2014

Harmonizing Choice-of-Law Rules For International Insolvency Cases: Virtual Territoriality, Virtual Universalism, and the Problem of Local Interests

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HARMONIZING CHOICE-OF-LAW RULES FOR INTERNATIONAL INSOLVENCY CASES: VIRTUAL TERRITORIALITY, VIRTUAL UNIVERSALISM, AND THE PROBLEM OF LOCAL INTERESTS

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INTRODUCTION

This Article explores the potential content and the feasibility of a set of harmonized choice-of-law rules that would apply in insolvency proceedings. For brevity's sake, the Article refers to such rules as Harmonized Insolvency Choice-Of-Law Rules (HICOL Rules). The discussion generally contemplates a main insolvency proceeding opened in a debtor's center of main interests (COMI) and the existence of (or possibility of opening) one or more non-main (or secondary) proceedings. It also contemplates the possibility that an insolvency representative in a main or non-main proceeding may seek and be granted recognition in another State under the UNCITRAL Model Law[1] (Model Law or ML). In some cases it also contemplates application of the European Union Insolvency Regulation (EUR)[2] as it is in effect and as it is proposed to be revised (EUR 2012/14).[3] Under a truly harmonized choice of law rule, as to any given

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* Charles A. Heimbold, Jr. Professor of Law, University of Pennsylvania Law School. I thank the participants in the Symposium, Choice of Law in Cross-Border Bankruptcy Cases, March 2014, sponsored by the *Brooklyn Journal of Corporate, Financial and Commercial Law*, the participants at a seminar held at Gakushuin University Law School, Tokyo, July 2014, and the participants at a faculty workshop, University of Pennsylvania Law School, July 2014, for comments on earlier drafts of this paper. I also thank Isaac Roszler, J.D. candidate, Class of 2016, University of Pennsylvania Law School, for his excellent research assistance. All errors are mine.

1. U.N. COMM. ON INT'L TRADE LAW, UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION, U.N. Sales No. E.14.V.2 (1997) [hereinafter MODEL LAW]. The paper generally borrows from certain terminology used in the Model Law. It refers to a "main proceeding" opened in the debtor's COMI and a "non-main proceeding" opened in another jurisdiction. *See id.* art. 2(b) (defining "foreign main proceeding"), art. 2(c) (defining "foreign non-main proceeding"). The Model Law does not define COMI. The United States has enacted a version of the Model Law as Chapter 15 of the Bankruptcy Code. 11 U.S.C. §§ 1501 *et seq.*

2. Council Regulation 1346/2000, On Insolvency Proceedings, 2000 O.J. (L 160) 1 (EC) [hereinafter EUR].

3. *Proposal for a Regulation of the European Parliament and of the Council Amending Council Regulation (EC) No 1346/2000 on Insolvency Proceedings*, COM (2012) 744 final (Dec. 12, 2012) [hereinafter EUR 2012/14]. For convenience the EUR and the EUR 2012/14 are referred to collectively as the EUR when it is not necessary to distinguish between the two. The European Parliament has approved the European Commission's proposal with some proposed modifications. European Parliament Legislative Resolution of 5 February 2014 on the Proposal for a Regulation of the European Parliament and of the Council Amending Council Regulation (EC) No 1346/2000 on Insolvency Proceedings, *available at*

issue of law, and as it may relate to any particular asset, the same rule of insolvency law would apply regardless of whether the matter is addressed by the court[4] in a debtor's main proceeding, in a non-main proceeding, or in another forum in which the relevant insolvency law must be determined. This Article largely eschews the more theoretical debates about territorialism (many courts, many insolvency laws) versus universalism (one court in the COMI, one insolvency law)[5] and focuses instead on HICOL Rules.

In his article appearing in this symposium issue, Professor Edward Janger embraces, again, the approach of "virtual territoriality" under which a court in a main insolvency proceeding would apply the law that *would have been* applied in a non-main proceeding—*if one had been opened*—in a jurisdiction other than the COMI.[6] In effect, the court in the main proceeding would conduct a "synthetic" non-main proceeding to deal with assets and issues as to which the respect and protection of "local" interests are justified. There are of course some advantages arising out of this approach. For example, the availability of such a virtual-territoriality-based synthetic proceeding reduces incentives for local creditors to employ non-main proceedings to protect local interests. Costly and duplicative proceedings are avoided by the virtual territorial approach, which advances an efficiency-enhancing universalist goal of centralized administration.[7]

This Article also considers an alternative, or at least a counterbalancing or coexisting, approach—virtual universalism. Under this approach, the court in a *non-main* proceeding would apply the insolvency law applicable in the *main* insolvency proceeding—the law of the COMI. Under such an

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http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2014-0093+0+DOC+XML+V0//EN. Under EUR and EUR 2012/14, non-main proceedings are referred to as "secondary proceedings." EUR, *supra* note 2, art. 3(3); EUR 2012/14, art. 3(3). While the terms "non-main" and "secondary" can be used interchangeably, I generally refer here to "non-main" proceedings except in the context of EUR or EUR 2012/14.

4. For convenience references are to courts or forum courts, although in some States an insolvency proceeding may be an administrative as opposed to a judicial proceeding. *See, e.g.*, MODEL LAW, *supra* note 1, art. 2(a) (defining "foreign proceeding" in part as "a collective judicial or administrative proceeding in a foreign State.").

5. For a recent collection of literature on the territorialism-universalism debates, see Jay Lawrence Westbrook, *A Comment On Universal Proceduralism*, 48 COLUM. J. TRANSNAT'L L. 503, 504 n.2 (2010) [hereinafter Westbrook, *A Comment*].

6. Edward J. Janger, *Silos: Establishing the Distributional Baseline in Cross-Border Bankruptcies*, 9 BROOK. J. CORP. FIN. & COM. L. 180, 182–83 (2014) [hereinafter Janger, *Silos*]; *see also* Edward J. Janger, *Universal Proceduralism*, 32 BROOK. J. INT'L L. 819 (2007); Edward J. Janger, *Virtual Territoriality*, 48 COLUM. J. TRANSNAT'L L. 401 (2010) [hereinafter Janger, *Virtual Territoriality*]; Edward J. Janger, *Reciprocal Comity*, 46 TEX. INT'L L.J. 441 (2011) [hereinafter Janger, *Reciprocal Comity*].

7. Janger, *Silos*, *supra* note 6, at 182–83. For a creative and fresh approach to non-main proceedings, see John A. E. Pottow, *A New Role for Secondary Proceedings in International Bankruptcies*, 46 TEX. INT'L L.J. 579 (2011) (urging a reduced scope for secondary proceedings, embracing the potential virtues of synthetic proceedings, and proposing an international priorities registry of "approved" priorities).

insolvency choice of law rule, incentives to commence a non-main proceeding also would be reduced, just as under virtual territoriality. To the extent that the law of the COMI would apply even in the non-main proceeding, the non-main proceeding would not result in the territorialist application of the law of the non-COMI jurisdiction.[8]

Under HICOL Rules, however, the "virtual" and "synthetic" heuristics or metaphors would be of diminished importance. Under such rules the role of comity would also be reduced. A forum court would defer to the substantive law of a jurisdiction other than the forum not as a result of comity, but because the harmonized choice of law rule would dictate that result.[9] Every court in every insolvency proceeding—main (actual or synthetic as applied in a non-main) or non-main (actual or synthetic as applied in a main)—would apply the same substantive law to the same issues.[10] The real project of importance, then, is the determination as to which issues, and as to which assets, the insolvency law of the COMI should govern and as to which the insolvency law of another jurisdiction should apply. While certainly not altogether ignored, this important project has received insufficient attention in the "ism" debates over universalism, territorialism, and the hybrid progeny of each as articulated and debated by legal academics. In exploring the *content* of harmonized choice of law rules, this Article confronts this project directly.

Following this Introduction, Part I of the paper outlines the basic facts concerning a hypothetical debtor corporation and a hypothetical initial state of play. Part II then applies the ALI/III Global Rules on Conflict-of-Laws Matters in International Insolvency Cases (Global Rules)[11] to the

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8. The benefits of synthetic proceedings conducted either in a main proceeding or a non-main proceeding must be weighed against the difficulties that could be anticipated from a court sitting in one State applying the insolvency law of another State.

9. Of course, the normative force of the concept of comity could play an important role in the debates over when the harmonized choice of law rule *should* call for a forum to defer to another jurisdiction's law on a particular issue.

10. Hannah Buxbaum has argued persuasively for such a choice-of-law approach to international bankruptcy. Hannah Buxbaum, *Rethinking International Insolvency: The Neglected Role of Choice-Of-Law Rules and Theory*, 36 STAN. J. INT'L L. 23 (2000). In particular she explains the benefits of a multilateralist (as opposed to unilateralist) approach, under which "any court considering which law to apply to a particular case should reach the same result, and that result should be predictable." *Id.* at 48. *See also* Jay Lawrence Westbrook, *Universalism and Choice of Law*, 23 PENN. ST. L. REV. 625, 632 (2005):

> [A]s to distribution rules and other rules governing bankruptcy, . . . [the court] must choose the applicable bankruptcy law by focusing upon the debtor's affairs as a whole on a worldwide basis, looking to factors such as principal place of business, principal location of assets, residence of most creditors, center of financial interests, and the like.

11. *See* AM. LAW INST., *Global Rules on Conflict-of-Laws Matters in Insolvency Cases*, *in* TRANSNATIONAL INSOLVENCY: GLOBAL PRINCIPLES FOR COOPERATION IN INTERNATIONAL INSOLVENCY CASES ann. at 200 (2012), *available at* http://www.iiiglobal.org/component/jdownloads/finish/557/5932.htm [hereinafter *Global Rules*]. The Global Rules, including Comments and Reporters' Notes, are set forth in the Annex to the

hypothetical facts based on the hypothetical debtor. The hypothetical debtor has assets and establishments located in several States and is subject to multiple insolvency proceedings. The Global Rules build on choice-of-law rules found in the UNCITRAL Legislative Guide and those in the EUR.[12] Although the Global Rules are not a product of an intergovernmental organization, they were compiled by two highly respected and experienced scholars and are certainly worthy of a trial run for application to specific facts.[13] In applying the Global Rules, the paper also acknowledges the impact of the Model Law and, in some respects, the EUR and EUR 2012/14. The upshot of this exercise reflects a world of cross-border insolvency law that is overwhelmingly territorial to the extent that non-main proceedings are involved.

