

A Test Case in International Bankruptcy Protocols: The Lehman Brothers Insolvency

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I. INTRODUCTION

On September 15, 2008, Lehman Brothers, then the fourth largest investment bank in the United States, filed for chapter 11 bankruptcy. Later, some would claim that the collapse of Lehman Brothers (“Lehman”) into bankruptcy sparked the international financial crisis of 2009.¹ Lehman was one of the largest financial services firms in the world, with headquarters in New York and regional headquarters in London and Tokyo. Lehman offices were spread around the world—throughout North America, Europe, the Middle East, Latin America and the Asia Pacific region.² As a result, its bankruptcy would prove to be a complex and lengthy process with global ramifications.

Lehman operated in over forty countries and had more than 650 legal entities outside of the United States.³ The bankruptcy filing resulted in over seventy-five separate proceedings, with more than sixteen administrators playing multiple roles.⁴ Proceedings were adjudicated by tribunals in nine countries, and the law in each country varied widely.⁵ For example, the applicable law included the Dutch Bankruptcy Act, the German Insolvency Code, Swiss Law on Banks and Savings, Civil Rehabilitation Law of Tokyo, French Financial and Monetary Code, Hong Kong Companies Ordinance, Singapore Companies Act, and the Australian Corporations Act. Accordingly, coordinating an international bankruptcy of this size and scope would be a daunting task.

1. E.g., MARK WILLIAMS, UNCONTROLLED RISK: LESSONS OF LEHMAN BROTHERS AND HOW SYSTEMIC RISK CAN STILL BRING DOWN THE WORLD FINANCIAL SYSTEM (2010); JOSEPH TIBMAN, THE MURDER OF LEHMAN BROTHERS: AN INSIDER’S LOOK AT THE GLOBAL MELTDOWN (2009).

2. Lehman Bros. Holdings Inc., Cross Border Insolvency Protocol for the Lehman Brothers Group of Companies, 1 (May 12, 2009), *available at* <http://www.lehman-docket.com> (select “Key Documents”) [hereinafter Protocol].

3. Alvarez & Marsal Holdings LLC, Lehman Brothers International Protocol Proposal, 4 (Feb. 11 2009), *available at* <http://www.lehman-docket.com> [hereinafter Proposal].

4. Administrators were located in the United Kingdom, Japan, Switzerland, Germany, Australia, Korea, Bermuda, the Philippines, and the Netherlands. Proposal, *supra* note 3, at 5.

5. Proposal, *supra* note 3, at 18–26.

To facilitate the process, interested parties entered into a private agreement: the Cross-Border Insolvency Protocol for the Lehman Brothers Group of Companies (the “Lehman Protocol”).⁶ Protocols in international bankruptcies are not a new tool. The Lehman Protocol, however, was novel in the number of countries which participated and in the amount of assets it governed. There was little precedent which could effectively be applied to a bankruptcy on such a global scale.

The Lehman Protocol was ground breaking in a number of ways and this article will explore that protocol, showing how it sought to address the unique problems arising from international insolvency proceedings. This article will also follow the international bankruptcy laws and guidelines on which the Lehman Protocol is based to show that the theory underlying the Lehman Protocol is modified universalism. Modified universalism is one of a number of theoretical bankruptcy models which could potentially govern an international bankruptcy. The two main models are universalism and territorialism, and proponents of each argue fiercely over which is the better model. The adoption of modified universalism by private parties in a protocol may reflect modified universalism’s wide-spread appeal and success.

A protocol is a private agreement which parties in an international bankruptcy enter into of their own accord. Protocols are especially important for coordinating the multiple proceedings in different countries that arise as a result of an international corporate group, such as Lehman, filing bankruptcy.⁷ The main goal of a protocol is to maximize efficiency and minimize dispute among all parties: debtors, creditors, and tribunals worldwide.⁸

The term “international bankruptcy” refers to a number of situations—when the debtor has a presence in more than one country (such as in the case of Lehman), when a debtor is domestic but creditors exist in foreign countries, or when the debtor is foreign and creditors are domestic. On the most basic level, two major problems arise in international insolvencies: (1) determining which forum will govern the proceedings,

6. See generally Protocol, *supra* note 2.

7. HON. SAMUEL L. BUFFORD, UNITED STATES INTERNATIONAL INSOLVENCY LAW 50 (2009).

8. Evan D. Flaschen & Ronald J. Silverman, *Cross-Border Insolvency Cooperation Protocols*, 33 TEX. INT’L L.J. 587, 590 (1998).

and (2) determining what law will be applied in that forum.⁹ Theoretically, the principles underlying a domestic bankruptcy can be transferred to an international bankruptcy. However, conflicts arise in international settings because substantive and procedural bankruptcy laws vary between countries.¹⁰ Further issues arise due to language differences, differences between common law and civil code systems, differences in litigation culture, different time zones, different resources available to courts, and weak bankruptcy infrastructures in some countries.¹¹ Protocols attempt to harmonize the proceedings by providing a framework to guide the parties and courts.¹²

The mechanisms driving international bankruptcy are important in today's world because multinational businesses with extensive global connections are thriving.¹³ Prior to its bankruptcy filing, Lehman was a prototypical example of a thriving multinational corporation. International trade and investment has been stimulated by new economic markets, the reduction of barriers to foreign trade, and advancing technology.¹⁴ As the world becomes more globalized and technological advances break down distance barriers, companies will act on increasingly international scales. Inevitably, this will lead to bankruptcies on similarly international scales—the Lehman bankruptcy.¹⁵ An understanding of the complex problems arising from international bankruptcy and the possible solutions is vital to the continued development of the global economy.

Before the Lehman Protocol can be analyzed in depth, some general principles underlying bankruptcy law, both domestic and international, must be identified. An international bankruptcy should ideally lead to the same predictable results as a bankruptcy filed within a single country. This has not, however, always been the case. Although there are a number of widely recognized goals of bankruptcy, bankruptcy law and policy vary widely from country to country.¹⁶ For example, the proceedings

9. Lawrence Westbrook, *The Lessons of Maxwell Communication*, 64 *FORDHAM L. REV.* 2531, 2532 (1996).

10. Every country has its own bankruptcy code, except Ghana. See Samuel L. Bufford, *Global Venue Controls Are Coming: A Reply to Professor LoPucki*, 79 *AM. BANKR. L.J.* 105, 109 (2005).

11. BUFFORD, *supra* note 7, at 548.

12. *Id.* at 589.

13. *Id.*

14. BOB WESSELS ET AL., *INTERNATIONAL COOPERATION IN BANKRUPTCY AND INSOLVENCY MATTERS* 201 (2009).

15. 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, 679–80 (2000). See also Andrew T. Guzman, *International Bankruptcy: In Defense of Universalism*, 98 *MICH. L. REV.* 2177, 2177 (2000).

16. WESSELS, *supra* note 14, at 17. Some examples of these differences include: (1) Some countries treat creditors with a “right of set off” as having a secured claim, while

in the Lehman filing were subject to the laws of nine different countries, all encompassing different public policy and social mores.¹⁷

A lack of predictability in cross-border insolvencies hinders the free flow of capital among countries and creates a disincentive to investment across borders.¹⁸ As such, predictable results for all parties involved is one bankruptcy goal generally accepted by all countries. In addition to predictability, there are other principles of bankruptcy law that are accepted by individual countries, yet which are difficult to accomplish in international bankruptcies. One example is the maximization of assets for all creditors.

The maximization of assets available for distribution to creditors is one of the most important goals of modern bankruptcy.¹⁹ When insolvency strikes, one of the initial reactions of creditors is to grab whatever assets they can lay their hands on.²⁰ Without the intervention of bankruptcy law, this “feeding frenzy” mentality leads individual creditors to seize assets in inefficient ways, such as quickly auctioning off the debtor’s assets below their value.²¹ The goal of insolvency law in the United States and other countries is to overcome the difficulty of enforcing collective action among creditors and preventing individuals from acting in ways that unnecessarily reduce assets available to all

others treat them as having an unsecured claim. See PHILIP R. WOOD, MAPS OF WORLD FINANCIAL LAW 38–43 (3d ed. 1997). (2) Some countries (e.g., the United States) give creditors with a tort claim equal status to creditors with commercial claims, while other countries give tort creditors a lower status. Further, in some countries, tort creditors who have not won a judgment before the bankruptcy is filed have no claim, while others allow claims even in the absence of a judgment. See Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 CORNELL L. REV. 696, 709 n.62 (1999). (3) In some countries, employee creditors are the highest priority creditors in the bankruptcies of their employers, which furthers the substantive policy of encouraging employees to extend credit to their employers in difficult times. Other countries employee’s creditors are not given any priority, making it unlikely that employees will lend to their employers. *Id.* at 710.

