

# An Executory Approach to Cross-Border Insolvencies

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## I. INTRODUCTION

In a world of rapid globalization, it is increasingly important that the laws of each country are able to settle disputes between parties that have international implications. There has been much advancement in the area of international law with the creation of the World Trade Organization in late 1994.<sup>1</sup> The WTO agreements are negotiated and signed by most of the world’s trading nations and ratified in their parliaments, which has enabled disputes to be resolved with fewer opportunities for parties to block proceedings.<sup>2</sup> In addition to the WTO, there are also

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1. See RALPH H. FOLSOM ET AL., *INTERNATIONAL BUSINESS TRANSACTIONS: A PROBLEM-ORIENTED COURSEBOOK* 21 (9th ed. 2005).

2. *Id.* (“The Uruguay Round made important advances towards freer trade, not only in the traditional areas of lower tariffs and fewer nontariff barriers, but in addressing problems of trade in services, intellectual property, foreign investment and agriculture. It further created new methods of dispute resolution of trade agreements, making the process more like a judicial than an arbitral proceeding, and reducing opportunities of parties to block proceedings.”).

more advanced regional developments aimed at fewer member states.<sup>3</sup> As between Canada and the United States, these two countries have the added benefit of being signatories to the North American Free Trade Agreement, which includes Mexico as well.<sup>4</sup>

In bankruptcy the goal is to maximize the value of the bankruptcy estate for the benefit of the creditors, while permitting the debtor to get a fresh start.<sup>5</sup> As articulated by the Supreme Court, the purpose is to “relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.”<sup>6</sup> This purpose has been emphasized as being in both public as well as private interest.<sup>7</sup>

However, what happens in the case of cross-border insolvency when it involves two countries with different public policies with respect to bankruptcy? What about when a debtor has assets in one country, but files for bankruptcy in another country where it also has assets—which country’s laws govern? When is it appropriate to recognize a judgment from a foreign court? What if the other country applies a law that causes an undesirable result and might be regarded as contrary to domestic policy? When do concerns of comity and overall efficiency take precedence over state sovereignty or the claims of domestic creditors?

This article addresses the ways in which these problems are currently addressed and discusses some potential conflict areas that inevitably arise. Adding to the complexity of these issues are substantial differences in both policy and law that distinguish American bankruptcies from those of other countries.<sup>8</sup>

This article examines the framework and methods currently being used in cross-border insolvencies between the United States and Canada and analyzes several recent cases on both sides of the border. Recent

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3. *Id.* (“There are other international organizations which are of considerable importance to world or regional trade, but with far more limited membership. They include the organizations which have been created for the purpose of economic integration, and those which have evolved with a participation of member nations with similar levels of development and attitudes toward what international law norms should be.”).

4. *Id.*

5. *See* *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934).

6. *Id.* (quoting *Williams v. U.S. Fidelity & G. Co.*, 236 U.S. 549, 554–55. (1915)).

7. *See id.*

8. *See* Nathalie Martin, *Common-Law Bankruptcy Systems: Similarities and Differences*, 11 AM. BANKR. INST. L. REV. 367, 367 (2003); Jason J. Kilborn, *Mercy, Rehabilitation, and Quid Pro Quo: A Radical Reassessment of Individual Bankruptcy*, 64 OHIO ST. L.J. 855, 889 (2003) (suggesting that the U.S. should follow a more similar bankruptcy practice to Canada and parts of Europe and limit individuals to debt relief through mandatory payment plans); Michael J. White, *Why It Pays to File for Bankruptcy: A Critical Look at the Incentives Under U.S. Personal Bankruptcy Law and a Proposal for Change*, 65 U. CHI. L. REV. 685, 685 (1998) (stating U.S. is “extremely unusual” in its debtor-friendly stance).

cases demonstrate the ways in which Canada and the United States have afforded comity to one another and how this has allowed companies operating across national boundaries to reorganize successfully. Nevertheless, this article points out that there are still reasons to be concerned due to inconsistencies in procedural as well as substantive laws between the two countries.

Part II will look at the framework currently used in handling cross-border disputes, primarily looking at the policies underlying the Transnational Insolvency Project<sup>9</sup> and how judicial decisions have promoted the spirit of cooperation and the policies outlined in the Project. Part III will discuss the procedural aspects of cross-border insolvencies, in particular the ways in which the United States recognizes a foreign bankruptcy proceeding differently from Canada which has created some problems in dealing with jurisdictional issues. Part IV discusses some of the complications that can arise when substantive laws differ between the United States and Canadian bankruptcy laws. This section discusses several fundamental differences between the two countries and will argue that consistency and harmonization of laws is the best way to promote trust and efficiency within the realm of cross-border insolvencies. For instance, this section will demonstrate the burdensome effect of having a circuit split with different interpretations regarding the treatment of executory contracts in a bankruptcy proceeding. While different interpretations may be justified by different policies behind the Bankruptcy Code,<sup>10</sup> circuit splits should be resolved with an overriding policy consideration toward facilitating the operation of international business.

In most of the cases examined in this article, the courts have been successful in construing the principles of comity and practicality so as to best serve the interests of all the parties in the long run. While these types of solutions have recently aided in the successful reorganization of several companies operating throughout the United States and Canada, they have also masked some of the underlying fundamental problems that are bound to reoccur as companies located on both sides of the border file for bankruptcy. Gradual changes that promote consistency and reflect the reality of global society are necessary in order to promote a more stable regime of trust and predictability in cross-border insolvencies.

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9. AM. LAW. INST., TRANSNATIONAL INSOLVENCY PROJECT: PRINCIPLES OF COOPERATION IN TRANSNATIONAL INSOLVENCY CASES AMONG THE MEMBERS OF THE NORTH AMERICAN FREE TRADE AGREEMENT (2000), [http://www.ali.org/ali\\_old/InsolvencyPrinciples.pdf](http://www.ali.org/ali_old/InsolvencyPrinciples.pdf).

10. 11 U.S.C. §§ 101–1532 (2006).

## II. THE INTERNATIONAL SETTING

In the normal course of business, a multinational corporation can make quick decisions and conduct business in multiple countries quite smoothly and efficiently. However, a bankruptcy filing changes all of that, and before long a formerly functional business can turn into a state of chaos. In a typical international insolvency, different sets of creditors assert claims to the debtor's assets under the different laws of each country involved.<sup>11</sup> Although the organization has become insolvent, it would not be in the interest of anybody to have the business shut down and its assets liquidated at a price worth only the sum of its parts. Both domestic and foreign creditors can surely agree on this general policy. It is for this reason that the United Nations Commission on International Trade Law (UNCITRAL) began an extensive study regarding achieving higher levels of cooperation in international insolvencies.<sup>12</sup> Although no binding legislation has been implemented, UNCITRAL has approved the Model Law,<sup>13</sup> which can be understood as an "agreed-upon international model for domestic legislation."<sup>14</sup> The Model law took over three years to draft and more than thirty-six member states were involved.<sup>15</sup> While the Model Law will be referred to throughout this article, it is of limited use due to the large number of countries that were involved.

### A. *The Transnational Insolvency Project*

In contrast, the Transnational Insolvency Project was drafted with only three countries in mind, yet it also began largely in response to the increased number of bankruptcies occurring worldwide with international implications.<sup>16</sup> "The Principles [from the Project] were developed specifically for use among the NAFTA countries, but the [American Law Institute] concluded that they should be applied generally in multinational bankruptcy cases in United States courts."<sup>17</sup>

The European countries long ago realized that some coordination

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11. See The Honourable James M. Farley, Q.C., Globalization and Its Impact on Cooperation and Coordination in Cross-Border Insolvency Cases, American Bar Association Conference (Sept. 24, 2008), at 8 (on file with student author).

12. *Id.* at 20.

13. U.N. COMM'N ON INT'L TRADE LAW (UNCITRAL), Uncitral Model Law on Cross-Border Insolvency with Guide to Enactment, U.N. Sales No. E.99V.3(1997), available at <http://www.uncitral.org/pdf/english/texts/insolven/insolvency-e.pdf>.

