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## Why Toss Out the Baby with the Bath Water? Saving the UNCITRAL Model Law on Cross-Border Insolvency from the Perpetually-Stalled Bankruptcy Reform Act

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# WHY TOSS OUT THE BABY WITH THE BATH WATER? SAVING THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY FROM THE PERPETUALLY-STALLED BANKRUPTCY REFORM ACT

## INTRODUCTION

It seemed too easy this time.

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2002<sup>1</sup> (Act) had the support of the White House<sup>2</sup> and passed both houses of Congress. The Act was then sent to a congressional conference committee and in July 2002, key members of the Senate<sup>3</sup> and House<sup>4</sup> conference committee compromised on the thorny issue of discharging debts arising from attacks against abortion clinics.<sup>5</sup> The Act's prospects for enactment were so positive that on July 26, 2002, Senator Orrin Hatch of Utah, the then-ranking Republican on the Senate Judiciary Committee, predicted that the Act "will pass soon so we can send it to the President before the August recess."<sup>6</sup>

Senator Hatch's rosy prediction belied the Act's lengthy history, and was proven utterly wrong. The Act's passage is now on hold,<sup>7</sup> having been

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1. The House passed H.R. 333, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2001, introduced by Rep. George Gekas, on March 1, 2001 by a vote of 316-109. The Senate approved its version, S. 420, the Bankruptcy Reform Act of 2001, introduced by Sen. Charles Grassley, on March 15, 2001. As the conference committee's work dragged into the next year, the Act became known as the Bankruptcy Abuse Prevention and Consumer Protection Act of 2002. Its earlier cousins, the Bankruptcy Reform Act of 1999 and the Bankruptcy Reform Act of 2000, were known in the 106th Congress as H.R. 833 and S. 625.

2. Mike Sorohan, *Bankruptcy Bill Moving at Snail's Pace*, REAL EST. FIN. TODAY, July 30, 2001, at 4.

3. *Senate Names Conferees*, 38 Bankr. Ct. Dec. (LRP) no. 1, at 3 (July 31, 2001).

4. *House Appoints Conferees*, 38 Bankr. Ct. Dec. (LRP) no. 3, at 1 (Aug. 14, 2001).

5. See Sheldon, *infra* note 7. See also *infra* notes 45-47.

6. Press Release, U.S. Senate, Hatch Announces Agreement Reached in Bankruptcy Reform Act Conference (July 26, 2002) at <http://hatch.senate.gov/pressapp/record.cfm?id=186187>. Analysts and experts have been predicting the Act's passage for years. Greta Schneider was so sure the law would pass that in the preface to her 2001 book, *Holistic Bankruptcy*, she wrote that the most recent change to our personal bankruptcy system "was passage of the Bankruptcy Reform Act of 2001." See Karen Gross, *The Lawyer's Bookshelf: Holistic Bankruptcy/Navigating Failure*, N.Y. L.J., Dec. 4, 2001, at 2 (book review). Another article in 2001 suggested that Congress will "complete work on the bill and get it to President Bush's desk before the session is scheduled to end on Oct. 5." *Reform Bill Poised for Compromise*, 10 Cons. Bankr. News (LRP) no. 22, at 2 (Aug. 9, 2001).

7. Philip Sheldon, *Anti-Abortion Lawmakers Kill House Bankruptcy Bill*, N.Y. TIMES, Nov. 15, 2002, at A28.

defeated during a “lame duck” congressional session after the November 2002 elections,<sup>8</sup> but some lawmakers question whether it should be passed at all.<sup>9</sup>

Originally introduced as the Bankruptcy Reform Act of 1999 (then, as time lagged, subsequently renamed as the Bankruptcy Reform Act of 2000, 2001, and 2002), the Act is still the subject of vigorous debate. As the most comprehensive Congressional change to this area of law since the Bankruptcy Reform Act of 1994,<sup>10</sup> the Act<sup>11</sup> includes a controversial measure that would make it more difficult for debtors to erase their obligations under Chapter 7, and would instead force more debtors into

8. Warren Vieth & Richard Simon, *Hopes of Bankruptcy Overhaul Die in Senate*, L.A. TIMES, Nov. 16, 2002, available at 2002 WL 10321829.

9. See Sheldon, *infra* note 38.

10. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (1994).

11. Here are the proposed changes to the bankruptcy law:

For individuals:

- Before filing for bankruptcy, individuals will have to go through credit counseling at their own expense.
- Under current bankruptcy law, the filing of a petition stops all collection efforts, including the collection of child support for dependent children of debtors. The proposed rules give child-support payments first priority and allow collection efforts to continue even after a petition has been filed.
- Credit-card companies will be required to provide new disclosures to cardholders in the hope that the information will help them avoid getting into financial trouble.
- Debtors who have the ability to pay must file under Chapter 13—and comply with a repayment plan—rather than file under Chapter 7, which discharges all debts.
- Debtors must repay the full amount due on auto loans, not merely the automobile’s often-depreciated market value, as current law allows.

For businesses:

- The law creates special provisions for small businesses, defined as companies with debts of \$3 million or less. Such companies would have strict timetables for reorganization. For example, if there is no creditors’ committee monitoring a case, the court must confirm the bankruptcy plan within 175 days. Companies that could not reorganize within that time would have their cases dismissed or converted from a Chapter 11 reorganization to a Chapter 7 liquidation.
- Companies in bankruptcy will be prohibited from selling their customer lists to raise money to pay creditors.

The House and Senate bills differ radically with respect to their treatment of home equity. In Florida and four other states, debtors who file for bankruptcy can keep all the equity in their homes as long as they have resided there for at least two years. This can lead to inequities when bankrupt debtors retain protected multi-million dollar homes. The House bill makes no change to that law, allowing states such as Florida to “opt out” of federal limits on the amount and type of property that a debtor may claim as exempt from creditor claims. The Senate bill, on the other hand, would allow creditors access to home equity in excess of \$125,000 if the debtor has lived in the home for less than two years. Robyn A. Friedman, *Bankruptcy Reform: Where It Stands*, TREND MAG., Jan. 1, 2002, available at 2002 WL 11485286.

