doctrine of comity more leniently, they still are not bound by the Bankruptcy Code).

45. Gitlin and Flaschen, *supra* note 39, at 317-18. Section 109(b) of the United States Bankruptcy Code provides:

(b) A person may be a debtor under chapter 7 of this title only if such person is not-

(1) a railroad;

(2) a domestic insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, credit union, or industrial bank or similar institution which is an insured bank as defined in section 3(h) of the Federal Deposit Insurance Act; or

(3) a foreign insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, or credit union, engaged in such business in the United States.

11 U.S.C. § 109(b) (1988).

have assets in the United States to qualify for section 304 relief;⁴⁶ whether a foreign representative in a section 304 case can utilize the avoidance powers provided in the Code;⁴⁷ whether domestic assets should first be used to satisfy domestic claims;⁴⁸ and how to achieve uniformity in the courts' treatment of attachment liens secured by domestic creditors prior to commencement of United States proceedings.⁴⁹ Some courts have interpreted section 304(c) of the Code as a set of prerequisites for granting relief, rather than as a flexible standard.⁵⁰ Critics oppose using section 304(c) as a rigid standard because this favors United States creditors over foreign creditors.⁵¹

United States case law concerning multinational bankruptcies reflects these problems. Prior to the enactment of the Bankruptcy Reform Act of 1978,⁵² courts often issued inconsistent decisions that were hostile to foreign representatives.⁵³ An incident commonly called the "Her-

46. Gitlin and Flaschen, *supra* note 39, at 317-18. Although section 304 does not specifically address the question, the court in *Metzeler v. Bouchard Transp. Co.*, 78 Bankr. 674 (S.D.N.Y. 1987), granted section 304 relief to recover United States property when the United States was not the foreign debtor's domicile, place of business, or the location of the debtor's tangible property. *Id.*

47. Gitlin and Flaschen, *supra* note 39, at 317-18. Section 926 of Title 11 provides for the appointment of a trustee to pursue an action under an avoiding power. 11 U.S.C. § 926 (1988). The Senate Report explains section 926 as follows:

This section is necessary because a municipality might, by reason of political pressure or desire for future good relations with a particular creditor or class of creditors, make payments to such creditors in the days preceding the petition to the detriment of all other creditors.

SENATE REPORT, *supra* note 33, at 111.

48. Gitlin and Flaschen, *supra* note 39, at 317-18.

49. *Id.*

50. Leonard, Carfagnini and McLaren, *supra* note 36, at 29. See 11 U.S.C. § 304(c)(4) (1988) (stating that the distribution of proceeds be "substantially in accord" with United States Bankruptcy law).

51. Leonard, Carfagnini and McLaren, *supra* note 36, at 31.

52. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended in scattered sections of 11 U.S.C. and 28 U.S.C.).

53. In *Harrison v. Sterry*, 9 U.S. (5 Cranch) 289 (1809), the Supreme Court held that the assets held in the United States by a joint American-British partnership would be adjudicated according to United States laws. *Id.* at 302. The Court based its decision on the premise that "the bankrupt[cy] law of a foreign country is incapable of operating a legal transfer of property in the United States." *Id.* The Supreme Court, in *Hilton v. Guyot*, 159 U.S. 113 (1895), held that a French judgment would not be enforced in the United States because of the "want of reciprocity, on the part of France, as to the effect to be given to the judgments of this and other foreign countries." *Id.* at 210. *But see* *Disconto Gesellschaft v. Umbreit*, 208 U.S. 570 (1908) (ruling that a German judgment should be recognized provided that local citizens' interests and public policy concerns are retained without compromise); *Canada S. R.R. v. Gebhard*, 109 U.S. 527 (1883) (holding that reorganization schemes in other countries should be recognized because of the doctrine of international comity).

statt Affair"⁵⁴ vividly illustrates the inability of United States bankruptcy courts to efficiently and predictably manage international insolvencies.

When a German company that used Chase Manhattan Bank as a clearinghouse declared bankruptcy in Germany, Chase immediately froze the company's United States assets.⁵⁵ A race to file proceedings in courts of various countries ensued.⁵⁶ Unsure of its rights with regard to the German bankruptcy, Chase filed an interpleader action in New York.⁵⁷ The Cologne liquidator of the estate never appeared in a United States court for fear of subjecting himself to the full jurisdiction of the United States court system.⁵⁸ Unsure of the outcome of a potentially lengthy adjudication, the parties agreed to reach an out of court settlement.⁵⁹ The parties' preference for settlement over court adjudication illustrates the failure of international law to manage complicated multinational bankruptcy cases.⁶⁰

After the enactment of the Bankruptcy Reform Act of 1978,⁶¹ court decisions became less hostile to foreign proceedings.⁶² The main advantage to increased United States cooperation with ongoing proceedings in a foreign court is that it encourages the reciprocal cooperation of those countries in future cases.⁶³ United States enactment of section 304 of the Bankruptcy Code demonstrates this cooperative effort.⁶⁴ The case of *Drexel Burnham Lambert Group, Inc. v. A.W. Galardi & A.W. Galardi Commodities* further demonstrates the trend toward greater

54. See Nadelmann, *Rehabilitating International Bankruptcy Law: Lessons Taught By Herstatt and Company*, 52 N.Y.U.L. REV. 1 (1977) (discussing the "Herstatt Affair"); Becker, *International Insolvency: The Case of Herstatt*, 62 A.B.A.J. 1290 (1976) (describing the "Herstatt Affair" in detail).

55. Unger, *supra* note 27, at 1164-65.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended in scattered sections of 11 U.S.C. and 28 U.S.C.); see Nadelmann, *A Reflection on Bankruptcy Jurisdiction: News From the European Common Market, the United States and Canada*, 27 MCGILL L.J. 541, 544-48 (1982) (discussing the development of the Bankruptcy Reform Act of 1978).

62. Powers and Mears, *Protecting a U.S. Debtor's Assets in International Bankruptcy: A Survey and Proposal For Reciprocity*, 10 N.C.J. INT'L L. & COMM. REG. 303, 344-45 (1985).