Following that hypothetical application and related analysis, Part III of the Article addresses the question whether HICOL Rules would and should promote substantive harmonization of insolvency law. It considers the potential for HICOL Rules, such as the Global Rules, to facilitate a move away from territoriality and towards a more universalist approach in cross-border insolvency situations.

HICOL Rules would provide some obvious benefits. In particular, such a regime could foster more certainty and predictability for multinational firms and their creditors and prospective creditors both before and after the commencement of an insolvency proceeding. But could–and should–such a harmonized regime be structured with the goal of increased harmonization of substantive insolvency law? Grappling with this question puts front and center the debates on territorialism and universalism (as well as modified universalism, virtual territorialism, and the other subsets of each approach found in the academic literature).

Harmonized rules operating together with regimes intended to encourage cross-border cooperation, such as the Model Law, could encourage more centralized administration of the insolvency proceedings of a multinational firm in the main proceeding opened in the State of the

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Global Principles. For convenience of reference, the Global Rules are set out in Appendix I to this paper.

12. U.N. COMM'N ON INT'L TRADE LAW, UNCITRAL LEGISLATIVE GUIDE ON INSOLVENCY LAW, rec. 30–34, U.N. Sales No. E.05.V.10 (2004); EUR 2012/14, *supra* note 3, art. 4–15. The Global Rules are similar in many respects to the choice-of-law rules found in the UNCITRAL Legislative Guide and the EUR, although the Global Rules are more detailed. The Global Rules also provide for exceptions to the applicability of the law under which insolvency proceedings are opened, patterned on those found in the EUR.

13. The Reporters were Professor Ian Fletcher, University College London, and Professor Bob Wessels, University of Leiden. The Reporters contemplated that a more formal procedure would follow. "It is envisaged that the proposed Global Rules could serve as the basis for international negotiation under the auspices of one or more appropriate organizations." *Global Rules*, *supra* note 11, Statement of the Reporters.

debtor's COMI.[14] This would further an important goal of universalism which we might refer to as "procedural" or "administrative" universalism. But HICOL Rules could also further substantive harmonization of insolvency law, which we might refer to as "substantive universalism." To the extent that the harmonized rules point to the law of the COMI to deal with assets and establishments located outside the COMI (whether or not a non-main proceeding had been opened) and that otherwise would be subject to non-COMI law applied on a territorial basis, substantive law is harmonized at least for the particular debtor's insolvency proceeding. As to those matters that are governed by the insolvency law of the COMI jurisdiction under HICOL Rules, that law would be applied in a non-main proceeding opened in another State.

I make no normative claim here that harmonization of choice-of-law rules should promote substantive universalism, but it is plausible that this would be the result. As UNCITRAL may be considering the feasibility of HICOL Rules,[15] it would be an unfortunate missed opportunity were no efforts made to *attempt* to achieve consensus on at least some HICOL Rules.

For this reason, Part IV of the Article offers some preliminary and tentative proposals as to matters that should be governed by the law of the COMI and those that should be governed by the law of another jurisdiction.[16] In particular, it focuses on the issue of local interests. It offers a framework for determining when universalism should bow to local interests outside the COMI. The discussion invites a debate on these proposals. While theory may aid in the normative evaluation of the range of possible conclusions, the debate ultimately must focus on conclusions.

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14. The Global Rules also borrow from the Model Law's definition of "foreign main proceeding" in a debtor's "centre of main interests." MODEL LAW, *supra* note 1, art. 2(b).

15. *See* U.N. Comm'n on Int'l Trade Law, Working Group V (Insolvency Law), Rep. on its 44th Sess., July 7–25, 2014, para. 24, U.N. Doc A/CN.9/798 (Jan. 8, 2014) (emphasis added):

> The Working Group noted that choice of law issues formed part of the proposal for a convention (as discussed above), and that some of the elements to be addressed in the context of further work on enterprise groups (such as synthetic secondary proceedings and directors' obligations) raised choice of law questions that would need to be addressed in the course of that work. However, paragraphs 12 to 16 of document A/CN.9/WG.V/WP.117 outlined *a proposal for articulating principles on choice of law that could constitute possible future work*. The Working Group expressed support for that proposal, noting that choice of law issues were key to many of the topics discussed in document A/CN.9/WG.V/WP.117.

Currently and for the past several years UNCITRAL's Working Group V has been the locus of its work in the field of insolvency law. For a description, see http://www.uncitral.org/uncitral/en/index.html.

16. The article does not address the difficult issues involving insolvencies of corporate groups but instead focuses on the applicable choice of insolvency law rules for a discrete debtor. UNCITRAL Working Group V also is addressing these problems of multinational enterprise groups. For a list of issues that the Working Group is considering, see *id.* paras. 16–17.

This Article leaves much work for another day. If, at the end of harmonization efforts a consensus were to emerge on even *some* HICOL Rules (even if no consensus emerges on others), then the exercise would have been fruitful.

I. HYPOTHETICAL SETTING AND BACKGROUND FACTS: THE INITIAL STATE OF PLAY

MNE Inc. (MNE) is a corporation organized and validly existing under the laws of State A, where its head office is located and where the bulk of its operations take place. State A is MNE's center of main interests (COMI), and State A has enacted the Model Law (ML).

MNE operates a branch facility in State B. State B also has enacted the Model Law. MNE has creditors that are located in State B and that entered into transactions with MNE through its State B branch. At Time 1 (T-1), MNE entered into a sale contract (Sale Contract), governed by State B law, for the future sale of goods to Buyer, a State B corporation.

MNE also operates a branch facility in State C. State C also has enacted the Model Law. However, under the law of State C, MNE is not eligible to be a debtor in an insolvency proceeding in State C or a petitioner under State C's Model Law.[17] MNE has creditors that are located in State C and which entered into transactions with MNE through its State C branch.

MNE owns assets located in State D but MNE does not have a branch or other establishment in State D. State D has not enacted the Model Law. The assets are subject to a security interest (a right *in rem*) that secures a debt that MNE owes to X Bank. The law of State D governs the creation, perfection, and priority of the security interest under the choice of law rules of State D. X Bank is located in State E.

At Time 2 (T-2), a rescue/reorganization-type insolvency proceeding (a main proceeding per the Global Rules and the Model Law) is opened under the law of State A. At Time 3 (T-3), a non-main rescue/reorganization-type insolvency proceeding is opened in State B. At Time 4 (T-4), a creditor of MNE commences an involuntary liquidation insolvency proceeding against MNE in State D and the appropriate court opens the proceeding.

17. *See* MODEL LAW, *supra* note 1, art. 1(2).

The Global Rules are applicable under the laws of States A, B, C, and D. These facts can be illustrated as follows:

State A	State B	State C	State D
MNE's COMI	MNE Branch ("establishment")	MNE Branch ("establishment")	MNE assets; No branch/establishment
ML applies	ML applies	ML applies	ML does not apply; Assets subject to security interest (State D law)
	Branch creditors	Branch creditors	
Main proceeding opened	Non-main proceeding opened		Involuntary proceeding opened

II. CHOICE-OF-LAW HYPOTHETICALS

A. STATE B REPRESENTATIVE'S PREFERENCE ACTION IN STATE B: WHICH STATE'S LAW GOVERNS THE AVOIDANCE ACTION?

At Time 5 (T-5), MNE's State B (non-main) insolvency representative commences an action in the State B proceeding to recover an allegedly preferential payment made to a State B branch creditor.

Global Rules 12 and 13 provide the generally applicable choice-of-law rules to be applied in insolvency proceeding. Under Global Rule 12, it is the law of the State in which insolvency proceedings are opened that governs and that law "determine[s] the conditions for the opening of those proceedings, their conduct, administration, conversion, and their closure."[18] Note that Global Rule 12 is not limited to main proceedings in its application; it also applies to non-main proceedings. However, in the case of non-main proceedings, the law of the (non-COMI) State in which the proceedings are opened applies. But under Global Rule 13 that law applies only to assets that are situated in that State when the proceedings are opened.

Applying Global Rules 12 and 13 here, the law of State B would govern, subject to its application being limited to assets situated in State B. Under Global Rule 9, assuming the representative's avoidance claim (as to which the State B creditor is the debtor) is a claim of a "known creditor," it is situated in State B, which is the State B branch creditor's (i.e., the debtor's) seat or domicile. The same result would be achieved under the EUR[19] as well as the EUR 2012/14.[20]

18. *Global Rules*, *supra* note 11, r. 12(1), (2).
19. EUR, *supra* note 2, art. 2(g), 4(2).
20. EUR 2012/14, *supra* note 3, art. 2(f)(vi), 4(2).

On the other hand, the Comment to Global Rule 9 adopts the context of claims against the debtor in an insolvency proceeding. Is it possible that the claim involved in the preference action is the State B creditor's claim that was satisfied by the alleged preferential payment (and that would be reinstated if the preference action were sustained) as opposed to the insolvency representative's claim against the State B creditor? If that were the case, the claim would be located in State A (MNE being the debtor) and the State B non-main proceeding could not deal with the preference claim (it not being situated in State B). In this situation, could the State A insolvency representative sue the State B creditor in State B outside of the non-main insolvency proceeding to avoid the preference? If not, there may be no remedy unless the State B creditor is subject to jurisdiction in the State A insolvency proceeding. Presumably, the harmonized choice-of-law rule making State A's law apply to the preference action would not of itself subject the State B creditor to jurisdiction in State A. It appears that the State B creditor would be subject to jurisdiction in a State A preference action if European law applied.[21]

The better view is that the preference claim by the State B representative, in the State B proceedings, and against the State B branch creditor, whose seat or domicile is State B, would be situated in State B and subject to State B law.

B. STATE A REPRESENTATIVE'S PREFERENCE ACTION IN STATE A OR STATE B: WHICH STATE'S LAW GOVERNS THE AVOIDANCE ACTION?

Now assume, alternatively, that at T-5, MNE's State A (main) insolvency representative commences an action to recover an allegedly preferential payment made to a State B branch creditor either (i) in the State A proceeding (this assumes that B would be subject to jurisdiction of the State A proceeding) or (ii) in State B. Given these assumptions, it is a plausible further assumption that the State A representative would *not* have caused the opening of State B non-main proceedings (but, instead, might have petitioned the appropriate State B court for recognition of the State A foreign main proceeding under the Model Law, discussed below).

