Fordham Law Review

Volume 71 | Issue 5 Article 11

2003

# Not All Politics Is Local: The New Chapter 15 To Govern Cross-Border Insolvencies

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# NOTES

# NOT ALL POLITICS IS LOCAL:* THE NEW CHAPTER 15 TO GOVERN CROSS-BORDER INSOLVENCIES

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## INTRODUCTION

Consider this scenario:[1] Global Tech, PLC, is a global communications company with its headquarters just outside of London, England. Global Tech has manufacturing plants, assets, directors, and creditors in London, as well as in the United States, Australia, Italy, and South America. Each Global Tech plant has borrowed funds from local banks. After several years of operation, the corporation has developed serious problems and is facing bankruptcy. Should Global Tech file for bankruptcy, how will the liquidation be carried out? Will there be a free-for-all with banks and creditors fighting to protect their rights? Are creditors from different countries subject to different jurisdictions and different insolvency laws? How will Global Tech's assets be distributed? Can the United States use its own bankruptcy laws to protect local creditors? If so, will this lead to an unfair result? Unfortunately, there are no easy answers to these questions. In a perfect world, a global insolvency regime would produce outcomes that would serve the interests of all of the parties involved, wherever located, in a simple and efficient manner. Today, however, no such regime exists.

International commerce and trade are gathering momentum such that the tendency towards globalization seems irreversible. This tendency has grown in the recent past and will certainly be the

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* "All politics is local" is the well-known motto of former Speaker of the House Tip O'Neill. *See, e.g.*, Tip O'Neill Archives On Line, *at* http://www.bc.edu/bc_org/rvp/pubaf/chronicle/v7/n12/archives.html (last visited Mar. 25, 2003).

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1. This hypothetical example is based on a situation described in David Cowling, *Cross-border Insolvencies: Building a Framework*, Australian Acct. (Aug. 1997), *at* http://www.cpaonline.com.au/Archive/9708/pg_aa9708_crossborder.htm (last visited Feb. 24, 2003).

tendency in the years to come.[2] International borders have become non-existent with respect to trade and investment. Irrespective of the size of the company, there is a current and widespread tendency to do business across national borders. The continuing global expansion of trade and investment has resulted in a trend of increased cross-border insolvencies.[3] The threat of injustice in instances of cross-border insolvency is a pressing consideration.

A cross-border insolvency arises in any situation where a business enterprise operating in multiple jurisdictions commences or finds itself involuntarily placed into an insolvency proceeding. Cross-border insolvencies present unique challenges to a bankruptcy court to coordinate and synchronize the administration of a reorganization or liquidation involving multiple jurisdictions. While it is possible to manage foreign assets without having to commence a proceeding in the jurisdiction in which the assets are located, more frequently a cross-border insolvency will involve proceedings in more than one jurisdiction.[4]

The extent to which a local insolvency regime can facilitate the efficient and fair administration of an international insolvency is a universal concern. National insolvency laws—including those of the United States—do not adequately address this trend towards globalization.[5] Presently, only a small number of countries have a legislative framework equipped to handle a cross-border insolvency that is well suited to meet the needs of the increasing globalization of the economy.[6] The laws used in cases of cross-border insolvencies are primarily regulated by bilateral and regional treaties, or by the jurisprudence of individual nations. The United States is not a party to any of the international bankruptcy treaties in effect today.[7] The lack of treaty participation by the United States frequently results in inharmonious and often conflicting legal approaches in American

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2. *See* J.M. Farley, *A Judicial Perspective on International Cooperation in Insolvency Cases*, 17 Am. Bankr. Inst. J. 12 (1998); Sara Isham, Note, *UNCITRAL's Model Law on Cross-Border Insolvency: A Workable Protection for Transnational Investment at Last*, 26 Brook. J. Int'l L. 1177 (2001).

3. Carl Felsenfeld et al., International Insolvency pt. 1, 1-2 (2002). Professor Felsenfeld notes that "'[t]he resulting multinational insolvency or reorganisation can present some of the most complex situations confronted by international business and finance.'" *Id.* (quoting Leonard, *Committee J's Initiatives in Cross-Border Insolvencies and Reorganisations: The Experience of the Everfresh Case*, 6 Int'l Ins. Rev. 126 (1997)).

4. E. Patrick Shea, *Cross-Border Insolvency—the Canadian Perspective, in* The European Restructuring and Insolvency Guide 2002-2003, at 555.

5. *See* Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency, 30th Sess., U.N. Doc. A/CN 9/442 (1997) [hereinafter Guide to Enactment].

6. *Id.* at pt. IV.

7. Ronald J. Silverman, *Decision-Making Under Section 304 of the Bankruptcy Code: The Necessity for a Balanced Approach*, 7 Conn. J. Int'l L. 395, 395 (1992) [hereinafter Silverman, *Decision-Making*].

courts which hinder the reorganization of financially troubled companies. These legal approaches are not conducive to an effective or an efficient administration of cross-border insolvencies, and they endanger the assets of the insolvent debtor while preventing maximization of the value of those assets.[8]

Furthermore, the current methods of handling cross-border insolvency cases present foreign investors with tremendous risk and uncertainty, leading to a disincentive to partake in transnational investments.[9] Creditors continue to suffer losses resulting from preferential treatment in foreign bankruptcy courts.[10] Additionally, the current methods of handling cross-border insolvencies are targets for fraudulent behavior because insolvent debtors can more easily conceal assets or transfer them to foreign jurisdictions.[11] The lack of interconnectedness creates an environment where fraud can go undiscovered more easily. Ultimately, this system increases the cost of international trading and prevents worldwide economic growth.[12]

An effective cross-border insolvency system is important to the well-being of a transnational economy and the functioning of its financial scheme. The United Nations Commission on International Trade law ("UNCITRAL") responded to this concern by adopting the Model Law on Cross-Border Insolvency ("Model Law") in 1997. The Model Law creates a thirty-two article framework for the effective judicial administration of cross-border insolvencies.[13] The Model Law does not seek the substantive harmonization of different local insolvency laws.[14] Rather, the Model Law provides a mechanism for the simple, interdependent operation of various local laws and courts.[15] The United Nations has recommended the Model Law for adoption. To date, however, only a few countries have enacted local versions of the Model Law.[16] UNCITRAL's goal, however, is to move international insolvency cooperation to a higher level by ensuring that

8. Guide to Enactment, *supra* note 5, at pt. IV.

9. Isham, *supra* note 2, at 1177-78.

10. *Id.* at 1178.

11. *See Report of the National Bankruptcy Review Commission, at* http://govinfo.library.unt.edu/nbrc/report/10transn.html (Oct. 20, 1997) [hereinafter Report].

12. *See* Farley, *supra* note 2; *see also* Harold Burman & Jay Lawrence Westbrook, *Introductory Note to United Nations Commission on International Trade Law: Model Law on Cross-Border Insolvency*, 36 I.L.M. 1386, 1386 (1997).

13. *United Nations Model Law on Cross-Border Insolvency,* U.N. Commission on International Trade Law, G.A. Res. 52/158, U.N. GAOR, 30th Sess., Supp. No. 17, U.N. Doc. A/52/17 (1997) [hereinafter Model Law].

14. Guide to Enactment, *supra* note 5, at pt. I, para. 3.

15. *Id.*

16. Eritrea, Japan, Mexico, South Africa, and areas within Serbia and Montenegro have all adopted local legislation based on the Model Law. *See* United Nations Commission on International Trade Law Status of Conventions and Model Laws, pt. II, para. 14, *at* http://www.uncitral.org/English/status/status-e.htm (last modified on February 19, 2003).

the Model Law is widely adopted in domestic insolvency legislation worldwide.

In the United States, the text of the Model Law has been proposed as a new chapter, Chapter 15, to the Bankruptcy Code. Currently, the United States Senate and House of Representatives have each passed their own bankruptcy reform legislation. The bills are the Bankruptcy Reform Act of 2001 (the Senate bill)[17] and the Bankruptcy Abuse Prevention and Consumer Protection Act of 2001 (the House of Representatives bill),[18] and are currently pending in Congress.[19] Chapter 15 adopts verbatim many provisions of the Model Law.

This Note argues that the adoption of Chapter 15 into United States law would provide the optimum solution to the problems associated with the current section 304 of the Bankruptcy Code. Part I of this Note discusses two theories that underlie the different types of cross-border insolvency administration. At one end of the spectrum is universalism, while at the other end lies territorialism, with the American procedure falling somewhere in between. This part also discusses section 304 of the United States Bankruptcy Code, the current provision governing cross-border proceedings involving the United States. Finally, Part I describes the Model Law and Chapter 15, and illuminates several of the important provisions of each.

Part II of this Note describes current problems with section 304 of the United States Bankruptcy Code. In particular, Part II explains problems with the modified universalist approach to governing cross-border insolvencies.

Finally, Part III argues that the United States should enact a local version of the Model Law by way of the proposed Chapter 15 because, through its incorporation of universalist principles and its retention of territorialist principles, Chapter 15 is a promising step toward alleviating a substantial number of the significant obstacles to cooperation and the equal distribution of assets. This part describes the ways in which Chapter 15 exhibits both universalist and

17. S. 420, 107th Cong. (2001).

18. H.R. 333, 107th Cong. (2001).

19. The House and Senate adjourned in December 2002 without voting on the Bankruptcy Reform Bill. While the House and Senate passed the bankruptcy reform bills in early 2001, the two versions differed significantly in matters unrelated to the Chapter 15 legislation. For example, a significant issue in dispute concerned the question of whether perpetrators of abortion clinic violence should be able to discharge judgments against them in bankruptcy. The passage of the legislation was delayed by attempts to reconcile the differences in the House and Senate versions. The congressional term concluded without a final vote on the bill. However, bankruptcy reform legislation is certain to be revised for another attempt at passage in the 108th congressional term. *See* Michael E. Foreman & Maryse S. Selit, *Proposal Enhances Protection to Foreign Debtors*, N.Y. L.J., Aug. 26, 2002, at A13; *see also* Paul Gores, *Bankruptcy Reform Likely to Surface Again Next Year*, Milwaukee J. Sentinel Online, *available at* http://www.jsonline.com/bym/news/nov02/98044.asp (last updated Nov. 22, 2002).

territorialist principles, and explains why this combination is necessary to effective treatment of parties to cross-border insolvencies.

## I. THEORETICAL AND LEGAL BACKGROUND OF METHODS OF CROSS-BORDER INSOLVENCY ADMINISTRATION

To understand the impact that Chapter 15 could have upon cross-border insolvency administration, it is helpful to understand the current method used by the United States to handle such situations. Two theories underlie the cross-border insolvency governance. This part discusses these two theories, giving examples of how the theories are used and modified by bankruptcy courts. Additionally, this part describes section 304 of the United States Bankruptcy Code, the current law governing cross-border insolvencies in the United States. This part then introduces the Model Law on cross-border insolvency and describes several of its significant provisions. Finally, this part illustrates several of Chapter 15's significant provisions.

### A. *Two Theories of Cross-Border Insolvencies*

Universality and territoriality represent the margins of international insolvency theory; in practice, most jurisdictions have implemented approaches that fall in between them. These theories are essentially choice-of-law principles. Universality favors abiding by the law of the forum where the main bankruptcy case is pending, while territoriality favors abiding by the law of the court where the local proceeding is pending. Bankruptcy courts often produce different results from one another as a result of the competing theories that underlie their analyses.

#### 1. Universalism: Pure and Modified

The theory of universalism conceives of a system where all components of an international insolvency are governed by a single court and a single applicable law. Universalism has been described as a theory that envisions "a single forum applying a single legal regime to all aspects of a debtor's affairs on a worldwide basis."[20] Universalism purports to send property owned by the foreign debtor in any part of the world back to the debtor's home jurisdiction in order for the property to be distributed to the debtor's creditors in compliance with the local jurisdiction's distribution scheme.[21] Thus, in

20. Paul L. Lee, *Ancillary Proceedings Under Section 304 and Proposed Chapter 15 of the Bankruptcy Code*, 76 Am. Bankr. L.J. 115, 118 (2002) (quoting Maxwell Communication Corp. v. Barclays Bank, 170 B.R. 800, 816 (Bankr. S.D.N.Y. 1994).

21. *See* Jay Lawrence Westbrook, *Multinational Enterprises in General Default: Chapter 15, the ALI Principles, and the EU Insolvency Regulation*, 76 Am. Bankr. L.J. 1, 6 (2002) [hereinafter Westbrook, *Multinational Enterprises*]. Professor Westbrook is an avid supporter of universalism, as well as a leading author of literature on

a cross-border insolvency case rooted in universalism, "countries that hold assets of the debtor will turn over those assets to the trustee or liquidator in the central proceeding . . . and creditors worldwide will be required to submit their claims to this central proceeding."[22] All other courts would recognize the jurisdiction of the presiding court and "abide by and even enforce that court's decisions."[23] Two elements are necessary to a universalist-laden cross-border insolvency: a single forum and a single law to govern every case.[24] Either of these elements is sufficient, although both may co-exist.[25]

Universalism also exists in a modified form. Modified universalism combines the theories of universality and territoriality[26] such that one forum hosts a primary insolvency proceeding to which other jurisdictions supplement with ancillary or secondary proceedings.[27] Ancillary proceedings, therefore, merely aid the main proceeding.

A 1982 case, *In re Culmer*, [28] decided under section 304 of the Bankruptcy Code,[29] effectively demonstrates both universalism and modified universalism.[30] In *Culmer*, a Bahamian bank owned assets in the United States to which creditors had priority rights under the United States Bankruptcy Code.[31] Bahamian liquidators, appointed by the Bahamian Supreme Court to conduct a voluntary liquidation of the bank, filed a section 304 petition seeking turnover of the bank's assets located within the district to the Bahamas for distribution under Bahamian law.[32] The court granted both requests.[33] The court's decision reflects the universalist theory in that the relief included turnover of assets. The court noted that it is the policy of the United

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international insolvency. *See also* 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, 687-88 (2000); Andrew T. Guzman, *International Bankruptcy: In Defense of Universalism*, 98 Mich. L. Rev. 2177, 2179 (2000); Foreman & Selit, *supra* note 19, at A11.

22. Lee, *supra* note 20, at 119.

23. *See* Isham, *supra* note 2, at 1187.

24. Jay Lawrence Westbrook, *A Global Solution to Multinational Default*, 98 Mich. L. Rev. 2276, 2292 (2000) [hereinafter Westbrook, *A Global Solution*]. *See generally* Jay Lawrence Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 Am. Bankr. L.J. 457 (1991) (discussing the role of universalism in transnational defaults) [hereinafter Westbrook, *Theory and Pragmatism*].

25. *See* Westbrook, *A Global Solution*, *supra* note 24, at 2292.

26. *See infra* Part I.B.

27. Westbrook, *A Global Solution*, *supra* note 24, at 2301; *see also* Anderson, *supra* note 21, at 690-91; Isham, *supra* note 2, at 1187 (quoting *In re* Culmer, 25 B.R. 621 (Bankr. S.D.N.Y. 1982)).