14. See The Honourable James M. Farley, Q.C., *supra* note 11, at 20.

15. COLLIER ON BANKRUPTCY, MONOGRAPH 2 ANCILLARY AND OTHER CROSS-BORDER INSOLVENCY CASES UNDER CHAPTER 15 OF THE BANKRUPTCY CODE, at 2 (2005).

16. See Jay Lawrence Westbrook, *Chapter 15 at Last*, 79 AM. BANKR. L.J. 713, 713-14 (2005).

17. *Id.* at 714.

was necessary in order to manage the risks of default across national borders.<sup>18</sup> Much like the developments in Europe, the goal of the Transnational Insolvency Project was to “develop principles and procedures for managing a cross border insolvency . . . having its center of interests in a NAFTA country and having assets, creditors, and operations in more than one NAFTA country.”<sup>19</sup> The American Law Institute allocated a number of resources to this Project, which included the participation of many leading bankruptcy-law experts from each of the three countries.<sup>20</sup>

The Project was divided into two phases, the first’s goal being to achieve a general understanding of the insolvency laws of each of the three countries involved.<sup>21</sup> This was accomplished by having each country put forth an international statement reflecting its respective laws shaped to speak to an “international audience.”<sup>22</sup> This was necessary because the credibility of the Project’s recommendations rested upon “the legitimacy of the drafters and whether they truly represent a consensus of leading experts.”<sup>23</sup> The goal of the second phase was to “develop a set of agreed principles governing multinational bankruptcy cases and to offer useful approaches to managing such cases based on those principles.”<sup>24</sup> In other words, the intent behind the Project was to decide on certain shared values between the three countries and then interpret the laws of each country with regard to those shared values or policies.

The initial stages of the Project were quite successful in revealing substantial similarities between the three legal systems involved.<sup>25</sup> Since the specific laws of each country were “known factors and were not greatly different from one another,” this regional Project was able to go a step further than other general global initiatives, such as the UNCITRAL Model Law.<sup>26</sup> Despite the high levels of consensus amongst the NAFTA experts regarding the bankruptcy policies that should be promoted,<sup>27</sup> the Project is nevertheless lacking in its goal to influence legis-

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18. See AM. LAW. INST., *supra* note 9, at 1.

19. *Id.*

20. See *id.*

21. See *id.*

22. *Id.* (“As to each country, they represent a summary of its bankruptcy laws approved by judges, lawyers, and academics widely recognized as experts in the field.”).

23. *Id.*

24. *Id.*; see also *id.* at 7 (“A particular Procedural Principle may be regarded in these Principles as applicable in a given country if it is permitted under existing law, even if the current practice in that country is underdeveloped, unclear, or inconsistent as to the subject matter of that Principle.”).

25. See *id.*

26. *Id.*

27. See *id.* at 13.

lative reforms that would provide for more consistency in the application of bankruptcy laws between the countries. Perhaps this was because the Project was slightly conservative in its efforts to draw a balance between advancing the policies of cooperation while being careful not to make the proposals too lofty.<sup>28</sup> Furthermore, despite the Project's recommendation for both Canada and the United States to adopt the Model Law on Cross-Border Insolvency in its entirety,<sup>29</sup> this has not yet been done.<sup>30</sup>

### B. *Principles Established by the Transnational Insolvency Project*

The proposals of the Project were divided into three sections of recommendations: 1) general recommendations that include shared values between the three bankruptcy systems, 2) procedural recommendations that enable courts to cooperate and communicate under the existing laws, and 3) recommendations for new legislation or international agreements.<sup>31</sup> Although the Project has not been successful in generating many legislative reforms, the Project has been very influential with respect to the general and procedural recommendations.<sup>32</sup> Rather than create any new body of law, these recommendations set forth common objectives as well as "best practices" under current law.<sup>33</sup> The recommendations leave open the issue of implementation to the legislators of each individual country.<sup>34</sup>

The Project yielded seven general principles and twenty-seven procedural principles that were agreed upon by each NAFTA country.<sup>35</sup> The first general principal is that courts and administrators should cooperate with the "goal of maximizing the value of the debtor's worldwide assets."<sup>36</sup> The second is that recognition should be granted as quickly and inexpensively as possible in each of the other NAFTA countries with minimal legal formalities.<sup>37</sup> The third is that bankruptcy cooperation requires the automatic stay to take effect at the earliest possible time in each country where the debtor has assets.<sup>38</sup> The remaining general

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28. *Id.* at 3 ("[T]he Project has conscientiously attempted to draw a proper balance between advancing common values in a spirit of cooperation to the maximum extent possible, while being cautious to restrict its proposals to those that are realistic at the current stage of development of legal relationships within the NAFTA.").

29. *Id.* at 14.

30. *See infra* Part III.C.

31. *See* AM. LAW. INST., *supra* note 9, at 2.

32. *See id.* at 6-12.

33. *Id.* at 3.

34. *See id.*

35. *See id.* at 6-12.

36. *Id.* at 6.

37. *See id.*

38. *See id.*

recommendations include the free exchange of information to be obtained from each proceeding, the sharing of assets on a worldwide basis where appropriate, and the absence of discrimination against debtors and creditors alike.<sup>39</sup>

The procedural recommendations are more specific and are primarily designed to ensure that domestic creditors are not treated favorably or unfavorably and that foreign proceedings can be recognized promptly except when “manifestly contrary to public policy.”<sup>40</sup> Some of the particular provisions include but are not limited to the topics of structure, recognition, reconciliation of automatic stays, abusive filings, court access, communication, asset transfers, notice, cooperation, coordination, cross-border sales, avoidance actions, postpetition financing, claims, priorities, treatment of subsidiaries, as well as any discharges.<sup>41</sup> For example, Procedural Recommendation 20 states that “where there are parallel proceedings, administrators should attempt to agree upon a common position concerning the avoidance of any prebankruptcy transactions involving the debtor.”<sup>42</sup>

The procedural principles can also serve as a good indication of where substantive laws can be reformed.<sup>43</sup> The final section of the Project recommends that each NAFTA country should adopt legislation that is consistent with the general and procedural principles.<sup>44</sup> The elimination of unnecessary circuit splits, as this article encourages, would greatly facilitate this objective and promote the Project’s recommendations. It would be far easier for U.S. laws to achieve greater harmonization with their NAFTA counterparts if there were greater harmonization of bankruptcy laws in the United States.

### C. Cases Interpreting the Transnational Insolvency Project

As some of the recent cases will demonstrate, the Transnational Insolvency Project has provided helpful guidance in terms of administering a cross-border bankruptcy. Nevertheless, there is no way of predicting whether a given court will be willing to accommodate a foreign insolvency proceeding or recognize the orders of another jurisdiction if

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39. *See id.*

40. *See id.* at 7–8 (“Recognition of a proceeding in another NAFTA country should be granted as quickly as possible.”); *see also infra* Part II.C.1 (discussing the concept of manifestly contrary to public policy in regards to the *Muscletech* case).

41. *See* AM. LAW INST., *supra* note 9, at 7–12.

42. *Id.* at 11.

43. *See id.* at 7 (“If the laws of a given country are inconsistent with a Procedural Principle, these inconsistencies were mentioned in the Country Notes that accompany that Principle in hope of eventually achieving legislative reform.”).

44. *See id.* at 13.

they are somewhat inconsistent with domestic policies. How much will the effect on domestic creditors influence a ruling? Would it matter if GM were the largest unsecured creditor in the case rather than a closely held corporation? In several recent cases, there has been a lot of compromising and good will amongst the parties involved.<sup>45</sup> Courts have been willing to extend comity and promote the overall goals and values agreed upon in the Transnational Insolvency Project. As these recent cases will demonstrate, a great deal of cooperation can be achieved through increased communication, flexibility, and technological sophistication.

