

# A LOOK AT TRANSNATIONAL INSOLVENCIES AND CHAPTER 15 OF THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005

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**Abstract:** Transnational insolvency cases inherently involve questions of jurisdiction and conflicts of law. In an attempt to add uniformity to international insolvency law, the United Nations Commission on International Trade Law (UNCITRAL) unanimously adopted the text of the Model Law on Cross Border Insolvency on May 30, 1997. Congress, drawing from UNCITRAL's Model Law, reformed the United States' statutory law on international bankruptcies, namely section 304 of the Bankruptcy Code, as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. This Article examines current theoretical approaches to international insolvencies, prior law on international insolvency, and the probable effect of Chapter 15's addition to the Bankruptcy Code.

## INTRODUCTION<sup>1</sup>

Historically, little has been done on an international basis to promote cooperation between bankruptcy courts of various nations. Because most nations have their own bankruptcy laws, many of which differ dramatically, and because it is difficult to resolve such conflicts without a comprehensive international insolvency framework, few

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countries have entered into multinational and bilateral treaties relating to bankruptcy. Due to the lack of a comprehensive framework, many courts have been forced to deal with transnational insolvencies on a case-by-case basis.

The difficulties involved in this case-by-case approach prompted an effort to reconcile the international insolvency laws in a global arena. The growing number of multinational companies and cross-border insolvencies<sup>2</sup> have accelerated the need for an efficient international insolvency system to allow bankruptcy courts in multiple jurisdictions to coordinate and cooperate in the administration of a bankruptcy proceeding involving a transnational debtor. Such coordination and cooperation are essential, as cross-border insolvencies can involve (1) a debtor with a single international creditor, or (2) multiple debtors with subsidiaries, assets, operations, and creditors in dozens of nations.<sup>3</sup>

Congress attempted to address this problem head-on with the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). Although the focus of the public press has been on BAPCPA's consumer bankruptcy provisions, the international insolvency community has for the most part been pleased to witness the enactment of the 500-plus pages of Chapter 15 dealing specifically with cross-border insolvency cases. This new Chapter 15 replaces section 304 of the former Bankruptcy Code,<sup>4</sup> which

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<sup>2</sup> "Cross-border insolvency is a term used to describe circumstances in which an insolvent debtor has assets and/or creditors in more than one country." *Cross-Border Insolvency: Promoting International Cooperation and Coordination*, Corporate Law Economic Reform Program Proposals for Reform: Paper No. 8, at 7 (2002), available at <http://www.treasury.gov.au/documents/448/PDF/CLERP8.pdf> (last visited Nov. 23, 2005).

<sup>3</sup> See *Gitlin v. Societe Generale (In re Maxwell Comm. Corp.)*, 93 F.3d 1036 (2d Cir. 1996) (involving one proceeding in the United States and one in the United Kingdom); see also *United States v. BCCI Holdings (Luxembourg) S.A.*, 48 F.3d 551 (D.D.C. 1995) (involving subsidiary banks operating in seventy-five countries and proceedings in both the United Kingdom and the United States); *In re Maruko Inc.*, 160 B.R. 633, 677 (Bankr. S.D. Cal. 1993) (involving proceedings in the United States and Japan); *In re Axona Int'l Credit & Commerce Ltd.*, 88 B.R. 597, 598 (Bankr. S.D.N.Y. 1988) (involving proceedings in Hong Kong and the United States).

<sup>4</sup> The current Bankruptcy Code is found in Title 11 of the United States Code. See 11 U.S.C. §§ 101 *et seq.* (2000). Its foundation is the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (effective Oct. 1, 1979) (codified as amended at 11 U.S.C. §§ 101 *et seq.* (2000)). The Bankruptcy Reform Act of 1978 is typically referred to as the "Bankruptcy Code" or the "Code." References in this work to the "Bankruptcy Code" or the "Code" are to Title 11 of the United States Code as amended through April 20, 2005.

previously dealt with cases ancillary to foreign proceedings.<sup>5</sup> Through the enactment of BAPCPA, Congress attempted to establish the United States as a leader in the movement towards greater cooperation in international insolvencies.

Part I of this Article examines competing academic approaches to transnational insolvencies<sup>6</sup> and the resolution of international bankruptcy disputes through ancillary and parallel proceedings.<sup>7</sup> Part II analyzes section 304 under the former Bankruptcy Code.<sup>8</sup> Part III examines the creation of the Model Law of International Insolvency and the increasing desirability of uniform insolvency laws.<sup>9</sup> Part IV focuses on the recently enacted Chapter 15 and its potential impact on international insolvencies.<sup>10</sup>

## I. COMPETING ACADEMIC APPROACHES TO THE POLICIES UNDERLYING INTERNATIONAL INSOLVENCIES—TERRITORIALISM, UNIVERSALISM, AND CONTRACTUALISM

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

Territorialism, as one may guess, contemplates that each country maintains control over all assets located within its territory for the benefit of its local creditors.<sup>11</sup> This theory is based upon the idea of national sovereignty, in that national sovereignty "imposes the law of the sovereign on all within its territorial reach."<sup>12</sup> Accordingly, the law of the situs controls the assets located within the territory.<sup>13</sup> Significantly, the local law controls how the debtor's assets will be distributed among

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<sup>5</sup> See generally 11 U.S.C. § 304, *repealed by* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 802(d) (3), 119 Stat. 23, 146 [hereinafter BAPCPA].

<sup>6</sup> See *infra* notes 11–50 and accompanying text.

<sup>7</sup> See *infra* notes 51–62 and accompanying text.

<sup>8</sup> See *infra* notes 63–177 and accompanying text.

<sup>9</sup> See *infra* notes 178–99 and accompanying text.

<sup>10</sup> See *infra* notes 200–28 and accompanying text.

<sup>11</sup> Jay Lawrence Westbrook, *Multinational Enterprises in General Default: Chapter 15, the ALI Principles, and the EU Insolvency Regulation*, 76 AM. BANKR. L.J. 1, 5 (2002). Local creditors would likely benefit from a territorialistic approach because they would not have to adjudicate their claims abroad. See M. Cameron Gilreath, Note, *Overview and Analysis of How the United Nations Model Law on Insolvency Would Affect United States Corporations Doing Business Abroad*, 16 BANKR. DEV. J. 399, 406 (2000). Similarly, local creditors would have assurance that the local law of their "home country" would apply. See *id.*

<sup>12</sup> Westbrook, *supra* note 11, at 5.

<sup>13</sup> *Id.*

creditors, including the priority of such distribution.<sup>14</sup> Thus, there are no extraterritorial results.<sup>15</sup> Given this theory and its embodiment of notions of national sovereignty, it is often referred to as the "grab rule."<sup>16</sup> Some scholars have acknowledged that this approach may actually make it more difficult to reorganize a multinational business because most of the reorganization would be done piecemeal under various (and often differing) laws.<sup>17</sup> Adding more fuel to the fire, courts applying a territorialistic approach would likely be uncooperative with extra-jurisdictional courts.<sup>18</sup> Accordingly, a multinational debtor would potentially have to file for bankruptcy relief in each country in which it has assets, operations, or creditors.<sup>19</sup>

Because of this "grab rule" approach, many academics have criticized its application as contravening the principle of creditor equality and encouraging a race to the courthouse.<sup>20</sup> It has been argued that this race to the courthouse encourages multiple bankruptcy proceedings and duplicative administrative expenses.<sup>21</sup>

As Professor Jay L. Westbrook, a leading expert in U.S. bankruptcy and international insolvency law and one of two leaders of the American delegation to UNCITRAL, noted, although many academics favor universalism<sup>22</sup> (discussed below), countries have generally applied a

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<sup>14</sup> See *id.*

<sup>15</sup> Gilreath, *supra* note 11, at 406.

<sup>16</sup> See Westbrook, *supra* note 11, at 8. The Report of the National Bankruptcy Review Commission perhaps summarized this rule best when it said: "When a person or a company with international operations falls into serious financial trouble, each country employs its insolvency laws to grab local assets and administer them locally according to the procedures and priorities of that country's laws." See NAT'L BANKR. REVIEW COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS 353 (1997), available at <http://govinfo.library.unt.edu/nbrcreport/10transn.pdf>.

<sup>17</sup> 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, 293 (2002).

<sup>18</sup> See *id.*

<sup>19</sup> See David Neiman, *International Insolvency and Environmental Obligations: A Prelude to Resolving the Conflicting Policies of a Clean Slate Versus a Clean Site in Transnational Bankruptcies*, 8 FORDHAM J. CORP. & FIN. L. 789, 823 (2003).

<sup>20</sup> See Gilreath, *supra* note 11, at 406.

<sup>21</sup> See *id.*

<sup>22</sup> Westbrook, *supra* note 11, at 8. In fact, the Report of the National Bankruptcy Review Commission notes that many scholars and practitioners have criticized territorialism for five major reasons:

(a) Reorganization is difficult or impossible, because each uncoordinated local proceeding is focused on maximizing the return for local creditors. The local officials are often unwilling to permit any use of local assets for ongoing international operations. Indeed, in many countries there is no authority for cooperation with foreign proceedings even if the local officials were so in-

more territorialistic approach.<sup>23</sup> Some countries, including the United States, have even gone so far as to adopt a rule which grants their own courts worldwide jurisdiction, although simultaneously refusing to recognize the international jurisdiction of other countries.<sup>24</sup>

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clined. In addition, many of the actions necessary for cooperation are not contemplated by local procedures and would violate local law.

(b) Even in a liquidation there can be realization of much greater value if assets can be sold without regard to national borders. For example, a division of a company may have manufacturing and distribution facilities in several countries. That division might be saleable for a much higher price as a unit than would be each bundle of assets in each country, but existing law makes it very difficult to sell assets in multinational packages.

(c) Although virtually all national insolvency laws endorse the principle of equality of distribution to creditors, territorialism produces highly unequal results. Aside from differing priority rules in each country, the distributions vary greatly depending on the assets seizable in each country at the moment of bankruptcy. Local creditors benefit where they are lucky enough to have more assets in their country at that moment and suffer where their jurisdiction is less fortunate. A few very sophisticated international creditors may collect in several proceedings and do very well, but most smaller creditors cannot play that game. The results are arbitrary and inconsistent with the principles of virtually every country's laws. Above all, they are unpredictable, creating substantially increased transaction costs in international financing.

(d) Shrewd debtors can exploit modern technology and the globalization of commerce to move assets rapidly from one jurisdiction to another and to transfer assets to insiders or preferred creditors in other countries. Because recognition of foreign insolvency proceedings and cooperation with those proceedings is so cumbersome in most countries, it is very hard for administrators or liquidators to pursue and capture the assets.

(e) Although overt discrimination against foreign creditors is relatively rare, they often receive little or no real notice of insolvency proceedings and too often suffer *de facto* discrimination in those proceedings.