28. 25 B.R. at 622.

29. See *infra* Part I.B describing the steps and factors involved in administering a section 304 proceeding.

30. *See* Westbrook, *A Global Solution*, *supra* note 24, at 2300-01.

31. *Culmer*, 25 B.R. at 623.

32. *Id.*

33. *Id.* at 634.

States Bankruptcy Code to afford equal treatment to all creditors.[34] The court's decision effectively allowed the Bahamian government to control the dispersion of the debtor's assets and forced the creditors to submit their claims to the Bahamas. The court reasoned that its role was not to "protect the positions of fast-moving American and foreign attachment creditors."[35] The court instead chose to safeguard the policy favoring "uniform administration" of the insolvency in a foreign court.[36]

Modified universalism, however, was also present in the *Culmer* decision.[37] Before reaching its decision, the court inquired whether the Bahamian law could be trusted to be fair.[38] The court declared that it would:

> look to the other relevant factors enumerated in Section 304(c) to determine whether the evidence presented as to Bahamian law indicates that its application therein would be wicked, immoral, or violate American law and public policy.
>
> An examination of the provisions of Bahamian law related to liquidation proceedings reveals that they are in substantial conformity with our own law.[39]

Thus, the court did not grant the relief until it was satisfied that Bahamian law was similar enough to United States law in order to ensure protection of local creditors.[40] This search for similarity and assurance of fairness represented modified universalism in that deference to universalism was not automatic.[41] The court sought the result that would ultimately come as close as possible to the "ideal of a single-court, single-law resolution."[42] It maintained its discretion to evaluate the fairness of the Bahamian procedures and to protect the interests of local creditors.[43]

### 2. Territorialism: "The Grab Rule"

In contrast to universalism, a country following a territorialist perspective will attempt to keep hold of a foreign debtor's assets located within its boundaries and to distribute those assets pursuant to its own laws for the benefit of its own creditors.[44] In other words,

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34. *Id.* at 630.
35. *Id.* at 629.
36. *Id.*
37. *See* Westbrook, *A Global Solution*, *supra* note 24, at 2300-01.
38. 25 B.R. at 629-30.
39. *Id.* at 629.
40. *Id.* at 629-31.
41. Westbrook, *A Global Solution*, *supra* note 24, at 2300-01.
42. *Id.* at 2301.
43. *Id.*
44. *See* Westbrook, *Multinational Enterprises*, *supra* note 21, at 5-6; *cf.* Shinichiro Abe, *Recent Developments of Insolvency Laws and Cross-border Practices in the*

territoriality is the idea that each country retains the exclusive right to govern within its own borders.[45] In terms of international bankruptcies, territorialism indicates that the bankruptcy courts of one country may preside over those assets of the debtor located within its borders, but not those assets outside its borders.[46] Some commentators refer to territoriality more negatively as the "grab rule" in that a debtor's assets in each country are essentially "grabbed" by local courts and distributed only to those creditors—usually local creditors—who appear at the local proceeding.[47]

*In re Toga Manufacturing*[48] provides an example of a territorialist outcome. In *Toga*, the trustee of a Canadian debtor petitioned to enjoin all of the debtor's creditors from commencing or continuing actions against the debtor or its assets.[49] The court declined to defer to Canadian law because the United States creditor's secured claim under the United States law would be deemed unsecured under Canadian law.[50] The court commented that "[h]istorically, the bankruptcy laws of our country have been hostile towards claims asserted by foreign trustees in bankruptcy against alleged estate property located in the United States."[51] Because of this, the court leaned towards a territorialist result.

The present lack of international cooperation, treaties, or conventions to govern cross-border insolvencies has resulted in a tendency towards territoriality in bankruptcy governance.[52] Under the territorialist approach, foreign insolvency proceedings are seldom recognized by other states.[53] Territorialism is founded upon the idea

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*United States and Japan*, 10 Am. Bankr. Inst. L. Rev. 47, 55 (2002) (describing Japan's move away from territorialism); Foreman & Selit, *supra* note 19; *see also* Disconto Gesellschaft v. Umbreit, 208 U.S. 570, 579 (1908). The Supreme Court refused to apply comity because it "prejudice[d] the rights of local creditors and the superior claims of such creditors to assert and enforce demands against property within the local jurisdiction." The Supreme Court noted that "such recognition is not inconsistent with that moral duty to respect the rights of foreign citizens which inheres in the law of nations." *Id.*

45. Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy*, 98 Mich. L. Rev. 2216, 2218 (2000) [hereinafter LoPucki, *Cooperative Territoriality*]. Professor LoPucki, a leading bankruptcy scholar, believes that "[territoriality] is the default rule in every substantive area of law, including constitutional law, taxation, trademarks, industrial regulation, debt collection, and bankruptcy." *Id.*

46. *Id.*

47. *See* Report, *supra* note 11; *see also* Guzman, *supra* note 21, at 2179; Isham, *supra* note 2, at 1181-82.

48. 28 B.R. 165 (Bankr. E.D. Mich. 1983).

49. *Id.* at 167.

50. *Id.* at 169-70.

51. *Id.* at 167.

52. *See* LoPucki, *Cooperative Territoriality*, *supra* note 45, at 2219.

53. *See* Report, *supra* note 11. *See generally* Leslie A. Burton, *Toward an International Bankruptcy Policy in Europe: Four Decades in Search of a Treaty*, 5 Ann. Surv. Int'l & Comp. L. 205 (1999) (explaining the history of and efforts toward a

of state sovereignty, and as a result, courts oriented towards territorialist outcomes often decline to recognize foreign orders.[54]

### B. *The Current Approach: Section 304*

Section 304 of the Bankruptcy Code was enacted as part of the Bankruptcy Reform Act of 1978 and exists primarily to permit foreign debtors "to prevent the piecemeal distribution of assets in the United States by means of legal proceedings initiated in domestic courts by local creditors."[55] It provides some limited and generalized procedural guidelines for the administration of foreign proceedings in accord with the main case pending in a foreign jurisdiction.

#### 1. Section 304(a): Initiating an Ancillary Proceeding

The first requirement for initiating a proceeding under section 304 is that there must be a "foreign proceeding"[56] pending against the debtor.[57] Section 304 establishes a local proceeding related to the foreign proceeding.[58] Subsection (a) provides the procedure for invoking the regime for administering foreign proceedings.[59]

The second requirement is that the party petitioning for relief must be a "foreign representative"[60] entitled to file the action under section

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system of cross-border insolvency governance).

54. Isham, *supra* note 2, at 1180-81. While territorialism may seem similar to modified universalism, territorialism simply pursues the goal of maintaining exclusive control over matters within a country's own borders. Courts employing territorialist principles usually analyze situations in such a way that will lead to an outcome that favors local sovereignty. *See supra* notes 48-51 and accompanying text. Modified universalism, by way of contrast, leads to more inconsistent and unpredictable outcomes. See *infra* Part II for a discussion of several problems associated with modified universalism.

55. Koreag, Controle et Revision, S.A. v. Refco F/X Assocs., Inc., 961 F.2d 341, 348 (2d Cir. 1992) (holding that the Swiss proceedings fell clearly within the definition of a foreign proceeding).

56. The foreign proceeding to which section 304 is ancillary is defined in 11 U.S.C. § 101(23) of the United States Bankruptcy Code. A "foreign proceeding" is a

> proceeding, whether judicial or administrative and whether or not under bankruptcy law, in a foreign country in which the debtor's domicile, residence, principal place of business, or principal assets were located at the commencement of such proceeding, for the purpose of liquidating an estate, adjusting debts by composition, extension, or discharge, or effecting a reorganization.

11 U.S.C. § 101(23) (1994).

57. 11 U.S.C. § 304(a).

58. *Id.*

59. *Id.*

60. Section 101(24) of the United States Bankruptcy Code defines "foreign representative" as a "duly selected trustee, administrator, or other representative of an estate in a foreign proceeding." The foreign representative commencing the section 304 proceeding must represent the debtor in a foreign proceeding. 11 U.S.C. § 101(24).

304.[61] Section 304(a) enables a representative of a foreign bankruptcy estate to commence an ancillary proceeding in the United States by filing a petition with the bankruptcy court.[62] Ancillary proceedings are most often initiated by a foreign representative seeking the turnover of a foreign debtor's property in the United States.[63] The jurisdiction of the United States bankruptcy courts to hear an action under section 304, however, does not turn on the presence or absence of foreign-owned assets in the United States.[64] Section 304(b) describes the different types of relief, some of which involve the presence of assets in the United States and some of which do not.[65]

### 2. Section 304(b): Available Relief

Once the party bringing a section 304 action establishes that he or she meets the requirements of section 304(a), section 304(b) establishes the extent of the bankruptcy court's power to order relief to that party. The broad language of section 304(b) gives the court substantial discretion in determining whether to grant relief to a foreign representative.[66]

#### a. *Injunctive Relief*

Section 304(b) authorizes a foreign representative to seek relief in the form of an injunction.[67] A foreign representative may petition the court to enjoin "the commencement or continuation of the enforcement of any judgment against the debtor with respect to such property, or any act or the commencement or continuation of any judicial proceeding to create or enforce a lien against the property of

61. *See* 11 U.S.C. § 304(a).
62. *Id.*
63. *See* Foreman & Selit, *supra* note 19.
64. While a fundamental purpose of section 304 is to administer a foreign debtor's United States assets, a foreign representative may petition for a case ancillary to a foreign proceeding for other reasons, such as to obtain an injunction. Section 304 is broad and vague enough to encompass whatever particular problem might arise in a foreign bankruptcy. *See infra* Parts I.B.2.a, I.B.2.b; *see also, e.g.*, Haarhuis v. Kunnan Enterprises, Ltd., 177 F.3d 1007 (D.C. Cir. 1999). The appellees, reorganizers of Kunnan Enterprises appointed pursuant to Taiwanese insolvency laws, filed an action in the United States Bankruptcy Court requesting an injunction against Haarhuis pursuant to 11 U.S.C. § 304(b)(1)(A)(i), which allows a foreign representative to petition a United States Bankruptcy Court to "enjoin the commencement or continuation of any action against a debtor with respect to property involved in such foreign proceeding." *Id.* at 1009. Haarhuis argued that the bankruptcy court had no jurisdiction to hear the proceeding because Kunnan did not own assets in the United States. The bankruptcy court ruled that the presence of such assets was not a necessary condition for jurisdiction under section 304. *Id.* at 1009.
65. 11 U.S.C. § 304(b).
66. *Id.*
67. *Id.* § 304(b)(1)(B).

such estate."[68] Because one filing a petition for relief under section 304 is not entitled to an automatic stay,[69] the bankruptcy court must order all relief under this section expressly.[70] In practice, some bankruptcy courts have been willing to exercise their injunctive power once the section 304(a) procedural predicates for an ancillary proceeding have been met, thus creating a de facto stay.[71]

### b. *Turnover of Assets*

Section 304(b)(2) affords the bankruptcy courts the power to "order turnover of the property of such estate, or the proceeds of such property, to such foreign representative."[72] If granted, a foreign representative will obtain a judgment ordering the property of the debtor held by creditors, or the proceeds of such property, to be turned over to the foreign representative and to be included as part of a foreign proceeding.[73] Turnover of property is the ultimate relief available to a foreign representative,[74] the objective of which is to allow the foreign representative to send the property back to the foreign country for distribution.[75]

### c. *Other Relief*

Section 304(b)(3) enables the United States Bankruptcy Court to "order other appropriate relief" as necessary.[76] This again provides broad discretionary power to the Bankruptcy Court to grant the equitable relief as it sees fit.[77] This authorization is essentially a "blank check" for the courts in fashioning relief under section 304.[78]

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68. *Id.*; *see also* Barbara K. Unger, *United States Recognition of Foreign Bankruptcies*, 19 Int'l Law. 1153, 1170 (1985).

69. An automatic stay operates as an injunction against all entities of such activities as the commencement or continuation of an action against the debtor or the debtor's property, any act to obtain possession of property of the debtor's estate or any act to collect a claim against the debtor that arose before the commencement of the bankruptcy case. 11 U.S.C. § 362(a). In an ordinary title 11 bankruptcy, a stay is automatically granted upon the filing of the petition for relief. *Id.*

70. Lee, *supra* note 20, at 138.

71. *Id.* at 139; *see also supra* note 69 and accompanying text.

72. 11 U.S.C. § 304(b)(2).

73. *Id.*; *see also* Unger, *supra* note 68, at 1171.

74. Lee, *supra* note 20, at 159.

75. *See e.g.*, *In re* Culmer, 25 B.R. 621 (Bankr. S.D.N.Y. 1982); *see also* Lee, *supra* note 20, at 159-60 (discussing *Culmer*).

76. *In re* Schimmelpenninck, 183 F.3d 347, 363 n.45 (5th Cir. 1999) (noting that section 304(b)(3) provides a relief mechanism, for even if a creditor's claim was not sufficiently "'involved in' the foreign proceeding to warrant injunctive relief under [section 304] (b)(1), [section 304] (b)(3) gives [the court] the authority to order 'other appropriate relief'").

77. 11 U.S.C. § 304(b)(3) (1994).

78. 2 Collier on Bankruptcy ¶ 304.03, 304-9 (Lawrence P. King et al. eds., 15th. rev. ed. 2001) (citing H.R. Rep. No. 95-595, at 324-25 (1977); S. Rep. No. 95-989, at 35

3. Section 304(c): Determining Whether To Grant Relief

After recognizing the foreign representative and determining that the relief he or she seeks is an appropriate matter for bankruptcy court jurisdiction, section 304(c) addresses the likelihood of the foreign representative's successful receipt of such relief from the bankruptcy court. Section 304(c) mandates principles in fashioning such relief available under 304(b)(3):

> (i) the just treatment of holders of claims against or interests in such estate;
>
> (ii) protection of claimholders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
>
> (iii) prevention of preferential or fraudulent dispositions of property of such estate;
>
> (iv) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;
>
> (v) comity;[79] and
>
> (vi) if appropriate, the provision of an opportunity for a fresh start for the individual that such proceeding concerns.[80]

Subsection (c) states that the provision aims to promote the "economical and expeditious" administration of the foreign estate.[81] In reality, the language of section 304(c) affords the bankruptcy courts great flexibility in granting relief.[82] Generally, bankruptcy courts will "be guided by what will best assure the economical and expeditious administration of the insolvent estate," provided that it is consistent with the above factors.[83]

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(1978)).

79. Section 304(c)(5) incorporates the common-law principle of comity to "determine whether a foreign representative may recover local assets to be administered in a foreign proceeding or otherwise assert rights in the United States." The doctrine of comity encourages courts to defer "to foreign laws and judgments if the foreign jurisdiction applies fundamental notions of due process and impartiality similar to those applied in the United States." *See* C. Timothy Corcoran, III, Relief Available to Foreign Trustees, Liquidators, Receivers, and Similar Functionaries and to Foreign Debtors in United States Bankruptcy Courts: An Introduction with Recent Developments 5-6 (2001). Section 304(c) is designed to provide deference to protecting creditors in the United States. *Id.*; *see also infra* Part III.C.1.