Under Global Rule 12, the general rule would be that the law of the State in which insolvency proceedings are opened—State A—would govern. Even if the avoidance claim is situated in State B by virtue of the seat or domicile of the State B branch creditor, in the absence of a State B non-main proceeding (as assumed above), State A law would govern.[22]

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21. Case C-339/07, Seagon v. Deko Marty Belgium NV, 2009 E.C.R. I-791.

22. Under Global Rule 15.1 an insolvency proceeding opened in a State does not have extraterritorial effects on rights in rem in respect of assets situated in another State. *Global Rules*, *supra* note 11, r. 15.1. But, here, assuming that the property at issue is the representative's avoidance claim, we are not dealing with any competing in rem rights to that claim, so it does not

However, the State A insolvency representative (which is assumed to be the same person as the State B insolvency representative, or under common control) could choose the law of State A or State B, whichever has the preference avoidance law that is more favorable. By choosing to have a State B proceeding opened, as under the original assumption, State B law would apply (assuming the preference claim is situated in State B) under Global Rules 12 and 13. By not causing a State B non-main proceeding to be opened, State A law would apply under Global Rule 12. However, if the relevant property is the State B creditor's claim that was satisfied by the allegedly preferential transfer, as discussed above, then the claim is located in State A. If that were the case (and I do not believe that it should be), under Global Rule 13 the opening of a State B non-main proceeding would not result in the applicability of State B law to an asset situated in State A.

Now consider the interaction of the Model Law's recognition and relief provisions with the choice of law rules. Assume further that instead of requesting the opening of a State B rescue proceeding, the State A insolvency representative files a petition in State B seeking recognition in State B as a foreign main proceeding. Assume further that the representative's potential preference action against the State B creditor is located in State B. Following such recognition, the State A representative requests relief under Model Law Article 21 consisting of authorization to administer all of MNE's State B assets, including the application of State A's distributional scheme, and under Article 23 to exercise avoidance powers under State A (COMI) law.[23]

Contrast the approach under EUR and EUR 2012/14 in the absence of the Model Law. Assuming that no secondary proceeding has been opened in State B, the State A representative is empowered to administer MNE's State B assets under the law of State A without the intervention of a State B court, subject to respect for third party *in rem* rights and the rights of any seller to MNE under a title reservation agreement.[24] Of course, if a secondary proceeding is opened, then the law of State B will apply as to State B assets under EUR and EUR 2012/14 (as well as under Global Rule

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appear that Global Rule 15.1 would deprive the representative from relying on State A's preference rule. Moreover, under Global Rule 21 the rule of Global Rule 15.1 does not apply to avoidance actions (assuming the operation of Global Rule 22 does not change that result). *Id.* r. 21.

23. *See* MODEL LAW, *supra* note 1, art. 21(1)(e), (2); 23(1). Note that the Chapter 15 version of article 23 is more limited that the Model Law version. Under Chapter 15 the foreign representative is entitled to assert avoidance powers only under United States law and only if a parallel United States proceeding has been commenced under another chapter of the Bankruptcy Code. 11 U.S.C. § 1523(a). For a strong critique of cases permitting a foreign representative to commence avoidance actions under section § 1521(a)(7) of Chapter 15, see Katelyn Trionfetti, *The Use of Foreign Avoiding Powers Under Section 1521(a)(7) in Chapter 15 Cases*, 21 AM. BANKR. L. REV. 279 (2013).

24. EUR, *supra* note 2, art. 5, 7, 18(1); EUR 2012/14, *supra* note 3, art. 5, 7, 18(1).

13).[25] EUR 2012/14 promotes central administration, however, by allowing a State B court to postpone a decision on opening a secondary proceeding if the State A representative undertakes to give effect in the State A main proceeding to the distribution and priority rights that would apply in a State B non-main proceeding for the benefit of State B local creditors (*i.e.*, a synthetic State B secondary proceeding).[26]

C. STATE A REPRESENTATIVE'S PREFERENCE ACTION IN STATE C: WHICH STATE'S LAW GOVERNS THE AVOIDANCE ACTION?

At Time 6 (T-6), MNE's State A (main) insolvency representative sues a creditor in State C to recover an allegedly preferential payment made to a State C branch creditor.

The State A insolvency representative will contend the law of State A applies for the reason explained in Part III.B.1. This scenario involves not only a question of applicable law but also a question of which court has jurisdiction over the avoidance claim against the State C branch creditor. Even if the preference avoidance law of State C is more favorable, the State A representative should not be entitled to assert a claim on that theory inasmuch as MNE is not eligible to be a debtor in State C.

D. STATE A REPRESENTATIVE'S ACTION IN STATE D: WHICH STATE'S LAW GOVERNS THE AVOIDANCE ACTION?

At T-6, MNE's State A (main) insolvency representative sues X Bank, the creditor holding a security interest in the State D asset in State D to set aside the security interest as a preference.

The State D insolvency representative in the involuntary proceeding will wish to recover the preference if possible for the benefit of the creditors asserting claims in the State D proceeding. Under Global Rules 12 and 13, State D law should apply to any preference action against X Bank in the State D proceeding. Moreover, the State A representative's commencement of an action may violate the State D law automatic stay (or other stay) or injunction. Under the EUR or EUR 2012/14, the secondary proceeding in State D could not be opened because of the absence of an establishment in that state and, in the absence of a secondary proceeding, the State A representative could pursue its preference action against X Bank in State D (assuming jurisdiction) under the State A avoidance powers.

25. EUR, *supra* note 2, art. 3(2); EUR 2012/14, *supra* note 3, art. 3(2).
26. EUR 2012/14, *supra* note 3, art. 18(1), 29a(2).

E. DOES THE ANSWER IN SUBPARTS II.A, B., C., OR D. DEPEND ON THE LAW APPLICABLE TO THE OBLIGATION THAT WAS OWED BY MNE TO THE CREDITOR?

As to the alleged preferential payments involved in Subparts II.A., B., and C., the answer is no, it does not depend on the applicable law. Global Rule 21 provides that the special rules on *in rem* rights (Global Rule 15), set-off (Global Rule 17), and employment contracts (Global Rule 20) do not preclude the avoidance of "acts detrimental to the general body of creditors" (*e.g.*, fraudulent transfers and preferences).[27] However, Global Rule 22 provides a defense that calls off the protection of Global Rule 21.[28] The defense turns in part on whether the act in question is subject to the law of a State other than the State of the opening of insolvency proceedings.[29] Global Rule 23, then, renders inapplicable the protection of Global Rule 22 if the parties have chosen to apply to the transaction the law of a State other than the State of the opening of insolvency proceedings and the law of that other State "has no substantial relationship to the parties or the transaction, and there is no other reasonable basis for the selection of the law of that state."[30] However, the scheme provided by Global Rules 21, 22, and 23 does not implicate any law other than the law of the State of the opening insolvency proceedings because the alleged preferential payments involved here did not implicate *in rem* rights, a set-off, or an employment contract. Neither the EUR nor the EUR 2012/14 appears to have a scheme as contemplated by Global Rules 21, 22, and 23. On the other hand, the preference action involved in Subpart II.D. does involve *in rem* rights—a security interest. Consequently, the law selected by the parties to apply to the secured transaction (the law of State D) may be implicated in the analysis of whether Global Rule 22 is applicable to call off Global Rule 21 and whether Global Rule 23 renders inapplicable Global Rule 22.[31]

F. STATE B UNPAID BRANCH EMPLOYEES.

1. Which State's law governs the rights and claims of MNE's unpaid State B branch employees vis-à-vis other State B branch creditors in the State A, B, and D insolvency proceedings?

Assuming that the law of State B governs the employment contracts of the State B branch employees, under Global Rule 20 the law of State B governs the effect of insolvency proceedings on the rights of the State B

27. *Global Rules*, *supra* note 11, r. 21.
28. *Id.*, r. 22.
29. *Id.*
30. *Global Rules*, *supra* note 11, r. 23.1.
31. Concerning the application of Global Rules 21, 22, and 23 and the interrelationship of these rules, see text at *supra* notes 27–30 .

Branch employees. The relevant law, such as a priority claim or privilege, might be found as a part of or separate from State B's insolvency law. This law would apply to the employees' claims whether lodged in one or more of the State A, State B, or State D insolvency proceedings. EUR and EUR 2012/14 Article 10 is in accord with Global Rule 20. The law of State B would apply to all employee claims lodged in those proceedings and, because of the absence of a State D establishment, a State D secondary proceeding would not be permitted.

2. Vis-à-vis other non-State B creditors?

The nature of creditors' claims, including the location of creditors and the place where creditors' claims were incurred, does not affect the applicability of State B law to the rights of the State B Branch employees in insolvency proceedings.

G. STATE C UNPAID BRANCH EMPLOYEES.

1. Which State's law governs the rights of MNE's unpaid State C branch employees vis-à-vis other State C branch creditors in the State A, B, and D insolvency proceedings?

Assuming that the law of State C governs the employment contracts of the State C branch employees, under Global Rule 20 the law of State C governs the effect of insolvency proceedings on the rights of the State C Branch employees. The discussion of State B employees in in Part III.F. applies as well to the situation of the State C Branch employees.

2. Vis-à-vis other non-State C creditors?

Again, State C law applies.

H. TREATMENT OF THE SALES CONTRACT: WHICH STATE'S LAW GOVERNS THE INSOLVENCY REPRESENTATIVE'S AND BUYER'S RIGHTS WITH RESPECT TO THE SALE CONTRACT?

The Sales Contract is a long-term (three-year) agreement. Under the agreement, MNE is to sell and Buyer is to buy all of Buyer's requirements for cotton to be processed in Buyer's State B fabric factory. The agreement's pricing formula turns out to be very unfavorable to MNE under current market conditions. The State B insolvency representative wishes to reject the sale agreement and relegate Buyer's rights to an unsecured claim for damages.

The applicable insolvency law might provide that reciprocal (executory, to use Bankruptcy Code Terminology[32]) contracts are terminated upon the opening of insolvency proceedings. Or, it might entitle the insolvency representative to choose whether to continue performance of the contract. According to the Comment to Global Rule 19, the rights of the debtor and non-debtor party to a reciprocal contract, here the Sale Agreement, are governed by the law of State A—MNE's COMI—where the main proceedings were opened.[33] This would appear to be the import of the Comment even if raised by the State B insolvency representative in the State B insolvency proceeding, even if the law of State B were more favorable to one party or the other, and even though the sale agreement is governed by the law of State B.