NAT'L BANKR. REVIEW COMM'N, *supra* note 16, at 353.

<sup>23</sup> Westbrook, *supra* note 11, at 8; *see also* Levenson, *supra* note 17, at 293 (acknowledging that the "grab rule" represents the rule in international insolvencies for a majority of countries). Additionally, many countries apply a territorialistic approach because most nations do not have treaties, protocols, and conventions establishing any framework for cooperation relating to international insolvencies. *See* Elizabeth J. Gerber, *Not All Politics Is Local: The New Chapter 15 to Govern Cross-Border Insolvencies*, 71 *FORDHAM L. REV.* 2051, 2058 (2003).

<sup>24</sup> Westbrook, *supra* note 11, at 8. Congress defined "property of the estate" under section 541 of the Bankruptcy Code to include all the debtor's interests in property "wherever located." *See* 11 U.S.C. § 541(a) (2000). This language expresses a clear intent to exercise worldwide subject matter jurisdiction over a debtor's assets. That intent is even more clearly expressed by 28 U.S.C. § 1334(e), which provides that the Bankruptcy Court shall have jurisdiction over property of the debtor's estate "wherever located." 28 U.S.C. § 1334(e); *see also* Celotex Corp. v. Edwards, 514 U.S. 300, 308 (1995) (acknowledging that "Congress intended to grant *comprehensive jurisdiction* to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate") (emphasis added).

Despite these two extremes, as Andre J. Berends has noted, "no country applies either the universality principle or the territoriality principle without any deviation. Every domestic insolvency law is a mixture of [these] two principles."<sup>25</sup> Whichever approach is ultimately applied, most commentators agree that an "optimal" choice-of-law system is one that is cost effective, fair, and predictable.<sup>26</sup>

Though territorialism and universalism (discussed below) represent the two extremes of choice-of-law principles, other, more intermediate approaches have developed, including modified territoriality, cooperative territoriality, modified universalism, and contractualism.<sup>27</sup> These intermediate approaches are discussed briefly below.

### 1. Modified Territoriality

Under a modified territoriality approach, a local court would apply its own law regarding the collection and distribution of a debtor's assets located within its jurisdiction.<sup>28</sup> This theory is closely analogous to the modified universalism approach described below.

### 2. Cooperative Territoriality

As one author recently explained, a "cooperative territoriality" approach perhaps best represents the approach that many courts have embraced when dealing with international insolvencies.<sup>29</sup> Under this approach, foreign representatives<sup>30</sup> of the various bankruptcy-related proceedings could enter into agreements to regulate certain aspects of the bankruptcy proceeding.<sup>31</sup> By entering into such agreements, the debtors maximize the distribution of their assets and, as a result, the creditors are treated equally.<sup>32</sup> Accordingly, the local law of each

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<sup>25</sup> Andre J. Berends, *UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview*, 6 TUL. J. INT'L & COMP. L. 309, 314 (1998).

<sup>26</sup> See Levenson, *supra* note 17, at 296.

<sup>27</sup> *Id.* at 294-96.

<sup>28</sup> See *id.* at 295.

<sup>29</sup> *Id.*

<sup>30</sup> Under the recently amended Bankruptcy Code, a "foreign representative" is defined as "a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding." BAPCPA, Pub. L. No. 109-8, § 802(b), 119 Stat. at 145 (to be codified at, and amending, 11 U.S.C. § 101(24)).

<sup>31</sup> Levenson, *supra* note 17, at 295.

<sup>32</sup> See *id.*

creditor no longer predominates and controls the priority and distribution of such assets.<sup>33</sup>

## B. Universalism

### 1. Pure Universalism

In contrast to territorialism, universalism promotes a cooperative approach between each affected country in the administration of a debtor's estate.<sup>34</sup> This system promotes a centralized administration of the debtor's assets in one main proceeding.<sup>35</sup> Ideally, the debtor's assets, wherever located, would be transferred to the main proceeding to be distributed under that forum's local law.<sup>36</sup> This approach embraces the ability of courts to work together in a collective effort to maximize the value of the debtor's assets and recovery to creditors.<sup>37</sup> If a creditor, however, does not submit his claim and participate in the main bankruptcy proceeding, the creditor would be precluded from submitting and adjudicating such claim at a later time.<sup>38</sup> Thus, under this approach, creditors could be severely prejudiced by the unexpected application of a foreign law.<sup>39</sup>

Because the ultimate goal of a pure universalism approach is to develop a common insolvency framework, commentators argue that this theory is problematic, as universalism, in order to work effectively, requires each country to have similar laws, with all creditors represented in a single, centralized proceeding.<sup>40</sup>

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<sup>33</sup> See *id.*

<sup>34</sup> Westbrook, *supra* note 11, at 6. As Professor Westbrook noted, "[o]ne traditional idea was *in rem* jurisdiction, so that one court would enjoy jurisdiction over the entire 'estate' of the indebted company . . . ." *Id.*

<sup>35</sup> See Levenson, *supra* note 17, at 292–93; see also Gerber, *supra* note 23, at 2056 (acknowledging that two elements are required in a universalism regime: (1) a single forum; and (2) a single law to govern every case).

<sup>36</sup> See Levenson, *supra* note 17, at 293; see also Paul L. Lee, *Ancillary Proceedings Under Section 304 and Proposed Chapter 15 of the Bankruptcy Code*, 76 AM. BANKR. L.J. 115, 119 (2002) (stating that "[u]niversalism envisions that the countries that hold assets of the debtor will turn over those assets to the trustee or liquidator in the central proceeding and that creditors worldwide will be required to submit their claims to this central proceeding").

<sup>37</sup> See Levenson, *supra* note 17, at 293.

<sup>38</sup> Gilreath, *supra* note 11, at 407.

<sup>39</sup> *Id.* at 407–08.

<sup>40</sup> *Id.* at 408–09. It has been suggested, however, that this problem could be remedied through the use of reciprocal legislation or treaties. *Id.* at 409. The United States, however, along with many other countries, is not a party to any bankruptcy treaty. Gerber, *supra* note 23, at 2052.

Like territorialism, however, universalism has its critics.<sup>41</sup> One of the most vocal critics of universalism, Professor Lynn LoPucki, has argued that, because multinational companies do not have home countries in any meaningful sense, the indeterminacy of the home-country standard under a universalistic approach would lead to forum shopping and promote jurisdictional competition.<sup>42</sup>

## 2. Modified Universalism

As with territorialism, intermediate approaches to universalism have also developed. In fact, some believe that a "modified universalism" approach best described the system under section 304 of the former Bankruptcy Code.<sup>43</sup> As discussed below, under section 304, a foreign representative could commence an ancillary proceeding in the United States for the limited purpose of assisting a pending foreign insolvency proceeding.<sup>44</sup> Section 304 presented a modified version of universalism as U.S. courts had discretion to grant a foreign representative relief.<sup>45</sup>

### C. Contractualism

A third theory, known as contractualism, has been espoused by Professor Robert Rasmussen.<sup>46</sup> This approach essentially allows a debtor through contract to choose which country's bankruptcy law will

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<sup>41</sup> See Lynn M. LoPucki, *Universalism Unravels*, 79 AM. BANKR. L.J. 143, 143 (2005).

<sup>42</sup> See *id.* Professor Lynn LoPucki has challenged universalists to answer three questions, each of which addresses how one is to determine the identity of a debtor's home country. *Id.* at 143-44. First, when the principal assets, operations, headquarters, and place of incorporation are in different countries, which is the "home country?" Second, does "home country" refer to the home country of a corporate group or does each corporation in the group have its own "home country?" Third, what rules will govern the inevitable changes in the "home country" that will occur after credit has been extended? *Id.* Professor LoPucki contends that the leading universalists offer no answers to these questions. *Id.* at 144.

<sup>43</sup> See Levenson, *supra* note 17, at 294; see also *In re Maxwell Comm. Corp.*, 170 B.R. 800, 816 (Bankr. S.D.N.Y. 1994) (acknowledging that "[a]s the enactment of Section 304 of the Bankruptcy Code demonstrates, the United States in ancillary bankruptcy cases has embraced an approach to international insolvency which is a modified form of universalism accepting the central premise of universalism, that is, that assets should be collected and distributed on a worldwide basis, but reserving to local courts discretion to evaluate the fairness of home country procedures and to protect the interests of local creditors").

<sup>44</sup> 11 U.S.C. § 304 (2000), *repealed by* BAPCPA § 802(d)(3), 119 Stat. at 146.

<sup>45</sup> See *id.*

<sup>46</sup> See Levenson, *supra* note 17, at 296.

apply.<sup>47</sup> According to Professor Rasmussen, contractualism merely extends the general rule favoring party choice in contractual settings.<sup>48</sup> This theory recognizes that contracts are often entered into by sophisticated parties in multiple jurisdictions who, he postulates, should have the freedom to negotiate.<sup>49</sup> Under this approach, the parties essentially decide which law would apply.<sup>50</sup>

Contractualism, however, bears many procedural problems, as a debtor may choose differing jurisdictions with contracting parties or may not be in a financially desirable bargaining position to control its bankruptcy forum. Obviously, such scenarios result in duplicative estate administration and a waste of judicial resources.

#### D. *Competing Methods of Adjudicating International Insolvency Matters: Ancillary and Parallel Proceedings*

In addition to the choice-of-law approaches to cross-border insolvencies discussed above, Professor Jay Lawrence Westbrook has identified an additional classification that does not fit directly under either territorialism or universalism.<sup>51</sup> This additional classification to resolving international insolvencies includes two basic approaches: the ancillary-proceeding approach and the parallel approach.<sup>52</sup>

##### 1. Ancillary Proceedings

Ancillary proceedings are not full domestic insolvencies, but rather, are limited proceedings which have the narrow purpose of assisting a foreign "main" proceeding.<sup>53</sup> Ancillary proceedings arise only after a domestic court is satisfied that the international proceeding will be fair and adequate, as judged by national law and policy.<sup>54</sup> Once an

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<sup>47</sup> See *id.*; Bank of New York & JCPM Leasing Corp. v. Treco (*In re Treco*), 240 F.3d 148, 153 n.2 (2d Cir. 2001) ("A third approach called contractualism, in which a corporation may specify in its charter the jurisdiction that will administer its bankruptcy, has been advocated in academic literature." (citing Robert K. Rasmussen, *Resolving Transnational Insolvencies Through Private Ordering*, 98 MICH. L. REV. 2252, 2254-55 (2000))).

<sup>48</sup> See Robert K. Rasmussen, *A New Approach to Transnational Insolvencies*, 19 MICH. J. INT'L L. 1, 33 (1997).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 32.