Chapter 13 repayment plans.<sup>12</sup> Debate has most notably centered on the merits of raising the Chapter 7 liquidation threshold during a recession when more Americans are seeking bankruptcy relief.<sup>13</sup> Other areas of conflict include discharging debts of abortion protesters<sup>14</sup> and preventing bankruptcies such as that of Enron Corporation.<sup>15</sup>

However, one aspect of the Bankruptcy Reform Act that enjoys broad, enthusiastic domestic and international support is the adoption of the United Nations Commission on International Trade Law's (UNCITRAL) Model Law on Cross-Border Insolvency<sup>16</sup> (Model Law) as a new Chapter 15 of the Bankruptcy Code.<sup>17</sup> The Model Law would govern corporate bankruptcies with assets in more than one country.<sup>18</sup> Unfortunately, because UNCITRAL's Model Law is incorporated into the Bankruptcy Reform Act, U.S. adoption of this favored international provision hinges on—or is being held hostage by—passage of the entire Act.<sup>19</sup>

Part I of this Recent Development briefly traces the history of the Bankruptcy Reform Act, focusing on its many delays and its implications for domestic bankruptcy filings that have been the crux of opposition to the bill. Part II provides background for the UNCITRAL's Model Law on Cross-Border Insolvency. I also detail the benefits that its adoption as

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12. Chapter 7 relates to liquidation proceedings or "straight bankruptcy." Its purpose is to achieve a fair distribution to creditors of whatever nonexempt property the debtor has, and to give the individual a fresh start through the discharge of debts in bankruptcy. Ordinarily, the goal of a Chapter 13 reorganization is to rehabilitate a debtor, rather than liquidate assets. Typically, Chapter 13 is used to budget some of the debtor's future earnings under a plan through which all creditors are paid in whole or in part over 3 to 5 years. FEDERAL JUDICIAL CENTER, CHAMBER HANDBOOK FOR JUDGES' LAW CLERKS AND SECRETARIES, 64-65 (1994).

One of the Reform Act's controversial provisions is a means-balancing test which would push more Chapter 7 (liquidation) debtors with financial means into Chapter 13 (reorganization). Many argue that the policy change "has no public welfare justification. In effect it will be a transfer of income from bankrupt individuals to very profitable corporations." William Waller, *Kickin' em While They're Down: Consumer Bankruptcy Reform*, J. ECON. ISSUES, Dec. 1, 2001, at 15, available at 2001 WL 21300828.

13. See *infra* notes 35-37.

14. See *infra* notes 45-47 and accompanying text.

15. See *infra* notes 40-44 and accompanying text.

16. See *infra* note 49.

17. I will use the word "insolvency" throughout this Recent Development. In the United States, the term "insolvency" is used interchangeably with "bankruptcy." Internationally, however, such usage is the exception rather than the rule. The United Nations, the American Bar Association, and the International Bar Association use the term "cross-border insolvency" to describe an insolvency proceeding involving assets in more than one country. See Kent Anderson, *The Cross-Border Insolvency Paradigm: A Defense of the Modified Universal Approach Considering the Japanese Experience*, 21 U. PA. J. INT'L ECON. L. 679, 680 n.2 (2000).

18. See *infra* notes 51-53 and accompanying text.

19. Bruce A. Markell, *What If Bankruptcy Reform Is Not Dead? Securitization Exclusions Could Pose Problems*, 38 Bankr. Ct. Dec. (LRP) no. 11, at 3 (Oct. 9, 2001).

Chapter 15 of the Bankruptcy Code would provide to American and international bankruptcy law. Finally, Part III argues that separate adoption of the UNCITRAL's Model Law will provide a means to circumvent the Act's continual delay, while immediately effectuating its important provisions on cross-border insolvencies. Passing UNICIRAL's Model Law would enhance commerce and cooperation throughout the world.

### I. THE BANKRUPTCY REFORM ACTS OF 1999, 2000, 2001, ETC.

Congress has considered modifying the Bankruptcy Code since 1998.<sup>20</sup> Attempts to institute reform statutes in 1998 failed because of continuing disputes over proposed amendments to tighten the requirements for individuals seeking bankruptcy protection.<sup>21</sup> The final House version of the Bankruptcy Reform Act of 1999, known as H.R. 833, and its Senate counterpart, S. 625, contained numerous controversial provisions<sup>22</sup> supported by the banking and credit industries.<sup>23</sup>

After much debate, the House passed its version of the Bankruptcy Reform Act of 1999 on May 5, 1999, and the Senate passed its version on February 2, 2000.<sup>24</sup> The compromise bill was sent to then-President Bill Clinton. He vetoed the bill in November 2000 because, amidst controversial anti-consumer provisions, it also contained a clause that would have allowed abortion clinic protestors to seek bankruptcy

20. Paula E. Garzon et al., *Cross-Border Insolvency and Structural Reform in a Global Economy*, *International Lawyer*, 34 INT'L LAW. 533, 538 n.51 (2000).

21. *Id.*

22. See *supra* notes 11 and 12 for an outline of Act provisions. Specifically, each bill created a "means test" that would steer bankruptcy filers away from Chapter 7 of the Bankruptcy Code, in which their debts would be eliminated. Instead, bankruptcy filers would be encouraged to file Chapter 13 payment plans, which would require them to pay back most or all of their debts.

In addition, the Senate version sets a national \$125,000 cap on homestead provisions. Bill proponents argued that without the cap, wealthy debtors could frustrate creditors by purchasing expensive homes that are exempt from foreclosure. See Sorohan, *supra* note 2.

23. See Sorohan, *supra* note 2. The banking and credit card industry has been a strong supporter of bankruptcy reform and a generous lobby group. Scott Klinger & Holly Sklar, *Titans of the Enron Economy: The Ten Habits of Highly Defective Corporations*, NATION, Aug. 5, 2002, at 16. "Credit-card giants Citigroup and MBNA were among the largest campaign contributors during the 2000-02 period. On the very day the House voted on the bankruptcy bill, MBNA contributed \$200,000 to the National Republican Senatorial Committee, according to a Time exposé." *Id.* Before the vote, "[f]inance and credit card companies contributed more than \$9 million in political action committee, soft money, and individual contributions to federal candidates and committees in the 1999 to 2000 election cycle, according to the Center for Responsible Politics." *Phoenix-like Bankruptcy Bill to Return in September*, DOW JONES INT'L NEWS, July 30, 2002, available at Westlaw, 7/30/02 DJINS 15:57:00.