III. WOULD (AND SHOULD) HARMONIZED CHOICE-OF-LAW RULES PROMOTE UNIVERSALISM?

Consider a best-case scenario: Every State in which MNE has an establishment or assets, and every State that would be a forum for litigation with MNE's creditors or other parties in interest, has adopted HICOL Rules. For simplicity, assume that these rules are identical to the Global Rules. When MNE's main proceeding is opened in State A, the COMI state, under Global Rule 12 the law of State A applies with respect to, *inter alia*, all of MNE's assets and the treatment of all of its creditors' claims—worldwide. There are some limitations, however. The State A proceeding will not affect secured creditor rights/rights *in rem* as to assets not situated in State A[34] or creditors' set-off rights if permitted by the law applicable to MNE's claim against the creditor.[35] And the law applicable to employment contracts applies to the effects of insolvency proceedings on such contracts;[36] that law will not necessarily be State A law. Moreover, there are exceptions to these exceptions.[37] Significantly, however, the exceptions provided by Global Rules 15, 17, and 20 do *not* preclude avoidance actions

32. *See* 11 U.S.C. § 365 (assumption, rejection, and assignment of executory contracts and leases).

33. There is some ambiguity inasmuch as Global Rule 19 does not itself make any reference to the main proceeding but refers to "the state of the opening of proceedings." *Global Rules*, *supra* note 11, r. 19. As contemplated by Global Rule 12, and as that reference or similar phrases are used through the Global Rules, the reference includes both main and non-main proceedings. However, based on the Comment and my direct communications with the Reporters, it is clear that the intention was that reciprocal contracts would be dealt with under the insolvency law of the COMI.

34. *Id.* r. 15.

35. *Id.* r. 17.

36. *Id.* r. 20.

37. *See id.* r. 16 (exception to Global Rule 15); *id.* r. 18 (exception to Global Rule 17). Global Rule 14 also provides exceptions to Global Rule 12 and 13 to address assets that are moved from one jurisdiction to another for the purposes of avoiding the effects of the law of the first jurisdiction. *Id.* r. 14.

pursuant to the law of State A in the State A main proceeding (at least when that is the only insolvency proceeding that has been opened).[38]

Upon the opening of the State A main proceeding, the HICOL Rules applicable in the relevant states under the Global Rules reflect an apparently universalist-oriented regime—the law of State A applies across the board subject only to the exceptions mentioned above. However, it is one thing to appreciate that in the abstract the law of State A is applicable under the choice-of-law rule of State B, for example, to assets situated in State B and to State B creditors' claims. It is yet another thing for the State A insolvency representative under the auspices of the State A main proceeding to actually administer those State B assets. If the State A representative finds it necessary under the law of State B to seek the opening of a State B non-main proceeding in order to administer (protect, realize upon, etc.) the assets, then it is an entirely new (and distinctly territorialist) ballgame.[39] Under Global Rules 12 and 13, State B law would then apply in respect of the assets situated in State B.[40] Note as well that the exceptions in Global Rule 15 (rights *in rem*) and Global Rule 20 (employment contracts) are essentially territorialist in nature.

Clearly, HICOL Rules have the powerful *potential* for pushing regimes toward a more (less modified) universalist cross-border regime even without substantive harmonization of domestic insolvency laws. But this does not mean that HICOL Rules necessarily would have that effect even if harmonization of choice-of-law rules were to be a widespread success. HICOL Rules could just as well essentially embrace territorialism, as appears to be the case for the most part with the Global Rules when non-main proceedings are involved. A serious effort to achieve progress in moving cross-border insolvencies in the universalist direction must involve the attempt to identify and justify matters and issues as to which HICOL Rules should require the application *in the State B non-main proceedings* (to continue with the example) *of the insolvency law of State A* with respect to assets situated in State B and claims lodged in the State B proceedings. A serious reform effort should examine the feasibility of HICOL Rules providing that the law applicable in the main proceeding governs issues in a non-main proceeding which are as varied and significant as distributional rules (rankings), avoidance claims, third party releases/injunctions, reciprocal/executory contracts, and the like. Even the development of a consensus on *some* substantive rules under the law of the main proceeding

38. Note, however, that Global Rule 22 is an exception to Global Rule 21 and Global Rule 23 is an exception to Global Rule 22. *Id.* r. 22, 23.

39. This contemplates that neither the Model Law nor another cooperative regime in State B would be available.

40. The Reporters' Notes to Global Rule 13 begin with the statement: "Global Rule 13 epitomizes the pragmatic accommodation of competing principles that lie at the heart of the theory of modified universalism." If this is so, certainly much emphasis must be placed on the term "modified." *Global Rules*, *supra* note 11, r. 13, Reporters' Notes.

that would apply to *some extent* in a non-main proceeding certainly would represent progress toward a more universalist international regime. To the extent that the law of the COMI applies in non-main proceedings—virtual universalism—incentives to open non-main proceedings are reduced.

I do not suggest that efforts to balance interests of central administration and coordination with local interests should be abandoned. Nor do I believe it reasonable to expect that a consensus would emerge that anything like substantially all of the COMI's insolvency law should be applied in non-main proceedings. It is quite likely that under HICOL Rules certain significant local interests, such as labor claims, would not be submitted to the law of the COMI. And, of course, like other choice-of-law rules any harmonized rule would yield to the fundamental public policies of a non-COMI forum.[41] As to matters not governed by the law of the COMI, as already noted, benefits might be achieved by empowering the COMI forum to synthetically apply the local law of other jurisdictions in the interest of central administration and as a disincentive to opening a non-main proceeding—virtual territoriality, as advocated by Professor Janger.[42] EUR 2012/14 embraces this approach.[43]

The UNCITRAL Working Group V[44] would miss a unique opportunity were it to fail to explore in depth and attempt to identify a set of matters and issues as to which the COMI law should be applicable in a non-main proceeding and to non-main assets and claims against the debtor's estate. I realize that depending on the matters that would be governed by the law of the COMI there may be downsides to such a choice-of-law rule. But to pre-judge the result at the outset by dismissing—as either unwise or unfeasible—a more expansive role for the COMI's insolvency law without a serious exploration seems unjustified. This exploration of issues should recognize that many interested parties that choose to do business with a debtor often are well positioned to take into account the location of the debtor's COMI and to adjust their relationships accordingly based on the COMI State's insolvency law. It is also the case that one size might not fit all, and certain types of claims, in addition to workers' claims, might be excepted from the applicability of the law of the COMI, such as involuntary creditors (tort claimants and tax claimants, for example) and creditors that hold claims below a certain amount.

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41. For a discussion of the public policy exception in the context of international insolvency proceedings, see Buxbaum, *supra* note 10, at 55–58, 63–70.

42. *See* Janger, *Virtual Territoriality*, *supra* note 6. For a critique, see Jay Lawrence Westbrook, *A Comment*, *supra* note 5.

43. As already noted, the EUR 2012/14 contains a universalist move towards centralized administration in its provision for a main proceeding's liquidator to undertake the application of the distribution and priority law of another member State as a condition for postponing the opening of a secondary proceeding in that member State. *See supra* text accompanying note 26.

44. Concerning Working Group V, see *supra* note 15.

If the Working Group were to confront the issue and its efforts toward such universalist goals failed to result in a consensus, perhaps that would be no surprise. It is quite a territorial world out there. Arguably, at least in that case it would make apparent what some may have suspected all along—that calls for bolder moves toward universalism, beyond *ad hoc* comity-like moves, may have been abstract, unrealistic, and without hope. Indeed, the possibility of complete failure in this respect might make universalists quite leery of any such efforts by the Working Group. The results of the exercise ultimately could more clearly enshrine territorialism as the name of the game in cross-border insolvencies. Perhaps universalism (even a modified universalism) simply has no clothes. But I am not so pessimistic.

Short of a universalist move toward actual harmonization of substantive insolvency law,[45] the Model Law offers a means of ameliorating, through the exercise of comity, the territorialism that is inherent in the opening of a non-main proceeding. Returning to the example, recall that instead of seeking to open a State B non-main proceeding, MNE's State A representative might have petitioned in State B for the recognition of the State A proceeding as a foreign main proceeding. Of course, this is a far cry from the direct application of State A law in a State B non-main proceeding, but the relief that might be granted by a State B court could prove enormously useful in the administration of the State B assets.[46] Moreover, the fact that insolvency law currently remains essentially territorial should not detract from the enormous improvements in cross-border insolvency law and advances in administration and cooperation in recent years.[47] Although these developments are largely outside the scope of this Article, efforts to develop harmonized HICOL Rules must take account of and draw upon lessons learned from these other moving parts.

IV. INSOLVENCY LAW OF COMI VERSUS INSOLVENCY LAW OF ANOTHER ("LOCAL") JURISDICTION: ANALYTICAL FRAMEWORK AND PROPOSALS FOR THE PROBLEM OF LOCAL INTERESTS

This Part offers concrete proposals for HICOL Rules that would apply in any forum but which would be limited to determining the applicable rules of insolvency law. Scholars have reminded us that we must distinguish generally applicable choice-of-law rules that a forum court

45. I do not entirely discount the possibility that deliberations on HICOL Rules could lead to the development of a consensus on the *substantive* harmonization of at least some aspects of insolvency law. The law of fraudulent transfer (including under value transactions) would be a prime candidate.

46. *See, e.g.*, MODEL LAW, *supra* note 1, art. 19 (relief upon application for recognition); art. 21 (relief upon recognition); art. 7 (additional assistance under other laws).

47. For an outstanding survey, analysis, and critique of these developments, see BOB WESSELS, BRUCE A. MARKELL, & JASON J. KILBORN, INTERNATIONAL COOPERATION IN BANKRUPTCY AND INSOLVENCY MATTERS 71–250 (2009).

would apply to issues of *non-insolvency law* from choice-of-law rules that a forum court would apply to questions of *insolvency law*.[48] While the Reporters' Notes to the Global Rules may appear to question this dichotomy,[49] clearly it must be observed. For this reason (following a brief detour on substantive harmonization), this Part sets out an analytical framework for approaching harmonized choice-of-law rules for questions of insolvency law. By way of example, the analysis first focuses on the non-insolvency law that would apply to proprietary interests such as consensual security interests—which all would agree is a question of great importance. It then addresses non-insolvency choice-of-law rules for rights *in personam* or contract rights. Finally, it outlines some tentative proposals for HICOL Rules that, in particular, address the issue of local interests outside a debtor's COMI.