<sup>51</sup> Westbrook, *supra* note 11, at 10.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

ancillary proceeding is invoked, the domestic court's primary responsibility is to aid the foreign court in administering the debtor's assets.<sup>55</sup>

Professor Westbrook has noted two advantages to this ancillary proceeding approach.<sup>56</sup> First, ancillary proceedings are generally cheaper and more efficient because they do not require all of the complications of a full insolvency case.<sup>57</sup> Second, ancillary proceedings permit the coordination of a worldwide resolution because local rules do not apply (discussed further below).<sup>58</sup>

## 2. Parallel Proceedings

In contrast to the ancillary proceeding, parallel proceedings are full domestic insolvencies (as opposed to limited proceedings with a narrow purpose) in each country where the debtor has assets.<sup>59</sup> Under this approach, judges of various nations coordinate and cooperate in administering the debtor's estate.<sup>60</sup> Although it has been suggested that this approach favors local creditors, Professor Westbrook argues that virtually all well-developed legal systems afford foreign creditors equal status with local creditors.<sup>61</sup> Thus, the effect of a parallel proceeding would be to favor local law, while theoretically being neutral to domestic and foreign creditors alike.<sup>62</sup>

## II. FORMER SECTION 304 OF THE BANKRUPTCY CODE: CASES ANCILLARY TO FOREIGN PROCEEDINGS

In order to understand the effects, if any, of the new Chapter 15, one must first have a basic knowledge of the Bankruptcy Code's former method of handling ancillary foreign cases.<sup>63</sup> Section 304 of the Bankruptcy Code provided authority for adjudicating international

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<sup>55</sup> *Id.*

<sup>56</sup> Westbrook, *supra* note 11, at 10.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Westbrook, *supra* note 11, at 10-11.

<sup>62</sup> *See id.* Professor Jay Westbrook has also identified a subcategory of the parallel proceeding, called the secondary proceeding. *Id.* This approach, according to Professor Westbrook, is best understood as a parallel proceeding "which goes beyond mere coordination with other jurisdictions by requiring the local proceeding and local law to defer in some respects to a foreign main proceeding." *Id.*

<sup>63</sup> *See generally* 11 U.S.C. § 304 (2000), *repealed by* BAPCPA, Pub. L. No. 109-8, § 802(d)(3), 119 Stat. 23, 146.

insolvency issues where a proceeding has already been filed, or would be more appropriately filed, in a foreign jurisdiction.<sup>64</sup>

Section 304 of the Bankruptcy Code authorized the filing of ancillary cases in U.S. bankruptcy courts to protect the dignity of concurrently existing foreign proceedings.<sup>65</sup> "The purpose of a [section] 304 petition [was] to prevent the piecemeal distribution of assets in the United States by means of legal proceedings initiated in domestic courts by local creditors."<sup>66</sup> In other words, section 304 was designed to act as a "gateway," shielding American creditors and assets situated within the borders of the United States from foreign reorganization or liquidation procedures (procedures which undoubtedly would alter the priority and distribution schemes under U.S. law). The "philosophy [of section 304] was that of deference to the country where the primary insolvency proceeding [was] located . . . and flexible cooperation in administration of assets."<sup>67</sup> These competing goals resulted in wide judicial latitude and, therefore, significant precedential divergence in interpreting section 304.

### A. Statutory Framework of Section 304

#### 1. Section 304(a): Restrictions to Filing

Even though section 304 is broad in its application,<sup>68</sup> subsection (a) of the rule required that a "foreign representative" commence a case "ancillary" to a "foreign proceeding."<sup>69</sup> An ancillary case, as discussed above, was limited to proceedings narrow in scope. Accordingly, ancillary proceedings under former section 304 did not result in a conventional reorganization or liquidation, did not create a bankruptcy estate,<sup>70</sup> and did not result in the appointment of a U.S. trustee.<sup>71</sup> Fur-

<sup>64</sup> See *id.*

<sup>65</sup> *Controle et Revision S.A. v. Refco F/X Assocs., Inc. (In re Koreag)*, 961 F.2d 341, 348 (2d Cir. 1992).

<sup>66</sup> *Refco F/X Assocs.*, 961 F.2d at 348 (citing *Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 713–14 (2d Cir. 1987)); *Cunard S.S. Co. v. Salen Reefer Servs. AB*, 773 F.2d 452, 454–55 (2d Cir. 1985).

<sup>67</sup> *Hong Kong & Shanghai Banking Corp. v. Simon (In re Simon)*, 153 F.3d 991, 998 (9th Cir. 1998).

<sup>68</sup> LAWRENCE P. KING, *COLLIER ON BANKRUPTCY* ¶ 304.01[1] (15th ed., rev. 2004).

<sup>69</sup> 11 U.S.C. § 304(a) (2000), *repealed by* BAPCPA § 802(d)(3), 119 Stat. at 146.

<sup>70</sup> KING, *supra* note 68, ¶ 304.03[1].

<sup>71</sup> See Allan L. Gropper, *Current Developments in International Insolvency Law: A United States Perspective*, 8 (2004), [http://www.iiglobal.org/calendar/conference4/Current\\_Developments.pdf](http://www.iiglobal.org/calendar/conference4/Current_Developments.pdf).

thermore, section 304 cases were procedurally conducted as adversary proceedings.<sup>72</sup> In short, section 304 acted as a jurisdictional aid to foreign bankruptcy representatives by providing for discovery and a structured distribution of assets.<sup>73</sup>

Additionally, only a "foreign representative" could commence a section 304(a) case ancillary to a "foreign proceeding."<sup>74</sup> The Code defined "foreign representative" as a "duly selected trustee, administrator, or other representative of an estate in a foreign proceeding."<sup>75</sup> The Code defined "foreign proceeding" as 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 affecting a reorganization.<sup>76</sup>

While these terms were already broadly defined in the Code, not even requiring a foreign bankruptcy proceeding as long as some process of liquidation or reorganization had been instituted, U.S. bankruptcy courts applied section 304 even more expansively through their interpretation of subsections (b) and (c).<sup>77</sup> The strong policy of avoiding piecemeal asset distribution drove this approach.

## 2. Section 304(b): Judicial Enforcement Powers

Although many of the powers of the Bankruptcy Code were not available to a foreign representative because section 304 only provided for ancillary proceedings, bankruptcy courts were hardly con-

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<sup>72</sup> See *id.*

<sup>73</sup> KING, *supra* note 68, ¶ 304.01[1].

<sup>74</sup> 11 U.S.C. § 304(a), *repealed by* BAPCPA § 802(d)(3), 119 Stat. at 146.

<sup>75</sup> *Id.* § 101(24), *repealed by* BAPCPA § 802(b), 119 Stat. at 145.

<sup>76</sup> *Id.* § 101(23), *repealed by* BAPCPA § 802(b), 119 Stat. at 145.

<sup>77</sup> See *In re Brierley*, 145 B.R. 151, 167 (Bankr. S.D.N.Y. 1992) (holding that it was sufficient in an ancillary proceeding for the entity to be a debtor under its own laws, even if the entity does not meet the requirements of 11 U.S.C. §§ 101 and 109 of the Bankruptcy Code); see also *Goerg v. Parungao (In re Goerg)*, 844 F.2d 1562, 1568 (11th Cir. 1988) (holding that a foreign representative of a foreign proceeding involving an insolvent decedent's estate could commence an ancillary case even though such entity did not fall within the Bankruptcy Code's definition of debtor); *Saleh v. Triton Container Int'l, Ltd. (In re Saleh)*, 175 B.R. 422, 425 (Bankr. S.D. Fla. 1994).

strained from asset distribution based on the language of section 304(b).<sup>78</sup> Section 304(b) stated, in relevant part:

[T]he court may—

(1) enjoin the commencement or continuation of

(A) any action against—

(i) a debtor with respect to property involved in such foreign proceedings; or

(ii) such property; or

(B) the enforcement of any judgment against the debtor with respect to such property, or any act or the commencement or continuation of any judicial proceedings to create or enforce a lien against the property of such estate;

(2) order turnover of the property of such estate, or the proceeds of such property to such foreign representative; or

(3) order other appropriate relief.<sup>79</sup>

For example, an automatic stay is not invoked in a section 304 ancillary proceeding. Expansive interpretation of section 304(b)(1), however, has resulted in U.S. bankruptcy courts obtaining the effect of a stay by issuing an injunction.<sup>80</sup> Similarly, foreign representatives were not vested with the power to commence avoidance actions under sections 542, 543, 545, 547, 548, 549, 550, and 553 of the Bankruptcy Code.<sup>81</sup> Representatives would, on the other hand, seek relief under foreign laws in the U.S. ancillary court by following standard choice-of-law rules.<sup>82</sup> Thus, avoidance actions still could be filed in the ancillary proceeding; they simply did not stem from the Bankruptcy Code.

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<sup>78</sup> See 11 U.S.C. § 304(b) (2000), *repealed by* BAPCPA § 802(d)(3), 119 Stat. at 146.

<sup>79</sup> *Id.*

<sup>80</sup> See KING, *supra* note 68, ¶ 304.06; see also Schimmelpenninck v. Byrne (*In re Schimmelpenninck*), 183 F.3d 347 (5th Cir. 1999) (acknowledging that the automatic stay did not apply to foreign proceedings, but stating that injunctive relief could be granted under section 304 if actions to be enjoined concerned property “involved in” the foreign proceeding and relief would ensure economical and expeditious administration of the estate).

<sup>81</sup> See 11 U.S.C. §§ 542, 543, 545, 547, 548, 549, 550, 553.

<sup>82</sup> See Metzeler v. Bouchard Transp., Co. (*In re Metzeler*), 78 B.R. 674, 677 (Bankr. S.D.N.Y. 1987) (“With respect to the exercise of avoidance powers, the foreign representative should be limited to the powers available under the Laws of the State where the foreign proceeding is pending. The section 304 court’s tasks should be to assist implementation of the foreign court’s decrees [when not contrary to fundamental domestic policies] not to provide the foreign representative with the benefit of American avoidance powers, which may be better [from a debtor’s perspective] than those available in the foreign court.” (quoting R.A. Gitlin and E.D. Flaschen, *The International Void in the Law of Multinational Bankruptcies*, 42 BUS. LAW. 307, 319 (1987))).

