
INTERPRETATION INTERNATIONALE

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ABSTRACT

This Article proposes a new classification of international texts for the purposes of interpretation and an “international interpretive rule” to be applied to those found to be “system” texts rather than “standards” texts. System texts establish an international system of cooperation or enforcement while standards texts create norms for international behavior of states or persons. The international interpretive rule would follow the tradition of fixing uniformity as a central interpretive goal for standards texts. By contrast, system texts require interpretations that best assist the achievement of the goals inherent in the international systems they establish; uniformity is only one of those goals. The Article discusses recent cases in the field of cross-border insolvency cooperation, an area in which the need for systematic cooperation is most needed and most advanced, but the approach may also apply, for example, to a system such as that which established the International Criminal Court. The Article uses its approach to compare the system-friendly interpretations applied in insolvency cases in North America with the insular interpretations recently announced in the United Kingdom.

INTRODUCTION

This Article discusses and compares recent decisions under the Model Law on Cross-Border Insolvency (Model Law) in the United Kingdom, Canada, and the United States. The *Rubin* case and its progeny in the United Kingdom seem to make it difficult or impossible to obtain enforcement of insolvency reorganization plans. More fundamentally, they appear to reflect a profoundly negative approach to international cooperation under the Model Law. The case provides a good occasion to consider the typical provisions in treaties and model laws that call for application of a special rule for interpretation of international instruments of that sort—an “international interpretive rule.” The Article argues that the traditional goal of uniformity is only one component of the larger need for reading international instruments in a way that will serve the needs of international systems of cooperation that legislatures have sought to achieve in a number of fields, including insolvency law, international sales of goods (the CISG), and arbitration law under the United Nations (UN) arbitration convention.

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Bill Whitford is the archetype of a commercial scholar, the standard to which we all aspire. He has contributed so magnificently to every genre and every aspect of commercial law that it was hard to pick an area suitable for an article that would serve as part of this tribute to him. Some of his best work has been in comparative law and in bankruptcy law, so I decided to offer something that combines those two.¹

One piece in a book on contracts struck me years ago.² In it, Bill puzzled through the possible reasons that British courts interpret contracts in a rather different way than courts in the United States. The reader will quickly see how this point brought me to my choice of topic in this small offering in his honor.

This Article tells a tale of achievement and disappointment in private international law. It concerns the application of the Model Law on Cross-Border Insolvency, promulgated by the United Nations Commission on International Trade Law (UNCITRAL). The achievement is that it has been adopted by twenty-two nations, including many of the leading commercial jurisdictions in the world. Among them are Canada, the United Kingdom, and the United States. Most of the courts in adopting countries seem to be in tune with the new law, and most decisions are advancing international cooperation.³

The disappointment derives from the recent hostility of the United Kingdom courts to the Model Law, an attitude reflected in their candid rejection of the developing case law in the courts of North America and elsewhere. A comparison of certain key decisions in the three countries, each of which has adopted the text of the Model Law largely intact, illustrates that point. More generally, the story reflects the central role played by courts in the advancement of international cooperation in a globalizing world. The example is especially useful because no aspect of human endeavor is more clearly global than commerce and investment and no part of commercial law has been more in the forefront of international cooperation than the law of insolvency.

Although I have the highest regard for the British courts and it is not my place to judge the proper application of English law, the existence of a treaty or a Model Law obligates all of us to think about the right approach to an international system of law that necessarily invokes considerations beyond domestic policy. After reviewing the contrasting application of the Model Law in three highly important jurisdictions, I argue that an international instrument requires consideration of factors beyond mere uniformity of interpretation, factors that go to the unique requirements of a model law that cannot succeed without cooperation across national boundaries.

1. I had also hoped for an empirical component, but will have to do that another time. See *infra* Section V.

2. William C. Whitford, *A Comparison of British and American Attitudes Towards the Exercise of Judicial Discretion in Contract Law*, in *IMPLICIT DIMENSIONS OF CONTRACT* (Hugh Collins, David Campbell & John Wightman eds., 2003).

3. See generally *CROSS-BORDER INSOLVENCY: A COMMENTARY ON THE UNCITRAL MODEL LAW* (Look Chan Ho ed., 3d ed. 2012) [hereinafter *CROSS-BORDER INSOLVENCY*].

I. BACKGROUND OF THE MODEL LAW

A. *History*

This Section introduces the Model Law and its recent history, so those familiar with all that should leap ahead to Section II.

The United States has been a leader in international insolvency matters for a long time.⁴ The 1978 Bankruptcy Code (the Code) in sections 304 through 306 gave to the bankruptcy courts the authority to recognize foreign bankruptcy proceedings and to cooperate with them, generally in an ancillary mode—that is, without the filing of a “full” bankruptcy under Chapters 7, 11, or 13.⁵ The United States courts developed a strong cooperative jurisprudence through the quarter century or so before we adopted the Model Law. During this period, various groups, both domestic and international, promulgated various statutory models and statements of basic principles that captured the evolving jurisprudence in the United States and elsewhere and pointed the way to further developments. Notable were the Model International Insolvency Cooperation Act, adopted by the International Bar Association, and the Principles of Cooperation Among the NAFTA Countries, adopted by the American Law Institute.⁶

UNCITRAL became interested in insolvency law as an object of possible international law reform after discovering that there were very few international instruments of any kind dealing with the insolvency of persons and multinational companies with operations, assets, and liabilities in a number of countries. Aside from a few small regional conventions, the subject was little addressed in international law, despite a rising number of cases in the courts of all the leading commercial jurisdictions. In 1995, UNCITRAL convened a working group to consider the negotiation of an international instrument on the subject.⁷ In two

4. Much of the history summarized here is developed in various articles and books, including HON. LEIF M. CLARK, *ANCILLARY AND OTHER CROSS-BORDER INSOLVENCY CASES UNDER CHAPTER 15 OF THE BANKRUPTCY CODE: A COLLIER MONOGRAPH* (Daniel M. Glosband ed., 2008); *CROSS-BORDER INSOLVENCY*, *supra* note 3; Hon. Leif M. Clark & Karen Goldstein, *Sacred Cows: How to Care for Secured Creditors' Rights in Cross-Border Bankruptcies*, 46 *TEX. INT'L L.J.* 513, 524 (2011); Alesia Ranney-Marinelli, *Overview of Chapter 15 Ancillary and Other Cross-Border Cases*, 82 *AM. BANKR. L.J.* 269 (2008); David Sheehan, Mark Kornfeld, Natacha Carbajal, Nikolaus Pitkowitz & Nick Moser, *Chapter 15 and Coordinating Complex Global Bankruptcy Proceeding*, *INT'L L. PRACTICUM*, Spring 2012, at 35; Jay Lawrence Westbrook, *Chapter 15 at Last*, 79 *AM. BANKR. L.J.* 713 (2005) [hereinafter Westbrook, *Chapter 15*].

