

2017

An Analysis of the Three Major Cross-Border Insolvency Regimes

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An Analysis of the Three Major Cross-Border Insolvency Regimes

By:

Ryan Halimi

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I. Introduction

As companies have increased their international presence, cross-border insolvency has become more prevalent. Companies have formed complex corporate groups which contain many subsidiaries in multiple countries, each owning different assets. The growing convolution of companies' corporate structures has led to more intricate cross-border insolvencies involving additional countries. Transnational insolvency has several problems, including forum selection, enforcement of judgments, and creditor rights, but the various cross-border insolvency regimes create major issues among countries. Countries have different cross-border insolvency policies for the assets within their border, but universalism and territoriality represent the two overarching regimes.

This paper analyzes the cross-border insolvency regimes of the United States, Singapore, and Hong Kong as case studies of the different systems. The United States utilizes a universalism regime which requires the countries with the company's assets to transfer them to the main court proceeding. On the opposite end of the spectrum, Singapore's old territoriality system allows the country's courts to apply its local insolvency laws without deferring to other proceedings. Earlier this year, Singapore changed its insolvency statute to a universalism system, but this paper will use Singapore's old regime to represent the other territoriality countries.¹ Hong Kong utilizes modified universalism, which incorporates certain aspects of both territoriality and universalism.

I recently visited Hong Kong and Singapore on the school's International Immersion Program where I learned about the territories' legal systems and spoke with professionals. This paper will analyze the insolvency of the hypothetical company DroneCo to discuss how cross-

¹ Companies (Amendment) Act (Cap 50, 2017 Rev Ed)

border insolvencies operate in each of the three territories. By analyzing the differences among the territories, the reader will better understand the effect of the various transnational insolvency regimes and the creditors' disparate outcomes.

The paper will also analyze potential policy changes in each territory, including Singapore's decision to move to a universalism regime. Each territory's unique issues either limit or encourage changes to its insolvency regimes. Countries should realize that the signaling effect of their decision to adopt a different type of regime might affect external factors—such as foreign direct investments—more than the statute's actual effects.

II. Cross-Border Insolvency Regimes

a. Singapore's Old Territorial Approach

Singapore's old Companies Act contained the territorial cross-border insolvency provisions.² The main tenant of territoriality is that the country uses its own cross-border insolvency laws without deferring to other countries' laws. With Singapore, the country's statutes provided more financial support for the creditors within the country over other cross-border insolvency regimes. In practice, however, Singapore's old system had recently relied upon common law principles that resulted in a system more akin to a modified universalism regime.

For a country of such small size, Singapore's decision to institute the initial territorialism regime earned the country many advantages. This system alleviated the need for the Singaporean courts to worry about foreign proceedings or recognize other judgments, which led to easier dispositions of claims. The local debtors also obtained a higher percentage of the insolvency award which would increase the likelihood they loan money to Singaporean businesses.

² Companies Act (Cap 50, 2006 Rev Ed)

Some commentators have called territoriality the “Grab Rule” as local creditors have legitimate expectations that potential issues are resolved using local policies.³ Proponents of territoriality argue that local creditors likely contribute most to the debtor’s business and, therefore, should receive money first. While this may have been true when Singapore became a country in 1962, Singapore’s reign as one of the main centers for the global economy means transnational insolvency cases receive investments from international institutions.

Importantly, Singapore relies on English case law for various areas of law, including insolvency. The Application of the English Law Act states that the common law of England continues to be the law of Singapore.⁴ This act treats as binding both English and Australian court decisions before November 12, 1993. Cases and common law principles after that date are highly persuasive; they become binding only when a Singapore court applies the decision.

The government provided multiple reasons for Singapore’s decision to move from a territoriality regime to adopting the UNCITRAL Model Law on Cross-border Insolvency (“Model Law”). On March 30, 2017, the Companies Amendment Bill became law, which changed Singapore’s territoriality system into universalism.⁵ Although the bill has been signed, even an efficient country like Singapore cannot institute the amendment immediately. The country has implemented a grace period for lawyers and companies to understand the new policy.

b. United States’ Universalism

The United States universalism exists on the other side of the cross-border insolvency spectrum. Universalism states that Court A—and any other courts dealing with the company’s

³ Leah Barteld, Cross-Border Bankruptcy and the Cooperative Solution, 9 B.Y.U. Int’l L. & Mgmt. Rev. 27 (2012)

⁴ Companies Act (Cap 7A, 1994 Ed) s 3(1)

⁵ Companies (Amendment) Act (Cap 50, 2017 Rev Ed)

assets within its jurisdiction—should transfer the ability to deal with those assets to Court B where the main proceeding occurs.⁶ Court B can then make a unified distribution to creditors regardless of their location. Universalism’s central idea provides the judge of the main proceeding with the ability to make a more equitable allocation of resources as the court has more of the company’s assets at its disposal.