24. Garzon et al., *supra* note 20, at 538 n.50.

protection, thus avoiding payment of court-ordered fines.<sup>25</sup> President George W. Bush approves of such a clause, and indicated he would sign the bill if it came across his desk.<sup>26</sup> After the change of administrations in 2001, the Act's backers, including the banking and consumer lending industries, swiftly reintroduced the bill as the Bankruptcy Reform Act of 2001.<sup>27</sup>

In March 2001, the House and Senate each passed their respective versions of the bill and formed a conference committee to bridge differences between the two bills.<sup>28</sup> However, by May 2001, control of the Senate had shifted to the Democrats, and the new Senate leadership reached an impasse with the Republican-controlled House regarding the membership of the conference committee.<sup>29</sup> Despite differences, the thirty-two conference committee members were finally named in July 2001,<sup>30</sup> with an initial conference committee meeting scheduled for September 12, 2001.<sup>31</sup> However, the terrorist events on September 11, 2001, altered Congress's legislative priorities for the remainder of the session.<sup>32</sup> Since September 11, 2001, judiciary committee members focused on pending security concerns and new anti-terrorism bills. Bankruptcy reform legislation became a less pressing concern.<sup>33</sup>

Conference committee members first met on November 14, 2001,<sup>34</sup> but by then the political and economic landscape had changed since earlier that March when the Act passed both chambers. The United States had embarked on an international anti-terrorism campaign, and by the fourth quarter of 2001, the government announced that the nation's economy was officially in recession.<sup>35</sup> The terrorist attacks and the gloomy economic outlook may have helped boost the estimated bankruptcy filings in 2001 to

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25. Sorohan, *supra* note 2.

26. *Id.*

27. *See supra* note 1.

28. Sorohan, *supra* note 2.

29. Hon. Randolph J. Haines & William L. Norton III, *Bankruptcy Reform Legislation of 2001: Summary of the Bankruptcy Reform Act of 2001*, NORTON BANKR. REFORM ACT NEWSL., May 10, 2001.

30. *See supra* notes 3 and 4 and accompanying text.

31. *Is the Bankruptcy Reform Act of 2001 Dead?* 38 Bankr. Ct. Dec. (LRP) no. 10, at 1 (Oct. 2, 2001).

32. *Id.*

33. *Id.*

34. *Partisan Rhetoric Returns with Bankruptcy Bill*, 11 Cons. Bankr. News (LRP) no. 7, at 2 (Nov. 29, 2001).

35. Press Release, President Discusses Job Creation Package (Dec. 2001), at <http://www.whitehouse.gov/news/releases/2001/12/20011201.html>.

more than 1.4 million—setting a ten-year record.<sup>36</sup> The worst may not be over; a recent poll found that ninety-three percent of American Bankruptcy Institute members believed filings would continue to rise.<sup>37</sup>

At the November 2001 conference committee meeting, some lawmakers urged that the Bankruptcy Reform Act was needed more than ever; others countered that the legislation's timing could not be worse.<sup>38</sup> The conference committee ended the meeting with no firm resolution to differences of opinion, no timetable for passing the bill, and no assurances that the Act would ever become law.<sup>39</sup> Also stuck in this legislative limbo were popular aspects of the Bankruptcy Reform Act, including the UNCITRAL's Model Law. The exasperating four-year wait for a Model Law continued.

Since the November 2001 conference committee meeting, passage of the Bankruptcy Reform Act has been further complicated by Enron's collapse and bankruptcy in December 2001. Some bankruptcy practitioners have raised concern over provisions in the Act easing conflict-of-interest rules that prevent investment banking firms from

36. Joseph A. Slobodzian, *The Big Bankruptcies of 2001: Total Filings Could Top 1998 Record*, NAT'L L.J., Jan. 7, 2002, at A1. Since a new Bankruptcy Reform Act would not take effect until six months after the president signs the bill, experts predict that personal bankruptcy filings will increase during the interim as consumers panic and scramble to file before the stricter rules in the Act take effect. See Friedman, *supra* note 11.

37. Andrew Clark, *Bankruptcies Soar to Record in 2001*, ST. LOUIS DAILY REC., Feb. 21, 2002, at 1.

38. See Sorohan, *supra* note 2. Rep. James Sensenbrenner Jr., the conference committee's chair, and Sen. Orrin Hatch said the bill was needed to help an ailing economy. Rep. George Gekas, the primary sponsor of the House bill, said the timing was irrelevant and that "[T]he legislation wasn't written for a good times or bad times, we did it for all times." See *supra* note 34.

The late-Sen. Paul Wellstone countered, "This conference isn't just bad timing for consumers, it's bad timing for the economy as a whole. It makes no sense for Congress to put consumers in the bankers' crosshairs at a time when we are relying on those same consumers to pull our economy out of recession by increased spending." *Id.*

Some experts in the field agree with Wellstone. Mark Zuckerberg noted:

It would be political suicide to file a federal bankruptcy bill when companies are laying off people in record numbers. Airlines have laid off tens of thousands of employees since the attacks, and the nation's unemployment rate rose to 5.4 percent in October, up a half-percent from September. The increase represented the largest one-month jump in more than 21 years. The 415,000 total jobs eliminated during October was the nation's biggest cut in payroll since May 1980.

Scott Olson, *Bankruptcy Reform Put on Back Burner*, INDIANAPOLIS BUS. J., Nov. 12, 2001, at 7A, available at 2001 WL 27820515.

39. See Olson, *supra* note 38. The House conferees sent their Senate counterparts a list of provisions on which they were willing to compromise. However, they indicated no willingness to compromise on the primary sticking points such as "whether to supersede state 'homestead' laws, which let wealthy debtors thwart creditors by buying expensive homes that are exempt from foreclosure, and whether to prohibit people convicted of violent crimes, such attacks on abortion clinics, from filing for bankruptcy to avoid paying court-ordered fines." *Legislative Update*, AM. BANKER, Dec. 13, 2001, at 7, available at 2001 WL 26575602.

advising insolvent companies about restructuring their finances.<sup>40</sup> Also, experts in bankruptcy and commercial law warn that a provision in both the House and Senate bills will encourage secret corporate accounting transactions, making it easier for companies such as Enron to move assets off the books and out of the reach of creditors seeking redress in bankruptcy.<sup>41</sup> Specifically, they warn that Section 912 of both the House and Senate bills “will allow corporations to disguise borrowing transactions, secured by receivables, as sales of assets, to the detriment of both creditors and equity investors.”<sup>42</sup> Senator Hatch, a principal backer of this section, argues that Enron’s demise reflects “accounting failures,” not bankruptcy law failures.<sup>43</sup> Nonetheless, on January 30, 2002, Senator Patrick Leahy, then-chair of the Senate Judiciary Committee and a key member of the conference committee, requested that the Justice Department investigate the possible ramifications of Section 912.<sup>44</sup> Delaying the Act for study further delays adoption of the Model Law.