In addition to the relief available under former section 304, bankruptcy courts have held that the judicial power to order any appropriate relief under section 304(b)(3) should be interpreted expansively, "in near blank check fashion."<sup>83</sup> Pointing to this "other appropriate relief" language, bankruptcy judges have ordered discovery,<sup>84</sup> required that matters be adjudicated in the original, foreign jurisdiction,<sup>85</sup> and heard issues based solely on foreign law.<sup>86</sup> Section 304(b)(3) also provided the judge with powers that were not dispositive of property, such as in *In re I.G. Services, Ltd.*, where the court relied on this section when issuing confidentiality orders to protect creditor identities.<sup>87</sup> More innovative measures have been introduced in complex cross-border insolvency proceedings.<sup>88</sup> As expansive as section 304(b) became, subsection (c) expressly qualified its powers by outlining a series of competing balancing factors.<sup>89</sup>

### 3. Section 304(c): Balancing Fairness and Comity

Section 304(c) lent bankruptcy judges the discretion to balance judicial bankruptcy ideals with the interests of foreign and domestic creditors.<sup>90</sup> The enumerated factors were relied upon when fashioning a broad spectrum of judicial relief, "including dismissal or suspension of a case before the court, enjoining prosecution or commencement of a separate and independent case or proceeding, turnover of property, enjoining the disposition or transfer of property, and discovery."<sup>91</sup> The factors were "designed to give the Court maximum flexibility and permit it to 'make the appropriate orders under all of the circumstances of

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<sup>83</sup> See *In re Culmer*, 25 B.R. 621, 624 (Bankr. S.D.N.Y. 1982); see also *In re Brierley*, 145 B.R. at 160.

<sup>84</sup> See *Angulo v. Kedzep Ltd.*, 29 B.R. 417, 419 (S.D. Tex. 1983); *In re Brierley*, 145 B.R. at 160; *Universal Cas. & Surety Co. v. Gee (In re Gee)*, 53 B.R. 891, 899 (Bankr. S.D.N.Y. 1985).

<sup>85</sup> See *In re Lines*, 81 B.R. 267, 271 (Bankr. S.D.N.Y. 1988).

<sup>86</sup> *In re Metzeler*, 78 B.R. at 678.

<sup>87</sup> *In re I.G. Servs. Ltd.*, 244 B.R. 377, 390 (Bankr. W.D. Tex. 2000).

<sup>88</sup> See, e.g., *In re Maxwell Comm. Corp.*, 170 B.R. 800, 802 (Bankr. S.D.N.Y. 1994). In *In re Maxwell Communication Corp.*, the court appointed an examiner to harmonize the British and U.S. proceedings to permit a reorganization under U.S. law that would maximize the return to creditors. The examiner ultimately succeeded in negotiating a joint plan of reorganization under U.S. law and a scheme of administration under English law that provided for the partial reorganization and partial liquidation of the Maxwell entities.

<sup>89</sup> See 11 U.S.C. § 304(c) (2000), repealed by BAPCPA § 802(d)(3), 119 Stat. at 146.

<sup>90</sup> See *id.*

<sup>91</sup> KING, *supra* note 68, ¶ 304.08.

each case, rather than being provided with inflexible rules.’’<sup>92</sup> Specifically, section 304(c) stated:

In determining whether to grant relief under subsection (b) of this section, the court shall be guided by what will best assure an economical and expeditious administration of such estate, consistent with—

(1) just treatment of all holders of claims against or interests in such estate;

(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 such estate;

(4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;

(5) comity; and

(6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.<sup>93</sup>

Subsections (1) and (3), which required just treatment to holders of claims against the estate and prevented preferential or fraudulent transfers, suggested that section 304(c) favored a unitary foreign administration.<sup>94</sup> On the other hand, foreign administration seemed contrary to the second factor enumerated under former section 304(c) (that is, protection of claim holders in the United States). Although comity, a factor under section 304(c) (5), is a principle rooted in deference to foreign laws and administration, subsection (4) called for distribution of the estate in accordance with the Bankruptcy Code.<sup>95</sup> These competing goals are analyzed more fully below.

a. Section 304(c) (1) and (3): Favoring a Unitary Foreign Proceeding

As previously mentioned, section 304’s chief responsibility was to prevent a piecemeal dismemberment of the bankruptcy estate. Thus, ancillary relief, and not a full-scale bankruptcy administration, was best

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<sup>92</sup> *In re Ionica PLC*, 241 B.R. 829, 834 (Bankr. S.D.N.Y. 1999) (quoting H.R. REP. NO. 95-595, at 324–25 (1977)).

<sup>93</sup> 11 U.S.C. § 304(c), *repealed by* BAPCPA § 802(d) (3), 119 Stat. at 146.

<sup>94</sup> *See id.*

<sup>95</sup> KING, *supra* note 68, ¶ 304.08.

sued for preventing local creditors from gaining an upper hand over foreign creditors.<sup>96</sup> This aspect of section 304 employed the goal of fair treatment to *all* claim holders.<sup>97</sup> Also, U.S. bankruptcy courts consistently held that "[i]t is the foreign court which is in the best position to assess where and when claims should be liquidated in order to conserve estate resources and maximize the assets available for distribution" to claim holders.<sup>98</sup> In this regard, foreign law was relied upon in defining and preventing fraudulent and preferential property dispositions<sup>99</sup> so long as the law was not contradictory or repugnant to the laws of the United States.<sup>100</sup>

#### b. Section 304(c)(2): Protection of U.S. Claim Holders

Section 304(c)(2), providing for the "protection of claim holders in the United States against prejudice and inconvenience," was the corollary to deferring to foreign proceedings.<sup>101</sup> As the subsection clearly stated, bankruptcy judges had to be mindful of the possibility that foreign reorganization and liquidation laws and procedures could unjustly interfere with U.S. citizens' rightful claims. Section 304(c)(2), however, was rarely dispositive.<sup>102</sup> The cost of traveling to foreign lands to pursue collection was never held sufficient to justify prejudice and inconven-

<sup>96</sup> See 11 U.S.C. § 304(c) (2000), *repealed by* BAPCPA § 802(d)(3), 119 Stat. at 146.

<sup>97</sup> See *In re Culmer*, 25 B.R. at 629 (finding that deferring to Bahamian law will best further section 304(c)(1) because it "provides a comprehensive procedure for the orderly and equitable distribution of . . . assets among all . . . creditors," a substantially similar scheme as that found in the Bankruptcy Code). The "[c]ourt is thus not obliged to protect the positions of fast-moving American and foreign attachment creditors over the policy favoring uniform administration in a foreign court." *Id.* (citing *Banque de Financement, S.A. v. First Nat'l Bank of Boston*, 568 F.2d 911, 921 (2d Cir. 1977)).

<sup>98</sup> *In re Bird*, 229 B.R. 90, 94 (Bankr. S.D.N.Y. 1999) (citing *In re Petition of Bird*, 222 B.R. 229, 233 (Bankr. S.D.N.Y. 1998); *In re Rukavina*, 227 B.R. 234 (Bankr. S.D.N.Y. 1998); *In re Gercke*, 122 B.R. 621, 626-27 (Bankr. D.D.C. 1991)).

<sup>99</sup> KING, *supra* note 68, ¶ 304.08[3] (citing *In re Laitasalo*, 193 B.R. 187, 195 (Bankr. S.D.N.Y. 1996) (ancillary petition granted because among other things Finnish law avoids preferences and fraudulent transfers); *In re Kojima*, 177 B.R. 696, 701 (Bankr. D. Colo. 1995) (ancillary petition granted because among other things Japanese law avoids fraudulent transfers); *In re Hourani*, 180 B.R. 58, 67 (Bankr. S.D.N.Y. 1995) (ancillary petition to obtain turnover to Jordanian liquidators of certain funds in the United States dismissed because among other things special Jordanian bank liquidation procedures contained no provision for the recovery of preferences and fraudulent conveyances); *In re Rubin*, 160 B.R. 269, 282-83 (Bankr. S.D.N.Y. 1993) (ancillary petition granted because, among other things, Israeli law avoids preferences and fraudulent transfers)).

<sup>100</sup> See *In re Kojima*, 177 B.R. at 701.

<sup>101</sup> See 11 U.S.C. § 304(c)(2), *repealed by* BAPCPA § 802(d)(3), 119 Stat. at 146.

<sup>102</sup> KING, *supra* note 68, ¶ 304.08[2].

ience.<sup>103</sup> In extreme situations, protection of U.S. claim holders prevented ancillary relief. Where foreign law was so grossly unfair that fundamental tenets of American law, such as notice and due process, were not provided, section 304(c)(2) carried a heavy influence.<sup>104</sup>

### c. Section 304(c)(4) and (5): Comity Versus Conformity

Section 304(c)(4) and (5) confront the struggle between respecting international legal schemes and furthering U.S. procedures and policies. In the seminal case of *Hilton v. Guyot*, the U.S. Supreme Court addressed the role of comity:

"Comity," in the legal sense, is neither 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.<sup>105</sup>

Under this standard, when determining whether to defer to foreign proceedings, the bankruptcy courts had to determine whether the law of the foreign jurisdiction incorporated "fundamental standards of procedural fairness" and was not contrary to U.S. legal policies.<sup>106</sup> Comity is not an obligation, but a consideration, and should be withheld only "when its acceptance would be contrary or prejudicial to the interest of the nation called upon to give it effect."<sup>107</sup> Still, the application of comity has caused numerous cases to be either stayed, suspended, or dismissed to permit foreign courts to adjudicate insolvency issues.<sup>108</sup>

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<sup>103</sup> *In re Brierley*, 145 B.R. at 162-63 ("[T]he prejudice and inconvenience of which [the creditor] complains is typical of what every U.S. creditor in a sizeable domestic case encounters when it is forced to litigate its claim.").

<sup>104</sup> *See In re Hourani*, 180 B.R. at 66-69 (finding that Jordanian law lacked fundamental protections, including proper notice to known claimants, thus violating several subsections of section 304(c), including subsection (c)(2)).

<sup>105</sup> *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895).

<sup>106</sup> *Allstate Life Ins. Co. v. Linter Group Ltd.*, 994 F.2d 996, 999 (2d Cir. 1993); *see also* *Phila. Gear Corp. v. Phila. Gear de Mexico, S.A.*, 44 F.3d 187, 191 (3d Cir. 1994).

<sup>107</sup> *Cunard S.S. Co. v. Salem Reefer Services AB*, 773 F.2d 452, 457 (2d Cir. 1985) (quoting *Somportex Ltd. v. Phila. Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971) (internal citations omitted)).

<sup>108</sup> *See Cunard S.S. Co.*, 773 F.2d at 457.

Historically, comity was the most influential factor when determining whether a U.S. judicial proceeding was proper when a foreign action was underway concurrently.<sup>109</sup> Section 304(c), comparatively, placed comity as only one of six "fairness" factors.<sup>110</sup> As one court noted, "[s]ection 304(c)(4), [requiring substantial accord with the Bankruptcy Code,] represents a legislative choice to require courts to consider differences between American priority rules and those applicable to the foreign proceeding in determining whether affording comity will be repugnant to American public policies."<sup>111</sup> "Substantial accord" is not to be confused with duplication; an exact match with U.S. law was not required.<sup>112</sup> Comity was a strong consideration in a section 304 analysis, but certainly not the sole consideration.<sup>113</sup>

B. *A Variation in Choice-of-Law Models Under Section 304—  
A Caselaw Approach*

As discussed above, much of the debate relating to international insolvencies has centered on the opposing theories of territorialism and universalism. Despite these divergent theories, most scholars believe that the enactment of section 304 was a step toward following the universality approach (or at least a modified universality approach).<sup>114</sup>

Despite this belief, however, uncertainty rooted in balancing the factors enumerated under section 304 has led to several decisions em-

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<sup>109</sup> See *In re Treco*, 240 F.3d 148, 158 (2d Cir. 2001).