63. Gitlin and Flaschen, *supra* note 39, at 323.

64. *Id.* The authors claim that despite the problems posed by section 304, it demonstrates an American desire to aid foreign nations in administering their bankruptcies. *Id.*

recognition of foreign bankruptcy proceedings.⁶⁵ In *Drexel*, a United States district court deferred to proceedings in Dubai on the basis that, although different from United States law, Dubai bankruptcy law was not inconsistent with United States principles and therefore should be recognized.⁶⁶ The *Drexel* result is particularly significant because it reflects a new willingness on the part of United States courts to recognize even those foreign proceedings unfavorable to United States creditors.⁶⁷

E. THEORETICAL UNDERPINNINGS OF UNITED STATES BANKRUPTCY LAW

American inconsistency in dealing with foreign insolvencies results from the absence of a clear policy regarding international cooperation. While increased United States recognition of foreign proceedings promotes reciprocity by other nations, enhances efficient use of resources, and avoids multiplicity, non-recognition protects local creditors, avoids inconvenience to United States claimholders and prevents application of unfair foreign standards.⁶⁸ Advocates of the "universality theory"

65. *Drexel Burnham Lambert Group, Inc. v. A.W. Galadari*, 610 F. Supp. 114 (S.D.N.Y. 1985). See *Kenner Prods. v. Société Foncière et Financière Agache-Willot*, 532 F. Supp. 478 (S.D.N.Y. 1982) (granting a motion to transfer the case to the court's suspense docket pending termination of bankruptcy proceedings in France); *Cunard Steamship Co. v. Salen Reefer Servs.* 49 Bankr. 614 (S.D.N.Y.), *aff'd*, 773 F.2d 452 (2d Cir. 1985) (deferring to a foreign proceeding when no American interest was implicated in the dispute); *In re Culmer*, 25 Bankr. 621 (S.D.N.Y. 1982) (granting transfer of assets to a district within the Bahamas for foreign adjudication of interests of American creditors); *In re Lineas Aereas de Nicaragua, S.A.*, 10 Bankr. 790 (S.D. Fla. 1981) (releasing United States held assets of a Nicaraguan airline to a Nicaraguan bankruptcy proceeding subject to the condition that claims of United States creditors be satisfied first). But see *International Corp. v. Karlander Kangaroo Line, Pty. Ltd.*, 102 Bankr. 373 (D.N.J. 1988) (denying a foreign representative's petition for ancillary relief under section 304 on the basis that the laws and public policy of the United States would be violated if the United States court deferred to Australian bankruptcy law); *In re Toga Mfg.*, 28 Bankr. 165 (E.D. Mich. 1983) (denying relief to a Canadian trustee because the Canadian Bankruptcy Act provides for a different order of priority than does the United States).

66. *Drexel*, 610 F. Supp. at 119. In *Drexel*, an American plaintiff argued that he should be able to seek relief in the United States court system because he would not be granted full relief under Dubai law. *Id.* at 116. The court held that unless the Dubai proceedings were fraudulent or fundamentally unfair, they were entitled to deference from American courts. *Id.*

67. Unger, *supra* note 27, at 1183. Furthermore, *Drexel* marked the first time a United States court granted relief to a foreign trustee from a non-sister common law jurisdiction. *Id.* Accord *The Clarkson Co. ex rel. Newfoundland Refining Co. v. Shaheen*, 544 F.2d 624 (2d Cir. 1976) (concluding that a Canadian trustee could procure records from a Canadian corporation's New York office because comity dictated that United States courts recognize foreign proceedings, especially in a sister common law jurisdiction such as Canada).

68. Unger, *supra* note 27, at 1160.

emphasize the beneficial aspects of international cooperation.⁶⁹ The universality theory dictates that the court in which the bankruptcy suit is pending has exclusive jurisdiction over all of the debtor's assets, regardless of where these assets are situated.⁷⁰ As a result, all creditors must argue their claims in the original bankruptcy court.⁷¹

Other commentators focus on the disadvantages of universality and adhere to the alternate theory of "territoriality."⁷² According to the territoriality theory, a multinational corporation could be subject to proceedings in different states with each state applying its own laws.⁷³ These competing theories⁷⁴ form the basis of modern obstacles to international cooperation in bankruptcy law.⁷⁵ Rather than committing itself fully to one particular approach, the United States utilizes an amalgamation of the two theories.⁷⁶ Whenever a foreign court claims the United States assets of a debtor, the United States typically advocates universality in theory yet actually practices territoriality, thus producing inconsistent and often conflicting court decisions.⁷⁷

69. Gitlin and Flaschen, *supra* note 39, at 309; Powers and Mears, *supra* note 62, at 305-06.

70. Gitlin and Flaschen, *supra* note 39, at 309.

71. *Id.*; Powers and Mears, *supra* note 62, at 305-06; *see* Unger, *supra* note 27, at 1154 (stating that the debtor's assets are controlled by the trustee and all creditors must go to that jurisdiction to enforce claims).

72. Gitlin and Flaschen, *supra* note 39, at 309; Powers and Mears, *supra* note 62, at 306.

73. Gitlin and Flaschen, *supra* note 39, at 309; *see* Unger, *supra* note 27, at 1155 (explaining that no extraterritorial recognition is given to proceedings taking place in other states).

74. *See* Powers and Mears, *supra* note 62, at 305 (discussing the theories of universality and territoriality).

75. Gitlin and Flaschen, *supra* note 39, at 309.

76. Unger, *supra* note 27, at 1155. Unger postulates that subsections one, three, and four of section 304 of the Bankruptcy Code demonstrate a tendency toward universality, while subsections two and five reflect a territorial approach. *Id.* at 1172-73.

77. Powers and Mears, *supra* note 62 at 309; *see* *Hilton v. Guyot*, 159 U.S. 113 (1894) (recognizing the doctrine of comity but denying the enforcement of a French judgment because of the lack of reciprocity demonstrated by French courts); *Harrison v. Sterry*, 9 U.S. (5 Cranch) 289 (1809) (denying recognition of British claims on the basis that the operation of a foreign jurisdiction's laws cannot legally transfer property located in the United States); *In re Toga Mfg.*, 28 Bankr. 165 (E.D. Mich. 1983) (finding that comity did not require recognition of Canadian bankruptcy law because there was no strict mutuality); *In re Stoddard and Norsk Lloyd Ins. Co.*, 242 N.Y. 148, 151 N.E. 159 (1926) (granting claims under United States policies issued by agents of the insurance company located in New York, but refusing to grant claims under United States policies issued by agents of the company outside the United States).