### 1. THE “*MUSCLETECH*” CASE

The *Muscletech* decision<sup>46</sup> was a major step forward in advancing the relationship between the United States and Canada in regards to the joint administration of a cross-border insolvency. The facts of the case demonstrate some of the complications that can arise when a company operating in both sides of the border files for bankruptcy. Among the most important issues under Chapter 15 of the U.S. Bankruptcy Code,<sup>47</sup> which deals with cross-border insolvencies, is determining whether to recognize a foreign proceeding and whether an automatic stay should be granted.<sup>48</sup> The court may grant appropriate relief to a foreign debtor in order to “protect the assets of the debtor or the interests of the creditors.”<sup>49</sup> However, “[n]othing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States.”<sup>50</sup> *Muscletech* involved the issue of whether the actions taken by the Canadian bankruptcy court were “manifestly contrary to U.S. public policy” so as to prevent the foreign proceeding from being recognized.

The facts of the case are as follows: “Before the substance known as ephedra was banned by the U.S. Food and Drug Administration in 2004, a Canadian-based company Muscletech marketed and sold products containing ephedra in the United States.”<sup>51</sup> “Some of the consumers suffered severe injuries, such as heart attacks and strokes, and eventually more than thirty civil actions were filed for personal injuries and wrong-

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45. See, e.g., *In re Babcock & Wilcox Canada Ltd.*, 18 C.B.R. (4th) 157 (2000) (Canadian bankruptcy court granting recognition to a U.S. bankruptcy proceeding, despite the fact that the particular debtor would not have even qualified for protection under Section 18.6 of the CCAA).

46. See *In re Ephedra Products Liability Litigation*, 349 B.R. 333 (S.D.N.Y. 2006).

47. See 11 U.S.C. §§ 1501–1532 (2006).

48. See § 1521.

49. See § 1521.

50. See § 1506.

51. *In re Ephedra Prod. Liab. Litig.*, 349 B.R. at 334.



ful deaths allegedly caused by ephedra.”<sup>52</sup> As a result of the lawsuits, Muscletech filed for bankruptcy in the Ontario Superior Court, under the CCAA.<sup>53</sup>

In the Canadian proceeding, the parties negotiated a Claims Resolution Procedure that was “designed to speedily assess and value all creditor claims, including the claims of the plaintiffs in the Muscletech actions in the United States. . . .”<sup>54</sup> The problem arose when Muscletech moved for an order recognizing and enforcing the Claims Procedure in the United States pursuant to sections 1521 and 105 of the Bankruptcy Code.<sup>55</sup> Four claimants opposed the motion, “arguing that it is manifestly contrary to the public policy of the United States in that it deprives the objectors of due process and trial by jury.”<sup>56</sup> Judge Rakoff raised the issue as to whether these four parties may have waived their objection by also making these same arguments in the Ontario Court.<sup>57</sup>

Although Judge Rakoff did not rule on this issue, the claimants’ motion was denied nonetheless because the Canadian Claims Resolution Procedure was not “manifestly contrary” to public policy.<sup>58</sup> “In adopting Chapter 15, Congress instructed the courts that the exception provided therein for refusing to take actions ‘manifestly contrary to the public policy of the United States’ should be narrowly interpreted.”<sup>59</sup> The court stated that “[t]his is the standard meaning accorded to the word ‘manifestly’ in international law when it refers to a nation’s public policy.”<sup>60</sup> The claimants argued that the Canadian proceeding should not be recognized because it violates the untouchable U.S. constitutional right to a

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52. *Id.*

53. *See id.*; *see also* Sheryl Seigel, Lang Michener LLP, *Distinctions with a Difference: Comparison of Restructurings Under CCAA with Chapter 11 Law and Practice*, at 2, available at <http://www.langmichener.ca/uploads/content/LM%20LLP%20Distinctions%20with%20a%20Difference%20022808%20final-revised.pdf> (“In Canada, restructurings are accomplished using the provisions of the Bankruptcy and Insolvency Act (“BIA”) or the Companies’ Creditors Arrangement Act (“CCAA”). There are far fewer legislative provisions relating to restructurings under the BIA and CCAA than under Chapter 11, leaving many significant issues to be defined and refined by jurisprudence.”).

54. *In re Ephedra Prod. Liab. Litig.*, 349 B.R. at 334 (“by that time the [U.S. plaintiffs] had filed claims and otherwise appeared in the Ontario insolvency proceeding.”).

55. *See id.*

56. *Id.* at 335.

57. *See id.*

58. *See id.*

59. *Id.* at 336 (“[The] word ‘manifestly’ in international usage restricts the public policy exception to the most fundamental policies of the United States. ”) (quoting H.R.Rep. No. 109–31(I), at 109, *as reprinted in* 2005 U.S.C.C.A.N. 88, 172); *see also* *Louks v. Standard Oil Co.*, 224 N.Y. 99, 110–11 (1918) (Cardozo, J.) (“We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.”).

60. *Id.*

jury trial.<sup>61</sup>

Ultimately, the court rejected these arguments and enforced the Claims Resolution Procedure put into place by the Ontario Superior Court.<sup>62</sup> Judge Rakoff further stated that “the notion that a fair and impartial verdict cannot be rendered in the absence of a jury trial defies the experience of most of the civilized world.”<sup>63</sup> Even England, where the jury concept began, limits its jury trials in civil proceedings to those cases that involve allegations of “libel, slander, malicious prosecutions, false imprisonment, and fraud.”<sup>64</sup> By recognizing the Canadian proceeding, the United States provided a reassuring signal to many global companies that were conducting business in the United States. A contrary decision might have caused crippling effects to certain industries that are commonly exposed to tort or class-action litigations in the United States.

Chapter 15 seeks to advance many of the comity-based objectives of the Model Law and the Transnational Insolvency Project.<sup>65</sup> For example, it states that U.S. Courts “*shall* cooperate to the maximum extent possible with a foreign court or foreign representative,” and “*shall* consider the international origin of the insolvency, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions.”<sup>66</sup>

Under Chapter 15, the type of relief available to a foreign debtor depends on whether they are recognized as a foreign main proceeding or a foreign nonmain proceeding.<sup>67</sup> The most notable difference between the two types is that if the proceeding is recognized as a foreign main proceeding, then U.S. creditors of the foreign debtor will automatically be subject to the broad automatic stay of section 362 of the Bankruptcy Code.<sup>68</sup>

In order to qualify as a foreign main proceeding and receive the protections under the Code, the foreign debtor must demonstrate that the jurisdiction where they filed for bankruptcy is in fact their center of

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61. See *id.* at 337. The claimants also argued that the right to a jury is further enhanced in the context of personal injury cases by 28 U.S.C. § 1411(a).

62. See *In re Ephedra Prod. Liab. Litig.*, 349 B.R. at 337.

63. *Id.*

64. *Id.* (citing Richard L. Marcus, *Putting American Procedural Exceptionalism Into a Globalized Context*, 53 AM. J. COMP. L. 709, 712–13 (2005)).

65. 11 U.S.C. § 1501(a) (2006). This section incorporates most of the preamble of the Model Law verbatim.

66. See §§ 1526, 1508 (emphasis added).

67. See § 1517(b).

68. See 11 U.S.C. § 1520 (2006); see also § 1520 (a)(3) (“Unless the Court orders otherwise, the foreign representative may operate the debtor’s business and may exercise the rights and powers of a trustee.”).

main interests (“COMI.”)<sup>69</sup> In making this determination, Chapter 15 presumes that the debtor’s registered office, or habitual residence in the case of an individual, is the debtor’s COMI “in the absence of evidence to the contrary.”<sup>70</sup> The presumption is a rebuttable one, subject to the interpretation under the Federal Rule of Evidence 301.<sup>71</sup>

This test is a very important aspect of international insolvencies and can have a major effect on the outcome of a case.<sup>72</sup> Although COMI is not defined,<sup>73</sup> it has been said to “generally equate with the concept of a ‘principal place of business’ in United States law.”<sup>74</sup> If a foreign proceeding fails the COMI test and is classified as a nonmain proceeding rather than a main proceeding, then the foreign representative will only be granted relief if the court is “satisfied that the relief relates to assets that, under the law of the United States, should be administered in the foreign nonmain proceeding or concerns information required in that proceeding.”<sup>75</sup>

Another contentious issue in the *MuscleTech* restructuring was whether Canada or the United States was the debtor’s COMI. In order for the Canadian proceeding to be recognized under Chapter 15 as foreign main proceeding, it was necessary that Judge Rakoff make this finding. On March 2, 2006, Judge Rakoff expressly accepted the Ontario court’s finding that the debtor’s COMI was in Canada, despite the fact that *MuscleTech* sold a substantial portion of its products in the United States and had actively been defending litigation in the United States<sup>76</sup>

The court stated that the following were several of the factors that were essential to the finding: 1) “[t]he business was carried on primarily in Canada, and the principals, directors, and officers of the Applicants are residents of Ontario,” 2) the debtors’ registered mailing addresses were almost all in Canada, 3) the debtors had no physical place of business in the United States with the exception of a warehouse facility, 4)

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69. See §§ 1516, 1520. This classification will ultimately determine whether a foreign proceeding is entitled to relief automatically (main), versus available only under the further discretion of the U.S. judge (nonmain).