80. Foreman & Selit, *supra* note 19.

81. 11 U.S.C. § 304(c).

82. Lee, *supra* note 20, at 137.

83. Neil Cooper & Rebecca Jarvis, Recognition and Enforcement of Cross-border Insolvency: A Guide to International Practice 128 (1996).

#### 4. Application of Section 304

Because section 304 falls somewhere in between universalism and territorialism, the section is most often described as representing "modified" universalism.[84] In other words, section 304 accepts the "central premise of universalism"—that assets should be brought together and disseminated on a universal basis—but reserves "discretion [to local courts] to evaluate the fairness of home country procedures and to protect the interests of local creditors."[85] This designation is primarily due to the broad discretionary scheme of section 304(c).[86]

Under a modified universalist approach, parties may commence proceedings in jurisdictions that are ancillary to the main bankruptcy proceeding.[87] The ancillary proceedings are intended to assist the main proceeding, but are also used to ensure a forum's right to apply its own law.[88] However, the Model Law on Cross-Border Insolvency intends to move away from this modified universalist approach and into a strictly universalist theory.

### C. *The Model Law*

#### 1. Purpose and Scope of Application

The Model Law[89] on Cross-Border Insolvency is the result of the United Nations Committee on International Trade Law's[90] endeavor

84. *See, e.g.*, Foreman & Selit, *supra* note 19.

85. Lee, *supra*, note 20, at 123 (citing Maxwell Communication Corp. v. Barclays Bank, 170 B.R. 800, 816 (Bankr. S.D.N.Y. 1994)).

86. *See infra* Part III.C; *see also* Lee, *supra* note 20, at 123.

87. Anderson, *supra* note 21, at 690-91.

88. *Id.*; *see also* Lee, *supra* note 20, at 123.

89. "A model law is a legislative text that is recommended to states for incorporation into their national law. Unlike an international convention, a model law does not require the State enacting it to notify the United Nations or other States that may have also enacted it." *See* Guide to Enactment, *supra* note 5, at pt. III, para. 11. The text of a model law is accompanied by a series of reports of each meeting, a final report upon adoption, and, usually, a Guide to Enactment. *See, e.g.*, Report, *supra* note 11.

90. UNCITRAL, a subsidiary body of the General Assembly of the United Nations, was established in 1966 to further the "progressive harmonization and unification of the law of international trade." United Nations Commission on International Trade Law, *About UNCITRAL*, *at* http://uncitral.org/en-index.htm (last updated Dec. 6, 2002). Thirty-six states comprise UNCITRAL such that the various geographic regions and the principal economic and legal systems of the world are represented. *Id.* UNCITRAL is currently the main legal body in the domain of international trade law within the United Nations. *Id.* UNCITRAL seeks to unite member nations in cooperating and participating in various international trade regimes. *Id.* It has prepared a wide range of model laws, conventions, and other instruments addressing the aspects of substantive law that has an impact on international trade. *Id.*

to improve international cooperation in insolvency cases.[91] The Model Law was designed to aid member states ("enacting states") in outfitting their insolvency laws with a modern, unified framework to effectively address cross-border insolvencies.[92] Specifically, the Model Law applies to cases where the debtor has assets in more than one country, or where any of the debtor's creditors are residents of the country in which the insolvency proceeding is taking place. The Model Law provisions represent a universal consensus on insolvency practices and therefore offer an opportunity for introducing improvements and uniformity into the enacting states' insolvency regimes.[93] The Model Law provisions offer solutions that respect the differences among procedural laws, but nonetheless offer solutions to help in simple, but significant, ways.[94]

The Model Law has five primary objectives: (1) cooperation between local and foreign courts involved in cross-border insolvencies; (2) greater legal certainty for international commerce; (3) fair and efficient administration of cross-border insolvency proceedings; (4) protection and maximization of the debtor's assets; and (5) facilitation of the rescue of financially distressed companies.[95]

The Model Law provisions apply in a number of cross border situations, including situations where: (1) assistance is sought by a foreign representative in connection with a foreign proceeding; (2) assistance is sought in a foreign state in connection with a proceeding under the specific insolvency laws of another state; (3) cooperation is needed when proceedings under two states are taking place; and (4) creditors in a foreign state are interested in commencing, or participating in, a proceeding under the laws of another state.[96]

### 2. Main Features of the Model Law

UNCITRAL adopted the final text of the Model Law in May of 1997.[97] The key features of the Model Law's thirty-two articles can be grouped and summarized by subject. The key subjects of the Model Law are: (1) access of foreign representatives; (2) treatment of foreign creditors; (3) recognition of a foreign proceeding; and (4) cooperation and coordination among proceedings in several countries.[98]

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91. Report, *supra* note 11.
92. Guide to Enactment, *supra* note 5, at pt. I, para. 1.
93. *Id.*
94. *Id.* at pt. I, para. 3.
95. Model Law, *supra* note 13, at pmbl.
96. *Id.* at art. 1.
97. *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, 6 Tul. J. Int'l & Comp. L 415, 418 (1998).
98. Model Law, *supra* note 13.

a. *Access of Foreign Representatives: Articles 9-12*

An important objective of the Model Law is to provide prompt and immediate access for foreign representatives to the courts of the enacting state.[99] The Model Law aims to facilitate the often tedious communication process that might otherwise be used by allowing a foreign representative to apply directly for recognition of a foreign insolvency proceeding.[100] Specifically, Articles 11 and 12 give the foreign representative standing to initiate a local bankruptcy proceeding or to participate as of right in an existing local proceeding.[101] By making this access automatic upon compliance with procedural requirements, the Model Law attempts to assure unrestricted access to foreign insolvency proceedings for all foreign representatives.[102]

b. *Treatment of Foreign Creditors: Articles 13 and 14*

Article 13 of the Model Law gives "national treatment" to foreign creditors.[103] In other words, the Model Law requires foreign creditors to be treated in the same non-discriminatory way that local creditors are to be treated. Such treatment includes the right to commence and to participate in a local insolvency proceeding.[104] While permitting the enacting state to grant or deny equivalent treatment for foreigners as to priorities, Article 13 also provides information about treatment given to general, unsecured creditors.[105]

Article 14 requires that notice be given to foreign creditors whenever it is given to local creditors under local law.[106] Notice to foreign creditors must be served individually, as opposed to service by publication. Furthermore, foreign creditors must be provided with a reasonable time to file claims as well as instructions as to where and when claims should be filed.[107]

c. *Recognition of Foreign Proceeding: Articles 15-24*

The Model Law determines the criteria whereby a foreign insolvency procedure may be recognized by a reciprocating state.

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99. Guide to Enactment, *supra* note 5 at pt. V, para. 93.

100. Model Law, *supra* note 13, at art. 9; Guide to Enactment, *supra* note 5, at pt. V, para. 93.

101. Guide to Enactment, *supra* note 5, at pt. V, paras. 98-101.

102. Matthew T. Cronin, *UNCITRAL Model Law on Cross-Border Insolvency: A Procedural Approach to a Substantive Problem*, 24 J. Corp. L. 709, 713 (1999).

103. Model Law, *supra* note 13, at art. 13.

104. *Id.*; *see also* Guide to Enactment, *supra* note 5, at pt. V, para. 103.

105. Model Law, *supra* note 13, at art. 13.

106. *Id.* at art. 14; *see also* Report, *supra* note 11.

107. Model Law, *supra* note 13, at art. 14.

Moreover, it establishes the criteria for providing relief to the representative of such foreign insolvency action in certain instances.

### i. Recognition

The Model Law allows a foreign representative[108] to apply for recognition of the foreign proceeding in which the foreign representative has been appointed.[109] UNCITRAL expresses the desire that, upon incorporation into national law, the states should avoid encumbering the process with additional procedural requirements.[110] Articles 15 through 17 of the Model Law are designed to make the recognition process as simple, fast, and inexpensive as possible.[111] Article 15 defines the fundamental procedural requirements for a foreign representative's application for recognition.[112] The process begins with the foreign representative filing an application for recognition along with several documents, most of which are needed to affirm certification of the commencement and existence of the foreign proceeding and of the appointment of the foreign representative.[113]

Several presumptions accompanying this application, such as a presumption of authenticity, allow the court to expedite the evidentiary process while simultaneously aiding the foreign representative in moving the proceeding along.[114] Article 16 permits the local court to rely on the presumption of authenticity or to conclude that evidence to the contrary prevails.[115] Further, the Model Law presumes that documents submitted in support of the application for recognition need not be authenticated in any special way.[116] This presumption is useful to avoid cumbersome and tedious procedures.[117]

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108. "Foreign representative," for the purposes of the Model Law, is defined as "a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding." Model Law, *supra* note 13, at art. 2(d).

109. Model Law, *supra* note 13, at art. 15(1).

110. Guide to Enactment, *supra* note 5, at pt. V, para. 112.

111. *Id.*

112. Model Law, *supra* note 13, at art. 15; *see also* Guide to Enactment, *supra* note 5, at pt. V, para. 112.

113. Model Law, *supra* note 13, at art. 15(2)(a), (b), (c).

114. *Id.* at art. 16(2).

115. Guide to Enactment, *supra* note 5, at pt. V, para. 122.

116. *Id.* at pt. V, para. 113.

117. For example, the court is entitled to presume that the foreign representative's application documents are authentic despite the lack of certification by an appropriate agent to ensure that the signature is authentic, that the person signing the document has acted in the correct capacity, and that the document is appropriately sealed or stamped. Guide to Enactment, *supra* note 5, at pt. V, para. 113. Nonetheless, the court retains the discretion to refuse to give effect to an application that has not been certified in this manner. *See* Guide to Enactment, *supra* note 5, at pt. V, paras. 113, 119.

Next, the court must decide whether to recognize a foreign proceeding. Subject to public policy concerns,[118] if the application meets the requirements set out in the Article, recognition will be granted as a matter of course. Once a foreign proceeding has been recognized, the Model Law requires that the court cooperate with the foreign court and representatives.[119]

A decision to recognize a foreign proceeding "is left to the procedural law of the enacting State other than the provisions implementing the Model Law."[120] A decision on recognition, however, may be subject to a review of whether the requirements for recognition were observed in the decision-making process.[121] Appeals of decisions regarding recognitions are limited to the question of whether the requirements of Articles 15 and 16 were observed.[122]

ii. Effects of Recognition: Main Versus Non-Main Proceedings

Article 17 draws a distinction between "main" and "non-main" proceedings.[123] "Main" proceedings are those taking place in the state in which the debtor has its main assets, while "non-main" proceedings are those in a country other than the debtor's home country.[124]

The determination that a foreign proceeding is a "main" proceeding may affect the nature of relief accorded upon recognition of the representative.[125] Article 19 of the Model Law permits a foreign representative to apply for temporary, emergency relief while an application for recognition is pending.[126] Thereafter, if the foreign proceeding is recognized as a "main" proceeding, recognition produces certain mandatory effects under Article 20.[127] Recognition of a "main" proceeding triggers an automatic stay of individual creditor actions or executions concerning the assets of the debtor and suspends the debtor's right to transfer or encumber its assets.[128] Such stay and suspension are mandatory in that they flow automatically

118. *See* Model Law, *supra* note 13, at art. 6. "Nothing in the present Law prevents the court from refusing to take an action governed by the present Law if the action would be manifestly contrary to the public policy of this State." *Id.* There is no uniform concept of the public policy reference in Article 6, for public policy may differ from nation to nation. *See* Guide to Enactment, *supra* note 5, at pt. V, paras. 86-89.

119. Brian M. Devling, Note, *The Continuing Vitality of the Territorial Approach to Cross-Border Insolvency*, 70 UMKC L. Rev. 435, 447 (2001).

120. Guide to Enactment, *supra* note 5, at pt. V, para. 129.

121. *Id.* at pt. V, paras. 129-31.

122. *Id.* at pt. V, para. 131.

123. Model Law, *supra* note 13, at art. 17(2); Guide to Enactment, *supra* note 5, at pt. V, para. 126.

124. Model Law, *supra* note 13, at art. 17(2)(a) & (b).

125. Guide to Enactment, *supra* note 5, at pt. V, para. 126.

126. Model Law, *supra* note 13, at art. 19.

127. Guide to Enactment, *supra* note 5, at pt. V, para. 126.

128. *Id.*

from the recognition of a foreign main proceeding.[129] In a modern, global economic system, it is possible for multinational debtors to move assets across boundaries quickly.[130] The moratorium prevents such actions from occurring until the court has the opportunity to notify other parties involved.

There is no automatic relief upon the recognition of a "non-main" proceeding.[131] Under Article 17, a non-main proceeding must be recognized only if the debtor has an establishment in that country.[132] Article 2 defines "establishment" as a place where the debtor carries out "nontransitory" activities involving "human means and goods or services."[133] This definition means something falling between a mail-drop and a branch.[134] If a foreign representative commences a proceeding in a country where the debtor merely has assets but no actual establishment, the local court need not recognize the foreign proceeding.[135]

Article 21 gives the local court the power to grant additional relief to the foreign representative.[136] Article 21 lists the relief that may be granted upon recognition of a foreign proceeding.[137] Additionally, the Model Law authorizes the court to grant "discretionary" relief to any type of proceeding.[138] Such relief may consist of "staying proceedings or suspending the right to encumber assets . . . facilitating access to information concerning the assets of the debtor and its liabilities, appointing a person to administer all or part of those assets, and any other relief that may be available under the laws of the enacting State."[139] The courts will have discretion in determining whether to grant such relief.[140]

### d. *Cooperation and Coordination: Articles 25-32*

Once a court has recognized a foreign proceeding, the Model Law seeks to simplify cooperation among multiple nations and the parties involved. Articles 25 through 32 harmonize the results in the foreign and local proceedings to achieve a fair and efficient result by requiring cooperation between the two proceedings.[141]

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129. *Id.* at pt. IV, para. 32.
130. *Id.*
131. *Id.* at pt. V, para. 141.
132. Model Law, *supra* note 13, at art. 2.
133. *Id.*
134. *See* Report, *supra* note 11.
135. *Id.*
136. Model Law, *supra* note 13, at art. 21.
137. *Id.*
138. Guide to Enactment, *supra* note 5, at pt. IV, para. 34.
139. *Id.*
140. *See id.*
141. *See* Cronin, *supra* note 102, at 714.