<sup>110</sup> See 11 U.S.C. § 304(c) (2000), repealed by BAPCPA § 802(d)(3), 119 Stat. at 146.

<sup>111</sup> *In re Treco*, 240 F.3d at 158–59.

<sup>112</sup> See, e.g., *In re Ionica PLC*, 241 B.R. at 837 (finding compliance with section 304(c)(4) where a foreign distributive scheme gave lower priority to a U.S. creditor's claim than the creditor would have received under the Bankruptcy Code).

<sup>113</sup> KING, *supra* note 68, ¶ 304.08[5][b]; see *In re Papelera Reunidas, S.A.*, 92 B.R. 584, 594 (Bankr. E.D.N.Y. 1988). ("[I]t is best to equally consider all of the variables of § 304(c) in determining the appropriate relief in an ancillary proceeding.").

<sup>114</sup> See *In re Treco*, 240 F.3d at 154; see also *In re Koreag, Controle et Revision S.A.*, 961 F.2d 341, 358 (2d Cir. 1992) (stating that "[t]he overriding purpose of § 304 is to prevent piecemeal distribution of a debtor's estate"); *Cunard S.S. Co.*, 773 F.2d at 455 (stating that "[s]ection 304 may be said to have been designed to accommodate the problems . . . in which foreign bankruptcy proceedings have been instituted and creditors are attempting to seize assets of the debtor located in the United States"); *In re Maxwell Comm. Corp.*, 170 B.R. at 816 (acknowledging that section 304 embraces "a modified form of universalism accepting the central premise of universalism, that is, that assets should be collected and distributed on a worldwide basis, but reserving to local courts discretion to evaluate the fairness of home country procedures and to protect the interests of local creditors"); Jay Lawrence Westbrook, *Choice of Avoidance Law in Global Insolvencies*, 17 BROOK. J. INT'L L. 499, 517 (1991) (citing section 304 as "the leading example" of modified universalism).

playing aspects of both universalism and territorialism.<sup>115</sup> Some of these cases are discussed in more detail below.

## 1. Cases Applying a Territorialistic Approach

### a. *In re Toga Manufacturing, Ltd.*

The case of *In re Toga Manufacturing, Ltd.* provides an example of a territorialist outcome. An unsecured creditor of Toga Manufacturing Limited, a Canadian corporation, filed a petition in order to institute an involuntary proceeding in bankruptcy under Canadian and Ontario law before the Supreme Court of Ontario in Bankruptcy on October 18, 1982.<sup>116</sup> Thereafter, on December 14, 1982, Peat Marwick Limited, the Canadian Bankruptcy Trustee of the debtor, brought an ancillary proceeding pursuant to section 304 requesting an injunction prohibiting all creditors of Toga from commencing or continuing to take action against Toga or its assets and an order directing the Wayne County Circuit Court Clerk (Michigan) to turn over the \$215,000 fund to the Trustee.<sup>117</sup>

The court began by addressing what effect, if any, was to be given to foreign bankruptcy law as it concerns property located in the United States.<sup>118</sup> The court acknowledged 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. '[T]he bankrupt law of a foreign country is incapable of operating a legal transfer of property in the United States.'"<sup>119</sup> Section 304 of the Code embodies the *universal* theory of conflicts of laws with some qualifications; this theory requires that a judgment rendered in the domicile of the debtor be recognized in all other jurisdictions.<sup>120</sup>

The court acknowledged that, due to the close geographic proximity of Canada and the United States, the creditor would suffer no inconvenience if it were forced to litigate its claim in Canada because the courts of the Province of Ontario were readily available to the credi-

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<sup>115</sup> An in-depth case comparison illustrates this point in Part III.B.1.a of this Article. See *infra* notes 116–26 and accompanying text.

<sup>116</sup> *In re Toga Mfg., Ltd.*, 28 B.R. 165, 165–66 (Bankr. E.D. Mich. 1983).

<sup>117</sup> *Id.* at 167.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 167–68.

tor.<sup>121</sup> Additionally, the creditor would receive just treatment of its claim against Toga in the Canadian courts.<sup>122</sup> Upon distribution of the proceeds of the estate under Canadian bankruptcy law, however, the court found that the creditor's claim would not receive the priority recognition "substantially in accordance with the order prescribed by this title" as required by section 304(c)(4).<sup>123</sup> Specifically, the court found that because the creditor had received a judgment against Toga from a court of competent jurisdiction in Michigan and the fact that it perfected its judgment, the creditor was a lien creditor under U.S. law.<sup>124</sup> Under Canadian law, however, the creditor would most likely have been considered an "ordinary creditor."<sup>125</sup>

The court concluded that this treatment violated section 304(c)(4) and, therefore, denied the trustee's petition to enjoin the American creditor's state court action against Toga, the Canadian debtor.<sup>126</sup>

b. *In re Treco*

In *In re Treco*, the liquidators, Alison J. Treco and David Patrick Hamilton, (the "Liquidators") of Meridien International Bank Limited ("MIBL"), a bank incorporated in the Bahamas undergoing bankruptcy proceedings there, filed a petition in the Bankruptcy Court for the Southern District of New York pursuant to section 304(a) seeking the turnover of certain funds maintained by the Bank of New York and JCPM Leasing Corp.<sup>127</sup>

After the Liquidators moved for partial summary judgment, the bankruptcy court granted the motion and directed turnover.<sup>128</sup> The United States District Court for the Southern District of New York affirmed that decision.<sup>129</sup> The bankruptcy court and district court both held that turnover was appropriate under section 304(c) irrespective of whether the Bank of New York's (the "BNY") claim to the funds held by it was secured.<sup>130</sup> On appeal, the Second Circuit Court of Appeals disagreed and concluded that if the BNY's claim was se-

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<sup>121</sup> *In re Toga Mfg., Ltd.*, 28 B.R. at 168.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *In re Toga Mfg., Ltd.*, 28 B.R. at 168.

<sup>127</sup> *In re Treco*, 240 F.3d at 151.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

cured, turnover of these funds would be improper because of the extent to which the distribution of the funds' proceeds in the Bahamian bankruptcy proceeding would not be "substantially in accordance with the order prescribed by" the U.S. Bankruptcy Code.<sup>131</sup>

The Second Circuit began its analysis by examining the two general approaches to distributing assets in such proceedings, territorialism and universalism.<sup>132</sup> Although the Second Circuit acknowledged that the enactment of section 304 was a step toward the universality approach, the court noted that section 304 did not implement pure universality.<sup>133</sup>

The court focused its analysis on section 304(c).<sup>134</sup> In particular, the court acknowledged that comity did not automatically override the other specified factors.<sup>135</sup> The statute plainly provided that the other factors may form the basis for denying relief, and thus denying comity, in some cases.<sup>136</sup> Additionally, the principle of comity, according to the court, has never meant categorical deference to foreign proceedings.<sup>137</sup>

In analyzing the factors under section 304(c), the court concluded that section 304(c)(1) was satisfied because the applicable Bahamian law provided for a comprehensive procedure for the orderly and equitable distribution of MIBL's assets among all of its creditors.<sup>138</sup> Additionally, Bahamian law complied with section 304(c)(2) because it protected U.S. claimholders from prejudice and inconvenience in the processing of their claims.<sup>139</sup> Finally, Bahamian law prevented preferential and fraudulent dispositions of property and thus satisfied section 304(c)(3).<sup>140</sup>

Despite the foregoing, however, the Second Circuit found that U.S. law and Bahamian law treated administrative expenses differently—a difference that apparently would have a substantial impact on BNY's claim.<sup>141</sup> Because the Bahamian rule that secured creditors did not have priority over administrative expenses threatened to destroy BNY's

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<sup>131</sup> *Id.*

<sup>132</sup> *In re Treco*, 240 F.3d at 153.

<sup>133</sup> *Id.* at 154.

<sup>134</sup> *Id.* at 156.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 157. In fact, some courts have maintained that comity should not be weighed more heavily than the other factors. See, e.g., *In re Papeleras Reunidas S.A.*, 92 B.R. 584, 594 (Bankr. E.D.N.Y. 1988).

<sup>137</sup> *In re Treco*, 240 F.3d at 157.

<sup>138</sup> *Id.* at 158.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 159.

claim, the Second Circuit concluded that the bankruptcy court abused its discretion by ordering turnover without first determining the impact of Bahamian rule in the discrete context of BNY's claim against MIBL's estate.<sup>142</sup>

## 2. Cases Applying a Universalism Approach

### a. *In re Culmer*

One of the landmark universality-based cases applying section 304 was *In re Culmer*.<sup>143</sup> In *Culmer*, Banco Ambrosiano Overseas Limited ("BAOL") was a banking company that was liquidated in the Bahamas on August 16, 1982.<sup>144</sup> Upon commencement of the liquidation, BAOL maintained clearing, custodial, and brokerage accounts at banks and financial institutions located within the southern district of New York.<sup>145</sup> Soon thereafter, a petition was filed under section 304 of the Bankruptcy Code seeking injunctive relief in addition to an order that property in the United States be turned over to the Bahamas for administration in the Bahamian liquidation proceeding in accordance with Bahamian law.<sup>146</sup> American creditors opposed the petition, arguing that their interests should have been determined under U.S. law.<sup>147</sup> The issue presented, according to the court, was one of first impression in the Second Circuit: "whether this court should in its discretion pursuant to 11 U.S.C. section 304 of the Bankruptcy Code grant the relief sought in the Petition of allowing the transfer of all of BAOL's assets located within the district to the Bahamas to be dispersed as part of the Bahamian liquidation of BAOL."<sup>148</sup>

The court began by analyzing section 304.<sup>149</sup> The court analyzed the issue of whether deferring to the foreign proceeding would best assure an economical and expeditious administration of the BAOL estate.<sup>150</sup> The court found that BAOL's records and pre-liquidation employees were in the Bahamas; the liquidators and their staff were in Nassau and were bound to comply with the laws of the Bahamas and

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<sup>142</sup> *In re Treco*, 240 F.3d at 160-61.

<sup>143</sup> *In re Culmer*, 25 B.R. at 621.

<sup>144</sup> *Id.* at 623.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 627.