5. 11 U.S.C. §§ 304–306 (2012). This important first step was the work of Professor Stefan Rosenfeld. Along with Professor Kurt Nadelmann, he was the U.S. academic custodian of international insolvency law and theory, one of a number of extraordinary contributions by their generation of European expatriates. See Kurt Hans Nadelmann, *The Bankruptcy Reform Act and Conflict of Laws: Trial-and-Error*, 29 *HARV. INT'L. L.J.* 27, 28–33 (1988) (recounting the legislative history of the 1978 Bankruptcy Reform Act).

6. AM. L. INST., *TRANSNATIONAL INSOLVENCY PROJECT: PRINCIPLES OF COOPERATION AMONG THE NAFTA COUNTRIES* (2003).

7. For those unfamiliar with the process, a “working group” consists of perhaps a hundred delegates from forty or fifty nations convened in a large hall resembling the General Assembly hall in New York, simultaneous translation into all the official UN languages, and the other formal trappings

years—a remarkably short time for a major undertaking in an entirely new field⁸—its delegates agreed⁹ on the text of a Model Law on Cross-Border Insolvency, which became Chapter 15 of the Bankruptcy Code in the United States in 2005, sections 44 through 61 of the Companies Creditors Arrangements Act and sections 267 through 284 of the Bankruptcy and Insolvency Act in Canada in 2009, and the Cross-Border Insolvency Regulations in the United Kingdom in 2006.

In the United States and elsewhere, the adoption of the Model Law was virtually unopposed, but was delayed by a variety of considerations other than its merits, including lack of legislative interest in insolvency matters.¹⁰ Since the Model Law's adoption as Chapter 15 in the United States in 2005, more than eight hundred ancillary proceedings have been brought under its provisions.¹¹ It is fair to say, as several courts have done,¹² that adoption of the Model Law represents the adoption of universalism in insolvency matters.¹³

B. Structure

The statement is often made that the Model Law is merely “procedural” and changes (or should change) no substantive result.¹⁴ Of course, some have

of an international negotiation. I had the privilege of serving as co-head (along with the Honorable Harold Burman) of the United States delegation to the conference.

8. The speed of the process was even more remarkable because a widespread belief that the UNCITRAL project was a waste of time, with no prospect of agreement in so complicated a legal field as bankruptcy that is so intertwined with every other aspect of the law.

9. UNCITRAL operates by “consensus,” which in practice means more than a majority in acquiescence with no country willing to say formally it is really unhappy with the result. Only “straw” votes are taken.

10. In the United States, despite bipartisan and enthusiastic support for the Model Law in Congress and among experts, the great struggle over the consumer amendments to the Code delayed all bankruptcy reform for years until the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Westbrook, *Chapter 15*, *supra* note 4.

11. See *Chapter 15 Cases*, GLOBAL INSOLVENCY, <http://globalinsolvency.com/newchapter15> (last visited Sept. 15, 2015) (cataloging all Chapter 15 proceedings filed in the United States).

12. *In re ABC Learning Centres Ltd.*, 728 F.3d 301, 306 (3d Cir. 2013) (“Chapter 15 embraces the universalism approach.”), *cert. denied*, 134 S. Ct. 1283 (2014); *In re Condor Ins. Ltd.*, 601 F.3d 319, 329 (5th Cir. 2010) (holding that Chapter 15 allows avoidance actions brought under the foreign law governing the main proceeding); *In re Fairfield Sentry Ltd.*, 458 B.R. 665, 678–79 (S.D.N.Y. 2011) (discussing the role of U.S. courts in ancillary proceedings as an adjunct or arm of the main proceeding).

13. Professor Lynn LoPucki is one distinguished scholar who steadfastly opposes the Model Law precisely because he understands that it embodies universalism. See Lynn M. LoPucki, *Global and Out of Control*, 79 AM. BANKR. L.J. 79 (2005). In this context, it is often said that universalism embodies the ideal of a single, global insolvency proceeding for the worldwide activities of a debtor, in contrast to the traditional territorialism in which each country's courts grab the local assets and distribute them locally. The most favored doctrine in the current era is “modified universalism,” which seeks to achieve steady pragmatic progress toward the ideal within the framework of existing political and technological possibilities.

14. See, e.g., *Saad Inv. Co. v Deputy Comm. Tax.* [2014] FCR 57, 114 (Austl.); *Rubin v. Eurofinance SA* [2012] UKSC 46 [143]; see also *Rubin v. Eurofinance SA* [2009] EWHC 2129 (Ch) at [64].

tried to constrain all of bankruptcy law with that assertion.¹⁵ Yet no one would concede the procedural label who has had to pay back to the bankruptcy estate a substantial sum received as a preference or has seen a crucial security interest voided by a bankruptcy trustee. In fact, insolvency laws reflect the reality that both normative and efficiency goals are often reshaped by financial failure. So too the Model Law is focused on procedure, but it often affects substantive results as well.

At the heart of the Model Law is the process of recognizing a foreign insolvency proceeding and its embodiment, the foreign representative of that proceeding. The rules for recognition are designed to be simply and expeditiously satisfied, with a minimum of formalities, permitting courts all over the world to exercise and coordinate control over a debtor's global assets very quickly. For coordination purposes, the recognition procedure requires a court to determine at the start if the foreign proceeding seeking recognition is the "main" proceeding involving the debtor. If so, it enjoys a special status in the recognizing court, starting with the automatic imposition of a local stay protecting the debtor's assets in that jurisdiction. The main proceeding also serves as the hub of what is hoped to be a coordinated effort by all the relevant courts to achieve a coherent and fair result on a global basis. Subject to the usual public policy caveat found in all international instruments, the merits of the foreign proceeding are irrelevant.

This very broad and liberal recognition procedure was made possible by giving the recognizing court considerable discretion in deciding what sort of relief to grant to the foreign representative.¹⁶ On the other hand, the relief that is listed in the statute as available includes turnover of local assets to the foreign representative, a fairly dramatic step in the direction of trust and cooperation.¹⁷ Given this structure, one would expect to see considerable success in achieving recognition and a more mixed bag as to relief granted, which is a fair description of what has happened in the adopting countries. Nonetheless, the Model Law

15. See, e.g., Douglas G. Baird, *Bankruptcy Procedure and State-Created Rights: The Lessons of Gibbons and Marathon*, 1982 SUP. CT. REV. 25, 47; Charles W. Mooney, Jr., *A Normative Theory of Bankruptcy Law: Bankruptcy As (Is) Civil Procedure*, 61 WASH. & LEE L. REV. 931, 934, 1011–12 (2004).