### i. Cooperation: Articles 25-27

Due to lack of legislative framework, cooperation and coordination between judges from different nations in cross-border insolvencies has been deficient. UNCITRAL asserts that cooperation "is often the only realistic way . . . to prevent dissipation of assets [or] to maximize the value of assets."[142] The Model Law attempts to serve as a gap-filler for many nations by empowering courts, through Articles 25, 26, and 27, to extend cooperation in the areas covered by the Model Law, such as in the administration and supervision of the debtor's assets, coordinating the concurrent proceedings involving the same debtor, and the implementation by courts of agreements concerning the coordination of proceedings.[143] The courts are required to cooperate to the "maximum extent possible" with foreign courts or foreign representatives, and may do so either directly or through the person administering a reorganization or liquidation under the law of the enacting state.[144] Courts are entitled to request assistance, communication, or information directly from foreign courts or foreign representatives.[145] The Model Law lists possible forms of cooperation and gives the enacting state's legislator the ability to list others.[146] All courts are assumed to exercise their respective authority in accordance with local concepts of due process and fairness.[147]

### ii. Coordination: Articles 28-32

The Model Law provides that recognition of a foreign main proceeding does not limit the jurisdiction of the courts in the enacting state to commence or continue insolvency proceedings.[148] Pursuant to Article 28, even after recognizing a foreign "main" proceeding, a proceeding in the enacting state may only be commenced if the debtor has assets in that enacting state.[149] Thus, the recognition of a foreign main proceeding will not prevent the court from retaining jurisdiction of a local insolvency proceeding concerning the same debtor, as long as the debtor has assets in that state.[150] The state, however, may restrict its jurisdiction to cases where the debtor has an actual establishment within its borders.[151]

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142. Guide to Enactment, *supra* note 5, at pt. V, para. 173.
143. Model Law, *supra* note 13, at art. 27(c), (d), (e); *see also* Guide to Enactment, *supra* note 5, at pt. V, paras. 173-77.
144. Model Law, *supra* note 13, at art. 25(1).
145. *Id.* at art. 25 (2).
146. *See* Model Law, *supra* note 13, at art. 27.
147. *See* Report, *supra* note 11.
148. Guide to Enactment, *supra* note 5, at pt. V, para. 184.
149. *Id.*
150. Model Law, *supra* note 13, at art. 28.
151. *See* Guide to Enactment, *supra* note 5, at pt. V, paras. 185-86.

The objective of Articles 29 and 30 is to foster coordinated decisions that would best achieve the objectives of all proceedings concerning the same debtor.[152] Thus, the Model Law aims to serve as a guide to courts in every situation in order to facilitate coordination and adapt to changing circumstances. Article 29 addresses cooperation needed in situations where a foreign proceeding and a local proceeding involving the same debtor are taking place concurrently, while Article 30 facilitates coordination between two or more foreign proceedings concerning the same debtor.[153] Both Articles mandate that the court must seek cooperation and coordination under Articles 25, 26, and 27 when a foreign proceeding and a local proceeding are taking place concurrently.[154] Any relief granted under the Model Law must be consistent with the local proceeding.[155] If the foreign proceeding commences after recognition or after filing the application for recognition, the court must review any relief to ensure consistency with the local proceeding.[156]

Article 31 provides a presumption of the debtor's insolvency, absent evidence to the contrary, based on recognition of a foreign proceeding under the laws of the enacting state.[157]

Article 32 mandates that a creditor who has received a distribution in a foreign insolvency proceeding must stand aside in a local distribution until creditors of the same class have received as much from the local proceeding as the first creditor received from the foreign one.[158]

### D. *Chapter 15: Ancillary and Other Cross-Border Cases*

Chapter 15 is intended to incorporate the Model Law on Cross-Border Insolvency to encourage cooperation between the United States and foreign countries with respect to transnational insolvency cases. Through its enactment, Chapter 15 aims to provide greater legal certainty for trade and investment, to provide for the fair and efficient administration of cross-border insolvencies, and to protect the interests of creditors and other interested parties.[159] Additionally,

152. Model Law, *supra* note 13, at art. 29-30; *see also* Guide to Enactment, *supra* note 5, at pt. IV, para. 44.

153. Model Law, *supra* note 13, at art. 29-30; *see also* Guide to Enactment, *supra* note 5, at pt. V, paras. 188, 192.

154. Model Law, *supra* note 13, at art. 29-30.

155. *Id.*

156. *Id.*

157. *Id.* at art. 31.

158. *Id.* at art. 32. This rule is analogous to 11 U.S.C. § 508(a) of the United States Bankruptcy Code.

159. H.R. Rep. No. 107-3, pt. 1 (2001), *accompanying* H.R. 333, 107th Cong. (2001) (providing an explanation of the changes and additions made to the Model Law to incorporate it into the Code) [hereinafter House Report 107-3].

Chapter 15 aims to protect and maximize the value of the debtor's assets.[160]

The House Report provides that cases commenced under Chapter 15 are intended to be ancillary to cases commenced in a debtor's home country, unless a full United States bankruptcy case is brought under another chapter of the United States Bankruptcy Code.[161] Even if a full case is brought under another Code section, however, the bankruptcy court may decide under section 305[162] to limit the United States' involvement to an ancillary case under Chapter 15 by staying or dismissing the Unites States case.[163]

The drafters of Chapter 15 sought to follow the Model Law as closely as possible throughout the entire text. Nevertheless, there are a number of semantic changes in Chapter 15 from the Model Law, as well as several important substantive changes from the Model Law. For example, the Model Law lacked several provisions that were necessary to assure the protection of United States interests.[164] Additionally, Chapter 15 contains many procedural changes.[165]

### 1. Access of Foreign Representatives to the Court

Chapter 15 implements the purpose of the Model Law's Article 9, enabling a foreign representative to commence a Chapter 15 case by filing a petition for recognition of a foreign proceeding directly with the court.[166] It alters the language, however, to fit United States procedural requirements and imposes recognition of the foreign proceeding as a condition to enhance the rights and duties of the foreign representative.[167] If recognized, the foreign representative may sue and be sued in a United States court, apply directly to a United States court for relief, and may be granted comity or

160. *Id.*

161. *Id.*

162. Guidelines for the court's abstention from presiding over certain matters are found in 11 U.S.C. § 305. Section 305(a) provides that the court, after notice and a hearing, may suspend or dismiss a case or proceeding at any time if "the interests of creditors and the debtor would be better served by such dismissal or suspension," or if there is a foreign proceeding pending and the 304(c) factors warrant such dismissal or suspension. 11 U.S.C. § 305(a)(1), (2) (1994). A foreign representative may seek dismissal or suspension under subsection (a)(2) of section 305. *Id.* § 305(b).

163. House Report 107-3, *supra* note 159.

164. For example, Chapter 15's definition of "establishment" in section 1502(7) includes a location "within the territorial jurisdiction of the United States." This definition is not taken from the Model Law, and has instead been added because the United States asserts insolvency jurisdiction over assets outside the United States' territorial boundaries under appropriate circumstances. House Report 107-3, *supra* note 159; *see also supra* notes 56, 60 (discussing the definitions of "foreign proceeding" and "foreign representative").

165. *See infra* Part III.C.

166. Bankruptcy Abuse Prevention and Consumer Protection Act of 2001, H.R. 333, 107th Cong. § 1509 (2001); *see also* House Report 107-3, *supra* note 159.

167. House Report 107-3, *supra* note 159.

cooperation by a United States court.[168] If, however, the court declines to recognize the foreign representative under Chapter 15, the court may issue "any appropriate order necessary" to prevent the foreign representative from obtaining cooperation from United States courts.[169]

Section 1514 provides that notice shall be given to known foreign creditors whenever notice is required.[170] The notice must indicate the details regarding the commencement of the case, such as the time period for filing proofs of claim, the need for filing proofs of claim, and any other necessary information.[171]

2. Recognition of a Foreign Proceeding and Available Relief

a. *Process of Recognition*

The process for applying for recognition under Chapter 15 is similar to that of the Model Law.[172] Under section 1515, a foreign representative applies to the court by filing a petition for recognition accompanied by several certified documents and statements required to affirm the existence of the foreign proceeding.[173] Section 1516 provides several presumptions concerning recognition of the foreign proceeding.[174] These presumptions essentially permit the court to accept as true the statements required by section 1515 asserting that the applicant meets the definitional requirements of a foreign representative and the proceeding meets the definition of a foreign proceeding.[175] After notice and hearing, the court may recognize a foreign proceeding as either a main or non-main proceeding if it meets the definitional requirements of section 1502.[176]

b. *Available Relief*

Section 1519 lists the types of relief available to the foreign representative upon filing the petition for recognition.[177] Such relief

168. H.R. 333, § 1509(b)(2).
169. *Id.* § 1509(d).
170. *Id.* § 1514.
171. *Id.* § 1514(c).
172. *Compare id.* § 1515, *with* Model Law, *supra* note 13, at art. 15.
173. H.R. 333, § 1515(a)-(c).
174. *Id.* § 1516. This section follows article 16 of the Model Law with only minor changes. House Report 107-3, *supra* note 159.
175. H.R. 333, § 1516(a), (b); *see also supra* notes 56, 60 (discussing the definitions of "foreign representative" and "foreign proceeding").
176. H.R. 333, §§ 1502(7), 1517(a), (b); *see also supra* notes 123-35 and accompanying text (discussing the distinction between foreign main and non-main proceedings). Section 1517 closely follows Article 17 of the Model Law with a few exceptions. House Report 107-3, *supra* note 159.
177. H.R. 333, § 1519(a).

includes a stay against the debtor's assets,[178] turnover of the debtor's United States assets to the foreign representative,[179] and certain other relief specified under section 1521(a).[180]

Section 1521 lists the relief that may be granted upon the bankruptcy court's actual recognition of the foreign proceeding, whether it is recognized as main or non-main. Such relief includes a stay of the commencement or continuation of an individual action or proceeding concerning the debtor; a suspension of the right to transfer, encumber, or dispose of the debtor's assets; and granting any additional relief that may be available to a trustee, excluding the relief available as a result of avoidance powers.[181] The court may also require turnover of the debtor's assets to the foreign representative.[182]

c. *Effects of Recognition*

Upon recognition of a foreign main proceeding, section 1520 lists the sections of the United States Bankruptcy Code that will apply to the debtor and the debtor's property that is within the territorial jurisdiction of the United States.[183] The foreign representative will obtain the use of such provisions as the automatic stay,[184] adequate protection,[185] and various other sections pertaining to a transfer of interest of the debtor in property that is within the territory of the United States. The foreign representative may operate the debtor's business and may assert the rights and powers of a United States trustee, unless otherwise ordered by the court.[186]

3. Additional Assistance

If recognition is granted to the foreign representative, the court may provide additional assistance other than that which is available under Chapter 15.[187] This section is intended to permit the further development of international cooperation, but is not to be the "basis for denying or limiting relief otherwise available under this

178. *Id.* § 1519(a)(1).
179. *Id.* § 1519(a)(2).
180. *Id.* § 1521(a)(3). This subsection includes a suspension of the right to transfer, encumber, or dispose of any of the debtor's assets. Section 1521(a)(4) provides for the examination of witnesses and other evidentiary privileges; section 1521(a)(7) provides for any additional relief that may be available to a United States trustee, with the exception of the Code's avoidance powers. Section 1521 loosely follows Article 21 of the Model Law, but incorporates detailed changes. House Report 107-3, *supra* note 159.
181. H.R. 333, § 1521(a)(1), (3), (7); *see also infra* Part III.C.2.
182. H.R. 333, § 1521(b).
183. *Id.* § 1520(a).
184. *Id.* § 1520(a)(1).
185. *Id.*
186. *Id.* § 1520(a)(3).
187. *Id.* § 1507(a).

chapter."[188] Section 1507 provides five guidelines to determine whether to provide additional assistance, including:

> (1) just treatment of all holders of claims against or interests in the debtor's property;
>
> (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
>
> (3) prevention of preferential or fraudulent dispositions of property of the debtor;
>
> (4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and
>
> (5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.[189]

#### 4. Cooperation with Foreign Courts and Foreign Representatives

Generally, Chapter 15 calls for cooperation to the maximum extent possible with foreign courts and foreign representatives.[190] Courts may communicate directly with foreign courts or simply request information or assistance.[191] Such cooperation may be implemented by "any appropriate means," including appointment of a person to act at the direction of the court, approval or implementation of agreements concerning coordination of the proceedings, and coordination of concurrent proceedings involving the same debtor.[192]

## II. WHY THE UNITED STATES NEEDS A NEW SYSTEM: PROBLEMS WITH MODIFIED UNIVERSALISM UNDER SECTION 304

While section 304 purports to assist in the administration of foreign bankruptcy proceedings, the actual application of section 304 has proven difficult and often inconsistent. Section 304 is often criticized for having neither "stated bounds nor a prescribed outcome."[193] Such critics of section 304 believe that it proclaims universalism while contemporaneously and inconsistently asserting a local preference, leading to an unclear standard of what the ultimate goal of ancillary

188. House Report 107-3, *supra* note 159.

189. H.R. 333, § 1507(b); *see also infra* Part III.C.3 (discussing the impact that section 1507 is likely to have on the administration of cases ancillary to foreign proceedings).

190. H.R. 333, § 1525(a). Section 1525 is worded almost identically to article 25 of the Model Law. House Report 107-3, *supra* note 159; Model Law, *supra* note 13, at art. 25.

191. H.R. 333, § 1525(b).

192. *Id.* § 1527.

193. Lee, *supra* note 20, at 123; *see also* Felsenfeld, *supra* note 3, at 4-18.

proceedings should be.[194] The language provides "no guidance on how the courts are to apply [the section 304 factors] or on what relative weight is to be accorded these factors."[195] Thus, the language of section 304 lacks a clear standard, which may result in different interpretations of similar fact patterns depending on the jurisdiction in which the proceeding is commenced.[196]

Hence, section 304 delegates to the courts the discretion to fashion a result based upon many conflicting directives.[197] The bankruptcy courts have been called upon to decipher the language of section 304 in administering foreign insolvency proceedings to ensure that creditor and debtor interests are balanced.[198] Courts may do "as much or as little" as is subjectively required by the particular set of facts.[199] As a result, ancillary proceedings under current United States bankruptcy law result in a lack of predictability and certainty for all parties, as well as for the court.

Thus, the United States faces the need for a cross-border insolvency regime that will create greater certainty and predictability, that will foster cooperation and coordination with other nations of the world, and that will maintain its national sovereignty and protect the interests of those within its borders.

### A. *Ambiguous Interpretation of Section 304(c) Factors*

Because section 304 compels United States courts to embrace modified universalism as opposed to a strictly universalist or strictly territorialist theory, bankruptcy judges often take different approaches when evaluating cases ancillary to foreign proceedings.[200] The main distinction between such cases is the individualized weight the courts give to each of the section 304(c) factors.[201] In particular, courts following a universalist approach are distinguishable from courts following a territorialist approach by the weight the different

194. *See, e.g.*, Lee, *supra* note 20, at 123; *see also* Brian J. Gallagher & John Hartje, *The Effectiveness of § 304 in Achieving Efficient and Economic Equity in Transnational Insolvency*, 1983 Norton Ann. Surv. Bankr. L. 1 (1983).

195. Lee, *supra* note 20, at 123.

196. *See, e.g.*, *In re* Treco, 239 B.R. 36, 41 (Bankr. S.D.N.Y. 1999) ("Treco II"); *In re* Hourani, 180 B.R. 58, 63-64 (Bankr. S.D.N.Y. 1995).