Another contentious issue is an abortion-related amendment to the Act introduced by New York Senator Charles Schumer. The amendment would prohibit protesters who block access to medical clinics that perform abortions from discharging in bankruptcy court-ordered fines and judgments stemming from such protests.<sup>45</sup> Senator Schumer struck a compromise with Representative Henry Hyde in July 2002 to soften the language of the amendment in order to ensure passage of the Act. Some pro-life lawmakers find the compromise unacceptable and continue to insist that the abortion amendment will eventually kill the whole Act.<sup>46</sup> A spokesman for Representative James Sensenbrenner, chair of the House Judiciary Committee, declared, “[T]he unfortunate reality is, it unravels the whole agreement, negotiated over many painstaking months.”<sup>47</sup>

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40. Randall Smith & Tom Hamburger, *Bankruptcy Bill Eases Conflict Curbs*, WALL ST. J., Aug. 27, 2002, at C1.

41. Letter from Edward J. Janger, Associate Professor, Brooklyn Law School, et. al. to Senator Patrick Leahy and Congressman F. James Sensenbrenner (Jan. 28, 2002), at [www.abiworld.org/research/lawletter.htm](http://www.abiworld.org/research/lawletter.htm).

42. *Id.*

43. *Enron: Asset Securitization Provision Undercut by Enron Fall as Leahy Seeks Clarification*, BANKR. L. DAILY, Feb. 27, 2002, at D13.

44. *Id.*

45. Julie Eilperin, *Abortion Fight May Scuttle Bankruptcy Bill*, WASH. POST, Sept. 13, 2002 at A1.

46. *Id.*

47. *Social Conservatives Reiterate Stand on Bankruptcy Measure*, CONGRESSDAILY, Sept. 4, 2002, available at 2002 WL 11269988.



However, there was more to the Act than issues regarding the Chapter 7 liquidation threshold, secret accounting transactions, or debts arising from protests against abortion clinics. The Act would also adopt the UNCITRAL's Model Law. But the abortion amendment stalemate may again put the Act indefinitely on hold. A lobbyist told the *Washington Post* in September 2002, "I would challenge anybody in this town to show me another piece of legislation that has passed both houses of Congress with bipartisan, veto-proof margins, and continues to be held hostage over issues that are unrelated to the intent of the legislation."<sup>48</sup>

## II. THE MODEL LAW ON CROSS-BORDER INSOLVENCY

The UNCITRAL's Model Law has been tucked into every version of the Bankruptcy Reform Act proposals.<sup>49</sup> If the Act is adopted, the relatively innocuous Model Law would become a new Chapter 15 of the United States Bankruptcy Code.<sup>50</sup>

The Model Law aims to create a more coherent and efficient international insolvency system.<sup>51</sup> International insolvency problems arise when, for example, an American company with off-shore assets files for bankruptcy protection in the United States. To reorganize a debtor's obligations or to liquidate its debt, it would be more efficient for the American court to have jurisdiction over all of the debtor's assets—even those overseas. In addition, it would be more efficient for the parties to initiate just one bankruptcy proceeding, rather than forcing the creditor to

48. Quote by Steve Pfister, senior vice president for government relations at the National Retail Federation. See Eilperin, *supra* note 45.

49. *Model Law on Cross-Border Insolvency*, U.N. Commission on International Trade Law, 30th Sess., Annex 1, U.N. Doc. A/52/17 (1997) [hereinafter Model Law]. The United Nations General Assembly adopted the Model Law on January 30, 1998. G.A. Res. 52/158, U.N. GAOR, 52nd Sess., U.N. Doc. A/RES/52/158 (1997).

50. See Bankruptcy Reform Act of 2001, § 801, in both the House and Senate versions.

51. Tina L. Brozman & Denise R. Polivy, *Concurrent, Same Entity, Cross-Border Insolvency Proceedings*, in 22ND ANNUAL CURRENT DEVELOPMENTS IN BANKRUPTCY AND REORGANIZATION 2000 895 (Practicing Law Institute ed., 2000).

The preamble of the Model Law explains that its purpose is to provide an effective mechanism for dealing with cross-border insolvencies so as to promote five articulated objectives:

1) [c]ooperation between courts involved in cases of cross-border insolvency; 2) [g]reater legal certainty for trade and investment; 3) [f]air and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested parties, including the debtor; 4) [p]rotection and maximization of the value of the debtor's assets; and 5) [f]acilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

*Id.*

seek judicial relief in each country where the debtor's assets are located.<sup>52</sup>

Countries differ in the extent to which they recognize insolvency proceedings begun in other countries.<sup>53</sup> The United States does not have a single treaty with another country dealing with cross-border insolvencies,<sup>54</sup> and the current Bankruptcy Code leaves many questions unanswered in respect to cross-border insolvencies.<sup>55</sup>

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52. These hypothetical scenarios are not merely intellectual exercises, but are becoming more frequent realities. Of the 266 large public companies that filed for bankruptcy reorganization in the United States between 1980 and 1997 examined by researchers, nearly a third of the companies reported owning property outside the United States. Sara Isham, Note, *UNCITRAL's Model Law on Cross Border Insolvency: A Workable Protection for Transnational Investment At Last*, 26 BROOK. J. INT'L L. 1177 n.1 (2001).

The same has been true in other nations. The financial prosperity of the 1980s was followed by an increased number of international insolvencies in the 1990s, including the 1997 economic downturn that spread from Asia to Russia and Latin America. See Martin N. Flics & Michael J. Ireland, *Bankruptcy and the Problems of Multi-Jurisdictional Workouts*, 553 PLI COMM. L. & PRAC. COURSE HANDBOOK SERIES 175, 179 (1990); see also Jay Lawrence Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANK. L. J. 457 (1991); see also Thomas M. Gaa et al., *International Creditors' Rights and Bankruptcy*, 33 INT'L LAW 379 (1999).

53. For example, the NAFTA trading countries each have different insolvency laws. Mexico's legal system is based on civil law, and commercial insolvency is a federal issue. Canada has begun to overhaul its bankruptcy system and is still in the process of updating its laws. M. Cameron Gilbreath, Note, *Overview and Analysis of How the United Nations Model Law on Insolvency Would Affect United States Corporations Doing Business Abroad*, 16 BANKR. DEV. J. 399, 414 (2000).