16. For discussion about the extent and desirability of courts' considerable discretion in granting relief to a foreign representative and how that discretion should take into account local concerns, see Edward S. Adams & Jason K. Fincke, *Coordinating Cross-Border Bankruptcy: How Territorialism Saves Universalism*, 15 COLUM. J. EUR. L. 43, 85 (2008) (arguing that localism better protects creditors and other stakeholders' interests than does universalism); Edward J. Janger, *Reciprocal Comity*, 46 TEX. INT'L L.J. 441 (2011) (advocating for a system of "universal proceduralism" that is administratively centralized but respects local concerns as much as possible); Frederick Tung, *Fear of Commitment in International Bankruptcy*, 33 GEO. WASH. INT'L L. REV. 555 (2001) (offering reasons why states resist universalism approaches); Benjamin J. Christenson, Comment, *Best Let Sleeping Presumptions Lie: Interpretation of "Center of Main Interest" Under Chapter 15 of the Bankruptcy Code and an Appeal for Additional Judicial Complacency*, 2010 U. ILL. L. REV. 1565, 1595 (arguing that courts should not exercise discretion to find a COMI differently from that agreed to and offered by the parties).

17. 11 U.S.C. § 1521 (2012).

has worked well on the whole and has promoted swift and effective cooperation among national courts in a number of cases.

Two types of issues have dominated Model Law litigation: identification of the main proceeding or “COMI” of the debtor, and the kind of relief to be granted. The debtor’s COMI under the statute is its “center of main interests.” In the usual case of a corporation, there is room for argument as to whether to look to a corporation’s formal domicile in its state of organization, to the location of its assets, or to the location of its administrative and managerial center. (These arguments are much the same as those made about the similar test of “principle place of business” in the United States.) Although COMI litigation is relatively rare in United States cases, there is an emerging case law that tends to look to the economic and administrative facts as controlling.¹⁸ Relief is inevitably a more important point of contention in light of the discretion the courts are given in the Model Law and the ambiguity of the relevant sections.¹⁹

The system working at its best is illustrated by a Korean case described by Look Chan Ho.²⁰ He notes the key points about this case:

- In the *Samsun* case, there has been a uniform recognition of a Korean rehabilitation proceeding as a foreign main proceeding under the UNCITRAL Model Law on Cross-Border Insolvency in the United Kingdom, United States, and Australia.
- These jurisdictions have also granted a uniform stay on enforcement of security interests in order to promote the purpose of the Korean rehabilitation.
- The case is concrete testament to the potential of the Model Law in managing transnational insolvencies.

18. COMI is a law professor’s dream subject, so there is a relatively vast literature about it. See generally John J. Chung, *The New Chapter 15 of the Bankruptcy Code: A Step Toward Erosion of National Sovereignty*, 27 NW. J. INT’L L. & BUS. 89 (2006); Edward J. Janger, *Virtual Territoriality*, 48 COLUM. J. TRANSNAT’L L. 401 (2010); LoPucki, *supra* note 13; John A. E. Pottow, *The Myth (and Realities) of Forum Shopping in Transnational Insolvency*, 32 BROOK. J. INT’L L. 785 (2007); Jay Lawrence Westbrook, *An Empirical Study of the Implementation in the United States of the Model Law on Cross Border Insolvency*, 87 AM. BANKR. L.J. 247 (2013); Jay Lawrence Westbrook, *Locating the Eye of the Financial Storm*, 32 BROOK. J. INT’L L. 1019 (2007); Aaron M. Kaufman, Comment, *The European Union Goes COMI-Tose: Hazards of Harmonizing Corporate Insolvency Laws in the Global Economy*, 29 HOUS. J. INT’L L. 625 (2007); Alexandra CC Ragan, Comment, *COMI Strikes A Discordant Note: Why U.S. Courts Are Not in Complete Harmony Despite Chapter 15 Directives*, 27 EMORY BANKR. DEV. J. 117 (2010).

19. Article 21 of the Model Law sets forth specific types of relief available, but only after authorizing “any appropriate relief.” Article 22 muddies the waters further by requiring the court to assure that the interests of the debtor and the creditors are adequately or sufficiently protected. UNCITRAL, UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION 11–12 (2014), available at <http://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf>.

20. Look Chan Ho, *Smoothing Cross-Border Insolvency by Synchronizing the UNCITRAL Model Law: In re Samsun Logix Corporation*, 24 BUTTERWORTHS J. INT’L BANKING & FIN. L. 395 (2009).

II. THREE ADOPTING STATES

This Section looks at three cases that arose under different provisions of the Model Law. A fair amount has been written about the central legal doctrine presented in each of these cases: determination as to which national proceeding concerning a given debtor is the main one (Canada); granting of relief not available under local law (United States); and enforcement of foreign bankruptcy judgments (United Kingdom). The first one is a COMI issue as introduced above, while the second and third are available relief issues. Here my concern is not to sort out the right answer to each legal issue, but to use the cases to illustrate the contrasting approaches in the two North American jurisdictions on the one hand and in the United Kingdom on the other: to plumb the judicial attitude.

A line of Canadian cases has consistently focused on cooperation even where it would have been easy to rely on strict technical detail to achieve a different result favoring the local courts. An illustrative case is *Re Probe Resources Ltd.*,²¹ in which the parent company of a group was incorporated in Canada, registered in Vancouver, and listed on a Toronto Exchange. Only its subsidiaries operated in the United States, but virtually the entire operations of the corporate group consisted of the U.S. activities of the subsidiaries. On that record, the court held that the COMI of the company was in the United States and that the U.S. proceeding should be recognized as the main one. That is, the economic substance of the business trumped the technical, legal aspects and triumphed over any local concerns. Another Canadian case in a similar vein and with a similar result was especially impressive because a Canadian lender was the debtor's principal secured creditor.²²

An American case that illustrates the North American attitude is *In re Metcalfe & Mansfield Alternative Investments*,²³ where the court was not confronted with a COMI question, but rather a question of available relief. The United States court there was requested to recognize and enforce the results of a Canadian reorganization proceeding that resolved the Great Recession's commercial paper paralysis in Canada. The Canadian debtors in *Metcalfe* had been central parties to the settlement. They sought, in effect, a United States discharge that included parties who were not debtors in the Canadian proceedings. There are rather strict rules in the United States against releasing third parties through a reorganization plan, with only limited exceptions. Although these releases would probably not have been enforceable if entered in a United States proceeding, under Chapter 15 and general principles of comity,

21. 2011 BCSC 79 5th 148 (Can.).

22. See Jeremy Opolsky, *COMI's Fifth Year in Canada: Centre of Main Interest and the Inescapable Corporate Group*, in ANNUAL REVIEW OF INSOLVENCY LAW 2013, 233, 252 (Janis P. Sarra ed. 2014) for a discussion of *Gyro-Trac (USA) Inc., Re*, 2010 QCCS 1311 (Can.). The decision is written in French, but reported in the *Annual Review* in English.