17. For example, the French insolvency system presumes that a business should be reorganized, rather than liquidated. The primary goals of French insolvency law are the survival of businesses and the discharge of their liabilities. The payment of creditors is only secondary, and is often not accomplished. See Richard L. Koral & Marie-Christine Sordino, *The New Bankruptcy Reorganization Law in France: Ten Years Later*, 70 AM. BANKR. L.J. 437, 453 (1996). In contrast, the German insolvency system presumes that a business should be liquidated. Bufford, *supra* note 10, at 112.

18. WESSELS, *supra* note 14, at 17.

19. *Id.* at 14.

20. *Id.*

21. *Id.*

creditors.²² While all countries accept the theoretical need for collective action among creditors, they do not agree on the best method of maximizing assets.²³ This disagreement creates inefficiency when the assets of one debtor are subject to the varying laws of different countries.

Another fundamental principle of bankruptcy law is the equitable treatment of similarly situated creditors.²⁴ This idea is captured by the concept of *pari passu*, which requires that all creditors of a certain level of priority should receive the same proportionate distribution of assets as all other creditors on that same level.²⁵ The opposite of the *pari passu* concept is the distribution of assets to creditors based on characteristics other than their type of claim—for example, distribution based on personal favoritism.²⁶ While the equitable treatment of creditors is often attained when bankruptcy proceedings are within one country, the principle can break down on an international level.²⁷ Countries inevitably give preference to certain claims for social and political reasons—claims of domestic creditors are often favored over the claims of similarly situated foreign creditors.²⁸ For example, in Mexico, government tax debts are given higher priority than the claims of foreign secured creditors.²⁹ These substantive differences between laws unfortunately can lead to inequitable treatment of creditors in international bankruptcies.

Differing treatment of creditors in an international bankruptcy is not limited to treatment of their claims. Often issues arise regarding notice—the substantive law of a country may not require that foreign creditors be given the same level of notice offered to domestic creditors. This unquestionably puts foreign creditors at a disadvantage when it comes to filing their claims. Foreign creditors and administrators may also be denied equal access to a country’s tribunals. Furthermore, the simple

22. *Id.*

23. For example, the bankruptcy law of almost every country includes the power to “avoid,” or nullify, certain transactions made by the debtor before he filed for bankruptcy. Westbrook, *supra* note 9, at 2531. The purpose of avoidance is to regain assets that the debtor owned before his bankruptcy filing in order to maximize the estate. However, jurisdictions differ in which types of pre-petition transactions they allow to be avoided. This can lead to disparate methods of maximizing an estate.

24. WESSELS, *supra* note 14, at 16.

25. *Id.*

26. Without the *pari passu* concept, the party responsible for distributing the debtor’s estate would choose to repay creditors with whom he has a close relationship (e.g. family, friends, vendors critical to the debtor’s continuing operation) in full before repaying other creditors.

27. WESSELS, *supra* note 14, at 17.

28. *Id.*

29. *Id.* at 18–19.

differences among countries in procedural law, as opposed to substantive law, can result in inefficiency and disputes.³⁰

These issues make administration of an international bankruptcy inefficient and often unfair. In a bankruptcy the size of Lehman's, the aforementioned problems could cause proceedings to continue for an unnecessary amount of time and harm the interests of all parties involved. Because these widely recognized problems may be alleviated or worsened depending on what theoretical model of international bankruptcy law applies, the debate over what model is best is heated.³¹ The two major approaches are universalism and territorialism, and each side has its own proponents.

Part II explains the competing theories underlying bankruptcy systems: universalism and territorialism. Part III details various statutory solutions to international bankruptcy problems. Next, Part IV analyzes the provisions of the Lehman Protocol in depth. Part V then examines the precedent upon which the Lehman Protocol relies. Part VI assesses potential threats to the Protocol's success. This leads to Part VII, which contains suggestions for future protocols. Finally, Part VIII concludes.

II. FROM TERRITORIALISM TO UNIVERSALISM: A SPECTRUM

Universalism and territorialism are at opposite ends of the spectrum of theoretical approaches to international bankruptcy.³² Universalism is the idea that the home country of a multinational debtor, for example the United States in the case of Lehman, should have worldwide jurisdiction over its bankruptcy.³³ In contrast, territorialism, the traditional approach, is the idea that the assets of a multinational debtor should be governed completely by the country in which they are located, and the debtor's home country should not have any authority outside of its borders.³⁴ The current state of international bankruptcy law is a system of territoriality,

30. *Id.* at 17.

31. For an illustration, see the exchange of publications between the Honorable Samuel L. Bufford and Professor Lynn M. LoPucki; for example Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy*, 98 MICH. L. REV. 2216, 2218 (2000) and Bufford, *supra* note 10, at 108. See also LoPucki, *supra* note 16, at 696; Robert K. Rasmussen, *A New Approach to Transnational Insolvencies*, 19 MICH. J. INT'L L. 1, 27 (1997); Liza Perkins, *A Defense of Pure Universalism in Cross-Border Corporate Insolvencies*, 32 N.Y.U. J. INT'L L. & POL. 787 (2000).

32. LoPucki, *supra* note 16, at 696.

33. See *id.* at 2216.

34. Bufford, *supra* note 10, at 108.

and has been described as “the inverse of multinational cooperation.”³⁵ Some legal scholars, for example, the Honorable Samuel L. Bufford, argue that the only solution to the current problems facing international insolvencies is a shift towards universalism, and the Lehman Protocol’s reliance on modified universalism principles seems to suggest the same.

A. Territorialism

Under territorialism, each country seizes the debtor’s assets which are located within its borders and conducts a separate bankruptcy proceeding to divide those assets among local creditors according to local law.³⁶ A representative is appointed for each creditor filing in a jurisdiction.³⁷ In the Lehman Protocol, these representatives are termed “Official Representatives.”³⁸ No proceeding in an individual country affects proceedings in any other country, and international cooperation exists only to the extent that parties actively pursue such cooperation.³⁹ Unfortunately, even where cooperation would be beneficial and is desired by the representatives, cooperation may not be possible if the laws of an individual country do not provide for it.

Proponents⁴⁰ of territorialism argue that the current system presents no serious problems.⁴¹ When a company’s insolvency is confined to one country, a positive aspect of territorialism is that corporate entities in other jurisdictions remain unaffected.⁴² And when a company is insolvent in multiple countries, private protocols, such as the Lehman protocol, provide for international cooperation. Professor LoPucki, a fierce proponent of territorialism, recognizes that representatives may be unable to agree on a protocol, but claims that there are no examples of cases where this has occurred.⁴³

35. LoPucki, *supra* note 31, at 2219.

36. Lore Unt, *International Relations and International Insolvency Cooperation: Liberalism, Institutionalism, and Transnational Legal Dialogue*, 28 LAW & POL’Y INT’L BUS. 1037, 1040 (1997).

37. LoPucki, *supra* note 31, at 2219.

38. Protocol, *supra* note 2, at 1.

39. Unt, *supra* note 36, at 1040.

40. When identifying proponents of territorialism, the question arises of which parties benefit most from the doctrine. Originally, territorialism was thought to benefit local creditors. Westbrook, *supra* note 9, at 2532. However, as the bankruptcy laws of many countries have changed to become less discriminatory against foreign creditors, territorialism began to benefit “large and sophisticated” creditors in addition to local creditors. *Id.*

41. LoPucki, *supra* note 31, at 2219.

42. *Id.*

43. LoPucki’s article may predate any such examples of cases where parties have failed to agree on a protocol. Unfortunately, such cases presently exist.