II. THE MODEL INTERNATIONAL INSOLVENCY COOPERATION ACT

A. DEVELOPMENT

Recognizing the problems caused by the lack of bankruptcy cooperation among nations, Committee J of the International Bar Association inquired into how the members could advocate a universality approach.⁷⁸ The members of Committee J concluded that worldwide enactment of domestic legislation encouraging international cooperation would successfully address the deficiency.⁷⁹ The focus in the international arena shifted from competing rights of states to a realization that the international character of modern business transactions compelled efficient adjudications benefitting both creditors and debtors.⁸⁰

When members of Committee J of the International Bar Association proposed section 304 of the United States Code as a model for international legislation, other countries objected. Other countries argued that although the aims of section 304 were praiseworthy, its results did not meet cooperation expectations.⁸¹ The resulting proposal aims to preserve local bankruptcy court jurisdiction, assuming such jurisdiction supports certain general bankruptcy principles.⁸² These principles include: (1) stay or dismissal of local proceedings; (2) production of records and access to testimony; (3) turnover of assets; (4) recognition and enforcement of judgments and orders; (5) recognition of a representative of the debtor's estate; (6) flexibility in procedures; and (7) consideration for local policies and laws within a reciprocal duty to cooperate.⁸³

B. PROVISIONS

Committee J presented the Model International Insolvency Cooperation Act with the goal of achieving universality.⁸⁴ MIICA addresses

78. Leonard, Carfagnini and McLaren, *supra* note 36, at 39-40.

79. *Id.*

80. *Id.* at 42.

81. *Id.* In particular, countries have rejected section 304 as an international alternative because it affords the presiding judge considerable discretion and thus creates uncertainty in the international community. *Id.* at 23.

82. *Id.* at 40.

83. Mears, *supra* note 2, at 27.

84. MIICA, *supra* note 9, at 324 (Official Comment, Statement of General Principles). The MIICA Statement of General Principles explains:

The ultimate goal of model legislation for international insolvency cooperation is universality which envisions a single administration providing protection of the insolvent debtor's estate from dismemberment, and an equitable distribution of assets among both domestic and foreign creditors in liquidation, or the equitable

three major topics: (1) the duties of a local court to assist in foreign proceedings; (2) the procedures for providing such assistance; and (3) a treaty override provision.⁸⁵ Section one of MIICA⁸⁶ requires courts to recognize foreign representatives, to aid foreign proceedings in countries that afford substantially similar treatment for foreign insolvencies, and to aid foreign proceedings in any country if the jurisdiction is proper and convenient or serves the best interests of the creditors and debtor.⁸⁷

Section two⁸⁸ of MIICA allows a foreign representative to seek relief ancillary to a foreign proceeding in the form of a turnover of assets, a

administration of the estate in a reorganization, composition or rehabilitation proceeding. Insofar as possible, such universality should be the guiding principle of all efforts toward international insolvency cooperation, for it alone is truly compatible with the realization of equal treatment of all creditors, debtors, assets and liabilities, and the swift and effective administration of the estate. Within the parameters of this overarching principle, mechanisms must be provided for the recognition of foreign representatives, the stay of local proceedings, the production of documents and testimony, the integration of asset distribution and other forms of ancillary relief. In a world of increasing global integration and growth of true multinational business entities, these principles are the indispensable elements in attaining equity and fairness in international insolvency proceedings.

Id.

85. Mears, *supra* note 2, at 30. A clear summary and description of the MIICA provisions can be found at Leonard, Carfagnini and McLaren, *supra* note 36, at 40.

86. MIICA, *supra* note 9, § 1, at 323. Section one provides:

In all matters of insolvency, including bankruptcy, liquidation, composition, reorganization or comparable matters, a Court, in accordance with the provisions of this Act,

(a) shall recognize a foreign representative of the debtor or estate, provided that such foreign representative complies with the orders of such Court;

(b) shall act in aid of and be auxiliary to foreign proceedings pending in the courts of all countries that provide substantially similar treatment for foreign insolvencies as that provided by this Act; and

(c) shall act in aid of and be auxiliary to foreign proceedings pending in the courts of all other countries, if the Court is satisfied that:

(i) the court or administrative agency having jurisdiction over the foreign representative is a proper and convenient forum to supervise administration of the property of the debtor; and

(ii) the administration of the property of the debtor in the pertinent jurisdiction by the foreign representative is in the overall interests of the creditors of the debtor.

Id. § 1, at 323-24.

87. *Id.* The sources for section one include English case law, U.S. Bankruptcy Code §§ 304(a) and 306, the Australian Bankruptcy Act, and two not yet enacted Canadian bankruptcy bills. MIICA, *supra* note 9, § 1, at 324 (Official Comment, Sources).

88. *Id.* § 2, at 324. Section two provides:

(a) A foreign representative may commence a case ancillary to a foreign proceeding by a petition under this Act for purposes of:

(i) obtaining an order to turn over to the foreign representative any property of the debtor or the estate in this jurisdiction;

stay or dismissal of a proceeding in the jurisdiction, discovery regarding the insolvency, recognition and enforcement of a foreign order, or any other "appropriate relief."⁸⁹ Section two further provides that a court shall consolidate any ancillary case with pending related insolvency proceedings in that jurisdiction.⁹⁰ Finally, section two affords flexibility in the type of relief granted to the foreign representative and emphasizes the fact that an ancillary proceeding should aid the overall administration of the estate in the dominant jurisdiction.⁹¹

Although MIICA is premised on the central administration of the debtor's estate, it does provide for commencement of a full proceeding by a foreign representative in section three.⁹² A foreign representative may petition the court for a full proceeding if ancillary relief is unavailable or if the court denies such relief.⁹³ The court will grant a full proceeding only if the foreign representative has already pursued and been denied ancillary relief.⁹⁴

(ii) staying or dismissing any action or proceeding concerning the debtor or estate in this jurisdiction;

(iii) obtaining testimony or production of books, records or other documents relating to an insolvency;

(iv) obtaining recognition and enforcement of a foreign judgment or court order; or

(v) obtaining any other appropriate relief.

The Court may exercise such additional powers with respect to the matter as it could exercise if the matter had arisen within its own jurisdiction.

(b) Upon the commencement of an ancillary case, any currently pending related insolvency proceeding in this jurisdiction shall be consolidated with such ancillary case.

Id.

89. *Id.* The form and concept of section two is derived from section 304 of the United States Bankruptcy Code. *Id.* § 2, at 325 (Official Comment, Sources). The specific types of relief presented in section two, however, are based on the Special Project on International Cooperation and Bankruptcy Proceedings of the International Bar Association Committee J (1987), the proposed Canadian Bill, the Federal Statute on Private International Law of Switzerland, and the Switzerland Commentary on the Special Project on International Cooperation and Bankruptcy Proceedings, of the International Bar Association Committee J (1987). *Id.*

90. *Id.* § 2(b), at 324. This is to ensure that all proceedings will be "in aid of and auxiliary to" the dominant foreign proceeding. Mears, *supra* note 2, at 32.

91. MIICA, *supra* note 9, § 2, at 325 (Official Comment, Explanation).

92. *Id.* § 3, at 324. Section three provides:

In the event that ancillary proceedings pursuant to Section 2 are unavailable or denied, a foreign representative of the estate in a foreign proceeding concerning a person, may commence an insolvency proceeding against such person in this jurisdiction in accordance with the provisions of the applicable laws of this jurisdiction.

Id.