70. See § 1516.

71. See *In re Tri-Continental Exchange Ltd.*, 349 B.R. 627, 635 (2006).

72. See discussion *infra* Part III.

73. See Carfagnini J.A., *Recent CCAA and Cross-Border Developments in MuscleTech and Calpine Canada Restructuring*, at 131 (“Prior to the *MuscleTech* case, there had been essentially no North American judicial determinations as to the meaning of the term ‘centre of main interests,’ which is not defined in chapter 15 or anywhere else in the U.S. Bankruptcy Code despite its central use and importance.”).

74. See *Phoenix Four, Inc. v. Strategic Resources Corp.*, 446 F. Supp. 2d 205 (S.D.N.Y. 2006) (describing the two tests commonly employed to determine a corporation’s principal place of business).

75. See 11 U.S.C. § 1521(c) (2006).

76. See Carfagnini, *supra* note 73, at 133.

the decision-making and control of the company was in Canada, and 5) the debtors' banking and administrative functions were conducted by Canadian employees in the province of Ontario.<sup>77</sup>

The District Court's holding that the CCAA was entitled to recognition as a foreign main proceeding, as well as its determination that the Canadian Claims Resolution Procedure was not manifestly contrary to U.S. public policy, were both essential for the survival of Muscletech. By eliminating the absolute requirement for a jury trial and by allowing the CCAA to have primary jurisdiction over the case, the U.S. court was able to facilitate the successful reorganization of Muscletech, a company operating on both sides of the border.

## 2. SUMMARIZING THE CURRENT U.S.-CANADA TRENDS

In addition to the recommendations and policy-oriented Principles discussed above, the three NAFTA countries also approved the *Guidelines Applicable to Court Communications in Cross-Border Cases* ("Guidelines").<sup>78</sup> Although the *Muscletech* case demonstrates a significant degree of comity and cooperation that can be achieved between the two countries, there are certainly still reasons to be concerned. Much of the success regarding the Transnational Insolvency Project as well as the implementation of the Guidelines has been dependent on the flexible and active roles played by individual judges.<sup>79</sup> The Canadian courts have also displayed cooperation and flexibility in several recent cross-border cases. One Canadian court demonstrated this flexibility in the bankruptcy of Archibald Candy Corporation, where it implemented the Guidelines in order to facilitate cooperation and communication with the U.S. court.<sup>80</sup>

In January 2004, Archibald Candy Corporation filed for bankruptcy under Chapter 11 even though Archibald Canada was still growing and

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77. *See id.*

78. AM LAW. INST., *supra* note 9, at app. 2 ("These Guidelines are intended to enhance coordination and harmonization of insolvency proceedings that involve more than one country through communications among the jurisdictions involved . . . These Guidelines encourage such communications while channeling them through transparent procedures. The Guidelines are meant to permit rapid cooperation in a developing insolvency case while ensuring due process to all concerned. The Guidelines at this time contemplate application only between Canada and the United States, because of the very different rules governing communications with and among courts in Mexico. Nonetheless, a Mexican Court might choose to adopt some or all of these Guidelines for communications by a *sindico* with foreign administrators or courts."); *see also* Matlack Inc., Re, No. 01-CL-4109 (Ont. Sup. C.J. 2001), 9-38, *available at* 2001 O.T.C. LEXIS 2324.

79. *See, e.g., In re Ephedra Prod. Liab. Litig.* 349 B.R. 333 (S.D.N.Y. 2006).

80. *See In re Archibald Candy (Canada) Corp.*, Ontario Court of Justice, File No. 04-CL-5461, July 27, 2004.

profitable throughout much of Canada.<sup>81</sup> Later that year, with the aid of interim receiver Laura Secord to facilitate the cross-border insolvency process,<sup>82</sup> the parties sought the court's approval to conduct a sale of assets.<sup>83</sup> The process was complicated by the fact that the U.S. parent company owned some critical assets, including intellectual property, as well as the fact that Canada does not normally follow the "stalking horse" bidding process that the United States is accustomed to.<sup>84</sup> In order to solve this problem, the United States and Canadian courts conducted a joint hearing held by video conference, and the Canadian court eventually approved the U.S.-style bidding process as well as the asset sale.<sup>85</sup>

This example displays many of the benefits of cooperation and coordination in a cross-border bankruptcy, including the "gesture of comity" shown by the Canadian court in participating in a "U.S. style bidding process."<sup>86</sup> Nevertheless, despite the enormous benefits of such judicial cooperation, we are a far cry away from a regime of predictability or stability. For example, another Canadian court might have refused to approve the sale, if it found that the U.S. sale was overly prejudicial to Canadian creditors or violated domestic policy. After all, asset sales are conducted much differently in Canada than in the United States.<sup>87</sup>

In the foreign bankruptcy context, the primary policy consideration in determining whether a U.S. court should extend comity to a bankruptcy court from another jurisdiction is whether the foreign court shares our "fundamental principle that assets be distributed equally among creditors of similar standing."<sup>88</sup> The U.S. courts must also "guard

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81. See The Honourable James M. Farley, *supra* note 11, at 44.

82. Archibald Canada carries on its business under the name Laura Secord. Laura Secord was appointed as interim receiver by the Ontario Court to facilitate the insolvency process of the parent company. See *id.*

83. See *id.*

84. See *id.*; see also Cozier, *The Stalking Horse in Cross-border Insolvency Sales: Canada Saddles Up*, 23-9 AM. BANKR. INST. J. 30 (2004) ("[T]he court-supervised auction of assets between a stalking-horse purchaser and other bidders has been atypical of Canadian insolvency proceedings. By contrast, the traditional method of asset sales by an insolvent Canadian debtor is a process where all potential purchasers are encouraged to submit their highest and best offers before a fixed deadline. Generally, the practice is to administer the process to ensure that bidders are not provided with particulars of competing offers before the bid deadline. After the successful bidder is selected and subject generally to court approval, the sales process is concluded. Overbidding or re-bidding among the participating bidders has generally not been condoned by the Canadian courts, and after the conclusion of the bidding process, the successful bid is rarely replaced by another, even if the later bid is higher.").

85. See *In re Archibald Candy Corp.*, Ontario Superior Court of Justice, File No. 04-CL-5461, June 29, 2004; see also The Honourable James M. Farley, *supra* note 11, at 44.