United States’ universalism regime adopted the Model Law. Chapter 15 of the Bankruptcy Code adopts the Model Law nearly verbatim. Unlike other statutes, the introductory section of Chapter 15 details the rationale and benefits of adopting the Model Law.⁷ These ideas reflect the specific reasons for adopting the universalism regime, including cooperation, legal certainty, fairness, maximizing value of debtor’s assets, and rescuing financially troubled businesses.⁸ Forty-two other territories subscribe to the Model Law.⁹ From an American perspective, the benefits of universalism provide certainty regarding bankruptcy laws to the corporations that conduct business in the country.

c. Hong Kong’s Modified Universalism

A description of Hong Kong’s insolvency regime must begin with a better understanding of its legal and political history. Hong Kong was nominally under British rule until 1997 but had retained political and legal autonomy during this period. In 1997, the official handover to the People’s Republic of China (“China”) occurred, making Hong Kong a Special Administrative Region of China.

⁶ John J. Chung, *The Retrogressive Flaw of Chapter 15 of the Bankruptcy Code: A Lesson from Maritime Law*, 17 *Duke J. Comp. & Int’l L.* 262-263 (2007)

⁷ *Companies Act (Cap 50, 2006 Rev Ed)* s 1501(a)

⁸ *Id.*

⁹ *Status of UNCITRAL Model Law on Cross-Border Insolvency*, http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html (last visited May 15, 2017).

The handover created questions about how Hong Kong's previously autonomous political and legal system would later overlap with China but instead proposed to review these issues in 2047. The situation in Hong Kong has been best described as "one country, two systems," which emphasizes Hong Kong's involvement with China while addressing the obvious differences.

Hong Kong's insolvency regime falls between the extremes of territoriality and universalism in a form called modified universalism. This idea starts with universalism and then moves towards the other end of the spectrum, depending on the amount of territoriality. As discussed later in this paper, Hong Kong's regime is closer to Singapore's written territorialism statutes than the United States' universalism. Hong Kong's insolvency laws are in Chapter 32 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (the "Companies Ordinance").¹⁰

Modified universalism allows Hong Kong to reap the benefits of both regimes. The territory can cooperate with other countries during insolvency proceedings, but courts are not forced to cooperate. Hong Kong also can invoke the provisions that protect the creditors within its borders by utilizing the company's assets within the territory. Similar to territoriality, not all countries agree with the concept of universalism, which provides Hong Kong with a huge benefit. Hong Kong's position as a major center of international business has created many multinational corporations in the territory and even more international lending.

While learning about each regime in the abstract is instructive, the paper will analyze the hypothetical cross-border insolvency of DroneCo to portray the practical concerns of each territory.

¹⁰ Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) (2016)

III. The Cross-Border Insolvency of DroneCo

a. DroneCo's Initial Success

This paper will discuss the three territories' insolvency regimes by walking through a cross-border insolvency of the hypothetical company, DroneCo. DroneCo was the New Zealand creation of Bird Wellington—one of the world's foremost engineers—who created DroneCo to manufacture drones for businesses and civilians. The company's humble roots began in Bird's garage as he personally manufactured the drones. Corporations quickly bought DroneCo's drones for aerial photography, especially for construction and farming zones.

After gaining traction selling his drones in small batches throughout the country, Bird obtained his initial \$20 million loan from SCLoanCo to create a large drone factory in New Zealand. After realizing that lenders would provide him with capital due to his experience and nascent success, he took another \$15 million loan from UCLoanCo to manufacture the drone materials necessary to increase the company's ability to control production. Both SCLoanCo and UCLoanCo are New Zealand based banks. DroneCo paid off only the interest of each loan throughout the relevant period, so the company still owed the entire loan amount.

Bird did not read his loan agreements; rather, he passed the job off to his general counsel, Tom. Tom had little experience with loan documents, but he realized the loan agreements came in two varieties. The loan from SCLoanCo had a lower interest rate and held a security interest in the valuable drone manufacturing equipment. The loans for the other facilities came from UCLoanCo, which charged a much higher interest rate without holding a security interest in the custom material manufacturing equipment.

b. Expansion

After a successful initial few years in New Zealand, Bird knew he had to stay ahead of the competition by creating a new version of his most popular aerial photography drone. While DroneCo had succeeded, the company did not have the capital to invest heavily in research and development for the new drone. Bird realized that he could get money from multiple banks, which would cover the costs of his research. Bird received \$3 million loans each from HKLoanCo, USLoanCo, and SingLoanCo, which were banks in Hong Kong, United States, and Singapore, respectively. Bird used the company's strong name to obtain unsecured loans with higher interest rates.

Some confidential details about the company had leaked, so Bird could not trust the development to his entire engineering team. DroneCo sunk every penny of the loan to develop three state-of-art aerial photography drones which could maneuver better around construction zones. Bird found three willing clients in the midst of complex construction in Hong Kong, Singapore, and the United States who were happy to test his new drones for a small fee. Bird personally oversaw the development of the three new construction photography drones called HKDrone, SingDrone, and USDrone (collectively, the "CPDrones").

c. Problems

After its initial success, DroneCo faced major obstacles. Bird supposedly located his office within the manufacturing plant in New Zealand to ensure quality. But, his workers began a sexual harassment lawsuit because the workers alleged that Bird walked around the factory in his underwear and made lewd remarks towards them. Tom knew even less about PR than law, which kept DroneCo in the media longer than necessary. While the case was eventually thrown out, the negative media attention drastically slowed the company's sales.