23. 421 B.R. 685 (Bankr. S.D.N.Y. 2010).

the court granted enforcement of the Canadian orders—providing relief that would not have been available in a United States bankruptcy proceeding.²⁴

In the United Kingdom, alas, we find a contrast with the North American experience in a judicial attitude that now hovers between hostility and indifference to the Model Law and perhaps to internationalism in general.²⁵ This development was surprising in light of earlier British positions. British courts have long been among the most progressive in cooperation with foreign insolvency proceedings.²⁶ Even before Parliament adopted the Model Law, Lord Leonard Hoffmann had become perhaps the most famous judge in the world in insolvency matters.²⁷ In particular, his opinion for the Privy Council in a case called *Cambridge Gas Transportation Corp. v. Official Committee of Unsecured Creditors of Navigator Holdings PLC*²⁸ seemed to ensure that United States bankruptcy judgments would receive a positive reception in the United Kingdom and its territories.

However, in 2012 British law took a severe local turn, explicitly disavowing *Cambridge Gas* and refusing to enforce a judgment of a United States bankruptcy court that most American observers thought was an easy case for enforcement. In *Rubin v. Eurofinance SA*,²⁹ Rubin was the de facto trustee for a bankrupt United States subsidiary of Eurofinance. Eurofinance and some of its principals were accused of fraudulent conduct affecting United States consumers. Rubin sued and got money judgments against various companies and individuals. None of the defendants appeared in the Chapter 11 court, preferring to await Rubin's assault in that fortress, England. The Supreme Court of the United Kingdom (successor to the judicial function of the House of Lords) rewarded the defendants' strategic retreat by issuing a scholarly opinion that ensured England would indeed be a fortress against such foreign judgments.

The Court refused to enforce the United States judgment because of the lack of personal jurisdiction over the defendants under United Kingdom standards for the enforcement of foreign judgments,³⁰ standards that represent

24. More recently a court in the United States refused to enforce a Mexican reorganization plan presenting a similar difficulty, but noted that under "exceptional circumstances" it would do so. *In re Vitro S.A.B. de CV*, 701 F.3d 1031, 1043 (5th Cir. 2012), cert. dismissed, 133 S. Ct. 1862 (2013).

25. British courts and judges have earned a great deference, but it is the duty of scholars to point out the international context of their decisions and the reactions those decisions will generate in the minds of Britain's friends.

26. See, e.g., *McGrath v. Riddell (In re HIH Cas. & Gen. Ins. Ltd.)* [2008] UKHL 21, [36] Lord Hoffmann (appeal taken from England) (explaining that English judges had for many years recognized a principle that bankruptcies should be unitary and universal).

27. *Id.*; see also *Cambridge Gas Transp. Corp. v. Official Comm. of Unsecured Creditors of Navigator Holdings PLC* [2006] UKPC 26 [2007] 1 AC 508 (appeal taken from the Isle of Man).

28. *Cambridge Gas*, [2006] UKPC 26.

29. [2012] UKSC 46.

30. As the court conceded, there were likely sufficient contacts to satisfy English law in the reverse circumstance, where a U.S. person was sued in England, but that fact was deemed irrelevant by the Supreme Court per Lord Collins. *Rubin*, [2012] UKSC 46 [123]–[129].

the highest and best nineteenth century jurisprudence.³¹ What is important for the present discussion is the Court's refusal to give more than a nod to the effect of Britain's adoption of the Model Law. As noted above, the Model Law leaves great discretion in the courts as to the relief to be granted a foreign representative after recognition. Article 21 lists specific relief that *may* be granted, but authorizes "any appropriate relief," suggesting a very broad discretion.³² The Supreme Court in *Rubin* conceded that the Model Law was entitled to a liberal construction within its precincts,³³ but found no reason to think that so delicate a subject as judgment enforcement³⁴ would have been included in the adoption of the Model Law in the United Kingdom without a specific provision covering that problem.³⁵

Unfortunately, the Court's concern with the special nature of judgment enforcement (and personal jurisdiction for that purpose) was not matched by an understanding of the special nature of bankruptcy. Insolvency cases produce the greatest concern about international cooperation and mutual enforcement of judgments because those proceedings must settle a number of questions

31. Lord Collins's justification for applying these standards was a lack of expectation of reciprocity in judgment enforcement, yet he forgot to cite any authority for that assertion. In fact, United States courts do not require reciprocity to enforce United Kingdom judgments and have enforced many of them over many years. One of the most famous of American cases enforcing judgments involved a British *default* judgment. See *Somportex Ltd. v. Phila. Chewing Gum Corp.*, 453 F.2d 435, 436 (3d Cir. 1971). In the specific area of insolvency, United States courts in recent years have enforced a large number of British schemes of arrangement despite strong grounds for refusal of enforcement. See generally Susan Power Johnston, *Why U.S. Courts Should Deny or Severely Condition Recognition to Schemes of Arrangement for Solvent Insurance Companies*, 16 NORTON J. BANKR. L. & PRAC. 953 (2007) (arguing for curtailing the recognition of such schemes). We are left to feel we receive no credit from our British friends for all that enforcement.

32. UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY, *supra* note 19, Art. 21.

33. *Rubin*, [2012] UKSC 46 [142]–[144].

34. The Court was quite right that agreement on a convention for judgment enforcement between the United States and the United Kingdom has been impossible to achieve thus far, although the difficulty has been almost entirely concerning tort judgments for personal injury, especially product liability. See RUSSELL J. WEINTRAUB, *INTERNATIONAL LITIGATION AND ARBITRATION: PRACTICE AND PLANNING* 271–308 (6th ed. 2011). It seems unlikely that American plaintiffs injured by British cutting machines will be pouring into bankruptcy to get their judgments, but in any case, that particular sort of judgment could be readily isolated from commercial matters. See *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2786 (2011).

35. As noted, the Court emphasized reciprocity as a central issue, with no apparent understanding of the broad recognition granted in the United States to British judgments generally, and in particular to British bankruptcy judgments. See *supra* note 31 and accompanying text. It specifically denied that the *Metcalfe* decision supported a broad acceptance of judgment enforcement under the Model Law. See *supra* notes 23–24 and accompanying text for a discussion of *Metcalfe*. The reason given was that the United States court in that case "applied the normal rules in non-bankruptcy cases for enforcement of foreign judgments in the United States." *Rubin*, [2012] UKSC 46 [144]. In fact, the court in *Metcalfe* cited comity by saying, "Principles of comity in chapter 15 cases support enforcement of the Canadian Orders in the United States whether or not the same relief could be ordered in a plenary case under chapter 11." *In re Metcalfe & Mansfield Alt. Invs.*, 421 B.R. 685, 700 (Bankr. S.D.N.Y. 2010) (emphasis added).

definitively and everywhere.³⁶ That is the basis for universalism, or modified universalism, and it is what sustains the appeal of those concepts despite substantial criticism. We often speak of insolvency as being “in rem.”³⁷ It is understandable that this phrase was the traditional formulation of the universalism concept because insolvency long meant liquidation. Thus clear title to property was the key point on which it was crucial to agree. An insolvency proceeding does determine title to property and other in rem questions, and it is important that titles be certain across the entire relevant market. In a global economy, that means globally.³⁸