86. See *id.*

87. See Cozier, *supra* note 84, at 30.

88. See *Remington Rand Corp. v. Bus. Sys. Inc.*, 830 F.2d 1260, 1271 (3d Cir. 1987).

against forcing American creditors to participate in foreign proceedings in which their claims will be treated in some manner inimical to this country's policy of equality."<sup>89</sup> Often times, reasonable judges may differ in their assessment of whether a foreign judgment is contrary to domestic policies. For example, in *Philadelphia Gear Corp.*,<sup>90</sup> Judge Roth agreed that comity should be extended to a Mexican proceeding regarding assets located in the United States, yet nevertheless disagreed with the view of the majority that comity should be afforded with respect to the attachment of foreign assets as well.<sup>91</sup>

In Canada, one judge who has been willing to provide flexible solutions in a cross-border insolvency is Justice Farley, who has demonstrated his willingness to accommodate U.S. bankruptcy proceedings nearly at all costs.<sup>92</sup> For example, in *In re Babcock & Wilcox*,<sup>93</sup> Justice Farley granted relief to a solvent entity that was actually not even eligible to seek insolvency protection under section 18.6 of the CCAA.<sup>94</sup> In reaching his conclusion to recognize certain U.S. orders, Justice Farley held that respect ought to be accorded to the "overall thrust" of the foreign bankruptcy laws, "unless in substance generally it is so different from the bankruptcy and insolvency law of Canada or perhaps because the legal process that generates the foreign order diverges radically from the process here in Canada."<sup>95</sup> He also stated that the enterprise should be able to "implement a plan so as to reorganize as a global unit, especially where there is an established interdependence on a transnational basis," or where one jurisdiction can administrate the case effectively on its own.<sup>96</sup> In considering the appropriate level of his involvement, Jus-

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(granting comity to Dutch bankruptcy proceedings, but only if and to the extent that the Dutch court is willing to recognize the American judgment in its proceedings).

89. See *id.* (citing *Banque De Financement S.A. v. First Nat'l Bank of Boston*, 568 F.2d 911, 921 (2d Cir. 1977)).

90. See *Philadelphia Gear Corp. v. Philadelphia Gear de Mexico, S.A.*, 44 F.3d 187, 194 (3d Cir. 1994) (Roth, J., dissenting).

91. See *id.* at 194-95 (Roth, J., dissenting) (arguing the district court would not have abused its discretion if it had decided that comity did not preclude it from deciding a summary judgment motion).

92. See, e.g., *In re Babcock & Wilcox Canada Ltd.*, 18 C.B.R. (4th) 157 (2000).

93. *Id.*

94. See *id.*; see also The Honourable James M. Farley, *supra* note 11, at 31-33 ("*Babcock & Wilcox*, which filed for bankruptcy protection in Louisiana largely as a result of the weight of asbestos litigation, . . . had an operating subsidiary in Canada ("*B&W Canada*") which was neither part of the Chapter 11 case nor apparently insolvent. Because claims against the parent (but not B&W Canada) were stayed, there was a risk that the parent's creditors might advance claims against B&W Canada based on *alter ego* or similar theories. Further, Canadian creditors and, perhaps, even some Canadian courts might not have recognized a stay of proceedings under Chapter 11 if B&W Canada had been included in that filing (assuming there had been jurisdiction to do so).").

95. See Farley, *supra* note 11, at 32.

96. See *id.*

tice Farley believes that it should vary depending on the case and that an important factor is the court's "nexus to that enterprise."<sup>97</sup>

Nevertheless, despite the flexibility of Justice Farley, not all Canadian judges have been willing to recognize foreign bankruptcy proceedings nor does the law require them to do so.<sup>98</sup> Furthermore, the successes achieved by Justice Farley might only have been achieved in part because of the cooperation of the creditors involved.<sup>99</sup> For example, the Canadian creditors in *Babcock & Wilcox* did not even challenge or object to the automatic stay that was in place for several years throughout the duration of the main proceedings that were taking place in the United States.<sup>100</sup>

While this has contributed to the successful implementation of many cross-border solutions, it has also masked many of the problems that are bound to reoccur in the future.

### III. PROCEDURAL ISSUES

Perhaps most problematic of the differences in the legal systems of the NAFTA countries are the procedural discrepancies regarding how a foreign judgment is recognized. Without any effective treaty or binding legislation, the choice in procedural posture in cross-border insolvency is either the concurrent/parallel model or the primary/secondary model.<sup>101</sup> A primary/secondary jurisdiction model is when there is "a filing in the primary jurisdiction where the debtor's central operations are located and subsequent secondary filings in jurisdictions where other assets are located."<sup>102</sup> Under the concurrent/parallel jurisdiction model, the debtor would file full proceedings in all jurisdictions where key assets are located.<sup>103</sup>

According to Justice Farley, both models have created several conceptual difficulties that have resulted in forum shopping.<sup>104</sup> Some of these problems have included: 1) businesses more frequently opting to locate their offices in jurisdictions that are inconvenient for their creditors, 2) global reorganization attempts where the first case to be filed is

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97. See *id.* at 33.

98. See, e.g., *Holt Cargo Systems Inc. v. ABC Containerline N.V.*, 3 C.S.R. 907 (2001) (affirming the trial court's discretion to refuse to automatically recognize a Belgian bankruptcy order).

99. See The Honourable James M. Farley, *supra* note 11, at 33. One of the great things about bankruptcy law is that it encourages creditors to make concessions because it is in the best interest of all the parties to preserve the going concern value of the company.

100. See *id.*

101. See *id.* at 6.

102. *Id.*

103. See *id.* at 6–7.

104. See *id.* at 7.

in a secondary jurisdiction, and 3) courts of individual countries reluctant to concede authority especially if it is at the expense of domestic creditors.<sup>105</sup>

### A. *The Dangers of Forum Shopping*

Currently, the United States is one of the most debtor-friendly countries in terms of bankruptcy laws.<sup>106</sup> Even Canada, whose laws are very similar, does not offer as much relief to its debtors under the CCAA.<sup>107</sup> For example, under the CCAA a stay against creditors must be granted by the court, while in the United States it is automatic.<sup>108</sup> Also, under the CCAA there are no cramdown provisions,<sup>109</sup> and thus it is almost impossible for a debtor to confirm a plan if there are dissenting creditors.<sup>110</sup>

As a result of this disparity, the leverage and bargaining power of the parties in bankruptcy differ depending on which country will be deemed the primary jurisdiction. Given this incentive, it is no secret that many troubled foreign entities will prefer the U.S. bankruptcy laws to those of their home country.<sup>111</sup> Adding to this issue is the low threshold regarding eligibility under the U.S. Code that merely requires a debtor to own “property” in the United States.<sup>112</sup> This requirement has been described as being “virtually no barrier to having federal courts adjudicate foreign debtors’ bankruptcy proceedings.”<sup>113</sup> Furthermore, unlike

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105. *See id.*

106. *See* Michael J. White, *supra* note 8 (stating that the U.S. is “extremely unusual” in its debtor-friendly stance).

107. *See* DOUGLAS R. EMERY, JOHN D. FINNERTY, AND JOHN D. STOWE, *CORPORATE FINANCIAL MANAGEMENT* 800 (3d ed. 2005).

108. *See id.*

109. *See* 11 U.S.C. § 1129 (2006). Cramdown provisions provide a means for dealing with dissenting creditors who may or may not be voting on a plan in bad faith.

110. *See* Douglas R. Emery et. al, *supra* note 107, at 800 (“There is no cramdown or other means of dealing with dissenting creditors. A proposed plan of reorganization must be approved by two-thirds in value and a majority in number of the members of each class, including unaffected classes. If it is rejected by any class, the stay is lifted and creditors are free to move against the debtor to collect on their loans.”).

111. *See, e.g., In re Aerovias Nacionales de Colombia S.A. Avianca*, 303 B.R. 1 (Bankr. S.D.N.Y. 2003) (“Columbia’s counterpart to chapter 11 would have prevented the debtor from rejecting burdensome leases and would have allowed a lessor to apply for termination of the reorganization, repossess the property, and force the debtor into liquidation if default payments were not cured within ninety days of filing.”).

112. *See* 11 U.S.C. § 109(a) (2006).

113. *See* Globo Comunicacoes, No. 04 Civ. 2818(VM), 2004 WL 2624866, at \*9 (S.D.N.Y., Dec. 23, 2004); *see also* Erin K. Healy, *All’s Fair in Love and Bankruptcy? Analysis of the Property Requirement for Section 109 Eligibility and its Effect on Foreign Debtors Filing in U.S. Bankruptcy Courts*, 12 AM. BANKR. INST. L. REV. 535 (2004). The grounds for dismissing a foreign filing are bad faith, substantial abuse, and abstention. *Id.* at 548. Healy argues that judges need to enforce these provisions stringently rather than creating new ones in order to



many other countries, the United States does not impose a reciprocity requirement on a foreign debtor whose country has not enacted the Model Law.<sup>114</sup> Thus, debtors from potentially more countries have access to U.S. bankruptcy laws.