A. A BRIEF DETOUR: HARMONIZATION OF SUBSTANTIVE INSOLVENCY LAW

Before getting to the principal business at hand, a slight detour is necessary. Professor Janger generally rejects substantive harmonization of insolvency law, asserting that "harmonization deprives nations of the power to implement their own policies about how various creditor constituencies should be treated when a business fails."[50] Instead, he would limit "harmonization to the few procedural rules necessary to administer a case comprising all of the debtor's assets and operations and a set of choice-of-law principles that would limit the effect of choice-of-forum[51] on substantive entitlements."[52]

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48. *See, e.g.*, Jay Lawrence Westbrook, *Avoidance of Pre-Bankruptcy Transactions in Multinational Bankruptcy Cases*, 42 TEX. INT'L L.J. 899, 900 (2007) (footnote omitted) [hereinafter Westbrook, *Avoidance*]:

> [M]any issues in a multinational bankruptcy case require two distinct choice-of-law analyses: one to determine the proper nonbankruptcy law and the other to choose the applicable bankruptcy law. Thus, for example, nonbankruptcy law might determine if a party has a valid contract claim against the debtor in bankruptcy, while bankruptcy law would determine the priority, if any, that claim would receive in a bankruptcy distribution.

49. *See Global Rules*, *supra* note 11, r. 12, Reporters' Notes. The Reporters (in Global Rule 12 and in their discussions of the rule) use "law" of the State in which insolvency proceedings are opened as opposed to "insolvency law." *Id.* We may be in substantial agreement, however, as I also would interpret the term "insolvency law" broadly and would not limit the concept merely to what is contained in a particular statute with the term "insolvency" or "bankruptcy" or the like in its title. I do not understand the Reporters to reject the idea that the generally applicable choice-of-law rules of the forum apply to questions such as the enforceability of a contract or the existence of a property right.

50. Janger, *Virtual Territoriality*, *supra* note 6, at 408–09.

51. In Janger-speak, "choice of forum" is actually a debtor's decision as to where it runs its business—its COMI. When a firm makes the COMI decision it also determines the forum of a future main insolvency proceeding. Although the COMI decision in fact determines the possible future forum, I doubt that any firm's management would describe the determination of its COMI

I could not disagree more with Janger's critique of harmonization efforts or the other critiques on which he relies.[53] Harmonization means that States *choose* to adopt a harmonized text. No deprivation of sovereign power is remotely involved. No institution can force a State to accept any proposed harmonized rule (unless the State has chosen to be bound by supranational legislation, as in the E.U.). And as recent commercial law conventions have shown, substantial harmonization is possible while allowing States to access a "menu" approach to a range of policy choices.[54]

I look forward to (actually, relish) joining the debate on substantive harmonization of insolvency law in a future effort. For present purposes, however, I will eschew this distraction in order to focus on HICOL Rules. Even if the goal of substantive harmonization were not controversial, it is quite plausible that a harmonization project would not be successful. For that reason, I believe that addressing HICOL Rules is a worthwhile next step. I note, however, that my position on the issue of substantive harmonization may affect my views on the appropriate *content* of HICOL Rules.

Finally, consider a less controversial dimension of substantive harmonization of insolvency law. Universal cross filing (UCF) and cross-priority (CP)[55] would in general advance universalist principles while in

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as a "choice of forum." As to forum shopping, see John A. E. Pottow, *The Myth (and Realities) of Forum Shopping in Transnational Insolvency*, 32 BROOK. J. INT'L L. 785, 787 (2007) ("universalism's capacity to encourage forum shopping [is] misunderstood and overstated—a myth—but . . . *territorialism's* potential for forum shopping has hitherto escaped unnoticed and may be much worse"). Westbrook's empirical study of Chapter 15 filings in the United States confirms that concerns about forum shopping and inconsistent determinations of the COMI "have been greatly exaggerated." 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, 261 (2013). Westbrook concludes: "COMI is a very interesting issue but is generally not a major problem in the American courts." *Id.* He notes that the same conclusion appears to hold in the United Kingdom. *Id.* n.70. On jurisdictional competition in the analogous context of corporate law, see, e.g., Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588 (2003); William W. Bratton, *Corporate Law's Race to Nowhere in Particular*, 44 U. TORONTO L.J. 401 (1994).

52. Janger, *Virtual Territoriality*, *supra* note 6, at 423–25. Janger cites three publications in support of his critique: Edward J. Janger, *Predicting When the Uniform Law Process Will Fail: Article 9, Capture, and the Race to the Bottom*, 83 IOWA L. REV. 569 (1998); Alan Schwartz & Robert Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995); Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 VA. J. INT'L L. 743 (1999). Both the Janger and Stephan articles rely on the Schwartz and Scott article, and Stephan candidly acknowledges that he does "not claim to have broken any new ground." Stephan, at 797.

53. I have earlier commented critically on the Schwartz and Scott article and a subsequent article by Scott. Charles W. Mooney, Jr., *Modeling the Uniform Law "Process": A Comment on Scott's Rise and Fall of Article 2*, 62 LA. L. REV. 1081 (2002); *see also* Charles W. Mooney, Jr., *The Roles of Individuals in UCC Reform: Is the Uniform Law Process a Potted Plant? The Case of Revised UCC Article 8*, 27 OKLA. CITY U. L. REV. 553 (2002).

54. Happily, the anti-harmonization, pro-nonuniformity movement has had no impact on the harmonization of international commercial law as far as I am aware.

55. As Westbrook has explained: "[E]very claim made in any proceeding may be asserted in all proceedings through the liquidators, and therefore every claim may share in the distribution

large part respecting (and in some cases even enhancing) local interests. UCF and CP would complement HICOL Rules and lead to a more universalist regime.[56] But the application of HICOL Rules would not require such limited harmonization in order to achieve an improvement of the current state of the law.

B. CHOICE-OF-LAW RULES FOR NON-INSOLVENCY LAW

The relationship between HICOL Rules and choice-of-law rules applicable to relevant non-insolvency law issues has been given short shrift in the commentary. Because the latter rules may differ from jurisdiction to jurisdiction, results applicable in an insolvency proceeding likewise may vary—even in the presence of HICOL Rules that ideally would yield the same results regardless of the forum.

Consider a consensual security interest granted by a debtor in favor of a creditor over a tangible moveable asset located in State C. How the security interest will be dealt with in the debtor's insolvency proceeding in State A, the debtor's COMI, is a matter that insolvency law must address. Will it be honored in the insolvency proceeding? Even if so as a general matter, is it subject to the applicable avoidance powers? The HICOL Rules will determine which State's insolvency law will govern these matters and those rules would be applied in the State A main proceeding.

In the first instance, however, it cannot merely be *assumed* that the putative security interest even exists (*i.e.*, is effective as between the debtor and the creditor) or, if it does, that it is effective against third parties. And it is the generally applicable non-insolvency choice-of-law rule that will govern these issues. Under the choice-of-law rule in effect in State A, the

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from every proceeding. That is the system I want to call universal cross-filing, or 'UCF'." Jay Lawrence Westbrook, *Universal Priorities*, 33 TEX. INT'L L.J. 27, 30 (1998). And as he further explained:

> Most national legal systems I have explored seem not to have developed a rule about the availability of local priorities to foreign creditors whose claims would qualify for priority treatment if they were local creditors. The granting of such nondiscriminatory treatment can be called "cross-priority." The grant of cross-priority would be a specific instance of the important modern concept of "national treatment," which promises the same treatment for foreigners as similarly situated citizens would receive.

Id. at 30–31. *See also* Jay Lawrence Westbrook, *Universal Participation in Transnational Bankruptcies*, *in* MAKING COMMERCIAL LAW: ESSAYS IN HONOUR OF ROY GOODE 419 (Ross Cranston ed., Oxford Univ. Press 1997); Jay Lawrence Westbrook, *Breaking Away: Local Priorities and Global Assets*, 46 TEX. INT'L L.J. 601 (2011).

56. Provision for local filing of claims also would complement HICOL Rules. As Westbrook observed, citing AM. LAW INST., PRINCIPLES OF COOPERATION IN TRANSNATIONAL INSOLVENCY CASES AMONG THE MEMBERS OF THE NORTH AMERICAN FREE TRADE AGREEMENT 74 (2003): "Local processing of claims addresses legitimate concerns that local creditors, especially consumers and other small creditors, cannot effectively press their claims in a distant forum. It also addresses problems of language and the application of local noninsolvency law to resolve claims on the merits." Westbrook, *A Comment*, *supra* note 5, at 515 n.44.

law of the location of the moveable asset, State C, governs these issues. If the issue arises in a forum sitting in State B, which may or may not be a non-main proceeding, under the choice-of-law rule of State B it is the law governing the debtor's agreement to create the security interest, which is State B law, which governs the effectiveness of the interest between the parties. And also under the State B rule, it is the law of the jurisdiction in which the debtor is located (*e.g.*, the debtor's COMI), State A, that governs the effectiveness as against third parties.[57] If the issue arises in the State A main proceeding, the security interest may not be recognized because, for example, of the failure to comply with a formality required under the law of State C. This is a risk that the creditor took by failing to (i) take into account the non-insolvency choice-of-law rule of State A, the debtor's COMI, and (ii) comply with the formalities required under the law of State C, where the moveable asset was (or might be, in the future) located.

Now assume that the moveable asset is located in State B. In the State A main proceeding the court should apply the law of State B, under its situs rule, *including* State B's choice-of law rules.[58] Under this approach, the question for the State A court would be whether a court sitting in State B would conclude that the security interest is effective against third parties. If the answer is affirmative, then the State A court should recognize the effectiveness of the security interest, subject to the application of the HICOL Rules in the State A main proceeding.

In the case of a creditor's unsecured claim against the debtor, the non-insolvency choice-of-law rules in States A and B also might be inconsistent. In that case, for example, the creditor's claim might be recognized in the debtor's State A main proceeding but not recognized in the debtor's State B non-main proceeding.

It is important to acknowledge that this analysis of choice-of-law rules for non-insolvency law issues is not concerned with HICOL Rules. These examples of differing results in different forums[59] would exist, as under

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57. These State B rules are not far-fetched. These are the rules that apply under Article 9 of the UCC. *See* UCC § 1-105 (pre-2001) (agreement of parties as to applicable law); § 1-301 (2001) (agreement of parties as to applicable law); § 9-301(1) (general rule that local law of location of debtor governs perfection and priority), (3)(c) (local law of location of tangible collateral governs priority); § 9-307 (determination of location of debtor).