Critics of territorialism point to its numerous disadvantages.⁴⁴ First, territorialism increases the costs of an international bankruptcy because the need to file separately in each country creates duplicative expenses.⁴⁵ Second, successful reorganization is more difficult under territorialism because it decreases liquidation values and makes coordination of cases more complicated.⁴⁶ Third, distribution of assets to similarly situated creditors is unequal and unpredictable, which increases the cost of capital because the possibility of bankruptcy would lead to uncertain results.⁴⁷ Finally, under territorialism debtors and creditors can act strategically to advance their private interests while injuring the general interests of creditors.⁴⁸

B. Universalism

Under universalism, the bankruptcy of one multinational debtor would result in only one proceeding, held in the debtor's "home country," under a single body of substantive and procedural bankruptcy law.⁴⁹ The single proceeding would distribute all of the debtor's assets to all creditors worldwide.⁵⁰ Officials in all countries would be obligated to enforce this single court order in their home country.⁵¹

Proponents of universalism cite as its main advantage the maximization of a debtor's assets. Universalism maximizes assets because the value of assets is highest when transaction costs are low.⁵² Multiple bankruptcy proceedings substantially increase transaction costs,⁵³ and those costs diminish the assets available for creditors.⁵⁴ Other advantages of universalism include more efficient allocation of capital, reduced administrative costs as a result of fewer proceedings, higher possibility of successful reorganization, increased liquidation value, and greater

44. See Bufford, *supra* note 10, at 114.

45. Jay Lawrence Westbrook, *A Global Solution to International Default*, 98 MICH. L. REV. 2276, 2309 (2000).

46. Guzman, *supra* note 15, at 2202-04.

47. See Unt, *supra* note 36, at 1043.

48. Westbrook, *supra* note 45, at 2309.

49. Unt, *supra* note 36, at 1040.

50. *Id.*

51. LoPucki, *supra* note 31, at 2220.

52. See Rasmussen, *supra* note 31, at 27.

53. Consider the cost of duplicative proceedings, the cost of translators at proceedings where parties speak different languages, and the cost of educating courts of the law of other jurisdictions involved in proceedings. Bufford, *supra* note 10, at 111.

54. Rasmussen, *supra* note 31, at 27.

certainty for all parties involved.⁵⁵ Further, similarly situated creditors would be treated equally, regardless of their nationality.

Critics of universalism point out that the theory leaves many practical questions unanswered. For example, when a multinational company's assets, headquarters, principal locations, and places of incorporation are all in different nations, how does one define a debtor's home country?⁵⁶ If there is more than one possible home country, how is opportunistic forum shopping by a debtor prevented?⁵⁷ And in the case of a corporate group like Lehman, does "home country" refer to the entire corporate group's headquarters, or does each corporation in the group have its own home country?⁵⁸ Proponents of universalism counter that in the "vast majority of cases, the home country will be easy to identify—making the issue a minor question."⁵⁹ This response fails to satisfy critics.⁶⁰

LoPucki argues that even if it were simple to determine a debtor's home country, universalism as applied to an international corporate group, such as Lehman, would lead to "anomalous results . . . which could be manipulated easily."⁶¹ For example, if a subsidiary company only did business in the United States and its only international ties were that it was held by a larger corporation in Japan, the bankruptcy of the U.S. subsidiary would take place in Japan, despite the fact that all its assets were in the United States.⁶² A universalism system could be easily manipulated by a company who, on the verge of bankruptcy, incorporated a holding company in a different jurisdiction, making the new jurisdiction the home country, and making the subsequent bankruptcy subject to the substantive bankruptcy law of that country.⁶³ This represents the significant risk of forum shopping posed by a universalism system.⁶⁴ Even under

55. See Anderson, *supra* note 15, at 688.

56. LoPucki, *supra* note 31, at 2217.

57. *Id.* at 2234.

58. *Id.* at 2217.

59. Guzman, *supra* note 15, at 2207.

60. LoPucki argues that this assertion fails to take into account increasing globalization, which results in multinational corporations, like Lehman, for which a home country would be difficult to identify. LoPucki, *supra* note 31, at 2227.

61. *Id.* at 2230.

62. *Id.*

63. This was done by Fruit of the Loom in the Cayman Islands in anticipation of its bankruptcy filing in 1999. In the current territorialism system, this action did not require the United States to surrender the company's billion dollar assets to a Cayman Islands court. But the result would have been different under a universalism system. See *id.* at 2230–31.

64. Many differences in substantive bankruptcy law give rise to parties' motivation to forum shop. For example, debtors would be motivated by laws in some countries that allow the debtor to remain in control of the company during reorganization, rather than requiring appointment of a trustee, or laws that allow for approval of plans of reorganization over

the current territorial system, large U.S. companies forum shop,⁶⁵ even though the motivating factors do not represent crucial gains to the companies.⁶⁶

In response to concerns about forum shopping, proponents of universalism suggest that only a few “modest” changes are needed to reduce the possibility of forum shopping,⁶⁷ and that the Model Law and the European Union Regulation on Insolvency Proceedings are scheduled to make such changes in venue decisions.⁶⁸

Critics also point out that universalism presents a threat to individual countries’ sovereignty, which demands that a country have complete control over matters within its borders (though modified universalism addresses concerns of sovereignty to some extent).⁶⁹ LoPucki argues that the failure of proponents of universalism to answer these fundamental questions will cause any attempt at universalism to fail.⁷⁰ And where it is conceded that universalism is theoretically meritorious, there is the question of whether a universalism system could realistically ever be adopted.

Critics question whether universalism could ever realistically be adopted on a large scale, because countries which do not even authorize cooperation in the current territorialism system would be unlikely to adopt a model requiring more extensive cooperation.⁷¹ Furthermore, if a system of universalism were ever adopted, countries would have to revise their bankruptcy laws in order to adapt to the new system.⁷² Such a process would be incredibly expensive in terms of time and resources,

objections by creditors. Creditors would be motivated by *seeking* countries whose laws give them priority over different groups of creditors. *See id.* at 2234–35.

65. As shown by the fact that 89% of large public companies who filed bankruptcy between 1980 and 1997 were incorporated in Delaware, making Delaware the proper forum for their bankruptcy. Theodore Eisenberg & Lynn M. LoPucki, *Shopping for Judges: An Empirical Analysis of Venue Choice in Larger Chapter 11 Reorganizations*, 84 CORNELL L. REV. 967, 985 (1999).

66. One hypothesis for the motivation to file bankruptcy in Delaware is that the state has “successfully addressed the single biggest problem with Chapter 11 in recent years—the inordinate time and expense of the reorganization process.” David. A. Skeel, Jr., *Bankruptcy Judges and Bankruptcy Venue: Some Thoughts on Delaware*, 1 DEL. L. REV. 1, 28 (1998).

67. Bufford, *supra* note 10, at 107.

68. *Id.*

69. Anderson, *supra* note 15, at 682.

70. LoPucki, *supra* note 31, at 2223.

71. *Id.* at 2219.

72. *Id.* at 2222.

and could be met with resistance from individual countries. And even if it were possible to adopt a universalism system, once such a system was adopted, it would be very difficult to make any changes or improvements to it in the absence of a world government.⁷³

Additionally, though proponents of universalism claim that territorialism leads to unfairness, universalism itself could also lead to unfairness. For example, universalism might create uniform international bankruptcy laws, but individual countries would continue to have different substantive law in other areas, such as torts.⁷⁴ If a creditor's claim arises under one country's tort system, but the bankruptcy takes place in a debtor's home country with a different tort system, the creditor's claim could be unfairly affected by the home country's substantive tort law.⁷⁵ The value of a tort claim in one country may be different from the value of the same claim in a different country.⁷⁶

C. Modified Universalism

If territorialism and universalism are two ends of a spectrum, modified universalism lies between them, though closer to pure universalism. Modified universalism coincides with the philosophy of universalism, but still gives countries unilateral control over matters within its borders.⁷⁷ Under modified universalism, there is no attempt to impose a single bankruptcy law upon all countries, but rather countries maintain their own bankruptcy law along with an emphasis on cooperation.⁷⁸ Modified universalism supports the idea that a non-home country court can open a secondary insolvency case, a "non-main" proceeding, that is separate from the main proceeding in the home country.⁷⁹ Non-main proceedings would provide support to the main proceeding, such as when assets are located within the non-main proceeding's jurisdiction.⁸⁰

73. *Id.*

74. *Id.* at 2225.

75. For example, the settlement of claims for faulty breast implants in the Dow Corning bankruptcy gave foreign creditors lower payments than creditors in the United States for the same injuries, based on the idea that a claim those same injuries would be worth less in a foreign jurisdiction. *See id.* at 2225–26.

76. For example, as the result of an accident in Bhopal, India, Union Carbide Company was responsible for the deaths of 4,000 people. Their liability was estimated to be \$3 billion when it seemed that the trial would take place in the United States. However, when it became clear that the trial would be in India, the claims were settled for only \$470 million. *See id.* at 2225; *see also* Richard L. Abel, *A Critique of Torts*, 37 UCLA L. REV. 785, 809 n.81 (1990).