If the U.S. courts do not properly address abusive filings by foreign debtors, the United States will inevitably lose the support of the international business community.<sup>115</sup> If companies are unable to determine the risks of conducting business, this will increase the required rate of return on a given investment which will reduce the overall level of multinational business transactions. This would have terrible consequences on the U.S. economy because lenders and investors would no longer be willing to conduct business.

### B. *Problems With the Current Application of COMI*

When it comes to recognizing the automatic stay of a foreign court, the COMI test is decisive.<sup>116</sup> The test originates in Europe where there is much more extensive case law on point because most insolvency laws in Europe are based on the UNCITRAL Model Law.<sup>117</sup> Although the COMI test does provide some useful frameworks in determining jurisdiction, there are many flaws with the test itself as well as in the lack of COMI's uniform application among the NAFTA countries.<sup>118</sup> In a fairly recent article, Lynn LoPucki, a professor at UCLA Law School, explains his concerns that the UNCITRAL Model Law and the COMI test are universalist concepts that are both "intentionally vague and practically meaningless" in application.<sup>119</sup>

The universalism that LoPucki criticizes refers to the international bankruptcies where the court of one country, the debtor's "home country," applies its own laws and controls the company's bankruptcy worldwide.<sup>120</sup> LoPucki argues that multinational companies do not always have a home country in any meaningful sense, and has challenged the

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prevent foreign debtors from abusing the system. *Id.* at 560. Since "the outcome under the laws of the debtor's home country may be drastically different than the result under the Code," one option that Healy proposes in order to ensure some predictability is for parties to "agre[e] upon the outcome of bankruptcy proceedings in advance of the event occurring." *Id.* However, while this may protect a party's right to recover damages, it "cannot prevent a debtor from establishing eligibility and utilizing the Code." *Id.*

114. See Alesia Ranney-Marinelli, *Overview of Chapter 15 Ancillary and Other Cross-Border Cases*, 82 AM. BANKR. L.J. 269, 271 (2008) (citing H.R. Rep. No. 109-31, pt. 1, at 113 (2005), as reprinted in 2005 U.S.C.C.A.N. 88, 175-76).

115. See Erin K. Healy, *supra* note 113, at 560.

116. See 11 U.S.C. § 1517(b)(1) (2006).

117. See Carfagnini, *supra* note 73, at 133 n.41.

118. See Ranney-Marinelli, *supra* note 114, at 278.

119. See Lynn LoPucki, *Universalism Unravels*, 79 AM. BANKR. L.J. 143, 143 (2005).

120. See *id.*

universalists to answer the following three questions regarding the application of COMI: 1) which country is the "home country" when the principal assets and operations are located in a different country from the headquarters or the place of incorporation, 2) does "home country" refer to the home country of each individual corporation or does it refer to the country of the corporate group, and finally 3) what laws will govern when the location of the home country has changed after credit has already been extended?<sup>121</sup>

Until these questions can be answered, credit extenders will not know which country's laws will govern a particular bankruptcy case.<sup>122</sup> Not only does this result create havoc and uncertainty, but it will also lead to more forum shopping and abusive behavior on the part of debtors.

### C. *The Lack of Procedural Uniformity*

In comparing the procedural aspects between the two countries, one notable difference pops out immediately. Unlike the United States, Canada has not yet formally adopted the Model Law.<sup>123</sup> This is strange considering that Canada participated actively in the development of the Model Law and even recommended its implementation in the Transnational Insolvency Project.<sup>124</sup> This might signal some confusion to the international community despite the fact that Canadian laws generally support the spirit of cooperation.<sup>125</sup>

In the United States, Chapter 15 of the Bankruptcy Code has incorporated most of the Model Law, but it also contains some unique variations that can lead to abuses as well as hardships for certain foreign debtor representatives.<sup>126</sup> Under Chapter 15, the vast majority of rights and benefits are not unavailable until after the entry of an order granting recognition of the foreign proceeding.<sup>127</sup> In addition, the court will recognize a foreign proceeding *only* if the proceeding is classified as either a foreign main proceeding or a foreign nonmain proceeding (i.e. where the debtor has an "establishment").<sup>128</sup>

Although Chapter 15's definition of "establishment" is broader than the one incorporated by the Model Law, it also may have the effect of preventing a foreign representative from obtaining relief if the underly-

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121. *See id.*

122. *See id.*

123. *See* The Honourable James M. Farley, *supra* note 11, at 28.

124. *Id.*; *see also id.* at 13.

125. *See id.* at 29; *See also supra* Part II.C.2.

126. *See* Ranney-Marinelli, *supra* note 114, at 270.

127. *See id.*

128. *See id.* at 284. *See also* 11 U.S.C. § 1502(7) (2006).

ing foreign proceeding cannot be recognized itself.<sup>129</sup> This “establishment” requirement has been labeled harsh and has created controversy in some recent cases involving hedge funds in the Cayman Islands.<sup>130</sup>

For instance, in *Bear Stearns*,<sup>131</sup> the debtor was unable to obtain recognition in the United States as either a foreign main or a foreign nonmain proceeding. In addition to not satisfying the COMI test,<sup>132</sup> Judge Lifland held that the Bear Stearns hedge funds’ “contact with, and business conducted in the Cayman Islands” were not enough to support a finding of an “establishment,” and thus could not be recognized as nonmain proceedings either.<sup>133</sup> As a result, no relief was available to this debtor under Chapter 15.

In contrast, Judge Drain from the Southern District of New York was much more willing to recognize a foreign proceeding as a nonmain without the strict “establishment” requirement.<sup>134</sup> Still, there is much uncertainty regarding whether and when relief will be granted to foreign debtors. Some commentators have argued that pre-BAPCPA comity cases as well as common-law principles provide the requisite authority to grant relief in certain instances.<sup>135</sup>

The United States establishment requirement has also impacted consumer-bankruptcy cases where a foreign debtor moves to the United States subsequent to having filed for bankruptcy in their home country.<sup>136</sup> Since the debtor has now moved to the United States, it would no longer have an “establishment” in the foreign jurisdiction where it originally filed for purposes of obtaining recognition as a foreign nonmain proceeding under the Code. Furthermore, the debtor no longer lives in the foreign country and so cannot obtain recognition as a main proceeding either.<sup>137</sup> As a result, such an individual will be denied the protec-

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129. See Ranney-Marinelli, *supra* note 114, at 278–79. This result is different than contemplated under the UNCITRAL Model Law.

130. See, e.g., *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd.*, 374 B.R. 122 (Bankr. S.D.N.Y. 2007).

131. See *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd.*, 374 B.R. at 131.

132. This would have enabled the debtor to obtain recognition as a foreign main proceeding.

133. See *id.* at 131 (refusing to grant recognition).

134. See *In re Sphinx Ltd.*, 351 B.R. 103 (Bankr. S.D.N.Y. 2006) (recognizing a proceeding as a foreign nonmain proceeding in similar circumstances, without focusing on whether the debtor in that case had an establishment in the Cayman Islands that actually met the test for recognition of a foreign nonmain proceeding).

135. See Ranney-Marinelli, *supra* note 114, at 304 n.178 (citing Gabriel Moss, *Mystery of the Sphinx – COMI in the US*, 20 INSOLVENCY INTELLIGENCE 4, 6 (2007)).

136. See, e.g., *Lavie v. Ran*, 384 B.R. 469, 471 (Bankr. S.D. Tex. 2008) (refusing to recognize an Israeli bankruptcy proceeding as either main or a nonmain proceeding where the debtor moved to and lived in Texas since 1997).