DroneCo also faced increasing costs when the New Zealand government passed laws to increase the minimum wage. Because DroneCo's located all of its factories in New Zealand, the company needed to invest heavily to move its manufacturing to another country. Additionally, Bird refused to outsource manufacturing outside of New Zealand. DroneCo could no longer pay off the creditors, so it filed for bankruptcy in New Zealand.

d. Insolvency

DroneCo has \$4 million in assets in New Zealand through its manufacturing facilities and stock of drones and materials. Due to the secrecy behind the CPDrones' development, Tom did not realize that Bird had sent the CPDrones to clients. During the insolvency process in New Zealand, Tom learned about the CPDrones in the various territories and stated they were worth approximately \$2 million each. DroneCo has no assets outside these four territories.

New Zealand has adopted the Model Law, so SCLoanCo wants to organize the company's proceedings in New Zealand under one main proceeding. However, HKLoanCo, SingLoanCo, and USLoanCo want to sue within their respective countries because they believe they would receive a higher percentage of their loans from individual sales of the CPDrones.

Two companies have shown interest in purchasing DroneCo. OpenSesame, a direct competitor of DroneCo, wants the technology behind the CPDrones. Bezos, an online retailer of nearly every possible product, would also like to purchase the CPDrones, and Bezos believes that the manufacturing plants are still valuable. By creating its own generic drones, Bezos would be one step closer to its plan of dominating every industry.

IV. Recognition of a Foreign Proceeding

DroneCo's decision to file bankruptcy in New Zealand will start a chain reaction for the creditors. Each creditor will initiate insolvency proceedings within their respective jurisdictions,

and each court's decision to recognize the foreign proceeding is one of the most important factors for the eventual distribution of assets.

a. United States' Recognition of the New Zealand Proceeding

In the universalism context, recognition of a foreign proceeding is the basis for transferring the right to distribute assets. A United States court's decision whether to acknowledge a foreign proceeding depends on the facts and the limited public policy exception.

i. Determining the Existence of Foreign Proceeding

The Model Law simplifies the decision-making process as each country agrees to recognize the proceedings of the other signatories. A few court cases have determined factors for recognizing foreign proceedings from countries that do not participate in the Model Law.

The leading case is *In Re Betcorp*, which outlines seven required elements for determining foreign recognition.¹¹ The most important element is whether the debtor's assets are subject to the control or supervision of the foreign court.¹² Courts also question whether the foreign proceeding meets the same level of fairness of a United States court.¹³

The decision to recognize a foreign proceeding must also pass the public policy exception. For very few cases, a court can decline to cooperate with a foreign proceeding if recognizing the action "would be manifestly contrary to the public policy of the United States."¹⁴ Courts in the United States have narrowly interpreted the public policy exception and only invoked the

¹¹ 400 B.R. 266 (Bankr. D. Nev. 2009)

¹² *Id.*

¹³ *In re Metcalfe & Mansfield Alt. Inv.*, 421 B.R. 685 (Bankr. S.D.N.Y. 2010) ("The key determination required by this Court is whether the procedures used in Canada meet our fundamental standards of fairness.")

¹⁴ 11 U.S.C.A. § 1506 (West)

protection in extreme circumstances.¹⁵ However in *Jaffe v. Samsung Elec. Co.*, the Fourth Circuit broadly invoked the public policy defense when discretionary relief under § 1521 would have imposed relief on other creditors not available in United States' courts.¹⁶ A court will generally attempt to recognize a foreign proceeding, especially one which occurs in a jurisdiction subscribing to the Model Law.

ii. Chapter 15 and Recognizing DroneCo's New Zealand Proceeding

Chapter 15 specifically addresses supporting other proceedings as the United States will “cooperate to the maximum extent possible.”¹⁷ Adoption of the Model Law provides the quickest path to recognizing other countries' foreign proceedings due to the nearly identical provisions. Since New Zealand also subscribes to the Model Law, the foreign representative would make a petition seeking recognition, and the United States judge would recognize DroneCo's New Zealand proceeding.¹⁸ The judge would not hesitate to recognize the proceeding because there is no public policy implication.

b. Singapore will likely recognize the New Zealand proceeding

A petition to recognize the New Zealand proceeding would fall under the discretion of the Singapore High Court. While a Singaporean court does not have the statutory ability to recognize a foreign proceeding, the courts have increasingly relied on common law principles to recognize foreign proceedings.¹⁹

¹⁵ *In re Toft*, 453 B.R. 186, 198 (Bankr. S.D.N.Y. 2011) (stating that the United States rarely denied recognition of foreign proceedings when manifestly contrary to the United States' public policy); *see also In re ABC Learning Centres Ltd.*, 728 F.3d 301 (3d Cir. 2013) (recognizing foreign proceeding even when it allowed secured creditors to retain all of the debtor's assets instead of providing for the administration of all creditor claims)

¹⁶ 737 F.3d 14 (4th Cir. 2013); *In re OAS S.A.*, 533 B.R. 83, 103 (Bankr. S.D.N.Y. 2015) (“courts are reluctant to proscribe an action a party merely finds inconvenient, unusual or even unjust in some way”)

¹⁷ 11 U.S.C.A. § 1501(a)

¹⁸ 11 U.S.C.A. § 1515(a)