197. Lee, *supra* note 20, at 125.

198. *Id.* at 125 (citing Israel-British Bank (London) Ltd. v. Federal Deposit Ins. Corp., 536 F.2d 509 (2d Cir. 1976); Bank of Commonwealth v. Israel-British Bank (London) Ltd., 429 U.S. 978 (1976); Banque de Financement, S.A. v. First Nat'l Bank of Boston, 568 F.2d 911 (2d Cir. 1977)).

199. Felsenfeld, *supra* note 3, at 4-18.

200. David Costa Levenson, *Proposal for Reform of Choice of Avoidance Law in the Context of International Bankruptcies from a U.S. Perspective*, 10 Am. Bankr. Inst. L. Rev. 291, 309-10 (2002); *see also supra* Part I.B.4.

201. Levenson, *supra* note 200, at 309-10; Lee, *supra* note 20, at 123-24; *see supra* Part I.B.3.

courts place upon the fifth factor, comity,[202] when determining whether to grant relief to the foreign representative.[203] Although comity is only one of six factors the court may consider, courts have discretion when applying section 304(c) to determine whether a foreign representative may recover local assets to be administered in a foreign proceeding or otherwise assert rights in the United States.[204] Thus, while some courts emphasize comity over the other five 304(c) factors, other courts view all factors to be of equal importance.

The concept of comity generally encourages deference to foreign laws and judgments, provided that the foreign jurisdiction would retain the goals of due process and fairness as applied in the United States.[205] *In re Maxwell Communication Corp.* provides an example of a bankruptcy court's comity analysis.[206] *Maxwell* involved an English holding company that filed a petition for Chapter 11 in the United States and a petition for administration in the United Kingdom.[207] The debtor filed an adversary proceeding in the United States against British and French banks to avoid preferential transfers pursuant to section 547 of the United States Bankruptcy Code,[208] thereby presenting the question of whether a foreign debtor could apply American bankruptcy law to transactions occurring outside of the

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202. The Supreme Court has defined "comity" as:

> [N]either a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Hilton v. Guyot, 159 U.S. 113, 163-64 (1895) (involving the recognition of a French judgment against a United States citizen conducting business in France). This was one of the first comity cases. *See also supra* note 79 and accompanying text.

203. Devling, *supra* note 119, at 439-40.

204. *See* Corcoran, *supra* note 79, at 5-6; *see àlso* Cunard Steamship Co. v. Salen Reefer Servs. AB, 773 F.2d 452 (2d Cir. 1985). In *Cunard*, a Swedish corporation that had commenced a bankruptcy case in Sweden moved to vacate an attachment by a British creditor on the debtor's United States assets. *Id.* at 454. The debtor had not filed a section 304 petition in the United States, and the creditor argued that section 304 was intended to be a foreign debtor's exclusive remedy. *Id.* at 454-55. The court disagreed with this argument and turned over the United States assets to be administered under the foreign proceeding. *Id.* at 455-56. The court, in analyzing the 304(c) factors, noted that the principle of comity sometimes means that creditors may be required to assert their claims in a foreign jurisdiction. *Id.* at 457. *Cunard* is an example of the subjective test that must be applied to such cases to determine whether the foreign jurisdiction's laws adhere to United States principles of fairness and public policy concerns. *See supra* Part I.B.3.

205. Corcoran, *supra* note 79, at 6.

206. *In re* Maxwell Communication Corp., 93 F.3d 1036 (2d Cir. 1996), *aff'g* 186 B.R. 807 (Bankr. S.D.N.Y. 1995), *aff'g* 170 B.R. 800 (Bankr. S.D.N.Y. 1994).

207. *Maxwell*, 93 F.3d at 1036.

208. Section 547(b) states that a trustee, under certain circumstances, may avoid any transfer of an interest of the debtor in property to a creditor on account of an antecedent debt made while the debtor was insolvent and on or within ninety days before filing for bankruptcy. 11 U.S.C. § 547(b) (1994).

United States.[209] The court's response to this inquiry rested almost entirely on the principle of comity.[210] In dismissing the debtor's complaints, the court held that the doctrine of comity advised against the application of the Bankruptcy Code's avoidance provision to claims asserted in a Chapter 11 case of which the debtor was the subject of a joint insolvency proceeding in England.[211]

Some bankruptcy courts view comity as the overriding principle to which the majority of the section 304 analysis should be directed. The *Culmer* court, for example, viewed comity as the paramount factor, rather than merely one of six factors to be weighed.[212] The court noted that comity should be afforded to the foreign proceeding as long as it would not be "inherently vicious, wicked or immoral, and shocking to the prevailing moral sense."[213] Thus, after determining that deference to the foreign proceeding would not produce a wicked or immoral result, the court analyzed the other 304(c) factors in light of the comity determination.[214]

While some courts place greater emphasis on comity, other courts analyze each 304(c) factor with equal importance. In *In re Papeleras Reunidas, S.A.*,[215] for example, the court found that in determining the appropriate relief in a proceeding ancillary to foreign bankruptcies, comity should not become the focus of the analysis with the other statutory factors subordinated or eliminated; rather, all factors should be considered equally. *Papeleras Reunidas* involved a group of Spanish liquidators appointed to oversee the liquidation of Papeleras Reunidas, S.A., a Spanish corporation.[216] Because the liquidation was pending in Spain, the liquidators filed a petition ancillary to a foreign proceeding under section 304 in the United States to enjoin an American creditor from seeking to obtain the portion of the debtor's assets that was owed to them.[217] In dismissing the proceeding, the court noted Congress's intention for courts to be guided by all of the factors specified in section 304(c).[218] It therefore decided that it was "best to equally consider all of the variables of § 304(c)" when determining the appropriate relief to grant in an ancillary proceeding.[219]

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209. *Maxwell*, 93 F.3d at 1043; *see also infra* Parts II.F, III.C.2.
210. *Maxwell*, 93 F.3d at 1048-49.
211. *Id.* at 1040.
212. *See supra* notes 28-43 and accompanying text.
213. *In re* Culmer, 25 B.R. 621, 629 (Bankr. S.D.N.Y. 1982) (citations omitted).
214. *Id.*
215. 92 B.R. 584 (Bankr. E.D.N.Y. 1988).
216. *Id.* at 585.
217. *Id.*
218. *Id.* at 594 (noting that the courts should be "guided by considerations of comity *in addition* to the other factors specified therein" (citations omitted)).
219. *Id.*

While the other five factors enumerated in section 304(c) are designed to ensure the protection of United States creditors, the comity factor has more of an emphasis on a universalist analysis.[220] It is unclear as to how much emphasis should actually be placed on the universalist principal of comity as opposed to the other five more territorial principles of section 304(c). Thus, interested parties can never know for certain whether a court applying a section 304 analysis is going to come out in favor of a universalist or territorialist approach, leaving ancillary proceedings in the United States to remain unpredictable.

### B. *Discretionary Recognition of Foreign Proceedings*

Although section 304(a) looks unambiguous on its face,[221] the process of determining whether to recognize a foreign proceeding is actually quite complicated. Rather than endorsing a specific standard for determining whether or not to recognize a foreign liquidation or reorganization as a "foreign proceeding" within the definition of the Bankruptcy Code, in practice, the Code has allotted bankruptcy courts significant discretion in determining whether a foreign proceeding qualifies under section 304.[222]

For example, *Petition of Hourani* involved an insolvent Jordanian bank whose liquidation committee petitioned for ancillary relief requesting deference to Jordanian liquidation proceeding and ordering turnover of all Jordanian bank funds to the committee for administration under Jordanian law.[223] The bankruptcy court denied relief to the foreign proceeding and dismissed the petition brought under section 304 because, among other things, the resolutions governing Jordanian liquidation proceedings did not provide sufficient minimal protections to assure fair treatment of all creditors, and thus, the Bankruptcy Code did not require deference to the process embodied in the resolutions.[224]

With only discretion as the standard for recognizing foreign proceedings, not surprisingly, grave inconsistencies often result. For example, *Petition of Tam* involved a petition filed by a liquidator to enjoin proceedings against a debtor corporation pending in a New York state court.[225] The foreign debtor was a Cayman Islands corporation subject to a "voluntary winding-up" (a similar concept to a voluntary liquidation in the United States) under the Cayman Companies Law.[226] The court, using its discretionary powers,

220. *See id.*
221. *See supra* Part I.B.1.
222. Foreman & Selit, *supra* note 19.
223. Petition of Hourani, 180 B.R. 58, 60 (Bankr. S.D.N.Y. 1995).
224. *Id.* at 67.
225. Petition of Tam, 170 B.R. 838, 839-40 (Bankr. S.D.N.Y. 1994).
226. *Id.*

dismissed the section 304 petition because the voluntary winding-up was not sufficiently similar to a United States proceeding.[227]

Interestingly, the bankruptcy court of the Southern District of New York—the same court that dismissed the ancillary petition in *Tam*—held that a voluntary winding-up under Zambian law qualified as a foreign proceeding in *In re Ward*.[228] Because the liquidation procedures, creditors' rights, and role of the court in the Zambian proceeding were substantially similar to an actual judicial proceeding, the bankruptcy court felt compelled to distinguish it from *Tam*.[229] The court again used its discretion to determine that even though a voluntary winding-up is not strictly a judicial proceeding, it possessed enough similarities to United States procedure to be recognized.[230] In both *Tam* and *Ward*, the court virtually created a test that did not exist under section 304.[231]

These decisions exemplify the liberal boundaries within which courts may recognize a foreign proceeding. While these cases may appear inconsistent, they ultimately reaffirm that the bankruptcy court retains the utmost discretion to discern different situations and determine whether they are appropriate matters to be handled by the United States judicial process in an ancillary proceeding. Under this discretionary system, many types of foreign cases will qualify as foreign proceedings, while other cases will not be accepted. The *Hourani* and *Tam* courts declined to accept the foreign proceeding merely on a discretionary basis, and not as a result of a strict section 304-mandated analysis or test as to what cases qualify as a foreign proceeding.[232] There continues to be a lack of clarity as to the substantive rules to be applied in the recognition of foreign proceedings. In other words, a creditor cannot predict with confidence whether the ancillary courts will assist that court or deny recognition.

### C. *Choice of Law and Predictability*

Currently, there is much uncertainty under section 304 regarding not only the question of which court will have jurisdiction of the insolvency proceeding, but additionally, which law will apply to the

227. *Id.* at 844-45. For example, the Cayman Islands proceeding did not qualify as a judicial proceeding because the liquidator operated free from supervision of the Cayman court and did not accord sufficient rights to creditors to be heard. *Id.*; *cf.* Universal Cas. & Sur. Co. v. Gee (*In re* Gee), 53 B.R. 891, 897 (Bankr. S.D.N.Y. 1985) (finding that a winding-up by a Cayman Islands court is a "foreign proceeding").

228. 201 B.R. 357 (Bankr. S.D.N.Y. 1996); *see also* Lee, *supra* note 20, at 130.

229. 201 B.R. at 361.

230. *Id.*

231. *See, e.g.*, *id.*; *see also Tam*, 170 B.R. at 845-46; Lee, *supra* note 20, at 130-32; *supra* Part I.B.

232. *See supra* notes 223-31 and accompanying text.

distribution of assets in international insolvency proceedings. In *In re Grandote Country Club Co.*,[233] the Tenth Circuit analyzed the various considerations in determining that Colorado, not Japanese, law governed the ancillary proceeding.[234] The trustee in a Japanese bankruptcy in *In re Grandote* filed an ancillary proceeding in bankruptcy court under section 304 seeking to set aside a tax sale and other conveyances of real estate formerly owned by the debtor corporation.[235] In determining that Japanese law did not apply to the proceeding, the court noted two competing principles—comity and local interests—the application of which would give rise to two different conclusions.[236] If the court had chosen to prioritize the principle of comity, application of Japanese law would have resulted.[237] If, however, the court upheld interests of the region in which the property was located, United States law would apply.[238] In this case, the court chose the latter approach and proceeded to apply Colorado law.[239] Under section 304, however, decisions regarding choice-of-law could easily compel an opposite conclusion.[240] If a court determines that comity is the ultimate goal, it might apply the law of the foreign jurisdiction, often to the detriment of local creditors.

### D. *Jurisdiction and Venue Problems*

The application of a section 304 proceeding brings about procedural issues concerning jurisdiction and venue. Generally, the jurisdiction in which a foreign representative must bring an action will differ depending upon the type of relief the representative is seeking.[241] A foreign representative seeking injunctive relief must commence an action in the district court in the jurisdiction where the proceeding is pending.[242] To obtain an order requiring the turnover of property, the foreign representative must commence an action in the district where the property is located.[243] Furthermore, a case to obtain other forms of relief must be commenced in the district where the principal place

233. 252 F.3d 1146 (10th Cir. 2001).
234. *Id.* at 1150.
235. *Id.* at 1148-49.
236. *Id.* at 1150.
237. *Id.*
238. *Id.*
239. *Id.*
240. Bankruptcy courts frequently place greater emphasis upon the doctrine of comity rather than upon local interests. As a result, courts are just as likely to apply the law of a foreign jurisdiction as they are to apply the law of a local jurisdiction. *See supra* Part II.A.
241. Lee, *supra* note 20, at 190-91; *see also supra* Part I.B.2.
242. Charles D. Booth, *Recognition of Foreign Bankruptcies: An Analysis and Critique of the Inconsistent Approaches of United States Courts*, 66 Am. Bankr. L.J. 135, 160 (1992); Burton R. Lifland, *Suggested Modifications to Ancillary Proceeding Statutes*, 4 Am. Bankr. Inst. L. Rev. 530, 532-33 (1996).
243. Booth, *supra* note 242, at 160; Lifland, *supra* note 242, at 532-33.

of business or principal assets are located.[244] Thus, if the debtor's property is dispersed throughout several jurisdictions, the foreign representative will be required to commence actions in multiple jurisdictions.[245]

The jurisdiction and venue problems may cause great inconvenience and difficulty for a foreign representative seeking a stay.[246] Because a section 304 proceeding is not a full-blown bankruptcy, the filing of a section 304 petition does not trigger an automatic stay.[247] As a result, the foreign representative must seek an immediate injunction in the nature of a stay at the same time he files the ancillary petition.[248] Due to the complicated venue problems, however, a foreign representative will not likely be able to avoid the commencement of multiple actions.[249]

### E. *Lack of Adequate Protection*

Section 304 does not include the concept of adequate protection in ancillary proceedings.[250] In an ordinary bankruptcy under the United States Bankruptcy Code, a secured creditor guaranteed adequate protection would receive payments in the form of cash or additional liens as a protection from any decline in value of the creditor's property held by the debtor.[251] Because section 304 does not ensure that local creditors receive adequate protection when necessary, local creditors run the risk of having their property lose value without receiving any compensation.[252]