But “in rem” is only a piece of the relevant concept, narrow and out of date.³⁹ In a world of reorganization, many questions of status must be considered in addition to the status of title to property. In international insolvency cases, “in rem” really means ensuring that various rights are enforceable “against the world”—what we may call insolvency’s universal aspect. In reorganization, discharge is at least as important as title to property. *Metcalf* is just one example of many cases in which companies seek to enforce an approved reorganization plan in another country. The *Metcalf* order in Canada would have been just barely better than worthless if the obligees on the obligations erased by the plan could have slipped over to the United States and seized property to enforce those obligations.⁴⁰

Viewed from this perspective, the disclaimer of *Cambridge Gas* in *Rubin* was far from gratuitous. It made sure that any universal (or global or in rem) effect of a reorganization would be blocked in the United Kingdom, requiring a

36. Insolvency cases also differ in that often the cases in various jurisdictions depend upon each other and have to be resolved in “real time.” That is especially true not only in reorganization, where a global plan must be produced and recognized in a reasonable period of time, but also in liquidation where piecemeal, territorial sales will destroy the value that could be obtained by going concern sales of operations that extend across national borders. The need for real-time resolution of legal issues is disserved by the *Rubin* rule, which explicitly requires that avoidance suits be brought in each country where assets might exist for enforcement of any judgment. Expense aside, that rule will often make impossible enforcement of the insolvency avoiding powers because it will not be possible to resolve lawsuits in a reasonable period of time.

37. *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 362 (2006) (“Bankruptcy jurisdiction, at its core, is *in rem*.”); *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 447 (2004) (“The discharge of a debt by a bankruptcy court is similarly an *in rem* proceeding.”).

38. See Jay Lawrence Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276, 2283–85 (2000).

39. The United States Supreme Court has recognized “bankruptcy exceptionalism” in two cases. See *Katz*, 546 U.S. at 373–78; *Hood*, 541 U.S. at 451–54. Both cases involved the protection given to American states by the Eleventh Amendment to the Constitution, which bars suits in federal courts against the states. It is an amendment beloved by a majority of the current Court, which has greatly expanded its effect. Yet the Court in those two cases has refused to apply the Eleventh Amendment to bankruptcy actions against states (lien avoidance and preference recovery, respectively) on the ground that bankruptcy operates “in rem.” In those cases, the term is clearly used in the expansive sense suggested in the text.

40. It appears that many of the beneficiaries of the controversial third-party releases would have been subject to suit in the United States and would likely have had property here. See *supra* notes 23–24 for a brief discussion of *Metcalf*.

separate reorganization proceeding to be brought in each and every country where the reorganized debtor had assets or operations. Although the implications of *Rubin* are quite significant in the area of the avoiding powers, this specter of denial of discharge to foreign reorganizations is far more serious in the long run.

The effect of this radical change in attitude in the United Kingdom has been quickly felt, most recently in *Fibria Celulose S/A v. Pan Ocean Co.*⁴¹ The case presented a twenty-five year shipping contract between a Korean shipping company and a Brazilian wood pulp company. The contract was governed by English law and gave each party an election to terminate if the other party became insolvent⁴²—what an American would call an “ipso facto” clause. The Korean company entered a rehabilitation proceeding in a Korean insolvency court. The administrator of the insolvency chose to take on and perform the contract, a decision approved by the Korean court. Subsequently, the contract was a key part of the reorganization plan confirmed in Korea.⁴³ Those two court actions were consistent with a Korean bankruptcy provision that permitted avoidance of an ipso facto clause. The administrator then sought an order in the United Kingdom enjoining the Brazilian counterparty from exercising its contractual right to terminate.⁴⁴ The Chancery judge wrote a long, careful, and thoughtful opinion, but in the end the result reflected the attitude and approach of *Rubin*.⁴⁵ The judge found that English law did not empower him to issue the injunction against termination for insolvency. He then read *Rubin* as limiting the Model Law to purely procedural matters and decided the Model Law does not provide him with any additional power to issue the injunction. Thus he applied English law to vindicate the ipso facto clause and refused to grant the requested relief.

What is striking is that the opinion barely mentions the two court actions approving the adoption of the contract.⁴⁶ The court does not expressly consider the possibility of enforcing the reorganization plan approved by the Korean court,⁴⁷ which apparently made no economic or legal sense without the

41. [2014] EWHC (Ch) 2124 (Eng.).

42. It was actually more complex because of the intervention of a security arrangement but the secured party supported the Korean debtor, so we can ignore that twist for purposes of this discussion.

43. The Brazilian party meantime had decided the contract was “onerous,” although we do not know if it was because of the insolvency of the shipping company, a change in market prices, or availabilities for shipping, or what. *Fibria Celulose S/A*, [2014] EWHC (Ch) 2124, [3].

44. The Brazilian party had already indicated that it intended to terminate the contract, subject to a possible deal with the secured party. It is not clear to me why the administrator felt it necessary to get the requested order from the English court, and that lacuna considerably complicates analysis of the court’s decision.

45. Also important was the decision of the Supreme Court of the United Kingdom in *Belmont Park Investments PTY Ltd. v. BNY Corporate Trustee Services Ltd.* [2011] UKSC 38, in which the Court applied the English law of the contract to an ipso facto clause, although the insolvency proceeding was centered in the United States. See *infra* note 47.

46. What Americans would call “assumption” of the contract. See 11 U.S.C. § 365(a) (2012).

47. The court ultimately applied English law under the contract without regard for the rules of insolvency law, a position that I have criticized for more than twenty-five years, but I put that point to

continuance of the contract with the Brazilian counterparty. But the effect was that the court refused to enforce the Korean judgment approving the plan.⁴⁸ That this refusal lay at the heart of the opinion does not leap off the page, but is strongly suggested by the court's extensive quotations from *Rubin* concerning the unlikelihood that Parliament intended to affect judgment enforcement in adopting the Model Law. In any case, the attitude, as well as the legal holdings, of the case make it seem unlikely that any United States reorganization plan could be enforced in the United Kingdom if the plan required assumption of a contract containing an ipso facto clause. Note that this result seems to hold true even though neither party to the contract was British; so an English choice of law clause may be a universal shield against being bound by a United States Chapter 11 case if activities in the United Kingdom are important to the business conducted under the Chapter 11 plan. That is a sobering thought.

III. INTERNATIONAL INTERPRETATION

For a conference honoring Bill Whitford, I would not want to do some doctrinal analysis of annoying cases and leave it at that. Bill has always probed beneath the legal surface to understand the deeper issues, whether legal or not. While I cannot do it as well as he does, it was for just that reason I wanted in Section I of this Article to avoid a focus on a dispute about some legal doctrine, in favor of identifying an attitude—and a shift in attitude—that seem to me to underlie the courts' approach to the legal issues presented.