58. When harmonizing a generally applicable choice of law rule it normally is desirable to refer to a State's local law without taking into account its choice-of-law rules in order to avoid renvoi. This is the effect of Global Rule 5. *Global Rules*, *supra* note 11, r. 5. In this situation, however, I would argue that what interests the State A court should be what the actual result would be if the matter were in fact addressed by a State B court. Others may disagree.

59. I am aware that some would consider "fora" to be the correct term. *See Forums or Fora?*, MEDIACOLLEGE.COM, http://www.mediacollege.com/internet/forum/forums-vs-fora.html:

> Whilst we are against most forms of language dumbing-down, we are also against unnecessary complication. Everyone knows and understands the word *forums*. Most people don't know what *fora* means. There is almost no chance of changing that

current law, even in the presence of HICOL Rules. Only harmonized *generally applicable* choice-of-law rules for non-insolvency law issues would provide consistency across forums. Such a harmonization project is beyond the scope of this paper.

C. THE MAIN EVENT: CONTENT OF HICOL RULES

Note first that HICOL Rules would apply whether or not the relevant forum is itself hosting an insolvency proceeding. For example, recall the State A representative's avoidance claim lodged in a court sitting in State C (in which no insolvency proceeding has been opened), discussed in Part III.C. Or, the relevant forum might be one that has recognized a foreign representative under the Model Law but in which no insolvency proceeding has been opened. Of course, the relevant forum might also be one in which a main or non-main insolvency proceeding has been opened.

The content of HICOL Rules is best considered in the concrete context in which such rules would be most significant and most likely to be applied. Returning to the initial state of play in Part I, MNE has opened a rescue/rehabilitation-type main insolvency proceeding in its COMI, State A. A non-main proceeding has been opened in State B, in which the debtor maintains establishments, has employees, and has creditors through its State B branch operations. The baseline HICOL Rule is straightforward: State A insolvency law applies in the State A main proceeding and State B insolvency law applies in the State B non-main proceeding. Beyond that baseline, the HICOL Rules proposed here address whether and the extent to which (i) the court in the State B non-main proceeding will apply the insolvency law of State A and (ii) the court in the State A main proceeding will apply the insolvency law of State B.[60]

1. Protection of Local Interests in Non-Main Proceedings

A non-main proceeding generally is thought necessary to deal with property and claims as to which, for one reason or another, administration in the main proceeding is inadequate. But disagreement exists in the literature as to the assets that properly should be subject to the insolvency

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situation significantly, no matter how hard the purists might want to. Like the failed Esperanto language, we believe reality wins over idealism. It's sad but inescapably true.

We don't believe it makes sense to promote *fora* as the "correct" pluralisation because it creates confusion, offers no real benefit, and can't work anyway so it's pointless trying.

60. The State A court might apply State B insolvency law even in the absence of the State B non-main proceeding under the virtual territorialism, synthetic approach already discussed. *See supra* text accompanying note 6; *see also supra* text accompanying note 26. However, for simplicity the following discussion assumes the existence of the actual, pending State B proceeding. Even given that assumption, it is possible that in the State A proceeding issues will arise that could call for the State A court to apply State B insolvency law.

law of the State of opening of a non-main proceeding—that of State B in the MNE example. As discussed below, the relevant literature has framed the issue as the protection of "local interests." The application of the insolvency law of the State of opening of a non-main proceeding (or the synthetic application of that law in the main proceeding), as opposed to the application of the COMI's insolvency law, has been viewed as a proxy for the protection of local interests. The following discussion outlines some competing views about the identification of local interests that should be protected. I then outline a proposal. In general (and with some exceptions), I propose that a non-main (or synthetic non-main) proceeding should apply the local insolvency law only with respect to assets that are connected to or arise out of a debtor's establishments in the non-COMI State of opening (or synthetic opening) of the proceedings—*establishment-related assets*.

Janger's virtual territoriality regime organizes a synthetic non-main proceeding around the location of a debtor's assets within the territory of the jurisdiction in which a non-main proceeding would have been opened.[61] Jay Westbrook takes issue with the implicit assumption in Janger's approach that local assets are equivalent to local interests.[62] In my view, Westbrook is right. The slavish application of State B insolvency law with respect to all assets that happen to be located in (or associated with) State B, and under the jurisdiction of the State B court, is too broad and too blunt. Assets may be located in a jurisdiction fortuitously or intentionally (including as a means of forum shopping or—Westbrook's term—"forum stashing"[63]). It has the potential for awarding State B (and its insolvency law) power and influence substantially greater than is warranted by actual local interests deserving of respect and protection. Thus, the approaches of the Global Rules and the EUR, which call for the application of State B insolvency law to all assets located in or associated with State B, also are overbroad.[64] Westbrook's bottom line response to Janger was that "[t]his subject needs much more work."[65]

John Pottow has provided a thorough consideration of the concept of local interests in this context.[66] Pottow's analysis demonstrates that the concept of local interests is enormously nuanced. It embraces not only

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61. *See* Janger, *Reciprocal Comity*, *supra* note 6, *passim*.

62. Westbrook, *A Comment*, *supra* note 5, at 509–14.

63. *Id.* at 504.

64. I note, however, that Global Rule 14 does make adjustment for assets moved from one jurisdiction to another for the purpose of escaping the law (including the insolvency law) of the first jurisdiction and provides a presumption in this respect for assets moved within 60 days prior to the opening of insolvency proceedings. *Global Rules*, *supra* note 11, r. 14. This is laudable in substance, but adds substantial complexity. The HICOL Rules that I propose below may address this problem, at least in part, in a less formal, complex manner.

65. Westbrook, *A Comment*, *supra* note 5, at 516.

66. John A. E. Pottow, *Greed and Pride in International Bankruptcy: The Problems of and Proposed Solutions to "Local Interests"*, 104 MICH. L. REV. 1899 (2006) [hereinafter Pottow, *Greed and Pride*].

interests of local creditors[67] and other local constituencies but also the interests of the State itself.[68] Moreover, Pottow points to the interest of the State (the "local sovereign"),[69] which is independent of creditor interests,[70] and the interests of a State's legislators and judges in the enforcement of the State's laws.[71]

Pottow is on the right track, but the solution he favored in 2006 is almost certain to be either under- or over-inclusive in virtually all cases. Pottow's preference was for a carve-out of five percent of the local assets, to which the local, non-main court would apply the local insolvency law (which would primarily address a State's "pride," to use his metaphor).[72] A serious concern about Pottow's carve-out is the apparent absence of a normative or empirical grounding. (Why five percent?) Also, it would be a substantial departure from the approaches of other harmonization efforts under existing international instruments. The Pottow approach would be a hard (or impossible) sell,[73] even if it were superior to other approaches on the merits.[74]

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67. Pottow uses the metaphor "greed" for the creditors' interests. *Id.* at 1901. In general, "local interests" have been associated with the interests of local creditors, including employees. *See id.* at 1902–03 ("Employee-creditors owed back wages for unpaid services are arguably no different from a bank owed back payments for unpaid loan invoices; yet many systems advance the employees to the front of the line, offering them special, preferred payment before the garden-variety creditors.").

68. Pottow uses the metaphor "pride" for the State's interests. *Id.* at 1901. Pottow analyzes the interests of local creditors based on the ratio of local-debtor assets to local-creditor claims, what he refers to as the local "Asset Coverage Ratio" or "ACR." *Id.* at 1908–10. This ratio will vary from case to case and is not predictable. *Id.* at 1908. He also explains that for certain creditors local law may be more favorable (because their claims are favored) independent of the ACR. *Id.* at 1910–14.

69. *Id.* at 1915.

70. *Id.* at 1915–19.

71. *Id.* at 1915.

72. *Id.* at 1939–42. By focusing only on assets located in or associated with the State of opening, Pottow's approach is subject to Westbrook's critique of a strict asset-location formula (though the five percent limitation would substantially ameliorate the effects).

73. I confess that my subjective reaction to the likely acceptability of Pottow's proposal is biased by thousands of hours spent in meetings deliberating the details of the international harmonization of commercial law (and, to a meaningful extent, insolvency law), drafting and negotiating proposed harmonized text, and preparing for those meetings.

74. Pottow explains that a five-percent carve-out is not unlike "a ninety-day lookback period for voidable preferences." Pottow, *Greed and Pride*, *supra* note 66, at 1940. Such arbitrary lines are "necessary to make a bankruptcy code operate." *Id.* Even so, selecting a particular suspect period is at least a relatively principled analysis. It is important to catch eve-of-bankruptcy transfers that upset the pro-rata sharing norm, but it also is important not to leave transferees in limbo for an excessive period. Pulling five-percent "out of the air" without any empirical basis or standard in mind seems considerably less principled. However, Pottow does observe that the exercise is to make an approach attractive to those interested in local interest protections as well as those favoring a more universalist approach. *Id.* at 1939–40. Of course, if I were *personally* making the rules I would welcome the five percent carve-out approach as it would substantially further universalist principles.

Pottow's most recent contribution on the matter of accommodating local interests, found in this symposium issue, takes a different tack.[75] He argues that actual reliance by a creditor on the applicability of non-COMI law provides a normative basis for applying non-COMI law with respect to that creditor.[76] Pottow would carve out in particular "defensive" reliance—reliance that if not respected would visit a loss or harm to the creditor.[77] As examples of a reliance-based normative theory, Pottow addresses certain carve-outs found in the Global Rules and explains that to a great extent they are grounded on reliance. In this respect, he discusses the treatment of set-off under Global Rule 17,[78] the treatment of employment contracts under Global Rule 20,[79] and *in rem* rights of creditors (e.g., security interests) under Global Rule 15.[80] Pottow further observes that such specific carve-outs could be abolished and replaced with a general rule to the effect that a party that actually and reasonably relies on local law would not be subject

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75. John A. E. Pottow, *Beyond Carve-Outs and Toward Reliance: A Normative Framework for Cross-Border Insolvency Choice of Law*, 9 BROOK. J. CORP. FIN. & COM. L. 202 (2014) [hereinafter Pottow, *Beyond Carve-Outs*].