¹⁹ *See Re China Underwriters Life and General Insurance CO* [1988] 1 SLR(R) 40 (recognizing a Hong Kong liquidator); *Re Taisoo Suk* (as foreign representative of Hanjin Shipping Co Ltd) [2016] 5 SLR 787 (recognizing and

In the case of the SingDrone, the Singaporean court will likely attempt to recognize the New Zealand proceeding. However, recognition does not guarantee it will transfer the right to distribute assets to the New Zealand proceeding, which would allow SingLoanCo to receive additional funds.²⁰

c. Hong Kong's Rules Regarding Recognition

The Companies Ordinance does not contain provisions covering the recognition of insolvency procedures commenced in other jurisdictions. Hong Kong does not have a formal process to assist or recognize a foreign proceeding, which makes it closer to a true territorial regime. However, courts have been willing to recognize other proceedings in certain situations.

Hong Kong courts will generally recognize a liquidator appointed in the country of the company's incorporation when no public policy issues exist.²¹ The Companies Ordinance also provides that the same rules will apply for the rights of unsecured and secured creditors which have been extended to include foreign creditors as well.²² However, courts have drawn a line between recognition of foreign liquidators and applying a foreign order.²³ Even if a court recognizes the foreign proceeding, the court has the discretion not to provide any further relief.

providing assistance to Korean proceedings); *Re Opti-medix* (in liquidation) [2016] SGHC 108 (“A consequence of a greater sensitivity to universalist notions in insolvency is a greater readiness to go beyond traditional bases for recognising foreign insolvency proceedings.”)

²⁰ *Tohru Motobayashi v. Official Receiver* [2000] 3 SLR(R) 435 (recognizing a Japanese liquidator through the Companies Act, but the court refused to allow Singaporean liquidator to remit assets of company); *Re Projector SA* [2009] 2 SLR(R) 151 (allowing a foreign company to fall into same pool as local unsecured creditors, yet the debtor did not have enough money to fully pay off secured creditors, which led to the foreign company receiving no tangible benefit)

²¹ *See Joint Official Liquidators of A Co v B* [2014] 4 HKLRD 374

²² Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) § 264 (2016); *see also Re Moulin Global Eyecare Trading Ltd* [2007] HKCFI 747

²³ *Joint Administrators of African Minerals Ltd (in administration) v Madison Pacific Trust Ltd & Shandong Steel Hong Kong Zengli Ltd* [2015] HKEC 608 (stating that a court will apply stricter requirements for recognizing a foreign order as the foreign court could proscribe relief not allowed in Hong Kong)

i. Hong Kong May Recognize the New Zealand Proceeding

Communication among the courts occurs on a case-by-case basis, but I have no reason to believe that the Hong Kong court would refuse to communicate.²⁴ A Hong Kong court can refuse to recognize a foreign proceeding if it believes that the foreign proceeding would hurt the local creditor. HKLoanCo would stand to lose more of the award than if the Hong Kong court placed the drone under the jurisdiction of the New Zealand court. The Hong Kong proceeding would then focus mostly on distributing the HKDrone to the local creditors.

On the other hand, recognizing the foreign proceeding and providing assistance falls under the comity principle.²⁵ Therefore, the Hong Kong court will likely recognize the New Zealand proceeding. Just like Singapore, however, the decision to recognize the proceeding does not necessarily lead to HKLoanCo receiving more than its initial share of the bankruptcy award.

V. Type of Proceeding

a. United States: Foreign Main Proceeding

After the judge recognizes the proceeding, the judge determines the type of foreign proceeding. Chapter 15 explicitly states two options for the type of proceeding including main and nonmain, but the case law has also shown that a proceeding could fall under neither category.²⁶ Each classification drastically changes a judge's approach to the case which affects the relevant bankruptcy protections in Chapter 15.

²⁴ Insolvency and directors' duties in Hong Kong: overview by John Robert Lees, JLA Asia Limited

²⁵ *Joint Official Liquidators of A Company v B and C* [2014] 4 HKLRD 374.

²⁶ *In re Bear Stearns High-Grade Structured Credit Strategies Enhanced Leverage Master Fund, Ltd.*, 374 B.R. 122 (Bankr. S.D.N.Y. 2007), *aff'd*, 389 B.R. 325 (S.D.N.Y. 2008)

i. DroneCo

For the United States' CPDrone, Chapter 15 would allow the court to recognize the New Zealand proceeding as a foreign main proceeding. The court would look at DroneCo's "center of main interest" ("COMI") to determine the type of proceeding. DroneCo's COMI is definitely in New Zealand because Bird controls the company and the manufacturing occurs there. The court would recognize the New Zealand insolvency as a foreign main proceeding.

b. Singapore and Hong Kong: By Order of the Court

Hong Kong and Singapore do not have specific insolvency statutes for distributing assets independent of a company. However, the territories still allow the creditors to initiate involuntary proceedings to obtain a claim on the assets. HKLoanCo and SingLoanCo will initiate the court ordered winding up procedure.²⁷ Both judges should accept the applications due to DroneCo's inability to repay its debt.