Section three is derived from section 303(b)(4) of the United States Bankruptcy Code. *Id.* § 3, at 326 (Official Comment, Sources).

93. *Id.* § 3, at 324.

94. *Id.* § 3, at 326 (Official Comment, Explanation).

In section four,⁹⁵ MIICA provides that while the substantive law of the foreign court that has jurisdiction over the principal proceeding governs ancillary proceedings, the substantive law of the local jurisdiction may supersede if private international law or conflict of laws rules so dictate.⁹⁶ Furthermore, if the foreign representative is granted a full proceeding under section three of MIICA, section four stipulates that local substantive law may then apply.⁹⁷ Section five⁹⁸ allows a foreign representative the opportunity to make a limited appearance in court to seek ancillary relief without subjecting herself to the full jurisdiction of the court.⁹⁹ Once the ancillary proceeding commences, however, the foreign representative is subject to counterclaims and cross-claims within the court's jurisdiction.¹⁰⁰ This provision not only encourages efficient administration of the estate, but also reassures the foreign representative that she will be treated fairly.¹⁰¹

95. *Id.* § 4, at 324. Section four provides:

(a) In any case commenced ancillary to a foreign proceeding as provided in Section 2, a Court shall apply the substantive insolvency law of the foreign court having jurisdiction over the foreign proceeding, unless after giving due consideration to principles of private international law and conflict of laws, the Court determines that it must apply the substantive insolvency law of this jurisdiction.

(b) A Court shall apply the substantive insolvency law of this jurisdiction in any insolvency proceeding brought by a foreign representative as provided in Section 3.

Id.

96. *Id.* § 4(a), at 324. Presumably, the procedural aspects of such a case are governed by local law. *Id.* § 4, at 326 (Official Comment, Explanation). Section 4(a) originates from the English Commentary to the Special Project on International Cooperation and Bankruptcy Proceedings of the International Bar Association Committee J. *Id.* § 4, at 326 (Official Comment, Sources).

97. *Id.* § 4(b), at 324. Section 4(b) articulates "the generally accepted principle of utilizing local substantive law when the benefits of a full local proceeding are sought by the person initiating the proceeding." *Id.* § 4, at 326 (Official Comment, Sources).

98. *Id.* § 5, at 324. Section five provides that "[a]n appearance in a Court by a foreign representative in connection with a petition or request under this Act does not submit such foreign representative to the jurisdiction of any Court in this jurisdiction for any other purpose." *Id.*

99. *Id.* Section five is primarily based upon section 306 of the United States Bankruptcy Code. *Id.* § 5, at 326 (Official Comment, Sources).

100. *Id.* § 5, at 326 (Official Comment, Explanation).

101. *Id.* The drafters explained:

The intention of the model act is not only to provide access to the Court for the foreign representative, but to provide an efficient, equitable and safe mechanism for the foreign representative to use, in order to encourage a central administration of the estate and to foster the principle of universality.

Id.

Section six of MIICA¹⁰² clearly defines "foreign representative" and "foreign proceeding."¹⁰³ Section seven¹⁰⁴ provides that any treaty or convention agreed to by two or more countries supersedes the provisions of MIICA.¹⁰⁵ This section responds to concerns that MIICA might impede the progress of treaties and conventions currently under consideration in various countries.¹⁰⁶

C. PROBLEMS

Although MIICA solves many of the current problems involving multinational bankruptcies, it raises new problems of its own. First, it remains unclear whether the ancillary proceeding approach is available or even possible to enact in all foreign jurisdictions.¹⁰⁷ Second, jurisdictions may favor local creditors over foreign representatives because of political pressure to protect local interests.¹⁰⁸ Third, MIICA may not be sufficiently jurisdiction-neutral, particularly because it closely resembles the United States Bankruptcy Code.¹⁰⁹ Fourth, whereas MIICA stipulates that the law of the principal forum is to be applied,

102. *Id.* § 6, at 324.

103. *Id.* § 6, at 326 (Official Comment, Purposes). Section six provides:

(a) "Foreign representative" means a person who, irrespective of designation, is assigned under the laws of a country outside of this jurisdiction to perform functions in connection with a foreign proceeding that are equivalent to those performed by a trustee, liquidator, administrator, sequestrator, receiver, receiver-manager or other representative of a debtor or an estate of a debtor in this jurisdiction.

(b) "Foreign proceeding" means an insolvency proceeding, whether judicial or administrative, in a foreign country, provided that the foreign court or administrative agency conducting the proceeding has proper jurisdiction over the debtor and its estate."

Id. § 6, at 324.

The definitions are expansive enough to encompass the different types of proceedings and different roles of representatives of various countries. *Id.* § 6, at 326 (Official Comment, Purposes). For example, the definition of "foreign representative" includes the uniquely American role of the "debtor in possession" as defined within the United States Bankruptcy Code. *Id.* § 6, at 326-27 (Official Comment, Explanation).

104. *Id.* § 7, at 324. Section seven provides that "[a]ny treaty or convention governing matters of insolvency cooperation, which has been ratified by this country and the country in which a foreign proceeding is pending, shall override this Act with regard to such matters between such countries, unless the treaty or convention shall otherwise provide." *Id.*

105. *Id.*

106. *Id.* § 7, at 327 (Official Comment, Explanation). Many bankruptcy practitioners feel that international cooperation can be better pursued through a treaty approach. *Id.* § 7, at 327 (Official Comment, Sources). For instance, Committee J of the International Bar Association argues that MIICA should be pursued concurrently with treaty negotiations. Mears, *supra* note 2, at 30.

107. Mears, *supra* note 2, at 17.

108. *Id.*

109. *Id.*

it does not establish guidelines for deciding which jurisdiction constitutes the principal forum.¹¹⁰ Lastly, MIICA encourages recognition of foreign proceedings where laws are substantially similar, but does not provide a standard or procedure for testing the similarity of the laws.¹¹¹

III. PROSPECTS FOR ENACTMENT

A. EUROPEAN ECONOMIC COMMUNITY

Although the process of adoption in each country will undoubtedly be complicated, prospects for MIICA seem positive. Within the European Economic Community ("EEC"), MIICA could be enacted in one of three ways.¹¹² The Council could issue a directive¹¹³ or a regulation,¹¹⁴ or the Member States could negotiate a Community Treaty regarding international bankruptcies.¹¹⁵

110. Westbrook, *Global Insolvencies in a World of Nation States*, 1, 18 (1990) (unpublished manuscript on file at the offices of the American University Journal of International Law and Policy).