54. Section 304 of the Bankruptcy Code addresses the issue of international insolvency, permitting the United States to act in an ancillary role to insolvency proceedings pending in the debtor's home country. See 11 U.S.C. § 304 (2002).

Throughout history, there have only been a few multilateral treaties in the field of cross-border insolvencies. Denmark, Sweden, Norway, Finland, and Iceland signed the Nordic Bankruptcy Convention on November 7, 1933. Several countries in South America signed two similar treaties, the so-called Montevideo Treaties on International Commercial Law. Andre J. Berends, *The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview*, 6 TUL. J. INT'L & COMP. L. 309, 316 (1998).

More recently, all EU members signed the European Union Convention on Insolvency Proceeds, which had been under consideration for more than thirty years. The Convention determines the jurisdiction of the member nations, creates certain conflict-of-laws rules for insolvency proceedings, establishes methods of recognizing and enforcing judgments contemplates foreign bankruptcy proceedings, and guarantees information for creditors and rights to lodge claims. Richard H.W. Maloy, *Comparative Bankruptcy*, 24 SUFFOLK TRANSNAT'L L. REV. 1, 50 (2000).

55. For example, "[t]he [C]ode is silent on what would happen to a corporation in an international proceeding with another country whose bankruptcy laws are not as liberal as those of the United States." Gilbreath, *supra* note 53, at 400. If a U.S. corporation with assets abroad becomes insolvent and foreign creditors rush to collect their assets, it is not immediately certain how those assets should be distributed. The Code is also silent in reverse situations, when a United States corporation is a creditor of an insolvent foreign corporation, the latter of which has assets in multiple countries. *Id.*

There are also unanswered questions about the protocol of collaboration between courts in different countries, or on different continents. Technology has helped provide new solutions to otherwise cumbersome procedural difficulties. One cross-border reorganization broke new ground in 1999 by linking the Alberta Court of Queen's Bench in Canada and the U.S. Bankruptcy Court in Albuquerque, New Mexico via telephone conference call. After contrary rulings by the two courts left

The Model Law does not fill this void with substantive insolvency law, because in the past, consensus in this area has proven too difficult.<sup>56</sup> Rather, the Model Law provides a framework for courts to coordinate their activities “to the maximum extent possible”<sup>57</sup> without ceding jurisdiction, while protecting the interests of both domestic and foreign creditors.<sup>58</sup> Each country could adopt the Model Law with specific modifications to satisfy local public policies, but at its core, the Model Law would allow one country’s bankruptcy court access to another country’s bankruptcy court, thus allowing one country’s court to apply its laws to property in another country.<sup>59</sup> For example, a foreign representative could seek an

the proceedings effectively deadlocked, the parties adopted procedures for linking hearings in the courts to approve the sale of the debtors’ assets, agreeing that the parties would file identical materials in both jurisdictions, and that the presiding justice and the judge could communicate with each other without counsel present for the purpose of making consistent rulings. The two courts reached identical conclusions that helped the company raise money to finance its restructuring. After, the successful outcome of this experiment with telephone conference calls the Southern District of New York and a Toronto court held the first cross-video conference hearing. *See Brozman, supra* note 51, at 891-92.

56. *See* Isham, *supra* note 52, at 1999-2000.

57. UNCITRAL, MODEL LAW ON CROSS-BORDER INSOLVENCY, at 13, U.N. Sales No. E.99 (1999).

58. There are two competing views regarding the most effective way to handle cross-border insolvencies: universality and territoriality. Those who favor universality seek to establish a uniform set of substantive insolvency laws governing all insolvency proceedings. In contrast, those who prefer territoriality leave each state to determine for itself the substantive law regarding insolvency proceedings within its border, but limit the application of that substantive law to property within a state’s jurisdiction. The Model Law adopts a so-called cooperative territoriality approach. The Model Law does not seek to unify or change the substantive insolvency laws of each enacting country. Rather, the Model Law seeks to change only the procedural law by encouraging and facilitating cooperation between states.

Further, the scope of the Model Law is expansive, which affords a broad range of creditors and representatives the benefits of an efficient and smooth liquidation. Specifically, the Model Law covers incoming requests for recognition, a court’s outgoing request from the enacting state for recognition of a domestic proceeding, coordination of proceedings, and participation of foreign creditors in local proceedings. The Model Law applies only to collective creditor actions and excludes individual creditor action such as attachment and garnishment. Matthew T. Cronin, *UNCITRAL Model Law on Cross-Border Insolvency: Procedural Approach to a Substantive Problem*, 24 J. CORP. L. 709, 711-12 (1999).

59. The Model Law’s goals are accomplished in three basic ways. First, the Model Law permits and requires courts and administrators to cooperate with each other to the maximum extent possible. Second, the Model Law enables a foreign insolvency administrator or representative to have standing in a local proceeding and to obtain relief in an efficient manner. Third, the Model Law requires a base level of equal treatment of foreign and local claims.

The Model Law will help lift the cloud of legal uncertainty that surrounds international insolvency issues. It provides clear, intelligible guidelines for determining what type of relief can be expected and granted. By enhancing predictability, the Model Law will promote economic efficiency and, in the end, benefit the entire international community. Ronald J. Silverman, *Advances in Cross-Border Cooperation: The UNCITRAL Model Law on Cross-Border Insolvency*, 6 ILSA J. INT’L & COMP. L. 265, 267, 272 (2000).

Moreover, the Model Law’s goals comport with the general goals of the United States bankruptcy system: to continue the smooth flow of credit, to maximize the value of the estate, and to rehabilitate

American bankruptcy court's jurisdiction when the main proceeding has commenced in a foreign country against a debtor company with assets in the United States.<sup>60</sup> Foreign creditors would have the same rights as domestic creditors to commence and participate in a case,<sup>61</sup> and courts would no longer favor local creditors over foreign ones.<sup>62</sup>

Such cooperation should increase creditors' recovery,<sup>63</sup> but it would be a radical departure from existing practice. Little effort has been made worldwide to integrate insolvency proceedings and promote cooperation among bankruptcy courts.<sup>64</sup> As a result, most bankruptcy courts have taken an increasingly nationalistic approach in cross-border cases. This has led to "full liquidation proceedings in every country in which the assets of a debtor are located. It has caused duplication of expenses and litigation, inequitable distribution to creditors worldwide, and instability in the climate for international trade."<sup>65</sup> In contrast, the Model Law's open system of consolidating all proceedings in one nation would lower administrative costs, increase efficiency, and improve predictability. These benefits could also encourage more American investment and capital lending overseas.<sup>66</sup>

In light of the lack of international cooperation, the UNCITRAL was originally met with widespread pessimism when it began work in 1995 to

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the debtor, if possible, so the debtor may once again contribute to the economy. *See Cronin, supra* note 58, at 719.