VI. Winding up

The drastically different approaches to the steps leading to winding up result in each territory distributing the CPDrones in various ways. For winding up, the major discrepancy among the cross-border insolvency regimes still occurs at the starting point of recognizing the foreign insolvency proceedings and leads to different outcomes for the creditors.

²⁷ Companies Act (Cap 50, 2006 Rev Ed) s 253(b), 254(e); Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) § 179(1) (2016)

a. United States

Chapter 15 provides the communication and cooperation required to find an equitable division of assets. On the request of the New Zealand foreign representative, the court would place the USDrone under the jurisdiction of the New Zealand main proceeding.

b. Singapore

Singapore's territorial statutes should provide a different outcome compared to the United States' cooperation, but the judges' dedication to common law principles leads to surprisingly similar results. Singapore's Companies Act technically requires ring-fencing for foreign companies and a preference for the creditors incorporated within Singapore before any other division of assets.²⁸ However, two major cases have held that debtors are no longer bound by the ring-fencing obligation.²⁹ The court's recent refusal to require ring-fencing makes Singapore cross-border insolvency statute more similar to modified universalism than territorialism. Therefore, a Singaporean court will likely place SingDrone under the jurisdiction of the New Zealand main proceeding.

c. Hong Kong

While Hong Kong utilizes a modified universalism approach for cross-border insolvencies, courts are limited by the insolvency statutes' strict interpretations of foreign proceedings. A court has little power to rule differently in cross-border cases because it must apply the same approach regardless of whether other liquidations are occurring.³⁰ Recognizing and supporting foreign liquidators does not hurt Hong Kong creditors in the same way as pooling together the assets owed

²⁸ Companies Act (Cap 50, 2006 Rev Ed) s 377(3)(c)

²⁹ See *Beluga Chartering GmbH (in liquidation) and others v Beluga Projects (Singapore) Pte Ltd (in liquidation and another)* [2014] 2 SLR 815; *Re Opti-medix (in liquidation)* [2016] SGHC 108

³⁰ *China Medical Technologies Inc*, [2014] 2 HKLRD 997

to a Hong Kong creditor. The court wants to protect the rights of HKLoanCo over providing an equitable division of assets.

d. Distribution of Assets

Under the New Zealand proceeding, the court has the jurisdiction to sell DroneCo's remaining drones and materials, including USDrone and SingDrone, which will greatly increase the price of the bidding. The Hong Kong court would likely not place the HKDrone under the jurisdiction of the New Zealand court.

e. Sale of Assets

Competition between OpenSesame and Bezos had been fierce for the assets under the New Zealand proceeding, but OpenSesame won. OpenSesame paid \$8 million for the New Zealand insolvency assets, and the New Zealand court provided an equitable division of those assets. Overall, UCLoanCo and USLoanCo were owed \$24 million from their loans. Each bank received 33 cents on the dollar for their loans, which led to USLoanCo receiving \$1 million. OpenSesame wanted to prevent Bezos from obtaining the innovative drone technology, so it bid \$2 million for the HKDrone in the Hong Kong proceeding.

Both Hong Kong and Singapore courts would have the HKDrone and SingDrone go directly to repaying HKLoanCo and SingLoanCo for the loans the companies made to DroneCo. HKLoanCo and SingLoanCo would receive the entire \$2 million, and no other money would go to UCLoanCo. Compared to the universalism system in the United States, HKLoanCo would receive twice the money of USLoanCo and SingLoanCo because they need not share the insolvency award with any other creditor.

VII. Singapore's Adoption of the Model Law

Switching gears, this paper will now turn to the current and potential policy changes of the territories' cross-border insolvency regimes. Analyzing a territory's transnational insolvency system reveals the rationale behind potential and implemented policy changes.

a. Pros and Cons of Switching to the Model Law

On March 30, 2017, Singapore incorporated a radical change in its insolvency regime by ratifying the Companies Amendment Bill, which adopted the Model Law.³¹ At first glance, Singapore would lose many benefits from adopting a universalism system. When changing an entrenched statutory regime, all countries must overcome losing the longstanding precedent and the political inertia required to make an enormous switch. However, Singapore's small population of six million people and one-party political system provide the ideal circumstances to quickly and easily switch from an ingrained system.

Another major benefit of switching to the Model Law is the reduction in forum shopping for the best insolvency laws. The Senior Minister of State for Law stated that the huge variety in cross-border insolvency laws across jurisdictions contributed to the complexity of these cases.³² The Judicial Commissioner also stated that traditional insolvency laws were developed with a domestic focus and, therefore, created uncertain results for cross-border insolvencies.³³ By

³¹ Companies (Amendment) Act (Cap 50, 2017 Rev Ed)

³² Speech by Senior Minister of State for Law, Indranee Rajah, at the Regional Insolvency Conference, (2014), <https://www.mlaw.gov.sg/content/minlaw/en/news/speeches/speech-by-sms-at-regional-insolvency-conf-2014.html> (last visited May 15, 2017).

³³ Kannan Ramesh, Cross-Border Insolvencies: A New Paradigm, http://www.supremecourt.gov.sg/Data/Editor/Documents/IAIR%202016%20Speech_Ramesh%20JC_delivered.pdf (last visited May 15, 2017).

incorporating the Model Law, Singapore reduces the desirability of forum shopping for cross-border insolvencies and provides more consistent and predictable outcomes.