111. *Id.*

112. Lafili and Hendrickx, Committee J, International Bar Association, Implementation of the Model International Insolvency Cooperation Act (MIICA) Within the European Economic Community 1, 3 (Oct. 4, 1989) (on file at the offices of The American University Journal of International Law and Policy). For a general discussion of current English, French, and German bankruptcy law, see Powers and Mears, *supra* note 62, at 318-34; INTERNATIONAL LOAN WORKOUTS AND BANKRUPTCIES, *supra* note 4, at 283-386.

113. Lafili and Hendrickx, *supra* note 112, at 3. According to Lafili and Hendrickx, such a directive may be legally based upon: (1) article 54(3)(g) of the Treaty Establishing the European Economic Community, March 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) (official English translation) [hereinafter Treaty of Rome]; (2) article 100A of the Treaty of Rome; (3) article 101 of the Treaty of Rome; or (4) articles 67 and 69 of the Treaty of Rome. Lafili and Hendrickx, *supra* note 112, at 3-5. Directives state an objective but allow national governments to decide how to pursue that objective. T.C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* 99 (1988). Directives bind only the people whom they address. *Id.*

114. Lafili and Hendrickx, *supra* note 112, at 6. A regulation issued by the Council of the European Communities may be based upon article 235 of the Treaty of Rome. *Id.* A regulation is binding at the Community and the national level. T.C. HARTLEY, *supra* note 113, at 99 (1988). Because regulations are directly effective, Member States do not need to promulgate national legislation to implement these regulations. *Id.* at 197. Furthermore, the European Court of Justice has stated that such implementing measures are inappropriate. *Id.*

Some commentators argue that there is no substantial difference between directives and regulations. *Id.* at 101. These commentators indicate that the European Court of Justice has "up-graded directives" so that they are similar to regulations. *Id.* This upgrade ultimately grants rights to private citizens who seek to implement directives and regulations against public authorities. *Id.*

115. *Id.* at 5. Article 220 of the Treaty of Rome allows Member States to "enter into negotiations with each other with a view to securing . . . benefit[s]." Treaty of Rome, *supra* note 113, art. 220. A treaty regarding subject matter within the scope of Community action may either be accepted as part of Community law or rejected as a

According to members of Committee J of the International Bar Association, the directive approach provides the best means for enacting common bankruptcy principles.¹¹⁶ The phrasing of the directive will determine its effectiveness because an EEC directive has binding effect only with regard to the results to be achieved, and not the method by which to achieve those results.¹¹⁷ A narrowly tailored directive would grant less discretion to Member States in meeting MIICA's goals through national insolvency legislation.¹¹⁸ Because MIICA establishes the methods for achieving international bankruptcy cooperation, MIICA cannot be adopted in full.¹¹⁹ Instead, a directive would include only the principal concepts of MIICA.¹²⁰ For example, a directive would probably require the single administration of the estate, protection of the estate, and the equitable distribution of assets among both domestic and foreign creditors in liquidation.¹²¹ Additionally, the directive should include a time limit for implementation within each country¹²² and a statement of reasons for the adoption of the MIICA provisions.¹²³

usurpation of Community law. T.C. HARTLEY, *supra* note 113, at 92-95. Rejection is based on the premise that certain subjects may be discussed at the Community level but not at the State level. *Id.* at 95. "Where the Member States joined the Community they transferred certain powers to the Community and the European Court has held that Community power to conclude agreements with non-member States can automatically exclude national jurisdiction to do so." *Id.*

116. Lafili and Hendrickx, *supra* note 112, at 6. A directive is the most "expedient" and "controllable" of the possible options. *Id.* See Mears, *supra* note 2, at 45 n.45 (noting that Timothy Powers, the Chairman of the International Bar Association Subcommittee on International Cooperation, commented that MIICA may be considered as an EC Council Directive). Mr. Powers believes that the EC's integrated statutory structure provides "a unique opportunity for implementing MIICA in multiple jurisdictions concurrently." *Id.*

117. Lafili and Hendrickx, *supra* note 112, at 11 (explaining article 189 of the Treaty of Rome). A directive in the European Economic Community would "give only guidelines for the implementation of such text into national law, therefore it is not at all certain that after this stage of implementation, a real 'common legislation' of EEC members will exist." *Id.* at 6. See T.C. HARTLEY, *supra* note 113, at 200 (explaining that a "directive lays down an objective and leaves it to the Member States to achieve that objective according to such means as they might think fit").

118. Lafili and Hendrickx, *supra* note 112, at 11-12.

119. *Id.* at 12.

120. *Id.* Although Member States may decide how to implement an EC directive, those States are required to satisfy standards of "clarity and legal certainty and thus to transpose the provisions of the directive into national provisions having binding force." *Id.*

121. *Id.* at 12.

122. *Id.* at 13. Any legislation concerning MIICA will be rendered less effective if Member States do not enact the provisions within a specific time limit. *Id.*

123. *Id.* The directive's implementation depends upon a detailed and specific statement of reasons and arguments for the adoption of the directive. *Id.*

B. CANADA

The Canada Report explains that for enactment in Canada, MIICA must pass through ten provincial governments.¹²⁴ This may be a difficult task, but the fact that MIICA legislates in broad terms rather than in detail makes its passage more likely.¹²⁵ The Canada Report also discusses unresolved issues that MIICA does not sufficiently address. These issues include: difficulties with reorganizations; treatment and priority for local creditors; treatment of foreign revenue or penal claims; degree of discretion allowed to local courts; dichotomy between common law and civil law concepts; a bilateral treaty alternative; and the effect of local adaptations and variations of MIICA.¹²⁶ The Canada Report expresses concern with MIICA's provision that a court will recognize the foreign representative provided she complies with court orders.¹²⁷ It is not clear when this recognition becomes final. The Canadian members seek recognition of the foreign representative before the termination of the estate in order to avoid the risk that non-compliance of their foreign representative will adversely affect creditors.¹²⁸ Moreover, the Canada Report criticizes MIICA for using terms that refer to American proceedings and have no real meaning in other countries.¹²⁹ Finally, the Canadian Committee is skeptical of the provision allowing a representative a full proceeding only if ancillary relief is unavailable or denied.¹³⁰ The Canada Report states that a foreign representative should be able to pursue the full range of remedies.¹³¹

124. See Committee J, Section on Business Law, International Bar Association, Update on MIICA: The Model International Insolvency Cooperation Act, Country Committee Reports, tab 4, at 5 (Canadian Committee) (Oct. 4, 1989) (on file at the offices of The American University Journal of International Law and Policy) [hereinafter Update on MIICA, Country Committee Reports] (stating that while in theory the federal government of Canada may pass legislation without regard to the provinces, in practice it rarely does). For a general discussion of current Canadian bankruptcy law and treaty negotiation efforts, see Powers and Mears, *supra* note 62, at 313-18.