60. The UNCITRAL delegates who wrote the Model Law disagreed on whether to specifically exclude consumer cross-border insolvencies in Article 1, Section 2 of the Model Law. In some European Union countries, such as Belgium, a person can only be subjected to an insolvency proceeding when acting in the capacity of a trader. The delegates compromised by not excluding consumer cases, but rather allowing each country to adopt its own rules in this area. *See Berends, supra* note 54, at 326-27.

61. Douglas L. Furth et. al, *What Institutional Lenders Can Expect from the Business Aspects of the Pending Bankruptcy Legislation*, 118 *BANKING L.J.* 520, 530 (2001).

62. *See Isham, supra* note 52, at 1203.

63. *New Developments in Structured Finance: Report by the Committee on Bankruptcy and Corporate Reorganization of the Association of the Bar of the City of New York*, 56 *BUS. LAW.* 95, 135 (2000).

64. There are a few multilateral treaty systems in effect, such as the Convention Regarding Bankruptcy Between Nordic States, Nov. 7, 1933, 155 *L.N.T.S.* 115, and the Havana Convention of 1928, Feb. 20, 1928, 86 *L.N.T.S.* 111.

Several nations, including Australia, Canada, England, Germany, India, Ireland, New Zealand, and the United States, allow for—but do not require—cooperation with foreign insolvency proceedings. *See Anderson, supra* note 17, at 682.

65. *See Gilreath, supra* note 53, at 401 (quoting Charles Booth, *Recognition of Foreign Bankruptcies: An Analysis and Critique of the Inconsistent Approaches of the United States*, 66 *AM. BANKR. L.J.* 135, 136 (1992)).

66. Liza Perkins, *A Defense of Pure Universalism in Cross-Border Corporate Insolvencies*, 32 *N.Y.U. J. INT'L L. & POL.* 787, 804-13 (2000).

coordinate international insolvency proceedings.<sup>67</sup> Many commentators were doubtful that any treaty or model bankruptcy law could successfully garner a consensus view.<sup>68</sup> Nonetheless, the UNCITRAL Model Law drafted in 1997<sup>69</sup> was received favorably. The Model Law is being considered for adoption in Great Britain,<sup>70</sup> Australia,<sup>71</sup> New Zealand,<sup>72</sup> and Canada.<sup>73</sup> It has already been adopted in Eritrea,<sup>74</sup> Montenegro,<sup>75</sup> Japan,<sup>76</sup> South Africa,<sup>77</sup> and Mexico.<sup>78</sup> South Africa's adoption of the Model Law was heralded as having "enormous potential to catapult the South African law of cross-border insolvency out of the age of sailing-ships and sealing-wax and into the age of the spaceship and the computer."<sup>79</sup> Similarly, Mexico's adoption of the Model Law was embraced enthusiastically domestically and internationally<sup>80</sup> because its insolvency laws had not

67. See *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, (1997) 28 UNCITRAL Y.B. pt. 3, § 2, U.N. Doc. A/CN.9/442, reprinted in Berends, *supra* note 54, at 419-21.

68. Jay Lawrence Westbrook, *A Global Solution of Multinational Default*, 99 MICH. L. REV. 2276, 2297 (2000).

69. Although the Model Law is not a treaty, it was designed to be incorporated into a nation's laws. Therefore, reciprocity is only guaranteed between nations that enact the Model Law. By recommending a model law rather than a treaty, UNCITRAL acknowledged that years of "parochialism and non-cooperation" required a new and different solution. *Model Law on Cross-Border Insolvency*, U.N. Commission on International Trade Law, 52nd Sess., Supp. No. 17, at 1387, U.N. Doc. A/52/17 (1992).

70. The United Kingdom has established a blue-ribbon committee to consider the impact of the adoption of the Model Law on existing U.K. insolvency legislation. The date for the Model Law coming into force in England has not yet been set. E. Bruce Leonard, *The International Year in Review*, AM. BANKR. INST. J. Dec./Jan. 2001, at 24.

71. *Id.*

72. *Id.*

73. *Id.*

74. See UNCITRAL, Status of Conventions and Model Laws, pt. II, ¶ 14 (2000), available at <http://www.uncitral.org/english/status/status-e.htm>.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. Alastair Smith & Andre Boraine, *Crossing Borders Into South African Insolvency Law: From the Roman-Dutch Jurists to the UNCITRAL Model Law*, 10 AM. BANKR. INST. L. REV. 135, 215 (2002).

80. Mexico adopted the Model Law as part of insolvency legislation (New Law) that overhauled its previous World War II-era insolvency rules (Old Law).

[T]he majority view is that the New Law will substantially improve the insolvency regime in Mexico. The potential effectiveness of the New Law is demonstrated by the sizable number of financially troubled businesses in Mexico that declared bankruptcy prior to May 2000 to seek shelter under the Old Law . . . . Moreover, a multiplicity of bankruptcy practitioners in Mexico and the U.S. have praised the New Law, describing it as "good news for the Mexican business community and Mexico's economic development." Finally, the New Law has been lauded within Mexican legal and political ambits as an instrument that will undoubtedly balance the interests of all the parties involved in the insolvency process.

previously addressed the issue of cross-border assets. Experts said the omission had “caused . . . headaches to foreign creditors in Mexico,”<sup>81</sup> but its inclusion “should enhance the development of international trade and investment in Mexico.”<sup>82</sup>

The U.S. adoption of the UNCITRAL’s Model Law would be less dramatic than Mexico’s adoption.<sup>83</sup> After all, the United States was influential in drafting the Model Law and incorporating policies it favored, such as open access to foreign bankruptcy courts.<sup>84</sup> The Model Law will thus conform “enacting nations’ bankruptcy legislation to the standards set out in § 304 of the U.S. Bankruptcy Code.”<sup>85</sup> Because of the Model Law’s liberal recognition of foreign representatives and insolvency judgments,<sup>86</sup> it embodies principles the United States has advocated internationally for many years.<sup>87</sup> Thus, in the United States, enactment of the Model Law will most likely affect an American corporation involved in insolvency proceedings with a corporation from a country that does not adhere to the principles of the Model Law.<sup>88</sup>

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Hale E. Sheppard, *The New Mexican Insolvency Law: Policy Justifications for U.S. Assistance*, 6 UCLA J. INT’L L. & FOREIGN AFF. 45, 72-73 (2001).