77. Anderson, *supra* note 15, at 690.

78. *Id.*

79. Bufford, *supra* note 10, at 108–09.

80. *Id.* at 112.

Where no such non-main proceeding is commenced, modified universalism remains identical to pure universalism.⁸¹

The main advantage of modified universalism is that it features the efficiency of pure universalism while including the “flexibility and discretion” of territorialism.⁸² Modified universalism also does not require countries to give up their sovereignty to the same extent as pure universalism because it provides courts governing non-main proceedings the power to refuse to turn over assets to main proceedings.⁸³ Further, modified universalism can be more realistically implemented because it does not require international conventions to enact a single body of law in all countries, and therefore allows countries to maintain their domestic legislation.⁸⁴

The Lehman Protocol reflects a modified universalism approach, and contains provisions which attempt to address the problems of pure territorialism and pure universalism systems. The creators of the Lehman Protocol, however, were not the first to turn to modified universalism in an attempt to solve the problems plaguing international insolvency.⁸⁵ Prior to the creation of the Lehman Protocol, a number of proposed statutory solutions based on modified universalism were created.⁸⁶ One of the most wide-reaching of these statutory solutions to international insolvency is the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvencies (Model Law).⁸⁷

81. *Id.* at 108–09.

82. Anderson, *supra* note 15, at 691.

83. *Id.*

84. See *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, [1997] 28 Y.B. U.N. Comm'n on Int'l. Trade L. 318, U.N. Doc. A/CN.9/442, reprinted in 6 TUL. J. INT'L & COMP. L. 415 (1998) [hereinafter *Guide to Enactment of Model Law*].

85. For example, the United States adopted a modified universalism approach to international insolvency with its enactment of section 304 of the United States Bankruptcy Code.

86. Bufford, *supra* note 10, at 118.

87. UNCITRAL Model Law on Cross-Border Insolvency, U.N. Doc. A/CN.9/436 (May 30, 1997) [hereinafter *Model Law*].

III. STATUTORY SOLUTIONS TO INTERNATIONAL INSOLVENCY PROBLEMS

A. *The UNCITRAL Model Law*

The Lehman Protocol appears to be largely based on a model law created by UNCITRAL to deal with international bankruptcies. UNCITRAL recognized the importance of efficiency and uniformity in international bankruptcy law and in 1994 formed a working group to create functional guidelines for international bankruptcies.⁸⁸ The solution that they created is the Model Law. The fundamental principle of the Model Law is that it does not seek to change the substantive bankruptcy law of individual countries.⁸⁹ Rather, the Model Law attempts to impose a uniform procedural bankruptcy law among all countries. The goal of the modifying procedural law is to allow equal access to substantive law for all parties involved in an international bankruptcy.⁹⁰ Under the Model Law, all countries are free to decide their own substantive law, but they must allow foreign representatives “equal, simple, and fast access” to that substantive law.⁹¹ Now UNCITRAL’s goal is for countries to adopt the Model Law in a somewhat complete form.⁹² Because the Model Law is simply a model, countries may choose to adopt only portions of it, and change its terms as they see fit. Therefore, even if the Model Law is widely adopted, there is still no guarantee of uniformity.⁹³

The Model Law’s approach to international bankruptcy has been described as a modified universalism approach—or a universalism approach influenced by territorialism principles.⁹⁴ While a pure universalism approach would seek to change individual countries’ substantive laws, and a pure territorialism approach would leave both procedural and substantive law decisions up to each individual country—the Model Law’s approach is a balance between the two.⁹⁵ The Model Law attempts to cover a broad scope of procedural bankruptcy law, providing guidance to creditors and administrators from the beginning to the end of a bankruptcy.⁹⁶ The Lehman Protocol appears to be based on the Model

88. Matthew T. Cronin, *UNCITRAL Model Law on Cross-Border Insolvency: Procedural Approach to a Substantive Problem*, 24 J. CORP. L. 709, 710 (1999).

89. *Id.*

90. See Guide to Enactment of Model Law, *supra* note 84, at 419.

91. Cronin, *supra* note 88, at 710.

92. *Id.*

93. *Id.* at 711.

94. See *id.*; Lynn M. LoPucki, *Global and Out of Control?*, 79 AM. BANKR. L.J. 79, 86 (2005).

95. See Cronin, *supra* note 88, at 711.

96. *Id.* at 712.

Law, which further reflects the Protocol's emphasis on modified universalism principles.

B. Cross-Border Insolvency Concordat

The Cross-Border Insolvency Concordat (Concordat)⁹⁷ was created by the International Bar Association as part of an effort to form principles to guide international bankruptcy cases.⁹⁸ The Concordat sets forth ten principles which can be applied to individual cases for a modified territorialism result.⁹⁹ According to the Report which accompanies the Concordat, the principles can be used in all types of insolvencies, including proceedings which govern assets and claims on a “worldwide basis”—like in the case of the Lehman bankruptcy.¹⁰⁰ Unlike the Model Law, the Concordat was not written for countries to adopt as a statute. Rather, the Concordat was intended as “an interim step until treaties and/or statutes are adopted by commercial nations,” in recognition of the fact that an international treaty was necessary, but would be difficult to achieve and a long time in coming.¹⁰¹ Hence, the Concordat envisions itself as being a useful tool in creating protocols.

Principle 1 of the Concordat states that in a bankruptcy where the debtor has “cross border connections,” there should be a single jurisdiction with primary responsibility for coordinating all insolvency proceedings relating to that debtor.¹⁰² This is an example of the Concordat's tendencies towards universalism. The commentary on principle 1 cites the benefits of having a primary administrative proceeding, which include enhanced control of assets, increased business values, and fair treatment of creditors.¹⁰³ The commentary also recognizes that it will not always be feasible to have only one main proceeding and allows for flexibility. Flexibility is one of the primary goals of the Concordat, because such varied situations arise in the international insolvency context that “one

97. Committee J Cross-Border Insolvency Concordat, Sept. 17, 1995 [hereinafter Concordat], reprinted in BUFFORD, *supra* note 7, at 651.

98. Anne Nielsen et al., *The Cross-Border Insolvency Concordat: Principles to Facilitate the Resolution of International Insolvencies*, 70 AM. BANKR. L.J. 533 (1996).

99. *Id.* at 537.

100. *Id.* at 538.

101. *Id.* at 537.

102. Concordat, *supra* note 97, at 652.

103. *Id.*

rigid rule cannot solve all of them satisfactorily.”¹⁰⁴ The Concordat principles have formed the basis for a number of successful protocols.¹⁰⁵

For example, in *In re Everfresh*, a protocol based on the Concordat was effective because it allowed the parties to specify early in the proceedings how a wide range of matters would be dealt with by courts in Canada and the United States.¹⁰⁶ The *Everfresh* protocol specifically addressed choice of law, choice of forum, claims resolution, and avoidance action issues, among other issues.¹⁰⁷ *In re Everfresh* provides a demonstration of why a protocol based on a statutory model, like the Concordat, is especially useful. The creators of the Concordat carefully considered situations which may arise in an international insolvency, and used those situations as a guiding principle in creating a highly detailed statutory system. Basing a protocol on a preexisting model statute allows protocols to be created more efficiently, because creators do not have to “reinvent the wheel.”

IV. THE LEHMAN PROTOCOL

The Lehman Protocol is a response to a lack of applicable law which would be binding on all parties to the Lehman bankruptcy. The lack of a universal system governing international bankruptcy often makes protocols necessary to ensure efficiency in the proceedings and maximization of assets for all creditors.¹⁰⁸ The creators of the Lehman Protocol recognized and documented this need in the Lehman Brothers International Protocol Proposal (“Proposal”) and in the introduction to the Protocol.¹⁰⁹ The Proposal provides helpful insight into the thought process behind the creation of the Protocol and the motivation behind the document.

The Proposal rests on the idea that because of the global nature of Lehman, Lehman’s assets and activities exist across multiple jurisdictions and are subject to the different laws of each of those jurisdictions. The need for some mechanism to organize and facilitate the bankruptcy process is described in the Proposal, which cites “chaos” from a barrage of filings; “melting” assets; lack of any asset or entity inventory; as well

104. Nielsen, *supra* note 98, at 544–45.

105. Including the *Everfresh* Protocol, the *Livent* Protocol, and the *Loewen* Protocol. See Wessels, *supra* note 14, at 183–88.

106. See Order Approving the Stipulation Regarding Cross-Border Insolvency Protocol, *In re Everfresh Beverages, Inc.*, Case No. 95-B-45405-06 (Bankr. S.D.N.Y. Dec. 20, 1995).