*In re Treco* ("*Treco I*")[253] provides an example of a potential result of this lack of adequate protection. *Treco I* involved the liquidation of Meridien International Bank Limited ("MIBL"), a bank incorporated under the laws of the Bahamas.[254] MIBL had conducted business in the Bahamas, Africa, and various other jurisdictions, including the United States.[255] In early 1995, the Bahamian liquidators commenced an involuntary liquidation proceeding against MIBL in the Supreme

244. Booth, *supra* note 242, at 160; Lifland, *supra* note 242, at 532-33.
245. Booth, *supra* note 242, at 160; Lifland, *supra* note 242, at 532-33.
246. *See, e.g., In re* MMG LLC, 256 B.R. 544, 549 (Bankr. S.D.N.Y. 2000); *see also* Levenson, *supra* note 200, at 313, 324.
247. *MMG*, 256 B.R. at 549.
248. *See* Booth, *supra* note 242, at 160; Lifland, *supra* note 242, at 532-33.
249. *See* Lee, *supra* note 20 at 143-44; *see also* Levenson, *supra* note 200, at 324.
250. *See supra* Part I.B.
251. 11 U.S.C. § 361 (1994).
252. *See generally* Lee, *supra* note 20, at 187-88 (discussing the effects of adequate protection incorporated into ancillary proceedings).
253. 229 B.R. 280 (Bankr. S.D.N.Y. 1999).
254. *Id.* at 283.
255. *Id.*

Court of the Bahamas.[256] Later, the Bahamian liquidators appointed to MIBL filed a petition in the Bankruptcy Court for the Southern District of New York pursuant to section 304(a) seeking, among other things, an order directing all persons or entities possessing MIBL's assets to turn over those assets, or the proceeds thereof, to the liquidators.[257] In support of its argument that turnover should not be compelled, the creditors asserted that turnover is conditioned upon the adequate protection provision of the United States Bankruptcy Code.[258] The bankruptcy court held that adequate protection was not a requirement under section 304 and ordered the turnover of the assets to the liquidators,[259] and, on appeal, the district court affirmed.[260] The bankruptcy court and the district court geared their decisions towards enhancing universalism by "granting deference to foreign proceedings, which . . . promot[es] efficiency in international bankruptcies."[261] The creditors in *Treco I* and *II* were compelled to forfeit their property to the debtor without being compensated for the loss in value of the property.[262] Without an adequate protection provision in section 304, United States creditors have much to fear if a court decides to recognize a foreign proceeding.

### F. *Availability of Avoidance Powers*

In early case law, courts grappled with the issue of whether foreign representatives may exercise the powers granted under the United States Bankruptcy Code to avoid preferential or fraudulent transfers in ancillary proceedings (sections 544,[263] 545,[264] 548,[265] 550,[266] and 724(a)[267]).[268] Some courts have exercised their powers rather broadly to allow foreign representatives to use the Code's avoidance

256. *Id.*
257. *Id.* at 284.
258. *Id.* at 292.
259. *Id.*
260. *In re* Treco, 239 B.R. 36 (Bankr. S.D.N.Y. 1999).
261. *Id.* at 41.
262. *Id.* at 44.
263. 11 U.S.C. § 544 (1994). A trustee has several powers under this section to avoid certain transfers made and obligations incurred by the debtor.
264. *Id.* § 545. The trustee has the power to avoid a statutory lien on the property under certain circumstances.
265. *Id.* § 548. The trustee may avoid transfer of an interest of the debtor in property or any obligation incurred by the debtor under fraudulent conveyances occurring ninety days (or one year under certain circumstances) before the bankruptcy.
266. *Id.* § 550. This section contains provisions for the enforcement of avoidances.
267. *Id.* § 724(a). This section permits a trustee to avoid a lien that secures a fine, penalty, forfeiture or multiple, punitive, or exemplary damages claim to the extent that the claim is not compensation for actual pecuniary loss.
268. *See* Lee, *supra* note 20, at 149-50; *supra* note 208 and accompanying text; *infra* Part III.C.2.

provisions.[269] The bankruptcy court in *In re Egeria Societa Per Azioni Di Navigazione* addressed the issue of whether a foreign representative in an ancillary proceeding can bring an action to avoid liens obtained by certain creditors against the foreign debtor pursuant to United States bankruptcy law.[270] The court determined that a preference action could clearly be brought in an ancillary proceeding by virtue of the language of section 304(c)(3).[271] The court determined that section 304(c)(3) "states that the Court (bankruptcy) shall act to prevent 'preferential or fraudulent dispositions of such estate.'"[272]

By contrast, many other courts have forbidden a foreign representative to assert avoidance powers.[273] In *In re Wachsmuth ex rel. Gussen*, a foreign representative of a German debtor asserted that several transfers made by the debtor to various creditors were fraudulent, and sought recovery of the transfers pursuant to Florida's fraudulent transfer statute.[274] The court held that, in general, a foreign representative is not entitled to employ the trustee's avoiding powers conferred under the Bankruptcy Code.[275] The court dismissed the proceeding, stating that an avoidance action is not one of the forms of relief enumerated in section 304(b).[276] In effect, *Wachsmuth* appeared to acutely curtail foreign representatives' avoidance powers and leave the foreign representative with only the avoidance powers available outside of title 11.[277]

The language of section 304 is therefore ambiguous as to whether the use of the Code's avoidance powers in an ancillary proceeding is permitted. Some commentators believe that "[t]he use of the Code's avoidance powers in a § 304 proceeding is at odds with the generally accepted view that § 304 does not create a case for administration under the Code and that instead a § 304 case is merely in aid of a foreign proceeding."[278]

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269. *See, e.g., In re* Comstat Consulting Servs. Ltd., 10 B.R. 134, 134-35 (Bankr. S.D. Fla. 1981).

270. *In re* Egeria Societa Per Azioni Di Navigazione, 26 B.R. 494 (Bankr. E.D. Va. 1983).

271. *Id.* at 497.

272. *Id.*; *see* Lee, *supra* note 20, at 150.

273. *See, e.g., In re* Axona Int'l Credit & Commerce Ltd., 88 B.R. 597 (Bankr. S.D.N.Y. 1988), *aff'd*, 115 B.R. 442, 447 (Bankr. S.D.N.Y. 1990) (holding that the Bankruptcy Code does not grant a foreign representative the option to determine whether United States or foreign avoidance law is applicable); *In re* Metzeler, 78 B.R. 674, 677 (Bankr. S.D.N.Y. 1987) (holding that a foreign trustee seeking to recover allegedly preferential and fraudulent transfers may assert "only those avoiding powers vested in him by the law applicable to the foreign estate").

274. *In re* Wachsmuth *ex rel.* Gussen, 272 B.R. 766, 767 (Bankr. M.D. Fla. 2001).

275. *Id.* at 770-71.

276. *Id.*

277. Robert B. Chapman, *Bankruptcy*, 53 Mercer L. Rev. 1199, 1311 (2002).

278. Lee, *supra* note 20, at 150.

## III. THE NEW CHAPTER 15: AN EQUITABLE COMBINATION OF UNIVERSALISM AND TERRITORIALISM

This part argues that in light of the problems associated with section 304 of the Bankruptcy Code, the adoption of Chapter 15 into United States law provides the most favorable solution. This part explains why Chapter 15, by virtue of its selective adoptions of and deviations from various provisions of the Model Law, updates the United States Bankruptcy Code to better facilitate cross-border insolvencies, create greater legal certainty for international commerce, and lessen the risks for creditors.

The new Chapter 15, entitled "Ancillary and Other Cross-Border Cases," incorporates nearly all of the language, ideas, and goals of the Model Law.[279] Because the Model Law is a universalist approach to cross-border insolvency governance, Chapter 15, by virtue of its incorporation of most of the Model Law's principles, will advance the Model Law's goal of universalism in the United States. Chapter 15, however, does not solely incorporate universalist principles. Chapter 15 alters some of the language of the Model Law and even adds additional provisions that do not exist in the Model Law's text. These new and different sections are territorialist in nature in order to protect local interests. Therefore, Chapter 15 differs from the Model Law in that it furthers universalist goals while maintaining territorialist aspects of cross-border insolvency governance.

### A. *Why Are Both Universalism and Territorialism Desirable?*

As businesses increasingly expand to global proportions, insolvencies will certainly follow the same pattern. Already in recent years, global markets and ideas have expanded to great dimensions.[280] With this pattern almost certainly expecting to continue, universalism will benefit the global economy as a whole.[281] In theory, a single system for handling cross-border insolvencies—that is, a pure universal system—would help achieve stability and predictability. First, this international cohesion would increase the flow of trade at lower transactional costs.[282] Due to the increased predictability of an

279. Bankruptcy Abuse Prevention and Consumer Protection Act of 2001, H.R. 333, 107th Cong. § 1501(a) (2001); *see also supra* Part I.D.

280. Michael Fitz-James, *Use of Cross-Border Insolvency Protocols on the Rise, reprinted in* Corp. Legal Times Int'l, May 2002, *at* http://www.gtlaw.com/pub/media/2002/leshawj02a/pdf (last visited Mar. 25, 2003); *see also supra* Introduction.

281. *See* Westbrook, *A Global Solution*, *supra* note 24, at 2286-87.

282. *See* Devling, *supra* note 119, at 435-36. *See generally* Ronald J. Silverman, *Advances in Cross-Border Insolvency Cooperation: The UNCITRAL Model Law on Cross-Border Insolvency*, 6 ILSA J. Int'l & Comp. L. 265 (2000) (discussing the benefits of implementing a uniform framework for the coordination of international insolvencies) [hereinafter, Silverman, *Advances*].

application of one country's laws to any future insolvency of the debtor, a cohesive insolvency system will introduce a measure of certainty into insolvency outcomes, allowing lenders to more accurately price risk and encourage cash flow. The risks and consequences of a failure of a transnational corporate entity will be easier to quantify for all parties involved.[283] Because of this ability to quantify the risks associated with a corporation, creditors will have greater confidence regarding how and whether they will be able to recover assets from financially troubled debtors. Increased creditor confidence will result in an increase in the willingness of lenders to extend loans and encourage caution in the incurrence of liabilities by debtors.[284] Next, universalism will help reduce costs to foreign companies and investors because they will be able to decrease their initial research.[285] Investors will no longer have to research the possible repercussions of situations where transnational companies must liquidate or reorganize.[286] They will be able to more easily weigh the benefits and disadvantages of investing with a particular transnational corporation.[287] Finally, universality would also promote fairness and equality of the distribution of assets to all creditors by virtue of universalism's mandate of administration by one central forum under one law.[288] Thus, universalism will be a necessary theory to ensure that cross-border insolvencies are handled effectively and as fairly as possible.

Eventually, the globalization of business will likely "harmonize the now divergent insolvency systems of the world,"[289] making conditions adequate for universalism to preside over cross-border insolvency administration.[290] The insolvency regimes of each nation, however, are currently very different, and until these regimes are harmonized—a process that will likely take a long time—pure universalism has a small likelihood of prevailing.[291] Until universalism does prevail, the

283. *See* Isham, *supra* note 2, at 1177-78; Westbrook, *A Global Solution*, *supra* note 24, at 2286.

284. *See generally* Jeremy Smith, Note, *Approaching Universality: The Role of Comity in International Bankruptcy Proceedings Litigated in America*, 17 B.U. Int'l L.J. 367 (1999).

285. *See* Isham, *supra* note 2, at 1177-79; *see also* Westbrook, *A Global Solution*, *supra* note 24, at 2286.

286. Isham, *supra* note 2, at 1177-79.

287. Furthermore, creditors will have more certainty as to whether or not a foreign proceeding will be recognized by the United States courts, what law will likely be applied, and what their likelihood of being able to recover assets will be. They will have less of a need to conduct legal and jurisdictional research prior to deciding whether or not to invest in a particular corporation. *Id.*

288. *Id.*

289. LoPucki, *Cooperative Territoriality*, *supra* note 45, at 2217 (agreeing, to an extent, with Professor Westbrook).

290. *See* Westbrook, *A Global Solution*, *supra* note 24, at 2292-97.

291. *See, e.g.*, LoPucki, *Cooperative Territoriality*, *supra* note 45, at 2216. LoPucki believes that "[u]niversalism can work only in a world with essentially uniform laws

United States must continue to apply principles of sovereignty through territoriality in order to guard against the prejudice that American creditors may encounter in foreign proceedings.[292]

The split between territoriality and universality often turns on the issue of whether comity or local creditor's rights are more important.[293] A combination of universality and territoriality would balance these two issues. A combination would allow a strong presumption in favor of deference to the foreign proceeding when comity is justified.[294] Because courts employing this line of reasoning often grant recognition to foreign proceedings more readily,[295] a combination system would ensure that American creditors would also be protected. The incorporation of territorialist factors into Chapter 15 will help ensure the protection of United States creditors against prejudice and inconvenience by continuing to give bankruptcy judges the means they need to follow the territorial approach.

Overall, such a balance is necessary for the effective governance of cross-border insolvencies. It allows the United States to further UNCITRAL's goal of enacting a unified approach to cross-border insolvencies, while simultaneously allowing it to retain control and discretion over cases, proceedings, and interested parties within its boundaries.

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governing bankruptcy and priority among creditors—a world that does not yet exist." *Id.*

292. *See generally id.* at 2218 (arguing that "territoriality continues to provide the soundest basis for international cooperation in present world circumstances and for the reasonably foreseeable future").

293. *See supra* Part II.A.

294. *See, e.g., In re* Koreag, 961 F.2d 341, 348 (2d Cir. 1992).

295. *See, e.g., In re* Ionica PLC, 241 B.R. 829 (Bankr. S.D.N.Y. 1999) (discussing comity as a factor bearing upon whether court should grant relief in case ancillary to foreign insolvency proceedings, encouraging deference to foreign laws); *In re* Bd. of Dirs. of Hopewell Int'l. Ins. Ltd., 238 B.R. 25, 68 (Bankr. S.D.N.Y. 1999) (finding that when foreign proceeding is brought under the law of another common-law jurisdiction with procedures akin to those applicable in United States bankruptcy cases, comity should be extended to foreign proceeding with less hesitation); *In re* Petition of Davis, 191 B.R. 577, 587 (Bankr. S.D.N.Y. 1996) (determining that a bankruptcy court "need not find that the foreign law is identical to [American law]" in order to grant comity; "[i]t is enough that [foreign law] is not repugnant to American laws and policies"); *see also* Société Nationale Industrielle Aérospatiale v. United States Dist. Court for the S. Dist. of Iowa, 482 U.S. 522, 546 (1987) (stating that "we have long recognized the demands of comity in suits involving foreign states, either as parties or as sovereigns with a coordinate interest in the litigation," and citing Hilton v. Guyot, 159 U.S. 113 (1895)); Cunard S.S. Co. Ltd. v. Salen Reefer Servs. AB, 773 F.2d 452, 457 (2d Cir. 1985); *In re* Gee, 53 B.R. 891, 901 (Bankr. S.D.N.Y. 1985) (holding that "[c]omity will be granted to the decision . . . of a foreign court if it is shown that the foreign court is a court of competent jurisdiction, and that the laws and public policy of the forum state and the rights of its residents will not be violated").