<sup>148</sup> *In re Culmer*, 25 B.R. at 627.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 628.

the orders of the Bahamas Supreme Court; and the Bahamian court could most efficiently deal with all of BAOL's creditors, both American and worldwide.<sup>151</sup> In addition, the court found that the Bahamas had the greatest interest in BAOL's liquidation because neither the United States nor the state of New York had any governmental or public interest in BAOL's liquidation.<sup>152</sup>

The court then addressed issues of comity.<sup>153</sup> Specifically, the court looked to the other relevant factors enumerated in section 304(c) to determine whether the evidence presented regarding Bahamian law indicated that its application would be wicked, immoral, or violate American law and public policy.<sup>154</sup> The court's examination of the provisions of Bahamian law, which related to liquidation proceedings, revealed that they were in substantial conformity with U.S. law.<sup>155</sup> Importantly, the Bahamian Companies Act provided a comprehensive procedure for the orderly and equitable distribution of BAOL's assets among all of its creditors.<sup>156</sup> The court also found that all of the evidence indicated that BAOL's Bahamian liquidation proceeding fully satisfied the criteria of section 304(c)(2) because all claim holders in the United States would be adequately protected against prejudice and inconvenience in the processing of their claims in the Bahamian liquidation proceeding under Bahamian law and procedure.<sup>157</sup> Furthermore, BAOL's Bahamian liquidation satisfied section 304(c)(3) in that preferential or fraudulent dispositions of BAOL's assets were prohibited.<sup>158</sup> On the contrary, the court noted that allowing BAOL's creditors to continue their actions in the United States might indeed result in preferential treatment of those creditors.<sup>159</sup> In addition, BAOL's assets would be disbursed according to statutory prescription in the Bahamas or in the United States: taxes, wages, and administrative costs are paid on a preferential basis; secured claims are paid according to their priorities; unsecured creditors are paid *pro rata*; and compositions with classes of creditors and compromises with individual creditors require court approval.<sup>160</sup> Because the record was devoid of any evidence of

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<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 628–29.

<sup>153</sup> *In re Culmer*, 25 B.R. at 629.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 630.

<sup>158</sup> *In re Culmer*, 25 B.R. at 630.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 632.

prejudice and because the legal requirements for affording comity to Bahamian proceedings had been satisfied, the court granted the section 304 petition.<sup>161</sup>

b. *Cunard Steamship Co. v. Salen Reefer Services AB*

A second major decision applying a pro-universality approach under section 304 was *Cunard Steamship Co. v. Salen Reefer Services AB*.<sup>162</sup> In *Cunard*, Salen Reefer Services, A.B., a business entity established under Swedish law, commenced a bankruptcy proceeding in the Stockholm City Court in the Kingdom of Sweden on December 19, 1984.<sup>163</sup> In accordance with Swedish law, an interim administrator was appointed to supervise the debtor's affairs, and creditor actions against the debtor were suspended.<sup>164</sup> On January 9, 1985, Cunard Steamship Company, Ltd. commenced an action in the District Court for the Southern District of New York and obtained an order of attachment against certain assets of Salen.<sup>165</sup>

After a hearing, the district court granted Salen's motion and ordered that the attachment be vacated.<sup>166</sup> The court found that U.S. public policy would be furthered by granting comity to the Swedish court's stay on creditor actions during the Swedish bankruptcy proceeding.<sup>167</sup> Cunard appealed the district court's order vacating the attachment.<sup>168</sup>

The issue, according to the Second Circuit, was whether, when a debtor is involved in a foreign bankruptcy proceeding, section 304 was the exclusive remedy for a trustee or representative of the bankrupt who wishes to stay or enjoin creditor actions in the United States.<sup>169</sup> The Second Circuit denied Cunard's argument that section 304 was intended to be a foreign debtor's exclusive remedy and instead applied the principle of comity and other section 304(c) factors.<sup>170</sup> In referring to the legislative history of section 304, the court explained:

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<sup>161</sup> *Id.* at 633.

<sup>162</sup> *Cunard S.S. Co.*, 773 F.2d at 452.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 454.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Cunard S.S. Co.*, 773 F.2d at 454.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 455.

[t]he court is to be guided by what will best assure an economical and expeditious administration of the estate, consistent with just treatment of all creditors and equity security holders; protection of local creditors and equity security holders against prejudice and inconvenience in processing claims and interests in the foreign proceeding; prevention of preferential or fraudulent disposition of property of the estate; distribution of the proceeds of the estate substantially in conformity with the distribution provisions of the bankruptcy code; and, if the debtor is an individual, the provision of an opportunity for a fresh start. These guidelines are designed to give the court the maximum flexibility in handling ancillary cases. Principles of international comity and respect for the judgments and laws of other nations suggest that the court be permitted to make the appropriate orders under all of the circumstances of each case, rather than being provided with inflexible rules.<sup>171</sup>

Accordingly, because section 304 was designed for cases such as this, the Second Circuit found that it would have been eminently proper for the district court to have referred the case to a bankruptcy "unit" of the court.<sup>172</sup>

The court went on to explain that "[t]he granting of comity to a foreign bankruptcy proceeding enables the assets of a debtor to be dispersed in an equitable, orderly, and systematic manner, rather than in a haphazard, erratic, or piecemeal fashion."<sup>173</sup> The *Cunard* court ultimately held that it was not an abuse of discretion to vacate the attachment and grant comity to pending Swedish bankruptcy proceedings.<sup>174</sup>

In both the *Culmer* and *Cunard* decisions, the courts focused on whether the foreign country's laws adhered to certain fundamental notions of fairness and due process.<sup>175</sup> The courts also examined whether the application of the foreign laws would violate American public policy.<sup>176</sup> While this test is inherently subjective (and thus must be applied

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<sup>171</sup> *Id.* (citing H.R. REP. NO. 95-595 at 324-25 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6281).

<sup>172</sup> *Cunard S.S. Co.*, 773 F.2d at 455.

<sup>173</sup> *Id.* at 458.

<sup>174</sup> *Id.* at 461.

<sup>175</sup> *See* Levenson, *supra* note 17, at 310.

<sup>176</sup> *See id.*

on a case-by-case approach), the majority of courts have followed this pro-universality approach.<sup>177</sup>

### III. THE LACK OF AN INTERNATIONAL BANKRUPTCY LAW AND THE UNCITRAL RESPONSE

#### A. *The Increasing Need for Uniform Insolvency Laws*

The proliferation of businesses operating internationally has led to a mounting concern regarding how such companies' assets should be treated in the event of bankruptcy, especially where company assets are spread throughout several countries.<sup>178</sup> These countries, of course, likely have their own insolvency laws that specifically address the procedures in administering bankruptcy proceedings; these laws would determine the distribution and priority scheme and such laws would even be determinative of whether a liquidation or reorganization should occur.<sup>179</sup> As one author has noted, international insolvency is an administrative nightmare when no country holds complete jurisdiction over either the debtor, its assets, or its creditors.<sup>180</sup> In fact, Professor Westbrook has identified eleven recurring issues as key to the problem of transnational insolvency.<sup>181</sup> These issues include: a moratorium on creditor action (*i.e.*, a "stay"), standing/title for the liquidator, information sharing, creditor involvement, executory contracts, coordinated claims procedures, priorities and preferences, avoiding powers, discharge, natural and legal persons, and choice of law.<sup>182</sup>

Recognizing the urgent need for cross-border cooperation and coordination in the supervision and administration of the insolvent debtor's assets and affairs, the United Nations General Assembly es-

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<sup>177</sup> *See id.*

<sup>178</sup> The Resolution adopted by the General Assembly of the United Nations noted that "increased cross-border trade and investment leads to greater incidence of cases where enterprises and individuals have assets in more than one State." *See* Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law, G.A. Res. 52/158, U.N. Doc. A/RES/52/158 (Jan. 30, 1998) [hereinafter *Model Law*].

<sup>179</sup> *See* Levenson, *supra* note 17, at 292.

<sup>180</sup> *See* Gilreath, *supra* note 11, at 402; *see also* NAT'L BANKR. REVIEW COMM'N, *supra* note 16, at 351 ("Administering assets in other countries has historically been difficult for a number of reasons, including no recognition of the 'foreign' insolvency proceeding in the country where the assets are located, inadequate notice to foreign creditors, and the inability to stay actions against foreign assets in order to administer them in one collective proceeding to the benefit of all creditors.").

<sup>181</sup> Jay Lawrence Westbrook, *Developments in Transnational Bankruptcy*, 39 ST. LOUIS U. L.J. 745, 753-57 (1995).

<sup>182</sup> *Id.*

established the United Nations Commissions on International Trade Law ("UNCITRAL"), a legal body within the United Nations system in the field of international trade law, in 1967.<sup>183</sup> UNCITRAL was created in an effort to help unify commercial and trade law.<sup>184</sup>

### B. *The Model Law on International Insolvency*

Due to the growing number of international insolvencies resulting from an economic downturn in the 1990s and a global cooperation failure among bankruptcy jurisdictions, UNCITRAL, with the assistance from the International Association of Restructuring, Insolvency & Bankruptcy Professionals (the "INSOL"), began investigating the possibility of formulating a model law to coordinate international insolvency proceedings in 1994.<sup>185</sup> Soon thereafter, a working group<sup>186</sup> was formed composed of all "state members of the Commission but attended only by certain members."<sup>187</sup> This working group met periodically in New York and Vienna to formulate a model law on cross-border insolvency.<sup>188</sup> Overall, approximately fifty countries participated in this project.<sup>189</sup>

As a result of this collective effort, UNCITRAL unanimously adopted the text of the Model Law on Cross Border Insolvency (the "Model Law") on May 30, 1997.<sup>190</sup> The Model Law was approved by resolution of the United Nations General Assembly on December 15, 1997.<sup>191</sup> The thirty-two article Model Law attempts to create an effective

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<sup>183</sup> See Gilreath, *supra* note 11, at 415; see also David Neiman, *International Insolvency and Environmental Obligations: A Prelude to Resolving the Conflicting Policies of a Clean Slate Versus a Clean Site in Transnational Bankruptcies*, 8 FORDHAM J. CORP. & FIN. L. 789, 828 (2003); Sandile Khumalo & Vrije Universiteit, *International Response to the UNCITRAL Model Law on Cross-Border Insolvency* 4 (2004), [http://www.iiiglobal.org/organizations/uncitral/Insol\\_Response.pdf](http://www.iiiglobal.org/organizations/uncitral/Insol_Response.pdf).

<sup>184</sup> See generally Khumalo & Universiteit, *supra* note 183. The United Nations General Assembly acknowledged that "many States lack[ed] a legislative framework that would make possible or facilitate effective cross-border coordination and cooperation." Gilreath, *supra* note 11, at 415; *Model Law*, *supra* note 178, at 1.