107. *Id.*

108. See BUFFORD, *supra* note 7, at 506.

109. Proposal, *supra* note 3, at 10.

as loss of accounting systems, operational support and resources.¹¹⁰ The Proposal specifies that some system is needed to provide information and data sharing, identification and inventorying of assets, management of intercompany claims, and restitution of misdirected funds.¹¹¹ In the introduction to the Protocol, two overarching goals are identified: (1) effective case management, and (2) consistency of judgments.¹¹²

According to the Proposal, the ideal protocol would be based on universalism, allowing the entire bankruptcy to be treated as a single unified case.¹¹³ This would “harmonize” the multiple filings filed globally.¹¹⁴ The Proposal notes, however, that as a practical matter, “no country adopts an unmodified universality approach, reserving some discretion to protect local interests, independence, sovereignty and authority.”¹¹⁵ This is a reflection of the main concern expressed by critics of universalism: individual countries must sacrifice their sovereignty.¹¹⁶ The Proposal therefore is modeled on the more realistic and practical theory of modified universalism.¹¹⁷

The Lehman Protocol, created with a basis in the principles expressed in the Proposal, has a number of overarching goals. The most important goals were to minimize costs and maximize recoveries for all parties involved, and to manage all individual cases effectively with consistent results.¹¹⁸ The Protocol seeks to achieve these goals by focusing on seven aims: (1) coordination, (2) communication, (3) information and data sharing, (4) asset preservation, (5) claims reconciliation, (6) maximization of recoveries, and (7) comity.¹¹⁹ After the Protocol lays out its purposes and aims, it separately addresses: (1) Notice, (2) Rights of Official Representatives and Creditors to Appear, (3) Communication and Access to Data and Information Among Official Representatives, (4) Communication Among Tribunals, (5) Communication Among Committees, (6) Asset Preservation, and (7) Claims. Each of these

110. *Id.*
111. *Id.*
112. Protocol, *supra* note 2, at 2.
113. Proposal, *supra* note 3, at 15.
114. *Id.*
115. *Id.*
116. *See, e.g.,* LoPucki, *supra* note 31, at 2221.
117. Proposal, *supra* note 3, at 15.
118. Protocol, *supra* note 2, at 2.
119. *Id.* at 3.

sections will be addressed separately to examine its basis in modified universalism and its contribution to efficient and successful proceedings.

A. *The Lehman Protocol's Aims*

1. *Coordination*

The Protocol states that international cooperation and coordination of proceedings will allow for the orderly, effective, efficient, and timely administration of proceedings in order to reduce the cost of proceedings and maximize recovery for creditors.¹²⁰

2. *Communication*

The Protocol requires promotion of communication among all “Official Representatives and Committees,” and also requires direct communication between courts whenever possible.¹²¹ The Proposal gives more insight into statutory provisions which should guide communication.

The Proposal outlines certain “mandates for communication and cooperation between courts and foreign representatives” by citing statutory provisions.¹²² The Proposal specifically mentions UNCITRAL Model Law of Cross-Border Insolvency, articles 25 and 26, the U.S. Bankruptcy Code §§ 1525 and 1526, and Guideline 2.1 from *Communication and Cooperation Between Courts and Foreign Representatives*.¹²³ These statutory provisions are cited as the authority which supports inclusion of provisions about cooperation among courts and parties in the protocol.

3. *Information Sharing*

The Protocol requires that all relevant information be shared among Official Representatives to promote effective, efficient, and fair proceedings; and to avoid the unnecessary waste of time and resources which would result from parties having to duplicate each other’s efforts in information gathering.¹²⁴

120. *Id.*
121. *Id.*
122. Proposal, *supra* note 3, at 37.
123. *Id.*
124. Protocol, *supra* note 2, at 3.

4. *Asset Preservation*

The value of all of Lehman's assets should be identified, preserved, and maximized for the collective benefit of all creditors and other interested parties.¹²⁵

5. *Claims Reconciliation*

An important goal identified by the Protocol is the coordination of an efficient and transparent claims process. There should be an especially "consistent and measured" approach to calculating intercompany claims in order to avoid unnecessary intercompany litigation.¹²⁶

6. *Maximize Recovery*

The ultimate goal of bankruptcy law in any country is to maximize recovery for all creditors. The Protocol explicitly recognizes this goal.¹²⁷

7. *Comity*

The Protocol emphasizes the ability of each country to maintain their independent jurisdiction, sovereignty, and authority. Such a provision is especially essential in the Lehman Protocol due to the number of countries involved in proceedings. Prior to the Lehman Protocol, no protocol had been created where proceedings took place in more than three countries.¹²⁸ Courts in the Lehman proceedings will be even more concerned about maintaining authority and independent jurisdiction over the subject matter in its own proceedings.

B. *Notice Provisions*

The Lehman Protocol designates email as the standard form of notice, and requires Official Representatives to provide notice to any party and any Committee established in the proceedings of any "relevant matters in which those parties have an interest."¹²⁹ Equal treatment of creditors is a fundamental principle of modified universalism. The Protocol's

125. *Id.*

126. *Id.*

127. *Id.*

128. Proposal, *supra* note 3, at 38.

129. Protocol, *supra* note 2, at 3.

requirement of equal notice to all creditors is most likely influenced by the Model Law's focus on equal treatment of creditors, including equal notice.

The Model Law recognizes that notice to creditors is crucial in a bankruptcy so that creditors can file their claims in a timely manner.¹³⁰ It acknowledges the importance of equal notice by requiring that foreign creditors be given the same level of notice as domestic creditors at all points where domestic creditors are required to be given notice.¹³¹ In fact, the Model Law requires that foreign creditors be given superior notice to domestic creditors in some situations.¹³² One such situation is where the notice given to domestic creditors would not reach foreign creditors equally well. For example, where notice by publication in a domestic periodical is sufficient for domestic creditors, foreign creditors must be given individual notice.¹³³

The Protocol's designation of email as the preferred form of notice effectively addresses the problems of unequal notice recognized by the Model Law and modified universalism. Notice by email is one of the few forms of notice that will reach all creditors equally, regardless of location.¹³⁴ The designation of email as the single form of notice eliminates problems of inequality of notice and simplifies the requirements for all parties because they need not worry about providing different forms of notice depending on which parties are involved.

Equal treatment of parties is not only important to the Model Law for efficiency and fairness, but also to its level of successful adoption by countries because no country would adopt a model law that disadvantaged its own creditors in certain situations.¹³⁵ The Model Law has provisions for equal treatment of creditors in three areas: (1) notice, (2) distribution of assets, and (3) protection under substantive law.¹³⁶ The Lehman Protocol mirrors the Model Law in that regard by stressing the equal rights of creditors in the areas of (1) notice, (2) filing of claims for asset distribution, and (3) rights under substantive law—the right of creditors to appear in court.

130. See Cronin, *supra* note 88, at 717.

131. Model Law, *supra* note 87, at art. 14.

132. *Id.*

133. *Id.*

134. While it is possible that some remote jurisdictions would not have email access, it does not appear as though any of the parties represented in the Lehman Protocol would have this problem.

135. See Cronin, *supra* note 88, at 717.

136. *Id.*

C. Rights of Official Representatives and Creditors to Appear

The Protocol establishes the right of Official Representatives to appear in all proceedings.¹³⁷ This provision, in effect, allows equal access for all parties to the substantive law governing a proceeding. The right of Official Representatives and creditors to appear is a fundamental principle underlying the Model Law.¹³⁸ The Model Law seeks to change a country's procedural bankruptcy laws rather than substantive bankruptcy laws, and without a provision giving all parties equal access to substantive law, the Model Law could not function.

After establishing the right of a party to appear in any proceeding, the Protocol establishes the right to appear without submitting to the jurisdiction of the tribunal governing the proceeding.¹³⁹ This addresses an important criticism of universalism: universalism is a threat to countries' sovereignty.¹⁴⁰ A party's right to appear at a proceeding without the risk of becoming subject to another jurisdiction's ruling, based on substantive law different from that of the party's home country, allows parties to fully participate in all proceedings without risking threats to sovereignty. Inclusion of this provision in the protocol is of utmost importance because parties cannot be forced to participate in a protocol—and they will only choose to participate if they find the terms to be agreeable. The Protocol makes it more likely that parties will adopt it by addressing what would probably be a main concern of any party: balancing the need to appear at a proceeding with wariness of submission to a foreign court's jurisdiction.