76. *Id.* at 210–14. Because Pottow views a State's interest as sufficiently protected by the generally applicable public policy exception to choice-of-law rules, his focus is on party (e.g., creditor) reliance. *Id.* at 211–12. However, Pottow seasons his argument with the following enigmatic sentence:

> Relaxing the need for theoretical purity, however, I might reject such a blanket rule and instead use the principle of defensive litigant reliance as a 'framework' to guide further movement along the paths already blazed by current international insolvency instruments, such as the EU amendments or GP Annex. Path dependency has its virtues, and modified universalism, by definition, recognizes the desirability of pragmatics over purity.

Id. at 214.

77. *Id.* at 212–14. Pottow posits a creditor's reliance on a local law defense to an avoidance action as an example of defensive reliance. *Id.* Affirmative reliance is reflected by the more diffuse reliance of an insolvency representative in the COMI main proceeding (and of other creditors that would benefit from avoidance)—gains that would not be achieved by virtue of protecting the creditor's defensive reliance. *Id.*

78. *Id.* at 218–20. Global Rule 17 provides: "Insolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of the debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim." *Global Rules*, *supra* note 11, r. 17. Global Rule 18 then provides an exception if "the law applicable to the insolvent debtor's claim would be that of the state of the opening of main insolvency proceedings." *Id.* r. 18. In that case, Global Rule 17 does not apply if the parties have chosen the law of a State that "has no substantial relationship to the parties or the transaction, and there is no other reasonable basis for the parties' choice." *Id.* The intended result, then, would appear to be that the law of the COMI applies. But because Global Rule 17 is called off, there is no choice-of-law rule. In that event, Global Rule 17 does not prevent the insolvency law of the COMI in the main proceeding from affecting any right of setoff. Finally, it is somewhat odd that when the parties have chosen an inappropriate governing law (which choice likely would not be honored in most forums), Global Rule 17 is called off *only* when the otherwise applicable governing law is that of the COMI and not when the governing law would be that of another jurisdiction.

79. Pottow, *Beyond Carve-Outs*, *supra* note 75, at 220–22.

80. *Id.* at 222–23.

to the COMI insolvency law.[81] He notes that such a general rule would adhere to the normative reliance-based principle while offering drafting simplicity.[82]

Pottow acknowledges that focusing on actual reliance raises concerns based on "administrability grounds" that would arise from "a fact-intensive debate into each setoff issue."[83] Basing the protection of local interests on a creditor's actual reliance raises other concerns as well. For example, that approach would treat similarly situated creditors differently based on their differing states of mind. Moreover, determining the state of mind or knowledge of corporate, non-individual parties also adds to the complexity of applying and administering such a rule.

The HICOL Rules that I propose here would focus on the principal normative justification for opening and maintaining a non-main proceeding—the presence of a debtor's "establishment" within the non-main jurisdiction. Under the EUR, the presence of an "establishment"[84] is a prerequisite for the opening of a secondary proceeding.[85] Recital (12) of the EUR explains that secondary proceedings are permitted in order "[t]o protect the diversity of interests."[86] Similarly, under the Model Law, the existence of an establishment is a requirement for the recognition of a foreign non-main proceeding.[87] An establishment must involve a debtor's

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81. *Id.* at 214.

82. *Id.*

83. *Id.* at 219. He also notes that an "alternative reformulation" would be to protect a creditor upon a demonstration that the creditor "was unaware of the debtor's COMI." *Id.* My principal concern about Pottow's proposal arises from its baking in this "fact-intensive" inquiry with respect to each creditor that might resist the application of COMI law.

84. EUR, *supra* note 2, art. 2(h) (defining "establishment" as "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods.").

85. *Id.* art. 3(2).

86. *Id.* recital (12).

87. MODEL LAW, *supra* note 1, art. 2(f) (defining "establishment" as "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services," which is identical to the corresponding definition in EUR, *supra* note 2, art. 2(h), with the addition of the words "or services"); *Id.* art. 17(2)(b). Note that Chapter 15 contains a more abbreviated definition. 11 U.S.C. § 1502(2) (defining "establishment" as "any place of operations where the debtor carries out a non-transitory economic activity"). The concept of COMI as well as the concept (and definition) of "establishment" derive from the EU Convention on Insolvency Proceedings, which inspired the EUR and later the Model Law. Miguel Virgós & Etienne Schmit, *Report on the Convention of Insolvency Proceedings*, para. 70, (May 3, 1996) [hereinafter Virgós-Schmidt Report], *available at* http://aei.pitt.edu/952/1/insolvency_report_schmidt_1988.pdf. The term "establishment" was to be construed broadly.

> The concept of "establishment" is linked to the basis of international jurisdiction to open territorial proceedings. In this regard, it should be mentioned that Article 3(2), in which the jurisdiction to open such territorial proceedings is dealt with, was one of the most debated provisions throughout the negotiations.
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> Several Contracting States wished to have the possibility of basing territorial proceedings not only on the presence of an establishment, but also on the mere presence

"place of operations" where "economic activity" that is "non-transitory" takes place.[88] The economic activity may consist of commercial, industrial, or professional activities.[89] A determination whether an establishment exits turns on external appearances, not a debtor's intentions.[90] Focusing on the assets and operations of a debtor's establishment, then, provides a coherent approach for the identification of local interests that is consistent with both the EUR and the Model Law.[91]

The establishment-based approach also has the advantage of freeriding on the concept of an establishment as it continues to be developed in the case law and commentary under the EUR and Model Law. Applying Chapter 15's definition, courts have held that the existence of an establishment is a factual question as to which there is no presumption as to its existence.[92] Indeed, the bankruptcy court in *In re Bear Stearns* held that the "bar is rather high" to prove that a debtor has an establishment.[93] In *In re Ran,* the court held that "establishment" does not mean merely having assets in a State but the presence of "a local place of business."[94] However, one commentator has argued against equating "establishment" with a "place of business," although acknowledging that in some cases the concept of "place of business" may be helpful.[95] In any event, it is clear enough that the mere presence of a debtor's assets in a State is not a sufficient basis for the existence of an establishment.[96]

As with the approaches taken by the EUR and the Global Rules, the assets subject to the State B insolvency law in MNE's State B non-main

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> of assets of the debtor (assigned to an economic activity) without the debtor having an establishment.
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> For the sake of an overall consensus on the Convention, those States agreed to abandon the presence of assets as a basis for international competence provided that the concept of establishment is interpreted in a broad manner but consistently with the text of the Convention. This explains the very open definition given in Article 2(h).

Id.

88. EUR, *supra* note 2, art. 2(h); MODEL LAW, *supra* note 1, art. 2(f); 11 U.S.C. § 1502(2).

89. Virgós-Schmidt Report, *supra* note 87, para. 71.

90. *Id.* ("A certain stability is required. The negative formula ('non-transitory') aims to avoid minimum time requirements. The decisive factor is how the activity appears externally, and not the intention of the debtor.").

91. It is always possible for a debtor to forum shop for a non-main proceeding by creating an establishment that it otherwise would not have created. But the establishment-based criterion nonetheless is less subject to manipulation than a standard involving only the location of assets.

92. *In re* Ran, 607 F.3d 1017, 1026 (5th Cir. 2010); *In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 389 B.R. 325, 338 (S.D.N.Y. 2008).

93. *In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 374 B.R. 122, 131 (Bankr. S.D.N.Y. 2007), *aff'd*, 389 B.R. 325 (S.D.N.Y. 2008).

94. *In re* Ran, 607 F.3d at 1027 (quoting *In re* Bear Stearns, 374 B.R. at 131 (2007)).

95. Travis Wofford, Comment, *The Other Establishment Clause: The Misunderstood Minimum Threshold for Recognition*, 44 TEX. INT'L L.J. 665, 673. Wofford argues that the "establishment" definition was intended to be "unique" and that the concept of "place of business" carries unhelpful baggage from its use in other contexts. *Id.* at 672–73, 688.

96. BOB WESSELS, INTERNATIONAL INSOLVENCY LAW 179 ¶ 10234 (3d ed. 2012).

proceeding would be *limited* to assets located in or associated with State B. But under the HICOL Rules proposed here the State B insolvency law would be applied *only* with respect to those assets with a sufficiently close connection to MNE's State B branch—its establishment—and the branch's operations. Even as to those establishment-related assets, the HICOL Rules would apply the State A insolvency law to the State B establishment-related assets to a limited extent. The HICOL Rules would apply the rescue- or rehabilitation-related aspects of State A insolvency law to the State B establishment-related assets, either directly in the State A main proceeding or synthetically in the State B non-main proceeding.[97] For example, under this HICOL Rule, the State B court would defer to the State A insolvency law in connection with procedures leading to a plan of reorganization.[98] Even if State B has not adopted the Model Law, this HICOL Rule would effectively require some cooperation between the State B court and the State A court.

Also under the HICOL Rules proposed here, the State B court would apply (or defer to the State A court's application of) the State A insolvency law to non-establishment-related assets subject to the State B court's jurisdiction (virtual universalism). Inspired by the role and significance of the existence of an establishment under the EUR and the Model Law, the connection between the establishment and the assets would provide a general proxy for the interests of local creditors with relationships to the establishment, the establishment's employees, and the interests of State B in general. Applying the State B insolvency law only to establishment-related assets also would provide a rough proxy for the actual and reasonable reliance standard proposed by Pottow. A creditor that does not obtain *in rem* rights has little basis to claim reliance on "local" law when the debtor has no establishment in the creditor's "local," non-COMI jurisdiction. I would subscribe to the underlying normative basis for Pottow's reliance-based proposal and in that respect we are kindred spirits. But without undercutting the normative base of Pottow's proposal, in my view the fact-intensive inquiries that it would entail would better be replaced by the

97. By proposing this application of State A's rehabilitation-related insolvency law to State B assets, consistent with the views expressed in Part IV I do not intend to reject serious consideration of whether other aspects of State A's insolvency law should be applied. Plausible candidates for consideration would include an automatic stay of secured (and other) creditor enforcement, and avoidance powers. For example, Westbrook has argued persuasively that in many situations the law of the COMI should apply to avoidance powers when distributions to creditors are to be made pursuant to COMI law. *See, e.g.*, Westbrook, *Avoidance*, *supra* note 48; Jay Lawrence Westbrook, *Choice of Avoidance Law in Global Insolvencies*, 17 BROOK. J. INT'L L. 499 (1991).