137. See 11 U.S.C. § 1520 (2006).

tions of the automatic stay (or any other relief) for their assets located in the United States.<sup>138</sup>

Although Canada has not explicitly incorporated the Model Law, it is more flexible than the United States in terms of granting recognition to foreign proceedings.<sup>139</sup> For example, Canada will not require that the debtor have an “establishment” in the jurisdiction where they first filed in order to be granted recognition as a nonmain proceeding.<sup>140</sup>

Despite some shortcomings and imperfections with the Model Law, Canada should nevertheless formally adopt it, while the United States should eliminate their strict “establishment” requirement for good-faith foreign debtors looking to obtain recognition as a foreign nonmain proceeding. By adopting identical versions of the Model Law, many procedural obstacles can be eliminated in cases involving the United States and Canada, and better predictability can be achieved for all parties involved. The inconsistent applications in this area should be addressed by both countries in order to prevent a large amount of forum shopping as well as unnecessary litigation over venue.

#### IV. SUBSTANTIVE LAWS

So far, this article has talked about some of the procedural problems that arise in cross-border insolvencies, including whether and when recognition is granted to a foreign proceeding. But what are some of the consequences when substantive laws differ between two countries? How much can a bankruptcy proceeding under the CCAA differ from a filing under the Code? This section looks briefly at the substantive laws of Canada and the United States and demonstrates that differences between the two systems may lead to problematic applications. In addition, because Canada often looks to the U.S. Code for guidance in forming interpretations under its laws,<sup>141</sup> this section also demonstrates that inconsistent application of laws and circuit splits within the United States can lead to troublesome results in a cross-border insolvency. In conclusion, it is possible to advance the aims of comity and predictability without requiring drastic legislative reform by interpreting circuit splits and unresolved issues in the Bankruptcy Code with regard to the international implications that may potentially emerge.

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138. See *Lavie v. Ran*, 384 B.R. at 471.

139. See Seigel, *supra* note 53, at 12 (“[a]s contrasted with Section 1506 of Chapter 15 of the Bankruptcy Code, which imposes an arguably higher threshold by the use of the phrase “manifestly” contrary to the public policy of the United States.”).

140. See *id.*

141. See *infra* Part IV.A.

### A. *Similarities and Differences*

There are already so many challenges in a typical cross-border insolvency that having to deal with different laws in different jurisdictions can add a layer of complexity. While it is true that there are fundamental elements in our laws that will likely never be synchronized, that does not mean that it is useless to attempt any such harmonization. Both American and Canadian personal bankruptcy laws are premised on the policies that creditors can do better in a collective fashion rather than piece-meal and that there should be a means of discharging an honest debtor in most instances.<sup>142</sup>

While both countries originally adopted many aspects of England's law into their own systems, the United States departed from the English system with respect to their bankruptcy laws while Canada did not.<sup>143</sup> Therefore Canada's original bankruptcy laws, like England's, were much harsher on the debtor than in the United States.<sup>144</sup> In recent years, however, Canada's reorganization laws have grown increasingly similar to those here in the United States.<sup>145</sup>

Despite recent conformities in the CCAA to the U.S. Code, there are still significant differences between the two bankruptcy systems. For example, in Canada there are no cramdown provisions and the sales process differs drastically from the classic U.S. stalking-horse method.<sup>146</sup> Further, unlike in the United States, Canadian bankruptcy law does not necessarily guarantee a right of discharge to a consumer debtor just because their nonexempt assets have been sold.<sup>147</sup>

Another aspect unique to American bankruptcy law is with respect to the generous homestead exemptions that vary drastically from state to state in consumer bankruptcies. For example, in Florida, Iowa, Kansas, South Dakota, and Texas, there is no dollar limit on the amount that an individual can claim as a homestead exemption.<sup>148</sup> Whether or not such laws are good or bad, there is no doubt that similarly situated debtors and creditors are being treated drastically different from one state to another.

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142. See Nathalie Martin, *supra* note 8, at 382.

143. See *id.* at 367.

144. See *id.*

145. See Sheryl Seigel, Lang Michener LLP, *supra* note 53 at 13 ("By reason of developing jurisprudence and legislative changes, restructuring law and practice under the CCAA is becoming more similar to that under Chapter 11."); see also Jacob S. Ziegel, *Canada's Phased-In Bankruptcy Reform*, 70 AM. BANKR. L.J. 383, 387 (1996) ("Canada's bankruptcy philosophy broadly mirrors the American philosophy.")

146. See Laurence Cozier, *supra* note 84, at 30; see also *supra* Part II.C.

147. See Jacob S. Ziegel, *supra* note 145, at 387.

148. See WILLIAM D. WARREN, DANIEL J. BUSSEL, AND ROBERT L. JORDAN, *BANKRUPTCY* 41 (7th ed. 2005).

Many have criticized these laws as being unfair, and arguments in favor of a uniform exemption system were once advanced that would override the current state exemptions.<sup>149</sup> Unfortunately, opposition prevented a uniform system from emerging due to the “creditors who wanted to preserve the law in states that had low exemptions and consumers in states that had more generous ones.”<sup>150</sup> These fairness and consistency issues are now reappearing in the context of cross-border cases where different countries apply different laws and have different economic and political interests.

B. *A Unique Solution: Create Internal Consistency By  
Resolving Circuit Splits*

One example that illustrates this problem is with the current circuit split regarding the treatment of executory contracts under the Code,<sup>151</sup> a very important aspect to nearly any successful reorganization plan. Currently, there is a circuit split as to whether a debtor in possession can assume or assign certain executory contracts depending on certain other applicable laws.<sup>152</sup> Section 365(c)(1) of the Bankruptcy Code provides that a trustee may not assume **or** assign any executory contract “if (1)(a) applicable law excuses a party other than the debtor or debtor in possession . . . and (B) such party does not consent to such assumption **or** assignment.”<sup>153</sup> The interpretation of Section 365(c)(1) has divided the circuit courts of appeal in adopting either the “hypothetical” test or the “actual” test. The Third, Fourth, Ninth and Eleventh Circuits have adopted the “hypothetical test”<sup>154</sup> while the First and Fifth Circuits have adopted the “actual test.”<sup>155</sup>

The “hypothetical test,” adopts a strict interpretation of the plain language of Section 365(c)(1). Its focus is on the language “the trustee may not assume **or** assign.”<sup>156</sup> This reading of this phrase prohibits the assumption of an executory contract by the debtor if applicable law pro-

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149. *See id.*

150. *See id.*

151. *See* 11 U.S.C. § 365(c); § 365(f).

152. *See, e.g., In re Matter of West Electronics Inc.*, 852 F.2d 79 (3d Cir. 1988) (detailing the alternative interpretations of this provision regarding the treatment of executory contracts).

153. *See* 11 U.S.C. § 365(c)(1) (emphasis added).

154. *See In re West Electronics, Inc.*, 852 F.2d 79 (3d Cir. 1988); *In re Sunterra Corporation*, 361 F.3d 257 (4th Cir. 2004); *In re Catapult Entertainment, Inc.*, 165 F.3d 747 (9th Cir. 1999); *In re James Cable Partners, L.P.*, 27 F.3d 534 (11th Cir. 1994).

155. *See In re Summit Investment and Development Co.*, 69 F.3d 608 (1st Cir. 1995); *In re Institut Pasteur*, 104 F.3d 489 (1st Cir. 1997); *In re Mirant Co.*, 440 F.3d 238 (5th Cir. 2006).