Additionally, Singapore is one of the few nations that utilizes the common law system; the nearby Asian countries rely on the civil law system. Singapore's switch to the Model Law will further complicate the insolvency procedures with its neighbors. But, Singapore has its sights on becoming the primary jurisdiction for commercial transactions throughout the world. Detailing some of Singapore's recent changes to become the world's center of international commercial disputes and transactions provides context for Singapore's adoption of the Model Law.

b. Singapore's Dedication to Becoming a Financial Center

My trip to Singapore included several discussions with executives from the Singapore International Arbitration Center and Singapore International Mediation Center.³⁴ Both people discussed Singapore's decision to increase its presence as the world's center for international disputes through alternative dispute resolution mechanisms and other legislative changes. The speakers argued that Singapore has consciously determined to turn itself into a "hub"—a word I heard from multiple speakers throughout the trip—for all commercial transactions. Christopher Bloch, my contact at the Singapore International Arbitration Center, believed that any country's corporate laws were only as strong as its weakest link, and companies would hesitate to enter the Singaporean market due to its small size.

One of Singapore's most innovative creations is the Singapore International Commercial Court ("SICC"). SICC provides jurisdiction over any claim of "international and commercial

³⁴ I spoke with Christopher Bloch who is the Associate Counsel and Business Development Manager at the Singapore International Arbitration Center and Deputy Chief Executive Officer Aloysius Goh at the Singapore International Mediation Center.

nature.”³⁵ The provision allows SICC to adjudicate any international dispute if both parties agree to appear in the court which provides a substitute to alternative dispute resolution unseen in other countries. SICC also allows foreign lawyers registered with the court to try cases and bypass the typical licensing process.³⁶ Singapore prides itself on the efficiency and sophistication of its judiciary. By striving to become a hub for international disputes and transactions, Singapore’s cross-border insolvency regime could not continue to isolate itself from the rest of the world. Switching to the Model Law allows Singapore the ability to present itself as a hub of international transactions from cradle to grave.

Singapore’s government rationalized the change in similar ways to the United States’ Chapter 15 views. The Second Reading Speech—the penultimate step of turning a bill into law—explains that the main reasons behind the change were “[g]reater certainty of outcome and significantly enhance[ing] Singapore’s capability in dealing with cross-border insolvencies.”³⁷ The country’s stated reasoning behind adopting the Model Law is only one reason for the switch from territoriality to universalism.

c. Other Rationales behind Adoption of the Model Law

In Singapore, I spoke with Chong Kah Kheng, an insolvency partner at Rajah & Tann, one of the largest law firms in Singapore. Our discussion helped provide further context for Singapore’s decision to formally switch to the Model Law because of the country’s dedication to limit uncertain results and increase investments.

³⁵ SICC - About the SICC, <http://www.sicc.gov.sg/About.aspx?id=22> (last visited May 15, 2017).

³⁶ Legal Profession Act (Cap 161, Rev Ed 2009)

³⁷ Second Reading Speech by Senior Minister of State, Ministry of Finance & Ministry of Law, Indranee Rajah SC, on the Companies (Amendment) Bill, (2017), <https://www.mlaw.gov.sg/content/minlaw/en/news/parliamentary-speeches-and-responses/second-reading-speech-by-senior-minister-of-state--ministry-of-f.html> (last visited May 15, 2017).

Both the United States and Singapore's adoptions of the Model Law explicitly state the desire for legal certainty in resolving cross-border insolvencies.³⁸ Chong believes that, because businesses are becoming increasingly global, Singapore's decision to adopt the Model Law occurred as a natural evolution after relying on uncertain common law principles. Additionally, he believed that the Model Law would boost Singapore's slowing economy by encouraging further investments.

Adopting the Model Law signals to investors and companies that legal certainty and economic focus are important. Singapore's dedication to becoming a hub for international transactions and commerce incentivizes the country to improve its economic policy. My trip emphasized the importance of the country's legal structure. Yet, others believed that the key to Singapore's current and future success depended directly on the economic policy itself.

d. Singapore's Other Advantages

I spoke with David Adelman, the former United States' ambassador to Singapore, and heard his perspective on possible factors that affect Singapore's cross-border insolvency compared to Hong Kong.³⁹ He argued that investors valued certain financial aspects in Singapore compared to other Asian markets, and bankruptcy falls near the bottom of that list. The most important factors for investors are the monetary authority of Singapore, Singapore's government, the long track record of an independent judiciary, and a favorable tax regime.

³⁸ 11 U.S.C.A. § 1501

³⁹ I discussed the relevant matters with former Ambassador Adelman from a more holistic standpoint and did not discuss specific insolvency regimes (including Singapore's recent adoption of the Model Law). However, many of his arguments relate to the international commercial hub concept and seemingly justify the country's ratification of the Model Law.

Ambassador Adelman noted that Singapore is the fifth largest recipient of foreign direct investment (“FDI”) in the world and third in Asia. Western investors pour more money into Singapore than any other Asian country, even after accounting for the differences in the size of the economy.⁴⁰ However, the other two Asian recipients—Hong Kong and China—are boosted in these rankings because they heavily invest in each other’s economies.⁴¹ The United States accounts for 12% of Singapore’s FDI compared to 3.3% and 3% of Hong Kong and China’s FDI, respectively. Accounting for the differences in the total dollars of FDI, Singapore remains ahead of the other territories.