125. See Update on MIICA, Country Committee Reports, *supra* note 124, tab 4, at 1 (Canadian Committee) (noting that international adoption of overly detailed legislation is difficult).

126. *Id.*, tab 4, at 4 (Canadian Committee).

127. MIICA, *supra* note 9, § 1(a), at 323.

128. Update on MIICA, Country Committee Reports, *supra* note 124, tab 4, at 2-3 (Canadian Committee).

129. *Id.*, tab 4, at 3. For instance, the Canadian members of Committee J emphasize that "commencing a case" is a uniquely American term. Additionally, the members suggest that "vesting" property be changed to "turned over" property in section 2(a) of MIICA. *Id.*

130. *Id.*

131. *Id.*

C. UNITED STATES

The United States Working Group of Committee J ("Working Group") hopes that Congress will promulgate MIICA in the United States.¹³² The Working Group reports that because MIICA is based largely on United States law, minimal revisions to existing law are necessary.¹³³ Because current United States bankruptcy law does not contain a provision that explicitly endorses universality, section one of MIICA should supplement the Bankruptcy Code.¹³⁴ Congress should add section seven of MIICA to extend the United States Code in order to supply the treaty override provision that United States law does not presently recognize.¹³⁵ In addition, even though section 304 of the United States Bankruptcy Code generally is considered the most "universalist" provision, section two of MIICA should replace it due to criticism that section 304 provides the court with too much discretion.¹³⁶ Section 304 of Title 11 should also provide that the substantive law of the foreign court applies in ancillary proceedings.¹³⁷

Furthermore, section 303(b)(4) of the United States Bankruptcy Code should clarify that a full proceeding is available only after the foreign representative seeks and is denied ancillary relief, and that the court applies local substantive law when a foreign representative com-

132. See U.S. Working Group, *supra* note 28, at 1 (declaring that MIICA can be incorporated into current United States law through minimal alterations to the Bankruptcy Code and Rules).

133. See *id.* (noting that the United States Bankruptcy Code, the Rules of Bankruptcy Procedure, and other statutory provisions already accomplish many of MIICA's aims).

134. See *id.* at 7 (stating that section 1 obliges the local bankruptcy court to recognize a foreign representative who respects the orders of the local court).

135. *Id.* Section 7 provides that any applicable treaty or convention overrides MIICA. *Id.* The Working Group recommends incorporating sections one and seven of MIICA into United States law by enacting a new section 110 of the United States Bankruptcy Code, 11 U.S.C. §§ 101-1330. U.S. Working Group, *supra* note 28, at 7.

136. *Id.* at 8-9 (commenting that 11 U.S.C. § 304(c) has been widely criticized as providing the court too much flexibility in deciding whether to grant relief). See Leonard, Carfagnini, and McLaren, *supra* note 36, at 30 (providing criticism of section 304(c) from the Canadian perspective). Section 2 of MIICA is preferable to section 304 because it lists the types of relief which a judge may grant in an ancillary proceeding. MIICA, *supra* note 9, § 2, at 324. Section 2 also provides that an ancillary proceeding must be consolidated with any other related insolvency proceeding in that jurisdiction. *Id.* The United States Working Group comments that Bankruptcy Rule 1015, regarding consolidation of actions, should be amended accordingly. U.S. Working Group, *supra* note 28, at 9.

137. U.S. Working Group, *supra* note 28, at 8-9. Section 4 of MIICA states that substantive foreign insolvency law applies unless "principles of international law and conflict of laws" dictate that local substantive law be applied. MIICA, *supra* note 9, § 4(a), at 324.

mences a full proceeding.¹³⁸ Because section five of MIICA closely parallels section 306 of the United States Bankruptcy Code regarding limited appearances of foreign representatives, United States law does not need to be changed to incorporate MIICA.¹³⁹ Lastly, section 101 of the United States Bankruptcy Code requires minimal changes to achieve a more precise definition of a foreign representative and a foreign proceeding.¹⁴⁰

The United States Working Group is actively seeking the enactment of MIICA through several channels.¹⁴¹ The Working Group has formulated a plan of action for the next two years that strives to raise consciousness about the defects in present United States bankruptcy law and the benefits of enacting MIICA.¹⁴²

D. OTHER COUNTRIES¹⁴³

Preliminary reports from numerous other countries indicate a mixed review of MIICA.¹⁴⁴ The reports from Australia,¹⁴⁵ Israel,¹⁴⁶ and Mex-

138. See U.S. Working Group, *supra* note 28, at 9 (proposing that these changes incorporate the principle enunciated in MIICA sections 3 and 4).

139. *Id.*

140. *Id.*

141. *Id.* at 32. The Working Group presents the following agenda for enacting MIICA:

The United States Working Group proposes to introduce MIICA for adoption by the United States Congress through the foregoing 'proposed amendments' to existing bankruptcy law. The Working Group will identify and gain the support of appropriate legislators to introduce bills in the United States House of Representatives and the Senate . . . Concurrently, the Working Group will seek to build a consensus and generate a coalition of support for MIICA amongst various 'opinion leaders' to whom Congress will look in deliberating over the proposed amendments.

Id.

142. *Id.* at 32-35.

143. See INTERNATIONAL LOAN WORKOUTS AND BANKRUPTCIES, *supra* note 4 (detailing the current status of the bankruptcy laws of Argentina, Brazil, Canada, Egypt, England, France, Germany, Israel, Italy, Japan, Mexico, the Netherlands, Switzerland, the United States, and Venezuela).

144. See Committee J, International Bar Association, MIICA Update, 1 (Sept. 22, 1990) (on file at the offices of The American University Journal of International Law and Policy) [hereinafter MIICA Update] (noting that one of the major obstacles to encouraging international consideration of MIICA is obtaining translations of the proposed act in various languages). Currently, MIICA has been translated into Danish, Dutch, German, Japanese, Norwegian, and Spanish. *Id.* Translations into French and Swedish are underway but have not been completed. *Id.*

145. See *Id.* at 1 (Australian Country Committee Report) (stating that the Australian Committee chair, David Bennett, reports that the principal legal officer to the Inspector General in Bankruptcy supports implementing MIICA in Australian law). The Australian Committee Report considers MIICA a "project of immense value." *Id.*

146. Update on MIICA, Country Committee Reports, *supra* note 124, tab 5, at 1 (Israel Country Report) (commenting that the chances of Israel adopting MIICA are

ico¹⁴⁷ expressed hope about the possibility of MIICA's passage, whereas the reports from Brazil¹⁴⁸ and Japan¹⁴⁹ portrayed the prospects as bleak. Responses from other countries reporting to Committee J on the implementation of MIICA were generally not extensive.¹⁵⁰ Because serious discussion of MIICA outside the major industrialized nations is limited, MIICA's potential within those countries cannot be evaluated yet.

good). While the Israeli members of Committee J are hopeful about the passage of MIICA, they warn that European and American countries must lead the way before it can become a viable alternative within Israel. *Id.* In addition, Israeli representatives stipulated that because of Israel's unique position, Israel's enactment of MIICA must include a provision that foreign substantive law applies for foreign proceedings in countries that "provide substantially similar treatment for Israeli insolvencies as for other countries adopting MIICA." *Id.*, tab 5, at 1-2.