### B. *Chapter 15 Promotes Universalism Through Its Adoption of Universalist Provisions of the Model Law*

#### 1. Promotion of "Comity" to a Factor of Higher Importance

Chapter 15 eliminates much of the confusion surrounding the emphasis that should be given to comity as opposed to the other factors used to determine whether to grant relief to a foreign representative.[296] *In re Maxwell*[297] and other prior case law have construed section 304 to hold comity as the central consideration,[298] but other courts have failed to hold comity in such a high regard.[299] Comity's physical placement as merely one of six factors in section 304 is misleading, however, because those factors are essentially elements of the grounds for granting comity. Therefore, Congress removed comity as a factor under section 1507(b) and raised comity to the introductory language to clearly indicate that it is the central concept to be addressed.[300]

While section 1507(a) virtually follows Article 7 of the Model Law almost exactly, section 1507(b) intends to permit the further development of international cooperation begun under section 304, but is not to be the underlying reason for denying or limiting relief otherwise available under Chapter 15.[301] The court's provision of additional assistance is conditional upon its "consideration of the . . . subsection 304(c) [factors] in a context of a reasonable balancing of interests following current case law."[302] Thus, section 1507(b) will read:

> In determining whether to provide additional assistance under this title or under other laws of the United States, the court shall consider whether such additional assistance, *consistent with the principles of comity*, will reasonably assure
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> (1) just treatment of all holders of claims against or interests in the debtor's property;

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296. *See supra* Parts I.D, II.A.

297. *Supra* notes 206-11 and accompanying text.

298. *See* Phila. Gear Corp. v. Phila. Gear de Mex., S.A., 44 F.3d 187, 193-94 (3d Cir. 1994) (reviewing the district court's denial of comity and finding that it was an abuse of the court's discretion); Remington Rand Corp. v. Bus. Sys., Inc., 830 F.2d 1260, 1266 (3d Cir. 1987) (stating that "[u]nder the principle of international comity, a domestic court normally will give effect to executive, legislative, and judicial acts of a foreign nation"); Cunard, 773 F.2d at 460.

299. *See, e.g.*, Matter of Papeleras Reunidas, S.A., 92 B.R. 584, 594 (Bankr. E.D.N.Y. 1988); *see also supra* Part II.A.

300. Stuart A. Krause et al., *Relief Under Section 304 of the Bankruptcy Code: Clarifying the Principal Role of Comity in Transnational Insolvencies*, 64 Fordham L. Rev. 2591 (1996) (offering the first suggestion that comity be elevated to a higher level of importance).

301. House Report 107-3, *supra* note 159.

302. *Id.*

> (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
>
> (3) prevention of preferential or fraudulent dispositions of property of the debtor;
>
> (4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and
>
> (5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.[303]

Thus, Chapter 15 seems to recognize the disparate treatment of comity among United States bankruptcy courts.[304] Under the new Chapter 15, comity will be universally applied in the same manner, which will lead to greater consistency and stability in cross-border insolvencies.

### 2. Elimination of Discretionary Recognition

Chapter 15 universalizes recognition in section 1517.[305] Adopting Article 17 of the Model Law nearly verbatim, section 1517(a) requires mandatory recognition of a foreign proceeding if the foreign proceeding and foreign representative meet the requirements of the Code and the filing requirements of section 1515.[306] Generally, this section enhances protections offered to foreign debtors under the Bankruptcy Code.[307] The House Report explains that granting recognition "is not dependent upon any findings about the nature of the foreign proceedings of the sort previously mandated by section 304(c) . . . . The requirements of [section 1517] . . . are all that must be fulfilled to attain recognition."[308] Thus, pursuant to Chapter 15, a foreign representative might obtain the benefits of an automatic stay even if he or she cannot satisfy the section 304(c) factors.[309]

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303. Bankruptcy Abuse Prevention and Consumer Protection Act of 2001, H.R. 333, 107th Cong. § 1507(b) (2001) (emphasis added).

304. *See supra* Part II.A.

305. *See supra* Part I.D.

306. H.R. 333, § 1517. This section provides that application for recognition shall be by petition to the court. The petition must be accompanied by one of the following: (1) a copy of the commencement decision in the foreign proceeding which appointed the foreign representative, (2) a certificate from a foreign court confirming the proceeding and representative, or (3) other acceptable evidence proving the existence of the proceeding and representative. In addition, a statement identifying all foreign proceedings involving the debtor must be filed. All documents required by this section must be filed in English. It also gives the court the power to require English translations of any additional documents.

307. *Id.*

308. House Report 107-3, *supra* note 159.

309. Lee, *supra* note 20, at 186-87.

Mandatory recognition represents a significant shift towards universalism from the approach taken under the current section 304 of the Code.[310] Under the current scheme, a bankruptcy judge could easily dismiss a petition under its discretionary authority even if the proceeding qualified as a foreign proceeding.[311] After the implementation of Chapter 15, however, a bankruptcy court would not have the same freedom as the *Hourani* court.[312] The grounds for denying recognition to a foreign proceeding are too narrow in section 1517(a) for such an unconstrained denial of recognition. The automatic recognition of Chapter 15 therefore helps to achieve the Model Law's goal of a universalist system of handling cross-border insolvencies.

### 3. Incorporation of an Automatic Stay

The Model Law creates an automatic stay in Article 20, which is incorporated into Chapter 15 through section 1520.[313] Pursuant to section 1520, upon recognition of a foreign main proceeding, a stay automatically protects the foreign debtor.[314] This section restrains the transfer, encumbrance, or any other disposition of the debtor's property within the United States to the extent that it is the property of the estate under sections 363,[315] 549,[316] and 552.[317] Thus, under Chapter 15, a foreign representative may obtain an automatic injunction against any entities from commencing or continuing any action involving the debtor, instead of first demonstrating his or her right to relief under section 304(b) in order to obtain the benefits of the stay. The addition of the automatic stay effectively contributes to

310. *See supra* Parts I.B, II.B.

311. *See supra* Part II.B.

312. *See supra* text accompanying notes 223-24. Section 1517(a) does provide a limited basis for denying recognition of a foreign proceeding. This section is subject to section 1506, which provides that nothing in Chapter 15 prevents the court from refusing to take action if the action would be manifestly contrary to United States public policy. This exception, however, is to be narrowly read. H.R. 333, § 1506; Lee, *supra* note 20, at 186.

313. *See supra* notes 183-86 and accompanying text. This section provides cross-references to other sections that become applicable upon recognition. In addition, it restrains the transfer, encumbrance or any other disposition of the debtor's property within the United States to the extent it is property of an estate under sections 363, 549, and 552. It also allows the foreign representative to operate the debtor's business and exercise the powers of a trustee. H.R. 333, § 1520.

314. H.R. 333, § 1520(a)(1); *cf.* 11 U.S.C. §§ 361, 362 (1994).

315. Section 363 of title 11 provides that, under certain circumstances and conditions, the trustee may use, sell, or lease property of the estate. 11 U.S.C. § 363; *see* Lee, *supra* note 20, at 186.

316. Section 549 of title 11 provides certain circumstances in which a bankruptcy trustee may avoid a transfer of property of the estate. 11 U.S.C. § 549; *see* Lee, *supra* note 20, at 186.

317. Section 552 of title 11 discusses the postpetition effect of security interest. 11 U.S.C. § 552; *see* Lee, *supra* note 20, at 186.

international cohesion, for it prevents any action from being taken that might result in preferential treatment or unfair distribution of the debtor's assets. It enjoins all actions so that all of the debtor's estate—wherever located—may be distributed in an equitable manner.

According to the House Report, by incorporating the automatic stay of the Bankruptcy Code into Chapter 15, section 1520(a) makes the exceptions to and limitations upon the stay applicable to a foreign representative in an ancillary case as well.[318] Included in these limitations would be the bankruptcy court's authority to terminate the stay of actions against the debtor or the debtor's estate pursuant to section 362(d) of the Bankruptcy Code for cause.[319] The incorporation of the automatic stay into cross-border insolvency governance would aid in the efficient and cooperative administration of the international debtor's estate.

### 4. Simplification of Choice-of-Law Concepts and Fostering Predictability

Chapter 15 aims to clarify the questions of which court will exercise jurisdiction over the insolvency proceeding, and additionally, which law will govern the distribution of the foreign debtor's assets.[320] Section 1516 of Chapter 15 provides safeguards to diminish the likelihood of conflicting interpretations of choice-of-law and jurisdiction.[321] These safeguards are nearly reproduced directly from the Model Law.[322] Section 1516(c) mandates that absent "evidence to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the center of the debtor's main interests."[323] Additionally, section 1508 provides that when

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318. House Report 107-3, *supra* note 159; Lee, *supra* note 20, at 187.

319. House Report 107-3, *supra* note 159; Lee, *supra* note 20, at 187-88. Also note that:

> Two special exceptions to the automatic stay are embodied in subsections (b) and (c). To preserve a claim in certain foreign countries, it may be necessary to commence an action. Subsection (b) permits the commencement of such an action, but would not allow for its further prosecution. Subsection (c) provides that there is no stay of the commencement of a full United States bankruptcy case. This essentially provides an escape hatch through which any entity, including the foreign representative, can flee into a full case. The full case, however, will remain subject to subchapters IV and V on cooperation and coordination of proceedings and to section 305 providing for stay or dismissal. Section 108 of the Bankruptcy Code provides the tolling protection intended by Model Law article 20(3), so no exception is necessary as to claims that might be extinguished under United States law.

House Report 107-3, *supra* note 159.

320. *See supra* Part II.D.

321. *See supra* notes 174-75 and accompanying text.

322. *See* Model Law, *supra* note 13, at art. 16.

323. Bankruptcy Abuse Prevention and Consumer Protection Act of 2001, H.R.

interpreting provisions under Chapter 15, the court should give regard to its international origin as well as the need to promote uniformity and consistency with similar statutes adopted by other jurisdictions.[324] Thus, while Chapter 15 will not expressly dictate which state's bankruptcy rules will govern proceedings, Chapter 15 indicates that each proceeding will be governed by the domestic law of the nation having jurisdiction over the main proceeding. Overall, Chapter 15 provides international parties to a cross-border insolvency a high degree of predictability as to which law will govern the proceedings.

Chapter 15 will also make the process for determining proper jurisdiction more specific. Section 1334(a) of title 28 gives exclusive jurisdiction to the district courts in a "case" under title 11.[325] Chapter 15 will provide that a petition for recognition commences a case, which immediately gives the district court jurisdiction.[326] This will bring other provisions into effect to assist in determining the proper venue, including a new subsection to 28 U.S.C. § 157 that designates a case under title 11 as a core proceeding.[327]

Furthermore, Chapter 15 will address the onerous venue requirements of 28 U.S.C. § 1410, which currently govern ancillary proceedings.[328] To follow the directive of section 1410 literally, a foreign debtor would be required to commence an ancillary proceeding in each district where an action was pending against the foreign debtor or where the debtor possessed property.[329] The automatic stay would allow the debtor to avoid the costly and repetitive requirements of commencing multiple ancillary proceedings.[330]

### 5. Suspension or Dismissal of a Local Bankruptcy Case When Necessary To Promote Transnational Cooperation

Currently, section 305(a)(2) of the Code furnishes the bankruptcy courts with the power to suspend or dismiss a full local bankruptcy

333, 107th Cong. § 1516(c) (2001); Lee, *supra* note 20, at 183.

324. H.R. 333, § 1508.

325. 28 U.S.C. § 1334(a) (1994); *see also* House Report 107-3, *supra* note 159.

326. House Report 107-3, *supra* note 159.

327. *Id.*

328. 28 U.S.C. § 1410(a). The statute mandates that a case under section 304 to enjoin the commencement or continuation of an actor or the enforcement of a judgment may be commenced only in the district court where the court in which the action is pending sits. *Id.* Section 1410(c) provides that a section 304 case may be commenced only in the district court for the district in which the principal place of business or the principal assets in the United States of the estate that is the subject of the case is located. *Id.*

329. *Id.*; *see also* Foreman & Selit, *supra* note 19.

330. Foreman & Selit, *supra* note 19.

commenced against a foreign debtor if the foreign proceeding is recognized under section 304.[331]

The House Report to the new Chapter 15 notes that a court will still retain the authority to apply section 305 of the Code to dismiss, stay or limit any bankruptcy case as it deems appropriate to promote a cooperation or coordination in a cross-border insolvency.[332] Chapter 15 amends section 305(a)(2) to provide that a bankruptcy court may dismiss or suspend a proceeding against a foreign debtor when a foreign proceeding with respect to that debtor has been recognized and when "the purposes of Chapter 15 would be best served by the suspension or dismissal."[333] Section 1529(4) expressly provides that a court may grant any relief authorized under section 305 when necessary to achieve cooperation and coordination.[334] Essentially, the United States bankruptcy judge will have broad power to promote solidarity among the different courts involved in the bankruptcy case. In effect, this permits United States courts to defer to a foreign jurisdiction to ensure that a universal approach to the distribution of assets is maintained when possible.

### C. *Chapter 15 Maintains Territorialism by Incorporating Local Principles That Deviate from the Provisions of the Model Law*

Chapter 15 ensures that local creditor interests are protected by altering the Model Law in such a way that territorialism is maintained, despite the universalist nature of the Model Law. The overall result is a universalist framework that incorporates territorialist protections.

#### 1. Inclusion of Adequate Protection

To ensure that United States creditors are sufficiently protected from any loss in value that might occur if the foreign debtor retains possession of secured assets to which the creditors have a right, Chapter 15 introduces the concept of adequate protection into cross-border insolvencies.[335] Chapter 15 makes the adequate protection provision of the United States Bankruptcy Code[336] applicable to foreign main proceedings that are recognized.[337] In other words, the incorporation of an adequate protection provision means that a

331. 11 U.S.C. § 305(a)(2) (1994); *see also supra* note 162 and accompanying text.

332. House Report 107-3, *supra* note 159; *see also* Lee, *supra* note 20, at 199.

333. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2001, H.R. 333, 107th Cong. § 1529(4) (2001) (citing 11 U.S.C. § 305(a)(2)); Lee, *supra* note 20, at 199.

334. H.R. 333, § 1529(4); Westbrook, *Multinational Enterprises*, *supra* note 21, at 21; *see also* Lee, *supra* note 20, at 199.

335. H.R. 333, § 1520(a)(1); *see also supra* text accompanying notes 183-86; *supra* Part II.E.

336. *See* 11 U.S.C. § 361.