Ambassador Adelman also argued that Singapore has huge economic power despite its small economy in terms of total GDP. Singapore has received invitations to the G20 Summit Conference for the past seven years and has been the organizer for the Global Governance Group, which is an informal meeting among non-G20 countries. Singapore’s efforts to become a hub for commerce and international transactions likely led it to adopt the Model Law.

VIII. Hong Kong’s Potential Policy Changes

Hong Kong would want to move away from its modified universalism regime for the same reasons as Singapore, but the Model Law’s inability to provide a solution for Hong Kong insolvencies with China acts as a major deterrent. However, the adoption of the Model Law mostly provides a signaling effect for investors, which can also be obtained through other methods.

⁴⁰ Singapore: Foreign investment, <https://en.portal.santandertrade.com/establish-overseas/singapore/foreign-investment#fdi> (last visited May 15, 2017).

⁴¹ Hong Kong: Foreign investment, <https://en.portal.santandertrade.com/establish-overseas/hong-kong/foreign-investment> (last visited May 15, 2017); China: Foreign investment, <https://en.portal.santandertrade.com/establish-overseas/china/foreign-investment> (last visited May 15, 2017) (stating 69% of China’s FDI comes from Hong Kong, while 32% of Hong Kong’s FDI comes from China)

a. Hong Kong's Other "Cross-Border" Insolvency Issue

While there is a border between Hong Kong and China, the Model Law does not recognize it as a formal border.⁴² The Model Law recognizes insolvencies only among “foreign states,” which does not describe the situation between Hong Kong and China. China’s current insolvency law provides only a single statute regarding cross-border insolvencies, and it applies only to cases involving a foreign state.⁴³ China has been increasing its political influence within Hong Kong and would not want to acknowledge differences between the two territories.

Hong Kong could adopt an additional amendment to clarify insolvencies between Hong Kong and China, but the amendment would not represent Hong Kong’s best interests. For example, China has difficulty recognizing Hong Kong liquidators and receivers.⁴⁴ On my trip, multiple experts on the “one country, two systems” principle explained that Hong Kong is trying to maintain its independence from China.⁴⁵ Hong Kong would not create an amendment that provides insolvency rights similar to a single country, and China would not accept a law that solidifies a difference between the two territories. The judicial system in China is more corrupt than Hong Kong’s judicial system,⁴⁶ so any additional power for China’s judges results in a net loss for Hong

⁴² U.N. Comm'n on Int'l Trade Law, UNCITRAL Model Law on Cross-Border Insolvency art. 2, U.N. Sales No. E.14.V.2 (1997), www.uncitral.org/pdf/english/texts/insolven/insolvency-e.pdf

⁴³ Emily Lee, Problems of Judicial Recognition and Enforcement in Cross-Border Insolvency Matters Between Hong Kong and Mainland China, 63 Am. J. Comp. L. 439 (2015)

⁴⁴ *McDonald v Golden Dynasty Enterprises Ltd*, [2008] 5 HKLRD 569 (“extremely difficult (although not impossible)” to obtain recognition of Hong Kong liquidators or receivers in China)

⁴⁵ I spoke with Stephen Tang, an expert of electoral politics in Hong Kong, and Anson Chan, the Former Chief Secretary in the British colonial government of Hong Kong and the Hong Kong Special Administrative Region government.

⁴⁶ World Justice Project Rule of Law Index 2016, https://worldjusticeproject.org/sites/default/files/documents/RoLI_Final-Digital_0.pdf (last visited May 15, 2017). (ranking Hong Kong 16th in the world compared to China which falls 80th in the world on 44 different factors relating to the judicial system)

Kong residents. Given the political capital and effort required to switch to the Model Law, Hong Kong is unlikely to change soon.

b. Increased Adoption of Insolvency Protocols

International insolvency protocols provide a framework for communication and cooperation among courts in cross-border insolvencies to harmonize proceedings before conflicts arise. Hong Kong has been willing to recognize international insolvency protocols to counteract the statutory limitations for cross-border insolvencies.⁴⁷ Liquidators set up the framework, which encourages the success of the insolvency through cooperation.⁴⁸ Protocols provide one of the best methods for organizing large cross-border insolvencies, but they have been used only for single cases.⁴⁹ International insolvency protocols assist the largest cross-border insolvencies, but they act only as a substitute until legislative reforms occur.

Yet, several jurisdictions including, Singapore, the Southern District of New York, and Delaware, have adopted the Guidelines for Communication and Cooperation between Courts in Cross-border Insolvency Matters ("Guidelines").⁵⁰ The Guidelines provide more cooperation between courts than insolvency protocols. The Guidelines represent the first time a courts adopted a common framework, and they become more effective when other jurisdictions adopt them.⁵¹ For

⁴⁷ *Re Kong Wah Holdings Limited & Another* HCCW 49 and 50/2000, unreported judgment dated 6 February 2004 ("In the absence of legislation to deal with matters affecting cross-border insolvency, the pragmatic exercise proposed to be adopted by way of the protocols does seem to me to best serve the interests of creditors.")