<sup>185</sup> See Gilreath, *supra* note 11, at 399, 400, 415.

<sup>186</sup> This "working group" is, in actuality, a formal UN-style meeting. NAT'L BANKR. REVIEW COMM'N, *supra* note 16, at 355.

<sup>187</sup> Gilreath, *supra* note 11, at 415.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> See Khumalo & Universiteit, *supra* note 183, at 4; see also Gilreath, *supra* note 11, at 400-01.

<sup>191</sup> Khumalo & Universiteit, *supra* note 183, at 4.

judicial framework for administering cross-border insolvencies.<sup>192</sup> Professor Westbrook places the Model Law's thirty-two articles in the following categories: (a) scope; (b) general provisions; (c) access; (d) recognition; (e) effects of recognition; (f) treatment of foreign creditors; (g) cooperation and communication among proceedings in several countries; and (h) coordination of parallel proceedings.<sup>193</sup>

According to UNCITRAL, the Model Law was "designed to assist States to equip their insolvency laws with a modern, harmonized, and fair framework to address more effectively instances of cross-border insolvency."<sup>194</sup> Those instances include cases where the insolvent debtor has assets in more than one State or where some of the creditors of the debtor are not from the State where the insolvency proceeding is taking place.<sup>195</sup> Importantly, the Model Law "respects the differences among national procedural laws and does not attempt a substantive unification of insolvency law."<sup>196</sup> Rather, the Model Law is designed to offer a solution by providing: foreign assistance for an insolvency proceeding taking place in the enacting country, foreign representatives access to courts of the enacting country, recognition of foreign proceedings, cross-border cooperation, and coordination of concurrent proceedings.<sup>197</sup>

Since its adoption by UNCITRAL in 1997, several countries have passed legislation based on the Model Law, including: Eritrea; Japan; Mexico; Poland; Romania; South Africa; within Serbia and Montene-

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<sup>192</sup> Evan D. Flashen, Anthony J. Smits & Leo Plank, *Case Study: Foreign Representatives in U.S. Chapter 11 Cases: Filling the Void in the Law of Multinational Insolvencies*, 17 CONN. J. INT'L L. 3, 18 (2001).

<sup>193</sup> Westbrook, *supra* note 11, at 12.

<sup>194</sup> U.N. Comm'n on Int'l Trade Law, 1997—UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment (2005), [http://www.uncitral.org/uncitral/en/uncitral\\_texts/insolvency/1997Model.html](http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html).

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* UNCITRAL quickly realized that any attempt to draft one cohesive bankruptcy system, thereby requiring individual States to modify their bankruptcy codes, would be futile. Neiman, *supra* note 19, at 829–30. Accordingly, UNCITRAL limited its scope to address the procedural aspects regarding transnational insolvencies. *Id.* at 830.

<sup>197</sup> See Model Law, *supra* note 178. According to its Preamble, the purpose of the Model Law "is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of: (a) Cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency; (b) Greater legal certainty for trade and investment; (c) Fair and efficient administration of cross-board insolvencies that protects the interests of all creditors and other interested persons, including the debtor; (d) Protection and maximization of the value of the debtor's assets; and (e) Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment." See *id.*

gro, Montenegro; the British Virgin Islands, an overseas territory of the United Kingdom of Great Britain and Northern Ireland; and the United States of America.<sup>198</sup> The U.S. version of the Model Law, which was recently enacted in BAPCPA, is discussed below.<sup>199</sup>

#### IV. THE CURRENT APPROACH: CHAPTER 15—ANCILLARY AND OTHER CROSS-BORDER CASES

##### A. Overview of Chapter 15

Chapter 15, titled "Ancillary and Other Cross-Border Cases,"<sup>200</sup> was enacted to incorporate the UNCITRAL Model Law on Cross-Border Insolvency so as to provide an effective mechanism for dealing with cross-border insolvency cases.<sup>201</sup> The Model Law on Cross-Border Insolvency was designed to assist states by attempting to address instances of cross-border insolvency more effectively.<sup>202</sup>

Despite these new provisions dealing with cross-border insolvency, the substantive rules in Chapter 15 are not significantly different from those previously enacted in former section 304 of the Bankruptcy Code discussed above.<sup>203</sup> In fact, some believe that neither jurisprudence nor practice will change dramatically under the new Chapter 15.<sup>204</sup>

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<sup>198</sup> U.N. Comm'n on Int'l Trade Law, *Status of 1997 Model Law on Cross-Border Insolvency*, (2005) [http://www.uncitral.org/uncitral/en/uncitral\\_texts/insolvency/1997Model\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html).

<sup>199</sup> See *infra* notes 201–28 and accompanying text.

<sup>200</sup> On Wednesday, April 20, 2005, President Bush signed into law S. 256, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 119 Stat. 23 (to be codified in scattered sections of 11 U.S.C., 12 U.S.C., 15 U.S.C., 18 U.S.C., and 28 U.S.C.).

<sup>201</sup> See BAPCPA, Pub. L. No. 109-8, § 801, 119 Stat. 23, 134–45 (to be codified at 11 U.S.C. §§ 1501–1532). Section 1501(a) largely tracks the language in the preamble and Article 1 of the Model Law. See *Model Law*, *supra* note 178.

<sup>202</sup> See Khumalo & Universiteit, *supra* note 183, at 4 (discussing the Model Law).

<sup>203</sup> 11 U.S.C. § 304 (2000), *repealed by* BAPCPA § 802(d)(3), 119 Stat. at 146. See generally Alan D. Smith & Michael A. Fitch, Q.C., *North American Cross Border Cases: The Possible Impact of Impending Insolvency Reform Initiatives* 7 (2002), <http://www.iiiglobal.org/country/canada/TMAPaper.pdf>. In addition to section 304 caselaw which may prove to be persuasive, the legislative history indicates that the court decisions interpreting treaties, model laws and other text promulgated by UNCITRAL (compiled by UNCITRAL Case Law On Uniform Texts ("CLOUT")) will also be persuasive and will advance the goal of uniformity of interpretation. H.R. REP. No. 109-31, at 109–10 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 172–73.

<sup>204</sup> See e.g., Smith & Fitch, *supra* note 203, at 7; Gropper, *supra* note 71, at 13–14, 23.

### B. Purpose of Chapter 15

The stated purpose of Chapter 15, as with the Model Law,<sup>205</sup> is to: (1) promote cooperation between courts of the United States, United States trustees, trustees, examiners, debtors, and debtors-in-possession and the courts and other competent authorities of foreign countries involved in cross-border insolvency cases; (2) provide greater legal certainty for trade and investment; (3) promote the fair and efficient administration of cross-border insolvencies that protect the interests of all creditors, and other interested entities, including the debtor; (4) protect and maximize the value of the debtor's assets; and (5) facilitate the rescue of financially troubled businesses, thereby protecting investment and preserving employment.<sup>206</sup>

### C. Scope of Chapter 15

As described in section 1501 of the Bankruptcy Code, Chapter 15 applies in four situations, including where:

- (1) assistance is sought in the United States by a foreign court or a foreign representative in connection with a foreign proceeding; (2) assistance is sought in a foreign country in connection with a case under [Title 11 of the Bankruptcy Code]; (3) a foreign proceeding and a case under [Title 11] with respect to the same debtor are pending concurrently; or (4) creditors or other interested persons in a foreign country have an interest in requesting the commencement of, or participating in, a case or proceeding under Title 11.<sup>207</sup>

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<sup>205</sup> United Nations Comm'n on Int'l Trade Law (UNCITRAL), *Report Of the United Nations Commission on International Trade Law on the Work of Its 30th Session, 12-30 MAY 1997*, Annex I, U.N. Doc. A/52/17 (July 4, 1997) (the "Report"). The legislative history of Chapter 15 indicates that the Report and Guide to Enactment of the Model Law should be considered for guidance as to the meaning and purpose of its provisions. H.R. REP. NO. 109-31, at 105-07 (2005), reprinted in 2005 U.S.C.C.A.N. 88, 169-70. Additionally, uniform interpretation will also be aided by reference to the UNCITRAL CLOUT. *Id.* at 109-10, reprinted in 2005 U.S.C.C.A.N. at 172-73. CLOUT compiles various court decisions interpreting treaties, model laws and other text promulgated by UNCITRAL. *Id.*

<sup>206</sup> BAPCPA § 801(a), 119 Stat. at 135 (to be codified at 11 U.S.C. § 1501(a)).

<sup>207</sup> *Id.* (to be codified at 11 U.S.C. § 1501(b)). Section 1501(c) also expressly prohibits Chapter 15's application to certain individuals and entities that are excluded from being debtors under section 109 (such as insurance companies). See *id.* (to be codified at 11 U.S.C. § 1501(c)).

### D. Statutory Framework

#### 1. Commencement of an Ancillary Case Under Chapter 15<sup>208</sup>

A case<sup>209</sup> is commenced under Chapter 15 by filing a petition for recognition of a foreign proceeding<sup>210</sup> under section 1515.<sup>211</sup> Once filed, prior to the court ruling on the petition, the court may, at the request of the foreign representative, grant certain enumerated forms of provisional relief to protect the assets of the debtor or the interests of creditors.<sup>212</sup> This provisional relief terminates when a petition for

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<sup>208</sup> As discussed above, ancillary proceedings are not full domestic insolvencies, but rather are limited proceedings which have a narrow purpose of assisting the foreign main proceeding. Westbrook, *supra* note 11, at 10. Accordingly, the use of the word "ancillary" in the title of Chapter 15 illustrates the United States' policy "in favor of a general rule that countries other than the home country of the debtor, where a main proceeding would be brought, should usually act through ancillary proceedings in aid of the main proceedings, in preference to a system of full bankruptcies in each state where assets are found." H.R. REP. NO. 109-31, at 107-08 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 171.

<sup>209</sup> Since a petition for recognition under section 1504 commences a "case," a number of other useful procedural provisions come into play. *Id.* For example, 28 U.S.C. § 1334(a) gives exclusive jurisdiction to the district courts in a "case" under title 11. *See* 28 U.S.C. § 1334(a) (2000); *see also* H.R. REP. NO. 109-31, at 107-08, *reprinted in* 2005 U.S.C.C.A.N. at 171. Additionally, a new subsection (P) in 28 U.S.C. § 157 makes cases under Chapter 15 part of the core jurisdiction of bankruptcy courts if referred by the district courts. *See* 28 U.S.C. § 157(P) (2000); *see also* H.R. REP. NO. 109-31, at 108, *reprinted in* 2005 U.S.C.C.A.N. at 171.

<sup>210</sup> A "foreign proceeding" means "a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation." BAPCPA § 802(b), 119 Stat. at 145 (to be codified at, and amending, 11 U.S.C. § 101(23)).