147. See *id.*, tab 2, at 1 (Mexico Country Report) (stating that international bankruptcy cooperation is especially important for a country such as Mexico because increased numbers of Mexican insolvencies and bankruptcies seem likely as a result of Mexico's large private and public debt). Recent elections and pluralism in the Mexican Congress have contributed to an uncertain political position that may delay adoption of MIICA. *Id.*, tab 2, at 6. The Mexican members of Committee J question why a foreign representative may only commence a full proceeding if ancillary relief is unavailable or denied. *Id.*, tab 2, at 4. The members oppose imposing the burden of proving that the ancillary relief was unavailable or denied on the foreign representative. *Id.* Additionally, in Mexico the duties of a bankruptcy trustee are performed by a "sindico." *Id.*, tab 2, at 2. Only national banking institutions, chambers of commerce, or chambers of industry may assume the functions of a "sindico." *Id.* There is uncertainty as to whether the term "foreign representative" adequately parallels the Mexican "sindico." *Id.* The disparity in terms may require the term "sindico" to replace "foreign representative" in the Mexican adoption of MIICA. *Id.*

For a general discussion of current Mexican bankruptcy law, see Lic. Federico Martinez Montes de Oca, *The Commercial Laws of the Republic of Mexico*, V DIGEST OF THE COMMERCIAL LAWS OF THE WORLD 22-28 (1978); Romo, *Questionnaire on Creditors' Rights Against Business Debtors (Mexico)*, 1983 A.B.A. INST. ON INT'L WORKOUTS AND BANKR. 1-68; Powers and Mears, *supra* note 62, at 337-40.

148. See MIICA Update, *supra* note 144, at 1 (Brazil Country Committee Report) (noting that although the initial report from Brazil was encouraging, the most recent report is not hopeful). The report states that Brazilian bankruptcy attorneys are neither familiar with nor interested in MIICA. *Id.*

For a general discussion of current Brazilian bankruptcy law, see Baptista, Carvalho Tess and Christino Netto, *The Commercial Laws of Brazil*, I DIGEST OF COMMERCIAL LAWS OF THE WORLD 31-33 (1983); Powers and Mears, *supra* note 62, at 309-13.

149. See Update on MIICA, Country Committee Reports, *supra* note 124, tab 7, at 1 (Japan Country Report) (reporting that although Japanese enactment of MIICA was initially promising, recent reforms of the Civil Procedure Code coupled with political scandals and declining popularity of the Liberal Democratic Party make adoption in the near future unlikely). For a general discussion of current Japanese bankruptcy law, see Logan, Okamoto and Takashima, *The Commercial Laws of Japan*, IV DIGEST OF COMMERCIAL LAWS OF THE WORLD 21-25 (1982); Powers and Mears, *supra* note 62, at 335-37; Takeuchi and Butler, *Creditors' Rights and Bankruptcy Law in Japan*, 1983 A.B.A. INST. ON INT'L WORKOUTS AND BANKR. 52.

150. See Update on MIICA, Country Committee Reports, *supra* note 124 (including brief reports from Israel, Italy, Japan, Switzerland, Brazil, Mexico, the United States and Spain); MIICA Update, *supra* note 144.

IV. ALTERNATE FORMS OF INTERNATIONAL BANKRUPTCY COOPERATION

Due to the criticisms of MIICA and the difficulties involved in enacting it in any country, some bankruptcy practitioners advocate alternate avenues for international cooperation. Other attempts at international insolvency cooperation include the Scandinavian Convention,¹⁵¹ the Bustamante Code of Private International Law,¹⁵² the EEC Draft Convention,¹⁵³ and the United States-Canada Draft Treaty.¹⁵⁴ In addition, one bankruptcy expert has proposed a series of bilateral treaties for adoption by pairs of states.¹⁵⁵ Presently, only the European Community

151. Scandinavian Convention, Nov. 7, 1933, 155 L.N.T.S. 136. Denmark, Finland, Iceland, Norway, and Sweden have ratified the Scandinavian Convention. Gitlin and Flaschen, *supra* note 39, at 309.

152. Bustamante Code of Private International Law, Feb. 20, 1928, 86 L.N.T.S. 362. This code, which contains a chapter on bankruptcy, has been ratified by fifteen Latin American countries. Gitlin and Flaschen, *supra* note 39, at 309.

153. EEC Draft Convention, *supra* note 11. See Nadelmann, *supra* note 61, at 541-44 (discussing the development of the EEC Draft Convention).

The EEC Draft Convention balances a universality approach to international insolvencies against the need to retain differences in local law. The draft proposes the assertion of original bankruptcy jurisdiction only in courts of the state where the debtor's "center of administration" is located; governance of procedural and many substantive matters by the law of the state where the bankruptcy case is pending; and the preservation of local substantive law when claims are made on assets within that state. Powers and Mears, *supra* note 62, at 348. Mr. Powers and Ms. Mears criticize the EEC Draft Convention on the following grounds: (1) lack of flexibility in conflict of laws rules; (2) inadequate treatment of preventive proceedings such as reorganizations; (3) insufficient protection of third party interests; (4) lack of accounting provisions for concurrent proceedings; and (5) failure to deal adequately with assets of a debtor located outside the EEC. *Id.* at 348-49.

154. United States-Canada Draft Treaty, *supra* note 11. Even though a 1970 Report of the Canadian Study Committee on Bankruptcy and Insolvency Legislation found that bankruptcy treaties would be useful, recent efforts at such a treaty have illustrated that "[i]n the short term, a treaty is not likely to be a realistic solution to cross-border bankruptcy problems." Leonard, Carfagnini and McLaren, *supra* note 36, at 38. Cooperation between the United States and Canada is particularly important because of the likelihood that cross-border business will increase as a result of the Canada-United States Free Trade Agreement. *Id.* at 25. The major obstacles that stand in the way of a treaty are the differences in priority ranking in American and Canadian law, the choice of laws, and the reluctance of the United States Congress to relinquish autonomy in bankruptcy proceedings. *Id.* at 37 n.38. Cooperation between the United States and Canada cannot be achieved until the problems of cross-border insolvencies receive as much attention as other aspects of bilateral cooperation. *Id.* at 25. One criticism of the draft treaty is that it fails to recognize differences in the substantive bankruptcy law of the United States and Canada. As a result, the draft treaty fails to acknowledge that the law of the nonadjudicating state should govern in certain circumstances. Powers and Mears, *supra* note 62, at 347-48. For a general discussion of the United States-Canadian Draft Treaty, see Nadelmann, *supra* note 61, at 550-55.