D. Communication and Access to Data and Information

The Protocol instructs Official Representatives to “keep each other generally informed when appropriate of any relevant information and material developments,” to “consent whenever possible to the sharing of information,” and not to unreasonably withhold consent.¹⁴¹ The Protocol is careful, however, not to infringe on the substantive law of any country by specifically not requiring data sharing that violates any country's

137. Protocol, *supra* note 2, at 4.

138. Cronin, *supra* note 88, at 718.

139. Protocol, *supra* note 2, at 4.

140. See LoPucki, *supra* note 31, at 2221.

141. Protocol, *supra* note 2, at 4.

substantive law.¹⁴² For example, the Protocol says that with respect to information that constitutes an attorney’s work product or falls under the category of privileged information, Official Representatives “may, but are not obliged, to share such information with each other, subject to all privileges under the applicable rules of evidence . . . and provided that sharing work product or privileged information shall not be deemed a waiver of any attorney-client privilege or work product protection” under the applicable substantive law of any country.¹⁴³ Because protocols in general are only adopted by the free choice of parties involved, drafters of protocols must be careful to protect all parties’ ability to conform to their country’s substantive law. Otherwise, parties will be reluctant to agree to protocols.

The Protocol also requests that Official Representatives make available to each other “any information that is publicly available” in their jurisdiction, and further, “where permitted under applicable laws, share non-public information with other Official Representatives, subject to appropriate confidentiality arrangements and all privileges.”¹⁴⁴ The Protocol then gives examples of appropriate data sharing: (1) sharing by read-only access all relevant information and data that a party has the right to disclose, and for which it does not have to pay; (2) providing access to books, records, correspondence or other documents that belong to the debtor; (3) “coordinating in good faith the investigations of pre-filing activities with any other Official Representative with an interest in such activities;” and (4) “liasing” with other Official Representatives on matters concerning mutual interests, as long as the parties’ interests are aligned.¹⁴⁵

These provisions concerning data sharing and communication are an attempt to further one of the identified goals of this Protocol—and of all protocols in general—and of the Model Law: effective, efficient and timely administration of proceedings. To further this goal, it is important to conserve resources and time. It can be costly and difficult for parties to discover information from other jurisdictions, even if that information is public. Requiring Official Representatives to provide, upon request, any public information and possibly even non-public information benefits all parties involved because it allows proceedings to operate more efficiently. The Protocol’s emphasis on communication and information sharing is a logical extension of the Model Law’s focus on cooperation between parties.

142. *Id.*

143. *Id.*

144. *Id.* at 4–5.

145. *Id.* at 5.

E. Communication Among Tribunals and Committees

The Protocol references *Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases* (Guidelines), which is included in the appendix to the Protocol.¹⁴⁶ These Guidelines were created by the American Law Institute and the International Insolvency Institute as part of the Transnational Insolvency Project, which resulted in *Principles of Cooperation among the NAFTA Countries*.¹⁴⁷ In its introduction, the Guidelines point to the need for cooperation and coordination between courts in order to maximize assets for all creditors.¹⁴⁸

Cooperation is important in insolvency proceedings because such proceedings are “real time litigation” in the sense that urgent matters depend on timely resolution of proceedings.¹⁴⁹ Delay can cause a debtor’s assets to lose value, thereby depriving creditors of maximum recovery.¹⁵⁰ In tension with the need for timeliness is the fact that miscommunication, misinformation, and misunderstanding between and among courts and parties is common and causes unnecessary delay and expense.¹⁵¹ The Lehman Protocol’s inclusion of the Guidelines is recognition of these issues, and will help the proceedings operate efficiently and in a timely manner.

The introduction to the Guidelines urges courts and parties to apply its principles in a flexible way, stating that “the Guidelines are not meant to be static, but are meant to be adapted and modified to fit the circumstances of individual cases and to change and evolve . . . as the community gains experience from working with them.”¹⁵² This approach is fitting for incorporation into a protocol, such as Lehman’s, because protocols themselves are meant to be flexible documents reflecting the practical experience of parties. The Protocol’s inclusion of flexible and adaptable principles will contribute to its success in governing the proceedings,

146. See American Law Institute, *Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases* (2000), reprinted in Protocol, *supra* note 2, at Schedule A. [Hereinafter Guidelines for Court-to-Court Communication].

147. *Id.*

148. *Id.* at Introduction.

149. Justice J.M. Farley, *A Judicial Perspective on International Cooperation in Insolvency Cases*, 17 AM. BANKR. INST. J. 12 (1998). See also BUFFORD, *supra* note 7, at 547. As opposed to “autopsy litigation,” where it does not make a difference whether a case is dealt with next week or next year. *Id.*

150. See Farley, *supra* note 149, at 12.

151. *Id.*

152. Guidelines for Court-to-Court Communication, *supra* note 146, at Introduction.

especially since prior protocol has governed as many proceedings and assets.

The Guidelines are made up of seventeen principles which can be applied to any international insolvency and even outside of the insolvency context.¹⁵³ The principles allow for communication between almost all parties to an insolvency,¹⁵⁴ and specify the proper means of communication to be used between parties.¹⁵⁵ Guideline 9 allows courts to conduct joint hearings by means of any two-way communication which enables the courts to simultaneously hear each other.

The Guidelines are similar to the Model Law in that they do not attempt to change the substantive rights of parties. Rather, the Guidelines simply seek to provide a procedural mechanism for communication between courts in international insolvency cases.¹⁵⁶ In fact, the Guidelines are closely aligned with the Model Law, and in its Introduction, the Guidelines commended the Model Law for recognizing the importance of communication between courts.¹⁵⁷

The Model Law was one of the first bodies to recognize the need for cooperation between international courts, coupled with equal emphasis on the need to maintain each country's sovereignty.¹⁵⁸ The Model Law orders that courts shall cooperate "to the maximum extent possible" with foreign courts, either directly or through the administrators involved in the proceedings.¹⁵⁹ It then specifies a number of forms of appropriate cooperation, including: (1) communicating information, (2) coordinating the administration of the debtor's assets and affairs, (3) approving and implementing "agreements concerning coordination of proceedings" (such as a protocol), (4) and coordination of concurrent proceedings involving the same debtor.¹⁶⁰ Therefore the Lehman Protocol's incorporation of the Guidelines is in line with the Model Law's modified universalism

153. *Id.* at Judicial Preface.

154. For example, Guideline 2 allows for communication between courts in different jurisdictions. Guideline 3 gives a court authority to communicate with Insolvency Administrators or authorized foreign Court Representatives (the equivalent of an Official Representative in the Lehman Protocol). Guideline 8 states that counsel for all parties should be allowed to participate in communications between a court, a foreign Court Representative, and an Insolvency Administrator.

155. For example, Guideline 6 provides that parties can communicate by sending, transmitting, or delivering copies of any document, including formal orders, judgments, opinions, reasons for decision, endorsements and transcripts of proceedings. Guideline 7 covers all two-way communications, such as by telephone, video conference, or through "any other electronic means."

156. Guidelines for Court-to-Court Communication, *supra* note 146, at Judicial Preface.

157. *Id.*

158. *See* WESSELS, *supra* note 14, at 199.

159. Model Law, *supra* note 87, at art. 25.

160. *Id.* at art. 27.

approach, which emphasizes the importance of communication between courts.

F. Asset Preservation

A widely recognized goal of bankruptcy is the preservation of a debtor's assets in order to maximize recovery for creditors.¹⁶¹ The Lehman Protocol devotes an entire section to this topic. It provides that each tribunal should administer the assets subject to its jurisdiction.¹⁶² If an Official Representative believes that a certain debtor may have a material interest in a specific asset whose value or recovery is at risk,¹⁶³ the Official Representative may (and presumably should) notify that debtor.¹⁶⁴ This certainly furthers the spirit of cooperation and communication espoused by the Model Law and modified universalism. Even further, if an Official Representative believes he has a claim to any asset which has been received by another debtor, or knows himself to have improperly received an asset which should be in another debtor's possession, the Protocol demands cooperation in rectifying the situation.¹⁶⁵

G. Claims

The Lehman Protocol states that when there is more than one proceeding related to the same debtor, including main proceedings (Plenary Proceedings) and non-main proceedings (Limited Proceedings), a creditor should only file a claim in the one proceeding designated by the debtor—the main proceeding in the debtor's home country.¹⁶⁶ Further, actions should be undertaken—such as “adjust distributions”—to ensure that a creditor who has received payments on a claim in one proceeding does not receive payments for the same claim in any other proceeding.¹⁶⁷

161. See, e.g. WESSELS, *supra* note 14, at 14.

162. Protocol, *supra* note 2, at 6.

163. An asset may be at risk because of (1) sale, abandonment, or other disposition of the asset, (2) termination, suspension, or other transition of an employee managing the asset, or (3) commencement of any judicial or non-judicial proceeding affecting the asset. *Id.* at 6.