<sup>211</sup> *Id.* § 801(a), 119 Stat. at 136 (to be codified at 11 U.S.C. § 1504). Under section 1515, a foreign representative applies to the court for recognition of a foreign proceeding in which the foreign representative has been appointed by filing a petition for recognition. *Id.* § 801(a), 119 Stat. at 139 (to be codified at 11 U.S.C. § 1515(a)). Certain other documents must accompany the petition to identify the applicable foreign proceeding which has been commenced. *See id.* § 801, 119 Stat. at 135 (to be codified at 11 U.S.C. § 1515(b)-(c)). These documents include: (1) a certified copy of the decision commencing such foreign proceeding and appointing the foreign representative; (2) a certificate from the foreign court affirming the existence of such foreign proceeding and of the appointment of the foreign representative; or (3) in the absence of the above, any other evidence acceptable to the court of the existence of such foreign proceeding and of the appointment of the foreign representative. *Id.* § 801(a), 119 Stat. at 139 (to be codified at 11 U.S.C. § 1515(b)). The petition for recognition also must be accompanied by a statement identifying all foreign proceedings with respect to the debtor that are known to the foreign representative. *Id.* § 801(a), 119 Stat. at 139 (to be codified at 11 U.S.C. § 1515(c)).

<sup>212</sup> *Id.* § 801(a), 119 Stat. at 140 (to be codified at 11 U.S.C. § 1519). This provisional relief includes: "(1) staying execution against the debtor's assets; (2) entrusting the administration or realization of all or part of the debtor's assets located in the United States

recognition is granted.<sup>213</sup> The fact that a foreign representative<sup>214</sup> files a petition under section 1515, however, does not subject the foreign representative to the jurisdiction of any court in the United States for any other purpose.<sup>215</sup>

## 2. Recognizing a Foreign Proceeding

A court must enter an order recognizing a foreign proceeding if: (1) such foreign proceeding for which recognition is sought is a foreign main proceeding or foreign nonmain proceeding as defined under Chapter 15,<sup>216</sup> (2) the foreign representative applying for recognition is a person or body, and (3) the petition meets the requirements of section 1515.<sup>217</sup> This order recognizing a foreign proceeding is subject to section 1506, which states a public policy exception.<sup>218</sup> A foreign proceeding will be recognized "(1) as a foreign main proceeding if it is pending in the country where the debtor has the center of its

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to the foreign representative or another person authorized by the court, including an examiner, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to evaluation or otherwise in jeopardy; and (3) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under section 1520(a); providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities; and granting any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, 550 and 724(a). *See id.* § 801(a), 119 Stat. at 139-41 (to be codified at 11 U.S.C. §§ 1519, 1521).

<sup>213</sup> *Id.* § 801(a), 119 Stat. at 140 (to be codified at 11 U.S.C. § 1519(b)).

<sup>214</sup> "Foreign representative" means "a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding." *Id.* § 802(b), 119 Stat. at 145 (to be codified at, and amending, 11 U.S.C. § 101(24)).

<sup>215</sup> BAPCPA § 801(a), 199 Stat. at 138 (to be codified at 11 U.S.C. § 1510).

<sup>216</sup> Under Chapter 15, a "foreign main proceeding" means a foreign proceeding pending in the country where the debtor has the center of its main interests; and a "foreign nonmain proceeding" means a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment. *See id.* § 801(a), 119 Stat. at 135 (to be codified at 11 U.S.C. § 1502(4)-(5)). The principles of section 304 are similar to those of the Model Law to the extent that it contemplates a nonmain proceeding which, to some extent, supports and complements a main proceeding elsewhere. Gropper, *supra* note 71, at 7.

<sup>217</sup> BAPCPA § 801(a), 119 Stat. at 139 (to be codified at 11 U.S.C. § 1517(a)).

<sup>218</sup> *Id.* § 801(a), 119 Stat. at 136, 139 (to be codified at 11 U.S.C. §§ 1506, 1517). Although "public policy" is not defined anywhere in the Bankruptcy Code, the legislative history suggests that this should be interpreted narrowly and should be restricted to "the most fundamental policies of the United States." H.R. REP. NO. 109-31, at 109 (2005), reprinted in 2005 U.S.C.C.A.N. 88, 172.

main interests; or (2) as a foreign nonmain proceeding if the debtor has an establishment within the meaning of section 1502 in a foreign country where the proceeding is pending.”<sup>219</sup>

### 3. Relief upon Recognition

After a U.S. bankruptcy court recognizes the case as a foreign main proceeding, the foreign representative is entitled to certain specified relief under section 1520, including an automatic stay with respect to the debtor and the debtor’s property within the territorial jurisdiction of the United States, the right to operate the debtor’s business, and the right to sell and deal with property in the same manner as a trustee or debtor-in-possession in the United States.<sup>220</sup> At the request of the foreign representative, the court may grant other relief under section 1521, whether main or nonmain.<sup>221</sup> Upon granting this relief under section 1521 to a representative of a foreign nonmain proceeding, however, “the court must be satisfied that the relief relates to assets that, under the law of the United States, should be administered in the foreign nonmain proceeding or concerns information required in that proceeding.”<sup>222</sup> Section 1507 reads:

[i]n determining if the court will provide “additional assistance” to a foreign representative, the court will consider such additional assistance, consistent with the principles of comity, which will reasonably assure (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 the Bankruptcy Code; and if ap-

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<sup>219</sup> BAPCPA § 801(a), 119 Stat. at 139 (to be codified at 11 U.S.C. § 1517(b)). “Establishment” means any place of operations where the debtor carries out a nontransitory economic activity. *Id.* § 801(a), 119 Stat. at 135 (to be codified at 11 U.S.C. § 1502(2)).

<sup>220</sup> *Id.* § 801(a), 119 Stat. at 141 (to be codified at 11 U.S.C. § 1520(a)(1)–(4)); see also Gropper, *supra* note 71, at 7.

<sup>221</sup> BAPCPA § 801(a), 119 Stat. at 142 (to be codified at 11 U.S.C. § 1521).

<sup>222</sup> *Id.*

propriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.<sup>223</sup>

These are essentially the same factors which appeared under section 304 of the Bankruptcy Code.<sup>224</sup>

Additionally, upon recognition, a foreign representative may commence an involuntary case under section 303 or a voluntary case under section 301 or 302 if the foreign proceeding is a foreign main proceeding.<sup>225</sup> A case under another chapter of the Bankruptcy Code, however, may only be commenced if the debtor has assets in the United States.<sup>226</sup>

#### 4. Venue of Cases Ancillary to Foreign Proceedings

With the addition of Chapter 15 to the Bankruptcy Code, Congress has necessarily addressed related statutes, including 28 U.S.C. § 1410, titled "Venue of Cases Ancillary to Foreign Proceedings."<sup>227</sup> Section 1410 allows a case to be commenced under Chapter 15 in the district court of the United States for the district:

(1) in which the debtor has its principal place of business or principal assets in the United States; (2) if the debtor does not have a place of business or assets in the United States, in which there is pending against the debtor an action or proceeding in a Federal or State court; or (3) in a case other than those specified in paragraph (1) or (2), in which venue will be consistent with the interests of justice and the conven-

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<sup>223</sup> Compare *id.* § 801(a), 119 Stat. at 136 (to be codified at 11 U.S.C. § 1507), with 11 U.S.C. § 304 (2000), *repealed by* BAPCPA § 802(d)(3), 119 Stat. at 146 (enumerating similar factors).

<sup>224</sup> 11 U.S.C. § 304, *repealed by* BAPCPA § 802(d)(3), 119 Stat. at 146. As the legislative history indicates, caselaw analyzing comity and the other factors under section 304(c) is misleading since those enumerated factors under section 304(c) are essentially grounds for granting comity. H.R. REP. NO. 109-31, at 109 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 172. Accordingly, in section 1507, the issue of comity is raised in the introductory language. *Id.* This placement ensures that comity will be addressed. *Id.*

<sup>225</sup> BAPCPA § 801(a), 119 Stat. at 138 (to be codified at 11 U.S.C. § 1511(a)). Additionally, in the absence of evidence to the contrary, recognition of a foreign main proceeding is, for the purpose of commencing a proceeding under section 303, proof that the debtor is generally not paying its debts as such debts become due. *Id.* § 801(a), 119 Stat. at 145 (to be codified at 11 U.S.C. § 1531).

<sup>226</sup> *Id.* § 801(a), 119 Stat. at 144 (to be codified at 11 U.S.C. § 1528).

<sup>227</sup> *Id.* § 802(c)(4), 119 Stat. at 146 (to be codified at, and amending, 28 U.S.C. § 1410).

ience of the parties, having regard to the relief sought by the foreign representative.<sup>228</sup>

### CONCLUSION

Chapter 15 represents Congress's attempt to establish a comprehensive procedural framework to manage cross-border insolvencies. Central to Chapter 15's framework is an emphasis on transnational comity. Despite the comity language and Chapter 15's stated purpose, many believe that Chapter 15 merely codifies the precedent established from cases decided under former section 304.

The eventual effect of Chapter 15, however, is uncertain. As the wise Yoda noted in *Star Wars: Episode V—The Empire Strikes Back*, “[d]ifficult to see. Always in motion is the future.”<sup>229</sup> As international insolvencies emerge in U.S. bankruptcy courts, judges, advocates, and scholars will all play their parts in the application of Chapter 15. Undoubtedly, academic theories such as territorialism and universalism will once again guide the formation of legal precedent.

Whatever the result, substantive differences between the U.S. Bankruptcy Code and the insolvency statutes of other countries will likely become increasingly important. Until such time as international insolvency laws are reconciled, forum shopping will remain a concern as transnational debtors must balance the alternatives available to them in the international insolvency context.

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<sup>228</sup> *Id.* Under the former venue provisions, a case under section 304 to enjoin the commencement or continuation of an action or proceeding in a state or federal court, or the enforcement of a judgment, could have been commenced only in the district court for the district where the state or federal court sits in which is pending the action or proceeding against which the injunction is sought. *See id.* Additionally, a case under section 304 to enjoin the enforcement of a lien against a property, or to require the turnover of property of an estate, could have been commenced only in the district court for the district in which such property is found. *See id.* Finally, a case under section 304 (other than a case specified above), could have been commenced only in the district court for the district in which is located the principal place of business in the United States, or the principal assets in the United States, of the estate that is the subject of such case. *See id.* § 802(c)(4), 119 Stat. at 146 (to be codified at, and amending, 28 U.S.C. § 1410(c)(4)).

<sup>229</sup> *STAR WARS: EPISODE V—THE EMPIRE STRIKES BACK* (Lucasfilm Ltd. 1980), available at [http://www.scifiscripts.com/scripts/esb\\_final.txt](http://www.scifiscripts.com/scripts/esb_final.txt).