81. *Id.* at 70 (citing Francisco Romero, The New Proposed Mexican Bankruptcy Law, Paper Presentation at the American Bankruptcy Institute 2000 Spring Meeting 25 (Apr. 29, 2000)).

82. Josephina Fernandez McEnvoy, *Mexico’s New Insolvency Act: Increasing Fairness and Efficiency in the Administration of Domestic and Cross-border Cases*, AM. BANKR. INST. J., Sept. 2000, at 23.

83. “One cannot emphasize too strongly that the Model Law will only modestly improve our law, primarily by adding statutory specifics where we have only caselaw now.” Jay Lawrence Westbrook, *Modeling International Bankruptcy*, 1998-1999 ANN. SURV. BANKR. L. 465, 471-72 (1999).

84. *Id.* at 470.

85. See Perkins, *supra* note 66, at 799.

86. For example, the United States has become progressive in its willingness to advocate foreign law, while E.U. countries have not traditionally reciprocated this willingness to cooperate. This puts the United States at a disadvantage. See Gilreath, *supra* note 53, at 423-24.

87. The United States added Section 304 of the Bankruptcy Code in 1978, and at the time, many thought America’s leadership in the field of cross-border insolvencies would spur other countries to adopt similar laws. This was not the case, and the lack of international coordination has created the need for the UNCITRAL Model Law. See *Report of the National Bankruptcy Review Commission*, (Oct. 10, 1997), available at <http://govinfo.library.unt.edu/nbrc/reportitlepg.html>.

88. See Gilreath, *supra* note 53, at 423. Because of the current laws,

some United States trustees have spent more than a year simply obtaining recognition in a foreign insolvency proceeding. In addition, the current process for recognition in some countries has caused at least one United States trustee to spend nearly \$1 million in fees that could have gone to satisfy creditors’ claims. The Model Law would minimize such wasteful expenses by providing for quick and efficient distribution of a debtor’s assets in cross-border insolvency proceedings.

Cronin, *supra* note 58, at 719-20 (citing *Examining the Need to Make Changes to Our Bankruptcy Laws to Facilitate International Trade: Hearings on S. 473 Before the Subcomm. on Admin. Oversight and the Courts of the Comm. on the Judiciary*, 105th Cong. 8 (1997) (statement of Jonathan L. Flaxer) (testifying that it took one year and three months simply to obtain recognition of a United States proceeding in French courts), reprinted in 1997 WL 16138789.

In sharp contrast to the controversial domestic implications of the pending Bankruptcy Reform Act, there is near-universal support in the United States for adoption of the UNCITRAL's Model Law. In 1998, the U.S. National Bankruptcy Review Commission unanimously recommended that Congress adopt the Model Law,<sup>89</sup> the Department of State unanimously endorsed it,<sup>90</sup> and United States bankruptcy courts have cited it favorably.<sup>91</sup> Express congressional support for the Model Law is apparent via its inclusion in the Bankruptcy Reform Acts of 1999, 2000, 2001 and 2002 without any debate.<sup>92</sup> Some academics would prefer to alter specific aspects of the Model Law, but they still support the legislation as a whole.<sup>93</sup> Todd Zywicki, a law professor at George Mason

89. National Bankruptcy Review Commission Report, *supra* note 87, at 351.

90. See Senate Hearing, *infra* note 88 (statement of Harold S. Burman, Office of Legal Adviser to the Department of State), *reprinted in* 1997 WL 16138787.

91. See *In re Blackwell*, 270 B.R. 814 (Bankr. W.D. Tex. 2001); *In re Bd. of Dir. of Hopewell Int'l Ins.*, 272 B.R. 396 (Bankr. S.D.N.Y. 2002).

92. This international provision of the Act is overshadowed by domestic provisions. A 134-page Senate Conference Report for the Bankruptcy Reform Act of 2001 failed to reflect any mention of the Model Law or any debate on its merits. 146 Cong. Rec. S11,683 (daily ed. Dec. 7, 2000), *available at* <http://www.abiworld.org/debate127.html>. Other searches on *Thomas* (<http://thomas.loc.gov>) failed to find any discussion about the cross-border insolvency provision.

93. Gilreath argues that the Model Law addresses most key issues in transnational bankruptcy cases except choice of law.

[T]hose issues loom the largest since the outcome of any proceeding fully depends on whose law, procedural or substantive, is applied. With no choice of law provision, the effect of the Model Law could be greatly weakened . . . [W]ithout an express choice of law provision, it may not be able to effectively confront or control the existing conflict of law problems encountered in international dealings.

See Gilreath, *supra* note 53, at 404, 425.

In addition, adoption of the Model Law is entirely voluntary. Therefore, "the Model Law's force is only as good as its acceptance" and can only bind those nations that agree to be bound. See Silverman, *supra* note 59, at 267.

Further, Perkins argues that the Articles of the Model Law dealing with cross-border cooperation are weak. Specifically, she argues that there are no teeth to the provision encouraging communication and cooperation, that nothing in the Model Law prevents the initiation of a second bankruptcy proceeding in the enacting country, and that the Model Law's reach only extends to countries that choose to adopt it. See Perkins, *supra* note 66, at 801-03.

The Model Law also has been criticized as yet another failed attempt at filling the vacuum in cross-border insolvency law. See John A. Barret, *Various Legislative Attempts with Respect to Bankruptcies Involving More Than One Country*, 33 TEX. INT'L L.J. 557 (1998).

Matthew T. Cronin sums the problems with the Model Law into four areas.