That discussion is meant to provide the medium to paint on a larger canvas: How are we to approach interpretation of an international instrument as opposed to a purely domestic one? We are all familiar with the issues that arise from the impact of foreign law on our judicial disputes generally. For example, we know about the silly idea that there is something wrong with learning from foreign courts.⁴⁹ I do not plan here to address all the parochial ideas, but to discuss the positive side of the need to interpret the growing body of multinational or transnational law. In particular, I want to share some thoughts about a provision commonly found in international instruments commanding the courts to interpret an international text with reference to its international nature. My idea is that courts should determine if an international text establishes a

one side for now. See Jay Lawrence Westbrook, *Choice of Avoidance Law in Global Insolvencies*, 17 BROOK. J. INT'L L. 499 (1991); Jay Lawrence Westbrook, *Extraterritoriality, Conflicts of Laws, and the Regulation of Transnational Business*, 25 TEX. INT'L L.J. 71 (1990); Jay Lawrence Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L.J. 457 (1991); Jay Lawrence Westbrook, *Universalism and Choice of Law*, 23 PENN ST. INT'L L. REV. 625 (2005).

48. The administrator seems to have couched the case in terms of the relief requested, so it is not clear to what extent the merits of various arguments were briefed and discussed before the judge.

49. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 622–28 (2005) (Scalia, J., dissenting); *Atkins v. Virginia*, 536 U.S. 304, 324–25 (2002) (Rehnquist, C.J., dissenting); *Foster v. Florida*, 537 U.S. 990, 990–91 n.* (2002) (Thomas, J., concurring); see also Austen L. Parrish, *Storm in A Teacup: The U.S. Supreme Court's Use of Foreign Law*, 2007 U. ILL. L. REV. 637.

system rather than standards; if so, it should adopt whatever reasonable interpretation best enables that system to achieve its intended ends.

Two of the provisions most often discussed in American courts are section 7(1) of the Convention for the International Sale of Goods (CISG)⁵⁰ and section 1508 of the Model Law on Cross-Border Insolvency, the last being the subject of the earlier discussion.⁵¹ A third instrument, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,⁵² also known as the New York Convention, does not have a specific provision but is treated as if it did. In each case the general idea is that courts should use a somewhat different interpretative approach for international instruments as opposed to domestic statutes and other local legal texts.⁵³ We might call that idea the “international interpretive rule.” In reading cases discussing the international rule and articles critiquing those cases, I am struck by how many discussions limit the international rule to achievement of uniformity.⁵⁴ That seems to me to be too narrow. For instance, I doubt our courts should follow whatever path has been laid down by courts in other countries, especially where we view that path as wrongheaded in the context of the international system that the instrument seeks to create. And obviously the uniformity goal gives little guidance in the case where American courts are the first to rule on the meaning of a particular provision.⁵⁵ While uniformity is one legitimate goal in interpreting an international instrument,⁵⁶ the international rule must include a broader

50. “In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.” U.N. Convention on Contracts for the International Sale of Goods (CISG) art. 7(1), Apr. 10, 1980, 19 I.L.M. 668 (1980).

51. “In interpreting this chapter, the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions.” 11 U.S.C. § 1508 (2012). See *supra* Section I for an overview of the history and structure of the Model Law on Cross-Border Insolvency.

52. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention].

53. The term “international instrument” could include a whole variety of texts reflecting agreement among countries as to some common issue, but I will discuss only treaties and model laws.

54. See, e.g., *Urica, Inc. v. Pharmaplast S.A.E.*, No. CV 11-02476 MMM (RZx), 2014 WL 3893372, at *10 (C.D. Cal. Aug. 8, 2014) (explaining that the CISG must be interpreted with general principles on which it is based, but then following what other American courts have interpreted the CISG to require for contract formation without any analysis); *Martini E Ricci Iamino S.P.A.—Consortile Societa Agricola v. Trinity Fruit Sales Co.*, 30 F. Supp. 3d 954, 965–66 (E.D. Cal. 2014) (mentioning only uniformity as an objective of the CISG as well as using the UCC to interpret the CISG); *Chicago Prime Packers, Inc. v. Northam Food Trading Co.*, 320 F. Supp. 2d 702, 716 (N.D. Ill. 2004), *aff'd*, 408 F.3d 894 (7th Cir. 2005) (looking to foreign cases to apply the same rule under the CISG in the case at bar to achieve uniformity, yet returning to domestic law to determine the rate for prejudgment interest, which is not covered under the CISG).

55. Or, for example, when there is a split among the international authority. See, e.g., *Chicago Prime Packers*, 320 F. Supp. 2d at 715–16 (discussing the international controversy surrounding prejudgment interest under the CISG and deciding to use domestic law because of that controversy).

56. The best article I have seen about the challenges of achieving uniformity is still 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 (1987).

approach of which uniformity would be only a part. The objective should be to adopt rules that enable the contemplated international system to achieve its goals.

Of the recent articles about the international interpretive rule, one by Professor Frédéric Bachand comes closest to discussing this broader conception of the rule.⁵⁷ His subject is international commercial arbitration under the New York Convention. He observes that “the Convention unquestionably rests on the idea that limiting the influence of domestic rules by subjecting the international arbitration system to international rules tends to serve the needs of its users.”⁵⁸ At several points, he says or implies that serving the needs of users is the underlying and controlling purpose for the international rule as applied to the New York Convention. While he reverts in the end to discussing uniformity, his analysis is more useful than most because of his attention to the arbitration system that the Convention seeks to create and the interpretive approaches that will best serve that system. Most of the other articles I have read are concerned with uniformity as such, without giving much attention to the needs of the underlying international system that an international instrument has attempted to create.⁵⁹

The approach I propose is not applicable to all international instruments. One useful distinction that I have not found in the literature is the difference

57. Frédéric Bachand, *Court Intervention in International Arbitration: The Case for Compulsory Judicial Internationalism*, 2012 J. DISP. RESOL. 83, 85–91 (2012).

58. *Id.* at 88; see also Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687, 733–34 (1998) (briefly discussing the interpretation of Article 7(1) of the CISG as reflecting a “system” of “general principles”).