⁴⁸ *Id.* (stating the liquidators "have put together the protocol as a pragmatic solution to harmonise and co-ordinate concurrent liquidations"); *Re Performance Investment Products Corporation LTD* [2014] HKCU 658 (approving a protocol which the court found agreeable because "the Liquidator is best placed to judge how best to advance the liquidation")

⁴⁹ See e.g., *In re Bear Stearns* 374 B.R. 122

⁵⁰ Issuance of Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters, <http://www.supremecourt.gov.sg/docs/default-source/module-document/registrar/circular/rc-1-2017---issuance-of-guidelines-for-communication-and-cooperation-between-courts-in-cross-border-insolvency-matters-.pdf> (last visited May 15, 2017).

⁵¹ Cross-Border Bankruptcy Guidelines, <https://jonesday-ecommunications.com/234/820/april-2017/cross-border-bankruptcy-guidelines-external-final.asp?sid=49358fd0-bfe1-489c-887d-5cfb30d59b7d> (last visited May 15, 2017).

Hong Kong, incorporating the Guidelines could function as a compromise between issues with China over adopting the Model Law and keeping a modified territoriality regime.

IX. Clarification of the United States' COMI Analysis

The United States need not implement drastic amendments of the Model Law, but it could greatly improve its efficiency and predictability by clarifying the COMI analysis. The COMI analysis was straight-forward for DroneCo, but it has the potential to be one of the most confusing aspects of cross-border insolvencies. Since the United States has already instituted the Model Law, a complete overhaul of Chapter 15 would not make sense. However, Chapter 15 could improve its structure by clarifying the COMI analysis and its rebuttal.

a. Grounding the COMI Analysis

Chapter 15 provides little guidance for judges to determine the company's COMI. The United States can improve cross-border insolvency efficiency and predictability—two of the main rationales behind Chapter 15—by further clarifying COMI. One major problem for the COMI analysis is that the phrase does not appear in other United States statutes.

A few United States bankruptcy courts have felt more comfortable equating COMI with “principle place of business,” a common term in corporate law.⁵² Absent conflicting evidence, courts start with the presumption that the debtor's COMI is the location of its main office.⁵³ An easy solution is to explicitly equate “center of main interests” with “principal place of business,” a phrase prevalent in corporate law. COMI does not fit perfectly into principal place of business, but allowing judges to cite the more established case law would reduce confusion.

⁵² See e.g., *In re Tri-Cont'l Exch. Ltd.*, 349 B.R. 627, 629 (Bankr. E.D. Cal. 2006)

⁵³ 11 U.S.C.A. § 1516(c)

b. Specifying Factors for the COMI Rebuttal

Rebutting the COMI analysis has been difficult for courts. The analysis begins with the assumption that the debtor's COMI is "the debtor's registered office."⁵⁴ Courts have struggled with the factors necessary to refute the COMI assumption, as some decisions rely only on the debtor's factors while others include creditors' concerns. Another solution could involve simply listing the evidence required to rebut the COMI presumption. For example in *In re SPhinX*, the court listed several debtor and creditor factors relevant to change the debtor's COMI away from its registered office:

"[T]he location of the debtor's headquarters; the location of those who actually manage the debtor (which, conceivably could be the headquarters of a holding company); the location of the debtor's primary assets; the location of the majority of the debtor's creditors or of a majority of the creditors who would be affected by the case; and/or the jurisdiction whose law would apply to most disputes"

Other courts have taken different approaches for rebutting the COMI analysis.⁵⁵ Regardless of the actual factors, Chapter 15 would greatly benefit from explicitly stating the elements involved in rebutting the debtor's COMI assumption.

X. Conclusion

Rising globalization leads to corporations finding themselves increasingly susceptible to countries' cross-border insolvency regimes. In theory, universalism provides the most efficient method of distributing the assets of a cross-border insolvency. But as demonstrated by DroneCo,

⁵⁴ *Id.*

⁵⁵ See *In re OAS S.A.*, 533 B.R. 83, 103 (Bankr. S.D.N.Y. 2015) (stating expectations of the debtor's financial creditors and their decisions behind investing affects the COMI rebuttal process)

the concept can break down when other countries do not follow. Each territory representing the cross-border insolvency regimes takes a different approach to cross-border insolvency procedures.

While Singapore's old regime appears more territorial, the country's judges have relied upon the common law to effectively shoehorn universalism and equally distributing assets. The United States' use of the Model Law predictably results in a universalistic approach to the distribution of assets as well. Surprisingly, Hong Kong's modified universalism is more stringent than expected and results in a regime closer to territoriality.

As David Adelman stated, a country's insolvency regime may be so far down the list of factors for deciding to enter the market that it would not change the investment analysis for a company. While cross-border insolvency statutes are important for companies, they likely care more about other economic policies that affect the corporation. Singapore's recent adoption of the Model Law suggests that the most important consequence of its adoption might be the signaling effect to investors about the country's legal and political framework. Even if globalization continues its pace, there are natural limits for insolvency as it must balance between local customs and practices. Companies will face more cross-border insolvency issues as they become more global, and countries which have created clear cross-border insolvency statutes will benefit.