164. *Id.*

165. *Id.* at 7.

166. *Id.*

167. *Id.*

This provision attempts to maintain equal treatment of creditors by preventing any creditor from receiving more than his fair share of assets by submitting the same claim in more than one proceeding.¹⁶⁸ Communication between courts will be essential to enforce this provision because, without communication, courts will not know whether a creditor has submitted the same claim in another proceeding. Article 8.4 of the Protocol recognizes that communication among the parties is also essential to ensure equal distribution of assets. It states that Official Representatives should, where possible, “coordinate notice procedures and establish the same deadlines for the filing of claims” in each proceeding.¹⁶⁹ Equal notice to creditors of deadlines for filing claims is fundamental because, before there can be fair distribution of assets, creditors must know how to submit their claims properly. The Protocol models its claims system on the modified universalism approach used by the Model Law.

The Model Law recognizes “main” proceedings and “non-main” proceedings. This is similar to the universalism idea of one home country proceeding, instead of individual proceedings in each country. Under the Model Law, there can only be one main proceeding, and it occurs where the debtor has the “centre [sic] of its main interests.”¹⁷⁰ There is a presumption that the debtor’s center of main interests lies where it is registered as a corporation, but that presumption can be overcome by evidence that the location of incorporation is not where the debtor has his main interests.¹⁷¹ If a debtor has an “establishment” in a foreign country, but not its center of main interests, then all proceedings in that country are designated as non-main proceedings.¹⁷² Similarly, the Protocol separates proceedings relating to each debtor into Plenary Proceedings and Limited Proceedings, which are “secondary or ancillary” to Plenary Proceedings.¹⁷³ These proceedings specified by the Protocol are different only in name to the main proceedings and non-main proceedings of the Model Law.

The designation of a proceeding as main or non-main has crucial consequences within the Model Law. The recognition of a main proceeding results in a stay being issued against all individual proceedings against the debtor and freezes all transfers of a debtor’s assets.¹⁷⁴ A determination that a proceeding is non-main has less extreme consequences. There are

168. *Id.*

169. *Id.* at 8.

170. Model Law, *supra* note 87, at art. (17)(2)(a).

171. *Id.* at art. 16(3).

172. *Id.* at art. 2.1.

173. Protocol, *supra* note 2, at Appendix A.

174. Model Law, *supra* note 87, at art. 20.

no mandatory actions taken when a proceeding is characterized as non-main. All actions are within the discretion of the court.¹⁷⁵ The court may choose to stay other individual proceedings, suspend the debtor's right to transfer any assets, or collect evidence, among other things.¹⁷⁶

Unfortunately, the Model Law does not address the critics of territorialism who point out that debtors may engage in forum shopping.¹⁷⁷ If there is more than one country where a debtor could have the main proceeding, it is likely that he will determine which country's substantive law is most favorable to him and then establish the main proceeding in that country. The law most favorable to the debtor is not always the law most favorable to creditors, so the ability of debtors to forum shop would be restricted in an ideal system.

The Model Law does, however, contain some provisions to prevent forum shopping by creditors—a possibility in a pure territorialism system. In such a system, it is sometimes possible for creditors who have received payment in a proceeding in one country to “hop” to another jurisdiction and receive another payment there, in effect getting more assets than are due to them.¹⁷⁸ The Model Law prevents this by demanding equal payment among all creditors. A creditor who has received payment in one jurisdiction cannot collect money in a different proceeding if similarly situated creditors have received proportionately less money.¹⁷⁹ The Model Law addresses other weak points of a pure territorialism system by focusing on recognition, access, and cooperation between countries and representatives.¹⁸⁰

The Model Law requires a court to recognize foreign proceedings once a foreign representative has filed the proper paperwork. At that time, the foreign proceeding is characterized as main or non-main. This characterization ensures unrestricted access for foreign creditors. Once the foreign proceeding has been recognized, the Model Law then seeks to integrate those two proceedings to achieve a fair and efficient result by requiring cooperation between the two courts.¹⁸¹ The Model Law places a strong emphasis on the requirement of cooperation between

175. *Id.* at art. 21.

176. *Id.* at 1.

177. Cronin, *supra* note 88, at 721.

178. *Id.* at 718.

179. Model Law, *supra* note 87, at art. 32.

180. Cronin, *supra* note 88, at 713.

181. *See* Model Law, *supra* note 87, at Ch. IV (emphasizing importance of cooperation).

courts and representatives in order to achieve efficiency and fairness. Another point central to the Model Law is the equal treatment of similarly situated creditors.¹⁸²

The Model Law also requires that a country's foreign creditors be given equal treatment to domestic creditors under local substantive law.¹⁸³ This does not introduce any changes to a country's substantive law, but rather changes to procedural law to provide foreign creditors with the same rights under the substantive law as those provided to domestic creditors. These changes to procedural law suggested by the Model Law work mainly by giving foreign creditors equal access to a country's legal system: foreign creditors have equal rights to commence and participate in any proceeding.¹⁸⁴ Another way the Model Law ensures equal treatment for foreign creditors is through regulation of discretionary relief given by a court. Courts are required to consider the interests of *all* parties when they fashion any form of relief; they may not protect domestic creditors at the expense of foreign creditors.¹⁸⁵

V. PRECEDENTS RELIED UPON BY THE LEHMAN PROTOCOL

Prior protocols only have narrow applicability to the Lehman Protocol because the prior protocols have been limited in both the size of proceedings and in the number of countries involved.¹⁸⁶ Lehman Brothers is the largest bankruptcy in history, and its size alone makes it difficult to apply the principles relied upon in prior protocols.¹⁸⁷ There are, however, prior protocols which can be applied to some extent.

The protocol in the case of *In re Maxwell Communication Corporation*¹⁸⁸ was the first global plan for "orderly liquidation" that had ever been achieved.¹⁸⁹ In *Maxwell*, the court-appointed examiner worked with administrators based in the United Kingdom to create a single unified plan of reorganization.¹⁹⁰ *Maxwell* is important to the Lehman Protocol in terms of precedential value because it was the first cross-border protocol ever approved for use among two plenary bankruptcy proceedings. Further, *Maxwell* provides a useful demonstration of how avoidance rules—which often differ widely from country to

182. *Id.* at art. 13.

183. *Id.*

184. *Id.*

185. Model Law, *supra* note 87, at art. 22.

186. Proposal, *supra* note 3, at 38.

187. *Id.*

188. *See generally In re Maxwell Commc'n Corp.*, 170 B.R. 800 (Bankr. S.D.N.Y. 1994).

189. Westbrook, *supra* note 9, at 2535.

190. Proposal, *supra* note 3, at 38.

country—can be applied “sensibly” in an international insolvency proceeding.¹⁹¹

In *Maxwell*, the corporate debtor had its administrative center in London, but the company’s principal assets were located in the United States.¹⁹² This corporate structure not only led to the administration of bankruptcy proceedings in the United Kingdom, but also the filing of chapter 11 bankruptcy in the United States.¹⁹³ Central to the case were certain pre-filing payments made by the debtor to various European banks.¹⁹⁴ Those payments would have been avoidable under U.S. law, but were not avoidable under U.K. law.¹⁹⁵ Parties could not agree over which law should apply because the application of U.S. law would benefit U.S. creditors by allowing greater recovery of assets, while application of U.K. law would benefit other creditors. Through the unprecedented use of a protocol, which focused on harmonizing the actions of the U.K. administrators and the examiner in the U.S. chapter 11 case, the U.S. courts and parties were able to “take a worldwide view of the case, rather than a parochial one.”¹⁹⁶ This resulted in an agreement between the parties to apply U.K. law. The protocol stated as its objective, that all parties should consult with each other and create “essentially similar arrangements” for a plan of reorganization.¹⁹⁷ This objective was successfully realized, and for that reason, *Maxwell* opened the door for future protocols and cooperation between private parties in the international insolvency context.