59. See Sieg Eiselen, *Literal Interpretation: The Meaning of Words*, in CISG METHODOLOGY 61 (André Janssen & Olaf Meyer eds., 2009) (arguing that a method of interpretation for the CISG should strive to meet the goals of uniform interpretation and application embodied in Article 7); Ulrich Magnus, *Tracing Methodology in the CISG: Dogmatic Foundations*, in CISG METHODOLOGY 33 (discussing foundations for a method of interpretation of the CISG in order to achieve its aims of autonomous interpretation, uniformity, and good faith under Article 7); H. Allen Blair, *Hard Cases Under the Convention of the International Sale of Goods: A Proposed Taxonomy of Interpretative Challenges*, 21 DUKE J. COMP. & INT’L L. 269, 290–94 (2011) (assessing the inclusion of “international character” in Article 7(1) as a command to avoid using domestic norms in interpreting the CISG, which complements the ultimate goal of uniformity); Sunil R. Harjani, *The Convention on Contracts for the International Sale of Goods in United States Courts*, 23 HOUS. J. INT’L L. 49, 56 (2000) (understanding the purpose of Article 7(1) as “[t]o promote uniformity of interpretation”); Alexander S. Komarov, *Internationality, Uniformity and Observance of Good Faith as Criteria in Interpretation of CISG: Some Remarks on Article 7(1)*, 25 J. L. & COM. 75, 76 (2005) (characterizing the “international character” phrasing of Article 7(1) as an instruction not to refer to domestic law, which would thwart uniformity); Shani Salama, Comment, *Pragmatic Responses to Interpretive Impediments: Article 7 of the CISG, an Inter-American Application*, 38 U. MIAMI INTER-AM. L. REV. 225, 226–27 (2006) (acknowledging that perfect uniformity at the expense of other goals is not the intent of the CISG, although not discussing other goals besides uniformity). Ms. Camilla Andersen goes beyond uniformity to some extent, arguing that local courts should avoid applying local interpretive rules and case law, instead looking to international sources for methods of analysis as well as results. See Camilla Andersen, *The Global Jurisconsultorium of the CISG Revisited*, 13 VINDOBONA J. INT’L COMMERCIAL L. & ARB. 43 (2009); Camilla Baasch Andersen, *The Uniform International Sales Law and the Global Jurisconsultorium*, 24 J. L. & COM. 159 (2005).

between a standards text and a system text. It seems plausible to divide international instruments into two broad categories: those that seek to establish international (or universal) standards and those that seek to establish an international system. To pick examples far from my own expertise, I would think that the Universal Declaration of Human Rights⁶⁰ would be a standards text, while the Rome Statute of the International Criminal Court,⁶¹ establishing the International Criminal Court (ICC), would be a system text. The former sets forth agreed propositions about the rights to which human beings are entitled as such and looks to application of those standards in domestic courts, as well in those supranational courts that are slowly but steadily coming into existence. On the other hand, the ICC text sets up an institutional and procedural structure for enforcing stated sorts of international norms against individuals in specified ways.

As a general proposition, it would seem that the international rule for the standards texts would usually be focused almost entirely on uniformity, so that states and individual actors could conform their conduct, especially their cross-border conduct, to those international norms, and nations could be consistent in applying those norms. By contrast, uniformity would be an important but subsidiary goal for a system text. There the overriding need is for decisions that enable the international system to function as designed. Uniformity would certainly contribute to that goal, but would hardly be enough by itself.

I preceded this discussion with a comparative examination of cross-border insolvency law in three jurisdictions precisely because the insolvency Model Law is an international instrument that seeks to establish a system and the field of insolvency is ahead of most other areas in doing that.⁶² A treaty with that goal would be more obviously part of a system, but a model law seeks similar goals, albeit with a lower level of ambition balanced against a greater chance of success at that lower level. The UNCITRAL delegates that produced the Model Law carefully considered a treaty approach, but decided to pursue a model law instead because it is so much more difficult to achieve wide adoption of a treaty.⁶³ In particular, it was felt that the binding nature of treaty commitments might make countries hesitant to join a treaty system when the area in question—insolvency law—is so complicated and had not been the subject of any previously successful effort at coordination or harmonization. A model law was a more modest first step, avoiding the risk that a treaty might languish for many years, admired but unadopted.

60. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

61. Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9*, reprinted in 37 ILM 999 (1998).

62. See *supra* Section II for a comparison of cases from the United States, the United Kingdom, and Canada addressing cross-border insolvency.

63. See Jenny Clift, *The UNCITRAL Model Law on Cross-Border Insolvency—A Legislative Framework to Facilitate Coordination and Cooperation in Cross-Border Insolvency*, 12 TUL. J. INT'L & COMP. L. 307, 317–19 (2004) (citing session documents discussing the merits of the model law approach over the treaty approach).

The nature of a model law is an attempt to construct cross-border institutional machinery in the service of coordinating achievement of a common goal and thus is a system text. The admonition in section 1508 of the Model Law to “consider” its international origin and to apply it in a way consistent with its application by other countries points to more than uniformity as a goal.⁶⁴ First, on its face, unlike similar admonitions in some other texts,⁶⁵ section 1508 does not limit itself to uniformity or even emphasize that goal by stating it. Instead, the language appropriately suggests that the rule applied in an adopting country should be consistent with the maximum cooperation and efficiency within an international matrix of courts applying the Model Law.

The earlier discussion explained specifically why international insolvency has to be understood as a system,⁶⁶ so that the needs of the system are considered as each case is resolved. Imagine a multinational corporation based in the United States with operations in Europe that are important to its financial future. It has issued several series of bonds, three of which are held in large part in Europe. After filing a Chapter 11 proceeding in the United States, it proposes a plan of reorganization that is supported by most of its creditors, but opposed by one European mutual fund not subject to United States jurisdiction and holding \$100 million of the company’s bonds.⁶⁷ The necessary majorities of bondholders vote for the plan and the United States court confirms it.

The opposing bond fund then proceeds to obtain judgments in England against the debtor on the basis of the default on the original bond obligation despite the restructuring of the bond debt in the reorganization.⁶⁸ The bondholder would have been able to obtain judgment because the British court, following *Rubin*, would have refused to enforce the reorganization judgment against the creditor, leaving it free of the U.S. discharge.⁶⁹ The creditor could proceed to enforce the English judgment in England and throughout the European Union.⁷⁰ Faced with that threat, the corporation would have little choice but to pay those bondholders much larger amounts. Moving back in time, the prospects of that preferential treatment would cause the remaining creditors to refuse to vote in favor of the plan in the first place. The only remedy might be to bring an additional administration case in the United Kingdom, which would

64. See 11 U.S.C. § 1508 (2012).

65. See, e.g., Irit Mevorach, *On the Road to Universalism: A Comparative and Empirical Study of the UNCITRAL Model Law on Cross-Border Insolvency*, 12 EUR. BUS. ORG. L. REV. 520, 522–28 (2011).

66. See *supra* Part I.B for discussion of the structure of the Model Law.

67. Many of these bonds could have been purchased for pennies on the dollar during the usual period shortly after a filing when many creditors are overly pessimistic.

68. The hypothesized facts echo the recent spectacle of the Argentinian bond litigation, in which a sovereign’s irresponsibility combines with the overreach of an American court. See *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246 (2d Cir. 2012), *cert. denied*, 134 S. Ct. 201 (2013).

69. That result is precisely the one avoided by the thoroughly international decision in *Cambridge Gas*, overruled in *Rubin*. See *supra* notes 25–35 and accompanying text.