First, the Model Law, by its own terms, does not apply where domestic policy conflicts, presenting a problem in the United States with certain criteria of Section 304 of the United States Bankruptcy Code. Second, the Model Law does not define a "main proceeding" in a way that ensures only one court may lay claim to the title. Third, the Model Law is certain to increase forum shopping, but has done a remarkable job of mitigating that risk while not disturbing either access or an enacting State's substantive law. Lastly, the scope of the bankruptcy estate, as the Bankruptcy Code currently defines it, is sufficiently broad to frustrate the goals of the Model Law . . . . States should not shy away from adopting the Model Law because of the criticisms

University who has advised Congress on general bankruptcy reform remarked, “The sense in the bankruptcy community is that issues involving cross-border insolvencies are so confused and chaotic right now, almost anything is better than nothing.”<sup>94</sup>

Experts predict that U.S. adoption of the Model Law will have a beneficial domino-effect internationally.<sup>95</sup> The United States, as the largest economy to incorporate the Model Law, would establish itself as a leader in the movement toward greater integration of cross-border insolvencies and would spur other nations also to adopt the Model Law.<sup>96</sup>

### III. A CALL FOR IMMEDIATE ACTION

The UNCITRAL’s Model Law helps create a more efficient international insolvency system through cooperation and integration.<sup>97</sup> As noted above, it has strong backing in the international community, and has already been adopted in Eritrea, Japan, Mexico, Montenegro, and South Africa.<sup>98</sup> Additionally, there is overwhelming domestic support for incorporating the Model Law into the Bankruptcy Code from the President,<sup>99</sup> Congress,<sup>100</sup> the National Bankruptcy Review Commission,<sup>101</sup> the State Department,<sup>102</sup> bankruptcy courts,<sup>103</sup> and academics.<sup>104</sup>

The Model Law would have been already adopted had it not become ensnared in a bill with controversial domestic bankruptcy provisions.

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mentioned above, but they should be aware of the potential problems and perhaps mold their existing law with the Model Law to ensure that the Model Law has the maximum effect.

Cronin, *supra* note 58, at 726.

94. Shanon D. Murray, *Cross-Border Bankruptcy Proviso Stuck*, DAILY DEAL, June 12, 2001, available at 2001 WL 20234360.

95. “If the United States does adopt the Model Law, there is a likelihood it will find favor in a number of other countries, leading to a ‘web’ of insolvency cooperation . . . .” Westbrook, *supra* note 52, at 465-66.

That sentiment was echoed by Tina Brozman, a former chief judge of the U.S. Bankruptcy Court for the Southern District of New York and now a partner at Bingham Dana L.L.P., who helped develop the UNCITRAL Model Law. The U.S. adoption of the Model Law will “act as a catalyst for other nations that are hanging back and waiting to see what the U.S. does.” Murray, *supra* note 94.

96. See Murray, *supra* note 94.

97. See *supra* notes 51-66 and accompanying text.

98. See *supra* notes 70-82 and accompanying text.

99. See Sorohan, *supra* note 2.

100. See *supra* note 1.

101. See Report of the National Bankruptcy Review Commission, *supra* note 87.

102. See Senate Hearing, *supra* note 90.

103. See *In re Blackwell*, 270 B.R. 814 (Bankr. W.D. Tex. 2001); *In re Bd. of Dir. of Hopewell Int’l Ins.*, 272 B.R. 396 (Bankr. S.D.N.Y. 2002).

104. See *supra* note 93 and accompanying text.



Instead, it is indefinitely delayed in order for lawmakers to debate the other contentious parts of the Act. With some lawmakers questioning whether passage of the Bankruptcy Reform Act is even appropriate during a recession, the Act—and the Model Law—could be scuttled indefinitely until the economy recovers.<sup>105</sup>

There is no need to wait for the Model Law when the United States could adopt it within mere weeks. Congress should rise above domestic political bickering and exhibit leadership in the field of international insolvency law by severing the Model Law provision from the general Bankruptcy Reform Act and pass the Model Law as an independent bill.<sup>106</sup> This idea is not unprecedented;<sup>107</sup> Congress carved out the provision that now governs the insolvencies of farmers and adopted it independently as Chapter 12.<sup>108</sup> There is no reason why Congress cannot similarly adopt a new Chapter 15 for the Model Law.

Separating the Model Law from the general Bankruptcy Reform Act would enable Congress to adopt immediately the Model Law. It would potentially garner more votes in Congress than the general Bankruptcy Reform Act, and its passage would strongly encourage other nations to promptly adopt the Model Law.

The United States is the largest economy to consider the Model Law, and other nations are waiting to follow.<sup>109</sup> The United States should use its

105. See *supra* notes 35-38 and accompanying text.

106. Other non-controversial provisions that could be adopted separately include adding new bankruptcy judges nationwide and making Chapter 12 a permanent part of the U.S. Bankruptcy Code. Statement by Rep. Jerrold Nadler, Meeting of Conferees to H.R. 333 (Nov. 14, 2001), available at <http://www.abiworld.org/research/nadlern.html>.

107. See Murray, *supra* note 94.

108. H.R. Rep. No. 99-958, at 48 (1986), reprinted in 1986 U.S. U.S.C.C.A.N. 5227, 5249. The 1986 version of Chapter 12 was a temporary, emergency law meant to help family farmers in need of financial rehabilitation because they could not qualify for Chapter 13 protection, and filing under Chapter 11 proved too slow, cumbersome and restrictive. Congress originally wanted to make Chapter 13 more available to farmers by lowering the percentage income test needed to qualify as a “family farmer,” raising the Chapter 13 debt limit for family farmers to \$1 million, and extending the Chapter 11 and 13 time limits for submitting a plan and making plan payments. Linda Kotis, *Chapter 13 and the Family Farmer*, 3 BANKR. DEV. J. 599, 623 (1986). However, changes to Chapter 13 would impact all bankruptcy filers, not just family farmers.

The compromise Chapter 12 was originally set to expire in 1993 but has been continuously extended—most recently on Dec. 19, 2002; President George W. Bush signed into law H.R. 5472 (P.L. 107-377, 116 Stat. 3115), extending Chapter 12 for six months, beginning Jan. 1, 2003.

109. See Westbrook, *supra* note 52.

leadership role in the field of cross-border insolvency<sup>110</sup> to benefit commerce and cooperation throughout the world.

*Gil Hopenstand\**

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110. According to Cronin:

In 1978, the United States adopted Section 304 of the United States Bankruptcy Code, which many saw as a step toward cooperation in international insolvency proceedings. At the time, many thought that the United States, by its leadership, would spur other countries into adopting similar provisions. This, however, has not been the case, and [nearly twenty-five] years later have gone by with little or no progress in this area.

The history and success of Section 304, though, should not lead the United States to shy away from adopting the Model Law. There are important differences between a model law that is a result of consensus of many nations and the United States' unilateral adoption of Section 304.

Cronin, *supra* note 58, at 720.

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