98. I do not underestimate the technical difficulties of applying the rehabilitation provisions of insolvency law applicable in the main proceeding in the COMI to assets subject to administration in a non-main proceeding.

deemed-reliance that is implicit in the establishment-related assets approach.[99]

The establishment-related assets would include the physical assets used to operate the establishment, intangibles such as receivables generated by its operations, and (to the extent that the assets retain a relationship to the establishment) investments made with value that it has generated. Under the EUR and Global Rules approaches, it would be necessary to determine which assets are located in or associated with State B. The establishment-based HICOL Rules advocated here would involve a second step—*removing* from the application of State B insolvency law assets that are shown to be unrelated to the establishment and its operations. State A insolvency law would be applied to those assets, even if administered in the State B non-main proceeding.

Limiting the application of the State B insolvency law to establishment-related assets would ensure a genuine local interest in the assets and a connection between the assets and State B that is more significant than mere location. It addresses the "forum stashing" concern about forum shopping by relocations of assets, as identified by Westbrook.[100] Moreover, arguably this approach would eliminate or reduce the need to address forum-shopping inspired movements of assets such as those addressed by Global Rule 14.[101] Assets that genuinely are establishment-related should be subject to State B insolvency law;[102] other assets located in or associated with State B would be subject to State A insolvency law. This approach would address concerns about forum shopping without involving potentially difficult factual disputes about the purpose or timing of movements of assets from one jurisdiction to another.

It is plausible, however, that something like Global Rule 14 would be appropriate, perhaps necessary, even under an establishment-based test for local interests. For example, assume that MNE has financial assets situated in State B that arose from its State B operations. Before MNE's main proceeding was opened, MNE moved those State B establishment-related assets to State C, a jurisdiction in which MNE has no establishment. Under the HICOL Rules proposed here, MNE's assets that are not located in a jurisdiction in which the debtor maintains an establishment or in which a

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99. Pottow, however, in general rejects a deemed or presumed reliance standard. Pottow, *Beyond Carve-Outs*, *supra* note 75, at 218. But he does acknowledge that "some instances of 'deemed reliance' would not be antithetical to this Article's normative enterprise." *Id.* at 223. As an example, Pottow notes that "creditors of a certain size or whose operations do not transcend national borders could be deemed to have relied on local law per se." *Id.*

100. Westbrook, *A Comment*, *supra* note 5, at 513–14.

101. *See supra* note 64 and accompanying text.

102. A close-connection test with respect to assets and business operations is successfully applied in other contexts, such as for United States taxation of non-residents. *See* 26 U.S.C. § 882(a) (imposition on foreign corporation of tax on "income that is effectively connected with the conduct of a trade or business within the United States.").

non-main proceeding is pending would be subject to the insolvency law of State A in the main proceeding.[103] It follows that in the example, absent a relocation rule such as Global Rule 14, State A's insolvency law applicable in MNE's main proceeding would apply to those assets. When the conditions of Global Rule 14 apply, however, these State B establishment-related assets would be legally repatriated to State B.

When the insolvency law of State A or State B is applied (even if applied synthetically), as a general matter the HICOL Rules contemplate that all aspects of the applicable insolvency law would be applied unless subject to an explicit exception. The application of State A rehabilitation-related insolvency law to State B establishment-related assets would be such an explicit exception.

The proposed establishment-based HICOL Rules may fall short of perfection. For example, there may be difficult questions of fact about the relationship between an asset and an establishment. But similar questions would arise in any event with respect to the exercise of situating or locating assets in a given jurisdiction.

2. Future Work: Harmonization Beyond Accommodating Local Interests

The HICOL Rules proposed here address primarily the applicability of the State A insolvency law applicable in MNE's State A main proceeding instead of the State B insolvency law otherwise applicable in MNE's State B non-main proceeding (or, for example, the insolvency law of State C, in which no insolvency proceeding has been opened and in which MNE may have no establishment). The exercise seeks to identify the circumstances under which deference should be given in the State A main proceeding to the insolvency law of State B based on appropriate local interests. It also seeks to identify the circumstances under which deference should be given in the State B non-main proceeding to the State A insolvency law based on universalist principles. These proposed HICOL Rules would base the result primarily (but not exclusively) on whether (or not) the relevant assets located in State B are establishment-related assets.

Comprehensive HICOL Rules also must consider the additional (and sensitive) issues covered by Global Rule 15 on *in rem* rights, such as security interests, Global Rule 17 on setoff, Global Rule 19 on reciprocal contracts, and Global Rule 20 on employment contacts, and their respective exceptions under the Global Rules.[104] While I am generally supportive of these proposed Global Rules and defer any detailed comments to a later

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103. An exception to this would apply if the assets were administered synthetically in the State A main proceeding by the application of State B insolvency law (based on the existence of the State B establishment) under the virtual territoriality approach.

104. *See* Parts II.E [pp.]; III [pp.]; IV.C.2.[pp.] (discussing Global Rules 15, 17,19,and 20).

effort, I offer here a few general comments and some very tentative suggestions.

Global Rule 15 may be too inflexible. It generally prohibits insolvency proceedings from affecting *in rem* rights in assets that are situated, when insolvency proceedings are opened, in a jurisdiction other than the one in which the proceedings have been opened.[105] Arguably there should be *some* potential for affecting (at least) consensual *in rem* rights (such as security interests) under the insolvency law of the main proceeding when no insolvency proceeding has been opened in the jurisdiction in which an asset is situated.[106] Such flexibility could be conditioned, for example, on providing the holder of the *in rem* right "adequate protection" of its interest.[107]

Under Global Rule 17, the law governing the (insolvent) debtor's claim determines any right of set-off of a non-debtor creditor. Under that rule, insolvency proceedings do not affect any such right of set-off.[108] This approach seems problematic to the same extent and for the same reasons mentioned above in connection with Global Rule 15.

Global Rule 19, as previously discussed, provides that the law of the COMI applies to reciprocal contracts of a debtor in insolvency proceedings.[109] Global Rule 20 on contracts of employment (labor contracts) also is briefly discussed above.[110] It is consistent with the EUR and the Legislative Guide.[111] And, regardless of the wisdom of the policy choice in favor of the law governing employment contracts, it likely reflects a political necessity for a HICOL Rules to be successful.[112]

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105. *Global Rules*, *supra* note 11, r. 15.1. Global Rule 16 provides some flexibility by calling off Global Rule 15 when the State in which an asset is situated bears no relationship to the parties or the transaction and there is no other basis for the location of the asset. *Id.* r. 16. Global Rule 14, on cross-border movement of assets, also ameliorates it in some respects. *Id.* r. 14. Finally, under Global Rule 21 avoidance actions are not precluded by Global Rule 15. *Id.* r. 21.

106. Indeed, depending on the State in which the asset is located, it might be impossible to open a non-main proceeding in the absence of an establishment of the debtor. It is also fair to question whether a rule such as Global Rule 15 that limits the effects of an insolvency proceeding is a choice-of-law rule as opposed to a substantive rule of insolvency law barring extraterritorial application. I pass over for now the implications for in rem rights of applying the insolvency law of the COMI to non-establishment-related assets located in the jurisdiction of a non-main proceeding or located in another non-COMI jurisdiction.

107. *See* MODEL LAW, *supra* note 1, art. 22(1) ("In granting or denying relief . . . the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are *adequately protected*.") (emphasis added); *see also* 11 U.S.C. § 361(3) ("adequate protection may be provided by . . . granting such other relief . . . as will result in the realization . . . of the indubitable equivalent of [a person's] . . . interest in such property.").

108. Again, Global Rule 18 provides an exception, as described above. *See supra* note 78 and accompanying text.

109. *See supra* note 33 and accompanying text.

110. *See supra* Part II.F.

111. *See Global Rules*, *supra* note 11, r. 19–21 cmt.

112. Pottow accepts the idea of excepting employment contracts from the application of COMI law. "I would recommend treating employment contracts as a straight-out categorical exception—

Finally, recall that the proposed HICOL Rules would apply the rehabilitation-related aspects of State A law to the State B assets, *including* the establishment-related assets. In any future project for the development of HICOL Rules, as argued in Part III, it would be wise to systematically work through all of the matters as to which the law of a COMI might be applied in (or to assets subject to) a non-main proceeding. Only then could there be a high comfort level that harmonization had been optimized.

CONCLUSION

I have proposed the application of COMI insolvency law in a non-main proceeding with respect to assets located in the non-main jurisdiction if the assets are not establishment-related assets and the application of the insolvency law of the non-main jurisdiction to establishment-related assets. Such a choice-of-law rule would provide an effective—even if not precise—means of protecting local interests. I also have proposed that the rehabilitation or rescue aspects of COMI law be applied in a non-main proceeding generally. And I have recognized that it may be appropriate to apply other aspects of COMI law in non-main proceedings. In my view, the strict territorialism that applies in EUR secondary proceedings, that would apply in non-main proceedings under the Global Rules (with the exception of reciprocal contracts), and that is envisaged by virtual territoriality fails to adequately accommodate the law of a debtor's COMI. But even so, the proposals made here would result in a very territorial choice-of-law regime in the context of non-main proceedings. The Model Law could provide one area of middle ground. To the extent that recognition of foreign representatives and relief under the Model Law could reduce the need for opening non-main proceedings, then the COMI law would stand unopposed—at least under HICOL Rules (including the Global Rules).

The type of product that might emerge from a project to develop HICOL Rules remains an open question. One might imagine the generation of a supplement to the UNCITRAL Legislative Guide,[113] model rules, a model law, or even a multilateral convention.

Applying the law of the COMI to important aspects of insolvency law in respect of assets situated outside the COMI, even if the assets were subject to a non-main proceeding, has the prospect of providing substantial additional *ex ante* certainty and predictability. While there would be a risk of failure were Working Group V to take a bold approach in this respect, there is a countervailing risk of a failure to advance the ball by taking an overly cautious approach. One hopes that the Working Group's exploration of HICOL Rules will strike the right balance. To do so, it will be necessary

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yes, a carveout (a meta-carve-out?)—from the approach espoused in this article." Pottow, *Beyond Carve-Outs*, *supra* note 75, at 222.

113. UNCITRAL LEGISLATIVE GUIDE ON INSOLVENCY LAW, *supra* note 12.

for it to address concrete issues to which the law of the COMI might be applied and to avoid the paralysis that can result from numbing and bewildering theoretical debates about "isms" and abstractions. My hope is that this paper may provide at least a bit of guidance.