156. *See* § 365(c) (emphasis added); *See also* Paul Battista, Nina Greene & Glenn D. Moses, *May a Franchisor Veto a Franchisee's Assumption of a Franchise Agreement in Bankruptcy?* 28-SUM FRANCHISE L.J. 16, 17 (2008).

vides that the nondebtor does not have to accept performance from a third party. This test is hypothetical because the debtor may only be trying to assume and not assign the franchise agreement, yet this assumption would be prohibited because “applicable law” prohibits such assignment.<sup>157</sup> Opponents of this test argue that this literal interpretation is inconsistent with the objectives of the Code, and have come up with various arguments to avoid the harsh results of the hypothetical test.<sup>158</sup>

Under the “actual test,” the courts presuppose that the “or” is really an “and” because the literal reading of the language may produce some results that conflict with the policies behind the Bankruptcy Code.<sup>159</sup> If the court uses the “actual test,” they will make a case-by-case inquiry into whether the nondebtor party is actually being forced to accept performance from someone other than the debtor party with whom it originally contracted.<sup>160</sup> While this approach has been criticized because it departs from the plain meaning of the language, and it is up to Congress, not the courts to legislate, the actual test offers a more functional interpretation of the Code.<sup>161</sup> Under the actual test, Section 365(c)(1) of the Bankruptcy Code does not serve as an obstacle in assuming a contract where no assignment of that contract is actually being contemplated.<sup>162</sup>

Regardless of what industry you are in, the treatment of executory contracts forms a key component of whether a debtor can emerge from Chapter 11 and ultimately become profitable again. For instance, Section 365(c)(1) has been applied to personal service contracts, partnership and limited-liability-company agreements, joint-venture agreements, intellectual-property and technological licenses, franchise agreements, and government contracts.<sup>163</sup> In the franchising context, a jurisdiction that uses the hypothetical test reaches a result whereby a franchisor can basically veto its franchisee’s ability to assume its own franchise agreement if the franchisee were to file for bankruptcy.<sup>164</sup> Thus, a franchisee would be much better off in a jurisdiction that employs the actual test. The reverse would apply for franchisors.

These inconsistencies incentivize forum shopping and further complicate matters when foreign creditors are involved. No matter how

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157. See § 365(c).

158. See, e.g., *In re Footstar, Inc.*, 323 B.R. 566 (Bankr. S.D.N.Y. 2005) (successfully arguing that section 365(c)(1) only prevented a “trustee” from assuming or assigning an executory contract and did not prevent a “debtor in possession” from doing so).

159. See Michell Harner et. al., *Debtors Beware: The Expanding Universe of Non-Assumable/Non-Assignable Contracts in Bankruptcy*, 13 AM. BANKR. INST. L. REV. 187, 233–43 (2005).

160. See, e.g., *In re Institut Pasteur*, 104 F.3d 489, 493 (1st Cir. 1997).

161. See Michell Harner et. al., *supra* note 159, at 238.

162. See *id.*

163. See *id.* at 187–190.

164. See Paul Battista et. al., *supra* note 156.

much cooperation is attempted, when the results under one bankruptcy system differ greatly from the results that would be obtained under a different bankruptcy system, the battle for jurisdiction is going to be fierce. On the other hand, if each of the different potential jurisdictions applied the same laws, there would naturally be less forum shopping and less funds of the debtor's estate spent litigating these matters. The only way to eliminate this problem is to level the playing field as much as possible by taking away the competitive advantages that derive from forum shopping.

This problem regarding the inconsistent treatment of executory contracts came up in the recent case of *Raddison Design Management Inc. v. Cummins*.<sup>165</sup> In that case, there was a dispute over whether the debtor, Technomarine, could assign its floating dock delivery contract that it had made with its general contractor, Bob Cummins Construction Company.<sup>166</sup> On April 25, 2006, the provincial bankruptcy court of Quebec approved the sale of all of Technomarine's assets to the Plaintiff Raddison Design Management, including its contract with Cummins.<sup>167</sup> When Raddison filed an action in U.S. District court seeking payment under the subcontract as an assignee, Cummins filed a motion to dismiss stating that "the assignment of the contract was invalid as a matter of state, federal and international law."<sup>168</sup> Cummins argued that the assignment authorized by the Quebec court should not be afforded comity because to do so would violate Pennsylvania public policy which recognizes that a right "may not be effectively assigned where such assignment is prohibited by the writing creating the right."<sup>169</sup>

Pennsylvania law will not recognize a foreign judgment which violates "a positive, well-defined universal public sentiment, deeply integrated in the customs and beliefs of the people."<sup>170</sup> Nevertheless, the *Raddison* court held that "the enforcement or non-enforcement of a contractual non-assignment clause does implicate issues which are so injurious or critical to public health and morals as to trigger the narrowly defined public policy exception."<sup>171</sup> As a result, Cummins would have

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165. See *Raddison Design Management, Inc. v. Cummins*, C.A. No. 07-92 Erie, 2008 WL 55998, (W.D.Pa. Jan 3, 2008).

166. See *id.* at \*1.

167. See *id.*

168. *Id.*

169. See *id.* at \*3 (citing *Nolan v. J. & M. Doyle Co.*, 338 Pa. 398 (Pa. 1940)).

170. See *id.*; See also *Somportex v. Philadelphia Chewing Gum Corp.*, 318 F. Supp. 161, 168 (Pa. 1970). In *Somportex*, the appellant sought to have an English judgment declared unenforceable because it included damages for loss of good will and attorney's fees, both of which are not recoverable under Pennsylvania law. The Third Circuit affirmed the district court's ruling that the English judgment did not violate public policy.

171. See *Raddison Design Management*, 2008 WL 55998 at \*4.



been forced to perform under the contract even if the District court had found Cummins to be correct on the merits.<sup>172</sup> Cummins would have had no redress even if his interpretation was meritorious.

The lack of any uniform law regarding the treatment of executory contracts in the United States might have led the Quebec Bankruptcy court to come up with its own interpretation regarding Section 365, even though it should have been applying Pennsylvania's interpretation.<sup>173</sup> If the circuit split were eliminated, there is a greater chance that a foreign court would apply the correct interpretation of U.S. law, which would make the overall administration of cross-border cases more manageable and less complex.

Especially between the United States and Canada, where there is a long history of cooperation and doing business together, there are certainly opportunities to create more uniformity and transparency between the two countries.<sup>174</sup> While there are certainly fundamental differences between the two countries, one action that can be taken without compromising state sovereignty is to resolve certain inconsistencies regarding the application of laws internally.

## V. CONCLUSION

If the trend is for the United States to recognize foreign proceedings with the utmost of deference, there is an element of control that is lost by having the laws of another country decide certain aspects of a proceeding that might come out differently under the U.S. Bankruptcy Code. The only way to help ensure that result will come out the same in another jurisdiction is to make the substantive laws more similar. The more similar the laws, the less likely it is that there will be forum shopping, the greater chance that a flawed COMI test will not cause any undue hardship, and the easier it will be to cooperate and utilize the principles and policies that were agreed upon in the Transnational Insolvency Project.<sup>175</sup>

This solution might prove futile in the context of UNCITRAL because it would require creating a somewhat harmonized system of laws for the majority of countries around the world. However, because the United States and Canada are so similar in culture and existing laws, it makes sense to examine each other's substantive laws and make spe-

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172. See *id.* The court ultimately disagreed, holding that Cummins' argument that the assignment was prohibited to be "belied by the statutory history of §365."

173. See *id.* at \*2, n.2 ("the parties agree that Pennsylvania law governs the substantive issues in this case.").

174. See discussion *supra* Part IV.A.

175. See discussion *supra* Part II.B.

cific legislative reforms that will facilitate cross-border insolvencies and use of the Guidelines.

When economic conditions are difficult like they are now, countries might be less inclined to extend comity to a foreign proceeding unless it is also in the interest of domestic creditors. We have seen from the *Rad-dison* case some of the dangers that can result when a court is forced to interpret the laws of another jurisdiction, especially when those laws are unclear. Up to date, bankruptcy courts on both sides of the border have done a commendable job in dealing with these cross-border issues despite the lack of uniformity and clear guidance.

At an American Bar Association Conference in September 2009, Justice Farley attributed much of the recent successes to the extra efforts of the judiciary.<sup>176</sup> He argued that some of these recent cases demonstrate that progress can be achieved without any need for legislative action.<sup>177</sup> While it may be true that a trend seems to be emerging that promotes international cooperation in a bankruptcy setting, especially between the United States and Canada, even Justice Farley admits that there are still cases where “particular courts overlook trends in international co-ordination.”<sup>178</sup>

The best way to make proceedings more efficient and predictable is by seeking more unity in U.S. laws and by staying proactive in updating any outdated laws. The circuit split regarding how to treat executory contracts is one example where there seems to be room for a workable solution. While different interpretations may be justified by different policies behind the Bankruptcy Code, circuit splits should be resolved with an overriding policy consideration in mind of facilitating the operation of global business.

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176. See The Honourable James M. Farley, *supra* note 11, at 49.

177. See *id.*

178. See *id.*