Without *Maxwell*, the Lehman Protocol could never have been created. *Maxwell* did, however, leave many issues which are relevant to the Lehman case unanswered.¹⁹⁸ While *Maxwell* provides the fundamental

191. Westbrook, *supra* note 9, at 2531.

192. Flaschen & Silverman, *supra* note 8, at 590. Maxwell Communication Corp. was a holding company based in the United Kingdom, with more than 400 subsidiaries spread across the world. *Id.* Primarily, the subsidiaries performed information services and electronic publishing, as well as language instruction. *Id.* Maxwell’s bankruptcy was sparked by the mysterious death of Robert Maxwell—he either fell from or was pushed from his yacht. Westbrook, *supra* note 45, at 2321. His financial empire subsequently collapsed within a matter of weeks. Westbrook, *supra* note 9, at 2534.

193. Westbrook, *supra* note 9, 2534.

194. *Id.* at 2535.

195. *Id.* at 2536.

196. Westbrook, *supra* note 45, at 2321.

197. WESSELS, *supra* note 14, at 180.

198. For example, the *Maxwell* protocol did not address matters of “ultimate proceeding resolution,” such as an exit strategy and methods of distribution to creditors. Flaschen & Silverman, *supra* note 8, at 591. Generally, *Maxwell* focused more closely on the issues

concept on which the Lehman Protocol is built, other earlier protocols addressed specific problems which may arise in the Lehman proceedings.

The Proposal cites one specific problem in implementing the Protocol in any civil law jurisdiction, as opposed to a common law jurisdiction.¹⁹⁹ Civil law judges may be restricted in their ability to take action not explicitly authorized by the civil code, limiting their ability to act pursuant to a privately agreed upon protocol.²⁰⁰ Two precedent protocols may, however, provide guidance in solving this problem.

In the case of *In re Nakash*, the first protocol between a common law country and a civil law country was created.²⁰¹ This is important precedent upon which the Lehman Protocol can rely because a number of civil countries are involved in the Lehman proceedings. Significantly, civil law countries require that judicial action be taken only as specifically authorized by statute. Therefore, a civil law court cannot simply order and enter into a protocol agreement with a foreign court unless there is express statutory authorization to do so. Very few, if any, civil law countries have such specific statutory authorization. In *Nakash*, however, the Israeli court gave tacit approval of the protocol without formal adoption of it.²⁰²

In re Nakash dealt with the bankruptcy of an Israeli bank and Joseph Nakash, the bank's former director.²⁰³ A conflict arose when the Israeli official receiver enforced a \$160 million judgment by an Israeli court against Nakash's assets, which existed in the United States and Israel.²⁰⁴ The receiver's action violated the stay imposed in Nakash's U.S. bankruptcy case. The U.S. and Israeli courts were able to resolve the conflict through the use of a protocol. In fact, *Nakash* was one of the first cases where the courts themselves, rather than the parties involved, expressed a desire for cooperation and communication.²⁰⁵ It was possible to create a protocol in this case, despite a civil law court's need to find express statutory authorization for all actions, because the Israeli Court adopted the protocol without formally approving the Nakash Protocol. Such a tactic could also work well in the Lehman setting.

of preserving stability in the corporate debtor's organization and asset preservation—both of which are specifically relevant to Lehman. *Id.*

199. Proposal, *supra* note 3, at 37.

200. *Id.*

201. *In re Nakash*, Case No. 94-B-44840 (BRL) (Bankr. S.D.N.Y. May 23, 1996), reprinted in Flaschen & Silverman, *supra* note 8, 612 [hereinafter *Nakash Protocol*]; see also *id.* at 593.

202. *See id.*

203. WESSELS, *supra* note 14, at 181.

204. *Id.*

205. *Id.* at 182.

VI. THREATS TO THE LEHMAN PROTOCOL

Ultimately, no matter how expertly a protocol is drafted, and no matter how well it should work in theory, a protocol is of no value if parties refuse to adopt it. Parties' reluctance has not been a problem in the protocols mentioned in this article. Yet, it is impossible to know how many attempted protocols have failed because parties refuse to accept the process. Although the Lehman insolvency is far from an ultimate disposition, it is already apparent that some parties in the Lehman case are reluctant to adopt the Protocol. For example, Pricewaterhouse Coopers, a major party in proceedings taking place in the United Kingdom, has refused to adopt the protocol.²⁰⁶

The parties resisting the Lehman Protocol fear that its adoption would not be in the best interests of creditors, and that the Protocol could put creditors in conflict with their own nation's bankruptcy law.²⁰⁷ Tony Lomas, the Pricewaterhouse Coopers partner dealing with the Lehman bankruptcy, stated, "[t]here is a concern that there will be differences of opinion, which could give rise to potential litigation between affiliates. We don't want to be morally blocked from doing anything like that."²⁰⁸ Unfortunately, such a statement reflects a misunderstanding of the scope of the Protocol, which does not impose any moral duties, but rather provides guidelines for cooperation between parties. If the Protocol fails, and parties cannot cooperate, the Protocol would have no bearing on any subsequent litigation. Nevertheless, future protocols would be well advised to explicitly state the limits of their scope, so concerns like Lomas' would not arise.

VII. SUGGESTIONS FOR FUTURE PROTOCOLS

Future protocols based on modified universalism could benefit from additional provisions which are contained in neither the Lehman Protocol nor the Model Law. The problem of forum shopping presented

206. See, e.g., Philip Aldrick & Helia Ebrahimi, *PwC Rejects Global Plan for Lehman Recoveries*, THE TELEGRAPH, May 26, 2009, <http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/5389607/PwC-rejects-global-plan-for-Lehman-recoveries.html>.

207. *Id.*

208. *Id.*

by universalism is not fully addressed by modified universalism.²⁰⁹ Forum shopping could be more efficiently thwarted if future protocols adopted formal procedures for deciding a debtor's home country.²¹⁰ Developing guidelines to help accurately and reliably determine a debtor's home country may not be easy, but doing so would increase predictability in international insolvency and would make it harder for all parties to engage in forum shopping. Presently, the decision of whether a proceeding is main or non-main is made within a few days of the filing of a case. This determination should be delayed somewhat, to allow all interested parties the opportunity to be heard and to allow the court to consider all evidence bearing on the issue.²¹¹ Further, notice of the pending determination should be provided to all interested parties in a timely manner, to allow them the opportunity to submit evidence.²¹²

Additionally, future protocols and the Model Law would be improved by the provisions allowing for all of the legal entities in a large multinational corporate group, such as Lehman, which constitute an "integrated economic unit" to file in the same venue.²¹³ Almost all multinational corporations such as Lehman are corporate groups, rather than single corporations, and have multiple legal entities.²¹⁴ The Model Law was not, however, drafted with corporate groups in mind. The Model Law requires that each legal entity of a corporate group be evaluated separately to determine its home country for purposes of characterizing a proceeding as main.²¹⁵ The Model Law's approach is problematic because "a corporate group that is an integrated economic unit can only be reorganized or liquidated efficiently if it is done collectively for the entire group."²¹⁶ Proponents of universalism and territorialism both agree that future protocols and the Model Law would be improved if economically integrated entities of a corporate group had the same home country, while economically independent entities of a corporate group each had separate home countries.²¹⁷

209. See *supra* Part II.B. Proponents of universalism do not have any strong arguments in response to criticism of universalism because of the opportunities it creates for forum shopping. They merely reply that forum shopping is not as big of a problem as some think, and that changes will eventually be made to the Model Law and E.U. Regulations.

210. See Bufford, *supra* note 10, at 131.

211. *Id.*

212. *Id.*

213. *Id.*

214. LoPucki, *supra* note 94, at 92.

215. Bufford, *supra* note 10, at 136.

216. *Id.*

217. LoPucki, *supra* note 94, at 136.

VIII. CONCLUSION

Although Lehman bankruptcy “saga” has not yet concluded—the Lehman bankruptcy’s full affect on creditors was still unclear upon publication of this article in 2011—it is clear that adoption of a protocol has provided for a more efficient process.²¹⁸ Nevertheless, the size and scope of the Lehman bankruptcy filings have made adoption of a protocol more difficult, and undoubtedly issues will arise that have not been addressed by prior protocols. Hopefully, courts and parties will be able to look back on the Lehman filing and the success—or lack thereof—of its Protocol and glean principles to guide future international insolvency proceedings.

218. See, e.g., Jim Boulden, *Lehman Saga Still Being Unraveled in London*, CNN.COM/WORLD BUSINESS, Sept. 15, 2009, <http://www.cnn.com/2009/BUSINESS/09/14/lehman.world.lomas/>.