337. H.R. 333, § 1520(a)(1).

foreign debtor may be required to make cash payments to a United States creditor or grant additional liens on the debtor's property in the equivalent of the decrease in the value of the creditor's interest in the property. Furthermore, the court will have the power to terminate the automatic stay granted under section 1520 for failure to provide such compensation to the United States creditors.[338] This effectively improves the standing of the United States creditors in such proceedings because under Chapter 15 the court may grant relief to the foreign representative "only if the interests of the creditors and other interested entities . . . are sufficiently protected."[339] If adequate protection is not paid to the United States creditors, the court may determine that their interests are not sufficiently protected and may not grant the desired relief to the foreign representative.[340]

The incorporation of the adequate protection provision—a provision exemplifying territorialism due to its goal of protecting United States creditors—is a significant drawback to the universalism incorporated from the Model Law. The *Treco I* and *Treco II* decisions, which granted relief to the foreign liquidators because adequate protection was not a requirement under section 304, exemplify the effect that this provision will likely have on case law decided under Chapter 15.[341] The new Chapter 15 would likely have compelled a different analytical process leading to a different result. Had Chapter 15 governed *Treco I* and *Treco II*, the liquidators would not have been able to get the relief they sought unless they had satisfied the adequate protection provision and assured that the United States creditors' interests were sufficiently protected. Chapter 15, therefore, maneuvers away from the universalist tendencies seen in the *Treco I* and *Treco II* decisions and instead commands the courts to conduct more of a territorial analysis. This exemplifies the territorialist goal of safeguarding local creditors and is a necessary provision to ensure that local creditors are not treated unjustly in the distribution of the debtor's assets.

2. Denial of Avoidance Powers to Foreign Representatives

The Model Law gives a foreign representative the ability to initiate an avoidance proceeding under the United States Bankruptcy Code, and therefore allows the foreign representative to use the avoidance provisions of the Bankruptcy Code to force United States creditors to relinquish property transferred to them by the debtor if the transfer meets the requirements of one of the Code's avoidance provisions.[342]

338. *Id.*
339. *Id.* § 1522(a).
340. *Id.*
341. *See supra* notes 253-62 and accompanying text.
342. Guide to Enactment, *supra* note 5, at pt. V, paras. 165-67; *see supra* Part II.F.

Chapter 15, however, declines to adopt this approach and expressly excludes the Code's avoidance provisions from the enumerated forms of relief available to a foreign representative under 1521(a).[343] Thus, the foreign representative in an ancillary case may not evade transfers made by the debtor that might be avoidable by a trustee in an ordinary United States bankruptcy case. In denying a foreign representative the ability to bring avoidance actions, Congress sought to avoid complicated issues such as choice-of-law and choice-of-forum.[344]

Instead of granting avoidance powers to a foreign representative in an ancillary case, section 1523(a) of Chapter 15 provides a foreign representative with standing to initiate avoidance actions in a case pending under another chapter of the Code.[345] Thus, a foreign representative will be required to initiate an involuntary bankruptcy case if there are assets in the United States that the foreign representative desires to recover using avoidance powers.[346] Even in a section 1523 action, however, the courts will continue to determine the nature and extent of any avoidance action and what national law may be applicable to such action.[347] Again, this provision leaves broad discretion to the United States bankruptcy judges, and protects United States creditors from challenges made by foreign representatives to compel them to turn over property to the debtor under certain circumstances.

### 3. Assurance of the Vitality of Section 304

#### a. *Reliance on the Ancillary Approach of Section 304*

Section 304 of the United States Bankruptcy Code has perpetually followed the ancillary proceeding approach.[348] This practice will "undoubtedly be continued, and perhaps even strengthened, by the adoption of Chapter 15, despite the fact that [section] 304 will be formally repealed by its adoption."[349] The House Report expressly indicates that Chapter 15 will continue the ancillary proceeding approach by deeming it "the exclusive door to ancillary assistance to foreign proceedings."[350] Chapter 15 aims to simplify and organize situations in which actions involving a debtor are pending in several

343. H.R. 333, § 1521(a)(7); *see also* Lee, *supra* note 20, at 191.
344. *See* House Report 107-3, *supra* note 159; *see also* Lee, *supra* note 20, at 191.
345. H.R. 333, § 1523(a); Lee, *supra* note 20, at 190-91.
346. Lee, *supra* note 20, at 191.
347. House Report 107-3, *supra* note 159; *see also* Lee, *supra* note 20, at 191.
348. Westbrook, *Multinational Enterprises*, *supra* note 21, at 20.
349. *Id.*
350. House Report 107-3, *supra* note 159; *see also* H.R. 333, §§ 1509(b)(2), (b)(3), (c).

different courts by concentrating all of the control in one court.[351] It allows the United States to retain the exclusive right to govern within its own borders by centralizing power and discretion in the United States Bankruptcy Court system. In this sense, Chapter 15 moves away from the modified universalism approach of section 304 and towards a territorial approach to ancillary proceedings by leaving key control in the hands of the United States bankruptcy courts to determine what would be in the best interests of the United States creditors.

Furthermore, section 1507 ensures the continued vitality of the "generous and deferential decisions" made under section 304, some of which may exceed the language of the Model Law.[352] Under Chapter 15, courts would not only remain free to grant additional assistance as permitted by Chapter 15, but section 1507(b) incorporates the power existing under section 304 to grant assistance beyond that which will be provided in Chapter 15.[353] Bankruptcy judges would retain the ability to rely on prior decisions made under a section 304 analysis in resolving cases brought under the new Chapter 15. In other words, the bankruptcy court will have the power to grant assistance currently available under section 304 case law, whereas, under Article 7 of the Model Law, the use of section 304 case law would no longer be permitted.[354]

### b. *Incorporation of Existing 304(c) Factors*

Two of the five factors of 1507(b) that determine whether a United States bankruptcy court should grant additional assistance are of a territorial origin. First, section 1507(b)(2) provides that additional assistance must ensure "protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding."[355] This provision requires that United States creditors' interests must be protected when assistance is given to a foreign representative. The next factor, provided in section

351. "After recognition of a foreign main proceeding, a case under another chapter of this title may be commenced only if the debtor has assets in the United States." H.R. 333, § 1528. The effects of this recognition will be restricted to the debtor's assets that are "within the territorial jurisdiction of the United States" and any "other assets of the debtor that are within the jurisdiction of the court under sections 541(a) of this title, and 1334(e) of title 28," but only to the extent that "such other assets are not subject to the jurisdiction and control of a foreign proceeding that has been recognized under this chapter." *Id.*

352. Westbrook, *Multinational Enterprises*, *supra* note 21, at 21; *see also* H.R. 333, § 1507(b); House Report 107-3, *supra* note 159.

353. House Report 107-3, *supra* note 159; Westbrook, *Multinational Enterprises*, *supra* note 21, at 21.

354. House Report 107-3, *supra* note 159; Westbrook, *Multinational Enterprises*, *supra* note 21, at 21.

355. H.R. 333, § 1507(b)(2).

1507(b)(4), mandates that the "distribution of proceeds of the debtor's property [must be] substantially in accordance with the order prescribed" by the Bankruptcy Code.[356] Bankruptcy courts may still opt not to grant injunctive relief or turnover of the foreign debtor's assets if it determines that the interests of United States creditors are not sufficiently protected under the foreign law.[357] The relief available in an ancillary case under Chapter 15, therefore, remains identical to that currently available under the Bankruptcy Code.

In reaching its decision, the *Treco* court of appeals determined that the factor of comity held no dominance over the other 304(c) factors and should not be the ultimate element of the analysis in cases ancillary to foreign proceedings.[358] The court noted that comity had never called for "categorical deference" to foreign proceedings.[359] Thus, courts will likely continue to give consideration to each factor, including the two remaining territorial factors, despite the fact that comity will be elevated to a higher standing.[360] This will inhibit the onset of pure universalism attempted by the Model Law, for the territorial factors in section 1507(b) could remain a strong part of the bankruptcy courts' analyses. For example, *Treco* followed a territorial approach by refusing to turn over local assets for distribution in the Bahamas because such distribution would not be substantially identical to the procedure for distribution under United States bankruptcy law.[361] Such reasoning might continue to exist under Chapter 15 due to the enduring territorialist factors of section 304(c).

Chapter 15's retention of the territorial 304(c) factors reflects the tension between deferring to foreign proceedings and protecting the rights of local creditors in transnational bankruptcies. Although Chapter 15 requires recognition of certain proceedings, the court retains broad discretion as to the relief that will be granted or retained. The chapter is designed to give the court maximum flexibility.[362] As a result, Chapter 15 delegates the power to the United States bankruptcy courts to determine the actions that would promote the best interests of United States creditors.

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356. *Id.* § 1507(b)(4).

357. *Id.*; *see also* Foreman & Selit, *supra* note 19.

358. *In re* Treco, 240 F.3d 148, 157-58 (2d Cir. 2001); *see also supra* Part II.A.

359. *Treco*, 240 F.3d at 157; Devling, *supra* note 119, at 450-51.

360. Also note that Chapter 15 will allow bankruptcy judges to continue to rely on existing case law, whereas the Model Law would not. Therefore, judges might continue to follow *Treco's* reliance upon all factors, not just comity. *See supra* notes 253-62 and accompanying text; *see also* Devling, *supra* note 119, at 450-51.

361. *Treco*, 240 F.3d at 159; *see also supra* Part II.A; *supra* notes 253-62 and accompanying text.

362. S. Rep. No. 95-989 (1978); H.R. Rep. No. 95-595 (1977).

### c. *Indefinite Approach to the Turnover of Property*

Territorialism will likely prosper due to the unclear standard for turnover of property in Chapter 15.[363] Section 1521 fails to give a clear standard for when turnover of the debtor's assets should be granted.[364] Specifically, section 1521(b) provides that once a foreign proceeding is recognized, the court may order the turnover of the debtor's assets located in the United States to the foreign representative, on the condition that the court is satisfied the United States creditors' interests are sufficiently protected.[365] Furthermore, the turnover will only apply to assets that, under United States law, should be administered in the foreign proceeding.[366] Thus, the turnover of property to foreign representatives remains a discretionary exercise under Chapter 15, as it is currently under section 304.

Previously, in cases such as *Treco*, courts used the section 304(c) factors to establish whether turnover of the debtor's assets was appropriate.[367] Due to the unclear standard set forth in section 1521, 1521(b)'s statutory test will likely result in the same outcome as under 304(c) in that courts may continue to use these territorial factors to make their decisions.[368] The House Report, in describing the purpose of section 1521, indicates that the statute incorporates the case law interpretations on the scope of relief under section 304.[369] Thus, the interests of United States creditors will be sufficiently protected through the discretionary procedure that the courts will follow pursuant to section 1521.

### d. *Cooperation and Protocols*

Chapter 15, unlike the Model Law, requires formal recognition before any cooperation among local and foreign courts may take

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363. *See* H.R. 333, § 1521; *see also supra* notes 180-82 and accompanying text.

364. *See* H.R. 333, § 1521; *see also* Devling, *supra* note 119, at 451.

365. H.R. 333, § 1521(b) provides that:

> [u]pon recognition of a foreign proceeding, whether main or nonmain, the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in the United States to the foreign representative or another person, including an examiner, authorized by the court, provided that the court is satisfied that the interests of creditors in the United States are sufficiently protected.

*Id.* § 1521(b).

366. *Id.* § 1521(c).

367. *See* Devling, *supra* note 119, at 451; *supra* Part I.B.2.

368. *Id.*

369. House Report 107-3, *supra* note 159; *see, e.g.*, *In re* Treco, 240 F.3d 148 (2d Cir. 2001); *see also* Lee, *supra* note 20, at 193 (noting that "[U]nder the analysis of the Second Circuit in *Treco*, the bankruptcy court would have been free to stay litigation against the debtor or even to order turnover of property to the foreign representative . . . .These bounds set the scope of relief available in [a § 304] case.").

place.[370] Section 1527, entitled "Forms of cooperation,"[371] expressly authorizes courts to execute agreements to coordinate multiple proceedings concerning the same debtor.[372] Essentially, this provision "codifies the existing practice of [bankruptcy courts] entering into protocols" to coordinate bankruptcy proceedings in multiple jurisdictions.[373] The *Maxwell* case was the first instance in which protocols were used.[374] The United States bankruptcy court and the English High Court effectively administered the *Maxwell* case such that claimants who had submitted claims either to the United States bankruptcy court or the English court would receive a distribution of the debtor's assets—which had been pooled together—with the same effect.[375]

The objective of the protocol is to ensure that an insolvency proceeding efficiently maximizes the value of the debtor's assets for the benefit of all interested parties, while simultaneously preserving local rights. This approach has been deemed "cooperative territoriality."[376] Protocols, therefore, protect fundamental local rights while serving to promote efficient coordination of multiple proceedings.[377] They essentially provide both flexibility and harmonization by encompassing elements of both universality and territoriality.[378]

The continued use of protocols promoted by Chapter 15 indicates that territoriality is very much a significant consideration in adopting a local version of the Model Law. Chapter 15 will ensure that while universalism will play a strong role in handling cross-border insolvencies, territorialism will nonetheless survive to ensure that creditors' local rights are sufficiently addressed.

## CONCLUSION

An effective insolvency system, applied in a predictable manner, is important to the well-being of a country and the functioning of its

370. *Compare* H.R. 333, §§ 1525-27, *with* Model Law, *supra* note 13, at art. 25-27; *see also* Lee, *supra* note 20, at 196; *supra* Part I.C.2.d.

371. H.R. 333, § 1527 provides that cooperation may be implemented by any appropriate means, including "appointment of a person or body, including an examiner, to act at the direction of the court"; "communication of information by any means considered appropriate by the court"; and "approval or implementation of agreements concerning the coordination of proceedings." H.R. Rep 333, § 1527.

372. H.R. 333, § 1527(3); *see also* Lee, *supra* note 20, at 196; *supra* Part I.D.4.

373. Lee, *supra* note 20, at 196; *see, e.g.*, *In re* Maxwell Communication Corp., 170 B.R. 800 (Bankr. S.D.N.Y. 1994); *see also supra* notes 206-11 and accompanying text.

374. *See* Fitz-James, *supra* note 280.

375. *See id.*

376. *See* Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 Cornell L. Rev. 696, 702 (1999).

377. Evan D. Flaschen & Ronald J. Silverman, *Cross-Border Insolvency Cooperation Protocols*, 33 Tex. Int'l L.J. 587, 599-600 (1998).

378. *Id.*

economic system. The United States' approach to governing cross-border insolvencies should adequately address the tensions that section 304(c) currently reflects. On one hand, it should ensure just treatment of all claimholders and prevent preferential and fraudulent conveyances. The Code should employ comity when appropriate and defer to foreign laws to accommodate jurisdictional conflicts. For these concerns, a universal administration is the best method. On the other hand, the Code should protect local creditors from prejudice and inconvenience. Furthermore, the Code must maintain its goal of providing debtors with a sufficient opportunity for a fresh start. These concerns require a territorial approach to ensure that they are not lost in the shuffle. The new Chapter 15 takes all of these considerations into account. Through its accurate adoption of many universalist principles of the Model Law and its incorporation of territorialist features, Chapter 15 strikes a suitable balance between universalism and territorialism such that the interests of all interested parties are best served.