70. The English judgment would be readily enforceable under the Brussels Convention, Article III, Section 2. Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1968 art. III(2), Sept. 27, 1968, 1990 O.J. (C 189) 32, 29 I.L.M. 1413 (1990).

certainly advantage the European creditor over others and increase costs dramatically. Some large companies have had “two humped” reorganizations—United States and British—in recent years, thus defeating the system the Model Law sought to create.⁷¹ There have been a variety of reasons for this unfortunate result, but the *Rubin* decision, as extended by *Fibria*, will certainly increase its incidence.

This example relates to the international interpretive rule because of the complete failure of the Supreme Court of the United Kingdom in *Rubin* to give any attention to the effect of its ruling on the international system that the Model Law sought to create, a goal necessarily adopted by the British Parliament in enacting the Model Law.⁷² That court is obviously far more qualified than I am to understand and apply British law, but when that law is part of an international system the other members of that system (those who have adopted the same Model Law) are entitled to discuss its effect on the common goal. The effect of *Rubin* is to call into question the functioning of the entire Model Law system. The *Rubin* court defended the result by saying that the American trustee could always file suit in the United Kingdom, thus indicating that it gave no weight whatsoever to the policy against a fragmented territorialism represented by the United Kingdom’s adoption of the Model Law.⁷³ Indeed, the combination of *Rubin* and *Fibria* makes one wonder why the Parliament bothered to enact such a toothless “procedural” law.

I do not make a case for always ruling for the foreign side in cases to which international instruments apply. I do argue for a careful judicial examination of the purposes of the system created by the instrument in question in addition to reviewing foreign decisions. Our precedents are less likely to harmonize than our attitudes. An attitude of openness and concern toward the international system that is the goal of a model law automatically vindicates its adoption by a

71. See, e.g., *In re Nortel Networks*, No. 09-10138-KG, 2011 WL 1154225 (D. Del. Mar. 29, 2011); *In re Lehman Bros. Inc.*, 458 B.R. 134 (Bankr. S.D.N.Y. 2011); *Belmont Park Investments Pty Ltd. v. BNY Corporate Trustee Services Ltd.* [2011] UKSC 38; *Re Nortel Networks SA* [2009] EWHC (Ch) 206 (Eng.) (actually three humps).

72. In the interests of clarity and brevity, I put aside the direct impact of *Rubin*’s refusal to enforce judgments avoiding fraudulent conveyances, an avoidance policy to which American and British law are equally devoted. The *Rubin* judgment concedes that its rule will require an insolvency administrator to bring an avoidance action in the United Kingdom and in every other country that follows *Rubin*, even where a defendant-transferee had a considerable presence in the COMI country, if that presence doesn’t fit the narrow Dicey rule of personal jurisdiction. *Rubin v. Eurofinance SA* [2012] UKSC 46 [123]–[129]. Any competent lawyer will therefore advise that transactions be structured to ensure that the entity that benefits from a transfer or other favor is carefully placed de hors the jurisdiction. The result would make the United Kingdom a bankruptcy-haven jurisdiction.

73. Adoption of the Model Law is widely conceded to amount to adoption of some version of universalism. See, e.g., Nigel John Howcroft, *Universal vs. Territorial Models for Cross-Border Insolvency: The Theory, the Practice, and the Reality that Universalism Prevails*, 8 U.C. DAVIS BUS. L.J. 366, 413 (2008) (describing the Model Law as adopting “modified” universalism); Adams & Fincke, *supra* note 16, at 46 (same); John A. E. Pottow, *Procedural Incrementalism: A Model for International Bankruptcy*, 45 VA. J. INT’L L. 935, 939 (2005) (explaining that the Model Law actually advances universalism although it may seem like a hybrid of universalism and territorialism “on the surface”). See also *supra* note 13.

legislature. Those laws always include ambiguities that are the consequence of compromise and nearly always have a public policy exception. The legislator assumes that the courts will sometimes protect the local fellow and is glad for that. But the legislator also assumes that good faith pursuit of an effective international system is good for the local people, so an attitude that gives explicit and careful consideration to both serves the legislative purpose.

By way of illustration, I offer a mild criticism of an American decision by one of our most distinguished judges who is also a leading internationalist. The foreign proceeding in that case concerned a German debtor, Dr. Jürgen Toft.⁷⁴ The foreign representative sought a secret order permitting examination of all of Dr. Toft's American mail. The United States court refused to grant the order on grounds of public policy under Article 6 of the Model Law (section 1506 of Chapter 15).⁷⁵ I have difficulty criticizing that result, but the opinion did not adopt the approach suggested here. An application of the international interpretive rule would have required a consideration of the risk that denial of this form of discovery would present an open invitation to deny testimony and documents to United States foreign representatives seeking them from countries more committed to privacy—and more uncommitted to transparency—than the United States. It would have been worthwhile just to discuss the relevant provisions of Chapter 15 (especially section 1521(a)(4)) in the context of the great importance of information exchange in achieving the goals of an international insolvency system under the Model Law. This analysis coupled with expressions of regret for an inability to cooperate would convey an attitude of concern for American obligations under the Model Law and encourage other courts to see that the United States courts wished to limit any exception as much as possible.⁷⁶

This example carries the concern about attitude and the impact of a decision on the system to another level. It is difficult to understand foreign decisions, even those rendered in English by common law courts. (Witness the *Rubin* court's apparent inability to correctly interpret *Metcalfe*, discussed above.⁷⁷) An exposition of an apparently parochial result consciously directed to a foreign audience combined with appropriate analysis can substantially mitigate the adverse effects of that decision on the future results in the system.

IV. CONCLUSION

The recent turn in British law unfortunately illustrates the challenge to producing international systems of law, while the experience in North America and elsewhere offers considerable hope for the future. Key to the hopeful

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

75. *Id.* at 191–92; see 11 U.S.C. § 1506 (2012).

76. In fairness, the opinion says repeatedly that this denial is a “rare” one. *Id.* at 189, 196, 200, 201. But my concern is that it did not focus on the harm resulting to the international system by the denial, a harm overcome only by the powerful policy effecting this particular request.

77. See *supra* notes 34–35 and accompanying text for a discussion of *Rubin*'s mischaracterization of the rationale underlying *Metcalfe*.

prospect is that courts should interpret international system instruments according to an international interpretive rule that goes well beyond uniformity to include careful consideration of the needs of the international system that the local legislature has adopted via the treaty or model law that applies to a particular case. It is important that that consideration reflect an attitude of cooperation and development of the system that has been adopted and that the needs of that system be put explicitly in the balance against claims of other local law, however strong.

V. AFTERWARD

This Article being a tribute to Bill Whitford, I had hoped very much to include a modest empirical section, at least comparing filing rates and perhaps recognition rates among the three jurisdictions discussed. Alas, I was unable to get useful statistics for Canada. For the United Kingdom there is one excellent paper by Irit Mevorach,⁷⁸ but the infirmities of British statistics (so far as I have been able to tell) did not permit her to go far enough to permit the comparisons I had envisioned. I hope by the time of our next celebration of Bill and his work (let there be many) we will have more data.

78. Mevorach, *supra* note 65.