155. Westbrook, *supra* note 110, at 46-49. Peter Totty, a prominent insolvency practitioner in London, suggests that national representatives draft a bilateral treaty, which may be modified and agreed to by individual countries. *Id.* Mr. Totty argues

Draft Convention is under serious consideration.¹⁵⁶ Although the enactment of the EEC Convention or any other treaty may discourage support for MIICA,¹⁵⁷ section seven of MIICA clearly states that such an agreement would override any MIICA provisions.¹⁵⁸ Consequently, the enactment of a Convention or Treaty should not curtail efforts to promulgate MIICA through domestic legislation. Although the more common approach to bankruptcy cooperation involves the development of treaties, few multinational treaties are actually in force at this time.¹⁵⁹ Furthermore, immediate prospects for treaty enactments are slim in light of extensive criticism.¹⁶⁰

V. RECOMMENDATIONS

The present draft of MIICA offers reciprocal treatment along with adequate flexibility for the adopting jurisdictions. MIICA's goal is to empower local courts to facilitate foreign proceedings¹⁶¹ and to be responsive to local creditors as well as to the policies reflected in local insolvency laws.¹⁶² MIICA promotes worldwide efficiency in international proceedings by centralizing the proceedings, treating creditors equitably, and having a binding effect internationally.¹⁶³ Simultaneously, MIICA provides commercial actors with greater certainty regarding international bankruptcies and encourages international investment. MIICA is capable of diminishing current international bankruptcy problems while the alternative solutions of treaties and conventions continue to be pursued.

As a world leader in both commercial and legal developments, the United States should pave the way for MIICA's enactment internationally. The numerous country reports on the potential for MIICA's enactment are evidence that many countries are unsure of MIICA's benefits. When nations still refuse to address bankruptcy problems because of the stigma attached to this field, the United States must initiate dis-

that this alternative avoids choice of law problems because each individual pair of states signing the bilateral treaty negotiates that issue. *Id.*

156. MIICA Update, *supra* note 144, at 2 (Scottish Country Committee Report).

157. See *id.* (noting that while the Council of Europe Convention on Bankruptcy and the European Community Draft Convention are under consideration, the chances of MIICA's adoption are slim).

158. MIICA, *supra* note 9, § 7, at 324.

159. See Gitlin and Flaschen, *supra* note 39, at 311 (discussing various countries' failure to ratify international bankruptcy treaties).

160. Powers and Mears, *supra* note 62, at 348-349.

161. MIICA, *supra* note 9, §§ 1(b) and (c), at 323.

162. *Id.* at 324 (Official Comment, Statement of General Principles).

163. Mears, *supra* note 2, at 27.

cussions. The United States has led the movement to establish bankruptcy law as an accepted field rather than a marginal one. Now, the United States should encourage other nations to recognize international insolvency problems and attempt to solve them through domestic adoption of MIICA's provisions.

The United States is in a unique position to initiate worldwide insolvency cooperation. Because MIICA is based primarily on American insolvency law, the United States Code needs few changes in order to incorporate MIICA. Adopting MIICA in the United States will spur other nations to adopt MIICA as well. For example, American corporations doing business in a foreign country will inquire whether that foreign country has codified MIICA in domestic legislation. American companies will be more willing to pursue business in countries that have adopted MIICA. Consequently, foreign countries will have an added incentive to enact MIICA.

Though enacting MIICA requires few changes in the Bankruptcy Code, political obstacles remain. The United States Congress will enact MIICA's provisions only when the American business community, scholars, consumers, and attorneys address international bankruptcy issues and pressure members of Congress to develop a more equitable and efficient system. Thus, it is the task of all parties affected by the inconsistencies and inefficiencies of international insolvencies to actively lobby for congressional enactment of MIICA.

VI. CONCLUSION

An international bankruptcy occurs when the assets and creditors of the bankrupt estate are located in more than one country. This type of bankruptcy is likely to increase in number because of the recent growth of international commerce.¹⁶⁴ Differences in domestic laws of each country in which assets and creditors are located can seriously affect the orderly liquidation of assets or restructuring of the insolvent company.¹⁶⁵ Thus, governments and individuals have been increasingly concerned by the uncertainty and unpredictability inherent in international bankruptcy.¹⁶⁶ Although this interest in international bankruptcy has led to different opinions on the best method for achieving international cooperation, all alternatives strive for the most equitable and efficient treatment of creditors.¹⁶⁷

164. Leonard, Carfagnini, and McLaren, *supra* note 36, at 26.

165. *Id.* at 23.

166. *Id.* at 27.

167. Unger, *supra* note 27, at 1154-55.

Presently, no such uniform treatment exists. The incoherency evidenced in international insolvencies destroys the value of assets¹⁶⁸ and impedes the growth of international commerce.¹⁶⁹ There is no indication that private international law has found a solution to this problem.¹⁷⁰ Furthermore, inconsistencies between different countries cannot be solved through independent actions within those countries. By definition, the lack of international cooperation must be approached through the development of an international solution.¹⁷¹

Ideally, nations would develop a unified bankruptcy system providing for equal treatment of all creditors in similar positions.¹⁷² In addition, major trading nations would agree to establish international customs and treaties to promote equity and efficiency.¹⁷³ Because such a prodigious meeting of the minds seems unlikely, adoption of similar domestic legislation within nations is easier to achieve and thus more immediately plausible.¹⁷⁴ Through the demonstration of a willingness to cooperate with other nations, one state may succeed in gaining the reciprocal cooperation of those other countries.¹⁷⁵

168. Westbrook, *supra* note 110, at 3.

169. See Leonard, Carfagnini and McLaren, *supra* note 36, at 42 (arguing that issues of international insolvency can be more easily resolved if focus shifts to the commercial reality of reorganizations and failures of businesses with international operations).

170. Harding, *Re Sefel Geophysical Ltd.: A Canadian Approach to Some Specific Problems in the Adjudication of International Insolvencies*, 12 DALHOUSIE L.J. 412, 440 (1989).

171. Mears, *supra* note 2, at 26.

172. Gitlin and Flaschen, *supra* note 39, at 311.

173. *Id.* at 307-08.

174. *Id.* at 323.

175. *Id.* The authors argue that United States enactment of section 304 of the Bankruptcy Reform Act of 1978 indicates such a willingness to cooperate with other countries. *Id.*